

# Preserving the financial futures of vulnerable Queenslanders

A review of Public Trustee fees, charges and practices

January 2021

## Acknowledgement of Country

The Public Advocate and staff acknowledge the traditional custodians of the lands across the State of Queensland and pay our respects to the Elders past, present, and emerging. We value the culture, traditions and contributions that Aboriginal and Torres Strait Islander people have made to our communities, and recognise our collective responsibility as government, communities and individuals to ensure equality, recognition and advancement of Aboriginal and Torres Strait Islander Queenslanders in every aspect of our society.

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### Office details

Location: State Law Building, 50 Ann Street, Brisbane, QLD 4000

Mail: GPO Box 149, Brisbane, QLD 4000

Telephone: + (61 7) 3738 9513

Facsimile: + (61 7) 3738 9516

Website: [www.publicadvocate.qld.gov.au](http://www.publicadvocate.qld.gov.au)

Email: [public.advocate@justice.qld.gov.au](mailto:public.advocate@justice.qld.gov.au)

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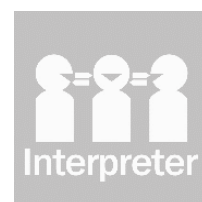
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The Honourable Shannon Fentiman MP  
Attorney-General and Minister for Justice, Minister for Women and Minister for  
the Prevention of Domestic and Family Violence  
1 William Street  
BRISBANE QLD 4000

22 January 2021

Dear Attorney-General,

Pursuant to Section 209A of the *Guardianship and Administration Act 2000* (Qld),  
I present to you my report *Preserving the financial futures of vulnerable  
Queenslanders; A review of Public Trustee fees, charges and practices*.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Mary Burgess', with a stylized, flowing script.

Mary Burgess  
Public Advocate



# Foreword

Since 1916, the Public Trustee of Queensland, and its predecessor agency, the Public Curator, have been providing essential services as the trustee and administrator for some of Queensland's most vulnerable citizens. Where a person is found to have 'impaired capacity' for decisions about financial matters, they can be placed under administration by the Queensland Civil and Administration Tribunal. An appointment as a person's administrator allows the Public Trustee to make all of the financial decisions for that person that they could make for themselves, if they had decision-making capacity. An appointment as administrator gives the Public Trustee significant power and control over the lives of its administration clients.

The Victorian Ombudsman, in her 2019 report reviewing the State Trustees in Victoria, described the relationship between the State Trustees and their clients in the following terms:

There can be few more potent examples of the imbalance of power between the individual and the state than **when the state assumes control over someone's financial affairs**. Whatever money or property a person has is no longer theirs to deal with, homes can be sold and personal property dispersed. The impact of this is obvious, the responsibility it places on those entrusted with their affairs equally so.

These observations apply equally to the relationship between the Public Trustee of Queensland and its administration clients.

With this power comes significant responsibility. The Public Trustee has strict legal obligations under the *Public Trustee Act 1978* and the *Guardianship and Administration Act 2000*, but also under the common law, as a trustee and 'fiduciary'. It must always act in the interests of its clients and avoid conflicts with clients' interests and not profit from the relationship.

This project initially commenced as a review of the Public Trustee's fees and charges for clients under administration. Over time, people who were under administration, their supporters and advocates had made approaches to the Public Advocate about what they perceived as excessive or unfair fees and charges, and their inability to access reasonable information or explanations from the Public Trustee about its decisions and actions.

On closer examination, the complaints and concerns of these people raised some serious issues about the level and complexity of the Public Trustee's system of fees and charges, its lack of transparency, the Public Trustee earning revenue from clients' funds and its use of external professional advice to justify investments in its own products.

It also became apparent that the small proportion of administration clients who are paying substantial fees (with little or no rebates) were helping to subsidise, at least to some degree, the cost of other services the Public Trustee provides. Essentially, they were paying a premium on their fees to help fund services the Public Trustee was providing to other people. There were also concerns about the way the Public Trustee used the Official Solicitor in legal cases involving administration clients and the level of fees being charged by the Official Solicitor for its services.

Consequently, what started as an examination of fees and charges became a broader exploration of a range of Public Trustee practices that raised concerns about whether the Public Trustee was acting in accordance with its fiduciary duties and in the interests of its administration clients.

The great challenge for people under administration and their advocates and supporters in being able to question Public Trustee's decisions and actions, is the lack of transparency and access to information about Public Trustee's fees, policies and practices.

People under administration have been found by QCAT to lack legal capacity for financial matters, so they are significantly disadvantaged when trying to access information, interpret what information they are able to access and present it in a form that is persuasive of QCAT or other authorities.

People under administration are unable to retain lawyers or other professionals to assist them in these endeavours, because they do not have access to their own funds, nor can they legally enter into contracts. They are completely subject to the power and decisions of the Public Trustee. Due to their vulnerability and the nature of their relationship, people under administration who allege impropriety or mismanagement by the Public Trustee are in an almost impossible position of conflict





with their administrator — **without the Public Trustee's support**, they cannot engage professional assistance and support to advance their claims against the Public Trustee.

This is not the first examination of the fees, charges and practices of the Public Trustee of Queensland. In 1996, the then Auditor-General undertook a 'special audit' of the Public Trustee and identified many of the same issues identified in this report. These included the Public Trustee's complex system of multiple fees and charges; a lack of publicly available information about fees and charges and how they would be applied; a general lack of transparency; concerns about the fairness of the proportion of earnings on client money being retained by the Public Trustee; and concerns about the funding of the Public Trustee's free services or 'community service obligations', which were approved, but not funded, by government.

The Victorian Ombudsman also released a report in 2019 that was critical of the charging and other practices of the State Trustees in Victoria, which led to a comprehensive fee review and a two-stage fee reduction process.

So, why does the treatment and financial outcomes of vulnerable members of our community matter? The administration clients of the Public Trustee are some of the most vulnerable members of the Queensland community. The Public Trustee, as an agency representing the State of Queensland has been appointed to protect the person's interests and has a string of obligations that go with that responsibility, including: to act honestly and with reasonable diligence, act in accordance with the general and health principles (outlined under the *Guardianship and Administration Act*) in all decisions, and to avoid conflict transactions. These are significant responsibilities that are unique to the Public Trustee — and in relation to guardianship, to the Public Guardian — as a public agency.

Members of the Queensland community have high expectations of their public agencies. They also have a strong sense of justice and fairness. In my role, I am often struck by the innate decency and sense of justice shown by the members of the Queensland public who call my office to seek some advice, support or redress for a vulnerable person who they think is being treated poorly. It is important to maintain public confidence in our institutions and their ability to protect the interests of our most vulnerable, to ensure that people under administration and guardianship with public agencies are receiving quality services that are delivered in a way that is respectful of their rights and interests, and empowers them to the greatest extent possible.

In 2020, Queensland also became a human rights jurisdiction with the commencement of the *Human Rights Act 2019*. The Act provides that every person has the right to recognition as a person before the law, the right to enjoy their human rights without discrimination, is equal before the law and entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination. The Act also provides that a human right can only be limited where it is reasonable and justifiable.

The Australian Government is also a signatory to the United Nations *Convention on the Rights of Persons with Disabilities*. Article 12 of the convention provides for 'Equal recognition before the law', including that States Parties 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity' and 'ensure that all measures provide for appropriate and effective safeguards to prevent abuse'. This includes ensuring 'measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free from conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body'.

We have also had the privilege to observe the nation-wide rollout of the National Disability Insurance Scheme (NDIS) over the past several years — possibly the most significant social reform in a generation. The NDIS grew out of the, *Every Australian Counts*, grassroots campaign. The organisers describe themselves as 'a community of hundreds of thousands of people with disability, their families and carers and those who support them, all working together to fight for a fair go for Australians with disability.' The NDIS also champions 'choice and control' for its participants.

These are all empowering developments for people with disability and impaired decision-making capacity.



Many of the Public Trustee's administration clients are people who may be eligible for NDIS-funded disability supports and who are benefitting from this positive program of social change. The world is rapidly changing in terms of its engagement with people with disability and capacity issues. They are entitled to have expectations that their rights and interests will be protected and upheld.

Accordingly, due to the vulnerabilities of its clients, but also the important role the Public Trustee plays in supporting people who are unable to make their own financial decisions, it is critical that the Queensland community has trust and confidence in it to always act to protect the human and financial rights and interests of its administration clients.

The Public Trustee has been struggling over many years to maintain its financial sustainability.

For some clients, the Public Trustee's commitment to self-funding and sustainability has been achieved at the expense of their own financial outcomes. As a trustee and fiduciary, the Public Trustee must take all reasonable steps to protect its clients' interests and to not prefer its own interests, or the interests of some of its clients, over others.

It is disappointing that in its final response to this report, the Public Trustee observed:

**The Report ... is focused on a very small cohort of our customers, noting that the vast majority of Public Trustee customers enjoy a high level of service for very little cost. The Public Trustee estimates that the report's scope focuses on around 418 customers, or about 4 per cent of financial management customers.**

When dealing with vulnerable people or breaches of human rights or fiduciary duties, the responsibilities of state agencies and fiduciaries are strict. No breach can be justified on the basis of a utilitarian argument supporting 'the greatest good for the greatest number'. Any breach of a person's rights or a fiduciary's obligations is 'one breach too many'. The financial futures, rights and interests of a 'small cohort' of Public Trustee clients, who are considered able to pay the fees, cannot be sacrificed to fund services for other clients and members of the community who are not paying for the services they receive or are receiving rebates on their fees. The Public Trustee cannot 'rob Peter to pay Paul' and fulfill its fiduciary duties to those clients who are paying high fees and charges, while others do not.

The Public Trustee has also acknowledged, '[D]espite our generous CSOs [community service obligation rebates of fees], it is acknowledged that the current fees and charges model may have unintended outcomes for a small group of customers.'

It is important that we remember that the fees and charges, and other practices of the Public Trustee can significantly affect the lives of vulnerable people. The case studies in this report tell the stories of some of that 'small cohort' who have experienced poor outcomes under Public Trustee administration. Their membership of a small cohort does not change their experience of their circumstances.

In any event, this report does not focus solely on this cohort of Public Trustee clients who are paying high fees for their services and having their small cash assets rapidly eroded. As the review proceeded other Public Trustee policies and practices that could be characterised as systemic issues of concern were identified. These included issues relating to the Public Trustee's investment policies and practices, its use of external financial advisors and the Official Solicitor, its use of client funds to earn revenue, and the charging of management fees on clients' money invested in Public Trustee financial products on which clients had already paid an asset management fee. Consequently, the scope of the review broadened beyond its original focus and objectives to also examine these other activities and practices of the Public Trustee, which impact all clients under administration.

It is hoped that this report will help to bring a new perspective to the operations of the Public Trustee and its obligations to its clients. It is appropriate that the whole system of the Public Trustee's operations, including its fees, charges and rebates be comprehensively reviewed and that consideration be given to whether the current range of free services funded by the Public Trustee as 'community service obligations' should continue or be wound back. The Public Trustee's preference for investing client funds almost exclusively in its own products for which it charges clients additional management fees, also needs to be carefully considered. Whatever future arrangements are adopted, they must be transparent and provide for full reporting of the Public Trustee's earnings on client funds and other investment products.



Steps need to be taken to ensure greater availability of information to clients, their advocates and supporters and that the Public Trustee complies with all government policies and practices relating to the release of information.

Issues relating to the operation of the Office of the Official Solicitor and the broader oversight, governance and accountability of the Public Trustee, will also require careful consideration and consultation with stakeholders to ensure the most appropriate outcomes, in terms of protection of the rights of clients and compliance with professional standards and community expectations.

It is appropriate that I acknowledge and thank the dedicated staff of the Public Trustee for their efforts in bringing together and providing what ultimately amounted to a vast quantity of information and detailed explanations in response to my numerous information requests during the project. They have responded diligently and patiently to my various requests. The information provided has been fundamental to understanding the Public Trustee's operations, views and practices to inform this report.

It must also be acknowledged that over the past year, the Public Trustee has initiated a range of reforms to modernise its operations and to address a range of issues that were identified as this project has progressed. These reforms are outlined briefly in Chapter 8 of this report, but are described in more detail by the Public Trustee in The Public Trustee Response to this report, which is reproduced in Appendix 1. I recommend that readers also read that document in full.

Much positive change has already occurred in the Public Trustee, especially in terms of its engagement with clients and seeking and supporting their input into decisions affecting their lives. However, there is still much to be done to fully address the wide and complex range issues identified in this report. When it is complete I trust Queensland will have a blueprint for a contemporary and human rights-focused Public Trustee that will continue to deliver essential services to our state's most vulnerable for another hundred years.

Mary Burgess

Public Advocate



# Acknowledgements

I would like to acknowledge and thank the people and organisations who took the time to raise issues about the Public Trustee's fees and charges and provide evidence to this office. Their concerns about the level and complexity of the fees and charges and their impact on the financial circumstances of people under administration with the Public Trustee helped identify many of the issues that are explored in this review.

I am grateful to the people who agreed for their stories to be shared as de-identified case studies in this report. Cases studies help demonstrate how certain policies and practices operate 'in the real world'. The case studies used in this report highlight the personal impact of the fees and charges on Public Trustee administration clients.

Particular mention should go to one of the people, in the case studies, 'Ella' and her supporter, who brought their concerns to me and became 'the case' that was the initial impetus for this project. That interaction is a timely reminder of the importance of engaging with community and taking the time to listen to people's concerns.

I also acknowledge and thank the former Attorney-General for my appointment to a position that allows me to do this work.

I particularly extend my gratitude to Mr David Honeyman who was seconded to my office for 18 months as the Manager of this project. David undertook all of the initial financial and operational analysis that underpins this report. His careful review of the large quantity of material provided by the Public Trustee helped us to gain a detailed understanding of the Public Trustee's various policies and practices and identify many of the practice and fiduciary issues that became the final focus of the report.

I also acknowledge and thank Kath Dornbusch, Manager in my office, for her tireless editing to produce a polished end product, her desktop publishing expertise, and her general talent for making reports come together. Thanks also to Tracey Martell for her careful editing (and re-editing), undertaking final checks of financial information and her testing of policy issues and recommendations with me. Thanks also to Yuu Matsuyama and Jo Sampford for their legal contributions to the report and general assistance with reviewing and editing the report. It has been a long haul for my very small team.

Special thanks to Mr Samay Zhouand, the Public Trustee of Queensland, and his team for their active engagement with my office during this review. I appreciate their cooperation and acknowledge their efforts collecting and collating large amounts of information in response to my numerous information requests. I acknowledge that this work was time-consuming and resource-intensive at times.

I also acknowledge the broad program of work and reform initiated by Mr Zhouand to review the current policies and practices of the Public Trustee and progress the agency's Customers First agenda. I hope that the findings from this review help to inform those organisational reforms.

Thanks also to all of those who will remain nameless, but who generously gave their advice, expertise and encouragement during this project.



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# Background and introduction

The Public Advocate is an independent statutory position established under the *Guardianship and Administration Act 2000* (Qld) to undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making capacity.



## Impaired decision-making capacity

**'Having capacity'** means a person is capable of understanding the nature and effect of decisions about a matter, can freely and voluntarily make decisions about it, and can communicate their decisions in some way. If a person is unable to do one or more of these things, they may have impaired decision-making capacity.

There are a number of conditions that may impact a person's decision-making capacity. These include intellectual disability, acquired brain injury, mental illness, neurological disorders (such as dementia) or alcohol and drug misuse. While not all people with these conditions will experience impaired decision-making capacity, many of them will at some point in their lives. For some, impaired decision-making capacity may be episodic or temporary, requiring intensive supports at specific times, while others may require lifelong support with decision-making and communicating their choices and decisions.

When a person does not have the capacity to make their own financial decisions, an administrator can be appointed to make those decisions for them. The role of an administrator can be performed by family members, friends or supporters, or a professional trustee, such as the Public Trustee.

In 2019-20, the Public Trustee provided financial management services to 10,071 Queenslanders, including 9,316 people under an administration appointment by QCAT.

The Public Trustee has significant power over its administration clients. It is in a position of trust, **controlling the person's money and property**, making many, if not all, of the financial decisions for the person and having significant power over **their lives**. The administrator's role can include paying household bills, buying or selling property, running a business, entering into contracts, applying for government benefits, making business decisions, managing investments, and bringing or defending legal proceedings of a financial nature.

The Public Trustee has significant obligations to its administration clients under the *Guardianship and Administration Act*, the *Trusts Act 1973* (Qld), and in terms of its broader 'fiduciary' duties as a trustee.

This review was undertaken to explore concerns raised by people under administration with the Public Trustee, their families and supporters, about the level and types of Public Trustee fees and charges, and their negative effect on financial outcomes for people under administration.

Many people under administration with the Public Trustee receive significant financial management services. The Public Trustee has a comprehensive fee rebate scheme which it advises benefits up to 82 percent of its clients with reduced (or rebated) fees based on their particular assets and financial circumstances. Most administration clients who have few assets (e.g. a small amount of cash and personal effects) and a low income (e.g. a pension) receive fee rebates or pay no fees at all. Many of these clients appear to receive a high level of service for very little, or no, cost. These clients were not the initial focus of this review.

The early focus of the review was on Public Trustee administration clients who receive few, if any, rebates of fees and charges. Some of these clients are wealthy and their income allows them to absorb the fees and charges without impact on their lifestyle or erosion of their assets. Those who this review is concerned with have modest assets (e.g. a modest home and superannuation balance) and income (often from a pension) and are not entitled to fee rebates due to the way the Public Trustee calculates a client's **eligibility for fee rebates**. For many in this cohort, the Public Trustee's **fees and charges, in combination with their regular expenses, exceed their income**, requiring them to spend their cash assets and resulting in the depletion of their assets over time.



The initial objectives of the review were to:

- identify the group of clients under Public Trustee administration at risk of poor financial outcomes due to the fees and charges regime of the Public Trustee;
- **understand the impact of the Public Trustee's fees and charges regime on the financial outcomes, rights and interests of the identified group of clients;**
- **determine if the Public Trustee's fees and charges regime is reasonable, consistent with its fiduciary responsibilities and its obligation to act in its clients' interests; and**
- **highlight any systemic issues related to the Public Trustee's fees and charges regime and recommend appropriate changes.**

As the review proceeded, other Public Trustee policies and practices of concern that raised broader **systemic issues were identified**. These issues included the Public Trustee's investment policies and practices, its use of external financial advisors and the Official Solicitor, its use of client funds to earn revenue, and the charging of management fees on **clients' money invested in its own financial products** on which clients had already paid an Asset Management Fee. Consequently, the scope of the review broadened beyond its original focus and objectives to examine other activities and practices of the Public Trustee for which administration clients were charged fees, or that impacted their financial outcomes.

The review took an exploratory approach to gain more information about the concerns raised and build a more comprehensive picture of the experiences and outcomes for some Public Trustee administration clients.

## Case studies

This report includes several de-identified case studies that show the lived experience of some Public Trustee administration clients and **demonstrate the 'real world' impact of the Public Trustee's policies and practices on their clients' financial and personal circumstances**.

The case studies and the commentary on them are recommended to readers. The case studies can be located in the report at:

Case study 1 - \$30,000 inheritance gone in 2 years and house not maintained, page 2.

Case study 2 – Fees charged to manage assets that were managed by a third party, page 3.

Case study 3 – Charged two fees for unnecessary financial advice, page 30.

Case study 4 – High earning shares sold and cash invested in Public Trustee investment, page 101.

Case study 5 (part 1) – Public Trustee opposes client's appeal because he 'lacks capacity', page 124.

Case study 5 (part 2) - Public Trustee resisted appointment of alternative administrator who wanted to make a claim against it for lost funds, page 128.

Case study 6 – Technical legal arguments raised against client's application to reopen hearing about capacity, page 125.

Case study 7 – Proposal to spend almost double client's funds exploring a compensation claim against a close family member with no money, page 135.

## Duties of administrators

The responsibilities and duties of the Public Trustee as an administrator stem from a variety of sources, including:

- common law (which includes equitable principles);
- legislation governing the duties and responsibilities of administrators and trustees; and
- legislation prescribing the professional duties of lawyers and the ethical duties of public sector agencies.



## Fiduciary duties

The Public Trustee is in a 'fiduciary relationship' with its administration clients. A fiduciary relationship can arise when some, or all, of the following circumstances apply:

- there is a relationship of confidence;
- there is an inequality of bargaining power between the parties;
- one party has given an undertaking to perform a task or fulfill a duty in the interests of another party;
- one party has the authority to unilaterally exercise a discretion or power which may affect the rights or interests of another; and
- one party is in a position of dependency or vulnerability that causes that party to rely on another.

The fiduciary – the person who has the authority and power in the relationship – has a number of legal duties to the other person. A fiduciary is under a legal obligation to act in the interests of the other person, who by the very nature of the relationship is in a position of vulnerability or dependency. Fiduciary duties protect the vulnerable party to the relationship from exploitation and harm.

Two of the key duties of a fiduciary are:

- the 'no conflict rule' — the fiduciary must not put themselves in a position where there is a conflict between their personal interests and the interests of the person to whom they owe the duty; and
- the 'no profit rule' the fiduciary must not use their position to make an unauthorised profit and must account for any benefit or gain.

## Statutory duties

The Public Trustee has significant duties and obligations imposed by the following legislation:

- *Public Trustee Act 1978* (Qld);
- *Public Trustee Regulation 2012* (Qld);
- *Trusts Act 1973* (Qld);
- *Guardianship and Administration Act 2000* (Qld); and
- *Powers of Attorney Act 1998* (Qld).

The *Guardianship and Administration Act* imposes a range of specific obligations on the Public Trustee as an administrator, including applying the General Principles under the Act when exercising a function and to avoid conflict transactions except where authorised by QCAT.

## Prudent person rule

Administrators are expected to make the best use of clients' (beneficiaries') assets. Accordingly, the Public Trustee invests clients' assets to ensure they last as long as reasonably possible and support their clients' lifestyles. The Public Trustee is required to 'exercise the care, diligence and skill a prudent person engaged in that profession ... would exercise in managing the financial affairs of other persons'. This provision in the *Trusts Act* restates an equitable principle known as the 'Prudent Person Rule'. The Prudent Person Rule applies to all investments made by the Public Trustee.

## Professional ethical duties

The Public Trustee employs staff from different professions to provide professional services to clients, for example, tax accountants and lawyers. These professional staff have duties arising from:

- their contract of employment;
- common law and legislation; and
- ethical codes set and overseen by their professional regulatory bodies.

Professionals, such as lawyers, are under a duty to exercise the reasonable care and skill expected of a person in that profession. This duty arises at common law and under state civil liability legislation.





## Public sector ethical duties

All employees of the Public Trustee, including the Office of the Official Solicitor, are required to comply with the Code of Conduct for the Queensland Public Sector's four ethics principles:

1. integrity and impartiality;
2. promoting the public good;
3. commitment to the system of government; and
4. accountability and transparency.

The Queensland Government, and all public sector agencies, are required to comply with the Model Litigant Principles issued by Cabinet. The Model Litigant Principles recognise that the power of the State is to be used for the public good and in the public interest. The principles require State and public sector agencies involved in litigation to follow a number of principles of fairness and firmness and to support alternative dispute resolution.

## Public Trustee fees and charges

The current system of Public Trustee fees and charges for administration clients has been in place for almost 20 years. The Public Trustee's self-funded operations are supported by its fees and charges regime along with other income it earns from interest on clients' investments and its own financial reserves, as well as management fees it charges on its own investment products.

The *Public Trustee Act* permits the Public Trustee to set fees and charges for its services and recover from clients all expenses incurred or fees payable by the Public Trustee on behalf of a client.

Fees and charges are set annually via the tabling of the *Public Trustee (Fees and Charges Notice)* in the Queensland Parliament and placing a notice in the Queensland Government Gazette. The Public Trustee can charge a range of fees to administration clients. These include:

- A personal financial administration fee;
- An asset management fee;
- A real estate property fee; and
- Additional service fees.

Additional expenses and fees that the Public Trustee can charge include:

- Outlays, including incidental outlays, fees for financial advice and fees for other professional services, including legal fees charged by the Official Solicitor; and
- Management fees on investments in some of the Public Trustee's investment products.

## Personal Financial Administration Fee

The Personal Financial Administration Fee is based on where a client lives, how their income is paid and the level of support and personal contact they receive from the Public Trustee. There are 6 tiers or levels of Personal Financial Administration Fee. If a client lives in a residential aged care facility and their income is paid directly to the facility, the amount of contact they have with the Public Trustee may be minimal and attract a low Personal Financial Management Fee. If a client lives in the community and potentially requires more assistance and contact with the Public Trustee, a higher fee is charged.

The Personal Financial Administration Fee ranges from \$1,302.40 per year 'for a client residing in a commonwealth funded aged care facility and their main source of income is paid to the facility' (Level 1), to \$9,127.95 per year for a 'client receiving personal financial administration assistance from the public trustee and contact with the public trustee is more than once per fortnight' (Level 6).

Over half of the Public Trustee's administration clients are assessed to pay the two highest levels of the Personal Financial Administration Fee (levels 5 and 6). In 2019-20, the Public Trustee had 4,504 clients on the Level 5 Personal Financial Administration Fee who were liable to each pay \$6,403.80, and there were 898 people on Level 6 who each were liable to pay \$8,966.60. The difference between these two Levels is based on the frequency of contact a person has with the Public Trustee. For example, to be charged at Level 5 the person has contact with the Public Trustee once



per fortnight or less. If the client has contact more than once per fortnight, they are charged the Level 6 rate.

The main source of income for many administration clients is the Disability Support Pension (DSP), aged pension or a payment from a superannuation fund. The amount of the Personal Financial Administration Fee can be a significant financial burden for these people. The highest level of the Personal Financial Administration Fee equates to almost 37 percent of the single-person rate of the DSP. This is a very large expense for a person living on the DSP and would significantly affect their ability to pay their accommodation and living expenses without eroding their savings or assets. If the client was paying this amount in rent, they would be considered to be in 'rental stress'.

The Public Trustee has a system of fee rebates for clients with modest assets. Many administration clients have modest assets such as superannuation, property or savings. Even though they may receive some fee rebates, the Personal Financial Administration Fee remains a significant financial burden which can cause a rapid decline in their assets.

Public Trustee clients who live more independent lives in the community and more actively exercise their autonomy also appear to pay higher fees in comparison with those who are residing in institutions such as residential aged care facilities. The charging of significantly higher fees for administration clients who live in the community and engage more frequently with the Public Trustee cannot be viewed as encouraging or supporting them to develop self-reliance or participate in community life and decisions affecting their lives (as is required by the General Principles under the *Guardianship and Administration Act*). The fee structure is likely to have the reverse effect, especially considering the impact of the fees on clients whose incomes are limited.

## Asset Management Fee

Administration clients are also charged an annual Asset Management Fee when the Public Trustee is responsible for assets such as real estate, cash or investments. This fee is based on the value of a client's assets, excluding the person's principal place of residence, personal and household items and motor vehicles. Annual Asset Management Fees range from \$193.35 to manage assets of \$5,000 to \$10,000, to \$13,201.15 to manage assets over \$2.5M. Clients with assets of less than \$5,000 do not pay an Asset Management Fee.

In 2017-18, according to a consultancy report commissioned by the Public Trustee, 55 percent of the Public Trustee's clients were on Asset Management Fee levels 3 and below, with average assets of \$20,000 or less.

The Asset Management Fee is based on the value of the client's assets, rather than the amount or complexity of the work involved in managing the assets. Many administration clients have a narrow range of assets that are managed very conservatively and their investment arrangements rarely vary. Once a decision is made about how best to invest these assets, there is little need for on-going oversight. In those cases, it is difficult to understand what services are being delivered for the ongoing Asset Management Fee.

This fee also applies to client assets such as superannuation that is managed by third party superannuation funds and for which clients are also paying a management fee to their fund.

Similar to the asset test applied by Centrelink for DSP eligibility, the Public Trustee does not include the value of a client's principal place of residence in its assessment of the asset management fee. However, as already noted, unlike Centrelink, the Public Trustee includes clients' superannuation in this calculation. In the circumstances, the Public Trustee's fees, especially for clients on very low incomes such as a pension, appear to be high and likely to cause significant financial hardship.

## Real Estate Property Fee

In addition to the Asset Management Fee, an annual Real Estate Property Fee of \$962.60 is charged for each real estate property and 'other place of residence' owned by an administration client. The fee is fully rebated for clients' principal place of residence. This fee also applies to property not usually legally considered to be 'real estate property' such as caravans and campervans and is charged annually for each 'property' regardless of its value.



## Additional Service Fees

Administration clients can be charged an Additional Service Fee in circumstances described by the Public Trustee as where assistance is required to manage more complex matters such as dealing with overseas authorities, buying or selling assets outside of Queensland, or administering complex assets and liabilities such as a business. However, the review identified numerous examples of Additional Service Fees being charged for ordinary and predictable activities on clients' accounts, such as reviewing a building report or pest inspection. It is unclear why the costs associated with undertaking routine activities involved in managing clients' assets and investments are not included in the various other fees that are charged to manage administration clients' affairs.

## Outlays

The Public Trustee charges for 'outlays', which can include professional fees for tax agents, valuers and stockbrokers, the cost of legal services and expenses such as photocopying, postage, or phone calls. Public Trustee client files feature a range of charges for outlays that include fees for necessary professional services. However, there are also a range of other fees that raise questions about reasonableness and whether they can be ethically and legally justified. These outlays include fees for 'incidental outlays', and some fees for financial advice and the Official Solicitor.

## GST on fees and charges

Public Trustee clients pay the Goods and Services Tax (GST) on Public Trustee fees and other charges. Effectively, this increases the cost of the fees to clients by 10 percent.

The Victorian Ombudsman, in its 2019 report into State Trustees (in Victoria), observed that State Trustees also charges clients GST on their fees but that the NSW Trustee and Guardian had obtained a private ruling from the Australian Taxation Office recognising that its financial management fees are GST-exempt, thereby saving their clients the additional 10 percent GST.

## Fees on Public Trustee investment funds

Administration clients may also pay fees on certain investments managed by the Public Trustee. The Public Trustee operates various funds to invest clients' money. These funds include the Cash Account, the Term Investment Account (both part of the Common Fund) and the Growth Trust.

Funds in the Growth Trust are invested and managed by the Queensland Investment Corporation, which charges fees to the fund, and by extension, to administration clients. The Public Trustee also charges a 1.52 percent annual management fee to administration clients to manage their funds in this investment. This means that administration clients essentially pay three fees on their funds in the Growth Trust – an annual Asset Management Fee, a fund management fee to the Public Trustee and an investment management fee to the Queensland Investment Corporation.

## Fees and charges in other Australian jurisdictions

There is no standard approach to the charging of fees by State and Public Trustees across Australia.

The Public Advocate compared the key characteristics of the fees and charges regimes of the State and Public Trustees in New South Wales, Victoria and the Australian Capital Territory. The comparison was based on the fees that would be applied by each State and Public Trustee for four hypothetical administration clients with different asset and income profiles.

The significant difference between the fees charged by the Queensland Public Trustee and the other trustees seems primarily attributable to the operation of its fee rebate policy which results in clients with small cash holdings but who own their own residence being expected to pay very high fees compared with other clients and their interstate counterparts (see Table 4 at page 38).



The Queensland Public Trustee's hardship provisions set the threshold for fee relief at a very low level of assets (\$5,000), compared to other State and Public Trustees. The NSW Trustee and Guardian's threshold for the application of fee rebates or discounts starts at asset levels of \$75,000, with additional discounts for clients with assets under \$25,000.

## Issues identified with Public Trustee fees and charges

In summary, the Public Advocate's review identified a range of issues relating to the Public Trustee's fees and charges regime. These include:

- the level and complexity of the fees and charges;
- a lack of transparency about the fees and the policies that guide how and when they are charged;
- a lack of clarity about what services administration clients receive for their fees;
- the relationship between the relative cost of providing the services and the fees charged to administration clients;
- double charging of fees and 'fees for no service';
- the practice of obtaining and charging for routine and potentially unnecessary independent financial advice that invariably recommends investing client funds in accordance with the Public Trustee's client investment manual;
- potential structural discrimination as a result of the fee structure;
- the legality of some fees and charges, including their reasonableness and consistency with the Public Trustee's fiduciary duties.



### Recommendations

#### Recommendation 1: Undertake a full fees and charges review

Review the Public Trustee's fees and charges regime for administration clients to achieve:

- a simpler fee regime for administration clients. Administration clients and their supporters must be able to easily understand the Public Trustee's fees, what services are provided for the fees, and how and when the fees will be charged;
- fees that are more equitable and take into account clients' financial circumstances and their level of income. All clients should pay something towards the cost of the Public Trustee services they receive. The fee regime should include a mechanism that ensures the fees payable to the Public Trustee by administration clients with limited income do not reach a level where the fees become financially oppressive and negatively impact clients' lives, deplete their assets and/or drive them into poverty;
- fees that reflect the actual cost to the Public Trustee of providing the services. The fees charged should not be inflated to cross-subsidise services provided to other Public Trustee clients, other organisational activities or to provide 'profit' for the Public Trustee, unless specifically permitted by legislation;
- no duplication or overlap in fees. Where clients have been charged an Asset Management Fee on an asset, the Public Trustee should not impose any additional charges for the management or investment of those clients' funds;
- cease the practice of charging administration clients fees on assets (such as superannuation fund holdings or other investments) managed by third parties and for which the clients are already paying management fees to those third parties. At a minimum the Public Trustee should charge a lower fee for superannuation fund holdings where it can be shown that there is annual 'active' management of the clients' funds; and
- a fee structure that supports and encourages administration clients to exercise autonomy and lead independent lives. Administration clients should not be charged higher fees where they require more support to exercise their capacity and autonomy in relation to their financial affairs.



## Recommendation 2: Improve the transparency of fees and charges

The Public Trustee adopt the following practices to improve the transparency of its fees and charges:

- a. Provide clear and accessible information to administration clients about its fees and charges and the services clients will receive for those fees.
- b. The Public Trustee's policies and manuals that guide what services administration clients receive and how the fees and charges for those services are calculated and applied be published in accessible language and format. This information should include scenario examples to clearly demonstrate the fees to be paid for that service.
- c. On appointment and annually, the Public Trustee send each client personal correspondence detailing the services they will receive and the fees for those services. This should also occur after any significant change to the client's financial circumstances. This communication should be written in plain English with clear explanations of all terms used. All correspondence to administration clients should explain how to locate relevant fees and charges information, policies and manuals on the Public Trustee website. Where clients do not have access to the internet, the Public Trustee should make this information available in hard copy on request.
- d. Review its policies and practices to ensure they actively encourage staff to be responsive to clients and their supporters, particularly in relation to explaining its fees and charges. This is likely to improve information transparency, client participation in the management of their financial affairs, and client satisfaction with Public Trustee services.
- e. The information presented in client Statements of Accounts be improved to make the statements more transparent and easier to understand. The statements should include summary information about categories of income and expenses and provide a total of the Public Trustee's fees, charges, additional service fees and outlays for the relevant period. Any special purpose or professional services payments should be the subject of separate correspondence that fully explains these costs and why they were incurred.

## Recommendation 3: Consider the effect of fees when appointing the Public Trustee as administrator

The *Guardianship and Administration Act* be amended to require a court or tribunal, when considering appointing the Public Trustee as a person's administrator, to consider the level of the Public Trustee's fees and their likely effect on the person's financial circumstances over time. This is especially relevant when there may be an alternative appointment option of a family member or friend as administrator who would not charge fees. The court or tribunal may need to request that the Public Trustee provide an estimate of annual fees and other usual charges and expenses associated with providing its services, prior to deciding the appointment.

## Recommendation 4: Reconsider the practice of routinely obtaining external financial advice

The Public Trustee review its practice of routinely obtaining annual financial advice from an external financial advisor and external legal advice to make Total Permanent Disability (TPD) insurance claims under clients' superannuation arrangements. The review should consider:

- a. whether obtaining external financial advice for most Public Trustee clients is reasonably necessary, considering the Public Trustee's expertise as a professional trustee;





- b. whether obtaining the external financial advice represents value for money for clients, taking into account:
  - the Public Trustee's conservative investment policies which limit where and how clients' funds can be invested, and the returns they earn; and
  - the relatively low value of client assets for which the Public Trustee routinely obtains independent advice;
- c. whether the thresholds for obtaining external financial advice should be reviewed and raised significantly to ensure clients are not bearing the cost of the Public Trustee's mitigation of risk associated with its decisions;
- d. when financial advice should be obtained for clients;
- e. the circumstances in which follow-up financial advice should be sought for clients, considering the costs of the advice and the genuine likelihood of a change in client investments being made; and
- f. whether obtaining external legal advice routinely to make TPD insurance claims under clients' superannuation arrangements is reasonably necessary and represents value for money, considering the relative simplicity of TPD claims processes.

#### Recommendation 5: Discontinue general fees for incidental outlays

The Public Trustee should cease the practice of charging general fees for incidental outlays to administration clients and only charge the actual costs of these outlays on each client's file, if they are capable of being accurately costed.

#### Recommendation 6: Seek a Goods and Services Tax exemption

The Public Trustee, with the support of the Queensland Government, seek a Goods and Services Tax exemption from the Australian Taxation Office on its fees and charges for administration clients.

## Community Service Obligations and fee rebates

The Public Trustee has a system of fee relief or rebates that it applies for eligible administration clients to reduce the financial burden of its fees and charges. The fee rebates form part of the Public Trustee's Community Service Obligations (CSOs).

CSOs are a major cost of the Public Trustee's operations, second only to employee expenses. In 2019-20 the Public Trustee provided \$38.4M worth of CSOs. As with all Public Trustee's expenses, the CSOs are funded exclusively by the Public Trustee.

The sheer volume of CSOs, in terms of their value, coupled with their significant annual growth, place enormous pressure on the Public Trustee to increase its revenue from all sources, including from fees and charges, to keep pace with this growing cost.



## Cost of Community Service Obligations (see Table 5 in report)

Category of CSOs	2018-19 (\$M)	2019-20 (\$M)
Fees rebated for clients with limited assets	28.1	29.2
Fees rebated for principal residence and other	0.8	0.8
Management of estates of prisoners	0.6	0.6
Public community education and advice to the courts and tribunals in the areas in which the Public Trustee has expertise	1.2	1.5
Providing a free will-making service to Queenslanders	5.0	4.8
Cash contribution to the Office of the Public Guardian	1.2	1.2
Civil Law Legal Aid - outlays written-off and administrative support	0.2	0.3
Total	37.1	38.4

Sources: The Public Trustee, Annual Report 2018-19, p 17; The Public Trustee, Annual Report 2019-20, p 14.

Most government agencies that deliver CSOs are reimbursed from State or Commonwealth Consolidated Funds for the cost of delivering those services, however the Public Trustee does not receive government funding for its CSOs. All other State and Public Trustees in Australian jurisdictions receive some financial assistance from their respective governments to fund their CSO obligations. During 2018-19, the NSW Trustee and Guardian (as noted in its Annual Report) received additional funding from the New South Wales Government of \$5.1M for CSOs and an additional \$6.5M to fund services associated with the rollout of the National Disability Insurance Scheme, as well as reforms within the office. Over the same period, State Trustees (in Victoria) reported that it was funded \$18.8M by the Victorian Government to provide financial management services to the community.

There are two significant consequences of the Queensland Public Trustee not being reimbursed by government for its CSOs. First, the Public Trustee must fund the CSOs from its own revenue. Due to the decrease in interest rates over recent years, the Public Trustee's income from investments has decreased and is now significantly lower than the cost of its CSOs. This has meant the Public Trustee must fund the CSOs from other income sources. Increasingly, the Public Trustee's fee-paying clients (many of whom are administration clients) are bearing the costs of paying for the CSOs.

The second consequence is the high annual growth in CSOs. While the Public Trustee participates in the annual Queensland Government Budget process, as a self-funded agency, it appears the Public Trustee's expenditure is not as closely scrutinised as agencies that are government-funded. There appear to have been few, if any, questions asked by government about the growth in CSOs or how they will be funded. Consequently, with no limitation or cap on the cost of the Public Trustee's CSOs, they have increased significantly over time. In the 18 years since the first full year of operation of the current fee structure, the value of the Public Trustee's CSOs has increased by 284 percent.

## Fee rebates and hardship provisions

The Public Trustee's fee rebate and hardship scheme provides a safety net or limit on the annual fees payable by clients. The fees directly relevant to the fee rebate scheme are the Realty Fee and the Personal Financial Administration Fee.



There are three types of fee rebates:

1. standard fee rebates – where clients' fees are capped at 5 percent of their total assets (which includes the value of the client's principal place of residence).
2. rebates of fees under the Public Trustee's financial hardship provisions where:
  - the value of the client's assessable assets (cash and investments excluding motor vehicles, furniture, personal effects and jewelry) is less than \$5,000;
  - the client owns their principal place of residence; and
  - the client's income combined with their cash assets is insufficient to cover the fees.
3. principal place of residence rebate — no realty fee is charged on a client's principal place of residence.



#### Public Trustee fee rebate calculation

The fee rebate threshold is calculated in the following way:

- A figure representing 5 percent of the total value of the client's assessable assets (including the client's primary residence and any superannuation they hold) is calculated.
- If the 5 percent figure is more than the total fees and charges payable by the client that year, then the total of the fees and charges is charged to the client.
- If the 5 percent figure is less than the total fees and charges, then only an amount equal to the 5 percent figure is charged. The amount of the fees and charges above the 5 percent figure is rebated.

Fee rebates are also available on some other Public Trustee fees and charges, such as legal fees. These rebates apply only in limited circumstances and require a submission to be made by the relevant Regional Director to the Director Client Experience and Delivery. There is also an automatic rebate of 75 percent on the Public Trustee Incidental Outlays fee where the client has been approved for a hardship rebate.

For many administration clients of moderate means and income, and particularly those who own their own home, the Public Trustee's fee rebate and hardship scheme is inadequate to alleviate the negative effects of its fees and charges. The fee rebate scheme mainly benefits clients who live under very constrained financial circumstances. For other clients, the Public Trustee's fees and charges can place them under additional financial stress, and the rebate system does not provide relief. In some instances, the interplay between the fees and charges and the rebate scheme can result in clients being unable to maintain their home, which for most people provides a place of safety, security and a level of independence.

The Public Trustee's *Quality Assurance and Continual Improvement (QACI) Manual* confirms that, since 2014, it has been aware that certain administration clients do not benefit from its standard fee rebate scheme, and those who own their own home are particularly disadvantaged.

Rather than amend the rebate scheme to properly address this problem, the Public Trustee's hardship provisions only apply when the clients' assessable assets, other than their home, have been reduced to less than \$5,000. A client whose only income is the DSP, with cash assets of less than \$5,000, would find it difficult to pay the usual expenses associated with owning a property, such as rates and insurance, afford their living expenses and still have funds left over for regular maintenance on their home, in addition to the routine Public Trustee outlays such as annual building and pest inspections, property valuations and incidental outlays. The most likely outcome of this scenario is that the home will fall into disrepair and the client will come under pressure to sell the house and move into public housing or the private rental market.

The *QACI Manual* outlines an obscure system for authorising a CSO rebate for clients experiencing financial hardship. It also requires that the decision to authorise a hardship rebate take into account a recent valuation of the administration client's property. It is unclear why it is considered necessary to obtain a recent valuation of a client's property to support an application for a hardship rebate, especially when the client is in such dire financial circumstances. The effect of this questionable requirement is that the Public Trustee would spend a sizeable proportion of the client's small amount of remaining funds (less than \$5,000) obtaining a property valuation for the



purpose of authorising a rebate of fees. These actions appear absurd in the circumstances and likely to drive the client unnecessarily into further financial distress.

Other concerns arising from the *QACI Manual* include:

- when assessing an application for a hardship rebate, staff are not required to consider how de-stabilising a move from the property and into the rental market might be for the client, whether the client would make a suitable tenant and/or the challenges of finding available public housing or other rental accommodation.
- There appears to be no review or oversight of the decision-making process around client eligibility for a hardship rebate.
- There is a requirement that the Public Trustee's Financial Planning Team provide advice about accessing clients' superannuation to pay the Public Trustee's fees before making an application for a hardship rebate. This appears to require Public Trustee staff to make hardship applications to clients' superannuation fund/s to access their superannuation on the basis of financial hardship, thereby impacting the clients' future income from this source, prior to authorising a hardship rebate.

## Funding Community Service Obligations

Until 2016-17, the Public Trustee's interest earnings on its investments and from the Common Fund covered the cost of its CSO expenses. In the years preceding 2016-17, the Public Trustee also used the surplus interest earnings after funding the CSOs to fund its other operations.

After 2016-17, the Public Trustee's interest revenue decreased to a level that did not fully fund the CSOs. By last financial year, the shortfall between the Public Trustee's interest revenue — which was always intended to be the source of funding of CSOs — and the cost of its CSOs, was approximately \$17M.

It appears that since 2016-17, the funding shortfall has primarily been met by **revenue from clients' fees and charges**.

The effect of this is that some administration clients, through their fees, are contributing to the funding of some Public Trustee services they do not, and may never, access. This includes free wills, the Civil Law Legal Aid Scheme, and the management of the estates of prisoners. A significant proportion of the CSOs are comprised of fee rebates, which means that some administration clients, even with modest assets, are paying a premium on their fees to fund administration services for other administration clients who are not paying any, or reduced, fees.

Considering that revenue from client fees is now being increasingly relied on to defray the costs of CSOs, it is critical that the Public Trustee take steps to contain this cost. The largest contributor to CSOs is rebated fees and charges for clients with limited assets. This is an area of service demand over which the Public Trustee has limited control. Some means of addressing this may be to reconsider whether the *Guardianship and Administration Act* provisions should be amended to provide that the appointment of the Public Trustee be one of 'last resort', which would potentially limit the number of new administration appointments for the Public Trustee. Alternatively, the Public Trustee could consider whether all administration clients who are currently not paying fees under the **Public Trustee's fee rebate and financial hardship schemes** should be paying something towards the cost of their services, perhaps by way of a small percentage of their pension income (as occurs in Victoria and the ACT), which could help to reduce some of the financial pressure.

The second largest contributor to CSOs is the **Public Trustee's free will-making service**. While the aim of the service, to reduce people dying intestate, is consistent with good public policy, the **availability of this free service and the Public Trustee's promotion of it drives demand and costs**. The cost of the free will-making service was \$4.8M in 2019-20 and the Public Trustee has budgeted for a \$0.3M increase in the costs associated with the service in the next financial year (despite its large operational deficit and interest rates remaining at an all-time low). There are many Queenslanders who are able to afford to have their wills made through other means, but have benefitted from the **Public Trustee's free will-making service**. It is questionable whether the benefits of free wills for a proportion of the population who could afford to pay for the service can be justified considering the cost to administration clients whose fees help to subsidise the service.



It is also questionable whether it is appropriate that administration clients should, through the fees and charges they pay, be contributing to the funding of other activities of the Public Trustee including the funding contribution to the Office of the Public Guardian (an independent state agency), providing advice to courts and tribunals or administering and managing philanthropic trusts.

From a legal perspective, it is not acceptable for a fiduciary to charge fees to one group of clients or beneficiaries to subsidise the costs of delivering services to another. The effect of the Public Trustee's system of fees and rebates is that some clients who are able to pay fees subsidise a range of services and activities provided to others. Ultimately, this raises questions about whether the Public Trustee is acting in the interests of its administration clients and fulfilling its duties and obligations as a fiduciary.

The people under administration with the Public Trustee are some of the most vulnerable people in our community. It is concerning that these people should not only be paying high, and multiple, fees for their administration services, but that those fees are being used to fund a range of other services that, in many cases, they will never access. Administration clients should only pay the reasonable costs of providing the services they receive. These practices may amount to a breach of trust on the part of the Public Trustee.

The need for the Public Trustee to have an alternative strategy to fund its CSO commitments was first identified in 1991 by the Public Sector Management Commission, which detailed a range of concerns for the Public Trustee (including an inadequate financial base) and recommended that it determine the cost of its CSOs and develop a policy for consideration by government about how they should be funded in the future. It does not appear that any such policy has been considered.

A 1996 Auditor-General audit of the Public Trustee also recommended the Public Trustee review the range of CSOs it provides and arrange for appropriate government funding of those services. These recommendations were not implemented. Instead, the Public Trustee has increased its reliance on revenue generated by client fees and charges to fund the continued growth in CSOs.



## Recommendations

### Recommendation 7: Review Community Service Obligations (CSOs)

The Public Trustee's Community Service Obligations be reviewed and consideration given to whether the Public Trustee's current Community Service Obligations should continue to be provided in their current form, and at current levels.

### Recommendation 8: Discontinue client subsidisation of Community Service Obligations

The Public Trustee cease using revenue raised through administration clients' fees and charges to fund or subsidise the cost of providing Community Service Obligations on the basis that a fiduciary should not use the funds of one client to fund services to another.

### Recommendation 9: Limit the level of community service obligations

The Public Trustee's Community Service Obligations should be capped at a level that can be reasonably funded from revenue earned on its investments.

### Recommendation 10: Review fee rebate and financial hardship provisions to ensure client assets are not depleted by fees and charges

The Public Trustee review its fee rebate and financial hardship schemes to:

- a. achieve more equitable outcomes for administration clients, especially those with limited incomes, such as pensions, who own their own home. The review should consider raising the level of assets for financial hardship eligibility above \$5,000 and reviewing the practice of including the value of clients' principal place of residence in the value of assets for calculating fee rebates;





- b. ensure no administration client will experience an unavoidable depletion of assets because of the amount of Public Trustee fees they pay and the inadequacy of the rebates; and
- c. develop a new stand-alone Fee Rebate and Financial Hardship Policy that is accessible and easy to understand to ensure that administration clients and members of the public know how the policy operates.

## Investment practices

Up to this point, the review has principally focused on the effect of the Public Trustee's fees and charges on people under administration. However, to fully understand the policies and practices that are contributing to the poor financial outcomes for some clients, it is necessary to have an understanding of the Public Trustee's investment practices. This is because those practices directly impact its revenue from investments and the financial returns for clients on their funds. The earnings of the Public Trustee from investments also have a direct relationship with the level of fees and charges set by the Public Trustee.

While examining these issues, certain investment practices of the Public Trustee were identified that raised broader concerns about whether the practices are consistent with the Public Trustee's fiduciary obligations.

The following aspects of the Public Trustee's investment practices have been identified as areas of concern:

- the Public Trustee raising revenue from client funds invested in the Common Fund by means of the 'interest differential';
- the accumulation of large reserves from annual surpluses or operating profits;
- the operation of the Public Trustee's Growth Trust; and
- investment practices that result in client funds being almost exclusively invested in Public Trustee investment products.

## The Common Fund

The Public Trustee is required by law to have a Common Fund, with all money coming to the Public Trustee paid into this fund and invested by the Public Trustee. According to its 2019-20 Annual Report, the Public Trustee held \$731M in trust on behalf of clients. Administration clients are the single largest group of contributors, accounting for \$316M (or around 43 percent) of the deposits held in the Common Fund by the Public Trustee. These funds represent cash available to the Public Trustee to invest in accordance with its legal and fiduciary duties. There was also a further \$178M in Public Trustee accumulated surpluses held in the fund during 2019-20.

The Public Trustee is authorised to invest client money and **can therefore move clients' money from** the Common Fund into other investments that earn a higher rate of return. The Public Trustee has established two accounts within the Common Fund that it uses to invest client money; the Public Trustee Cash Account and the Public Trustee Term Investment Account.

The Public Trustee may also move money out of the Common Fund and invest it in external financial products. The Growth Trust (discussed later) is an investment product established by the Public Trustee for investing client funds outside of the Common Fund.

All three of these funds earn specific rates of interest for Public Trustee clients/beneficiaries, with the Cash Account earning the lowest rate of interest, the Term Investment Account earning a higher rate and the Growth Trust earning a higher rate again. However, only the Cash Account and the Term Investment Account are considered part of the Common Fund and guaranteed by the government, in terms of the money invested and the interest payable.



## Interest differential

The Public Trustee has access to two separate sources of money to invest to earn revenue:

- client funds held in the Common Fund; and
- the Public Trustee's accumulated surpluses from operations year on year, also held in the Common Fund.

The Public Trustee is authorised, under the *Public Trustee Act*, to invest money in the Common Fund in its own name in any authorised investments, and the income earned from those investments must be paid into the Common Fund. The *Public Trustee Act* provides that interest at a prescribed rate is to be credited at least annually to clients whose money is in the Common Fund. The Act does not require that the interest paid to clients must be the same as the interest earned on the Common Fund money invested by the Public Trustee. The difference between what the Public Trustee earns in interest (usually a higher rate) compared to what it pays to clients (usually a lower rate) is described by the Public Trustee as the 'interest differential'.

The Public Trustee is required to use the earnings on the Common Fund investments to pay interest to the clients whose money is invested in the Common Fund and then to pay operating and capital expenses.

The Public Trustee does not publish information about the rate and amount of interest it earns on the money in the Common Fund. However, the interest rate payable to administration clients on their Common Fund balances is published under the *Public Trustee Regulation*. The rate payable at the time of publication was 0.25 percent, which has been in place since November 2020. The interest rate currently payable on Public Trustee Term Investment Account balances is 0.4 percent. These rates are generous compared with the current Reserve Bank cash rate of 0.1 percent. However, the non-publication of the rates of interest or earnings by the Public Trustee on client funds in the Common Fund results in a lack of transparency and accountability about how clients' money is being invested, the overall earnings on that money and who is benefitting from those earnings.

The Public Trustee's financial statements for 2019-20 showed that its investment activities earned \$20.9M in interest revenue, with \$8.0M paid out as interest expenses. Although no specific information is available in the Annual Report, it is assumed that this expense was paid as interest to clients on their money in the Common Fund. On that basis, the revenue kept by the Public Trustee from the interest differential is calculated to be \$12.9M (\$20.9M minus \$8.0M), or 62 percent of the interest earned on the Common Fund's investments. With the Public Trustee's accumulated surpluses accounting for only 20 percent of the money in the Common Fund, this appears to be a particularly favourable, and possibly unfair, return to the Public Trustee from earnings on its clients' funds.

The conflicts inherent in this funding arrangement appear to be incompatible with the duties and obligations of a trustee and fiduciary to not profit from its clients and to avoid conflicts.

A 1996 audit of the Public Trustee by the Auditor-General expressed concerns about the proportion of earnings being retained by the Public Trustee. The Auditor-General compared interest revenue and interest credited to clients from the Common Fund for the period 1991 to 1995, finding that the proportion of interest earnings retained by the Public Trustee over that time ranged from 27 percent to 48 percent of the earnings, causing the Auditor-General to observe:

While this is commonly practiced among trustee organisations the question arises as to the equity of the PTO [Public Trust Office] retaining a significant proportion of Common Fund earnings which could be argued, more properly should be distributed to estates.

The Auditor-General recommended that the Public Trustee ensure to the greatest extent possible that 'maximum benefit is transferred to estates' from interest earnings of the Common Fund.



The Public Trustee is in a position of conflict when it invests client funds and earns income or fees from those investments that it does not return to the client. The Public Trustee acknowledges this conflict in its *Prudent Person Rule Manual*, and justifies these arrangements on the basis that the interest differential arrangement:

is a model that has been in place since the Public Curator ... was created by the *Public Curator Act 1915*. Ever since its inception the Public Trustee has met its expenses ... from the margin between the earnings of the Common Fund and the interest paid to trusts and estates and the fees received from its services.

A fiduciary is only permitted to profit with the informed consent of the beneficiary and with full and frank disclosure of all relevant information. The concept of fully informed consent is more difficult in the context of providing services to people with impaired decision-making capacity, although it is arguable that there is nothing on the face of the *Public Trustee Act* that excuses the Public Trustee from compliance with the following:

- the fundamental fiduciary duty not to make a profit from its position;
- the fiduciary obligation to make full and frank disclosure of its fees and charges, and to justify profit from even reasonable fees; and
- the equitable principle that it is wrong to use the assets of one trust to meet the costs of administering another trust.

It is a principle of statutory interpretation that, unless there is a clearly expressed intention in legislation to override a fundamental principle of law or equity, it will not be overridden. There is nothing in the *Public Trustee Act* or other legislation governing the duties of administrators to indicate any specific intention to alter or override the Public Trustee's fiduciary duties.

The Public Trustee may view section 19(1)(c) of the *Public Trustee Act* as providing it with authority to profit from client funds. However, that section provides that a prescribed rate of interest will be paid on the money in the Common Fund, and arguably cannot be interpreted as a clear intention to allow the Public Trustee to profit.

One view is that this section allows the Public Trustee to cover its expenses using the interest differential and not to accumulate an unreasonably large surplus. This interpretation is supported by section 19A of the *Public Trustee Act*, which provides that the Public Trustee must apply all fees and charges as well as interest earned on investments for only two purposes: to pay interest to the clients whose funds were invested, then towards operating and capital expenses of the Public Trustee. The concerns of the Auditor-General in 1996 would also appear to support this view.

The Public Trustee has made operating surpluses over many years. If the interest differential income has contributed to these surpluses, the accumulation of these funds may be inconsistent with the requirements of section 19A of the *Public Trustee Act* and the Public Trustee's duties as a fiduciary.

The consequence of the Public Trustee investing client money in the Common Fund and generating interest as a source of income for its own operations is that the Public Trustee derives greater benefits by maximising the amount of funds in its control and invested in the fund, therefore maximising its earnings through the interest differential. The flow-on effects of these actions contribute to the Public Trustee's annual surpluses and accumulated reserves, which are also used to earn revenue.

## Surpluses and reserves

From 2001-02 to 2019-20, the Public Trustee reported surpluses in its Annual Reports of between \$0.3M and \$12.4M each year, except on three occasions:

- 2008-09 - operating loss of \$9.6M due to the Global Financial Crisis;
- 2018-19 - operating loss of \$0.8M due to higher than budgeted staffing costs; and
- 2019-20 – operating loss of \$12M.

The most significant source of the Public Trustee's income is its fees and charges, with administration clients being a significant contributor. In 2019-20 the Public Trustee's total revenue was \$115.6M and of this, administration of estates and trusts and other professional fees contributed \$90.1M or approximately 78 percent of its total revenue. (The Public Trustee does not report the sources of revenue from clients according to category.)



Surpluses often occur as a result of specific planning and budgeting. Considering the amount of Public Trustee revenue from fees and charges, there is a direct relationship between the fees and charges paid by clients and the Public Trustee's budget outcomes. The Public Trustee advises that it budgets for a balanced budget each year, not for surpluses. However, this is not borne out by its own Strategic Plan which lists as its second priority objective, '[D]eliver the surplus required to enable sustainable reinvestment that supports current and future business objectives'.

The Public Trustee's current fees and charges structure has been in place since December 2000. Since that time, the Public Trustee's reserve has grown from \$81.9M in 2000-01 to \$178M last financial year.

It is questionable whether the Public Trustee should be running surpluses and accumulating large reserves of funds rather than providing additional services to more clients or reducing its fees and charges.

## Growth Trust

The Growth Trust is a Public Trustee investment product that provides its clients with an opportunity to earn capital growth and income from a diversified investment portfolio. In 2018-19 the Growth Trust held approximately \$346.7M, with \$155M or 45 percent of this amount representing the funds of 1,406 administration clients. Of this group, there were 1,234 administration clients with investible assets under \$450,000 who collectively held \$91.5M in the Growth Trust at an average of \$74,000 per person.

Administration clients have their funds allocated, almost as a matter of course, to various Public Trustee investments. While the Public Trustee also obtains financial advice and develops financial management plans and budgets for clients, these activities invariably result in clients' funds being invested and managed in accordance with the standard or primary investment strategy outlined in the Public Trustee's *Prudent Person Rule Manual*.

The Public Trust Office Investment Board (Board) controls and manages the investments of the Common Fund and provides advice to the Public Trustee on the investment management of the Growth Trust. The Board has invested all of the Growth Trust funds with the Queensland Investment Corporation, which independently manages those funds. The Queensland Investment Corporation makes ongoing management decisions about how to invest the Growth Trust portfolio.

Administration clients whose funds are invested in the Growth Trust are paying up to three separate fees on their funds — the Public Trustee's annual Asset Management Fee, the Public Trustee's Growth Trust Management Fee and the Queensland Investment Corporation's investment management fee. As a matter of principle, the charging of multiple fees for the management of the same funds does not seem reasonable.

The Growth Trust Management Fees are an expense on the Growth Trust, but represent revenue for the Public Trustee. The \$1.6M Growth Trust Management Fees charged to administration clients contribute almost one-third of the Public Trustee's total Growth Trust Management Fees income of \$4.9M. Investment in the Growth Trust is the standard investment approach for administration clients as part of the Primary Investment Strategy for Public Trustee clients. In making the decision to invest the money of clients under administration in the Growth Trust, the Public Trustee provides them with an opportunity for their funds to earn higher rates of interest, however it also creates an additional source of income for itself in the form of management fees.



### Recommendations

**Recommendation 11: Do not profit from administration clients unless expressly permitted by law**  
As a fiduciary and financial administrator, the Public Trustee should not profit from administration client funds unless expressly permitted by legislation. Any such legislative provisions should set clear limits on the amount and purpose of any income or 'profit'. (See recommendations 29 and 31)



#### Recommendation 12: Improve transparency of Public Trustee revenue sources

The Public Trustee improve reporting of its sources of revenue, particularly revenue earned on administration client funds so that it is clear where clients' money is being invested, the overall returns on those investments, and the value of the interest differential that is being retained by the Public Trustee. The Public Trustee's revenue sources and use of administration client funds to raise revenue should be transparent and accountable so that people know how their money will be used and the likely returns on investments managed by the Public Trustee relative to their actual earnings.

#### Recommendation 13: Clearly report the fees and costs of managing Public Trustee investments

The Public Trustee clearly report the fees it charges and other costs associated with the operation and management of its various investments (in particular the Common Fund, interest bearing term deposits and the Growth Trust) and its effect on clients' investment returns.

#### Recommendation 14: Stop requiring administration clients to pay double charges on their funds

Administration clients should not pay double charges on their funds, where they pay an annual Asset Management Fee on their funds and additional fees to the Public Trustee and/or other organisations to manage investments dealing with those funds.

#### Recommendation 15: Limit the amount of Public Trustee surpluses and reserves

There should be a limit on the amount of operating surpluses and reserves that the Public Trustee can accumulate. Any reserves exceeding the cap should be returned to clients in reduced or rebated fees.

## Prudent Person Rule

The Public Trustee is authorised to make two types of investments. These are an investment in accordance with the Prudent Person Rule as defined in the *Trusts Act* or an investment approved by QCAT defined in the *Guardianship and Administration Act*. The Prudent Person Rule is not a single statement of legal principle. It is comprised of a series of duties, principles and considerations that a trustee must apply when investing on behalf of a client.

The Public Trustee's obligations to comply with the Prudent Person Rule do not operate in isolation. As an administrator under the *Guardianship and Administration Act*, all other obligations of an administrator apply to the Public Trustee. Some of these obligations are specific, such as:

- avoiding conflict transactions;
- how decisions are to be made when there are multiple decision-makers;
- keeping records;
- keeping property separate;
- when gifts are appropriate; and
- rules around maintaining the dependents of a person under administration.

There are also general duties that apply to administrators under the *Guardianship and Administration Act* and these operate alongside the Prudent Person Rule. These include the requirement to act honestly and with reasonable diligence to protect the client's interests, and apply the General Principles under the *Guardianship and Administration Act*. Anyone exercising a power under the Act must do so in a way that upholds the purpose of the Act and the General Principles (see Appendix 3).

The Public Trustee's *Operations Manual Chapter 28 Financial Planning and the Prudent Person Rule Manual* guides staff in how to manage and invest clients' assets according to their obligations as a trustee and fiduciary and the Prudent Person Rule. (Note: the *Operations Manual Chapter 28. Financial Planning* is referred to as the Financial Planning Manual and the Prudent Person Rule is referred to as 'the Rule').





The Financial Planning Manual and the *Prudent Person Rule Manual* are used by the Public Trustee as the rationale for many of its decisions about the management of client assets. These documents were internal and unpublished until early 2020 when the *Prudent Person Rule Manual* was published on the Public Trustee's website for the first time. Prior to this, the Public Trustee viewed its internal policies, procedures and the manuals that guide the decision-making of its staff to be 'commercial-in-confidence'.

People under administration are not a 'market' whose 'business' the Public Trustee (as a commercial entity) is competing for. The Public Trustee holds a unique position of responsibility and trust in the Queensland community and in the lives of its clients. Accordingly, its decision-making, policies and practices must be accessible and transparent.

## Investment Strategy

There are various statements in the Public Trustee's *Prudent Person Rule Manual* that suggest that clients' needs and circumstances should be considered when investing their funds. This is consistent with the General Principles. However, these statements are effectively overridden in practice by the Public Trustee's 'Client Investment' and 'Primary Investment' strategies as its standard approach to the investment of client funds.

The Client Investment Strategy divides clients into four groups, dictated by the value of their assets. Despite these groupings, and regardless of their individual circumstances, their risk profile, or particular asset holdings, the vast majority of clients appear to have their cash funds invested in the Cash Account, Term Investment Account and Growth Trust in particular proportions detailed in the strategies.

The only difference in how assets are managed for clients appears to be whether independent financial advice is obtained about how the clients' funds should be invested. Independent financial advice for clients is deemed to be necessary when they have what are defined as 'complex' assets (which the Public Trustee defines as any investable assets other than cash, or Public Trustee investments, and includes superannuation, shares etc) or an asset value that exceeds \$150,000.

However, the independent financial advice received by clients does not vary (except in very rare circumstances) from the Public Trustee's pre-determined investment strategies which require investment of client funds in its investment products. This raises questions regarding the necessity and value of the independent financial advice commissioned by the Public Trustee, particularly in those cases where it is obtained every year.

Overall, the strategies detailed in the *Prudent Person Manual*, in concert with the Public Trustee's Financial Planning Manual, establish a standard template for the investment of administration client cash funds in the Public Trustee Cash Account, the Term Investment Account, and the Growth Trust in the proportions outlined in the strategy. For existing clients this means the first \$450,000 of their cash assets (excluding funds in superannuation or recommended for investment in superannuation) will almost always be invested in the three Public Trustee products. For clients with assets in other investments, such as shares or other products, the usual course is to sell the shares and withdraw the investment (provided the exit fees are not prohibitive) and invest the cash according to the investment strategy in the Public Trustee investments.

For clients with assets of more than \$450,000, the financial advisor recommends how their funds should be invested. Based on the financial advice provided to administration clients that the Public Advocate has been able to access, it seems that the financial advice for these larger wealth clients also usually recommends the Growth Trust to invest the additional funds, ultimately resulting in client moneys being invested in all Public Trustee investments.

In only one case is the Public Advocate aware of a financial advice recommending an investment in a non-Public Trustee investment.

For the purposes of efficiency and practicality, it is acknowledged that there needs to be a level of uniformity in the investment approach adopted by the Public Trustee for its clients. However, the rigid application of a standard investment strategy with virtually no variation does not satisfy the Public Trustee's obligations.





The Manual also does not encourage Public Trustee staff to understand clients' risk preferences as is required by the Prudent Person Rule and General Principle 10 to ensure clients' individual circumstances are taken into account when making investment decisions. The risk profiles outlined in the manuals provide for a very limited range of risk, recommending the same investments for clients in three of the four investment profiles.

The practice of directing all client funds into Public Trustee investments also means that the Public Trustee earns income and fees additional to the general Asset Management Fees it charges clients for providing administration services. This practice raises questions about whether the Public Trustee is fulfilling its fiduciary duties to avoid conflicts with its clients' interests and not to make unauthorised profits from clients.

In the circumstances, the Financial Planning Manual and *Prudent Person Rule Manual* should be reviewed to ensure they provide appropriate guidance to Public Trustee staff about investing client funds in compliance with the Prudent Person Rule and the broader fiduciary and legal obligations of the Public Trustee.

## Conflict Issues

The *Prudent Person Rule Manual* includes a curious passage about the issue of conflict arising from the Public Trustee's investment practices:

There may be a perception that the Public Trustee prefers its clients to be invested in its own products. This conflict is experienced by any financial services provider offering financial planning advice and their own investment products.

We acknowledge there is a conflict and note that this has been approved by Queensland Supreme Court decision No 5391 of 1996 dated 15 July 1996.

Case No 5391 of 1996 is an unpublished Supreme Court order. It consists of affidavit material and attachments filed by the Public Trustee and a final order of the court on 15 July 1996, approving the establishment of an investment trust that has become known as the Public Trustee Growth Trust. The purpose of the court proceedings was for the Public Trustee to obtain court approval to invest money from the Public Trustee's 'Common Fund' into equities or shares in the Growth Trust.

This case cannot be regarded as setting a legal precedent because it does not have the necessary features of a legal decision. The case and the order made do not show there was a ruling on a point of law. There was no legal issue in contention — the only party to the proceedings being the Public Trustee. Accordingly, the court could not have given consideration to arguments of any other side, and no reasons for the order were given.

There was nothing in the file or the order of the court that addressed the issue of conflict of interest. There was no reference to a conflict of interest in any of the material filed by the Public Trustee, and yet, the *Prudent Person Rule Manual* claims that the Supreme Court in this case 'approved', not only a conflict of interest in relation to the Growth Trust, but apparently any conflict of interest that may arise from the Public Trustee investing client funds in its own products.

On the basis of the contents of the Supreme Court file, the Public Advocate can see no reasonable legal basis upon which the Public Trustee can make this claim.

In any event, legislation takes precedence over case law. The later enactment of the *Guardianship and Administration Act* in 2000, and its specific provisions requiring administrators to obtain QCAT approval to enter into conflict transactions, overrides any decision made by a court prior to that time.

The most concerning aspect of the Manual is that the Public Trustee acknowledges the inherent conflict in its investment of client funds in its own investment products. The Public Trustee clearly benefits, or profits, from these investments. However, it has not obtained tribunal approval for each, or any, occasion it has invested administration client funds in those products where it earns income or management fees. By almost exclusively investing client funds in its own products (and earning income or profit on those investments), the Public Trustee is potentially in breach of its fiduciary duties and its legal obligation to avoid conflict transactions under the *Guardianship and Administration Act*.





## Recommendations

**Recommendation 16: Review investment practices and discontinue activities that do not directly benefit clients**

The policies and practices of the Public Trustee relating to the investment of administration client funds be reviewed, and any investment activities involving their funds that do not maximise direct benefits to those clients be discontinued.

**Recommendation 17: Review and update the *Prudent Person Rule Manual***

Review and update the *Prudent Person Rule Manual* to ensure it appropriately reflects the law and the Public Trustee's obligations as a trustee and fiduciary. The review should include consideration, where appropriate, of a client investment approach that:

- a. ensures that decisions about investing client funds demonstrate that each decision was made in the interests of the client;
- b. seeks to achieve more for clients than just the preservation of their assets;
- c. moves away from an inflexible standard template approach to investing, to one that takes the clients' individual circumstances into account (wherever possible);
- d. relies on an actual assessment of clients' individual investor risk profiles (where possible), rather than assigning profiles based on clients' ages, and makes a meaningful distinction between each of the risk profiles and the types of investments considered appropriate for that profile.

**Recommendation 18: Publish the *Prudent Person Rule Manual***

The *Prudent Person Rule Manual* and all other Public Trustee manuals that guide the agency's decision-making about managing and investing administration clients' funds be published and re-written in accessible language.

**Recommendation 19: Review position on conflict transactions**

The Public Trustee review its reliance on Supreme Court case No 5391 of 1996 as providing legal authority for all potential conflict transactions involving the investment of administration client funds in its own products, particularly the Growth Trust.

**Recommendation 20: Review the practice of only investing in Public Trustee investment products**

The Public Trustee review its practice of investing administration client funds almost exclusively in its own investment products and seek advice about how it can fulfil its statutory and fiduciary obligations while managing client funds and earning revenue. Where the Public Trustee proposes to invest administration client funds in its own investment products it should seek appropriate approvals under the *Guardianship and Administration Act* or seek a specific legislative amendment to expressly permit these breaches of its obligations. Such arrangements should also be published in an accessible format and declared to clients.

## Financial advice

The Public Trustee's Financial Planning Manual guides staff about the investment strategy that will apply to each client and whether the client's investments will be managed according to the Primary Investment Strategy (internal) or the External Investment Strategy, which includes seeking external advice from a financial advisor which the client must pay for.

Neither the Financial Planning Manual nor the *Prudent Person Rule Manual* contains specific discussion or direction for Public Trustee staff about the circumstances in which a trustee's duty to obtain advice about an investment decision arises.



The Public Trustee's approach to obtaining external financial advice for clients is based on a rudimentary assessment of the value of the clients' assets and whether they are 'complex', according to the Public Trustee's very narrow definition of that term, which includes any assets other than Public Trustee investments or cash.

The result of this approach is that it seems financial advice is obtained for administration clients in many more cases than is necessary.

The NSW Trustee and Guardian, State Trustees (in Victoria) and the Public Trustee South Australia do not use external financial advisors for their clients, relying instead on the expertise of staff who are licensed to provide financial advice and who are charged out at an hourly rate or a set fee. In other jurisdictions, external financial advice for which clients pay is only sought by exception, where the client holds significant and complex assets.

The Public Trustee of Queensland takes the view that financial advice services can be more cheaply and professionally delivered through an outsourced service provider and provide more individualised outcomes for customers compared with the work completed in-house. This may be correct, where clients have genuinely complex assets or financial arrangements. The question remains whether the triggers for obtaining external financial advice are set at an appropriate level to manage risk and complexity, and also whether the advice represents value for money for the clients, in terms of the recommended investments and financial outcomes.

## Arrangements for external financial advice

The Public Advocate identified several issues surrounding the current arrangements for the provision of external financial advice to the Public Trustee. These include:

- The Public Trustee using the same, sole provider of financial advice services since 2013 rather than reviewing these arrangements regularly and appointing a panel of providers. (The Public Trustee advises that it is committed to regularly reviewing its contract to ensure they are meeting the needs of customers and the advice represents value for money, however, given the complexity and type of contact with the financial advice provider, it considers that up to ten years is a reasonable contract length.)
- The contractual documents between the Public Trustee and the financial advice provider:
  - Lacking clarity about whether the client of the external financial advice provider is the Public Trustee or the person under administration for whom the advice is prepared.
  - Requiring the inclusion of statements in the advice document that appear to transfer responsibility for the Public Trustee's compliance with the Prudent Person Rule to the external financial advice provider. The Prudent Person Rule can only be satisfied through the actions of the Public Trustee, not by a statement of guarantee for the advice from an external financial advice provider.
  - Requiring the external financial advisor to apply the risk profiles and the client investment strategy specified in the Public Trustee's Financial Planning Manual and the *Prudent Person Rule Manual*, rather than individually appraising each client's risk appetite and investment and financial needs.
  - Requiring the external financial provider to recommend the transition of clients' superannuation to the Public Trustee's preferred superannuation provider as a matter of course, irrespective of the performance of the clients' chosen superannuation fund.
  - Requiring the external financial provider to consider recommending clients' funds be invested in Public Trustee investment products.
- The Public Trustee's policies require that administration clients with 'complex assets' pay for external financial advice annually, without consideration of whether it is warranted due to a change of circumstances since the last advice, or any significant external factors impacting the client's financial position. An internal review of the client's investment arrangements should suffice in most similar circumstances.

The Public Trustee's contractual arrangements have the effect of limiting the advice that the external financial advisor can provide to a point where it cannot be characterised as independent or impartial, resulting in the investment strategies and products recommended by the provider being those prescribed by the Public Trustee in its policies and manuals. The contract arrangements leave little space for the financial advisor to exercise real independence, in terms of the



combinations and types of investments that can be recommended, or taking into account the individual circumstances of the people for whom the advice is provided.

While the Public Trustee provides information to the financial advisor about the individual circumstances of each of the clients it refers for advice, the investment recommendations of the advisor suggest that the advice is not necessarily prepared based on that information.

**It is unclear what benefits the Public Trustee's administration clients receive from arrangements, which require them to pay a fee for financial advice where the outcome of that advice is pre-determined by the Public Trustee's own investment policies, and the range of investments is restricted to Public Trustee-only products.**

Conversely, there are clear benefits for the Public Trustee from obtaining external financial advice. **Independent, external, financial advice that supports the Public Trustee's Client Investment Strategy** can be used to respond to complaints or criticisms about the investments the Public Trustee makes on behalf of clients. Seeking external financial advice can appear prudent and appropriately cautious (if the relative costs and benefits for the clients are not considered).

Obtaining external investment advice potentially shifts some of the risk borne by the Public Trustee when making investments on behalf of clients to the external financial adviser, albeit at the expense of the clients who must pay for the advice.

The advice also appears to justify and endorse investing Public Trustee client funds exclusively in Public Trustee investment products (a conflict of interest) on the basis that these investments were recommended by the independent financial adviser. **The recommendation of the Public Trustee's investment products suggests they are competitive with other alternative investment options in the market in terms of returns to clients and capital growth.** This may well be so, however, the Public Advocate has not viewed a Statement of Advice from the external financial advisor that considers alternative investments and undertakes any such comparison or analysis.

The arrangements between the Public Trustee and the independent financial advisor are not transparent and it is questionable whether they provide value for money for clients. While the Public Trustee is transparent with clients about its practice of seeking annual external financial advice, its clients, their families and supporters are not aware that the scope of the advice provided has been limited by the terms of the contractual arrangements between the Public Trustee and its financial advisor.

These arrangements result in investment advice that, in all but exceptional circumstances, recommends only Public Trustee investment products in accordance with the Public Trustee's investment strategy under the Financial Planning Manual and the *Prudent Person Rule Manual*.

**The Public Trustee's interpretation of sections 22 and 23 of the *Trusts Act*, as demonstrated in the development and use of its *Prudent Person Rule Manual* and Financial Planning Manual and the contract with the external financial advisor, appear designed to provide a publicly-defensible rationale for client investments which the Public Trustee maintains are in the interests of its clients. However, these mechanisms have the general effect of converting clients' assets into cash and concentrating client investments in Public Trustee investment products from which it earns revenue.** While people under administration obtain income benefit from these investments, the Public Trustee is also a key beneficiary of these arrangements.



## Recommendations

### Recommendation 21: Adopt a new client investment strategy

The Public Trustee develop a new client investment strategy, the process for which should involve:

- a. Reviewing all internal policies, manuals and guidance documents relating to the management and investment of client assets to properly acknowledge and reflect the duties of a trustee and fiduciary.



- b. Reviewing the purpose and continuing need for an overarching Client Investment Strategy and Primary Investment Strategy. Any future strategy or investment approach should not over-ride consideration of the individual circumstances and other needs of administration clients.
- c. Implementing investment decision-making policies that will:
  - (i) ensure that the interests of administration clients are at the centre of all investment considerations and decisions affecting their financial interests;
  - (ii) **use the client's individual financial and risk profile and living circumstances** as the starting point for decision-making, before considering a change of investment strategy; and
  - (iii) determine the expressed or implied risk appetite of the administration client in accordance with General Principle 7(4) the principle of substituted judgement, the client's investment history and individual financial circumstances.
- d. Reviewing the definition of 'complex asset' (which currently includes shares and any amount of superannuation) in light of the Public Trustee's acknowledged high level of professionalism and skill as a trustee and administrator, to reflect a more current view of what constitutes a complex asset for management by a professional trustee.
- e. Reviewing the 'Value of Assets' approach as the principal mechanism that determines whether independent financial advice is required. This review should be conducted with the objective of considering an approach that is based on a holistic appraisal of the key issues **affecting the client's life (e.g. legal action, involvements in partnerships, trusts or companies, or complex tax arrangements)** as well as the value, diversity and location of their assets.

Recommendation 22: Reconsider routinely obtaining external financial advice for certain types of assets

In addition to recommendation 4 and in regard to the practice of routinely obtaining external financial advice for administration clients:

- a. **External financial advice should only be obtained at a client's expense** as an exception and when clients or their supporters request this advice or there is a justifiable basis for the **expenditure based on the amount and complexity of the clients' assets and the potential investment benefits for the client.**
- b. If the Public Trustee continues to contract external financial advice services (even on a more limited basis), it undertake an open tender process and appoint a panel of providers (no less than two) and review and reappoint panel members on a regular basis, at a minimum, every five years.

Recommendation 23: Obtain advice about refunding financial advice fees

In relation to the contractual arrangements the Public Trustee has with an external financial advisor for the provision of financial advice services to administration clients, the Public Trustee should:

- a. review the contractual arrangements to ensure they do not unduly limit the investments the advisor can recommend (by limiting those investments to Public Trustee products) or otherwise interfere with the independence of the advice provided to administration clients;
- b. suspend the practice of charging clients for external financial advice that merely recommends investments in accordance with the Client Investment Strategy while the review of contractual arrangements is occurring; and
- c. take advice about whether the fees charged to administration clients for the financial advice referred to in b. (above), should be refunded.





# The Official Solicitor

Under the *Guardianship and Administration Act*, an administrator can make decisions for legal matters relating to the person's finances and property. This allows the Public Trustee to obtain legal advice and representation on behalf of administration clients. The Public Trustee can be reimbursed for expenses associated with obtaining legal advice for administration clients.

The *Public Trustee Act* also permits the Public Trustee to consult with and employ solicitors, counsel and other people as needed, to pay their fees and be reimbursed all relevant charges and expenses. The position of the Official Solicitor to the Public Trustee is created under the *Public Trustee Act* which also provides for a regulation that empowers the Public Trustee to set the fees for legal services provided by the Official Solicitor for the Public Trustee. The regulation requires the Public Trustee to set the fees for legal services that give fair and reasonable remuneration for the service while having regard to the nature and complexity of the service and the time spent in providing it.

The Office of the Official Solicitor to the Public Trustee operates as an in-house team of lawyers who undertake legal work for the Public Trustee and select government clients, and instruct external legal firms as appropriate. Fees for legal services provided by the Official Solicitor must be paid into the Common Fund. If legal costs are incurred and the administration client does not have sufficient funds to pay for the Public Trustee's fees and expenses, the Public Trustee can create a lien (or claim) on any of the client's property to pay the Official Solicitor's fees.

There is no publicly available information about when and why the Official Solicitor's services are engaged by the Public Trustee. The Public Trustee has informed the Public Advocate that:

[I]t is not possible to identify with any precision "the circumstances that guide a Public Trust Officer to engage the Official Solicitor" ... [T]here are extensive references throughout the Public Trustee's Manuals and training materials that outline when a referral to the Office of the Official Solicitor may be required ... the Public Trustee in his role as administrator will seek legal advice where it is reasonable to do so.

If a matter or decision is affected or informed by legal rights or obligations (that the adult may have) it is not possible to obtain (contextually) the adult's views and wishes (General Principle 7(3)(b)), enable the adult to participate in decision-making (General Principle 7(1)), or act consistently with the adults proper care and protection (General Principle 7(5), without obtaining legal advice in respect of those rights or obligations.

That is, for the adult to participate in decision-making or express his or her views and wishes, he or she must be benefited by legal advice as an important factor in contextualising the relevant decision or actions available.

That is where an adult's legal interests are involved, advice must be obtained and communicated in order for a decision or action to be settled.

This approach appears overly simplistic, potentially exposing administration clients to legal fees without proper consideration of the costs and benefits of this course. Such an approach may also be in conflict with the duties and responsibilities of an administrator. It is suggested that the obligation for an administrator to act 'reasonably' does not at all suggest that the administrator must, 'where legal issues are involved ... seek appropriate legal advice' in every instance. Such an approach may be appropriate for unqualified members of the public who are guardians or administrators, but not professional trust officers of the Public Trustee.

Generally, many people under administration and their administrators do not have ready access to lawyers or the funds to retain them (as is the case for many other members of the community). It is impractical, and perhaps even inappropriate, for all administrators to be required to obtain legal advice in every case when a matter is 'affected or informed by legal rights or obligations' and will likely result in significant and unnecessary expenditure of beneficiaries' funds. A trustee, in exercising its responsibilities to the beneficiary, must have regard to that beneficiary's best interests. This also requires the trustee to consider the proportionality of engaging expert legal advice with respect to the actual decision to be made.





The Public Trustee's position on this issue also disregards the operation of other General Principles in the *Guardianship and Administration Act*. For example, General Principle 10 requires administrators to exercise their powers in ways appropriate to the individual characteristics and needs of the person with impaired decision-making capacity. Logically, this must include the possibility that in certain situations, it is not appropriate to take legal action or advice for a range of reasons. This could include consideration of:

- the client's circumstances, as a whole, in terms of whether they can afford the legal advice or action and weighing the costs against the likely success and financial outcomes of any legal action; and,
- whether taking legal action will cause conflict with family members or other outcomes, such as forcing the sale of the house the person is living in (to pay for the legal action), that will obviously adversely affect the client's quality of life or may have other consequences that outweigh the benefits of the legal action.

In a number of cases reviewed by the Public Advocate, these types of issues did not appear to have been considered, or were disregarded, when trust officers were deciding whether to seek legal advice or take legal action on behalf of administration clients.

The Public Trustee has traditionally considered that sharing legal advice obtained from the Official Solicitor with administration clients may inadvertently waive legal professional privilege. The risks of waiving legal professional privilege requires the Public Trustee to take reasonable precautions to protect their clients' interests. However, these concerns do not justify adoption of a policy denying clients access to the legal advice that they have paid for. Further, it is questionable whether a person with impaired decision-making capacity can 'knowingly and voluntarily' waive their own legal professional privilege.

The practice of restricting the release of legal advice to an administration client could also be considered to conflict with the Public Trustee's obligations under the *Guardianship and Administration Act* to support the client to participate in decision-making.

## Who is the Official Solicitor's client?

When the Public Trustee becomes the administrator for a person, the trustee can be said to 'stand in the shoes' of the person. The relationships between a person under administration, their administrator and their legal advisors are well-established and are not controversial from a legal perspective – the legal advisor acts for the administrator as the person under administration.

The Public Trustee has described the relationship as follows:

Where the Public Trustee is the administrator for financial matters for an adult and where the Public Trustee in that capacity retains the Office of the Official Solicitor on a legal matter for that adult, the Official Solicitor's customer is the Public Trustee as administrator for the adult. In that circumstance, the Official Solicitor conducts legal work for the benefit of and acts in the best interests of the adult.

However, the practice of the Public Trustee and the Official Solicitor is not always consistent with the view stated above. Some examples include:

- In the same communication from the Public Trustee quoted above, the Public Trustee claimed to be 'the client' of the Official Solicitor, and in respect to administration clients that the Official Solicitor 'has only one capacity; as legal advisor to and instructed by the Public Trustee of Queensland'.
- When staff of the Office of the Official Solicitor provide written legal advice, it is usually addressed to either the Official Solicitor or the Director of Disability Services, not to the administration client. As already noted, it has historically been the Public Trustee's policy that neither the advice – nor even a summary – was provided to the administration client, to prevent the risk of the client disclosing the advice to third parties and inadvertently waiving legal professional privilege.
- The Public Trustee has charged an administration client the costs of the Official Solicitor preparing technical submissions 'on behalf of the Public Trustee' (not the client), in response to a QCAT direction after the person applied to re-open a hearing on the basis that they did not have sufficient notice of the hearing or the medical evidence about their capacity to properly respond to the application. The client received no support or assistance from the Official Solicitor or the Public Trustee at the hearing of the matter.



- The Public Trustee has successfully argued before the Information Commissioner that Official Solicitor invoices in respect of an administration client's file were subject to legal professional privilege in favour of the Public Trustee and could not be released to the client.

These examples suggest that the Public Trustee does not have a clear conception of its various roles — as the representative of people under administration, as the executor of deceased estates, as a trustee of other funds, or as the Public Trustee, the corporate entity — and the potential for conflict between these roles. This lack of clarity also impacts the Official Solicitor, which appears to have difficulty distinguishing between its role and responsibilities as the legal advisor and representative of the Public Trustee as administrator for its clients on the one hand, and as the legal advisor and representative of the Public Trustee, the corporate entity, on the other.

In cases where allegations are made about the conduct or decision-making of the Public Trustee as administrator, the Public Trustee will often engage the Official Solicitor 'in order to properly and carefully respond to any issues, questions or allegations put' and 'as a professional administrator (fiduciary), [the Public Trustee] can be reasonably expected to retain competent legal advice to respond to such applications'. It is unclear who pays the fees of the Official Solicitor in these apparent conflict situations, and how the Public Trustee ensures that it, and the Official Solicitor, act in the clients' interests in those hearings and when responding to such allegations.

The law has consistently held that, where there is an actual conflict and informed consent to the conflict cannot be obtained by the fiduciary/lawyer to continue to represent the parties in conflict, then they should decline to act and ensure that independent representation is obtained for the client. In some of the cases reviewed for this report where there was a clear suggestion of conflict, independent representation was not obtained for the client by the Official Solicitor or the Public Trustee.

## Duty to act in clients' interests and avoid conflict

Being in a fiduciary relationship with its clients, the Public Trustee is required, among other duties, to act in its clients' interests, avoid conflict and not make an unauthorised profit.

The Official Solicitor and its staff have an important role in the protection of Public Trustee administration clients' interests. Some examples of the type of work that the Official Solicitor undertakes to protect those interests include the recovery of misappropriated funds, applying to have transactions that disadvantage the client set aside, making claims for damages, or giving advice about the management of complex business enterprises.

However, there are cases where serious questions arise about the role of the Official Solicitor in administration clients' interactions with the Public Trustee. For example, when administration clients want to review the Public Trustee's appointment as their administrator, complain about the Public Trustee's management of their finances, or seek a declaration of capacity to demonstrate they no longer need administration, it can sometimes be unclear whose interests the Official Solicitor is representing, the administration client or the Public Trustee. Where the client asserts they have capacity, the Public Trustee should take no active role in the proceedings unless it is to support the person's application. Otherwise, the Public Trustee or Official Solicitor should appear only to assist the tribunal, and at no cost to the client.

During the review the Public Advocate identified a number of cases where administration clients had applied to the tribunal for a declaration of capacity, to appeal or set aside a decision that the person had impaired decision-making capacity, or for a change of administrator where the Official Solicitor has appeared at the hearing. In the cases examined, the submissions of the Official Solicitor did not appear to represent the clients' interests.

Occasionally, QCAT members will request that the Public Trustee provide submissions in relation to particular legal issues in matters involving Public Trustee administration clients. When this occurs, it can be unclear whether the Official Solicitor is acting as a form of 'Counsel assisting' the tribunal, is representing the Public Trustee (the corporate entity) or representing the interests of the administration client.

In the cases reviewed by the Public Advocate, these issues were not directly addressed, with the result that the Official Solicitor appeared to be endeavouring to fulfil a number of roles in the proceedings and was at risk of failing to support the Public Trustee to fulfil its primary function — to



represent the interests of the administration client. In a number of these matters, the Public Trustee **claimed reimbursement for the costs of the Official Solicitor's involvement in the proceedings from the administration client.**

Trustees, fiduciaries and solicitors should always act in the interests of their beneficiaries and clients. This duty is not a passive obligation that can be met merely because the trustee, fiduciary or solicitor *is not acting against the beneficiary's or client's interests.* **The distinction is simply one between work or activities undertaken in the interests of the client and that undertaken otherwise.** The ultimate question is, does the work undertaken by the Official Solicitor (and that the client pays for) **advance the administration client's interests?**

A number of case studies in the report raise significant concerns about conflicts of interest, and demonstrate the need for the complexities of the relationship between the Public Trustee, the Official Solicitor and its administration clients to be more clearly understood and acknowledged and appropriate arrangements put in place **to ensure clients' interests are properly represented.**

There have been only two applications brought in QCAT by a person under administration, for a compensation order against the **Public Trustee as the person's administrator.** While this could demonstrate the Public Trustee is performing its role well, it could also be further evidence of the relative vulnerability of people under administration and the absence of clear processes to support them to bring complaints and applications for compensation.

The Public Trustee has no policy for responding to clients seeking financial redress or compensation from the Public Trustee for impropriety or mismanagement as administrator. The Public Trustee has **advised that it 'would be able to provide assistance' to a client to make a compensation claim.** However, there appears to be no formal policy or process for this to occur, nor is it clear how the Public Trustee would assist clients to access evidence belonging to the person that is presumably in the **Public Trustee's control.**

The Public Advocate is aware that, from time to time, the Public Trustee initiates litigation against itself on behalf of clients. However, it is unclear why some cases are actively pursued by the Public Trustee and some are not.

The Public Trustee and its clients are in a unique relationship that is very different from the relationships other government agencies have with members of the public (with the exception of the Public Guardian). Rather than merely receiving a one-off service, such as a person engaging **with the Department of Transport and Main Roads to renew a driver's licence or a person obtaining a birth certificate from the registry of Births, Deaths and Marriages,** people under administration have an on-going relationship with the Public Trustee. People under guardianship and administration are dependent on the agency to make key decisions in their lives, and, because of the unique nature of these fiduciary relationships they are treated differently under the law, with significant duties and obligations imposed on the fiduciary.

As a consequence, the usual complaints and review processes of government agencies are not suitable for responding to the types of complaints that Public Trustee administration clients may raise, including allegations of financial mismanagement or breaches of legal or fiduciary duty. The Public Trustee needs to adopt a clear policy for managing and responding to complaints where there are allegations of breaches of fiduciary duty or that relate to its performance as an administrator.

## The duty not to profit

The Public Trustee refers its administration clients to the Official Solicitor for legal advice and representation and the Official Solicitor charges fees to those clients. Since the fees of the Official Solicitor benefit the Public Trustee, this arrangement raises questions about whether it breaches the **Public Trustee's fiduciary duty not to make unauthorised profit.**

The fees charged by the Official Solicitor are set by an agreement between the Public Trustee and the Official Solicitor dating back to October 2018. Until very recently (6 January 2021, when they **were published on the Public Trustee's website**) the Public Trustee took the view that the fees were exempt from public disclosure on the basis that they contain commercially sensitive information which would put the Public Trustee at a competitive disadvantage if it were in the public domain.



This raises questions about the appropriateness of about charging vulnerable clients commercial rates for legal services.

While it is common for private lawyers to keep their fees out of the public domain, they are under significant obligations to disclose their fees to clients. These requirements do not apply to the Official Solicitor or its staff because they are not subject to the same obligations as other legal practitioners under the *Legal Profession Act 2007*.

The Public Trustee treats the Official Solicitor's fees as an outlay, rather than as part of its fees and charges, and seeks 'reimbursement' for these charges from administration clients just as it would for fees for building reports or other services provided by external providers. Once the Official Solicitor's work is completed, it is charged against the client's account as an outlay, with the Public Trustee ultimately earning revenue from this arrangement. In a 1996 audit of the Public Trustee, the Auditor-General raised concerns about this practice of the Public Trustee, describing it as 'misleading' and recommending 'openness' in the disclosure of services by the Public Trustee.

Another concern in relation to these arrangements is that the Official Solicitor is not required to compete in any tender or selection process to secure Public Trustee client legal work. There appears to be no process undertaken by the Public Trustee to ensure that the Official Solicitor's services are competitive and value-for-money compared with other potential legal service providers. It is reasonable to expect that, as a diligent administrator and trustee, the Public Trustee would have an established process to ensure that the providers of professional services, for which clients are paying significant fees, have satisfied certain cost and quality standards before being retained by the Public Trustee.

It is unclear why the Public Trustee has established these artificial arrangements with the Official Solicitor. Ultimately, the structure of the relationship between the Public Trustee and the Official Solicitor results in the Public Trustee receiving a direct financial benefit from referring clients for legal advice to the Official Solicitor and the accrual and recovery of legal fees. It raises concerns about conflicts of interest and whether the Public Trustee is breaching its duty not to profit from its clients through the fees charged by the Official Solicitor. These concerns are exacerbated when considering the Public Trustee is the sole entity responsible for determining the amount and reasonableness of the Official Solicitor's fees.

## Weighing the costs of legal advice against client outcomes

During the review, the Public Advocate identified a number of legal cases brought by the Public Trustee on behalf of administration clients where the cost of the legal services significantly impacted the clients' finances and the legal outcomes could not justify the expense. The Public Advocate asked the Public Trustee about what assessments it carries out about the value of the service to the client compared to its cost and the client's financial position when engaging legal services for clients. The Public Trustee advised that a client's financial position is not a consideration in the engagement of legal services. Instead the decision is made on the basis of there being a 'viable claim with reasonable prospects of success'. However, it acknowledged that there may be 'a benefit to incorporate consideration of the impact of a costs agreement' and would review its processes.

The Public Trustee also acknowledged that there are no written procedures or guidance materials for assessing the reasonableness of the fees incurred by the Official Solicitor, although all accounts issued are now subject to internal review. This is at odds with the Public Trustee's policy requiring that when it receives an invoice from external lawyers for legal costs greater than \$1,500 they must obtain advice as to the reasonableness of these costs from the Official Solicitor. The Public Advocate has observed that the Official Solicitor often charges the client additional fees to review these external legal costs.

It is clear from the Public Trustee's response to the Public Advocate's inquiries that, when staff are making decisions about whether to pursue a legal claim, they do not apply the risk/benefit considerations that ordinary members of the community would when making these decisions for themselves. This should involve weighing the costs of the legal advice and/or action and the prospects of success against the likely financial outcome to ensure that it ultimately results in a



financial or other benefit for the client. Instead, it appears that in many cases the investigation and pursuit of prospective legal claims seem to have become ends in themselves. This may be driven by the Public Trustee's view that it must obtain formal legal advice in relation to all prospective legal issues to fulfil its fiduciary duties.

The incursion of significant legal and other costs by the Public Trustee on behalf of an administration client should be taken with the utmost care and diligence. In the same way that the Public Trustee is expected to exercise care and diligence in decisions relating to the spending or investment of clients' funds, it is reasonable to expect the same level of care and diligence when engaging professional services for clients. It is not appropriate for the Public Trustee, acting on behalf of an administration client, to incur fees on behalf of that person which significantly exceed the client's likely claim or their ability to pay. The Public Trustee should weigh the costs and potential benefits of obtaining the advice against the savings and risks to the client of not doing so.

It should not always be assumed that it is appropriate to spend clients' money to obtain professional advice. The act of obtaining advice and incurring fees, incurs costs for the client that need to be justified. It is not sufficient for the Public Trustee to consider only whether it has superficially fulfilled its responsibilities to explore potential claims for clients. The decision to obtain advice must, in all of the circumstances, be in the clients' interests.

## Professional oversight of the Official Solicitor

In Queensland, concerns or complaints about the conduct of a lawyer or the reasonableness or appropriateness of their fees, are usually referred to the Legal Services Commission for investigation and action.

The Official Solicitor to the Public Trustee and all lawyers employed in the Office of the Official Solicitor are regarded as 'government legal officers' over which the Legal Services Commissioner has only qualified jurisdiction. Consequently, clients of the Public Trustee who are dissatisfied with the conduct, or the fees charged by, the Official Solicitor, are unable to complain to the Legal Services Commission. Only another lawyer, the Public Trustee himself or one of the Queensland legal professional bodies (the Queensland Law Society or the Queensland Bar Association) can initiate a complaint against a government legal officer.

Public Trustee clients can make a complaint through the Public Trustee's usual client complaint processes, however, from the cases reviewed by the Public Advocate, such complaints usually result in a letter from the Public Trustee justifying the action and the fees.

The level of the Official Solicitor's fees that are charged to administration clients is also not considered to be a matter within the scope of the jurisdiction of QCAT. Accordingly, the level of the Official Solicitor's fees and the way they are assessed and applied are not subject to any independent scrutiny.

The Public Trustee advises that it 'takes care and external advice' in setting the scale of fees for the Official Solicitor to ensure that the charges are fair and reasonable as required by regulation. In 2016, and again in 2018, the Public Trustee engaged consultants to provide advice on the pricing of Official Solicitor legal services. The reviews compared the hourly fee rates of the Official Solicitor to a range of 'market rates' for legal services developed by the consultants, based on surveys of lawyers in private legal firms. They also included a comparison with Crown Law fees. The comparison showed that the Official Solicitor's fees were less than the various market rates listed by the consultants, but more than Crown Law's fees.

It is a genuine matter for consideration whether a comparison of Official Solicitor fees with 'market' rates of private commercial legal firms is appropriate in terms of the fees charged to administration clients and the types of services provided to such clients. This group is recognised as vulnerable; they often experience financial disadvantage and are unable to choose their own lawyer or make a complaint to the Legal Services Commission about the legal services they receive from the Official Solicitor. It also goes to the reasonableness of the Official Solicitor's fees that they are generally higher than the fees charged by Crown Law to government agencies – in some cases by as much as 27 percent.







## Recommendations

### Recommendation 24: Review the role and operations of the Official Solicitor

The Public Trustee initiate an urgent and comprehensive review of the role and operations of the Official Solicitor to the Public Trustee. The review should give particular consideration to:

- a. the structure of the arrangements between the Public Trustee and the Official Solicitor and whether they are appropriate and sufficiently transparent;
- b. whether the use of the Official Solicitor to provide legal services to administration clients is appropriate considering the potential conflicts in the Official Solicitor's role, issues of legal professional privilege and the Public Trustee financially benefiting from the Official Solicitor's fees;
- c. whether lawyers providing legal advice and services to people under administration should be required to hold practicing certificates and be subject to oversight by the Legal Services Commission (this includes administration clients or their supporters being able to make a complaint to the Legal Services Commission);
- d. reviewing the scale of fees of the Official Solicitor, with particular consideration of the reasonableness and appropriateness of the fees for Public Trustee administration clients;
- e. making the scale of fees of the Official Solicitor available to administration clients and/or their supporters, particularly when consideration is being given to obtaining legal advice for which the client will be required to pay; and
- f. whether the Public Trustee should establish a panel of solicitors and barristers to provide legal advice and services to Public Trustee administration clients that meet quality standards, deliver value-for-money, and whose fees are reasonable having regard to the vulnerabilities and financial disadvantage of many of the Public Trustee's administration clients.

### Recommendation 25: Develop a policy to support administration clients to make complaints about the Public Trustee

Develop a policy for supporting administration clients to make complaints against the Public Trustee, including support to investigate claims, obtain legal advice and seek redress when a client alleges that the Public Trustee has, by act or omission, caused the client loss or harm. The policy should establish an appropriate process for referring client matters that warrant investigation, legal advice and/or redress to appropriate professionals for advice. Broad stakeholder consultation should be undertaken to develop an appropriate and efficient model that protects people's rights while containing costs. The final model for responding to client complaints and managing conflicts may need to be supported by legislation.

### Recommendation 26: Amend legislation so Public Trustee solicitors are overseen by the Legal Services Commission

Amend the *Public Trustee Act* to provide that solicitors employed by the Public Trustee must:

- a. while performing their role, have regard to the 'fundamental duties of solicitors' as set out in the solicitors' rules (as defined by section 217 of the *Legal Profession Act*); and
- b. be subject to conduct and disciplinary investigations by the Legal Services Commission.





### Recommendation 27: Review Official Solicitor policies and practices

If the Public Trustee continues to provide legal advice and representation to administration clients using the Official Solicitor, it should review and update its policies, procedures and other guidance to Public Trustee lawyers to develop a comprehensive set of policies and procedures that:

- a. clarify who the client is in all legal matters and distinguish between the interests of the Public Trustee as the corporate entity and the Public Trustee as the representative of the person under administration;
- b. outline the law in relation to the duties of trustees, fiduciaries and lawyers and their duties to **always act in their clients' interests**;
- c. require lawyers in every case to consider the costs and benefits of any prospective legal action and provide advice (consistent with Rule 7 of the Australian Solicitors Conduct Rules ) **to ensure clients' funds are only spent when they are satisfied the expenditure is in the clients' interests, taking into account their individual needs, the risks, costs and likely outcomes**;
- d. develop a policy around obtaining consent from administration clients (where appropriate), their guardians or personal support networks to engage a lawyer and disclose the likely costs, benefits and outcomes for the client, prior to embarking on any legal process;
- e. **review the Official Solicitor's policy denying Public Trustee clients access to the legal advice they have paid for and to the invoices for that advice. The policy review should also consider the Public Trustee's role and duties under the *Guardianship and Administration Act*, including to support clients to participate in decisions affecting their lives; and**
- f. as part of the process for issuing an invoice for legal fees, the Official Solicitor should review **and assess the reasonableness of the fees in the context of the clients' overall financial circumstances and the likely outcomes and benefits of any proposed legal action.**

## The road to here

To effectively address the issues identified in this report it is necessary to understand the conditions and circumstances that allowed them to occur.

It should be acknowledged that many of the issues identified — practices such as multiple charges, **earning revenue on clients' funds, charging additional management fees to manage client funds** invested in its own products and charging additional fees for professional services — are not unique to the Public Trustee in Queensland. Other State and Public Trustees engage in some of these practices to a greater or lesser extent.

A key contributor to the development of **these issues has been the Public Trustee's operating environment**, including its funding arrangements, changes in the financial markets, increasing demand for **administration services, the Public Trustee's commitment to providing and increasing its CSOs**, and the changing financial profiles of its clients. There are also historical factors that have contributed to these issues, including **the Public Trustee's self-funding status**, its conservative approach to transparency and accountability, and its inward-looking culture.

**Another significant contributing factor to the Public Trustee's problems are the limitations of its legislation – the *Public Trustee Act*.** In the more than 100 years since its commencement there has been very little change to the legislation that established the Public Curator, and later the Public Trustee. With only one legislative review in its history, and that now 40 years old, it is unsurprising that the Public Trustee is struggling with its historical legacy and the limitations of the *Public Trustee Act*.

Many State and Public Trustees are agencies of long-standing that are proud of their histories but are also deeply conservative in their **approach to their roles and their clients' financial management**. The Public Trustee's long history of service to Queenslanders should be valued, but it should not be an obstacle to positive change and reform. If we are to support people with



disability to achieve the greatest level of autonomy and to live their best lives, it is important that the Public Trustee addresses and resolves these issues.

## A self-funding organisation

Since its inception, the goal of self-sufficiency has been a **significant focus of the Public Trustee's** business strategies and operations. This is despite there being no provisions in the *Public Trustee Act* requiring the Public Trustee to operate as a fully self-funded institution.

As already noted, all other Public and State Trustees in Australia receive some financial assistance from government, ranging from a little over \$0.5M in the Australian Capital Territory (accounting for seven percent of its operating revenue) to \$24.3M in Western Australia where the Public Trustee is fully funded by the State Government and returned \$23M in fees and surplus interest to the government in 2018-19.

As already noted, the Public Trustee funds itself through revenue sourced from fees and charges for services, fees earned on its investment products, the interest differential on client funds, and interest earned on its own reserves.

The self-funding model appears to have supported the operations of the Public Trustee well over its history. However, in recent decades, a number of changes have occurred in the Australian and global economic environment, in demand for Public Trustee services, and in the financial profiles of clients that have posed new challenges for the Public Trustee and its ability to maintain its self-funding status.

Many Public Trustee administration clients have few assets and their only income is from a government pension. An analysis of the assets of Public Trustee clients undertaken by a consulting firm in early 2019 identified that in the 2018-19 financial year 55 percent of administration clients **had average assets of less than \$20,000. Based on the Public Trustee's fees, charges and rebates** scheme, most clients with this financial profile will not pay any fees or will be eligible for significant fee rebates. Accordingly, this cohort of clients represent a significant cost to the operations for the Public Trustee.

The number of new deceased estates coming to the Public Trustee each year has also been decreasing, with only 2,069 new estates in 2019-20, a decrease of 3 percent since 2013-14. In fact, new deceased estates in 2019-20 were 21 percent lower than in 2002-03, when the Public Trustee reported 2,636 new estates. This contrasts with growth in financial management clients over that period of 78 percent from 5,660 to 10,071.

Consequently, the Public Trustee now administers proportionally fewer deceased estates (which, historically have been a well-paid source of revenue) and has more administration clients, with a greater proportion of them having no, or very low levels of, assets, and with their main source of income being a pension. The Public Trustee reports that more than 82 percent of its administration clients benefit from some form of fee rebate, which is a key driver of growth in its CSOs.

As a result of declining interest revenue, increases in the number of administration clients and the growth in its CSO commitments, the Public Trustee has had to reconsider its reliance on interest revenue as its primary source of revenue. Instead, its financial statements show it has had to increasingly rely on revenue from fees and charges to fund the shortfall. This has resulted in the fees of some administration clients helping to fund fee rebates for others, as well as supporting services such as free will-making and contributing to the funding of the Office of the Public Guardian.

During its more recent history, the challenges of self-funding faced by the Public Trustee have been recognised during reviews by the Public Sector Management Commission (1991) and the Auditor General (1996). **Both reports recommended that the Public Trustee's CSOs be reviewed by** government and decisions made regarding how they should be funded into the future. It appears that these recommendations were not acted upon and the Public Trustee has continued to rely on its own increasingly unstable sources of revenue (given global economic events) to maintain its self-funding status, while increasing its CSOs.





## Recommendation 28: Considerations for the review of Public Trustee fees and charges

The review of the Public Trustee's fees and charges for administration clients (see recommendation 1) should include the following to help maintain the organisation's long-term financial viability:

- a. consideration of changes over time in the:
  - economic environment and financial markets;
  - **Public Trustee's sources of revenue; and**
  - financial profile of administration clients and other clients of the Public Trustee that may impact their ability to pay fees.
- b. examination of the various fees and charges applied by other State and Public Trustees to ensure consideration of a wide range of fee options that will assist it to adopt the most fair and equitable system, taking into account clients' incomes and assets, and the value of the services provided;
- c. examination of the Public Trustee's costs of operation, including comparative analyses with other State and Public Trustees, which should include consideration of their levels of service provision, efficiency, productivity and service quality; and
- d. consideration of alternative and innovative ways the Public Trustee can deliver services to administration clients at a lower cost.

## Transparency

The Public Trustee has adopted a particularly conservative approach to providing information to clients and their supporters.

At the commencement of this review, and apart from information required to be published in the Gazette, there was very little accessible and publicly available information about the Public Trustee's fees and charges or the way they are calculated and applied.

The absence of this critical information in an accessible and understandable format has made it very difficult for administration clients, their families and supporters to understand what fees are charged, when, and why. There has also been very limited information available about the specific services provided for the fees charged. This lack of information also makes it very difficult for people to challenge the fees and charges.

Often the Public Trustee has relied on the protection of client confidentiality to deny access to information when members of a client's support network have sought access to information to better understand the fees and charges applied by the Public Trustee. While the approach of the Public Trustee to restrict the release of client information is technically correct, the Public Trustee could exercise discretion to allow the release of a client's information in appropriate circumstances to legitimate supporters of the person. Strictly limiting the release of information results in a lack of transparency about the Public Trustee's actions because in many instances the client is unable to understand and evaluate the effect of those actions, and others who would support them are unable to access the information. These issues can also reinforce feelings of frustration and mistrust of the Public Trustee felt by some clients, their families and supporters.

In relation to information about its fees and charges regime, the Public Trustee has also held a long-term view that its internal operational manuals that guide staff decision-making about fees and charges and the investment of clients funds are 'commercial in confidence'. Until very recently, none of the Public Trustee's operational manuals were published in the way other government agencies' policies and procedures are available under the government's proactive disclosure of information and publication regimes.

With all usual avenues for access to information blocked, some administration clients and their supporters have sought independent advice or applied to QCAT for a decision or direction about the Public Trustee's fees or other activities. However, clients are generally not supported by the



Public Trustee to pursue these avenues of redress, either because the Public Trustee has refused to fund independent advice for the clients or has made submissions opposing their position in QCAT which, in most cases, has had the effect of preventing them advancing their issues and concerns.

Over the past year the Public Trustee has reconsidered its position on some of these issues and has been actively improving the quality and detail of information about its fees and charges on its website and in other publications (see the Public Trustee website for examples).



#### Recommendation 29: Amend legislation to clarify how the Public Trustee can invest client funds

In the interests of clarity and transparency, and to remove all doubt about the lawfulness or propriety of the Public Trustee earning revenue from client funds, the *Public Trustee Act* should be amended to:

- a. clarify the investments the Public Trustee is permitted to make using client funds, in particular addressing the issue of investments that are permitted that may amount to a conflict of interest, the circumstances in which it can earn revenue on those funds, and the conditions or limitations on those earnings; and
- b. require the Public Trustee to report its earnings on client funds in its annual financial statements.

## Oversight and accountability

The Public Trustee is subject to a range of accountability mechanisms that also apply to other government departments and agencies.

These mechanisms include:

- annual Budget processes, and Estimates and Parliamentary Committee hearings;
- the Tabling of annual Fees and Charges Notices; and
- complaints processes.

As a self-funding agency the Public Trustee does not receive an annual Budget allocation (or funding) from the Queensland Government. Its proposed Budget for each financial year is submitted and approved as part of the annual government Budget process, however the Public Trustee fully funds its own operations. While participation in these processes is consistent with other government agencies, being a self-funded entity the Public Trustee's expenditure is unlikely to be subject to the same level of scrutiny as that of agencies seeking funds from government as part of the Budget process. The Public Trustee is also not required to seek Cabinet Budget Review Committee approval to self-fund projects involving significant expenditure, as is required when other government agencies are undertaking significant projects.

Queensland Treasury has a role in ensuring fees and charges across government are applied consistently with approved whole-of-government fees and charges policy settings. However, discussions with representatives of Queensland Treasury early in this review suggested there was **limited oversight of the Public Trustee's fees and charges outside of the Budget process and the annual process for approving fee increases**. Neither process involves consideration of whether the fees are reasonable in the circumstances, or the impact the fees have on clients, their financial outcomes or quality of life.

As already noted, the Public Trustee sets its fees and charges by a notice in the Queensland Government Gazette. The gazetting process requires that the gazette notice of the Public Trustee's fees and charges be tabled in the Queensland Parliament within 14 sitting days of it being published during which time the Parliament can 'disallow' or stop the subordinate legislation proceeding.

The objective of the tabling process is to ensure that subordinate legislation is open to parliamentary scrutiny. Currently, the Legal Affairs and Safety Committee has responsibility to **examine and consider the Public Trustee's Fees and Charges Notices**. This Committee has responsibility to examine Bills (that will become legislation) and subordinate legislation for the



purpose of considering the policy they are putting into effect, the application of fundamental legislative principles and, in relation to subordinate legislation, its lawfulness.

The gazetting and tabling process clearly exposes the Public Trustee's fees and charges to a level of scrutiny. However, other than those considerations outlined above, the Committee does not examine issues such as the level of fees relative to the clients' financial circumstances or the impact they might have on clients' financial outcomes. There also does not appear to be any specific consideration of the fees and charges in the broader context of the Public Trustee's fiduciary duties.

The Public Trustee has a complaints management policy that has been developed with input from consultants and the Queensland Ombudsman. This policy was updated in late 2019 in preparation for the commencement of the Human Rights Act. The policy outlines formal complaints processes and responses consistent with those adopted by most government departments.

The Queensland Audit Office recently reviewed the Public Trustee's responsiveness to complaints from clients with impaired decision-making capacity. While it found its complaint management policies and procedures follow good practice, it also found that the process is not well-designed for people with impaired decision-making capacity.

The Public Trustee is also subject to the jurisdiction of the Ombudsman and the Crime and Corruption Commission.

The question that arises from this review is whether these accountability and complaints processes are operating effectively to achieve a satisfactory level of transparency and accountability between the Public Trustee and its administration clients, especially considering their vulnerability and relative lack of power.

There may be benefits in exploring additional oversight mechanisms for an agency with the extensive powers and responsibilities of the Public Trustee. One possible additional oversight mechanism could be to establish a Public Trustee board that would provide direction and oversight to the organisation. This type of structure exists in Queensland statutory commissions such as the Crime and Corruption Commission and Legal Aid Queensland. State Trustees in Victoria is also a state-owned corporation with a diverse and independent board of directors.

A board provides the opportunity for board members, who could be selected on the basis of particular skills or expertise relevant to the Public Trustee's functions, to have a governance role as well as supporting senior management and guiding strategic decision-making. For example, State Trustees in Victoria has members with backgrounds in business, investment, superannuation, property, government, politics, disability, housing services, homelessness and community participation.

The other benefit of a board is that the members bring a fresh perspective to the organisation and its day-to-day operations and can challenge the 'conventional wisdom' that may have historically informed the organisation's decisions or direction. A board also provides an alternative avenue of complaint for clients and others who are dissatisfied with the Public Trustee's decisions or actions.

Another oversight mechanism that could be considered would be for the Public Trustee to report to a Parliamentary Committee, similar to the Crime and Corruption Commission and the Parliamentary Crime and Corruption Committee. In monitoring the Crime and Corruption Commission's activities, the Committee can make specific inquiries into matters pertaining to the Commission, receive complaints, review Commission guidelines and policies and make suggestions for improvements to its practices.



### Recommendation 30: Consider additional oversight mechanisms

The Queensland Government should consider whether the Public Trustee and its clients would benefit from additional oversight and/or reporting mechanisms to improve the Public Trustee's performance, transparency and public accountability.





## Public Trustee Act

The *Public Trustee Act* in 2020 is essentially the same legislation as that passed to establish the Public Curator in 1915. While both Acts supported their respective agencies to serve the people of Queensland well, it may be an appropriate time to consider whether legislation that was appropriate for the management of the financial affairs of people with impaired capacity in 1916 remains so for an accountable, transparent and contemporary Public Trustee in 2021.

As already noted, one of the fundamental obligations of a trustee as a fiduciary is to avoid a conflict of interest and, if such a conflict arises, to account for any profit which may have been made. The strictness of the trustee's duties to avoid conflict and profit extends to trustees generally not being permitted to be remunerated for their services.

In contrast, the *Public Curator Act* and later the *Public Trustee Act* made provision for these agencies to be remunerated for their services. In the case of the Public Curator the fees were prescribed by regulation. As already noted, under the *Public Trustee Act*, the Public Trustee may fix fees and charges for services it provides by gazette notice. However, the fees and charges 'must be reasonable having regard to the circumstances in which the service is provided', including the type and complexity of the service and the degree of care, responsibility, skill or special knowledge required.

Both the *Public Curator Act* and the *Public Trustee Act* provided for client funds to be invested in the Common Fund and interest to be paid at a prescribed rate — creating the 'interest differential' used by the Public Curator and the Public Trustee to earn revenue on client funds.

Further, the *Public Trustee Act* provides for a position of Official Solicitor and the charging of legal fees for the Official Solicitor's services. However, it does not address the obvious conflicts of interest involved in the Public Trustee referring clients to the Official Solicitor and earning revenue from the Official Solicitor's fees for those services.

From the commencement of their operations, it seems these provisions were intended to permit conduct and practices that would otherwise constitute a breach of the trustee's fundamental duties, with the object of supporting the Public Curator, and later the Public Trustee, to be self-funding.

It is clear from the speeches in support of the *Public Curator Bill* that it was the intention of the Queensland Parliament to permit some of these potential conflicts of interest and unauthorised profit. However, the loose drafting and consequent ambiguity of the legislation has potentially resulted in the Public Trustee being less accountable and perhaps treating conflicts of interest as 'part of doing business'. As already noted, it is a principle of statutory interpretation that unless legislation is clear and unequivocal in its drafting, it will not be interpreted as intending to override established legal principles.

The *Public Curator Act* and the later *Public Trustee Act* should have acknowledged the potential conflicts and breaches of fundamental trustee and fiduciary duties created by the provisions outlined above, and made specific provision to permit them, as well as setting the conditions or limits on those conflicts. This should have included prescribing the extent to which the Public Trustee can profit from its clients' investments and from earnings from the Official Solicitor providing services to clients.

A person under administration cannot provide informed consent to a trustee having a conflict of interest without being provided with all of the necessary information to understand and consent to the conflict. Without making that information available to its administration clients, and seeking appropriate approvals of those conflicts as required by law, the Public Trustee cannot claim to be accountable and transparent.

## Guardianship and Administration Act

The appointment of the Public Trustee as a person's administrator under the *Guardianship and Administration Act* is not an 'appointment of last resort', as is the case with appointments of the Public Guardian. It is unclear why this legislative anomaly exists and why it has persisted despite





recommendations by the Queensland Law Reform Commission in reports in 1996, and again in 2010, that the appointment of any substitute decision-maker should be a last resort.

In its 2010 report, the Queensland Law Reform Commission noted:

The Public Trustee has suggested that if the Act were amended so that the Public Trustee is unable to be appointed where there is another appropriate appointee available, it might sometimes result in the appointment of a 'less appropriate' appointee. Where the alternative appointee is an individual, the relevant issue is simply whether the alternative appointee is appropriate for appointment. This is a question of fact, the answer to which will always depend on the personal attributes of the individual and the adult's particular circumstances.

Based on the above, it is unsurprising that the assessment of a potential administrator's suitability for appointment in Queensland is sometimes reduced to a contest between the members of a person's support network and the Public Trustee, and who can establish they have the most legal, financial or investment knowledge.

Amending the *Guardianship and Administration Act* to provide for the appointment of the Public Trustee as a last resort would most likely result in fewer appointments and less demand for administration services from the Public Trustee. It would also resolve the inconsistency in the Queensland legislation about appointments of last resort between the Public Guardian and the Public Trustee.

The *Guardianship and Administration Act* also provides for the periodic review of the appointment of a guardian and administrator (other than the Public Trustee) at least every 5 years. It is not clear why the Public Trustee is exempt from this periodic review, which was also recommended by the Queensland Law Reform Commission.

The benefit of a periodic review is that it provides scrutiny of the way a substitute decision-maker has exercised their authority. Periodic reviews of Public Trustee administration appointments would provide an opportunity for regular third-party oversight of the Public Trustee's fees and charges and their effect on clients' financial outcomes. It would also potentially provide administration clients and their supporters greater access to information about the Public Trustee's fees and charges and the person's financial circumstances, than they might have been able to obtain in ordinary circumstances, and an opportunity for them to put forward alternative administrators. A periodic review would also create an opportunity for reconsideration of whether the appointment is still necessary or whether the person has recovered or improved their capacity to the point where they are again able to manage their financial affairs.



## Recommendations

Recommendation 31: Update the *Public Trustee Act* to better acknowledge rights and interests of people with impaired decision-making capacity

The *Public Trustee Act* should be reviewed to update and modernise the Act to ensure that it reflects contemporary views about the rights and entitlements of people with impaired decision-making capacity whose affairs are administered by the Public Trustee.

The review of the Act should:

- a. address issues relating to conflicts of interest or breaches of duty and ensure they are clearly acknowledged, the extent to which they are permitted and the limitations on those activities, including any profits that can be earned;
- b. address provisions in the Act that appear to permit breaches of the trustee's fundamental duties; and
- c. include amendments requiring greater accountability and transparency on the part of the Public Trustee about its fees and charges, various sources of revenue, including revenue earned from the Official Solicitor, on client funds invested in the Common Fund and from the management of other funds in which client money is invested.



Recommendation 32: Amend legislation to ensure the Public Trustee is an appointment of last resort and the appointment is periodically reviewed

The *Guardianship and Administration Act* be amended to provide:

- a. that the appointment of the Public Trustee as administrator for a person is an appointment of last resort; and
- b. consistency with other administration appointments, the appointment of the Public Trustee and other trustee companies as a person's administrator be subject to periodic review, at least every five years (preferably more frequently).

## Conclusion

The Public Trustee is a key member of Queensland's guardianship and administration system, delivering services to vulnerable Queenslanders for more than 100 years and supporting them to live safe and financially secure lives.

This report highlights a number of issues that may cause concern and potentially distress to Public Trustee staff. In no way should this report, its observations or recommendations, be interpreted as questioning or detracting from the commitment and hard work of the Public Trustee's staff. The problems and issues identified in this report have developed over a substantial period of time and appear to primarily stem from the original funding arrangements for the Public Curator and the lack of clarity in the legislation about the scope and nature of conflict transactions permitted under the Act.

It is also appropriate to recognise the essential role the Public Trustee plays in Queensland public life and the importance of it continuing to fulfill that role in the future. It is critical to the on-going successful operation of the Public Trustee that it has the confidence and trust of the Queensland community and other key institutions. It is hoped that the recommendations of this report will help to achieve this outcome.

The catalyst for this project was concerns about the effect of the Public Trustee's fees and charges on the financial outcomes of some of its clients. The objective of this project and report was to encourage changes to the Public Trustee's operations and to its fees and charges regime to improve these outcomes. During the project the Public Trustee and his staff were actively engaged with the issues and have commenced a significant program of work to address them.

Naturally, there are issues on which the Public Trustee and the Public Advocate have had differing views. However, we have maintained a positive working relationship. The Public Trustee has had the benefit of reviewing chapters of the report as they were being written and has provided feedback on them. The Public Trustee also prepared a response to the final draft report. These documents are reproduced in appendices 2 and 1 respectively of this report and are recommended to the reader.

Appendix 1 also includes a document titled, *The Public Trustee Response*, that outlines the actions taken by the Public Trustee to date to respond to the issues and concerns that have been highlighted in this report. It also charts a comprehensive reform agenda designed to modernise and streamline the Public Trustee's operations and processes, including:

- adopting a Customers First Agenda, putting customers at the centre of all that they do;
- undertaking a comprehensive review of fees and charges to ensure fees are fair, reasonable and sustainable, including the fees of the Official Solicitor;
- Increasing transparency by:
  - publishing the *Prudent Person Rule Manual*;
  - providing accessible information about its fees and charges;
  - reviewing customer letters and statements to make them clearer, easier to understand and accessible for customers and their supporters;
  - implementing processes for customers to review legal advice that will not risk waiving legal professional privilege;
  - providing customers with legal invoices on request;
  - publishing hourly fees of lawyers in the Official Solicitor's Office;



- embedding a Structured Decision-Making Framework to support clients to have greater involvement in decisions that affect them, including legal decisions;
- **splitting the Official Solicitor's Office into two teams**, the Official Solicitor – Corporate Legal Services and the Official Solicitor – Customer Legal Services;
- establishing a Legal Expert Transformation Panel to provide practice management and ethical guidance to the Official Solicitor – Customer Legal Services;
- developing Official Solicitor policies to actively consider the interests of customers in legal decision-making;
- investigating options for sharing legal advice with customers in a way that will not adversely impact the customer;
- exploring options to require all lawyers of the Official Solicitor to hold a current practising certificate, which would bring them into the jurisdiction of the Legal Services Commission;
- a new process to allow Trust Officers to query the invoices of the Official Solicitor – Customer Legal Services to provide assurance to customers that there is additional scrutiny of fees;
- establishing an Independent Complaints Review Process which will allow customers to lodge a complaint with a third party if they believe it was not handled adequately in the first instance;
- developing an Accessibility, Inclusion and Diversity Plan 2021-2025;
- adopting a learner-improver culture to empower staff and ensure knowledge is shared to effect meaningful change within the organisation;
- continuing the Queensland Civil and Administrative Tribunal Referral Panel to assess and approve applications to QCAT to improve transparency in decision-making and potential to identify systemic issues and reduce costs; and
- undertaking a financial advice procurement process in 2021 which will include consideration of the benefits of establishing a panel of providers.

The Public Advocate welcomes this extensive program of change within the Public Trustee and appreciates the **Public Trustee's receptiveness to the issues raised** during the project.

Even with this program of work, there remain significant areas where change may need to be effected through carefully considered legislative reform and a fundamental reconsideration of the **Public Trustee's funding base** — in particular the funding of its extensive program of CSOs. Other significant issues that will require serious policy and legal consideration include the way the Public Trustee manages client funds, its practice of investing client funds in its own products and the earning of revenue from client funds.

The goal of this project has always been to protect the rights and interests of people with impaired decision-making capacity and improve their lives by supporting them to achieve greater autonomy and dignity. This aspiration is shared by all of Queensland's guardianship and administration agencies.

The Public Advocate is committed to working with the Public Trustee and the government to achieve fair and equitable outcomes for clients that are financially sustainable into the future.



# List of recommendations

## Recommendation 1: Undertake a full fees and charges review

Review the Public Trustee's fees and charges regime for administration clients to achieve:

- a. a simpler fee regime for administration clients. Administration clients and their supporters must be able to easily understand the Public Trustee's fees, what services are provided for the fees, and how and when the fees will be charged;
- b. fees that are more equitable and take into account clients' financial circumstances and their level of income. All clients should pay something towards the cost of the Public Trustee services they receive. The fee regime should include a mechanism that ensures the fees payable to the Public Trustee by administration clients with limited income do not reach a level where the fees become financially oppressive and negatively impact clients' lives, deplete their assets and/or drive them into poverty;
- c. fees that reflect the actual cost to the Public Trustee of providing the services. The fees charged should not be inflated to cross-subsidise services provided to other Public Trustee clients, other organisational activities or to provide 'profit' for the Public Trustee, unless specifically permitted by legislation;
- d. no duplication or overlap in fees. Where clients have been charged an Asset Management Fee on an asset, the Public Trustee should not impose any additional charges for the management or investment of those clients' funds;
- e. cease the practice of charging administration clients fees on assets (such as superannuation fund holdings or other investments) managed by third parties and for which the clients are already paying management fees to those third parties. At a minimum the Public Trustee should charge a lower fee for superannuation fund holdings where it can be shown that there is annual 'active' management of the clients' funds; and
- f. a fee structure that supports and encourages administration clients to exercise autonomy and lead independent lives. Administration clients should not be charged higher fees where they require more support to exercise their capacity and autonomy in relation to their financial affairs.

## Recommendation 2: Improve the transparency of fees and charges

The Public Trustee adopt the following practices to improve the transparency of its fees and charges:

- a. Provide clear and accessible information to administration clients about its fees and charges and the services clients will receive for those fees.
- b. The Public Trustee's policies and manuals that guide what services administration clients receive and how the fees and charges for those services are calculated and applied be published in accessible language and format. This information should include scenario examples to clearly demonstrate the fees to be paid for that service.
- c. On appointment and annually, the Public Trustee send each client personal correspondence detailing the services they will receive and the fees for those services. This should also occur after any significant change to the client's financial circumstances. This communication should be written in plain English with clear explanations of all terms used. All correspondence to administration clients should explain how to locate relevant fees and charges information, policies and manuals on the Public Trustee website. Where clients do not have access to the internet, the Public Trustee should make this information available in hard copy on request.
- d. Review its policies and practices to ensure they actively encourage staff to be responsive to clients and their supporters, particularly in relation to explaining its fees and charges. This is likely to improve information transparency, client participation in the management of their financial affairs, and client satisfaction with Public Trustee services.
- e. The information presented in client Statements of Accounts be improved to make the statements more transparent and easier to understand. The statements should include summary information about categories of income and expenses and provide a total of the Public Trustee's fees, charges, additional service fees and outlays for the relevant period. Any special purpose or professional services payments should be the subject of separate correspondence that fully explains these costs and why they were incurred.



Recommendation 3: Consider the effect of fees when appointing the Public Trustee as administrator

The *Guardianship and Administration Act* be amended to require a court or tribunal, when considering appointing the Public Trustee as a person's administrator, to consider the level of the Public Trustee's fees and their likely effect on the person's financial circumstances over time. This is especially relevant when there may be an alternative appointment option of a family member or friend as administrator who would not charge fees. The court or tribunal may need to request that the Public Trustee provide an estimate of annual fees and other usual charges and expenses associated with providing its services, prior to deciding the appointment.

Recommendation 4: Reconsider the practice of routinely obtaining external financial advice

The Public Trustee review its practice of routinely obtaining annual financial advice from an external financial advisor and external legal advice to make Total Permanent Disability (TPD) insurance claims under clients' superannuation arrangements. The review should consider:

- a. whether obtaining external financial advice for most Public Trustee clients is reasonably necessary, considering the Public Trustee's expertise as a professional trustee;
- b. whether obtaining the external financial advice represents value for money for clients, taking into account:
  - the Public Trustee's conservative investment policies which limit where and how clients' funds can be invested, and the returns they earn; and
  - the relatively low value of client assets for which the Public Trustee routinely obtains independent advice;
- c. whether the thresholds for obtaining external financial advice should be reviewed and raised significantly to ensure clients are not bearing the cost of the Public Trustee's mitigation of risk associated with its decisions;
- d. when financial advice should be obtained for clients;
- e. the circumstances in which follow-up financial advice should be sought for clients, considering the costs of the advice and the genuine likelihood of a change in client investments being made; and
- f. whether obtaining external legal advice routinely to make TPD insurance claims under clients' superannuation arrangements is reasonably necessary and represents value for money, considering the relative simplicity of TPD claims processes.

Recommendation 5: Discontinue general fees for incidental outlays

The Public Trustee should cease the practice of charging general fees for incidental outlays to administration clients and only charge the actual costs of these outlays on each client's file, if they are capable of being accurately costed.

Recommendation 6: Seek a Goods and Services Tax exemption

The Public Trustee, with the support of the Queensland Government, seek a Goods and Services Tax exemption from the Australian Taxation Office on its fees and charges for administration clients.

Recommendation 7: Review Community Service Obligations (CSOs)

The Public Trustee's Community Service Obligations be reviewed and consideration given to whether the Public Trustee's current Community Service Obligations should continue to be provided in their current form, and at current levels.

Recommendation 8: Discontinue client subsidisation of Community Service Obligations

The Public Trustee cease using revenue raised through administration clients' fees and charges to fund or subsidise the cost of providing Community Service Obligations on the basis that a fiduciary should not use the funds of one client to fund services to another.

Recommendation 9: Limit the level of community service obligations

The Public Trustee's Community Service Obligations should be capped at a level that can be reasonably funded from revenue earned on its investments.



Recommendation 10: Review fee rebate and financial hardship provisions to ensure client assets are not depleted by fees and charges

The Public Trustee review its fee rebate and financial hardship schemes to:

- a. achieve more equitable outcomes for administration clients, especially those with limited incomes, such as pensions, who own their own home. The review should consider raising the level of assets for financial hardship eligibility above \$5,000 and reviewing the practice of including the value of clients' principal place of residence in the value of assets for calculating fee rebates;
- b. ensure no administration client will experience an unavoidable depletion of assets because of the amount of Public Trustee fees they pay and the inadequacy of the rebates; and
- c. develop a new stand-alone Fee Rebate and Financial Hardship Policy that is accessible and easy to understand to ensure that administration clients and members of the public know how the policy operates.

Recommendation 11: Do not profit from administration clients unless expressly permitted by law

As a fiduciary and financial administrator, the Public Trustee should not profit from administration client funds unless expressly permitted by legislation. Any such legislative provisions should set clear limits on the amount and purpose of any income or 'profit' (See recommendations 29 and 31).

Recommendation 12: Improve transparency of Public Trustee revenue sources

The Public Trustee improve reporting of its sources of revenue, particularly revenue earned on administration client funds so that it is clear where clients' money is being invested, the overall returns on those investments, and the value of the interest differential that is being retained by the Public Trustee. The Public Trustee's revenue sources and use of administration client funds to raise revenue should be transparent and accountable so that people know how their money will be used and the likely returns on investments managed by the Public Trustee relative to their actual earnings.

Recommendation 13: Clearly report the fees and costs of managing Public Trustee investments

The Public Trustee clearly report the fees it charges and other costs associated with the operation and management of its various investments (in particular the Common Fund, interest bearing term deposits and the Growth Trust) and its effect on clients' investment returns.

Recommendation 14: Stop requiring administration clients to pay double charges on their funds

Administration clients should not pay double charges on their funds, where they pay an annual Asset Management Fee on their funds and additional fees to the Public Trustee and/or other organisations to manage investments dealing with those funds.

Recommendation 15: Limit the amount of Public Trustee surpluses and reserves

There should be a limit on the amount of operating surpluses and reserves that the Public Trustee can accumulate. Any reserves exceeding the cap should be returned to clients in reduced or rebated fees.

Recommendation 16: Review investment practices and discontinue activities that do not directly benefit clients

The policies and practices of the Public Trustee relating to the investment of administration client funds be reviewed, and any investment activities involving their funds that do not maximise direct benefits to those clients be discontinued.

Recommendation 17: Review and update the *Prudent Person Rule Manual*

Review and update the *Prudent Person Rule Manual* to ensure it appropriately reflects the law and the Public Trustee's obligations as a trustee and fiduciary. The review should include consideration, where appropriate, of a client investment approach that:

- a. ensures that decisions about investing client funds demonstrate that each decision was made in the interests of the client;
- b. seeks to achieve more for clients than just the preservation of their assets;
- c. moves away from an inflexible standard template approach to investing, to one that takes the clients' individual circumstances into account (wherever possible);





- d. relies on an actual assessment of clients' individual investor risk profiles (where possible), rather than assigning profiles based on clients' ages, and makes a meaningful distinction between each of the risk profiles and the types of investments considered appropriate for that profile.

Recommendation 18: Publish the *Prudent Person Rule Manual*

The *Prudent Person Rule Manual* and all other Public Trustee manuals that guide the agency's decision-making about managing and investing administration clients' funds be published and re-written in accessible language.

Recommendation 19: Review position on conflict transactions

The Public Trustee review its reliance on Supreme Court case No 5391 of 1996 as providing legal authority for all potential conflict transactions involving the investment of administration client funds in its own products, particularly the Growth Trust.

Recommendation 20: Review the practice of only investing in Public Trustee investment products

The Public Trustee review its practice of investing administration client funds almost exclusively in its own investment products and seek advice about how it can fulfil its statutory and fiduciary obligations while managing client funds and earning revenue. Where the Public Trustee proposes to invest administration client funds in its own investment products it should seek appropriate approvals under the *Guardianship and Administration Act* or seek a specific legislative amendment to expressly permit these breaches of its obligations. Such arrangements should also be published in an accessible format and declared to clients.

Recommendation 21: Adopt a new client investment strategy

The Public Trustee develop a new client investment strategy, the process for which should involve:

- a. Reviewing all internal policies, manuals and guidance documents relating to the management and investment of client assets to properly acknowledge and reflect the duties of a trustee and fiduciary.
- b. Reviewing the purpose and continuing need for an overarching Client Investment Strategy and Primary Investment Strategy. Any future strategy or investment approach should not override consideration of the individual circumstances and other needs of administration clients.
- c. Implementing investment decision-making policies that will:
  - (i) ensure that the interests of administration clients are at the centre of all investment considerations and decisions affecting their financial interests;
  - (ii) use the client's individual financial and risk profile and living circumstances as the starting point for decision-making, before considering a change of investment strategy; and
  - (iii) determine the expressed or implied risk appetite of the administration client in accordance with General Principle 7(4) the principle of substituted judgement, the client's investment history and individual financial circumstances.
- d. Reviewing the definition of 'complex asset' (which currently includes shares and any amount of superannuation) in light of the Public Trustee's acknowledged high level of professionalism and skill as a trustee and administrator, to reflect a more current view of what constitutes a complex asset for management by a professional trustee.
- e. Reviewing the 'Value of Assets' approach as the principal mechanism that determines whether independent financial advice is required. This review should be conducted with the objective of considering an approach that is based on a holistic appraisal of the key issues affecting the client's life (e.g. legal action, involvements in partnerships, trusts or companies, or complex tax arrangements) as well as the value, diversity and location of their assets.

Recommendation 22: Reconsider routinely obtaining external financial advice for certain types of assets

In addition to recommendation 4 and in regard to the practice of routinely obtaining external financial advice for administration clients:

- a. External financial advice should only be obtained at a client's expense as an exception and when clients or their supporters request this advice or there is a justifiable basis for the expenditure based on the amount and complexity of the clients' assets and the potential investment benefits for the client.
- b. If the Public Trustee continues to contract external financial advice services (even on a more limited basis), it undertake an open tender process and appoint a panel of providers (no less



than two) and review and reappoint panel members on a regular basis, at a minimum, every five years.

#### Recommendation 23: Obtain advice about refunding financial advice fees

In relation to the contractual arrangements the Public Trustee has with an external financial advisor for the provision of financial advice services to administration clients, the Public Trustee should:

- a. review the contractual arrangements to ensure they do not unduly limit the investments the advisor can recommend (by limiting those investments to Public Trustee products) or otherwise interfere with the independence of the advice provided to administration clients;
- b. suspend the practice of charging clients for external financial advice that merely recommends investments in accordance with the Client Investment Strategy while the review of contractual arrangements is occurring; and
- c. take advice about whether the fees charged to administration clients for the financial advice referred to in b. (above), should be refunded.

#### Recommendation 24: Review the role and operations of the Official Solicitor

The Public Trustee initiate an urgent and comprehensive review of the role and operations of the Official Solicitor to the Public Trustee. The review should give particular consideration to:

- a. the structure of the arrangements between the Public Trustee and the Official Solicitor and whether they are appropriate and sufficiently transparent;
- b. whether the use of the Official Solicitor to provide legal services to administration clients is **appropriate considering the potential conflicts in the Official Solicitor's role, issues of legal professional privilege and the Public Trustee financially benefiting from the Official Solicitor's fees**;
- c. whether lawyers providing legal advice and services to people under administration should be required to hold practicing certificates and be subject to oversight by the Legal Services Commission (this includes administration clients or their supporters being able to make a complaint to the Legal Services Commission);
- d. reviewing the scale of fees of the Official Solicitor, with particular consideration of the reasonableness and appropriateness of the fees for Public Trustee administration clients;
- e. making the scale of fees of the Official Solicitor available to administration clients and/or their supporters, particularly when consideration is being given to obtaining legal advice for which the client will be required to pay; and
- f. whether the Public Trustee should establish a panel of solicitors and barristers to provide legal advice and services to Public Trustee administration clients that meet quality standards, deliver value-for-money, and whose fees are reasonable having regard to the vulnerabilities and financial disadvantage of many of the **Public Trustee's administration clients**.

#### Recommendation 25: Develop a policy to support administration clients to make complaints about the Public Trustee

Develop a policy for supporting administration clients to make complaints against the Public Trustee, including support to investigate claims, obtain legal advice and seek redress when a client alleges that the Public Trustee has, by act or omission, caused the client loss or harm. The policy should establish an appropriate process for referring client matters that warrant investigation, legal advice and/or redress to appropriate professionals for advice. Broad stakeholder consultation should be undertaken **to develop an appropriate and efficient model that protects people's rights** while containing costs. The final model for responding to client complaints and managing conflicts may need to be supported by legislation.

#### Recommendation 26: Amend legislation so Public Trustee solicitors are overseen by the Legal Services Commission

Amend the *Public Trustee Act* to provide that solicitors employed by the Public Trustee must:

- a. **while performing their role, have regard to the 'fundamental duties of solicitors' as set out in the solicitors' rules (as defined by section 217 of the *Legal Profession Act*); and**
- b. be subject to conduct and disciplinary investigations by the Legal Services Commission.



## Recommendation 27: Review Official Solicitor policies and practices

If the Public Trustee continues to provide legal advice and representation to administration clients using the Official Solicitor, it should review and update its policies, procedures and other guidance to Public Trustee lawyers to develop a comprehensive set of policies and procedures that:

- a. clarify who the client is in all legal matters and distinguish between the interests of the Public Trustee as the corporate entity and the Public Trustee as the representative of the person under administration;
- b. outline the law in relation to the duties of trustees, fiduciaries and lawyers and their duties to always act in their **clients' interests**;
- c. require lawyers in every case to consider the costs and benefits of any prospective legal action and provide advice (consistent with Rule 7 of the Australian Solicitors Conduct Rules) to **ensure clients' funds are only spent when they are satisfied the expenditure is in the clients' interests**, taking into account their individual needs, the risks, costs and likely outcomes;
- d. develop a policy around obtaining consent from administration clients (where appropriate), their guardians or personal support networks to engage a lawyer and disclose the likely costs, benefits and outcomes for the client, prior to embarking on any legal process;
- e. **review the Official Solicitor's policy denying Public Trustee clients access to the legal advice they have paid for and to the invoices for that advice.** The policy review should also consider **the Public Trustee's role and duties under the *Guardianship and Administration Act***, including to support clients to participate in decisions affecting their lives; and
- f. as part of the process for issuing an invoice for legal fees, the Official Solicitor should review and assess the reasonableness of the **fees in the context of the clients' overall financial circumstances** and the likely outcomes and benefits of any proposed legal action.

## Recommendation 28: Considerations for the review of Public Trustee fees and charges

The review of the Public Trustee's fees and charges for administration clients (see recommendation 1) should include the following to help maintain the organisation's long-term financial viability:

- a. consideration of changes over time in the:
  - economic environment and financial markets;
  - **Public Trustee's sources of revenue; and**
  - financial profile of administration clients and other clients of the Public Trustee that may impact their ability to pay fees.
- b. examination of the various fees and charges applied by other State and Public Trustees to ensure consideration of a wide range of fee options that will assist it to adopt the most fair and equitable system, **taking into account clients' incomes and assets, and the value of the services provided;**
- c. **examination of the Public Trustee's costs of operation**, including comparative analyses with other State and Public Trustees, which should include consideration of their levels of service provision, efficiency, productivity and service quality; and
- d. consideration of alternative and innovative ways the Public Trustee can deliver services to administration clients at a lower cost.

## Recommendation 29: Amend legislation to clarify how the Public Trustee can invest client funds

In the interests of clarity and transparency, and to remove all doubt about the lawfulness or propriety of the Public Trustee earning revenue from client funds, the *Public Trustee Act* should be amended to:

- a. clarify the investments the Public Trustee is permitted to make using client funds, in particular addressing the issue of investments that are permitted that may amount to a conflict of interest, the circumstances in which it can earn revenue on those funds, and the conditions or limitations on those earnings; and
- b. require the Public Trustee to report its earnings on client funds in its annual financial statements.

## Recommendation 30: Consider additional oversight mechanisms

The Queensland Government should consider whether the Public Trustee and its clients would **benefit from additional oversight and/or reporting mechanisms to improve the Public Trustee's performance, transparency and public accountability.**



Recommendation 31: Update the *Public Trustee Act* to better acknowledge rights and interests of people with impaired decision-making capacity

The *Public Trustee Act* should be reviewed to update and modernise the Act to ensure that it reflects contemporary views about the rights and entitlements of people with impaired decision-making capacity whose affairs are administered by the Public Trustee.

The review of the Act should:

- a. address issues relating to conflicts of interest or breaches of duty and ensure they are clearly acknowledged, the extent to which they are permitted and the limitations on those activities, including any profits that can be earned;
- b. **address provisions in the Act that appear to permit breaches of the trustee's fundamental duties; and**
- c. include amendments requiring greater accountability and transparency on the part of the Public Trustee about its fees and charges, various sources of revenue, including revenue earned from the Official Solicitor, on client funds invested in the Common Fund and from the management of other funds in which client money is invested.

Recommendation 32: Amend legislation to ensure the Public Trustee is an appointment of last resort and the appointment is periodically reviewed

The *Guardianship and Administration Act* be amended to provide:

- a. that the appointment of the Public Trustee as administrator for a person is an appointment of last resort; and
- b. consistency with other administration appointments, the appointment of the Public Trustee and **other trustee companies as a person's administrator be subject to periodic review, at least every five years (preferably more frequently).**



# Chapter 1: The review



# Why this review was undertaken

1. In 2018, the Public Advocate commenced a project examining the Public Trustee of Queensland's fees and charges for clients under personal financial administration (administration). A person can be placed under administration by the Queensland Civil and Administrative Tribunal (QCAT) if the person is found to be unable to manage their financial affairs due to impaired decision-making capacity. Many people under administration experience impaired decision-making capacity because of disability, illness or injury.



## Impaired decision-making capacity

'Having capacity' means a person is capable of understanding the nature and effect of decisions about a matter, can freely and voluntarily make decisions about it, and can communicate their decisions in some way.<sup>1</sup> If a person is unable to do one or more of these things, they may have impaired decision-making capacity.

There are a number of conditions that may impact a person's decision-making capacity. These include intellectual disability, acquired brain injury, mental illness, neurological disorders (such as dementia) or alcohol and drug misuse. While not all people with these conditions will experience impaired decision-making capacity, many of them will at some point in their lives. For some, impaired decision-making capacity may be episodic or temporary, requiring intensive supports at specific times, while others may require lifelong support with decision-making and communicating their choices and decisions.

2. For a number of years, people under administration with the Public Trustee, their families and supporters have raised concerns with the Public Advocate about the level and types of Public Trustee fees and charges, and their negative effect on financial outcomes for people under administration. A number of them provided documents and records to the Public Advocate that allowed a limited analysis to be conducted to understand and test the validity of these concerns.
3. The information revealed that administration clients who are considered to have the ability to pay are charged a multiplicity of fees by the Public Trustee. For some Public Trustee clients in this cohort who have only modest assets (such as their own home) and limited incomes, such as the Disability Support Pension (DSP), the fees and charges can consume a significant proportion of their income, resulting in a rapid depletion of their assets.
4. These outcomes raised concerns because many people in this group and their supporters had a genuine and reasonable expectation that their assets and regular income would support their lifestyle well into the future. However, the financial outcomes for many resulted in significant negative impacts on their lifestyle and, potentially, their wellbeing.



## Case study 1: \$30,000 inheritance gone in 2 years and house not maintained

Tony is a man with a disability from birth who lived with his parents and received the Disability Support Pension (DSP) as his primary source of income. Tony had been under administration with the Public Trustee for many years and paid no fees due to his low income and low level of assets.

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<sup>1</sup> Guardianship and Administration Act 2000 (Qld) sch 4.





After his parents' deaths, Tony inherited their home (the home he had lived in all of his life) and over \$30,000 in shares. As a consequence, the Public Trustee commenced charging Tony fees according to its usual schedule. The effect of the Public Trustee's fees and charges was that within two years of receiving his inheritance, the shares had been sold, the proceeds were exhausted and Tony had insufficient money to pay for some necessary house repairs.

Without the repairs, the Public Trustee said it was unable to insure the house. As a result, the Public Trustee wanted to sell Tony's home, which would require him to become a tenant for the first time in his life. Steps were taken by the Public Trustee to obtain a QCAT order to approve a decision-maker for accommodation for Tony with a view to moving him from his home so it could be sold.

Tony's family members were not informed about what was happening until the matter was before QCAT. Tony's family intervened and were successful in being appointed Tony's administrators instead of the Public Trustee. The family paid for the repairs to the house themselves, which cost around \$1,400.

After Tony's family assumed responsibility for his administration his financial situation improved steadily over the following two years. Savings were achieved in multiple ways, including because Tony no longer had to pay the Public Trustee's fees and charges. Family members also worked closely with Tony to help him manage his money more effectively. They encouraged Tony to begin doing jobs around his home that were undertaken by contractors when he was under Public Trustee administration. These savings allowed Tony to have an increased weekly cash allowance.

Other savings were achieved by the family administrators through more careful spending choices suitable to Tony's circumstances. In particular, the family did not continue Tony's private health insurance cover that he paid over \$165 per month for when he was with the Public Trustee. It is unclear why the Public Trustee took the view that this expenditure was appropriate for a person on Tony's limited income.

Two years after his family assumed administration for Tony, he is still living in his own home, has saved \$7,000 and has more control and flexibility in how he lives his life. For the first time in his life, Tony flew to Brisbane to spend Christmas with his family, something he found extremely exciting but which he could not afford when he was under Public Trustee administration. Tony is planning to spend Christmas with family again soon.



#### Case study 2: Fees charged to manage assets that were managed by a third party

Ella experienced a health event that affected her ability to speak and was placed under administration with the Public Trustee. Ella owned her home and had \$130,000 in cash and \$570,000 with QSuper (a superannuation fund). In addition to its other fees, the Public Trustee charged Ella an annual Asset Management Fee based on the total value of her assets (excluding her home where she lived). The Asset Management Fee was based on the value of her cash and superannuation. Ella's superannuation was managed by QSuper for which Ella was also paying fees. Effectively, Ella was paying a fee to the Public Trustee to 'manage' her superannuation while she was also paying her superannuation fund to manage the same funds. On the face of it, Ella was paying twice for the 'management' of her superannuation.

Ella's supporters initiated legal action against the Public Trustee, in an attempt to access information and obtain explanations about the way her assets were being managed. As a result, Ella was charged fees for the Official Solicitor to the Public Trustee to respond to the applications. This occurred despite the applications being brought by a third party (not Ella). It is questionable whether the Official Solicitor's work in this case could reasonably be characterised as 'undertaken in the interests of the client'.



Despite the small amount of Ella's investable assets, namely, \$130,000, the Public Trustee sought financial advice from its preferred financial advisor about how to invest her funds. Ella was charged \$396 for the financial advice. The advice confirmed the Public Trustee's standard investment arrangements (as outlined in its investment policies) for Ella's assets, and recommended (in line with Public Trustee policy) that Ella's superannuation be moved from QSuper to the Public Trustee's preferred superannuation provider.

When informed of this advice, Ella told the Public Trustee she did not want her superannuation moved from QSuper. In response, the Public Trustee obtained, and charged Ella for, a second financial advice responding to Ella's opposition to changing superannuation providers. The second advice, which cost Ella a further \$396, provided a comparison of the two funds based on performance and fees and confirmed the original advice to change from QSuper.

About 18 months after being put under administration with the Public Trustee Ella wanted to apply to QCAT for a declaration of capacity. The Public Trustee approved her engaging her own solicitors for this purpose and authorised payment to them. Ella's solicitors appeared at the hearing on her behalf, however, the Official Solicitor to the Public Trustee also appeared at the hearing and Ella was charged Official Solicitor's fees for that appearance. These fees were later refunded when challenged by Ella's private lawyer.

Ella's administration lasted 2 years and 3 months. During that time she was charged over \$70,000 in Public Trustee fees and outlays. This was made up of over \$48,000 in Official Solicitor fees and more than \$23,000 in administration fees and charges, additional service fees for work performed in 'supporting legal action', postage and incidentals and outlays for property inspections and financial advice (see below). Ella was eligible for a rebate on the Real Estate Property Fee on her house because she was living in it. That rebate was \$849.20 per year.<sup>2</sup>

Ella used almost \$15,000 of her own funds to pay her private lawyer to obtain the declaration of capacity in QCAT. It is unclear what the fees to 'support her legal action' involved (see below), especially since she had her own lawyer and was charged substantial additional legal fees by the Official Solicitor.

The specific administration fees charged to Ella to manage her finances and assets over the period she was under administration are listed below.

Personal Financial Administration Fees	\$12,701.33
Asset Management Fees	\$7,443.38
Fees for financial advice	\$792.00
Additional Service Fee – supporting legal action	\$449.00
Postage and incidentals	\$949.00
EFTPOS fees	\$44.73
Property costs (valuation, pest and building inspections)	\$720.00
Total Public Trustee fees and charges	\$23,115.09

5. It is unclear why the Public Trustee took the view that it did not have the requisite skills in-house to decide how to invest Ella's \$130,000 or considered it appropriate and prudent to spend her funds obtaining two financial advices when essentially they recommended no material change in Ella's investment outcomes from the standard Public Trustee investment approach (including moving her superannuation to the Public Trustee's preferred provider).
6. The fees Ella was charged to essentially manage her house, two vehicles and \$130,000 in cash, for such a brief period seem excessive.
7. While the Official Solicitor's fees for appearing at her QCAT hearing were refunded, it is difficult to understand how the payment of those fees could have been considered

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<sup>2</sup> Queensland Government, *Public Trustee of Queensland (Fees and Charges Notice) No. 1*, 2015, *Queensland Government Gazette* No. 40, 19 June 2015, p 20.



reasonable or to have had any legal basis, in the first instance. It is unclear who the Official Solicitor was representing at that hearing. Considering Ella already had her own lawyer, it has to be assumed that the Official Solicitor was acting for the Public Trustee. It is unclear why the Public Trustee would need legal representation at a QCAT hearing for a declaration of capacity. The Public Trustee should not have a legal position on this issue and has no expertise in terms of assessing a person's capacity. The Public Trustee disclosed in correspondence to Ella that they did not oppose her application.

8. The Public Trustee's handling of Ella's matter also raised the question, 'what happens to people who do not have support to question these charges'?
9. The cases initially reviewed by the Public Advocate raised concerns about the:
  - number and various types of fees being charged by the Public Trustee;
  - transparency of the fees and charges and the way they are calculated and applied;
  - cost of providing administration services and whether the fees charged provide value for money;
  - actual services that are delivered for the fees; and
  - use of the Official Solicitor and the charging of Official Solicitor fees by the Public Trustee.
10. The fees charged by the Public Trustee to administration clients was also raised by members of the public at a Legal Affairs and Community Safety Parliamentary Committee hearing for the *Guardianship and Administration and Other Legislation Amendment Bill 2017*. The Committee raised the issue with the Public Advocate who confirmed that similar concerns had been raised with her and her predecessor and she was considering raising the matter with the Public Trustee.<sup>3</sup>
11. When considering this review, the Public Advocate was also aware of the number of complaints made to the Queensland Ombudsman about the Public Trustee by members of the Queensland community. According to Queensland Ombudsman's annual reports, the Public Trustee has been the most complained about statutory authority in 8 of the past 10 years (see Table 1).

Table 1: Complaints to the Queensland Ombudsman about the Public Trustee

Year	Number of complaints	Percent of complaints about statutory authorities	Rank among statutory authorities by number of complaints
2009-10	161	26%	1
2010-11	170	29%	1
2011-12	196	29%	1
2012-13	182	33%	1
2013-14	168	23%	1
2014-15	176	20%	2
2015-16	213	24%	1
2016-17	176	20%	1
2017-18	205	21%	1
2018-19	183	17%	2

Source: Queensland Ombudsman, Annual Reports, 2009-10 to 2018-19.

<sup>3</sup> Transcript of Public Hearing, Legal Affairs and Community Safety Committee, *Examination of the Guardianship and Administration and other legislation Amendment Bill 2017*, p.21, Queensland Parliament, Brisbane, 11 October 2017.



# Public Advocate's authority

12. The Public Advocate is an independent statutory position established under the *Guardianship and Administration Act 2000* to undertake systemic advocacy to promote and protect the rights and interests of all adults with impaired decision-making capacity.
13. The Public Advocate's functions are to:
  - promote and protect the rights of adults with impaired decision-making capacity;
  - promote their protection from neglect, exploitation or abuse;
  - encourage the development of programs to help them achieve the greatest autonomy;
  - promote the provision of services and facilities for them; and
  - monitor and review the delivery of services and facilities to them.<sup>4</sup>
14. In exercising these functions, the Public Advocate must apply the General Principles outlined in the *Guardianship and Administration Act*.<sup>5</sup> (The General Principles are reproduced in Appendix 3.)
15. The Public Advocate has power to do all things necessary or convenient to perform the Public Advocate's functions<sup>6</sup> and has a right to all information necessary to monitor and review the delivery of services to people with impaired decision-making capacity.<sup>7</sup>
16. The Public Advocate's functions do not include the investigation of individual complaints or allegations.<sup>8</sup>
17. Under section 209A of the *Guardianship and Administration Act*, the Public Advocate may prepare systemic reports about matters arising from the performance of the Public Advocate's functions. These reports must be tabled in the Queensland Parliament.<sup>9</sup>
18. This report has been prepared under section 209A of the *Guardianship and Administration Act*.

## The decision to prepare a systemic report

19. Administration clients of the Public Trustee often experience a range of vulnerabilities arising from disability, injury or illness. However, an additional vulnerability arises once the Public Trustee is appointed as their administrator. From that point the Public Trustee is in a position of trust, controlling the person's money and property and having significant power over their lives. Once this occurs, it can be difficult for the person to obtain an order declaring they have capacity or to have another administrator appointed to manage their affairs. The relative power of the Public Trustee, and the various complaints and concerns of its clients and their supporters, raised questions about how the Public Trustee was fulfilling its obligations to act in its clients' interests.
20. The Public Trustee has significant obligations to its administration clients under the *Guardianship and Administration Act*, the *Trusts Act*, and in terms of its broader 'fiduciary' duties as trustee. (These obligations and duties are discussed further in 'Chapter 2: Financial administration and the Public Trustee' and in the later chapters of this report.)
21. The cases examined by the Public Advocate raised concerns about the way the Public Trustee made decisions on behalf of its clients and its compliance with the General Principles in the *Guardianship and Administration Act*.

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<sup>4</sup> *Guardianship and Administration Act 2000* (Qld) ch 9.

<sup>5</sup> *Ibid* sch 1.

<sup>6</sup> *Ibid* s 210(1).

<sup>7</sup> *Ibid* s 210A(1).

<sup>8</sup> *Ibid* s 209(2).

<sup>9</sup> *Ibid* s 209A.



22. The Public Advocate also found that the explanations provided by the Public Trustee to its clients, their families or supporters about its fees and charges were inadequate. At the commencement of this review, there was limited information about the Public Trustee's fees and charges on its website or elsewhere. While the Public Trustee annual Fees and Charges Notices are available, many of the policies that guide trust officers in their decision-making around the calculation and application of the fees and charges are not. At times it can be extremely difficult for families or supporters with concerns, to access information from the Public Trustee. Where explanations were provided by the Public Trustee, they often did not adequately address clients and supporters' concerns. In the cases brought to the Public Advocate, it was apparent that some Public Trustee administration clients and their supporters were not satisfied that they were given a clear and reasonable explanation for the Public Trustee's actions or fees.
23. There was also limited clarity or transparency about exactly what services administration clients could expect to receive for the fees they paid.
24. In addition, the financial statements provided by the Public Trustee to administration clients are difficult to read. In particular, the statements are not prepared in a format that makes it easy for clients to see what fees and charges have been applied in the reporting period. For example, there is no overall summary of all the Public Trustee's fees, charges, additional services and outlays for the period, as statements from financial institutions and superannuation funds do. To gain an accurate picture of the total deductions made by the Public Trustee, clients or their supporters must check each entry on the statements and calculate all that were applied during the period. This is a particularly unsatisfactory approach to reporting and accountability to people who have impaired decision-making capacity for financial matters.
25. The Public Advocate is the only independent oversight body with jurisdiction to look into the way the Public Trustee delivers services to its administration clients from a rights and interests perspective. The Public Advocate is uniquely positioned to explore issues beyond the strict legality or administrative fairness of individual Public Trustee decisions, practices and policies, including examining the reasonableness and fairness of outcomes for clients in the broader context of their rights, autonomy and quality of life.
26. Ultimately, after consideration of these various issues, the Public Advocate decided to examine them in greater detail and prepare a systemic report.

## How the review was undertaken

### Objectives and approach

27. The Public Trustee is a unique service delivery agency with a range of important roles and functions to perform and significant responsibilities to individual clients for whom it is administrator and trustee. Consequently, it was critical that the Public Advocate had a clear understanding of the various roles and functions of the Public Trustee to form views about how the Public Trustee is fulfilling its responsibilities to those clients.
28. An exploratory approach was taken to the review to gain more clarity about the concerns raised about the Public Trustee and build a more comprehensive picture about the experiences and outcomes for some Public Trustee administration clients.
29. The objectives of the review were to:
  - identify the group of clients under administration at risk of poor financial outcomes due to the fees and charges regime of the Public Trustee;
  - investigate the impact of the Public Trustee's fees and charges regime on the financial outcomes, rights and interests of the identified group of clients;
  - determine if the Public Trustee's fees and charges regime is reasonable, consistent with its fiduciary responsibilities and its obligation to act in its clients' interests; and
  - highlight any systemic issues related to the Public Trustee's fees and charges regime and recommend appropriate changes.



30. The review focused on the fees and charges that directly relate to the provision of administration services, as well as any other routine charges and other outlays and expenses that administration clients may be required to pay, such as, fees charged by the Official Solicitor to the Public Trustee.



#### Assumptions that underpinned or guided the review

- The Public Trustee plays an important role in Queensland's guardianship and administration system, and within the community more broadly.
- Many administration clients receive high levels of service from the Public Trustee for minimal, if any, fees.
- Administration clients should, where they are reasonably able to, contribute to the costs of the services they receive. However, the fees they pay should be reasonable, taking into account the circumstances in which they are provided and should not exceed the cost of providing those services.
- There is an ongoing need for the Public Trustee to provide administration and other services to Queenslanders.
- The Public Trustee exercises considerable power over the lives of its administration clients.
- The Queensland public should have confidence in the Public Trustee as the State's leading trustee and fiduciary to act in the interests of its clients.
- The Public Trustee must fulfil its fiduciary obligations and act in the interests of its administration clients.
- The Public Trustee must uphold the General Principles of the *Guardianship and Administration Act*.
- The Public Trustee should avoid conflict between its roles, policies, practices and obligations to its clients and seek judicial direction where it cannot be avoided.
- The Public Trustee should aspire to achieve financial outcomes that provide for the future needs of their administration clients.

## Scope of the review

31. Many people under administration with the Public Trustee receive significant financial management services. The Public Trustee has a comprehensive fee rebate scheme which it advises benefits up to 82 percent of its clients with reduced (or rebated) fees based on their particular assets and financial circumstances.<sup>10</sup> Most administration clients who have few assets (e.g. a small amount of cash and personal effects) and a low income (e.g. a pension) receive fee rebates. Many of these clients appear to receive a high level of service for very little cost. This review was not principally concerned with this group of people when it commenced.
32. This review had an early focus on the Public Trustee's administration clients who receive few, if any, rebates of their fees and charges. Some of these clients are wealthy and their income allows them to manage the fees and charges without impact on their lifestyle or erosion of their assets. Those who this review is concerned with have modest assets (e.g. a modest home and superannuation balance) and income (often from a pension) and are not entitled to fee rebates due to the way a client's eligibility for a fee rebate is calculated. For many in this cohort, the Public Trustee's fees and charges, in combination with their regular expenses,

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<sup>10</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 5 April 2019, in response to Information Notice No.1, p 12.





exceed their income, requiring them to spend their cash assets, resulting in depletion of these assets over time.

33. As the review proceeded, other Public Trustee policies and practices of concern that had a broader systemic application to administration clients were identified. These included issues relating to the Public Trustee's **investment policies and practices, its use of external financial advisors** and the Official Solicitor, its earnings on client funds, and the charging of management fees on investment funds when clients had already paid a management fee on their assets invested in those funds. Consequently, the scope of the review broadened beyond its original focus and objectives to examine other activities and practices of the Public Trustee for which administration clients were charged fees or that impacted their financial outcomes.
34. The scope of the review was constrained by the size and resources of the Office of the Public Advocate. The Public Advocate is supported by a small, but dedicated, team and a modest **budget. This review used a considerable amount of the office's resources** for the period it was being undertaken. The Public Advocate employed a temporary Project Manager with a specialisation in forensic accounting to lead the review. The Project Manager had a level of experience that was appropriate to lead such a project, while exercising careful judgement and applying solid policy analysis.
35. The Public Advocate does not provide services directly to the community and is not a complaint agency. As a result, the Public Advocate had limited internal data to inform the review. Instead, the review was based on information that was publicly available, sourced from other agencies and provided by Public Trustee clients and their supporters.
36. A considerable amount of information was also provided by the Public Trustee to the Public Advocate for the review. As noted above, it was important that the Public Advocate **thoroughly understood the Public Trustee's organisational, operational** and funding structures, the range and types of fees and charges applied to administration clients, and the systems and processes by which they are applied. Over a period of 22 months, the Public Advocate issued six Information Notices to the Public Trustee under section 210A of the *Guardianship and Administration Act* to obtain information to assist with the preparation of this report. The Public Trustee collated large amounts of material to respond to these notices. Much of the **detail of the Public Trustee's** policies and practices in this report is derived from the information provided by the Public Trustee in response to the Information Notices.
37. Due to resource constraints, the Public Advocate did not seek public submissions to inform the review. It was anticipated that a call for public submissions would attract a sizeable number of submissions on a wide range of issues outside of the scope of the review, and the Public Advocate does not have the resources to manage a large state-wide consultation process. Instead, a targeted consultation process was adopted to obtain information about current Public Trustee policies, practices, processes and client experiences.
38. A number of individuals and supporters agreed to have their de-identified stories included in this report as case studies. Other case studies were adapted from published QCAT cases. These case studies provide important real-life examples of the application of Public Trustee policies, fees and charges, and the impact they have had on the financial circumstances of some administration clients.
39. An important issue was raised by the Public Trustee and others in the early stages of this **review, inquiring about comparisons between the Queensland Public Trustee's fees, charges and services, and those of Public and State Trustees in other Australian jurisdictions.** The various trustees across Australia have different fees and charges regimes that make simple **fee comparisons difficult. For example, some charge fees that are a percentage of clients' assets** while the Public Trustee in Queensland uses a sliding scale for its Asset Management Fee. It also applies a **Personal Financial Administration Fee and does not consider a client's income**, whereas other trustees charge clients fees on their income from various sources.
40. Despite these disparities, it was considered necessary and useful for this report to provide some comparative information about the fees and charges applied by Public and State Trustees in other jurisdictions, and to demonstrate how they would apply to clients with differing asset and income profiles. Accordingly, broad information comparing the differing



fees and charges regimes and the funding and operations of the Public and State Trustees across Australia is included at relevant points in this report.

41. While the outcomes of these comparisons are interesting, the Public Advocate considers that it is irrelevant whether the fees and charges of the Public Trustee in Queensland are less or more than those of trustees in other jurisdictions. The real consideration is whether the fees are reasonable in the circumstances, taking into account the amount of work involved in providing the services, the clients' ability to pay for those services and the impact that the fees and charges have on the person's overall financial situation.
42. The Public Trustee has also expressed concerns that the report 'does not consider the financial outcomes for customers', suggesting that 'financial outcomes are broader than fees and charges alone' and the Public Advocate 'should consider the result for the customer factoring in investment returns, Community Service Obligations including fee rebates and the effects of other activities by the Public Trustee for the customer.'<sup>11</sup>
43. If Public Trustee clients were all enjoying positive financial outcomes there would have been no need for this review. This report examines those factors outlined by the Public Trustee above — investment returns, fee rebates, and Community Service Obligations among other things.
44. Further, it is not sufficient that some clients have positive financial outcomes while under administration with the Public Trustee. If the Public Trustee is engaging in conflict transactions, making unauthorised profits or using client funds to pay for advice or services that are not value for money or do not advance the clients' interests, it is in breach of its duties. Whether or not clients have positive financial outcomes, such practices will result in their financial outcomes being less than they might otherwise have been. It is also not appropriate from a legal or human rights perspective, to seek to justify the poor outcomes of a few — the Public Trustee refers to a 'very small cohort' of 418 people in its *Public Trustee Response*, reproduced in Appendix 1 — on the basis that many others are benefitting from the Public Trustee's services.

## About this report

45. The early chapters of this report describe the role of the Public Trustee as an administrator, its fees and charges regime and its system of fee rebates that apply to administration clients. It is important to understand these aspects of the Public Trustee and its operations as they form the information foundation for the chapters that follow. The remainder of the report examines various aspects of the Public Trustee's operations — its investment policies and practices, the use of financial advice, and the operations of the Official Solicitor. The final chapter explores a number of factors — changes in the markets, changes in client profiles, the limitations of the legislation and other issues around oversight and transparency that have contributed to the Public Trustee's current practices and operations.

## The legislation

46. The review was undertaken and most of this report was written prior to the amendments to the *Guardianship and Administration Act* that commenced 30 November 2020. The amendments of that date had little relevance or impact on the legal issues generally examined in this report, although it is acknowledged that there were amendments to the General Principles (which did not materially alter the substances of the principles). Accordingly, the references to the *Guardianship and Administration Act* in the report are to the Act prior to 30 November 2020. Both sets of the General Principles (being those currently in force and those in force prior to 30 November 2020) are included in Appendix 3.

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<sup>11</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 11 January 2021, in response to final draft report, pp 1-2.



## Case studies

47. This report includes several de-identified case studies that show the lived experience of some Public Trustee administration clients and demonstrate the 'real world' impact of some Public Trustee policies and practices on their clients' financial and personal circumstances.
48. The names and other details of the people featured in the case studies have been changed to protect their privacy. These changes were also made to ensure that the Public Advocate complies with the requirement prohibiting publication of any information from guardianship and administration proceedings that identifies, or could lead to the identification of, any party to a proceeding.<sup>12</sup>
49. The Public Advocate's exploration of the lived experience of Public Trustee administration clients extended beyond the case studies presented in this report. Not all of the client experiences and material reviewed by the Public Advocate could be directly referred to in this report. There are a range of reasons for this. However, the Public Advocate thanks those people who referred their cases and experiences, or those of their family members or friends, for their courage and persistence in bringing their concerns forward. All of this information contributed to a better understanding of the issues.

## Data and figures

50. This report presents a large amount of financial and client data that was published by the Public Trustee in its Annual Reports or provided by the Public Trustee in response to the Public Advocate's Information Notices. The methods used for calculating or reporting some data has changed over time. For example, the calculation of the total number of administration clients has changed over time and now includes clients who are under administration, prisoners requiring estate and administration services, and people for whom the Public Trustee acts as a financial attorney.
51. When the writing of this report first commenced, the most recent publicly available Public Trustee data was for the year ended 30 June 2019. After the Public Trustee's Annual Report 2019-20 became available, where possible, data and figures have been updated using this source. There may be some instances where 2018-19 data is still presented in the report due to changes in accounting or reporting methods.
52. In early 2019, the Public Trustee commissioned a 'benchmarking report' to compare its fees and charges with those of State and Public Trustees in other Australian jurisdictions. The benchmarking report contained very useful information about the Public Trustee's clients, their asset profiles and the average fees and charges they paid, however it specifically excluded comparisons of fees for clients who own a residence and have low cash assets and income — the cohort of clients who were the original focus of this review. Accordingly, the use of data from the benchmarking report in this report should not be interpreted as endorsement of the fee comparisons included in the benchmarking report.

## Procedural fairness

53. The Public Advocate is required to provide procedural fairness to any person about whom any adverse information is included in a systemic advocacy report.<sup>13</sup> This obligation requires the Public Advocate to give the person an opportunity to make submissions about the adverse information, and if the Public Advocate still proposes to include the information in the report, must ensure the person's submissions or position are fairly stated in the report.<sup>14</sup>
54. To satisfy these obligations, each draft chapter of Public Advocate's report was provided to the Public Trustee for review. This process was for the purpose of clarifying and/or confirming the accuracy of information in the report, as well as providing the Public Trustee (both the

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<sup>12</sup> *Guardianship and Administration Act 2000* (Qld) s 114A(2).

<sup>13</sup> *Ibid* s 209A(3)(a).

<sup>14</sup> *Ibid* s 209A(3)(b).



person and the entity) with an opportunity to raise any concerns, views or other issues in relation to the content of the report or any adverse information it contains, before the report was published.

55. The Public Advocate considered the responses and views from the Public Trustee when finalising this report and is of the view they have been fairly represented in the report.
56. The Public Advocate provided the Public Trustee with a second opportunity to review the draft report for purposes of accuracy after the Public Trustee's original feedback was responded to.
57. The responses of the Public Trustee to the draft chapters of the report are published in full at Appendix 2. **The Public Trustee's further feedback** on the final draft report<sup>15</sup> is reproduced in full at Appendix 1. *The Public Trustee Response* document that was part of this feedback contains information about recent changes to Public Trustee policies and practices, many of which address, or go some way towards addressing, the recommendations in this report. While every effort has been made to fairly reflect the Public Trustee's views on these issues and the actions it has taken, due to the lateness of receipt of the final response document (11 January 2021), not all of those changes may be reflected in the text of this report. Accordingly, readers are encouraged to read the Public Trustee's letter and response document at Appendix 1.

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<sup>15</sup> The final feedback from the Public Trustee on this report included a letter dated 11 January 2021, with two attachments and a document titled, *The Public Trustee Response*.



# Chapter 2: Financial administration and the Public Trustee



58. To understand whether the Public Trustee is acting in its clients' interests, it is necessary to understand how administration works and how the Public Trustee operates, including its powers and duties.

## Financial administration

59. When a person does not have the capacity to make their own financial decisions, an attorney or administrator can be appointed to make financial decisions for them.<sup>16</sup> (The meaning of capacity is explained in 'Chapter 1: The review'.) An administrator is appointed to ensure that their financial needs are met, and their financial interests protected.<sup>17</sup>
60. The role of an administrator can be performed by family members, friends or supporters, or a professional trustee such as a trustee company or the Public Trustee.<sup>18</sup>
61. An administrator is given control over a person's money, property and assets, and can make financial decisions on behalf of the person for whom they are appointed.<sup>19</sup> Generally, a person cannot legally make any of their own financial decisions once they are placed under administration.<sup>20</sup> However, any person performing a function under the *Guardianship and Administration Act* including a person's administrator or guardian is required to support the person to participate in decisions, take their views and preferences into account and support them to be as self-reliant as possible.<sup>21</sup>
62. The responsibilities and obligations of administrators are set out in the *Guardianship and Administration Act*.<sup>22</sup> These are discussed below in the context of the Public Trustee as a person's administrator.
63. An administrator has significant power over the person under administration because, in most cases, they will have authority to make all of the financial decisions that the person could make themselves. This includes paying household bills, buying or selling property, running a business, entering into contracts, applying for government benefits, making business decisions, managing investments, and bringing or defending legal proceedings of a financial nature.
64. For some people, this high degree of control over their life can have a negative impact on their wellbeing by reducing their sense of control over their lives.<sup>23</sup> The Queensland Law Reform Commission has recognised that the appointment of an administrator is a 'serious intrusion into the person's right to individual autonomy'.<sup>24</sup>

## The Public Trustee

65. In 1916, the Public Trustee was established to provide a range of services to Queenslanders including the preparation of wills, administration of deceased estates, trust administration, and the management of the property of people who, through disability or injury, are unable to manage their own financial affairs. At the time of introduction of the legislation it was envisaged by the Premier that the Public Curator would deliver its services 'without expense to the taxpayers' and be 'self-supporting'.<sup>25</sup>

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<sup>16</sup> Ibid s 12(1)(a).

<sup>17</sup> Ibid s 12(1).

<sup>18</sup> Ibid (Old) s 14.

<sup>19</sup> Ibid s 33.

<sup>20</sup> *Bergmann v DAW* [2010] QCA 143.

<sup>21</sup> *Guardianship and Administration Act 2000* (Old) ss 11B, sch 1.

<sup>22</sup> Ibid.

<sup>23</sup> Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, 'Supported Decision-Making: A Viable Alternative to Guardianship?' (2013) 117 *Penn State Law Review* 1120.

<sup>24</sup> Queensland Law Reform Commission, *Assisted and substituted decisions: Decision-making by and for people with a decision-making disability*, Report No 49, (1996), cited in *Bergmann v DAW* [2010] QCA 143, para 12.

<sup>25</sup> Queensland Parliament, *Parliamentary Debates – Public Curator Bill*, 20 Oct 1915, 1415 (TJ Ryan, Hon).





66. In 2019-20, the Public Trustee:
  - provided administration services to 10,071 clients;<sup>26</sup>
  - made 24,462 wills;
  - managed 2,069 new deceased estates;
  - managed 4,394 trusts.<sup>27</sup>
67. The Public Trustee has 15 offices across Queensland, including its head office in Brisbane. In 2019-20, the Public Trustee employed the equivalent of 600 full-time employees.<sup>28</sup>
68. The Public Trustee can be appointed to make decisions for financial matters on behalf of people in several ways. These include being appointed by QCAT as a person's administrator,<sup>29</sup> or being nominated as a person's attorney under an enduring power of attorney.<sup>30</sup>
69. The Public Trustee is the largest administrator in Queensland.<sup>31</sup> The number of Public Trustee administration clients has increased by 20 percent since 2014-15 and is expected to increase further in the coming years due to a range of systemic pressures, demographic trends and changes within society.<sup>32</sup>
70. The Public Trustee provides a range of services to clients under administration, including:
  - allocating a trust officer to manage the client's finances and act as a point of contact for the client and their support network;
  - receiving money on behalf of the client and ensuring that all entitlements (such as Centrelink benefits and any income from rent or investments) are paid;
  - paying bills on behalf of the client (this can be some or all of the bills as agreed, including accommodation, utilities, registration, rates, and medical expenses);
  - developing a budget and providing allowances to the client as agreed in the budget, for example, accommodation, personal living expenses, groceries, clothing, Christmas and birthday allowances;
  - completing and lodging annual tax returns;
  - managing and maintaining client's real estate property including arranging annual inspections, dealing with local council or government requirements (e.g. paying rates), overseeing repairs and maintenance and organising insurance. If required, the Public Trustee will also arrange valuations and the sale of property;
  - managing other financial assets (such as shares);
  - preparing an investment plan and, when required, obtaining financial planning advice;
  - providing an annual statement of account showing the client's income, payments, liabilities and assets;
  - contacting creditors and arranging for any outstanding debts to be paid; and
  - identifying and attempting to resolve any unsettled legal issues.<sup>33</sup>
71. The *Guardianship and Administration Act* allows administrators, including the Public Trustee, to be reimbursed for any reasonable expenses incurred while acting as an administrator. The reimbursement of these costs can be paid from the accounts of the person under administration.<sup>34</sup>

<sup>26</sup> The Public Trustee of Queensland, *Annual Report 2019-20* p 5. This number comprised of 9,316 administration clients, 502 prisoners (who are not considered to have impaired capacity but are under a legal incapacity) and 253 clients for whom the Public Trustee is financial attorney.

<sup>27</sup> The Public Trustee of Queensland, *Annual Report 2019-20*. The number of trusts managed has only been published in the Public Trustee's annual reports since 2016-17.

<sup>28</sup> The Public Trustee of Queensland, *Annual Report 2019-20*.

<sup>29</sup> *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(ii).

<sup>30</sup> *Powers of Attorney Act 1998* (Qld) s 29(1)(b).

<sup>31</sup> The Public Trustee of Queensland, *About Financial Administration* (1 December 2020), <<https://www.pt.qld.gov.au/financial-administration/about-financial-administration>>.

<sup>32</sup> Public Advocate, *Decision-making support and Queensland's guardianship system*, April 2015, p.13 <[https://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0010/470458/OPA\\_DMS\\_Systemic-Advocacy-Report\\_FINAL.pdf](https://www.justice.qld.gov.au/__data/assets/pdf_file/0010/470458/OPA_DMS_Systemic-Advocacy-Report_FINAL.pdf)>.

<sup>33</sup> The Public Trustee of Queensland, *Easy Read Guide for Financial Management Customers* (1 December 2020) <<https://www.pt.qld.gov.au/financial-administration/guide-for-financial-management-customers>>; The Public Trustee of Queensland, *A guide to Personal Financial Administration: A guide for carers, families and support people* (November 2020) <[https://www.pt.qld.gov.au/media/1814/guide-for-financial-management\\_carers\\_brochure\\_dl\\_2020.pdf](https://www.pt.qld.gov.au/media/1814/guide-for-financial-management_carers_brochure_dl_2020.pdf)>.

<sup>34</sup> *Guardianship and Administration Act 2000* (Qld) s 47.



72. Under the *Public Trustee Act*, the Public Trustee can set and charge fees for the services it performs. The fees and charges must be reasonable having regard to the circumstances in which the service is provided.<sup>35</sup> The fees and charges regime employed by the Public Trustee is discussed in detail in 'Chapter 3: Fees and charges for administration'.

## Duties of administrators

73. As well as having extensive powers over a person, administrators have significant duties and obligations. The responsibilities and duties of the Public Trustee as an administrator stem from a variety of sources, including:
- the common law (which includes equitable principles);
  - legislation governing the duties and responsibilities of administrators and trustees; and
  - legislation prescribing the professional duties of lawyers and the ethical duties of public sector agencies.
74. It is also arguable, due to the significant role the Public Trustee plays in people's lives and in the broader Queensland community, that the Public Trustee is also accountable in terms of the public's expectations of its performance and conduct.

## Fiduciary duties

75. The Public Trustee is in a 'fiduciary relationship' with its administration clients.
76. The law recognises a number of relationships as being fiduciary relationships.<sup>36</sup> A fiduciary relationship can arise when some or all of the following circumstances apply:
- there is a relationship of confidence;
  - there is an inequality of bargaining power between the parties;
  - one party has given an undertaking to perform a task or fulfill a duty in the interests of another party;
  - one party has the authority to unilaterally exercise a discretion or power which may affect the rights or interests of another; and
  - one party is in a position of dependency or vulnerability that causes that party to rely on another.<sup>37</sup>
77. The High Court of Australia has described a fiduciary relationship in the following way:
- The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.<sup>38</sup>
78. Fiduciary relationships are not limited to circumstances involving people with impaired decision-making capacity. For example, a fiduciary relationship exists between solicitors and their clients. That relationship imposes a number of legal duties on the 'fiduciary' — the person who has the authority and power in the relationship. Accordingly those legal duties also apply to the Public Trustee when it is acting as trustee or administrator for clients. The fundamental basis for fiduciary duties in all Australian jurisdictions is the obligation of loyalty to a person who is dependent on another.<sup>39</sup> A fiduciary is under an obligation to act in the interests of that other person, who by the very nature of the relationship is in a position of vulnerability or dependency. Fiduciary duties are there to protect the vulnerable party to the relationship from exploitation and harm.

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<sup>35</sup> *Public Trustee Act* 1978 (Qld) s 17.

<sup>36</sup> Relationships between trustee and beneficiary, agent and principle, solicitor and client, directors and their company as well as partnerships. See *Breen v Williams* (1996) 186 CLR 71 at 92 and 107.

<sup>37</sup> *Breen v Williams* (1996) 186 CLR 71 at 107.

<sup>38</sup> *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96-97.

<sup>39</sup> Hepburn, Samantha, *Principles of Equity and Trusts*, 5th Edition, 2016, The Federation Press, p123.



79. It is clear from the duties and obligations imposed by the *Guardianship and Administration Act* that financial administrators' duties are fiduciary in nature. Accordingly, when the Public Trustee is acting as administrator for people with impaired decision-making capacity it is in a fiduciary relationship with those people.<sup>40</sup> The Public Trustee<sup>41</sup> and QCAT<sup>42</sup> have acknowledged the existence of a fiduciary relationship between the Public Trustee and its administration clients.



### Duties of a fiduciary

There are two fundamental rules that apply to a fiduciary:

1. the **'no conflict rule'** — the fiduciary must not put themselves in a position where there is a conflict between their personal interests and the interests of the person to whom they owe the duty; and
2. the **'no profit rule'** the fiduciary must not use their position to make an unauthorised profit and must account for any benefit or gain.<sup>43</sup>

80. These fiduciary duties are particularly important in the relationship between the Public Trustee and its administration clients because of the level of influence and dependency in that relationship, and the power and control the Public Trustee has over its clients' property, rights and interests.

## Statutory duties

81. The Public Trustee has significant duties and obligations imposed by legislation. The main pieces of legislation that dictate the powers and obligations of the Public Trustee are the:
- *Public Trustee Act 1978* (Qld);
  - *Public Trustee Regulation 2012* (Qld);
  - *Trusts Act 1973* (Qld);
  - *Guardianship and Administration Act 2000* (Qld); and
  - *Powers of Attorney Act 1998* (Qld).
82. When acting as an administrator under the *Guardianship and Administration Act* or an attorney under an enduring power of attorney, the Public Trustee must:
- apply the General Principles<sup>44</sup> (see Appendix 3);
  - exercise power honestly and with reasonable diligence to protect the person's interests;<sup>45</sup>
  - act in accordance with the terms of the appointment;<sup>46</sup>
  - keep records of transactions and produce them for QCAT if required;<sup>47</sup>
  - keep property separate from the person's property;<sup>48</sup> and
  - avoid conflict transactions except with QCAT's authority.<sup>49</sup>

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<sup>40</sup> This is also contemplated by the *Public Trustee Act 1978* (Qld) s 27(1) which provides: "where any person or corporation may be appointed or act as a trustee, executor, administrator, next friend, guardian, committee, agent, attorney, liquidator, receiver, manager or director or to or in any other office of a fiduciary nature the public trustee may be so appointed or may so act".

<sup>41</sup> See, for example, RCP [2016] QCAT 278 at [11].

<sup>42</sup> See, for example, SPM [2017] QCAT 75 at [15].

<sup>43</sup> *Breen v Williams* (1996) 186 CLR 71 at 113.

<sup>44</sup> *Guardianship and Administration Act 2000* (Qld) ss 11, 34; *Powers of Attorney Act 1998* (Qld) s 76.

<sup>45</sup> *Guardianship and Administration Act 2000* (Qld) s 35; *Powers of Attorney Act 1998* (Qld) s 66.

<sup>46</sup> *Guardianship and Administration Act 2000* (Qld) s 36; *Powers of Attorney Act 1998* (Qld) s 67.

<sup>47</sup> *Guardianship and Administration Act 2000* (Qld) s 49; *Powers of Attorney Act 1998* (Qld) s 85.

<sup>48</sup> *Guardianship and Administration Act 2000* (Qld) s 50; *Powers of Attorney Act 1998* (Qld) s 86.

<sup>49</sup> *Guardianship and Administration Act 2000* (Qld) s 37; *Powers of Attorney Act 1998* (Qld) s 73. Note under these sections a conflict transaction is defined to mean a transaction where there may be a conflict or which results in conflict between the administrator's duty to the adult on the one hand, and on the other either the interests of the administrator (or a person with a close family or business relationship to the administrator), or another duty of the administrator.



## Prudent person rule

83. The Public Trustee has the power to invest the funds of clients for whom it acts as administrator or as attorney. The Public Trustee invests clients' funds because administrators are expected to make the best use of those assets, ensuring they last as long as reasonably possible, while also supporting their client's lifestyle.
84. The *Guardianship and Administration Act* requires administrators, including the Public Trustee, to invest client funds in particular ways, as if these investments were being made under certain provisions of the *Trusts Act*.<sup>50</sup> This requires a professional trustee (such as the Public Trustee), to 'exercise the care, diligence and skill a prudent person engaged in that profession ... would exercise in managing the affairs of other persons'.<sup>51</sup> This statutory provision restates an equitable principle known as the 'Prudent Person Rule'. The Prudent Person Rule applies to all investments made by trustees and financial administrators, including the Public Trustee. (The Prudent Person Rule, and the Public Trustee's interpretation and application of the rule is explored in 'Chapter 5: Investment practices').
85. The *Trusts Act* preserves the rules and principles of law or equity that apply when a trustee is investing a person's money. That may include:
- exercising powers in the best interests of all those who would benefit from the trust;
  - investing funds in investments that are not speculative or hazardous;
  - acting impartially towards beneficiaries and between different classes of beneficiaries; and
  - obtaining advice.<sup>52</sup>
86. The *Trusts Act* also contains a long and detailed list of considerations for trustees when investing client funds<sup>53</sup> and provides that a trustee may obtain 'independent and impartial advice reasonably required for the investment of trust funds or the management of the investment from a person whom the trustee reasonably believes to be competent to give the advice'.<sup>54</sup> If advice is obtained, the trustee 'must consider' the advice, and may pay for the advice using client's funds.<sup>55</sup>

## Professional ethical duties

87. The Public Trustee employs staff from different professions to provide professional services to clients, for example, tax accountants and lawyers.<sup>56</sup> These professional staff have duties arising from:
- their contract of employment;
  - the common law and legislation; and
  - ethical codes set and overseen by their professional regulatory bodies.
88. During this review, concerns were raised with the Public Advocate about the practices of, and the fees charged to clients for the services of, the Official Solicitor to the Public Trustee. The Office of the Official Solicitor provides legal advice to the Public Trustee and advice and representation for administration clients who are subsequently billed for the legal work undertaken.
89. These concerns prompted questions about what legal professional and ethical obligations apply to lawyers working for the Office of the Official Solicitor to the Public Trustee. They also raised questions about whether office policies and practices, provide adequate professional guidance and support to legal staff to ensure their work meets appropriate professional

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<sup>50</sup> Section 51 of the *Guardianship and Administration Act* requires administrators to only invest in authorised investments that are defined under that Act as being an investment under Part 3 of the *Trusts Act*.

<sup>51</sup> *Trusts Act* 1973 (Qld) ss 22(1)(a), 22(3). The trustee also 'must, at least once each year review the performance, individually and as a whole, of trust investments').

<sup>52</sup> *Trusts Act* 1973 (Qld) s 23.

<sup>53</sup> *Ibid* s 24 (1).

<sup>54</sup> *Ibid* s 24(2).

<sup>55</sup> *Ibid* s 24 (2).

<sup>56</sup> *Public Trustee Act* 1978 (Qld) s 16(1).



standards and protect clients' interests. (The Office of the Official Solicitor is discussed in 'Chapter 7: The Official Solicitor'.)

## General duty of care, skill and diligence

90. Professionals, such as lawyers, are under a duty to exercise the reasonable care and skill expected of a person in that profession. This duty arises both at common law<sup>57</sup> and under state civil liability legislation.<sup>58</sup> The particular practices or conduct of the profession, whether established by a professional regulatory body or from common practice, inform the standard of care expected in each case.<sup>59</sup>

## Professional and ethical duties of lawyers

91. Under Australian law the solicitor-client relationship is recognised as a fiduciary relationship,<sup>60</sup> on the basis that the client places confidence, good faith, reliance and trust in the solicitor whose advice is sought. To practice as a lawyer, a person must be 'admitted' as a legal practitioner.<sup>61</sup> This involves making a formal oath or affirmation of allegiance, and that the person will conduct themselves truly and honestly in the practice of a lawyer of the Supreme Court, according to the law and to the best of the person's knowledge and ability.
92. This reflects the paramount duties that a lawyer owes to the Court and to the administration of justice. These duties to the Court and to the practice of the law prevail over all other duties of a lawyer, where there is any inconsistency with any other duty.<sup>62</sup> Courts and tribunals have the power to regulate the conduct of lawyers,<sup>63</sup> and there is a significant body of common law about the standards of conduct expected of lawyers. These professional duties exist alongside duties arising from other laws and standards, including in negligence, contract law, equity and consumer protection legislation.
93. Lawyers' duties are also regulated through uniform national laws (which are reflected in State and Territory legislation), and professional conduct rules (developed by the Law Council of Australia and adopted in most States and Territories, including Queensland). These include the duties outlined in the *Legal Profession Act 2007* (Qld), the *Barristers' Conduct Rules 2018*<sup>64</sup> and the *Australian Solicitors Conduct Rules 2012*<sup>65</sup> which regulate the practice and duties of the legal profession in Queensland.
94. The duties of lawyers as described above are generally considered to apply to lawyers working in the private sector. Lawyers working for government are not considered to be bound by all of the duties that apply to lawyers in private practice. This is because government legal officers provide legal services to the government rather than to private citizens.
95. There is some question about whether lawyers working for the Official Solicitor to the Public Trustee are 'government legal officers'.<sup>66</sup> The Public Trustee has, for some time, taken the view that all of its lawyers are government legal officers and the broader professional duties of legal practitioners do not apply to them, including lawyers' obligations to clients about disclosing their fees and charges and the requirement that they be reasonable. It is the Legal Services Commissioner's view that her office has only 'qualified jurisdiction over government legal officers'.<sup>67</sup>

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<sup>57</sup> *Rogers v Whittaker* (1992) 175 CLR 479.

<sup>58</sup> *Civil Liability Act 2003* (Qld).

<sup>59</sup> *CGU Insurance Ltd v Porthouse* (2008) 235 CLR 103 at para 72.

<sup>60</sup> See, for example, *Breen v Williams* (1986) 186 CLR 71.

<sup>61</sup> *Legal Profession Act 2007* (Qld) s 24.

<sup>62</sup> *Ibid* s 38(i); *Giannarelli v Wraith* (1988) 165 CLR 543 at 556 per Mason CJ.

<sup>63</sup> *Legal Profession Act 2007* (Qld) s 456.

<sup>64</sup> *Legal Profession (Barristers Rules) Notice 2018* (Qld), commenced 23 February 2018.

<sup>65</sup> *Legal Profession (Australian Solicitors Conduct Rules) Notice 2012* (Qld), commenced 1 June 2012.

<sup>66</sup> *Legal Profession Act 2007* (Qld) s12.

<sup>67</sup> Letter from the Legal Services Commissioner to the Public Advocate, 7 February 2020, p 3.





96. When the Official Solicitor's lawyers provide advice relating to Public Trustee administration clients, they are providing that advice to the Public Trustee as the person under administration. Accordingly, the lawyers employed by the Official Solicitor are providing legal advice and representation to administration clients who are private citizens (although they may have lost their legal capacity).
97. These issues, and the views of the Legal Services Commission about the status of lawyers employed by the Official Solicitor are explored in 'Chapter 7: The Official Solicitor'.

## Public sector ethical duties

### Code of Conduct for the Queensland Public Sector

98. The *Code of Conduct for the Queensland Public Sector* (Code) applies to the Public Trustee.<sup>68</sup> All employees of the Public Trustee, including the Office of the Official Solicitor, are required to comply with the four ethics principles that are fundamental to good public administration.<sup>69</sup> Those principles are:
- integrity and impartiality;
  - promoting the public good;
  - commitment to the system of government; and
  - accountability and transparency.
99. The Code describes these principles as 'essential to robust public sector integrity and accountability' and sets out standards of conduct to support the principles. The Code requires public sector entities to promote the principles and standards in their internal and external relationships.<sup>70</sup> It also acknowledges that the standards 'may not cover every possible scenario', and mandates a commitment to uphold 'the intention and spirit of the principles and values'.<sup>71</sup>
100. A full list of principles, values and standards can be found in the Code of Conduct which is published online.<sup>72</sup>

### Model Litigant Rules

101. The Queensland Government, and all public sector agencies, are required to comply with the Model Litigant Principles, issued by Cabinet.<sup>73</sup> The Model Litigant Principles recognise that the power of the State is to be used for the public good and in the public interest.<sup>74</sup> The principles require State and public sector agencies to follow a number of principles of fairness and firmness and to support alternative dispute resolution.<sup>75</sup>

## National Standards for Financial Managers

102. The Public Trustee has also committed to complying with the National Standards for Financial Managers, developed by the Australian Guardianship and Administration Council, of which the Public Trustee and the Public Advocate are members. The National Standards outline the levels of service that financial managers should provide when they are managing a person's financial affairs. The standards complement legislation, policies, principles and practices,

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<sup>68</sup> *Public Sector Ethics Regulation 2010* (Qld) sch.

<sup>69</sup> *Public Sector Ethics Act 1994* (Qld) ss 4(2), 5, Dictionary; *Public Sector Ethics Regulation 2010* (Qld) sch.

<sup>70</sup> Public Service Commission, *Code of Conduct for the Queensland Public Service*, Queensland Government, Brisbane, 2010, p 3. <<https://www.qld.gov.au/gov/code-conduct-queensland-public-service>>.

<sup>71</sup> *Ibid*.

<sup>72</sup> Public Service Commission, *Code of Conduct for the Queensland Public Service* <<https://www.qld.gov.au/gov/code-conduct-queensland-public-service>>.

<sup>73</sup> Department of Justice and Attorney-General, *Model Litigant Principles* (revised as at 4 October 2010), last updated, 21 March 2019, <<https://www.justice.qld.gov.au/justice-services/legal-services-coordination-unit/legal-service-directions-and-guidelines/model-litigant-principles>>.

<sup>74</sup> *Ibid* preamble.

<sup>75</sup> *Ibid* principles 1, 2 and 3.





codes of professional conduct and ethical behaviour and other duties of financial managers.<sup>76</sup>

103. The National Standards cover a range of duties including:

- providing information to the person;
- **advocating the person's views and right to be involved in financial decision-making;**
- making financial decisions, protecting the assets of the person and investing the person's money; and
- protecting and respecting the person's legal rights.<sup>77</sup>

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<sup>76</sup> Australian Guardianship and Administration Council, *National Standards for Financial Managers* (14 October 2019), <[https://www.agac.org.au/images/stories/nat\\_stds\\_fin\\_mgrs.pdf](https://www.agac.org.au/images/stories/nat_stds_fin_mgrs.pdf)>.

<sup>77</sup> Ibid.



# Chapter 3: Fees and charges for administration



104. As already noted, this review was initiated because of concerns raised by members of the public and advocates about the number of different Public Trustee fees and charges and the level of those fees, charged to administration clients. There were fees that seemed to overlap or duplicate each other and a lack of clarity about the services clients could expect for the fees they paid. There were also concerns about whether the fees were reasonable considering the level of fees being charged relative to the clients' assets and income, the services provided, and the effect the fees were having on some clients' financial outcomes.
105. This chapter explains the range of fees and charges that the Public Trustee charges its administration clients and provides some necessary background for the next chapter, which examines the Public Trustee's scheme of fee rebates, hardship provisions, and its Community Service Obligations.
106. The current system of Public Trustee fees and charges for administration clients has been in place since December 2001.<sup>78</sup> The Public Trustee's self-funded operations are supported by its fees and charges regime along with other income it earns from interest on clients' investments and on its large financial reserves (discussed in 'Chapter 5: Investment practices').
107. The Public Trustee's fees are set annually via a process involving the tabling of a Public Trustee *Fees and Charges Notice* in the Queensland Parliament and placing a notice in the Queensland Government Gazette.<sup>79</sup>
108. The Public Trustee *Fees and Charges Notice* allows for a number of fees to be charged to administration clients. These fees include:
- A Personal Financial Administration Fee;
  - An Asset Management Fee;
  - A Real Estate Property Fee; and
  - Additional Service Fees.
109. In addition to the fees the Public Trustee can charge under the *Fees and Charges Notice*, the *Guardianship and Administration Act* allows it to recover all reasonable expenses incurred on behalf of administration clients.<sup>80</sup> Additional expenses and fees that the Public Trustee charges clients that are examined in this chapter include:
- Outlays, including incidental outlays, fees for financial advice and fees for other professional services, including legal fees charged by the Official Solicitor, as well as fees for property valuations and pest and building inspections; and
  - Additional management fees on the Public Trustee's Growth Trust investment fund.
110. Each of these fees is discussed in turn below.

## Personal Financial Administration Fee

111. As seen in Table 2, the Public Trustee's Personal Financial Administration Fee is based on where the client lives, how their income is paid and the level of support and personal contact the person receives from the Public Trustee. If the person lives in an aged care facility with their care funded by the Commonwealth Government and the person's income is paid to the facility, the amount of contact with the Public Trustee may be quite minimal and the fee charged is lower. However, if the client lives in the community and potentially requires more assistance and contact with the Public Trustee, the fee charged to the client is higher (see Levels 4, 5 and 6 in Table 2).<sup>81</sup>

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<sup>78</sup> The Public Trustee of Queensland, *Annual Report 2002-03*, p.10.

<sup>79</sup> Queensland Government, *Public Trustee of Queensland (Fees and Charges Notice) No. 1, 2020*, Gazette No. 56, 26 June 2020, p 443.

<sup>80</sup> *Guardianship and Administration Act 2000* (Qld) s 47.

<sup>81</sup> Queensland Government, *Public Trustee of Queensland (Fees and Charges Notice) No. 1, 2020*, Gazette No. 56, 26 June 2020, sch 4.



112. The Personal Financial Administration Fee ranges from \$1,302.40 per year 'for a client residing in a commonwealth funded aged care facility and their main source of income is paid to the facility' (Level 1), to \$9,127.95 per year for a 'client receiving personal financial administration assistance from the public trustee and contact with the public trustee is more than once per fortnight' (Level 6).<sup>82</sup>

Table 2: 2019-20 Personal Financial Administration Fee service levels

Service level	Description	Annual fee (incl. GST)
1	Client resides in a commonwealth funded aged care facility or hospital and their main source of income is paid to the facility.	\$1,302.40
2	Client resides in a commonwealth funded aged care facility or hospital and their main source of income is not paid to the facility.	\$2,087.95
3	Client is supported in the community by Disability Services Queensland through the alternate living service or by a non-government organisation through a management agreement.	\$2,606.15
4	Client is living in the community either independently or with the support of family/friends who assist the client with their day to day personal financial administration.	\$3,911.30
5	Client is living in the community with personal financial administration assistance from the public trustee and/or day to day assistance provided by support workers. Contact with the public trustee is once per fortnight or less.	\$6,519.05
6	Client is receiving personal financial administration assistance from the public trustee and contact with the public trustee is more than once per fortnight	\$9,127.95

Source: Schedule 4 Personal Financial Administration Fee, Public Trustee (Fees and Charges Notice) (No. 1) 2020, Gazette No. 56, 26 June 2020.

113. In 2017-18, 58 percent of Public Trustee administration clients were charged Personal Financial Administration Fees at Level 5 and 6, with 4,434 (or 47 percent) in Level 5 and 1,019 (11 percent) in Level 6. This is consistent with the high proportion of people with impaired decision-making capacity living fairly autonomous lives in the community. Of the remaining Personal Financial Administration Fees charged to clients, Level 2 was the most prevalent with 3,013 clients (or 32 percent) being charged that fee. This is consistent with the Public Trustee being appointed administrator for a large number of older people residing in aged care.<sup>83</sup>
114. The main source of income for many of the Public Trustee's administration clients is the Disability Support Pension (DSP), the aged pension or a payment from a superannuation fund. The amount of the Personal Financial Administration Fee can be a significant financial burden for people on these types of limited incomes.

<sup>82</sup> Ibid.

<sup>83</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 5 April 2019, in response to Information Notice No.1, confidential attachment, p 16.





## Personal Financial Administration Fee is 37 percent of disability support pension

A simple way to assess the relative financial impact of a fee for a particular group of people is to assess it as a proportion of their income. The Level 6 Personal Financial Administration Fee, the highest level of that fee at \$9,127.95, equates to over 37 percent of the single-person rate of the DSP.<sup>84</sup> This is arguably a very large expense for a person living on the DSP. This level of fee would seriously affect their ability to pay for their accommodation and other living expenses without eroding their savings or other assets.

The DSP for singles (including supplements) is currently \$944.30 per fortnight.<sup>85</sup> Almost seven DSP payments (3.5 months of payments) would be needed for a person to pay the annual Level 5 fee. Those people on Level 6 would need almost ten DSP payments to pay their fee, representing 5 months of income.

115. The Public Trustee has a system of fee rebates for clients with low levels of assets (see discussion in 'Chapter 4: Community Service Obligations and fee rebates'). Many clients under administration have modest assets such as a small amount of superannuation, property or savings. Even though many clients receive some fee rebates, for those on a limited income who are not eligible for such a rebate the Personal Financial Administration Fee is a significant burden which can result in a relatively rapid decrease in their cash assets. This is particularly the case for people on low incomes who live in their own home. While the value of a person's principal place of residence is not taken into account to calculate the Asset Management Fee payable, it is included in the total value of client assets for calculating eligibility for fee rebates. For those with even a modest dwelling, the value of their house will make them ineligible for a fee rebate, resulting in them paying substantial fees, quickly depleting their usually small cash holdings and reducing their financial resilience.<sup>86</sup> (see 'Chapter 4 Community Service Obligations and fee rebates' for a detailed discussion of these issues).
116. It is also concerning that the structure of the Personal Financial Administration Fee operates in such a way that Public Trustee clients who are living more autonomous lives in the community and more actively exercising their personal agency are paying higher fees for the privilege. This outcome is inconsistent with the General Principles in the *Guardianship and Administration Act* (reproduced in Appendix 3) that agencies and individuals exercising functions under the Act are required to apply, including:

### 5 Participation in community life

The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.

### 6 Encouragement of self-reliance

The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social emotional and intellectual potential and to become as self-reliant as practicable, must be taken into account.

<sup>84</sup> Australian Government Services Australia, *Payment Rates (Disability Support Pension)*, 2020 <<https://www.servicesaustralia.gov.au/individuals/services/centrelink/disability-support-pension/how-much-you-can-get/payment-rates>>.

<sup>85</sup> Ibid.

<sup>86</sup> Financial resilience is being able to 'bounce back' from a financial shock. Things that help people's financial resilience include income, savings, a willingness to seek financial advice, connections with family and friends, support from community and government organisations and access to appropriate banking products like credit and insurance. See Centre for Social Impact webpage, *Financial Resilience in Australia* (12 December 2017) <<https://www.csi.edu.au/financialresilience/>>.



- 7 Maximum participation, minimal limitations and substituted judgment
  1. An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.
  2. Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.
  3. So, for example—
    - the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and
    - to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account ...<sup>87</sup>

117. The charging of significantly higher fees for administration clients who live in the community and engage more frequently with the Public Trustee cannot be viewed as encouraging or supporting them to develop self-reliance or participate in community life and decisions affecting their lives. The fee structure is likely to have the reverse effect for this client group, especially considering the impact of the fees on clients whose incomes are limited. The proportional impact of the fees on their available income is likely to limit their ability to engage in social and community activities.

## Asset Management Fee

118. Administration clients are also charged an Asset Management Fee<sup>88</sup> for the Public Trustee to manage their assets. This fee is calculated on the value of clients' assets, excluding the person's principal place of residence, personal and household items and motor vehicles. Annual Asset Management Fees range between \$196 to manage assets valued between \$5,000 and \$10,000, to \$13,438 to manage assets in excess of \$2.5M. Clients with assets of less than \$5,000 do not pay an Asset Management Fee (see Table 3).

Table 3: 2019-20 Asset Management Fee service levels

Service Level	Minimum value of assets (\$)	Maximum value of assets (\$)	Annual fee (\$) (including GST)
1	0	5,000	Nil
2	5,001	10,000	196.80
3	10,001	30,000	294.15
4	30,001	50,000	594.75
5	50,001	100,000	791.90
6	100,001	200,000	1,284.45
7	200,001	300,000	1,974.10
8	300,001	500,000	2,767.45
9	500,001	750,000	3,952.30
10	750,001	1,000,000	5,927.90
11	1,000,001	1,500,000	7,706.50
12	1,500,001	2,000,000	9,582.25
13	2,000,001	2,500,000	11,557.85
14	>2,500,000		13,438.75

Note: The value of real estate property or other place of residence, motor vehicles, household furniture, effects, chattels and personal jewelry is excluded from the calculation of the value of assets for determining the level of the asset management fee payable.

Source: Schedule 6 Asset Management Fee, Public Trustee (Fees and Charges Notice) (No. 1) 2020, Gazette No. 56, 26 June 2020.

<sup>87</sup> *Guardianship and Administration Act 2000* (Old), sch 1. Note: amendments to the *Guardianship and Administration Act* that commenced on 30 November 2020 have amended the General Principles, but do not materially change their effect.

<sup>88</sup> Queensland Government, *Public Trustee of Queensland (Fees and Charges Notice) No. 1, 2020*, Gazette No. 56, 26 June 2020, sch 4.





119. In 2017-18, 55 percent of the Public Trustee's clients were on Asset Management Fee levels 3 and below, with average assets of \$20,000 or less.<sup>89</sup>
120. A number of issues arise from fees calculated this way. The first is that the amount of the fee is based on the value of the clients' assets rather than the amount or complexity of the work undertaken to manage them. Many Public Trustee administration clients have a narrow range of assets that are managed very conservatively and their investment arrangements vary little from year to year. Once a decision is made about how best to invest these assets, there is little need for on-going oversight (unless there are disruptions in the market or changes in the clients' individual circumstances). Once client assets are initially invested, it is difficult to determine what services are being delivered on an on-going basis for the Asset Management Fee charged annually. (For further details about the investment guidelines applied by the Public Trustee see 'Chapter 5: Investment Practices'.)
121. Another issue is the way the Public Trustee calculates the Asset Management Fee. The fee is calculated on client assets such as superannuation that is managed by third party superannuation funds and for which clients are also paying a management fee to their fund (see case study 2, the case of Ella as an example).
122. Similar to the asset test applied by Centrelink for DSP eligibility, the Public Trustee does not include the value of a client's principal place of residence in its assessment for the Asset Management Fee. However, unlike Centrelink, the Public Trustee includes clients' superannuation in this calculation. A single person is eligible for the DSP if they have assets of less than \$268,000, excluding their home and superannuation.<sup>90</sup> Considering that Centrelink's financial eligibility requirements are not usually regarded as generous, the Public Trustee's fees, especially for clients receiving very low incomes such as a pension, appear to be high and likely to cause significant financial hardship.

## Real Estate Property Fee

123. In addition to the Asset Management Fee, the Public Trustee also charges an annual Real Estate Property Fee,<sup>91</sup> which is currently \$979.90, and is charged for each real estate property and 'other place of residence' owned by a client. The fee is fully rebated for clients' place of residence. The Public Trustee applies the fee to property that is not usually legally considered to be 'real estate property' such as caravans and campervans. This fee is charged annually for each 'property' regardless of its value.<sup>92</sup>

## Additional Service Fees

124. Administration clients can also be charged an Additional Service Fee which may be occasionally charged where a person needs help with the collection or payment of considerable debts, providing instructions or other information in relation to legal services,<sup>93</sup> or to attend to 'complex financial matters such as dealing with overseas authorities, buying or selling assets outside of Queensland, or administering complex assets and liabilities such as a business'.<sup>94</sup>

<sup>89</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 5 April 2019, in response to Information Notice No.1, confidential attachment, p 23.

<sup>90</sup> Australian Government Services Australia, Assets, (1 July 2020)

<<https://www.servicesaustralia.gov.au/individuals/services/centrelink/disability-support-pension/who-can-get-it/non-medical-rules/income-and-assets-tests/assets>>.

<sup>91</sup> Queensland Government, *Public Trustee of Queensland (Fees and Charges Notice) No. 1, 2020*, Gazette No. 56, 26 June 2020, ss 14(3), sch 6.

<sup>92</sup> Ibid; The Public Trustee of Queensland, *Fees and charges for financial management* (22 October 2020)

<<https://www.pt.qld.gov.au/financial-administration/fees-and-charges/>>.

<sup>93</sup> The Public Trustee of Queensland, *Fees and charges for financial management* (22 October 2020)

<<https://www.pt.qld.gov.au/financial-administration/fees-and-charges/#assetmanagement>>.

<sup>94</sup> The Public Trustee of Queensland, *A Guide to Personal Financial Administration* (1 January 2020)

<[https://www.pt.qld.gov.au/media/1814/guide-for-financial-management\\_carers\\_brochure\\_dl\\_2020.pdf](https://www.pt.qld.gov.au/media/1814/guide-for-financial-management_carers_brochure_dl_2020.pdf)> p 20.



125. It is noted that the examples cited on the Public Trustee's website about when this fee would be charged do not reflect the circumstances identified during this review when this fee was charged. This review identified a number of cases where the Additional Service Fee was charged for relatively ordinary and predictable activities on clients' accounts, such as reviewing a building report. In a case reviewed, a \$162 Additional Service Fee was charged to the client in addition to the \$385 the client paid for the building and pest inspection report and an additional \$99 for a smoke alarm test.
126. It is difficult to understand how such a fee could be justified for the time involved in reading the building and pest inspection reports when the client has already been charged an Asset Management Fee.

## Outlays

127. The Public Trustee also applies a range of charges that are described as 'outlays', which can 'relate to specialised work carried out on the person's behalf' including professional fees for tax agents, valuers and stockbrokers, the cost of any legal proceedings and expenses such as photocopying, postage, or phone calls.<sup>95</sup>
128. The Public Trustee client files that were examined by the Public Advocate showed a range of charges for outlays that include fees for necessary professional services, valuations, pest and property inspections, all of which would generally be regarded as necessary fees and expenses to maintain and protect clients' property and financial interests. However, there are a range of other fees that raise questions about whether incurring those costs is prudent on the part of a trustee and can be ethically and reasonably justified. These outlays include:
- fees for incidental outlays;
  - fees for external financial advice; and
  - certain Official Solicitor fees.

## Fees for incidental outlays

129. These are general fees for postage, faxes, phone calls, photocopying, etc. which are charged annually to clients. Until recently, these fees and the formula for calculating them were not publicly available. In correspondence in 2017 to the representative of a former administration client, the Public Trustee advised the 'charge is calculated using a formula of the average expenses incurred, based on the number of transactions processed, during the period covered by the statement'.<sup>96</sup> The letter went on to state '[s]olicitors and trustee companies providing similar services also recover these expenses by making a similar charge'.<sup>97</sup> The Public Trustee charged a fee of \$260 for incidental outlays for a period of just under 6 months that the client was under administration.<sup>98</sup>
130. The Public Advocate has sighted other correspondence from the Public Trustee, explaining to their client that the outlays included 'charges for out-of-pocket expenses like postage, telephone calls, faxes and photocopying'.<sup>99</sup>
131. The Public Advocate has also seen Public Trustee financial statements where clients have been charged up to \$390 per year for incidental outlays.<sup>100</sup>

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<sup>95</sup> The Public Trustee of Queensland, *Fees and charges for financial management* (22 October 2020) <<https://www.pt.qld.gov.au/financial-administration/fees-and-charges/>>.

<sup>96</sup> Letter from the Public Trustee of Queensland to advocacy organisation regarding former Public Trustee client (de-identified), 8 August 2017, p 3.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Letter from the Public Trustee of Queensland to Public Trustee client (de-identified), 23 August 2018, p 2.

<sup>100</sup> The Public Trustee of Queensland, *Statement of Transactions for client 'Ella', case study 2*.



132. Lawyers in Queensland have not been permitted to charge a general fee for incidental outlays for many years. The Legal Services Commission issued guidelines about the charging of outlays and disbursements in June 2006<sup>101</sup> and updated them in April 2019. The current regulatory guide (which essentially re-states the original guideline) states:

... In our view ... such items [postage, stationery, photocopying, printing, facsimile and email charges] should only be billed to clients as outlays or disbursements if they are capable of and have been accurately costed.<sup>102</sup>

133. As noted earlier, like the lawyer-client relationship, the Public Trustee is in a fiduciary relationship with its clients. As a fiduciary, the Public Trustee should always act in its clients' interests and only charge outlays that are actual disbursements.
134. The Public Trustee has recently published new information on its website about its fees for incidental outlays.<sup>103</sup> It states that the fees are to cover outlays to 'run and maintain our systems as well as photocopying, postage and phone call costs'. Those fees range from \$31 per year for up to 55 'transactions' to \$193 for 221 or more transactions. The Public Advocate welcomes publication of incidental outlays costs and the apparent reduction in those costs, compared with previous years. However, concerns remain about whether it is appropriate for the Public Trustee to seek to recover 'outlays' for 'running and maintaining systems', when law firms are not entitled to charge clients for practice overheads as if they were outlays or disbursements.<sup>104</sup>

## Fees for financial advice

135. The Public Trustee has a contractual arrangement with a single external provider of financial advice services (the 'financial advisor') to provide financial advice services to Public Trustee clients. The fees for this financial advice are regarded by the Public Trustee as an expense, charged to administration clients as outlays.<sup>105</sup>
136. The Public Trustee obtains annual financial advice from its preferred provider of financial advice services to manage the assets of most administration clients with 'complex assets'.<sup>106</sup> In February 2020, about 1,500 of the Public Trustee's approximately 9,500 clients under financial management had what would be considered 'complex assets' by the Public Trustee because they had superannuation, shares, managed funds and annuities.<sup>107</sup>
137. New or existing clients with investable assets (that is, assets in a form such as cash, that can be invested) under \$150,000 and no complex assets are not referred for financial advice. Their assets are managed in line with the Public Trustee's 'Primary Investment Strategy' (discussed in 'Chapter 5: Investment practices').
138. New or existing clients with investable assets between \$150,000 and \$450,000 and no complex assets will be automatically referred for financial advice. However, this will only happen once, after which their funds will be managed according to the Public Trustee's Primary Investment Strategy.
139. Clients who have complex assets, and clients with investable assets over \$450,000, are referred for financial advice every year. The Public Trustee has advised that it exercises discretion about referring clients with complex assets under \$5,000 (for example, superannuation) for financial advice, and that decisions about whether to obtain external

<sup>101</sup> *Legal Profession (Solicitors) Rule 2007*, version 1, Appendix 1 – Legal Services Commission's Guidelines – Charging Outlays and Disbursements.

<sup>102</sup> Legal Services Commission – *Regulatory Guide 1 – Charging Outlays and Disbursements – April 2019* (Version 3), pp 2-3.

<sup>103</sup> The Public Trustee of Queensland, *Fees and charges for trust management – incidental outlays* (22 October 2020) <<https://www.pt.qld.gov.au/other-services/trusts/fees-and-charges/#incidentaloutlays>>.

<sup>104</sup> Legal Services Commission – *Regulatory Guide 1 – Charging Outlays and Disbursements – April 2019* (Version 3), pp 2-3.

<sup>105</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 19 May 2020, responding to draft chapters 1-4, p 2.

<sup>106</sup> The Public Trustee of Queensland, *Financial Management Manual 'Chapter 28 Financial Planning'* 2017 (internal unpublished document). The Public Trustee of Queensland defines a client's assets as complex if they include 'external shares, superannuation, and property other than a principal place of residence'.

<sup>107</sup> Email from the Public Trustee of Queensland to the Public Advocate, 21 February 2020.



financial advice in these circumstances are made on a case-by-case basis.<sup>108</sup> However, the Public Advocate has seen a case where the Public Trustee obtained financial advice for a client with only \$5,000 in investable assets (see case study 3 below, involving client Gary, as an example). The Public Trustee also has a 'Checklist – Review of Small Super – (Under \$20,000 only)' that is used when superannuation is the only complex asset, no financial advice has previously been provided about superannuation and the superannuation asset is valued at less than \$20,000.<sup>109</sup> The application of this checklist policy is discussed later in this report.

140. Financial advice fees are charged at a higher rates for the first advice and lower rates for reviews in following years. The fees for financial advice are on a three-tier sliding scale based on the value and complexity of the clients' assets and range from \$341 to \$880 for an initial advice and \$176 to \$495 for later advices.<sup>110</sup>



### Case study 3: Charged two fees for unnecessary advice

Gary is a young man who prematurely retired from work due to disability. At the time he stopped work, Gary had \$2,700 in his bank account and \$2,000 in superannuation.

The Public Trustee was appointed as Gary's administrator.

In line with its investment policies, the Public Trustee requested an initial financial advice for Gary from its external financial advisor. The Public Trustee sought external financial advice because, in accordance with its policies, Gary was regarded as having 'complex assets', because he had a small amount of funds (\$2,000) in superannuation.

The financial advice, which cost Gary \$176, recommended no change to Gary's existing financial arrangements. However, the financial advisor identified that Gary's superannuation had total and permanent disability insurance (TPD) as part of the superannuation cover and recommended a claim be made on the insurance on Gary's behalf.

The Public Trustee referred Gary's claim to an 'insurance claim specialist' to make the claim on Gary's behalf.

Gary's superannuation TPD cover claim was successful and \$120,000 was paid into his existing superannuation fund. The insurance claim specialist charged Gary \$11,000 to make his TPD insurance claim.

The Public Trustee then obtained a second financial advice on the basis that the insurance payout constituted a change in Gary's financial circumstances. In addition to his assets, Gary also had \$20,000 in debts and the Public Trustee was already aware that there would be a tax consequence for drawing some of Gary's superannuation to pay those debts.

This information was provided to the financial advisor who recommended that all money should be withdrawn from Gary's existing superannuation account and distributed as follows:

- Gary's debts to be paid;
- His cash holdings be 'topped up' to \$5,000;
- Funds should be paid into the Public Trustee Term Investment Account;
- The balance (approximately \$97,000) be paid to the Public Trustee's preferred superannuation provider. There was also a calculation of the tax consequences of the superannuation draw down.

<sup>108</sup> Email from the Public Trustee of Queensland to the Public Advocate, 25 February 2020.

<sup>109</sup> The Public Trustee of Queensland, Checklist – Review of Small Super – (Under \$20,000 only), (internal unpublished document), attachment to letter from Public Trustee of Queensland to Public Advocate, 8 December 2020.

<sup>110</sup> The Public Trustee of Queensland, *Financial Management Manual*, 'Chapter 28 Financial Planning' 2017, section 28.8.15.1. 'Fees and charges' (internal unpublished document).



The second financial advice essentially recommended that Gary's assets be invested in accordance with the Public Trustee's Primary Investment Strategy formula set out under *The Prudent Person Rule Manual*. The fee for the second financial advice was \$473.

Note: The Public Trustee has suggested an alternative version of Gary's case study which can be read at page 9 of *The Public Trustee Response*, in Appendix 1.

## Discussion

141. The Public Advocate acknowledges that the Public Trustee's administration of Gary's affairs resulted in positive financial benefits and outcomes for Gary. He came to the Public Trustee with assets of about \$5,000 and about \$20,000 in debts and following his TPD claim left the Public Trustee with almost \$100,000 in assets. However, there are a number of Public Trustee practices identified in Gary's case that raise questions about whether the external financial and other advice obtained was necessary and prudent in terms of delivering value to the client for the cost of that advice.
142. For example, it is unclear why the Public Trustee sought external financial advice for Gary. In both instances the advice that was obtained recommended investment arrangements that were consistent with the Public Trustee's mandatory Primary Investment Strategy about investing client assets of that value. Also, it appears to be an unusual practice for a professional trustee to take advice about a client's entitlement to make a claim on the insurance cover on their superannuation from a financial advisor. It seems reasonable to expect that Public Trustee staff should be capable of making inquiries about clients' insurance associated with their superannuation — and should do this routinely — without requiring the assistance of an external advisor, or in any event, to take the advice of a lawyer rather than a financial advisor.
143. The QSuper webpage 'Make an insurance claim' states '[W]e aim to make our claims process as simple as possible to provide you with peace of mind in this difficult time'. It encourages clients to make contact with QSuper or to login to its member online section to check their level of insurance cover.<sup>111</sup> There is no reason to think that a trust officer could not undertake these checks for clients with their respective superannuation funds and insurers as part of the routine initial inquiries for new clients.
144. It is also questionable whether it was necessary to obtain what the Public Trustee described as 'special' external financial advice about the tax implications of the superannuation draw down to pay Gary's debts because it is understood the Public Trustee's Taxation Unit has the capability to calculate the tax effect of those actions.
145. The referral of Gary's insurance claim to an external 'insurance claim specialist' also raises questions about the prudence of using lawyers to make an insurance claim, costing Gary \$11,000 of his insurance payout, when the process for making such a claim appears to be quite straightforward. The QSuper website outlines the process for making a claim for total permanent disability against a person's superannuation fund as follows:
- Total and permanent disability (TPD) claim
- We'll ask for:
- A completed TPD Benefit Claim form (this can be found at the back of the Permanent Disability Benefit Guide)
  - Copies of any medical documents about your condition you already have, such as doctor's reports and test results.<sup>112</sup>
146. It appears that the Public Trustee has adopted a practice of referring out all work for clients that could be performed by an external provider. There could be a number of reasons for this. The Public Trustee may not have the expertise in-house to perform some of this work; it may refer work out to spread some of the risk associated with its actions and decisions about clients' estates to other professional entities; or it assists to reduce the workload for Public

<sup>111</sup> QSuper, *Make an insurance claim* (2020) <<https://qsuper.qld.gov.au/Insurance/Make-a-claim>>.

<sup>112</sup> Ibid.





Trustee staff. A question that these practices raises is whether at least some of these activities should be performed in-house by a professional trustee and included in regular administration fees. It is also questionable whether obtaining external advice in many of these circumstances is a prudent expenditure of clients' funds, considering the limited complexity of the issues, the Public Trustee's status as a professional trustee and the overall benefits to the clients. They also raise questions about whether these practices could be considered as incurring unnecessary expenses for clients.

#### Public Trustee response

The Public Trustee advises:

The Public Trustee appreciates that many superannuation providers endeavour to make the TPD claim process as simple as possible. In practice, this can be a time consuming and lengthy process.

As part of the process to pursue a TPD claim, the insurer may require:

- a. tax return and assessment notices
- b. specialist medical reports
- c. additional medical reports
- d. independent medical examination
- e. clinical records
- f. workers compensation records
- g. Centrelink records
- h. Pharmaceutical Benefits Scheme/Medicare records
- i. Employer information.

...

Gathering all this information can be a difficult and time-consuming process. In many cases, the Public Trustee does not have access to all of the customer's information that is required for a TPD claim. The Public Trustee has found that it is more cost effective and efficient to engage an insurance claim specialist to ensure that the customer's TPD claim can be processed as quickly as possible.<sup>113</sup>

147. While the Public Trustee takes the view that it is more cost effective to engage and insurance claim specialist, the question remains, 'more cost effective for whom, the Public Trustee or the client under administration?'
148. Case study 2 involving Ella (in 'Chapter 1: The review') is also an example of a client being charged for two financial advices that appeared unnecessary in the circumstances. In both cases the financial advice did not materially vary from the Primary Investment Strategy 'formula' laid down in the Public Trustee's internal policies.
149. In all of the cases reviewed by the Public Advocate, there was no evidence of the client being asked whether they wanted the financial advice or agreed to pay for it, even when the clients were quite actively engaged with the Public Trustee and seeking more input into the management of their affairs. The Public Trustee has a practice of sending financial advice to the client and informing them they have 14 days to object to the proposed investment strategy. The client's right to object is not clearly explained in the letter. In any case, if they were to object it would likely trigger the Public Trustee to obtain a second financial advice, for which the client would incur another fee.
150. Further, the lack of communication with the client about obtaining financial advice may not be consistent with the General Principle to maximise clients' participation in decision-making.
151. The fees charged by the Public Trustee's preferred provider of financial advice are considered by the Public Trustee to be 'commercial in confidence' and are therefore not published. This makes it almost impossible for Public Trustee clients who are charged these fees to review them against any agreement or policy document to satisfy themselves that the fees are reasonable, correct or in accordance with those arrangements.

<sup>113</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 11 January 2021, attachment, *Public Trustee Response*, p 12.





152. Public Trustee manuals do not direct or encourage staff to discuss the potential need (and cost) for financial advice with clients. Nor do the manuals require that further financial advice only be obtained if the client has had a change of circumstances or there has been a significant change in the financial markets.<sup>114</sup> It appears that the Public Trustee continues to obtain annual financial advice for clients who have been with the Public Trustee for many years and whose investment arrangements have not changed and are not likely to change. It is questionable whether such practices are 'in the clients' interests' and demonstrate due diligence and care as an administrator.
153. The Public Advocate has a range of concerns about the purpose and value of the financial advice obtained by the Public Trustee for its clients which is explored in 'Chapter 6: Financial advice'.

## Official Solicitor fees

154. The Public Trustee, through trust officers, can seek advice from the Office of the Official Solicitor where a client matter involves a legal issue. The trust officer's time formulating a request to the Office of the Official Solicitor may result in an Additional Service Fee (discussed above) being charged to a client. However, the legal work involved in providing advice to the trust officer incurs fees by the Office of the Official Solicitor.
155. The fees charged by the Office of the Official Solicitor are set by a scale of fees agreed between the Public Trustee and the Official Solicitor.<sup>115</sup> The fees are similar, in type and range, to those charged by a private law firm. The scale of fees has not been made publicly available until very recently (6 January 2021, on the Public Trustee's website). Official Solicitor fees are charged to administration clients as though they are an expense or outlay, and the Official Solicitor is an external service provider, similar to the fees charged to clients for other external services, such as building reports and financial advice. It is difficult to justify how, or why, a business unit within the Public Trustee, can 'convert' the value of its work into costs similar to a commercially-based scale of fees, and have these charged to clients as though the services were provided by an external provider.
156. During this review, a number of concerns were raised about the way the Official Solicitor charges fees to administration clients, especially about the level of the fees and the clients' inability to have the fees reviewed or even access the Scale of Fees applied by staff of the Office of the Official Solicitor. 'Chapter 7: The Official Solicitor' contains a discussion about the way the Official Solicitor is used by the Public Trustee, the Official Solicitor fees that are charged to clients, concerns about particular practices of the Official Solicitor and the level of professional legal oversight and accountability of this unit.

## GST on fees and charges

157. Public Trustee clients pay the Goods and Services Tax (GST) on Public Trustee fees and other charges. Effectively, this increases the cost of the fees to clients by 10 percent.
158. The Victorian Ombudsman, in its report on the Investigation into State Trustees, observed that State Trustees (in Victoria) also charges clients GST on their fees but that the NSW Trustee and Guardian had obtained a private ruling from the Australian Taxation Office recognising that its financial management fees are GST-exempt, thereby saving their clients the additional 10 percent GST.<sup>116</sup>
159. The Public Trustee, with the support of the Queensland government, should take steps to seek a similar GST exemption from the Australian Taxation Office on its fees and charges for administration clients. This could have significant financial benefits for clients.

<sup>114</sup> The Public Trustee of Queensland, *Financial Management Manual*, 'Chapter 28 Financial Planning' 2017, (internal unpublished document).

<sup>115</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 5 April 2019, in response to Information Notice No.1, attachment 16.

<sup>116</sup> Victorian Ombudsman, *Investigation into State Trustees*, June 2019, p 67.



# Fees on investment funds

160. In addition to the fees already discussed, administration clients may also pay fees on certain investments managed by the Public Trustee.
161. The Public Trustee operates a number of funds which are used to invest clients' money. These accounts include the Cash Account, the Term Investment Account (both part of the Common Fund) and the Growth Trust.<sup>117</sup>
162. As already noted, the Public Trustee has a standard approach or formula for investing clients' funds, which provides for a certain amount to be held in each of these three funds.<sup>118</sup> (The allocation of client funds across these investments is discussed in 'Chapter 5: Investment practices'.)
163. The client funds held in the Public Trustee Cash Account and Term Investment Account do not attract Public Trustee management fees in addition to the Asset Management Fee payable by clients on those funds.<sup>119</sup> However, the Public Trustee charges an annual management fee of 1.52 percent, payable monthly in arrears, on all funds in the Growth Trust.<sup>120</sup>
164. The Public Trustee advises that it provides a copy of the *Growth Trust Product Profile* to all clients whose money is invested in the Growth Trust. This document includes information about fees and costs. Those clients who receive advice from the external financial advisor to the Public Trustee also receive the Growth Trust Product Profile document with their Statement of Advice. Details about the Growth Trust fees are published in the *Public Trustee of Queensland Growth Trust Product Information Statement*,<sup>121</sup> which is available on the Public Trustee's website.
165. In addition to clients paying the Growth Trust management fee to the Public Trustee, the funds in the Growth Trust are invested and managed by the Queensland Investment Corporation, which also charges fees to the fund (of between 0.2 and 0.3 percent),<sup>122</sup> and by extension, to administration clients. Effectively, the fees charged reduce the clients' earnings on their money in the fund.
166. The client funds invested in the Growth Trust are included in the 'client assets total', used by the Public Trustee to calculate the annual Asset Management Fee charged to clients. Consequently, the management fees charged by the Public Trustee on funds in the Growth Trust appear to be an additional management fee, or charge, on those assets.

# Fees in other jurisdictions

167. As previously mentioned, in the context of a review of the Queensland Public Trustee's fees and charges, it is useful to undertake some comparative analysis of the fees and charges regimes of Public and State Trustees in other Australian jurisdictions.<sup>123</sup>
168. There is no standard approach to the charging of fees by State and Public Trustees across Australian jurisdictions.<sup>124</sup>

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<sup>117</sup> The Public Trustee of Queensland, *Financial Management Manual*, 'Chapter 28 Financial Planning' 2017, section 28.8.1. 'Financial Planning' (internal unpublished document).

<sup>118</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, April 2020, Version 12.1, pp 11-14. <<https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf>>

However, the money held in these accounts is used by the Public Trustee to fund the 'interest differential', which is discussed in 'Chapter 5: Investment practices'.

<sup>119</sup> The Public Trustee of Queensland, *The Public Trustee of Queensland Growth Trust — Product Information Statement*, 2018, p 7. <<https://www.pt.qld.gov.au/media/1510/product-information-statement-growth-trust.pdf>>.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> Due to time and resource limitations, the comparison was limited to the three largest eastern Australian states (Queensland, New South Wales and Victoria) and the Australian Capital Territory.

<sup>124</sup> Although, the fee regime in Western Australia is the most similar to the Queensland Public Trustee's scheme.



169. The key characteristics of the fees and charges regimes of State and Public Trustees in New South Wales, Victoria and the Australian Capital Territory are outlined below. In addition to comparing the fees and costs between each jurisdiction, another purpose of the analysis was to examine a range of approaches to charging Public Trustee fees and charges for administration clients.
170. To provide a clear understanding of the effect of the different fees and charges on people with different income and asset profiles, an analysis of the fees that would apply in each of the four jurisdictions has been undertaken for four administration 'clients' with differing financial profiles. (These client profiles are also used to compare the impact of the fee rebate and financial hardship schemes in 'Chapter 4: Community Service Obligations and fee rebates'.)
171. The interstate comparisons should not be used to benchmark the 'performance' of Queensland's Public Trustee or as an indicator of what amounts to a reasonable fee for services for people under administration. What is a reasonable fee, as discussed later in this chapter, is a legal question that depends on the services provided and the individual circumstances of the client.



#### NSW Trustee and Guardian

The key characteristics of the fees and charges regime for direct financial management services clients of the NSW Trustee and Guardian are summarised below:

- A one-off establishment fee, equal to 1 percent of the client's assets, capped at \$3,000.
- A monthly account keeping fee, charged at a flat rate of \$10 per month.
- A management fee of 1.4 percent of total assets, calculated daily and charged at the end of each month, capped at \$15,000 per year.
- An investment fee of 0.1 percent of the value of any assets held in NSW Trustee and Guardian Investments for the client.

If additional services are required by administration clients, hourly rates apply, including:

- Financial planning undertaken in-house and charged at a rate of \$165 per hour.
- Tax returns and lodgments charged at a rate of \$297 for the first hour, and \$253 each hour after.

Discounts apply to all fees, charges, and additional services if a client's assets are \$75,000 or less. The calculation of asset value does not include the person's home, car, furniture, and other personal possessions. The calculation of assets for assessment of the management fee includes superannuation.<sup>125</sup>

<sup>125</sup> NSW Trustee and Guardian, *Financial Management Fees* (2020), <<https://www.tag.nsw.gov.au/fees-forms/fees/financial-management-fees>>.





## State Trustees (Victoria)

State Trustees fees and charges apply to clients' income and assets. The key characteristics of its fee scheme include:

- Fees on income— 3.3 percent of all pension-based income; 6.6 percent on all other sources of income.
- Fees on assets — 3.3 percent of all realised (or cash) assets up to \$500,000. A progressive fee scale (similar to the Pay As You Go income tax scale, i.e. a fixed amount plus a percentage of asset value) is applied when assets are more than \$500,000.
- Asset management fee — 0.88 percent of all assets held by the Trustee in its Common Fund along with other direct expenses incurred (e.g. audit and legal fees).
- If additional services are required, automated charges and hourly rates apply including:
  - Financial Planning — fees range from \$111 (for assets between \$30,000 and \$100,000) through to \$3,870 (for assets over \$2 million). The \$111 fee applies to an automated annual standard plan review for clients with assets between \$30,000 and \$100,000. Fees increase from this point and vary dependent on whether the customer holds all assets in the Trustee Common Fund or other locations.
  - Tax returns and lodgments — \$385 per standard return (1.1 hours).

All fees and charges are applied on a sliding scale as noted above. The calculation of **asset value does not include the person's home, car, furniture, and other personal possessions**. The calculation of assets for assessment of asset fees includes superannuation.<sup>126</sup>



## Public Trustee and Guardian (Australian Capital Territory)

Fees and charges are also levied in the Australian Capital Territory on clients' income and assets. A summary of fees and charges in this jurisdiction is as follows:

- Income fee — 3.0 percent on all pension-based income, 5.5 percent on all other sources of income.
- Fee on assets — 1.1 percent of cash assets, 4.4 percent of non-cash assets.
- Asset management fee — 1.1 percent of all assets held by the Trustee whether inside or outside of its Common Fund
- If additional services are required, automated charges and hourly rates apply including:
  - Investment advice — \$288 per hour.
  - Tax returns and lodgments — \$288 per hour.<sup>127</sup>

The calculation of **asset value does not include the person's home, car, furniture, and other personal possessions**. The calculation of assets for assessment of asset fees appears to include superannuation.<sup>128</sup>

172. Table 4 (below) presents a comparison of the fees payable by four notional 'clients' with differing financial profiles under administration with the Public and State Trustees in Queensland, New South Wales, Victoria and the Australian Capital Territory.

<sup>126</sup> State Trustees, *Victorian Civil and Administrative Tribunal Administration* < [https://www.statetrustees.com.au/wp-content/uploads/media/Commission\\_Fees\\_and\\_Charges\\_VCAT\\_ST\\_0719\\_v2.pdf](https://www.statetrustees.com.au/wp-content/uploads/media/Commission_Fees_and_Charges_VCAT_ST_0719_v2.pdf)>.

<sup>127</sup> Public Trustee and Guardian, Australian Capital Territory, *Our Fees* <<https://www.ptg.act.gov.au/images/inf/fact-sheet-fees.pdf>>.

<sup>128</sup> ACT Government, *Public Trustee and Guardian (Fees) Determination 2020* (ACT) DI2020-151, 18 June 2020.



173. In Financial Profile 1, which involves a client who owns their primary residence (valued at \$800,000) and \$500,000 in cash, the fees of the Queensland Public Trustee compare favourably against the fees of the other three jurisdictions. They are slightly less than the applicable fees charged by the NSW Trustee and Guardian (at least in the first year of management) and the Trustee and Guardian in the Australian Capital Territory. They are less than half of the fees that would be charged by the State Trustees (Victoria). At over \$10,000 a year, the Queensland Public Trustee fees are still relatively high, but do not significantly impact the client due to their large cash holdings.
174. In Financial Profile 2 (where the client has a residence valued at \$800,000 and only \$50,000 cash) the fees of the Queensland Public Trustee are more than \$3,000 lower than those charged to the client in Financial Profile 1. However, they are substantially higher than the other three trustees — being more than double the fees of State Trustees in Victoria, more than triple the fees of the Australian Capital Territory and over nine times more than the fees of the NSW Trustee and Guardian (on an on-going basis). The other jurisdictions, all charge clients an additional fee based on their income. However, it is the high cost of the Queensland Public Trustee's Personal Financial Administration Fee, which is charged irrespective of a client's assets or income, which makes the difference in these comparisons. In Financial Profile 2, the client paying the Queensland Public Trustee's fees could expect their small cash holdings of \$50,000 to rapidly decline. It is reasonably foreseeable that the client will not be able to pay \$7,311 in annual Public Trustee fees, maintain their home (including paying rates and insurance) and pay regular living expenses when their only form of income is the DSP without having to dip into their small savings.
175. It is interesting to contrast the Queensland Public Trustee's fees for the client in Financial Profile 2, where the client owns their place of residence with cash holdings of \$50,000 with the client in Financial Profile 4, who has only cash holdings of \$50,000. Despite these two clients having similar profiles in terms of income and cash assets — key considerations in determining a client's ability to pay the annual fees — the value of the client's home in Profile 2 pushes the fee rebate threshold too high for the client to receive any fee rebates, with the result that they pay almost three times the fees of the Profile 4 client. This seems inherently unfair in terms of the management costs and financial outcomes of both clients.
176. Financial Profile 3 provides a similar comparison to Financial Profile 1. For a client with \$500,000 in cash, the Queensland Public Trustee's fees are unlikely to have a significant impact on the client's financial outcomes except perhaps a small dissipation in the cash holdings over time.
177. In Financial Profile 4 (client on DSP and \$50,000 in cash), the Queensland Public Trustee's fees are comparable with the other trustees, but are still higher than both the New South Wales and Australian Capital Territory trustees, being more than three-times higher than the NSW Trustee and Guardian's on-going annual fees. This variation in the fees payable by clients between jurisdictions can have a significant impact on the life and wellbeing of people under administration.
178. The significant difference between the fees charged by the Queensland Public Trustee and the other trustees seems primarily attributable to its fee rebate policy which results in clients with small cash holdings but who own their own residence being expected to pay very high fees compared with other clients and their counterparts interstate.
179. The Queensland Public Trustee's financial hardship policy also sets the threshold for financial hardship relief for clients at a very low level of assets, namely \$5,000.<sup>129</sup> In contrast, the NSW Trustee and Guardian's threshold for the application of fee rebates or discounts starts at asset levels of \$75,000, with additional discounts for clients with assets under \$25,000. The Public Trustee's fee rebate and financial hardship schemes are examined in detail in 'Chapter 4: Community Service Obligations and fee rebates'.

<sup>129</sup> The Public Trustee of Queensland, *QACI Manual*, 9. Fees and Charges for All Activities, para 9.3.9.1 (unpublished).



Table 4: Comparison of Public and State Trustee client fees

Financial profile	Queensland	New South Wales	Australian Capital Territory	Victoria
Financial profile 1 Assets: House: \$800,000 (residence) Cash: \$500,000 Income assumptions: Not made	Asset Management Fee: \$3,952 Personal Financial Administration Fee: \$6,519  Total annual fee: \$10,471	Establishment fee (1st year): \$3,000 Asset fee: \$7,000 Investment fee: \$500 Account keeping fee: \$120  Total annual fee: \$10,620 (1 <sup>st</sup> year), \$7,620 (ongoing)	Asset fees: \$11,000 Income fee: Not calculated  Total annual fee: \$11,000 plus income fee	Asset fee: \$16,500 Investment fee: \$4,400 Income fee: Not calculated  Total annual fee: \$20,900 plus income fee
Financial profile 2 Assets: House: \$800,000 (residence) Cash: \$50,000 Income assumptions: DSP <sup>130</sup> \$24,552 per annum, no other income	Asset Management Fee: \$792 Personal Financial Administration Fee: \$6,519  Total annual fee: \$7,311	Establishment fee (first year): \$250 Asset fee: \$700 Investment fee: \$50 Account keeping fee: \$60  Total annual fee: \$1,060 (1 <sup>st</sup> year), \$810 (ongoing)	Asset fees: \$1,100 Income fee: \$736.56  Total annual fee: \$1,836.56	Asset fee: \$1,650 Investment fee: \$440 Income fee: \$810.22  Total annual fee: \$2,900.22
Financial profile 3 Assets: House: None Cash: \$500,000 Income assumptions: Not made	Asset Management Fee: \$3,952 Personal Financial Administration Fee: \$6,519  Total annual fee: \$10,471	Establishment fee (first year): \$3,000 Asset fee: \$7,000 Investment fee: \$500 Account keeping fee: \$120  Total annual fee: \$10,620 (1 <sup>st</sup> Year), \$7,620 ongoing	Asset fees: \$11,000 Income fee: Not calculated  Total annual fee: \$11,000 plus income fee	Asset fee: \$16,500 Investment fee: \$4,400 Income fee: Not calculated  Total annual fee: \$20,900 plus income fee
Financial profile 4 Assets: House: None Cash: \$50,000 Income assumptions: DSP \$24,552 per annum, no other income	Asset Management Fee: \$792 Personal Financial Administration Fee: \$6,519 Fee rebate (fees cannot exceed 5% of total assets)  Total annual fee: \$2,500	Establishment fee (first year): \$250 Asset fee: \$700 Investment fee: \$50 Account keeping fee: \$60  Total annual fee: \$1,060 (1 <sup>st</sup> year), \$810 (ongoing)	Asset fees: \$1,100 Income fee: \$736.56  Total annual fee: \$1,836.56	Asset fee: \$1,650 Investment fee: \$440 Income fee: \$810.22  Total annual fee: \$2,900.22

## Notes:

- These fee calculations are based on publicly available information available on Trustee websites: State Trustees (Victoria), <<https://www.statetrustees.com.au/>>, NSW Trustee and Guardian, <<https://www.tag.nsw.gov.au/>>, ACT Public Trustee and Guardian, <<https://www.ptg.act.gov.au/>>, The Public Trustee of Queensland, <<https://www.pt.qld.gov.au/>>.
- It has been assumed that the Personal Financial Administration Fee applicable in Queensland is a level 5 which is the most common level for administration clients living in the community.
- All Queensland clients with a residence that they live in receive a rebate on the realty fee. That has been taken into account in these calculations.

<sup>130</sup> Australian Government Services Australia, *Disability Support Pension*, 1 October 2020, <<https://www.servicesaustralia.gov.au/individuals/services/centrelink/disability-support-pension>>.





# Complexity of fees

180. All Queensland Government departments must apply the Queensland Government Enterprise Architecture (QGEA) information principles<sup>131</sup> that guide the sharing of information with the public. The Public Trustee is not bound by the QGEA, however, it provides practical guidance and sets standards for how government agencies should share information. There are six QGEA Information Principles. The two most relevant to this report and the way the Public Trustee shares information with its clients are:
- Transparent – The public has a right to information; and
  - Trustworthy – Information is accurate, relevant, timely, available and secure.
181. The above summary of the **Public Trustee's system of fees and charges demonstrates that the current regime is difficult to access, unnecessarily complex, and inappropriate for administration clients.**
182. All government agencies dealing with members of the community have obligations to ensure their practices and policies are accessible and accountable. It is reasonable to expect that agencies, such as the Public Trustee, that provide services to vulnerable members of the community, will comply with these obligations and ensure their clients, to the greatest extent possible, are informed about, and understand, what fees they will be charged for the administration services they receive. The current fee system is opaque and confusing. Administration clients need systems that are simple and straightforward. They have a right to know what they will pay for services they receive. If Public Trustee administration clients have more accessible information about the way their affairs will be managed and the fees they will be charged for those services, they are more likely to take an active interest in their own financial management, increase their financial literacy and live more autonomous lives.

# Lack of clarity about services received for fees

183. There is no information, either in legislation or the *Fees and Charges Notice*,<sup>132</sup> which clarifies what services are to be provided for each of the fees charged to administration clients. The Public Trustee website contains limited information about what services are provided for its financial management fees.<sup>133</sup>
184. While the Public Trustee has recently improved the information available on its website about the activities it engages in when acting as administrator for clients, it is unclear exactly what specific services are provided for each of the fees charged. There also appears to be some overlap between the services provided for different fees.
185. Members of the public who receive fee-based services from government are entitled to know exactly what they are paying for. As a fiduciary, the Public Trustee has a higher level of duty and accountability to its clients than most government agencies. The lack of transparency of fees further raises issues regarding whether the Public Trustee is acting in accordance with its fiduciary obligations to its clients.

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<sup>131</sup> The State of Queensland, *Queensland Government Enterprise Architecture Information principles*, Queensland Government Chief Information Office, 2009, pp 5-6.

<sup>132</sup> Queensland Government, *Public Trustee of Queensland (Fees and Charges Notice) No. 1, 2020*, Gazette No. 56, 26 June 2020, p 443.

<sup>133</sup> The Public Trustee of Queensland, *Fees and charges* (22 October 2020), <<https://www.pt.qld.gov.au/financial-administration/fees-and-charges/>>.



## Public Trustee response

In response to inquiries made by the Public Advocate, the Public Trustee outlined the activities and duties it considers the fees are intended to remunerate the Public Trustee for:

The personal financial administration fee is intended to remunerate the Public Trustee for his work as administrator, excluding his obligation under the Prudent Person Rule [sic] and any responsibilities flowing from the management of real estate.

These duties include:-

- Attendance if required at the QCAT Hearing (or Court application) by which the Public Trustee is contended for appointment.
- Taking initial full detail of the circumstances, assets and needs of the client/adult (opening a file).
- Arriving at a budget appropriate for the adult.
- Initiating contact with not only the adult but other support networks, financial institutions and service suppliers (particularly where payment is required).
- Establishing liaison (communication) guidelines and entry of all relevant information into the Public Trustee's central computer system.
- Identifying and securing assets, income and liabilities.
- Ensuring that income is receipted and payment of expenses occurs.
- Reviewing the clients' tax obligations and if necessary engaging (on an annual basis) the Public Trustee's Tax Unit.
- Conducting file reviews to ensure that all matters are attended to.
- Communication with the adult, support network of the adult, financial and other institutions (including Centrelink in most cases).
- Otherwise attending to all other decisions relating to "financial matters".<sup>134</sup>

In relation to the Asset Management Fee, the Public Trustee advised:

The asset management fee ... contemplates the Public Trustee managing the assets of adults:-

- (a) In accordance with the General Principles [under the *Guardianship and Administration Act*]
- (b) Applying the Prudent Person Rule
- (c) Having sufficient regard to the complexity, and degree of care, responsibility, skill or special knowledge required to manage the assets of others (which it is contended does require a high degree of skill and knowledge).

It ought be borne in mind in respect of the Asset Management Fee that whilst the Public Trustee seeks external advice in respect of investments, the duty is one for the Public Trustee as administrator to discharge (that is meet the Prudent Person Rule).<sup>135</sup>

186. The Public Trustee's explanation of the services provided for the Personal Financial Administration Fee seems clear and appropriate in terms of the actual services being provided. This information should have always been available to its clients and the public. The Public Advocate welcomes the steps the Public Trustee has taken to improve the availability of information about its services during the course of this project.
187. The services or activities funded by the Public Trustee's Asset Management Fee are less clear, at least in terms of how they interact with other Public Trustee activities for which clients are charged fees. For instance, it is unclear why an administration client who is paying an Asset Management Fee would be required to pay an 'Additional Service Fee' for the trust officer to review a building and pest inspection report (which is arguably an asset management function) when the client has already paid a fee for their assets to be managed.

<sup>134</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 5 April 2019, in response to Information Notice No.1, p 37.

<sup>135</sup> Ibid p 38.



# Fees and the relative cost of services

188. The Public Trustee's current regime of fees and charges commenced in 2001. At that time, the Public Trustee advises the fees were based on the actual costs of the Public Trustee delivering those services, with an additional provision for a 6 percent profit margin.<sup>136</sup> Since that time, the Public Trustee has increased the fees and charges each year by various percentages above the Consumer Price Index, when that was permitted by government, and increased them in line with the government fees and charges indexation policy in more recent years.<sup>137</sup>
189. In response to inquiries from the Public Advocate, the Public Trustee advises that its different fees reflect 'different aspects of the service required of an administrator ... and were intended to have a close correlation with the cost of ... the Public Trustee acting as administrator'.<sup>138</sup>
190. It is unclear how the Public Trustee's fees, either for administration or asset management have a 'close correlation with the cost of' delivering those services.
191. The Queensland Government *Principles for Fees and Charges* requires government departments and statutory bodies to 'undertake regular monitoring and review of fees and charges regimes' and recommends they 'undertake a comprehensive review of their existing fees and charges at least every five years'.<sup>139</sup> It is difficult for the Public Trustee to demonstrate that its fees continue to be efficient and that the underlying cost structure remains accurate, nineteen years after commencement of the regime. People receiving services from government agencies for which they are paying fees should be able to rely on those agencies to only charge fees equivalent to the estimated cost of providing the services, otherwise there may be a suggestion that the agency is profiting from the arrangement. This is a particularly relevant consideration for the Public Trustee as a fiduciary whose duties include not to profit from the relationship.<sup>140</sup>
192. The issue of cost recovery is addressed in the Queensland Government's *Principles for Fees and Charges* policy<sup>141</sup> which requires that 'full cost recovery should represent an efficient cost [which] reflects the minimum costs necessary to provide the activity .... Gold plating must not occur. Fees or charges ... should not exceed full cost recovery, unless there is a clear, justifiable basis for doing so ...'.<sup>142</sup>
193. The *Principles for Fees and Charges* policy applies to government agencies and statutory bodies<sup>143</sup> and accordingly is not directly applicable to the Public Trustee. However, the Public Trustee represents the State of Queensland and it has a direct relationship with its vulnerable clients on a user-pays basis. Consequently, it should be expected that this policy would provide strong guidance to the Public Trustee about the Queensland Government's expectations in relation to costing its fees and charges.
194. In relation to the Public Trustee's Asset Management Fee, the level of the fee is calculated on the value of clients' assets, applying a sliding asset value scale. It is unclear how the fee relates to the actual cost of the work required to provide the service.

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<sup>136</sup> Ibid pp 32-33.

<sup>137</sup> The State of Queensland (Queensland Treasury), *Principles for Fees and Charges*, January 2020, p 10.

<sup>138</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 5 April 2019, in response to Information Notice No.1, p 36.

<sup>139</sup> The State of Queensland (Queensland Treasury), *Principles for Fees and Charges*, January 2020, p 10.

<sup>140</sup> *Breen v Williams* (1996) 186 CLR 71 at 113.

<sup>141</sup> Queensland Government, *Principles for Fees and Charges*, Queensland Treasury, 2020.

<sup>142</sup> Ibid p 3.

<sup>143</sup> Ibid p 2.



# Lack of transparency about fees

195. The issues relating to the complexity of the fees are exacerbated by the historical practice of the Public Trustee to not publish its policies, procedures and manuals that guide decisions about when and why fees are charged.
196. The Queensland Government has adopted an information 'push' model to enable the widest possible access to information for the purposes of providing information to the community noting that 'it is fundamental to an open and participatory government that information is provided as a matter of course, unless there are good reasons for not doing so.'<sup>144</sup>
197. To help agencies determine what information can be made publicly available, the Implementing information governance guideline<sup>145</sup> suggests approaches to achieve an open, accountable and participatory government in line with the *QGEA Information governance policy*.<sup>146</sup>
198. The Public Trustee is not a government department. Accordingly, the documents referred to above provide guidance only. However, the QGEA policies and information materials provide best practice guidance and recommend that entities not subject to the mandatory aspects of information sharing work to achieve the Queensland Government's intended outcomes of maximising the amount of information available to the community.
199. As already acknowledged, the Public Trustee now provides a range of information on its website about its administration services.<sup>147</sup> The Public Trustee has also developed a number of new resources to assist clients and their carers and supporters to understand the fees and charges it applies. These include an Easy Read Guide for Financial Management Customers which provides a helpful overview about administration and a broad description of what services the Public Trustee will provide to administration clients.<sup>148</sup> There is also a new guide to financial management for carers and family.<sup>149</sup> These are all welcome initiatives.
200. At the commencement of this review, the Public Trustee considered itself a commercial entity, and took the view that its internal policies, procedures and manuals that guide the decision-making of its staff and the particular fees it charges to clients, are 'commercial-in-confidence' and should not be published. The Public Advocate could identify no reasonable basis for this view. People under administration are not a 'market' whose 'business' the Public Trustee is, or should be, competing for with other private trustee companies. They are vulnerable members of our community whose circumstances have resulted in them requiring support to manage their financial affairs.
201. Administration clients did not make a decision to have their affairs dealt with by a third party, nor did they choose the Public Trustee to be their administrator. Even if they did, their contractual arrangements relating to the fees for this service should be transparent and subject to negotiation. Due to the nature of an administration appointment, people's financial affairs have been taken out of their hands and entrusted to the Public Trustee. The Public Trustee holds a unique position of responsibility and trust in the Queensland community and its decision-making, practices, policies and fees must be accessible and transparent.

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<sup>144</sup> Queensland Government, *The right to information – A response to the review of Queensland's Freedom of Information Act*, Department of Premier and Cabinet, Brisbane, 2008, p.4.

<sup>145</sup> The State of Queensland, *Implementing Information Governance*, Queensland Government Chief Information Office, Brisbane, 2012.

<sup>146</sup> The State of Queensland, *Information Governance Policy*, Queensland Government Chief Information Office, Brisbane, 2017.

<sup>147</sup> The Public Trustee of Queensland, *What is Financial Administration?* (17 December 2019) <<https://www.pt.qld.gov.au/financial-administration/about-financial-administration/>>.

<sup>148</sup> The Public Trustee of Queensland, *Easy Read Guide for Financial Management Customers* (16 January 2020) <<https://www.pt.qld.gov.au/financial-administration/guide-for-financial-management-customers/>>.

<sup>149</sup> The Public Trustee of Queensland, *Personal Financial Administration: A guide for carers, family and support people*, <[https://www.pt.qld.gov.au/media/1925/guide-for-financial-management\\_carers.pdf](https://www.pt.qld.gov.au/media/1925/guide-for-financial-management_carers.pdf)>.



202. During this review, the Public Trustee has altered its position on the sensitivity and confidentiality of its internal policies and has committed to a process of publishing its policies on its website, with the *Prudent Person Rule Manual* outlining how the Public Trustee invests clients' funds in compliance with the Prudent Person Rule, the first policy to be published.<sup>150</sup>

## Client Statements of Account

203. The Public Trustee sends each administration client at least annual Statements of Account that show the types of transactions incurred by or on behalf of the person. The following commentary briefly describes the information contained in the statements. By way of example, a de-identified sample Statement is included in Appendix 4.
204. The Statements of Account are comprised of a Statement of Assets and Liabilities and a Statement of Transactions for each investment account held by the client.
205. The Statement of Assets and Liabilities contains a list of the client's assets and liabilities, showing the value of each item as at the closing date of the statement. Typically, this list would show real estate, motor vehicles, investments (including shares, superannuation, bank and investment accounts), furniture and personal effects.
206. The Statement of Transactions is a list of individual transactions, in date order, including all deposits to and withdrawals from the client's account from all sources such as pensions, interest earned on investments and rebates of Public Trustee fees and charges. This statement also shows withdrawals/debits for personal or living expenses (where it is the client's ordinary bank account) and includes all Public Trustee fees and charges and any other expenses recouped from the person by the Public Trustee during the statement period.
207. Separate Statements of Transactions are provided for each investment account held by the Public Trustee in the person's name and individual Statements of Transactions are produced showing special purpose transactions such as recouping the costs associated with the work of the Official Solicitor.
208. People who contacted the Public Advocate about their interactions with the Public Trustee described the difficulties in extracting meaningful information from the Statement of Transactions. The information in the statements is not grouped or summarised according to the activity. For example, the last page of the periodic Statement of Transactions show the opening and closing balance, total payments and total receipts. However, the statements do not provide a summary of the sources of income or the allocation of expenses. The statement does not contain a separate page summarising the Public Trustee's fees and charges for the period, rather it has a single line entry showing 'net public trustee fees' and the GST paid on those fees. This figure does not include fees charged by the Official Solicitor or any incidental outlays or charges incurred. The only way a client can determine exactly what fees and outlays they have paid in total to the Public Trustee is to manually identify and add together the individual transactions relating to fees and charges and other services. It is poor practice that the Public Trustee's statements to administration clients are not more accessible, and easy to understand, particularly considering the difficulties these clients have understanding and managing their financial affairs.
209. The transparency of information contained in client financial statements would be improved if they included a summary table listing income and outgoings information in the form of a cash flow statement. This section could separately show:
- income from the Public Trustee and other sources;
  - non-Public Trustee expenses such as living expenses, recurring accounts such as property expenses (rates, water, electricity, insurance) and costs associated with maintaining a property (for example, building and pest inspections); and
  - Public Trustee-related expenses such as fees and charges, investment expenses and an itemised list of any legal or other charges or outlays.

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<sup>150</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual* Version 12.1 (April 2020), <<https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf>>.





210. An additional benefit of providing administration clients with their own financial information in this way is that it would assist some to build their capacity to budget and manage their money. It is not possible for anyone to understand and manage their budget if they do not have a clear understanding of their expenses and discretionary spending. Similarly, it is difficult for an administration client to understand their financial affairs and build their ability to manage their finances without clear information about how and where their money is being spent.

## Level of Public Trustee fees

211. The individual fees charged by the Public Trustee can be very high. The effect of the level of the fees is compounded when clients are charged multiple fees. When Public Trustee **administration clients' fees are considered in combination**, and in the context of their limited incomes, small investment returns and their inability to easily move to another provider of trustee services, **the fees appear unduly high. The Public Trustee's fees should never be so high that they cause significant depletion of clients' assets. This outcome is counter-productive and inconsistent with the basis upon which the Public Trustee was appointed — to manage and protect clients' financial interests.**
212. Unlike most people in the community who have the power to select their service providers, an administration client who is dissatisfied with the service they receive or fees they are charged cannot simply 'vote with their feet' and find another provider.
213. People under administration can apply to QCAT to get a declaration of capacity to enable them to manage their own finances or to change from the Public Trustee to another administrator, however this can be a challenging proposition. Once a person has been found by QCAT to have impaired decision-making capacity, it can be difficult for them to demonstrate that they have regained their ability to make financial decisions or present the necessary evidence to persuade the tribunal of their claims.
214. Complaints about how funds are managed or the amount of fees charged for those services may be perceived to have less weight when the complaints are made by a person who has impaired decision-making capacity for financial matters. Also, it can be hard for administration clients to argue that their fees are too high or show the impact of the fees on their overall financial situation if they cannot access easy-to-understand information about the fees they have been charged and use it in evidence.
215. Another difficulty for the administration clients of the Public Trustee who want to challenge their fees and charges is that there is no specific mechanism through which the reasonableness of the fees and charges of the Public Trustee can be examined.
216. The Public Trustee routinely argues that its fees are lawful and in accordance with the current *Fees and Charges Notice*. When responding to inquiries by the Public Advocate, the Public Trustee suggested that clients or their supporters could challenge the Public Trustee's fees and charges 'in a Court of competent jurisdiction' and in QCAT by making an application for 'miscellaneous matters'.<sup>151</sup> However, it is unclear whether applications of this type have ever been successfully brought by Public Trustee clients, and even more uncertain whether, and how clients would be informed of this avenue of redress, or how the Public Trustee might assist a client in this endeavour.
217. Another obstacle for administration clients wanting to use legal processes to protect their interests is that they are often charged significant costs by the Official Solicitor to the Public Trustee to provide legal advice to the Public Trustee regarding the client's application. These costs are highly likely to discourage clients who might want to take steps to enforce their rights or challenge decisions of the Public Trustee. (These issues are discussed further in 'Chapter 7: The Official Solicitor'.)

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<sup>151</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 5 April 2019, in response to Information Notice No.1, p 53, 57.





218. Finally, many administration clients may not have an appropriate alternative administrator who they could suggest to QCAT would be suitable to take over the role. Consequently, it can be a challenging and complex process for administration clients to query or challenge the fees they are charged or to apply to change their status as a Public Trustee client under administration.

## Different charges applied to the same assets

219. Some Public Trustee fees appear to double-up, or overlap, with other fees it charges, while other fees do not appear to involve the provision of any direct service by the Public Trustee.
220. As noted earlier in this chapter, all administration clients with assets are charged an annual Asset Management Fee calculated on a sliding scale based on the value of their assets. In addition to the Asset Management Fee, clients with money invested in various Public Trustee investments — the Common Fund, a Term Investment Account and the Growth Trust — have additional deductions from the earnings on their funds or fees charged on their investments by the Public Trustee and others.
221. For example, the Public Trustee sets the rate of interest clients are entitled to earn on their money invested in the Common Fund or a Term Investment Account. The Public Trustee is able to retain the difference between the interest it earns on the clients' money in those investments and the set rate of interest payable on the money in those accounts.
222. In relation to the Growth Trust, the Public Trustee also charges a Growth Trust Management Fee of 1.52 percent<sup>152</sup> against the interest earnings of the Growth Trust. It is unclear what services the Public Trustee provides for this management fee as the funds in the Growth Trust are invested on behalf of the Public Trustee by the Queensland Investment Corporation, which also charges a fee for this service. Effectively, the Growth Trust Management Fee charged by the Public Trustee and the investment fee charged by the Queensland Investment Corporation reduce the amount of earnings the client would otherwise be paid on their money invested in the Growth Trust.
223. It appears to be a duplication of charges for the Public Trustee to charge clients two separate management fees (the Asset Management Fee and the Growth Trust Management Fee) on the same assets, especially when the clients are paying an additional fee to the Queensland Investment Corporation as the investment manager. (These practices are examined with in greater detail in 'Chapter 5: Investment practices'.)
224. The Public Trustee also includes the value of clients' superannuation funds when calculating the Asset Management Fee. This is consistent with the practice of most Public and State Trustees across Australia.<sup>153</sup> Client money in a superannuation fund is 'managed' by that fund. The superannuation fund managers also have fiduciary responsibilities to make decisions about the best ways to increase client wealth through prudent investments, and they charge annual fees for this service.

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<sup>152</sup> The Public Trustee of Queensland, *Product Information Statement – Growth Trust* (7 May 2020), p 7, <<https://www.pt.qld.gov.au/media/1510/product-information-statement-growth-trust.pdf>>.

<sup>153</sup> Letter from the Public Trustee of Queensland to the Public Advocate responding to draft report chapters 1-4, 19 May 2020, p 2. The Public Trustee advises that the inclusion of assets in superannuation in the value of clients' assets for the calculation of asset management fees occurs in all jurisdictions.



#### Public Trustee response

The Public Trustee states that 'managing superannuation ... is an active position and not a set and forget and must be reviewed at least annually to ensure that our customers' needs are met'<sup>154</sup> and whether their superannuation investments should be varied in any way.<sup>155</sup>

- 225. It is unclear what 'active' management the Public Trustee engages in that involves making decisions about 'managing' clients' superannuation for the Asset Management Fee and when, if ever, clients' superannuation arrangements are varied after the initial investment decisions, unless the client has a change of circumstances.
- 226. In the context of the recent Banking Royal Commission, these practices raise some concerns about the services people are receiving for their fees,<sup>156</sup> especially considering the Public Trustee's obligations as a fiduciary to always act in the clients' interests, and the particular vulnerabilities of its clients.

## Fees for independent financial advice

- 227. The Public Trustee's practice of obtaining and charging administration clients for routine independent financial advice also raises some issues.
- 228. In some of the cases examined for this review, administration clients were charged a fee for independent investment advice when it was questionable whether the advice was necessary.<sup>157</sup> At the commencement of this review, the Public Advocate became aware that the Public Trustee had a confidential in-house manual, called the *Prudent Person Rule Manual*, which outlines a very prescriptive approach to **the way clients' funds are to be managed and invested**. In a welcome development, earlier in 2020, the Public Trustee published the *Prudent Person Rule Manual* on its website. (The *Prudent Person Rule Manual* is also discussed in 'Chapter 5: Investment practices', which examines the Public Trustee's approach to investing client funds and its arrangements with its preferred financial advice provider.)
- 229. It is clear from the Public Trustee client files reviewed by the Public Advocate, that there is rarely any deviation from the **prescribed approach to investing clients' funds** as outlined in the *Prudent Person Rule Manual*. The approach is very simple and formulaic and is consistently applied by Public Trustee staff. In this context, the cases where clients were charged fees for independent financial advice raised genuine questions about the need for that advice when there was already a prescriptive policy about how the funds should be invested (refer to case study 3 about Gary, above).
- 230. In other cases reviewed, the person's **circumstances may not have materially changed** since the previous advice was obtained, yet the advice was sought and the clients charged.<sup>158</sup>

#### Public Trustee response

The Public Trustee takes the view that it has an obligation to review at least annually the performance of the investment, individually and as a whole, and that the advice from the financial advisor assists the Public Trustee to discharge its fiduciary obligations. It also relies on that advice for information about clients' potential insurance claims and payouts.<sup>159</sup>

<sup>154</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 19 May 2020, responding to draft report chapters 1-4, p 9.

<sup>155</sup> Ibid.

<sup>156</sup> Commonwealth Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, February 2019, vol 1, pp136-195.

<sup>157</sup> See case study 3, 'Gary' above.

<sup>158</sup> Case study 2 'Ella'.

<sup>159</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 19 May 2020, responding to draft report chapters 1-4, p 9.



231. The Public Advocate considers that in many cases after the initial on-boarding of administration clients, the cost of obtaining the external advice was unnecessary and potentially inconsistent with the Public Trustee's obligation to act prudently when managing clients' funds. For example, a prudent person is unlikely to pay for independent advice when the outcomes and investment recommendations are already prescribed.
232. Further discussion about the circumstances under which independent financial advice is obtained and its impact on the investment decisions of the Public Trustee is included in 'Chapter 6: Financial advice'.

## Fee structure may amount to structural discrimination

233. As shown earlier in this chapter, the Personal Financial Administration Fee is broadly based on where the administration client lives, whether their income is paid to a support provider and the level of contact they have with the Public Trustee. The highest level of fees are paid by administration clients who live independently in the community and make contact with the Public Trustee more than once per fortnight.
234. Administration clients make regular contact with the Public Trustee for various reasons including to:
- seek clarification about an aspect of their finances so that they can better understand their finances;
  - convey their views and wishes to the Public Trustee about an aspect of their finances;
  - request a change to the living allowance that they receive, or request money to purchase something that they want or need;
  - question their Statement of Account or the fees they have been charged; or
  - make a complaint.
235. Charging higher fees to some administration clients who exercise greater autonomy and more frequently engage with the Public Trustee is contrary to the General Principles in the *Guardianship and Administration Act* and could amount to a form of structural discrimination. This is particularly the case for administration clients who contact the Public Trustee in order to improve their understanding of, and ability to manage, their finances.
236. The rationale for these fees is that if a person lives in residential aged care and their care is funded by the Commonwealth Government and their income is paid to the aged care provider, the amount of support required from the Public Trustee may be minimal and therefore the fee is lower. If the administration client lives in the community, and in theory requires more support and contact with the Public Trustee, the administration fee is higher. There are a considerable number of Public Trustee administration clients living independently in the community who pay the highest levels of Personal Financial Administration Fees (see earlier discussion in this chapter).
237. The Personal Financial Administration Fees operate in such a way that administration clients who are living more autonomous lives in the community and more actively exercising their personal agency pay much higher fees for the additional contact they have with the Public Trustee. While it is acknowledged that the Personal Financial Administration Fee is based on a three-month assessment of client demand for services, it seems inappropriate that the fees operate this way.
238. It is usually reasonable for government fees to correlate with the cost and level of work required to provide services, however the structure of the Personal Financial Administration Fees raises two issues for consideration. First, the fee structure appears to be inconsistent with the General Principles contained in the *Guardianship and Administration Act* (reproduced in Appendix 3) that the Public Trustee is required to apply. Charging higher fees to clients who are living in the community because they require additional supports does not encourage or support them to develop self-reliance or participate in community life and decisions affecting them. It is likely to have the reverse effect, especially when considering the effect of the fees



on people with limited income, who are the majority of the Public Trustee's administration clients.

239. In addition, it is possible that the fee structure could be regarded as a form of structural discrimination against clients with disability, effectively penalising those who exercise greater agency and autonomy. Such an outcome is inconsistent with sound public policy and Australian commitments under human rights conventions, such as the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD).<sup>160</sup> The Convention incorporates a contemporary approach to disability and emphasises the importance of:
- recognising that disability is an evolving concept and that disability results from the interaction between people with impairments and their surroundings as a result of attitudinal and environmental barriers;
  - the right and capacity of people with disability to make valued contributions to their communities;
  - recognising the importance of individual autonomy and independence, including the freedom to make their own choices; and
  - recognising that all categories of rights apply to people with disability, who should therefore be supported to exercise those rights.<sup>161</sup>
240. An important overarching principle in the CRPD is that of 'reasonable accommodation'. This refers to support, modifications and adjustments that must be made so that people with disability can exercise their rights on the same basis as others. Importantly, discrimination is defined by Article 5 of the Convention to also mean the failure to provide adequate accommodation.<sup>162</sup>
241. The charging of higher fees to administration clients to support them to live in the community could breach these obligations.

## The legality of fees and charges

242. There are a number of considerations that apply when considering the legality of the Public Trustee's fees and charges for administration clients.
243. There is no doubt that as an administrator, the Public Trustee is entitled to be reimbursed for reasonable expenses from the person under administration.<sup>163</sup> Further, the Public Trustee is permitted by legislation to set fees and charges for its services.<sup>164</sup> However the fees and charges must be 'reasonable having regard to the circumstances in which the service is provided'.<sup>165</sup>
244. As discussed previously, the Public Trustee also has a fiduciary relationship with its clients. Therefore, the actions of the Public Trustee, including the setting of its fees and charges, must also be consistent with its fiduciary duties.

## Reasonableness

245. The process of tabling in Parliament and publishing of the Public Trustee's *Fees and Charges* Notice in the Gazette does not satisfy, nor displace, the requirement that the fees in the notice be reasonable, as required under the *Public Trustee Act*.
246. The Public Advocate is not aware of any decisions by a court or tribunal in which the fees and charges of the Public Trustee have been the subject of an application for review in terms of their reasonableness.

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<sup>160</sup> United Nations, *Convention on the Rights of Persons with Disabilities*, adopted by the General Assembly by Resolution 61/106, at its 76th plenary meeting on 13 December 2006 and opened for signature on 30 March 2007.

<sup>161</sup> *Convention on the Rights of Persons with Disabilities*.

<sup>162</sup> *Convention on the Rights of Persons with Disabilities*, art 5.

<sup>163</sup> *Guardianship and Administration Act 2000* (Qld) s 47.

<sup>164</sup> *Guardianship and Administration Act 2000* (Qld) s 48(3); *Public Trustee Act 1978* (Qld) s 17(1).

<sup>165</sup> *Public Trustee Act 1978* (Qld) s 17(3).



247. When considering the principles by which the reasonableness of the Public Trustee's fees and charges should be assessed, it is useful to recognise the similarities between the relationship of the Public Trustee and its clients, and that of solicitors and their clients. Specifically:

- both involve the provision of professional services by a fiduciary;
- just as the Public Trustee is required by legislation to charge reasonable fees, 'a solicitor's entitlement to remuneration is conventionally stated in terms of what is fair and reasonable in the circumstances';<sup>166</sup>
- in terms of the vulnerability of clients generally to fee abuse, the New South Wales Court of Appeal has observed:

Clients are, or may frequently be, in a vulnerable position vis-à-vis their solicitors; the presumption of undue influence is, I think, based at least in part upon the fact that when making decisions clients ordinarily or at least frequently place trust in their solicitors. They ordinarily are not in a position to know without investigation what work must be done and what charges are fair and reasonable; they ordinarily assume that the solicitor will make only such charges. Solicitors are, on the other hand, informed, or in a position to inform themselves, of what work may be required and what are fair and reasonable charges. They are, in that sense, in a position of advantage and trust is placed in them. Clients are entitled to be protected against the abuse of such an advantage.<sup>167</sup>

248. Therefore, to assess what is 'reasonable' in the context of the Public Trustee's fees, it may be instructive to consider a number of principles that apply to solicitor's fees.

249. The leading academic commentator on lawyers' professional obligations and legal costs, Dal Pont, states that:

[Reasonableness] is a question of degree and frequency. Relevant factors include the amount the costs in question were, or would likely be ... the novelty, complexity or difficulty of the case, the experience of the lawyer, the quality of her or his work, the amount of time spent on the matter, the responsibility involved, the amount or value of the subject matter in issue, and any costs agreement entered into.<sup>168</sup>

250. When considering allegations of overcharging, courts have used the comparative language of 'what is fair and reasonable' and 'what is grossly disproportionate'.<sup>169</sup> Charges that are properly considered to be 'general overheads' or 'operating expenses' are not to be considered 'disbursements', but instead, should be covered by professional fees.<sup>170</sup> Similarly, 'theoretical rather than actual cost'<sup>171</sup> should not be passed on to the client.

251. Similar issues in relation to the Public Trustee's fees have been discussed above, specifically in relation to the relative cost of the service versus the actual fees, the level of the fees, charging more than one fee on the same assets and the charging of a generalised postage and incidental fees as an outlay.

252. Another relevant consideration in determining the reasonableness of fees in the solicitor-client relationship is that a written costs agreement — which is arguably similar to the Public Trustee's *Fees and Charges Notice* — is relevant, but not conclusive when overcharging has been alleged. In other words, the existence of a written document that sets out fees and charges does not in itself make those fees and charges reasonable.

253. The following remarks from the courts provide some guidance about what fees and charges could be considered reasonable.

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<sup>166</sup> *Veghelyi v Law Society of New South Wales* [1995] NSWCA 483 per Mahoney JA at 6.

<sup>167</sup> *Ibid.*

<sup>168</sup> Dal Pont, G E, *Lawyers' Professional Responsibility* (Law Book, 6th ed, 2016) p 816.

<sup>169</sup> *Veghelyi v Law Society of New South Wales* [1995] NSWCA 483 per Mahoney JA at 7.

<sup>170</sup> *Equuscorp Pty Ltd v Wilmoth Field Warne* [2006] VSC 28, per Byrne J at [57]. While the decision turned heavily on the wording of a very detailed costs agreement, the remarks cited were expressed in more general term of 'disbursements' that a solicitor can charge to a client.

<sup>171</sup> *Equuscorp Pty Ltd v Wilmoth Field Warne* [2006] VSC 28, per Byrne J at [69].





254. In the leading Queensland case, the Court of Appeal remarked:

The circumstance that a solicitor's right to exact certain charges is enshrined in an executed client agreement will not necessarily protect the solicitor from a finding of gross overcharging. For example, as here, the client may not have given his or her "fully informed consent" to the agreement; or the very extent of the particular charges may itself evidence inexcusable rapacity. It is repugnant to think of a solicitor withholding detail from a client, precedent to an agreement, to the solicitor's advantage and the client's disadvantage.<sup>172</sup>

255. That case also approved the following remarks from the New South Wales Court of Appeal:

No amount of costs agreements; pamphlets and discussion with vulnerable clients can excuse unnecessary over-servicing, excessive time charges and over-charging where it goes beyond the bounds of professional propriety.<sup>173</sup>

256. The New South Wales Supreme Court has also approved the following remarks:

...it is equally well recognised in principle in the taxation of costs between solicitor and client that, in the absence of special circumstances, a solicitor cannot charge for work which is useless towards accomplishing the object his client has in view.<sup>174</sup>

257. Again, in relation to costs that have been calculated according to an agreement::

There are circumstances in which costs, though calculated according to a costs agreement, will in total be unacceptably excessive... They include cases in which the total of the fees charged was ... far beyond what would ordinarily be reasonable for the work shown to have been done. If the total of such fees was to be justified by the costs agreements, the inference would be either that the time taken was unacceptable or the rates specified in the costs agreement required justification.<sup>175</sup>

258. Some recent developments relevant to the reasonableness of fees relate to the improper fee-charging practices identified during the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Most relevantly, regarding the issue of 'fee for no service':

- the report stated 'Charging for what you do not do, is wrong';<sup>176</sup>
- the Commissioner refused to accept explanations based on 'processing errors' or 'poor systems and carelessness';<sup>177</sup>
- the Commissioner considered it obvious that 'making an ongoing fee arrangement gives the adviser a financial advantage. The adviser stands to earn, and to continue to earn, annual amounts from the client. The less the adviser does before the fee is paid, the greater the financial advantage';<sup>178</sup> and,
- the Commissioner also considered it problematic that:

... services to be provided under ongoing fee arrangements often were, and still are, neither well-defined nor onerous. Evidence showed how the services to be provided under ongoing service arrangements may not only be very loosely defined but also defined in a way that has little or no substantive content beyond a promise to speak with clients once each year.<sup>179</sup>

259. In considering the question whether the Public Trustee's fees are reasonable, the relationship between its fees and the relative complexity of the work and level of skill required, and cost of providing the services must also be examined. This review has identified issues relating to the level of the fees, the number of different fees, fees that are charged on the same funds, and fees where it was unclear what service was to be provided. Comments made by the courts regarding reasonableness above seem to apply directly to these issues. As also noted, the structure of the Personal Financial Administration Fee may operate in a discriminatory

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<sup>172</sup> *Council of the Queensland Law Society Inc v Roche* [2004] 2 Qld R 574 at 583 to 584.

<sup>173</sup> *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 at 422 as cited by *Council of the Queensland Law Society v Roche* [2004] 2 Qd R 574 at 584.

<sup>174</sup> *Re Windeyer, Fawl & Co; ex parte Foley* (1930) 31 SRNSW 145 at 149 as cited by *Ryan v Hansens* (2000) 49 NSWLR 184 at 198.

<sup>175</sup> *Veghelyi v Law Society of New South Wales* [1995] NSWCA 483 per Mahoney JA at 8.

<sup>176</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, February 2019, vol 1, p 140.

<sup>177</sup> *Ibid* p 138-139.

<sup>178</sup> *Ibid* p 140.

<sup>179</sup> *Ibid* p 141.





way. Taking all these matters into account, an argument could be made that some of the Public Trustee's fees, especially when multiple fees are charged, may not be reasonable. If the Public Trustee's fees are not reasonable, they may be unlawful.

## Fees must be consistent with fiduciary duties

260. As outlined in 'Chapter 2: Financial administration and the Public Trustee', one of the fundamental aspects of being a fiduciary is to not profit from the relationship. In the context of solicitor's fees, the courts have taken the view that a lawyer may receive payment for their fees solely on the basis that the client has given fully informed consent to the fees to be charged.<sup>180</sup>
261. The courts have expressed views about what constitutes fully informed consent in terms of agreement to fees charged. It should be acknowledged that the concept of fully informed consent presents challenges when being applied to situations for people with impaired decision-making capacity, as is the case with the Public Trustee's administration clients.
262. The High Court has said, '[W]hat is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given.'<sup>181</sup>
263. The Queensland Court of Appeal expressed the view that a client cannot be considered to have given fully informed consent where a solicitor has not provided all of the detail of the costs agreement to the client before the agreement was signed where the withholding of information advantaged the lawyer and disadvantaged the client.<sup>182</sup>
264. On the specific issue of the relationship between fiduciary responsibilities and fee charging, the New South Wales Court of Appeal said:
- ...if costs agreements of this kind are to be obtained from clients, it is necessary that the solicitor obtaining them consider carefully her fiduciary and other duties, that she be conscious of the extent to which the agreements contain provisions which put her in a position of advantage and/or conflict of interest, and that she take care that, by explanation, independent advice or otherwise, the client exercises an independent and informed judgement in entering into them.<sup>183</sup>
265. The Queensland Court of Appeal also remarked that overcharging was:
- a serious breach of fiduciary duty... [and was] a case of the respondent's preferring his own interest over that of his client. Otherwise he would, as duty bound, have given the respondent "full and frank disclosure" of all of the relevant information ... in order to ensure that the respondent's decision in the matter was fully informed.<sup>184</sup>
266. As already discussed, the concept of fully informed consent is more difficult in the context of dealing with people with impaired decision-making capacity. Although it is arguable that in the case of the Public Trustee the legislated system of fees and charges replaces the fee agreement, there is nothing on the face of the *Public Trustee Act* that excuses the Public Trustee from compliance with the:
- fundamental fiduciary duty not to make a profit from its position;
  - fiduciary obligation to make full and frank disclosure of its fees and charges, and to justify profit from even reasonable fees; and
  - equitable principle that it is wrong to use the assets of one trust to meet the costs of administering another trust.<sup>185</sup>

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<sup>180</sup> See, for example, GE Dal Pont 'Contextualising Lawyer Overcharging' [2016] 42(2) *Monash Law Review* 283 -291 (who also considered that informed consent 'as a matter of logic, rests on some degree of costs disclosure') and the reference of Ipp J (with whom Pidgeon and Franklyn JJ agreed) in *D'Allessandro v Legal Practitioners' Complaints Committee* (1995) 15 WAR 198 at 220 to the 'fiduciary obligation to adequately inform the client so that an informed decision could be made by the client as to the appropriateness of entering into a written agreement and as to the amount agreed for profit costs'.

<sup>181</sup> *Maguire & Anor v Makaronis & Anor* (1997) 188 CLR 449.

<sup>182</sup> *Council of the Queensland Law Society Inc v Roche* [2004] 2 Qld R 574 at 583 to 584.

<sup>183</sup> *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 at 437 as cited in *Council of the Queensland Law Society v Roche* [2004] 2 Qd R 574 at 584.

<sup>184</sup> *Council of the Queensland Law Society v Roche* [2004] 2 Qld R 574 at 577.

<sup>185</sup> See, for example, *Brisconnections Management Company Ltd & Anor v Dalewon Pty Ltd* (2010) 79 ACSR 530 at [10].



267. It is a principle of statutory interpretation that, unless there is a clearly expressed intention in legislation to override a fundamental principle of law or equity, it will not be overridden.<sup>186</sup> There is nothing in the *Public Trustee Act* or other legislation governing the duties of administrators to indicate that there was any specific intention to alter or override the Public Trustee's fiduciary duties.
268. On the basis of the statements of principle above that outline the duties of fiduciaries in relation to fees, the complex and opaque system of Public Trustee fees and charges raises genuine concerns about whether administration clients are able to give fully informed consent to the fees they are charged. It is not acceptable for the Public Trustee to accept or consent to its own fees and charges on behalf of administration clients when such an action is clearly to the advantage of the Public Trustee and the disadvantage of some of its clients. These issues present a strong case for reviewing the complex structure of Public Trustee fees and charges, increasing transparency, and changing the regime for setting those fees to ensure the Public Trustee is not at risk of breaching its fiduciary duties and that there is routine consideration given to the reasonableness of the fees and charges.

#### Public Trustee response

In its final response to this report the Public Trustee has advised:

It is acknowledged that our fees and charges model can be complex. Part of this complexity has been driven by trying to make the fees and charges as equitable as possible, ensuring customers only pay for the services they use.

The Public Trustee does not agree with inferences throughout the Report that customers may be double charged or charged **fees for no service**. **The Public Trustee's fees and charges are** in line with industry standards and are reflective of the costs involved in providing financial administration services to our customers.

To support our customers and their support network, we have published our fees and charges on our public website in an easy to read format. This is supported by case studies to provide context and assist our customers to identify the fees that may be charged in their individual circumstances. We are also currently developing different channels to convey information via easy to understand media such as videos.

**More than 82 per cent of the Public Trustee's financial Management customers receive reduced fees or fully rebated fees through Community Service Obligations (CSOs). The funding of Public Trustee's CSOs is assisted by the revenue it receives from its corporate investment activities.**

Despite our generous CSOs, it is acknowledged that the current fees and charges model may have unintended outcomes for a small group of customers.

The Public Trustee is undertaking a comprehensive review of all its fees and charges to ensure that they are fair, reasonable, sustainable, efficient and cost effective for our customers. The independent review will include customer and stakeholder consultation as part of the process.<sup>187</sup>

<sup>186</sup> See, for example, the remarks of the High Court in *Potter v Minahan* (1908) 7 CLR 277 at 304 and *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687.

<sup>187</sup> Letter from the Public Trustee of Queensland letter to the Public Advocate, 11 January 2021, in response to draft final report, attachment, *The Public Trustee Response*, p 6.





## Recommendations

### Recommendation 1: Undertake a full fees and charges review

Review the Public Trustee's fees and charges regime for administration clients to achieve:

- a. a simpler fee regime for administration clients. Administration clients and their supporters must be able to easily understand the Public Trustee's fees, what services are provided for the fees, and how and when the fees will be charged;
- b. fees that are more equitable and take into account clients' financial circumstances and their level of income. All clients should pay something towards the cost of the Public Trustee services they receive. The fee regime should include a mechanism that ensures the fees payable to the Public Trustee by administration clients with limited income do not reach a level where the fees become financially oppressive and negatively impact clients' lives, deplete their assets and/or drive them into poverty;
- c. fees that reflect the actual cost to the Public Trustee of providing the services. The fees charged should not be inflated to cross-subsidise services provided to other Public Trustee clients, other organisational activities or to provide 'profit' for the Public Trustee, unless specifically permitted by legislation;
- d. no duplication or overlap in fees. Where clients have been charged an Asset Management Fee on an asset, the Public Trustee should not impose any additional charges for the management or investment of those clients' funds;
- e. cease the practice of charging administration clients fees on assets (such as superannuation fund holdings or other investments) managed by third parties and for which the clients are already paying management fees to those third parties. At a minimum the Public Trustee should charge a lower fee for superannuation fund holdings where it can be shown that there is annual 'active' management of the clients' funds; and
- f. a fee structure that supports and encourages administration clients to exercise autonomy and lead independent lives. Administration clients should not be charged higher fees where they require more support to exercise their capacity and autonomy in relation to their financial affairs.

### Recommendation 2: Improve the transparency of fees and charges

The Public Trustee adopt the following practices to improve the transparency of its fees and charges:

- a. Provide clear and accessible information to administration clients about its fees and charges and the services clients will receive for those fees.
- b. The Public Trustee's policies and manuals that guide what services administration clients receive and how the fees and charges for those services are calculated and applied be published in accessible language and format. This information should include scenario examples to clearly demonstrate the fees to be paid for that service.
- c. On appointment and annually, the Public Trustee send each client personal correspondence detailing the services they will receive and the fees for those services. This should also occur after any significant change to the client's financial circumstances. This communication should be written in plain English with clear explanations of all terms used. All correspondence to administration clients should explain how to locate relevant fees and charges information, policies and manuals on the Public Trustee website. Where clients do not have access to the internet, the Public Trustee should make this information available in hard copy on request.



- d. Review its policies and practices to ensure they actively encourage staff to be responsive to clients and their supporters, particularly in relation to explaining its fees and charges. This is likely to improve information transparency, client participation in the management of their financial affairs, and client satisfaction with Public Trustee services.
- e. The information presented in client Statements of Accounts be improved to make the statements more transparent and easier to understand. The statements should include summary information about categories of income and expenses and provide a total **of the Public Trustee's fees**, charges, additional service fees and outlays for the relevant period. Any special purpose or professional services payments should be the subject of separate correspondence that fully explains these costs and why they were incurred.

Recommendation 3: Consider the effect of fees when appointing the Public Trustee as administrator

The *Guardianship and Administration Act* be amended to require a court or tribunal, when considering appointing the Public Trustee as a person's administrator, to consider the level of the Public Trustee's fees and their likely effect on the person's financial circumstances over time. This is especially relevant when there may be an alternative appointment option of a family member or friend as administrator who would not charge fees. The court or tribunal may need to request that the Public Trustee provide an estimate of annual fees and other usual charges and expenses associated with providing its services, prior to deciding the appointment.

Recommendation 4: Reconsider the practice of routinely obtaining external financial advice

The Public Trustee review its practice of routinely obtaining annual financial advice from an external financial advisor and external legal advice to make Total Permanent Disability (TPD) insurance claims under clients' superannuation arrangements. The review should consider:

- a. whether obtaining external financial advice for most Public Trustee clients is reasonably necessary, considering the **Public Trustee's expertise as a professional trustee**;
- b. whether obtaining the external financial advice represents value for money for clients, taking into account:
  - the **Public Trustee's conservative investment policies** which limit where and how **clients' funds** can be invested, and the returns they earn; and
  - the relatively low value of client assets for which the Public Trustee routinely obtains independent advice;
- c. whether the thresholds for obtaining external financial advice should be reviewed and raised **significantly to ensure clients are not bearing the cost of the Public Trustee's** mitigation of risk associated with its decisions;
- d. when financial advice should be obtained for clients;
- e. the circumstances in which follow-up financial advice should be sought for clients, considering the costs of the advice and the genuine likelihood of a change in client investments being made; and



- f. whether obtaining external legal advice routinely to make TPD insurance claims under clients' superannuation arrangements is reasonably necessary and represents value for money, considering the relative simplicity of TPD claims processes.

**Recommendation 5: Discontinue general fees for incidental outlays**

The Public Trustee should cease the practice of charging general fees for incidental outlays to administration clients and only charge the actual costs of these outlays on each client's file, if they are capable of being accurately costed.

**Recommendation 6: Seek a Goods and Services Tax exemption**

The Public Trustee, with the support of the Queensland Government, seek a Goods and Services Tax exemption from the Australian Taxation Office on its fees and charges for administration clients.



# Chapter 4: Community Service Obligations and fee rebates





269. The Public Trustee has a system of fee relief or rebates that it applies for eligible administration clients to reduce the financial impact of its fees and charges. Fee rebates are a mechanism used by governments to assist financially disadvantaged people by reducing the costs of certain government services. These arrangements are very beneficial for people for whom the fees would otherwise be a financial burden or exclude them from accessing services.
270. The Public Trustee's system of fee relief or rebates is regarded as part of its Community Service Obligations (CSOs).
271. The Public Trustee provides a range of other services to the community as part of its CSOs. These include a free will-making service, a funding contribution to the Office of the Public Guardian, and the provision of community education and advice to the community, courts and tribunals.
272. CSOs are a major cost of the Public Trustee's operations, second only to employee expenses. In 2019-20 the Public Trustee provided \$38.4M worth of CSOs. As with all of the Public Trustee's expenses, CSOs are funded by the Public Trustee from earnings on clients' funds and its own reserve, revenue from management fees on its investment products, and fees and charges.
273. The sheer volume of CSOs, in terms of their value, coupled with their significant annual growth, places significant pressure on the Public Trustee to increase its revenue from all sources, including from fees and charges, to keep pace with this growing cost.
274. This chapter examines the ways the Public Trustee provides fee relief through rebates and other mechanisms, and how it accounts for, costs and funds the rebates along with its other CSOs. It will show how the funding of CSOs has become a growing burden for the Public Trustee, with it increasingly relying on revenue from fees and charges to meet these expenses. Administration clients account for a significant proportion of fee-paying clients who are paying increasing fees for their services. Those with modest assets and income who receive no, or only limited, fee rebates, are experiencing a rapid depletion of their assets which impacts their quality of life.

## Definition and origin of CSOs

275. CSOs arose out of the implementation of the National Competition Policy.<sup>188</sup> Under this policy, government sought to reduce any competitive advantage enjoyed by government businesses delivering services that competed with the private sector. This was to be achieved by implementing a full cost pricing policy for government services identified as 'significant business activities'<sup>189</sup> to achieve 'competitive neutrality'<sup>190</sup> between public and private sector businesses. These measures have the objective of putting government services on an equal financial footing with commercial organisations, including their cost structure, and the requirement to achieve an appropriate rate of return on equity,<sup>191</sup> or a profit.
276. With the adoption of a full cost pricing policy for some government services, there was a need to introduce subsidies or rebates for fees for certain service users who could not reasonably afford the service due to financial disadvantage. This allowed the government to target subsidised services to those who need them. Examples of CSO subsidies in Queensland include student and pensioner discounts on public transport and early payment discounts on rates and other utilities bills. In addition to subsidies and rebates, government identified certain non-commercial activities that it decided should be delivered to the community for

<sup>188</sup> Queensland Government, *National Competition Policy Implementation in Queensland: Competitive Neutrality and Queensland Government Business Activities*, July 1996, <<https://s3.treasury.qld.gov.au/files/ncp-competitive-neutrality.pdf>>.

<sup>189</sup> Queensland Government, *National Competition Policy Implementation in Queensland: Competitive Neutrality and Queensland Government Business Activities*, p5, July 1996, <<https://s3.treasury.qld.gov.au/files/ncp-competitive-neutrality.pdf>>.

<sup>190</sup> Ibid.

<sup>191</sup> Queensland Government, *National Competition Policy Implementation in Queensland: Competitive Neutrality and Queensland Government Business Activities*, July 1996, <<https://s3.treasury.qld.gov.au/files/ncp-competitive-neutrality.pdf>>.



no fee or a reduced or rebated fee. These identified services and the subsidies, fee rebates and other fee relief mechanisms were defined as CSOs.<sup>192</sup>

277. The Public Trustee had been providing free and rebated services to the Queensland community since its inception. Those services became known as CSOs. While the Public Trustee was not ultimately **identified as a 'significant business activity'** for the purposes of the National Competition Policy,<sup>193</sup> in 2002 the then Attorney-General approved it delivering certain services as CSOs by the then Attorney-General.<sup>194</sup> The Public Trustee has been providing, and reporting on, its CSOs ever since.

## Public Trustee CSOs

278. The Public Trustee lists the following services and activities as CSOs:
- Fees rebated for administration clients with limited assets;<sup>195</sup>
  - **Fees rebated for a client's principal place of residence;**
  - Public community education and advice to the courts and tribunals in the areas in which the Public Trustee has expertise e.g. financial administration;
  - A free will-making service to Queenslanders;
  - A funding contribution to the Office of the Public Guardian;
  - Funding of the Civil Law Legal Aid Scheme - outlays written-off and administrative support.<sup>196</sup>
279. The Public Trustee has never received funding from the government for the CSOs it provides.
280. Most government agencies that deliver CSOs are reimbursed from State or Commonwealth Consolidated Funds<sup>197</sup> for the cost of delivering those services. In 2018-19, the NSW Trustee and Guardian received additional funding from the New South Wales government of \$5.1M for CSOs and an additional \$6.5M to fund services associated with the rollout of the National Disability Insurance Scheme, as well as reforms within the office.<sup>198</sup> Over the same period, State Trustees (in Victoria) were funded \$18.8M by the Victorian Government to provide financial management services to the community.<sup>199</sup>
281. There are two significant consequences of the Public Trustee not being reimbursed by government for its CSOs. First, the Public Trustee must fund the CSOs from its own income. Due to the decrease in interest rates over recent years, the **Public Trustee's income from investments** has decreased and is now significantly less than the cost of its CSOs. This has meant the Public Trustee has had to fund the CSOs from another income source. Increasingly, **the Public Trustee's fee-paying clients** (many of whom are administration clients) are bearing the costs of paying for the CSOs.<sup>200</sup>
282. The second consequence of the Public Trustee not being funded by government for its CSOs is their rate of growth. While the Public Trustee participates in the usual government Budget processes, as a self-funded agency, funds are not appropriated to it from Consolidated Revenue. As a result, its expenditure does not appear to be subject to the same level of

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<sup>192</sup> Queensland Treasury, *Community Service Obligations: a Policy Framework*, Economic Performance Division, Queensland Treasury, Brisbane, 1999.

<sup>193</sup> The Public Trustee of Queensland is not included in the list of agencies identified as **engaging in 'significant business activity' under section 33 of the Queensland Productivity Commission Act 2015** (Qld).

<sup>194</sup> Letter from the Hon Rod Welford MP to Mr David Mills, Acting Public Trustee, 12 February 2002, provided in attachments to a letter from the Public Trustee of Queensland to the Public Advocate, 5 April 2019, in response to Information Notice No.1.

<sup>195</sup> This can also include rebates for managing the estates of children, prisoners and unprofitable deceased estates administered by the Public Trustee.

<sup>196</sup> The Public Trustee of Queensland, *Annual Report 2018-19*, p 17.

<sup>197</sup> The State Consolidated Fund refers to the main bank account where monies paid to and held by the State Government are held.

<sup>198</sup> NSW Trustee & Guardian, *Annual Report 2018-19*, p 64 and 113.

<sup>199</sup> As defined in its Community Services Agreement with the Victorian Government. See State Trustees (Victoria), *Annual Report 2018-19*, p 56.

<sup>200</sup> This is despite the Public Trustee of Queensland acknowledging in its 2003-04 *Annual Report*, that it had 'been directed by Government to utilise surpluses generated in the Common Fund to fund Community Service Obligations'. See The Public Trustee of Queensland, *Annual Report 2003-04*, p 9. Also note: The Common Fund is the Public Trustee of Queensland's main investment account where clients' money is held.



scrutiny as agencies receiving funding from government. There appear to have been few, if any, questions asked of the Public Trustee about the growth in its CSOs or how they were being funded, so long as the Public Trustee delivers a balanced budget. Consequently, with no limitation or cap on the cost of CSOs, as would be the usual approach to government-funded services, they have increased significantly over time. In the 18 years since the first full year of operation of the current fee structure, the value of the Public Trustee's CSOs has increased by 284 percent.<sup>201</sup>

## Accounting for CSOs

283. The Public Trustee accounts for its CSOs in a variety of ways in its annual financial statements.
284. Table 5 shows that in 2018-19, the Public Trustee's CSOs were \$37.1M and increased to \$38.4M in 2019-20, a year in which the Public Trustee delivered a budget deficit of \$12M. As already noted, CSOs are a significant and growing cost to the operations of the Public Trustee. The CSOs are included in the Public Trustee's annual financial statements as a deduction from fee revenue where the CSO is a fee rebate, and as an expense when they relate to the grants to the Public Guardian and Legal Aid Queensland for the Civil Law Legal Aid Scheme.<sup>202</sup>

Table 5: Cost of Community Service Obligations

Category of CSOs	2018-19 (\$M)	2019-20 (\$M)
Fees rebated for clients with limited assets	28.1	29.2
Fees rebated for principal residence and other	0.8	0.8
Management of estates of prisoners	0.6	0.6
Public community education and advice to the courts and tribunals in the areas in which the Public Trustee has expertise	1.2	1.5
Providing a free will-making service to Queenslanders	5.0	4.8
Cash contribution to the Office of the Public Guardian	1.2	1.2
Civil Law Legal Aid - outlays written-off and administrative support	0.2	0.3
Total	37.1	38.4

Sources: The Public Trustee, Annual Report 2018-19, p 17; The Public Trustee, Annual Report 2019-20, p 14.

285. As the second largest expense of the Public Trustee,<sup>203</sup> it is important for the sustainability of the Public Trustee, that the growth in CSOs is carefully monitored and managed.

## Fee rebates and hardship provisions

286. The Public Trustee's fee rebate and hardship scheme provides a safety net or limit on the annual fees payable by clients. As mentioned earlier, fee rebates form a significant component of the Public Trustee's CSOs. The categories of fees and charges applied to administration clients was discussed in 'Chapter 3: Fees and charges for administration'. The fees directly relevant to the fee rebate scheme are the:
- Realty Fee; and
  - Personal Financial Administration Fee.

<sup>201</sup> The Public Trustee of Queensland, *Annual Report 2002-03*, p 10; The Public Trustee of Queensland, *Annual Report 2019-20*, p 14.

<sup>202</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 14.

<sup>203</sup> Ibid.



287. There are three types of fee rebates:

1. standard fee rebates — where clients' fees are capped at 5 percent of their total assets (which includes the value of the client's principal place of residence).
2. hardship rebates where:
  - the value of the client's assessable assets (cash and investments excluding motor vehicles, furniture, personal effects and jewelry) is less than \$5,000;
  - the client owns their principal place of residence; and
  - the client's income combined with their cash assets is insufficient to cover the fees.<sup>204</sup>
3. principal place of residence rebate — no realty fee is charged on a client's principal place of residence.



#### Public Trustee fee rebate calculation

The fee rebate threshold is calculated in the following way:

- A figure representing 5 percent of the total value of the client's assessable assets (including the client's primary residence and any superannuation they hold) is calculated.
- If the 5 percent figure is more than the total fees and charges payable by the client that year, then the total of the fees and charges is charged to the client.
- If the 5 percent figure is less than the total fees and charges, then only an amount equal to the 5 percent figure is charged. The amount of the fees and charges above the 5 percent figure is rebated.

288. Fee rebates are also available on some other Public Trustee fees and charges, such as legal fees. These rebates apply only in limited circumstances and require a submission to be made by the relevant Regional Director to the Director Client Experience and Delivery for the individual fee rebate. There is also an automatic rebate of 75 percent on the Public Trustee's incidental outlays where the client has been approved for a hardship rebate. The Public Trustee confirms that it rebated incidental outlays for financial management customers experiencing financial hardship of approximately \$400,000, in 2018-19.<sup>205</sup>

289. The Public Trustee's Quality Assurance and Continual Improvement (QACI) Manual which contains the provisions for the assessment of clients' eligibility for a hardship rebate states in the opening paragraph of the 'Hardship Provisions' section:

In a number of matters the applicable fees under the PFA fee charging regime may cause hardship due to the particular circumstances of the client. For example, clients whose sole asset is their Principal Place of Residence may not have sufficient income or cash reserves to pay the applicable fees.

...

[due to] little or no current Community Service Obligation [standard fee rebate] being received by the client due to the impact of the value of the realty in the calculation of the CSO rebate.<sup>206</sup>

290. Based on this information, it appears that the Public Trustee has been aware, at least since the most recent version of the QACI Manual (which was reviewed in late 2014), that certain clients were not benefitting from its fee rebate scheme and that those who owned a home, and received small incomes such as pensions, were significantly disadvantaged. Nonetheless, rather than amend its rebate scheme to address this issue, the hardship provisions only provide for rebates to apply when the clients' assessable assets, other than

<sup>204</sup> The Public Trustee of Queensland, *Quality Assurance and Continual Improvement (QACI) Manual, 9. Fees and Charges for All Activities*, (Date Reviewed 19/12/2014) (unpublished), paragraph 9.3.9.1.

<sup>205</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 19 May 2020, responding to draft report chapters 1-4, p 11.

<sup>206</sup> The Public Trustee of Queensland, *Quality Assurance and Continual Improvement (QACI) Manual, 9. Fees and Charges for All Activities*, (Date Reviewed 19/12/2014) (unpublished), paragraph 9.3.9 and 9.3.9.1.



their home, have been reduced to less than \$5,000. It is easy to envisage how once a client whose only income is the DSP, has their cash assets reduced to less than \$5,000, will find it difficult to pay for the usual expenses associated with owning a property, such as rates and insurance, afford their living expenses and still have funds left over for regular maintenance on their home. The most likely outcome of this scenario is that the home will fall into disrepair and there will be pressure on the client to sell the home and move into public housing or the private rental market. The QACI Manual also contains an obscure system for authorising a hardship fee rebate for clients experiencing financial hardship. Where the policy applies, the Regional Manager must submit a written request to the Director, Disability Services for consideration of the rebate and this process must be repeated annually.

291. The *QACI Manual* requires the following to be included in the submission to the Director, Disability Services for the approval of the rebate:

- Evidence of occupation of the realty by the client to show if the client has a long-term commitment to residing in the realty
- Copy of a recent valuation of the realty
- List of asset values of the client (excluding motor vehicle, furniture, effects, chattels and personal jewellery)
- Details of income stream of the client.

When considering approving the submission by the Regional Manager, the Director, Disability Services must consider the following:

- That the improvements on the property are consistent with improvements in the location and the state of repair of the improvements as set out in the valuation report on the property
- The value of the realty in comparison to realty within the area in which the property is situated
- The length of occupation of the residence by the client
- **The client's income stream is insufficient to cover the cost of the Public Trustee charge of the Personal Financial Administration Fee.**<sup>207</sup>

292. The material required to be submitted in support of the rebate, and the considerations the Director, Disability Services is required to apply to that material, deserve some specific comment.

293. It is unclear why it is considered necessary to obtain a 'recent valuation of the realty' of the client, especially when the client is in such dire financial circumstances as to warrant consideration of a hardship rebate. The effect of this requirement is that when the client is down to their last \$5,000 in cash, the Public Trustee is making a decision to spend those limited funds on a property valuation, the value of which, in the consideration of whether to grant a hardship rebate, is questionable.

294. The submission also requires evidence of the client's 'long-term commitment' to the property. **Certainly, the client's connection to the property is relevant in terms of how long they have lived in it and their attachment to it, especially if it is the family home. However, the Director, Disability Services' considerations are not framed in this way. It is of concern that other matters, such as how de-stabilising a move from the property and into the rental market might be for the client, an assessment of the client's suitability as a tenant and/or the challenges of finding available public housing or other rental accommodation, do not appear to be considerations. Broader public policy considerations such as the impacts of moving people with impaired decision-making capacity out of their own homes and into the property rental market (which may also be in a location away from their support network) are also not considered.**

295. Another issue arising from these arrangements is the fact that the system requires the trust officer and Regional Manager to initiate the application for a hardship rebate. Such a system is open to mistakes and oversight which could have serious implications for administration clients with limited funds who could greatly benefit from the rebate. There is nothing in the

<sup>207</sup> The Public Trustee of Queensland, *Quality Assurance and Continual Improvement (QACI) Manual, 9. Fees and Charges for All Activities*, (Date Reviewed 19/12/2014) (unpublished), paragraph 9.3.9.2.





hardship provisions that suggests that clients whose eligibility for the rebate has been overlooked can be assessed at a later date and have it retrospectively credited to them. There also appears to be no review or oversight of the decision-making process around client eligibility for a hardship rebate.

296. A final matter of concern arising from the hardship provisions in the *QACI Manual* is the apparent requirement that advice be obtained from the Financial Planning Team about **accessing clients' superannuation to pay the Public Trustee's fees before making an application for a hardship rebate for the client.**<sup>208</sup> This requirement raises questions about whether such a course is **appropriate on the part of the Public Trustee, when the client's financial hardship appears to be a consequence of its fees and charges and the inadequacy of the fee rebate scheme.** Such action would also **obviously affect the client's future income from superannuation.** There is no indication that the Public Trustee will cease charging the client fees once the **client's superannuation has been withdrawn.** The policy suggests that the Public Trustee **will continue to access the client's superannuation, where possible, to continue paying its own fees until that option is no longer available to it.** The policy **does not require consideration of the impact a withdrawal of a client's superannuation on their future income from this source.**
297. The way the *Quality Assurance and Continuous Improvement Manual* is drafted suggests that only certain fees and charges are rebateable to Public Trustee clients who are eligible for the hardship rebate. As already noted, there is provision for a rebate of the Personal Financial Administration Fee, a reduction in the incidental outlays charged and also for clients in certain circumstances to be eligible for a fee rebate on their legal fees. However, on the basis of omission, it appears that certain other outlays for services from external service **providers and costs associated with maintaining clients' properties,** such as valuations, building and pest inspections, are not part of the fee rebate or hardship arrangements.
298. The overall operation of the fee rebate scheme results in administration clients with no or low-value assets (including those who do not own their own home) receiving services from the Public Trustee at no, or very little, cost. The Public Trustee provides a significant service for this **group of people as noted in 'Chapter 1: The review'.** However there are concerns about the effect of the fees and charges on the financial outcomes of those administration clients with few cash assets and low income who own their own home, and receive little or no benefit from the fee rebate scheme.
299. Administration clients are most likely to be eligible for rebates when the value of their assets is **low.** If a client's assets have a higher value (which is likely when they own their own home), then the 5 percent fee cap can be so high that they are unlikely to ever benefit from a rebate (until the value of their cash assets falls below \$5,000, making them eligible for the hardship rebate described above).
300. Table 6 examines the operation of the fees and charges and rebates across a range of client financial profiles.<sup>209</sup> **It is important to note that every client's financial situation, asset holdings, income and spending habits are different, so the following assumptions were made:**
- the notional clients for the profiles are all assumed to be on Level 5 of the Personal Financial Administration Fee;<sup>210</sup>
  - **all sources of the client's income (pensions and entitlements, superannuation, interest), and expenses (except for the Public Trustee's fees and charges) are approximately equal; and**
  - the income and expenditure for each profile remained constant over the relevant period.

<sup>208</sup> The Public Trustee of Queensland, *Quality Assurance and Continual Improvement (QACI) Manual, 9. Fees and Charges for All Activities*, (Date Reviewed 19/12/2014) (unpublished), paragraph 9.3.9.1.

<sup>209</sup> This calculation is based on the Public Trustee of Queensland, *Financial Administration Fees and charges* (22 October 2020), <<https://www.pt.qld.gov.au/financial-administration/fees-and-charges/#servicelevel>>.

<sup>210</sup> Data provided by the Public Trustee of Queensland shows that in 2017-18 there were 9,811 people under administration. Of these, 4,434, approximately 47 percent, were placed on Personal Financial Administration Fee Service Level 5. The next highest category of Personal Financial Administration Fee was Service Level 2, with 3,013 people, or approximately 32 percent of administration clients.





301. The table highlights the relationship between varying values and combinations of client assets (cash and/or primary residence) on the level of fee rebate and therefore, the fees that clients have to pay.
302. It is important to note that for the calculation of fees and charges the value of any house or other real estate is not included in either the Personal Financial Administration Fee or the Asset Management Fee. Instead, clients who own real estate are charged a separate Realty Fee. Where the property is the client's primary residence the Realty Fee is rebated.
303. However, for the calculation of a client's fee rebates (i.e. calculation of the 5 percent fee cap) the value of a client's real estate, including their principal place of residence, is included in the 'assessable assets' for calculating the 5 percent cap. In simple terms, the higher the asset value, the higher the cap for fee relief and the less likely that the administration client will qualify for a rebate of any fees.



Table 6: Combinations of assets, fee rebates and effect on cash holdings over time

	Financial profile 1	Financial profile 2	Financial profile 3	Financial profile 4
House	\$800,000	\$800,000	\$0	\$0
Cash	\$500,000	\$50,000	\$500,000	\$50,000
Total assets	\$1,300,000	\$850,000	\$500,000	\$50,000
Fee rebate cap (5% of total assets) <sup>211</sup>	\$65,000	\$42,500	\$25,000	\$2,500
Personal Financial Administration Fee	\$6,519.05	\$6,519.05	\$6,519.05	\$6,519.05
Asset Management Fee	\$2,767.45	\$594.75	\$2,767.45	\$584.80
Realty Fee – Primary residence	\$979.90	\$979.90	N/A	N/A
Total fees	\$10,266.40	\$8,093.70	\$9,286.50	\$6,988.60
Fee rebate	Nil	Nil	Nil	\$4,488.60
Fee rebate – Primary residence	\$979.90	\$979.90	Nil	Nil
Total fees payable	\$9,286.50	\$7,113.80	\$9,286.50	\$2,500
Cash eroded	59 years	7 years	Over lifetime	45 years

- Notes:
1. Fees and charges are calculated at 2019-20 levels. See the Government Gazette No. 54, Friday 28 June 2019, pp. 363-388.
  2. Total fees are charged as calculated unless the fees exceed 5 percent of the client's total assets – if this occurs the client is charged a flat rate of 5 percent of their asset value per annum.
  3. The Realty Fee is rebated for clients living in their own home.
  4. References to years following the Asset Management Fee in the table above are included to illustrate the number of years to which this particular Asset Management Fee charge is applicable (it changes over time with a reducing asset balance).
  5. Cash eroded was based on a declining balance over time until cash holdings were less than \$5,000.

<sup>211</sup> The fee rebate cap is calculated at 5 percent of the client's total assets, including their principal place of residence. Fees that exceed the cap are rebated to clients.



304. The profiles above demonstrate that the overall value of **assets held (including a client's residence)** is critical to the calculation of the fee rebate cap and the amount of fees the client will pay. A higher asset total produces a higher cap before clients are eligible for a fee rebate, resulting in lower (or no) fee rebates for clients who own their own home or have large cash reserves.
305. The only profile where a client receives a rebate of fees other than the Realty Fee rebate is Profile 4. This client received the rebate because the value of their total assets (\$50,000) was so low that the usual Public Trustee fees (\$6,988) amounted to more than the 5 percent fee rebate cap (\$2,500). In this situation, the client is only required to pay the equivalent of 5 percent of their assets (\$2,500) as fees to the Public Trustee, with the remainder of the fees rebated or waived. Accordingly, the Profile 4 client would benefit from the fee rebate system. **In those circumstances it would take 45 years for the Public Trustee's fees and charges to result in that client's assets to fall below \$5,000 (assuming the client did not spend more than their income annually).**
306. In Profiles 1, 2 and 3, while the clients' overall asset values (house and/or cash) are modest in broader community terms, the calculation of the 5 percent fee cap is well above the total fees payable to the Public Trustee, making them ineligible for any significant fee rebate (except on their residence). Consequently, while the client in Profile 3 appears able to pay their total fees over their lifetime, the clients in Profiles 1 and 2 are charged significant fees with a rebate for their primary residence only, resulting in a depletion of their assets during their lifetime. **In the case of Profile 2, the client's cash assets would be depleted within 7 years of coming under administration.**
307. Profiles 1 and 3 both feature administration clients with high levels of cash. The profiles demonstrate that it would take approximately 59 years or more for the Public Trustee's fees and charges to erode these cash balances. The decrease in cash assets may be more rapid in practice because the calculations do not take into account potential annual fee increases, nor do they account for other spending by the client. The information in Profile 1 also does not take into account the appreciation in the value of the house that could be expected over time.
308. Case study 1 in 'Chapter 1: The review' told the story of Tony, a man with a life-long cognitive disability who received \$30,000 in shares from an inheritance. Tony had been a client of the Public Trustee and benefited from the Public Trustee's fee rebate scheme prior to receiving the inheritance. Tony's inheritance resulted in his assets taking him above the fee rebate threshold and he began paying the Public Trustee's full fees and charges. As a result of the fees and some out-of-the-ordinary spending by Tony, the funds from the sale of his shares was spent within two years. The case study also showed how Tony's low level of cash assets meant he could not pay his fees and maintain his house and was facing the prospect of it of being sold. It is also important to note that after Tony's family took over administration, Tony was able to live within his limited income, his savings increased and his quality of life improved.

## Other CSOs

309. As well as providing client fee rebates, the Public Trustee delivers a range of additional services that it classifies as CSOs. These include the costs of managing the estates of prisoners, community education and advice to courts and tribunals, a free will-making service, a financial contribution to the Office of the Public Guardian and funding for outlays for people accessing the Civil Law Legal Aid Scheme.
310. As noted earlier, the CSOs provided by the Public Trustee in 2019-20 amounted to \$38.4M.<sup>212</sup> This represents a 3.5 percent increase over 2018-19. **Based on the Public Trustee's financial projections, a further increase of 5 percent is anticipated in 2020-21.**<sup>213</sup> The amount of the anticipated increase in CSOs is concerning in the current economic climate, especially

<sup>212</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 14.

<sup>213</sup> Ibid.



considering the significant decrease in Public Trustee earnings on investments and its budget deficit of \$12M last financial year.

311. Over the ten years to 2018-19, the Public Trustee's CSOs increased by 66 percent,<sup>214</sup> while inflation for the period was only 20.4 percent.<sup>215</sup>

## Funding CSOs

312. The Public Trustee advises that the interest it earns from its investments helps pay for its CSOs<sup>216</sup> and, as noted earlier, it has been directed by government to use income from its investments (i.e. the Common Fund) to pay for them.
313. Table 7 shows the Public Trustee's sources of revenue and total CSOs over the eight years to 2019-20. The heading 'Administration of estates' represents the revenue earned by the Public Trustee in fees and charges and other professional fees from clients under administration and deceased estates.

Table 7: Sources of Public Trustee revenue and total CSOs

	Revenue (\$M)							
	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20*
Administration of estates <sup>^</sup>	67.9	72.2	74.0	76.0	80.5	85.7	90.1	91.0
Trust fees	7.3	6.2	5.4	4.5	4.7	4.9	4.8	-
Auction revenue	3.4	2.3	1.7	2.3	2.1	2.4	2.5	-
Investments (Interest revenue)	30.0	33.3	33.6	32.2	28.9	28.2	27.6	21.0
Other	11.6	5.1	5.4	4.0	3.9	3.3	4.1	3.7
Total Revenue before CSO deduction	120.2	119.1	120.2	119.0	120.1	124.5	129.2	115.6
Total CSOs <sup>#</sup>	26.9	28.4	30.4	31.3	33.8	35.6	37.1	38.4

Source: Public Trustee, Annual Reports, 2012-13 to 2019-20.

\* Due to a change in accounting practices implemented in 2019-20 it was not possible to include all figures for 2019-20 that are comparative with previous financial years. However, the shortfall in investment revenue relative to CSOs is noteworthy and continues the established trend.

<sup>^</sup> The full name of this category is: Administration of estates and trusts and other professional fees (the amounts in the table represent the reported revenue from Administration of estates before deduction of the CSOs).

<sup>#</sup> The CSO figures include all of the CSOs reported in the Public Trustee Annual Reports for the relevant years

314. Table 7 shows that until 2016-17, the Public Trustee's earnings on its investments covered the cost of its CSO expenses. In the years preceding 2016-17, the Public Trustee used the surplus interest earnings after funding the CSOs to help fund its other operations.
315. However, after 2016-17 investment revenue decreased to a level that was not enough to fully fund the CSOs. This meant that instead of the Public Trustee's investment earnings covering the CSOs, and also helping to fund other operational expenses, the Public Trustee needed to find alternative sources of income to fund the CSOs and those other expenses previously funded by surplus interest revenue. It appears that from 2016-17 onwards, this funding shortfall

<sup>214</sup> Increase calculated on \$22.4M reported in the Public Trustee of Queensland, *Annual Report 2009-10*, p.18 and \$37.1M reported in the Public Trustee of Queensland, *Annual Report 2018-19*, p.17.

<sup>215</sup> Reserve Bank of Australia, *Inflation Calculator*, <<https://www.rba.gov.au/calculator/financialYearDecimal.html>>.

<sup>216</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 5 April 2019, in response to Information Notice No.1, pp 28-29.



has primarily been met by increasing its fees and charges for administration clients and deceased estates. This is discussed further below.

316. Table 7 also shows the total revenue reported by the Public Trustee each year. Over the last six years, all sources of Public Trustee revenue (other than fees from the administration of estates) have decreased. Revenue from the administration of estates has experienced consistent growth, with income from this source increasing by approximately \$5M in each of the last three financial years. This growth is primarily accounted for by increases in fees and charges, rather than an increase in demand for services. Between 2015-16 and 2018-19, administration clients increased by 9 percent from 9,162 to 9,957, deceased estates remained static, while over the same period, revenue from these sources increased by 19 percent.<sup>217</sup>

## Discussion

317. The Public Trustee's revenue and CSO figures suggest that the fee revenue from administration of estates, which includes fees and charges paid by administration clients, has been subsidising the provision of CSOs since 2016-17. By last financial year, the shortfall **between the Public Trustee's investment revenue** — which was always intended to be the source of funding of CSOs — and the cost of its CSOs, was approximately \$17M.
318. The effect of this is that fee-paying clients, which include administration clients and deceased estates) are contributing to the funding of some Public Trustee services they do not, and may never, access. It is also questionable whether it is appropriate that administration clients should, through the fees and charges they pay, be contributing to the funding of other activities of the Public Trustee, including the provision of free wills, funding to the Office of the Public Guardian or advice provided by the Public Trustee to courts and tribunals.
319. As already noted, a key concern with the CSOs is their rate of growth and impact on the Public Trustee's operations over time. These increases are continuing despite the Public Trustee experiencing reductions in revenue from all sources (except fees), while interest rates remain at historically low levels.
320. Considering that revenue from client fees is now being increasingly relied on by the Public Trustee to defray the costs of CSOs, it is critical that the Public Trustee take steps to contain this increasing cost to its operations. The largest contributor to CSOs is rebated fees and charges for clients with limited assets. This means that administration clients, even with modest assets, are paying a premium on their fees to fund administration services for clients who are not paying any, or reduced, fees. Administration services is an area of service demand over which the Public Trustee has limited control. In the circumstances, it may be appropriate to consider whether the *Guardianship and Administration Act* provisions should be amended to provide that the appointment of the Public Trustee be one of 'last resort' (see further discussion about this issue in 'Chapter 8: The road to here'). Alternatively, the Public Trustee could consider whether all administration clients who are currently not paying fees under the Public Trustee's fee rebate and financial hardship schemes should be paying something towards the cost of their services, in the form of a fee based on a small percentage of their income, which could reduce some financial pressure on the Public Trustee.
321. The second largest contributor to CSOs is the Public Trustee's free will-making service. While the goal of ensuring that as many Queenslanders as possible have a valid will is consistent with good public policy, the availability of this free service and the Public Trustee's proactive promotion of it drives demand and increases costs. The cost of the free will-making service was reported to be \$4.8M in 2019-20.<sup>218</sup> Again, the Public Trustee is budgeting for a \$0.3M increase in costs associated with this service this financial year.<sup>219</sup>
322. The Public Trustee's current free will-making service is available to all Queenslanders, with no means test. While the policy objective is positive, it is questionable whether the benefits of having wills made free for a proportion of the population who could afford to pay for the

<sup>217</sup> The Public Trustee of Queensland, *Annual Reports, 2012-13 to 2018-19*.

<sup>218</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 14.

<sup>219</sup> *Ibid*.



service, and who would be unlikely to die intestate if the free will-making service were not available, can be justified, considering the cost to the Public Trustee and its clients who are subsidising the service through their fees.

323. The need for the Public Trustee to have an alternative strategy to fund CSO commitments was identified as early as 1991 by the Public Sector Management Commission (the precursor to the Public Service Commission). The Public Sector Management Commission undertook a review, identifying a range of concerns for the Public Trustee (including an inadequate financial base), and recommended the Public Trustee determine the cost of its CSOs and develop a policy for consideration by government about how they should be funded in the future.<sup>220</sup>
324. A 1996 Auditor-General audit of the Public Trustee also recommended the Public Trustee **'review the range of "community service obligations" to be provided and arrange for appropriate government funding of those services'**.<sup>221</sup> In relation to the free will-making service, the Auditor-General recommended:
- If the Government considers the making of wills by the PTO [Public Trust Office] is a service which the public should receive free of charge, arrangements should be made to ensure the cost of the service is accurately assessed and appropriate funding provided for the service. However, if the service is not to be regarded as a community service it should either be discontinued or commercial charges applied.<sup>222</sup>
325. It appears that these recommendations were not implemented. Instead, over the past decade, in a climate characterised by declining investment revenue, the Public Trustee has increased its reliance on revenue generated by fees and charges to fund the continued growth in CSOs.
326. The Public Trustee manages a range of other clients, including philanthropic trusts, for which it provides administration and other management services from its resources. It also provides rebates of its fees associated with management of the investment of funds of those philanthropic trusts in the Growth Trust (this is discussed further in 'Chapter 8: The road to here'). These fee rebates are not considered, or reported as, CSOs by the Public Trustee. The Public Trustee considers the rebate of the Growth Trust to be **'a commercial fee arrangement relating to all investments in the Growth Trust regardless of the financial circumstances of the investor'**.<sup>223</sup> This may be so, however, the rebates nonetheless represent a cost to the Public Trustee, in terms of revenue it has waived, for the benefit of these other clients and trusts. It appears, that to some degree, the fees and charges raised from administration and other clients are also supporting, and indirectly subsidising, these fee rebates.
327. It is not acceptable for a fiduciary to charge fees to one group of clients to subsidise the costs of delivering services to another group of clients. The effect of the Public Trustee's system of fees and rebates is that some clients who are able to pay fees, subsidise a range of services and activities provided to others. Ultimately, these practices raise questions about whether the Public Trustee is acting in the interests of its administration clients and fulfilling its duties and obligations as a fiduciary.
328. The people under administration with the Public Trustee are some of the most vulnerable people in the Queensland community. It is concerning that this group of clients should not only be paying high, and multiple, fees for their administration services, but that some of those fees are being used to fund a range of other services the Public Trustee provides, that, in many cases, they will never be able to access.
329. For many administration clients of moderate means and income, the Public Trustee's fee rebate and hardship scheme is inadequate to alleviate the negative effects of its fees and charges regime.

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<sup>220</sup> The Public Trustee of Queensland, *Annual Report 1990-91*, pp 6-10.

<sup>221</sup> Auditor-General of Queensland, *Report of the Auditor-General on A Special Audit of The Public Trustee of Queensland Relating to Certain Operational and Other Issues*, 1996, p 18.

<sup>222</sup> *Ibid* p 19.

<sup>223</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 19 May 2020, in response to draft report chapters 1-4, p 11.





330. The fee rebate scheme mainly benefits clients who live under very constrained financial circumstances. For other clients, the effect of the Public Trustee's fees and charges regime can place them under financial stress, and the rebate system does not provide relief. In some instances, the interplay between the fees and charges and the rebate scheme can result in clients being unable to maintain a key asset, such as their home, which for most people provides a place of safety, security and a level of independence.
331. Further, the Public Trustee's system of CSOs, their uncapped growth and their funding from administration client fees and charges amounts to a breach of trust on the part of the Public Trustee that should be immediately addressed. Administration clients should only pay the reasonable costs of providing the services they actually receive.

#### Public Trustee response

The Public Trustee advises:

The Public Advocate is of the view that the Public Trustee has been increasing its fees for financial management customers to cover the rising cost of CSOs and to offset declines in revenue in other parts of the business.

The Public Trustee does not agree with the conclusions of the Public Advocate. Fees and charges have only increased by the Government Indexation rate set by Queensland Treasury since the current fees and charges model was introduced. In 2019-20, the fees and charges were increased by 1.8 percent in line with the broader Government ...

... the Public Trustee made a loss of \$43 million on financial management services over the last six years, and even after including income from managing financial management customer funds, the Public Trustee has made a loss of \$6 million over the last six years.

This shows that the service to financial management customers is in fact being subsidised by the revenue earned by other parts of the business such as unclaimed money and real estate.

...

The Public Trustee cares for its customers and it is anticipated that there will be an ongoing need for generous CSOs now and into the future. The independent fees and charges review will consider the current CSO arrangements, including funding method, to ensure it is sustainable, cost effective and beneficial for our customers.<sup>224</sup>



#### Recommendations

##### Recommendation 7: Review Community Service Obligations (CSOs)

The Public Trustee's Community Service Obligations be reviewed and consideration given to whether the Public Trustee's current Community Service Obligations should continue to be provided in their current form, and at current levels.

##### Recommendation 8: Discontinue client subsidisation of Community Service Obligations

The Public Trustee cease using revenue raised through administration clients' fees and charges to fund or subsidise the cost of providing Community Service Obligations on the basis that a fiduciary should not use the funds of one client to fund services to another.

<sup>224</sup> The Public Trustee of Queensland letter to the Public Advocate, 11 January 2021, in response to draft final report, attachment, *The Public Trustee Response*, p 7.



Recommendation 9: Limit the level of community service obligations

The Public Trustee's Community Service Obligations should be capped at a level that can be reasonably funded from revenue earned on its investments.

Recommendation 10: Review fee rebate and financial hardship provisions to ensure client assets are not depleted by fees and charges

The Public Trustee review its fee rebate and financial hardship schemes to:

- a. achieve more equitable outcomes for administration clients, especially those with limited incomes, such as pensions, who own their own home. The review should consider raising the level of assets for financial hardship eligibility above \$5,000 and reviewing the practice of including the value of clients' **principal place of residence** in the value of assets for calculating fee rebates;
- b. ensure no administration client will experience an unavoidable depletion of assets because of the amount of Public Trustee fees they pay and the inadequacy of the rebates; and
- c. develop a new stand-alone Fee Rebate and Financial Hardship Policy that is accessible and easy to understand to ensure that administration clients and members of the public know how the policy operates.





332. Up to this point, the review has principally focused on the effect of the Public Trustee's fees and charges on people under administration. While examining these issues, certain Public Trustee policies and practices relating to its management and investment of client funds were identified that raised broader concerns about whether these practices are consistent with the Public Trustee's fiduciary duties.
333. This chapter examines the Public Trustee's investment practices and the way they are used by the Public Trustee to earn income from clients' funds. In particular, the following issues are examined:
- the various investments or financial products used by the Public Trustee to invest client funds;
  - the Public Trustee earning revenue from client money invested in the Common Fund by means of the 'interest differential';
  - the accumulation of large reserves from annual operating surpluses; and
  - the operation of the Public Trustee's Growth Trust.
334. This chapter also outlines the operation of the 'Prudent Person Rule' that guides the investment practices of all trustees. It examines the way the rule has been interpreted and applied by the Public Trustee in its *Prudent Person Rule Manual*, which is used to guide staff in their decision-making about the management and investment of client funds.

## The Common Fund

335. The Public Trustee is required by legislation to have a Common Fund with all money coming into the hands of the Public Trustee required to be paid into this fund and invested by the Public Trustee.<sup>225</sup>
336. In 2019-20, the Public Trustee reported that it held \$731M in trust in the Common Fund, on behalf of clients.<sup>226</sup> The Public Trustee reports that clients under 'financial management' represent the single largest group of contributors to these deposits, contributing \$316M<sup>227</sup> (or approximately 43 percent) of the deposits held in trust by the Public Trustee. These funds represent cash available to the Public Trustee to invest in accordance with its legal and fiduciary duties. There was also a further \$178M in Public Trustee accumulated surpluses held in the fund.<sup>228</sup>
337. The Public Trustee has established two accounts within the Common Fund, the Public Trustee Cash Account and the Public Trustee Term Investment Account. Although an administration client's cash must first be paid into the Common Fund, not all of that money needs to remain in that account. As noted, the Public Trustee is authorised to invest money on behalf of clients,<sup>229</sup> and so can take clients' money out of the Common Fund and place it into investments that earn a higher rate of return for the client.
338. The Growth Trust is an investment product established by the Public Trustee for investing client funds outside of the Common Fund. All three of these funds pay prescribed rates of interest, with the Cash Account paying the lowest rate of interest, the Term Investment Account paying a higher rate, and the Growth Trust paying a higher rate again. However, only the Cash Account and the Term Investment Account are considered part of the Common Fund and the funds in those accounts, and the interest payable on those funds, are guaranteed by the Queensland Government.<sup>230</sup>

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<sup>225</sup> *Public Trustee Act 1978* (Qld) s.19(1)(a). The Common Fund is not unique to the Public Trustee and is used by State and Public Trustees across Australia and internationally.

<sup>226</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 59.

<sup>227</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 59. People under 'financial management' include primarily those under administration, people for whom the Public Trustee is acting as financial attorney and prisoners.

<sup>228</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 81.

<sup>229</sup> *Public Trustee Act 1978* (Qld) s 19(1)(d), (2)(b).

<sup>230</sup> *Ibid* s 23. Also see email from the Public Trustee of Queensland to the Public Advocate, 10 February 2020, attachment, pp 1-2.



339. When considering the investment practices of the Public Trustee to earn income on clients' cash investments, it is useful to understand the approach used by the Public Trustee to invest those funds. The Public Trustee uses an industry-wide convention similar to banks and superannuation funds to make use of their customers' money, and it operates on two levels.
340. On the first level, a bank may receive customer money into a savings account and guarantee to pay the customer interest on their savings. Banks also offer products like term investment accounts and customers can decide to take money out of their savings account and invest it in a term investment account or another investment to earn a higher rate of interest. This is the same process used by the Public Trustee.
341. On the second level, the bank is allowed to use all of the money it is holding in both the savings and term investment accounts, pool it into larger deposits and invest those funds in the bank's own name into Australian and international investment markets that would not ordinarily be available to the customer. Through this pooling process, the bank can access much higher interest rates and get higher earnings, which it keeps to generate profits, fund operations and pay share dividends to investors, while it pays the lower guaranteed interest rate returns to the customer.
342. The Public Trustee uses similar processes when managing clients' money to generate income to fund its operations.<sup>231</sup> However, the Public Trustee is not a bank with customers who are in a contractual relationship with it and have legal capacity and the ability to take their business elsewhere. The Public Trustee's approach to the investment of its clients' funds benefits the operations of the Public Trustee, but does not necessarily benefit its administration clients, at least to the extent that it might. As noted in 'Chapter 2: Financial administration and the Public Trustee', as a trustee and fiduciary, the Public Trustee has very specific obligations to put its clients' interests before its own.

## Interest differential

343. In terms of the operation of the Common Fund, the Public Trustee has access to two separate sources of money for investment purposes:
- funds belonging to clients of the Public Trustee held in the Cash Account and Term Investment Accounts; and
  - the Public Trustee's accumulated surpluses (reserves) from operations year on year.
344. For ease of discussion, client money held in the Cash Account and Term Investment Accounts will be referred to as client money in the Common Fund.
345. The Public Trustee is authorised to invest the Common Fund money in its own name in any authorised investments, and the income earned from those investments is required to be paid into the Common Fund.<sup>232</sup> The *Public Trustee Act* provides that the investments from the Common Fund are not made on account of the individual clients or estates under administration, but that interest at a 'prescribed' rate is to be credited at least annually to the clients whose money is in the Common Fund.<sup>233</sup>
346. The *Public Trustee Act* does not require that the interest paid to clients must be the same as the interest earned by the Public Trustee from its investment of Common Fund money. The difference between what the Public Trustee earns in interest (usually a higher rate) compared to what it pays to clients (usually a lower rate) is described by the Public Trustee as the 'interest differential'. The Public Trustee is required to use the earnings on the Common Fund investments, first to pay interest to the clients whose money is invested in the Common Fund and then to pay the Public Trustee's operating and capital expenses.<sup>234</sup> (These financial arrangements and the associated conflicts and challenges for the Public Trustee as a fiduciary since its commencement are discussed further in 'Chapter 8: The road to here'.)

<sup>231</sup> Email from the Public Trustee of Queensland to the Public Advocate, 21 January 2020, attachment, pp 1-2.

<sup>232</sup> *Public Trustee Act 1978* (Qld), ss 19(1)(a), (b).

<sup>233</sup> *Ibid* s 19(1)(c).

<sup>234</sup> *Ibid* s 19A(2).



347. The Public Trustee does not publish information about the rate and amount of interest it earns on the money in the Common Fund. However, the interest rate payable to financial administration clients on their Common Fund balances is published under the *Public Trustee Regulation*.<sup>235</sup> The rate payable throughout 2018-19 was 1.75 percent,<sup>236</sup> with subsequent market changes resulting in the rate being reduced to 0.25 percent in November 2020.<sup>237</sup> At the same time, the interest rate payable on Public Trustee Term Investment Account balances during 2018-19 was also 1.75 percent<sup>238</sup> and as at November 2020 was 0.4 percent.<sup>239</sup> These rates are generous compared with the current Reserve Bank cash rate of 0.1 percent.<sup>240</sup> However, the non-publication of the higher rates of interest or earnings by the Public Trustee on client funds in the Common Fund results in a lack of transparency and accountability about how clients' money is being invested, the overall earnings on that money and the fairness of the division of those earnings between the Public Trustee and its clients.
348. The Public Trustee reported that in 2019-20 its investment activities earned \$20.9M in interest revenue,<sup>241</sup> with \$8.0M paid out as interest expenses.<sup>242</sup> Although no specific information is available in the annual report, it is assumed that this expense was paid as interest to clients on their moneys in the Common Fund. On that basis, the revenue kept by the Public Trustee from the interest differential in 2019-20 is calculated to have been \$12.9M (\$20.9M minus \$8.0M), or 62 percent, of the interest earned on the Common Fund's investments. With the Public Trustee's accumulated surpluses accounting for 20 percent of the money in the Common Fund,<sup>243</sup> this appears to be a particularly favourable, and possibly unfair, return to the Public Trustee from earnings on clients' funds.
349. Concerns about the amount of the interest differential retained by the Public Trustee is not new. In a 1996 audit of the Public Trustee, the Auditor-General undertook a comparison of interest revenue and interest credited to client estates from the Common Fund for the period 1991 to 1995, finding that the proportion of interest earnings retained by the Public Trustee over that time ranged from 27 percent to 48 percent. As a consequence the Auditor-General made the following observations:
- This interest differential has generated the operating profit recorded by the Common Fund as well as the accumulation of general reserves ...
- While this is commonly practiced among trustee organisations the question arises as to the equity of the PTO [Public Trust Office] retaining a significant proportion of Common Fund earnings which could be argued, more properly should be distributed to estates.<sup>244</sup>
350. The Auditor-General recommended that the Public Trustee:
- Ensure to the greatest extent possible that maximum benefit is transferred to estates from interest earnings of the Common Fund.<sup>245</sup>

<sup>235</sup> *Public Trustee Regulation* 2012 (Qld), sch 1, item 3.

<sup>236</sup> *Public Trustee Regulation* 2012 (Qld) sch 1, item 3; *Public Trustee Amendment Regulation* (No. 1) 2015, SL 2015 No. 7 in force from 1 April 2015 to 1 October 2019.

<sup>237</sup> *Public Trustee (Interest Rate) Amendment Regulation* (No. 2) 2020, SL 2020 No. 219, sch 1, Item 3, commenced 1 November 2020.

<sup>238</sup> *Public Trustee Regulation* 2012 (Qld), s 4(2), in force from 1 November 2016 to 1 October 2019.

<sup>239</sup> *Public Trustee Regulation* 2012 (Qld), s 4(2), commenced 1 October 2020.

<sup>240</sup> Reserve Bank of Australia, *Cash Rate Target*, (2020), <[rba.gov.au/statistics/cash-rate/](http://rba.gov.au/statistics/cash-rate/)>.

<sup>241</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 40.

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid* pp 40, 59.

<sup>244</sup> Queensland Audit Office, *Report of the Auditor-General on A Special Audit of The Public Trustee of Queensland Relating to Certain Operational and Other Issues*, March 1996, pp 16-17.

<sup>245</sup> *Ibid* p 18.





351. While it was not specifically addressed by the Auditor-General at the time, in addition to the obvious question of fairness arising from these practices, is their incompatibility with the duties and obligations of a trustee and fiduciary not to profit from its clients and to avoid conflicts. The Public Trustee justifies these arrangements on the basis that the interest differential arrangement:

is a model that has been in place since the Public Curator ... was created by the *Public Curator Act* 1915. Ever since its inception the Public Trustee has met its expenses ... from the margin between the earnings of the Common Fund and the interest paid to trusts and estates and the fees received from its services.<sup>246</sup>

352. The Public Trustee is in a position of conflict when it invests client funds in its own products and earns revenue or fees from those investments that it does not return to the client. The Public Trustee has acknowledged that such arrangements amount to a conflict in its *Prudent Person Rule Manual* (discussed in further detail below).

353. A fiduciary is only permitted to profit with the fully informed consent of the beneficiary and with full and frank disclosure of all relevant information.<sup>247</sup>

354. As noted in 'Chapter 2: Financial administration and the Public Trustee', the concept of fully informed consent is more difficult in the context of providing services to people with impaired decision-making capacity. Although it is arguable that in the case of the Public Trustee the legislated system of fees and charges replaces the fee agreement, there is nothing on the face of the *Public Trustee Act* that excuses the Public Trustee from compliance with the:

- fundamental fiduciary duty not to make a profit from its position;
- fiduciary obligation to make full and frank disclosure of its fees and charges, and to justify profit from even reasonable fees; and
- equitable principle that it is wrong to use the assets of one trust to meet the costs of administering another trust.<sup>248</sup>

355. It is a principle of statutory interpretation that, unless there is a clearly expressed intention in legislation to override a fundamental principle of law or equity, it will not be overridden.<sup>249</sup> There is nothing in the *Public Trustee Act* or other legislation governing the duties of administrators to indicate that there was any specific intention to alter or override the Public Trustee's fiduciary duties.

356. The Public Trustee views section 19(1)(c) of the *Public Trustee Act* as providing it with authority to profit from its client's funds. That section provides that a prescribed rate of interest will be paid, at least annually, on the money in the Common Fund. However, on its face, this section cannot be interpreted as demonstrating a clearly expressed intention to allow the Public Trustee to profit from clients' funds. Arguably, a more correct way to interpret this section is that it allows the Public Trustee to earn enough from the interest differential to cover its expenses, and not to run large operational surpluses or amass an unreasonably large reserve from accumulated surpluses, over time. This interpretation is supported by section 19A of the *Public Trustee Act*, which provides that the Public Trustee must apply all fees and charges as well as interest earned on investments for only two purposes: to pay interest to the estates whose funds were invested, then towards the operating and capital expenses of the Public Trustee. The concerns expressed by the Auditor-General in 1996 would also appear to support this view.

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<sup>246</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 14 August 2020, in response to draft report chapter 5, p 8.

<sup>247</sup> See, for example in the context of solicitor's fees as a fiduciary, GE Dal Pont 'Contextualising Lawyer Overcharging' [2016] 42(2) *Monash Law Review* 283 at 291 (who also considered that informed consent 'as a matter of logic, rests on some degree of costs disclosure') and the reference of Ipp J (with whom Pidgeon and Franklyn JJ agreed) in *D'Allessandro v Legal Practitioners' Complaints Committee* (1995) 15 WAR 198 at 220 to the 'fiduciary obligation to adequately inform the client so that an informed decision could be made by the client as to the appropriateness of entering into a written agreement and as to the amount agreed for profit costs'.

<sup>248</sup> See, for example, *Brisconnections Management Company Ltd & Anor v Dalewon Pty Ltd* (2010) 79 ACSR 530 at [10].

<sup>249</sup> See, for example, the remarks of the High Court in *Potter v Minahan* (1908) 7 CLR 277 at 304 and *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687.



357. The Public Trustee has made operating surpluses over many years (see the surpluses and reserves section below). If the interest differential income has contributed to these surpluses, the accumulation of these funds may be inconsistent with the requirements of section 19A of the *Public Trustee Act* and the Public Trustee's duties as a fiduciary.
358. The way the Public Trustee's interest differential earning arrangement operates means that it obtains greater benefits from maximising the amount of funds it controls and invests in the Common Fund. Ultimately, these practices also contribute to the Public Trustee's annual operating surpluses and accumulated reserves, which are also used to earn revenue.
359. The role of the *Prudent Person Rule Manual* and the Primary Investment Strategy in the conversion of clients' assets into cash and the investment of that money in Public Trustee investment products (including the Common Fund) is discussed below.

## Surpluses and reserves

360. A simple way to measure an organisation's performance is to examine whether it has been operating at a loss, or with a surplus. An operating loss is where the organisation spends more than it receives in a year. An operating surplus is where the organisation receives more in income than it spends. The Public Trustee places its annual operating surpluses into a reserve, allowing them to accumulate, or grow. Reserves are also referred to as accumulated surpluses, or equity.
361. In the 18 years from 2001-02 to 2019-20, there were three years where the Public Trustee reported an operating loss.<sup>250</sup> In 2008-09 the Public Trustee reported an operating loss of \$9.6M<sup>251</sup> due to the Global Financial Crisis, in 2018-19 it reported an operating loss of \$0.8M<sup>252</sup> due to higher than budgeted staffing costs<sup>253</sup> and in 2019-20 it reported an operating loss of \$12M.<sup>254</sup> The smallest surplus reported over the 18 years was \$0.3M in 2010-11,<sup>255</sup> while the largest surplus was \$12.4M in 2012-13.<sup>256</sup>
362. In relation to its surpluses the Public Trustee has said:
- Over the past 20 years modest surpluses have been recorded, but for those immediately following the global financial crisis ... The Public Trustee has operated for in excess of 102 years. Accumulated surpluses have resulted from the efficient operations of the Office over that period of time ... The Trustee surpluses are the result of particularly prudent investment and conservative but efficient operations of the organisation.<sup>257</sup>
363. Surpluses may arise from 'prudent investment and conservative but efficient operations', however they generally occur as a result of planned and budgeted operations, although the Public Trustee states it only plans for a 'balanced budget' result each year, rather than a surplus (see below).<sup>258</sup>
364. The current fees and charges structure has been in place since December 2000. At the end of that financial year, the new fee structure enabled the Public Trustee to achieve \$3.7M '[p]rofit from ordinary activities'<sup>259</sup> and the following year the profit was \$3.3M. In 2001-02 these annual profits or surplus increased the Public Trustee's reserves at the time to a total of \$85.8M.<sup>260</sup> In the almost 20 years since that time, the accumulated surplus has grown to \$178M at the end of 2019-20.<sup>261</sup>

<sup>250</sup> Financial Statements in The Public Trustee of Queensland, *Annual Reports 2001-02 to 2018-19*.

<sup>251</sup> The Public Trustee of Queensland, *Annual Report 2008-09*, p 6.

<sup>252</sup> The Public Trustee of Queensland, *Annual Report 2018-19*, p 57.

<sup>253</sup> Ibid p 21.

<sup>254</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 40.

<sup>255</sup> The Public Trustee of Queensland, *Annual Report 2010-11*, p 107.

<sup>256</sup> The Public Trustee of Queensland, *Annual Report 2012-13*, p 31.

<sup>257</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 5 April 2019, in response to Information Notice No.1, p 103 and p 106.

<sup>258</sup> Ibid.

<sup>259</sup> The Public Trustee of Queensland, *Annual Report 2001-02*, p 65.

<sup>260</sup> Ibid p 67.

<sup>261</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 41.



365. It must be acknowledged that there are a range of factors that contribute to a surplus. In addition to earning income from fees and charges, the Public Trustee also earns income from interest on its invested reserves, the interest differential (as already discussed), Growth Trust Management Fees (discussed below), and from a range of other activities. However, the most significant source of Public Trustee income is fees and charges, with administration clients being a major contributor. In 2019-20 the Public Trustee's total revenue was \$115.6M and of this, administration of estates and trusts and other professional fees contributed \$90.1M<sup>262</sup> or approximately 78 percent of this total revenue. (The Public Trustee does not report the sources of revenue from clients according to category.)

Public Trustee response

The Public Trustee advises that it budgets for a balanced budget each year, not for surpluses and that the surpluses that have occurred have been the result of the 'broader economic situation and associated interest rate environment'.<sup>263</sup>

366. The Public Trustee's advice that it does not budget for surpluses is not borne out by its own Strategic Plan<sup>264</sup> which lists as its second priority objective, '[D]eliver the surplus required to enable sustainable reinvestment that supports current and future business objectives'.
367. As at 30 June 2020, the Public Trustee had \$178M in the Common Fund that was described as 'accumulated surpluses'.<sup>265</sup> Considering the Public Trustee is a self-funding organisation and its income is mainly sourced from interest on investments (of clients' funds and its accumulated surpluses) and fees and charges, it is questionable whether it should be running surpluses and accumulating a large reserve of funds, rather than providing additional services to more clients or reducing its fees and charges. In 2018, the State Trustees (in Victoria) implemented such a strategy, including a reduction in its fees and charges, as part of its strategic pricing review.<sup>266</sup> It also may not be consistent with section 19A of the *Public Trustee Act* for the Public Trustee to be accumulating surplus funds. That section requires the Public Trustee to use the revenue from fees and charges and interest earned on the Common Fund to pay interest to clients on their funds and towards the operating and capital expenses of the Public Trustee. It makes no reference to using the funds to accumulate reserves.

Public Trustee response

The Public Trustee disagrees with the Public Advocate's view about the operation of section 19A of the *Public Trustee Act* and the accumulation of reserves on the basis that at the time the section was inserted into the Act, specifying how the revenue from fees and the interest on the Common Fund should be spent, the Public Trustee already held significant cash reserves of over \$80M from accumulated surpluses<sup>267</sup>.

The insertion of section 19A was necessary because a regulation which had previously authorised the deduction of those expenses from the Common Fund had expired. Accordingly, the amendment was to permit the continued use of fees and interest earned on the Common Fund to pay interest to clients on their money in the Common Fund and its other operating and capital expenses<sup>268</sup>.

<sup>262</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 48. Note: Calculation of total revenue includes community service obligations.

<sup>263</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 14 August 2020, in response to draft report chapter 5, p 2.

<sup>264</sup> The Public Trustee of Queensland, *Strategic Plan 2016-2020*, <<https://pt.qld.gov.au/media/1058/2016-2020-strategic-plan.pdf>>.

<sup>265</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 41.

<sup>266</sup> State Trustees (Victoria), *Annual Report 2018-19*, pp 5, 11. Another option could be to provide clients with a 'dividend' in years when surpluses unexpectedly occur due to higher than expected returns on investments.

<sup>267</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 14 August 2020, in response to draft report chapter 5.

<sup>268</sup> *Ibid*, p 9.



The Public Trustee relies on the then Attorney-General, the Hon RJ Welford's, second reading speech stating that the amendments were giving 'effect to the current state of play' as supporting the accumulation of large reserves from surpluses:<sup>269</sup>

The Honourable RJ Welford (as he was then), the then Attorney-General and Minister for Justice, in the Second Reading speech for the *Justice and Other Legislation (Miscellaneous Provisions) Bill 2002* stated that the intention of s. 19A was to give "effect to the current state of play" and that the Parliament was "simply restoring a provision that makes it clear that the existing practice which has been in place for decades ensures that the Public Trustee's costs can be paid of the capital fund. There are no financial implications other than that. It simply maintains the existing practice".

At the initiation to (sic) an amendment to the *Public Curator Act 1915* on October 1956, the then Attorney-General, the Honourable W Power spoke to the intent behind the Common Fund and stated that:-

"Moneys invested in the Public Curator now a (sic) part of the common fund and must be invested by the Public Curator. The interest earned by such investments also forms part of the common fund. The estates to which the moneys belong are credited within (sic) interest at a rate determined by the Governor in Council but any profit from the investments belongs to the Public Curator"<sup>270</sup>.

In relation to the Public Trustee's reserves, it also states:

The funds held in the Common Fund are protected by Government guarantee. The Public Trustee maintains \$30 million to guarantee the funds in the common fund. Additional funds are used for income stabilisation [that is, to earn interest and supplement other forms of income].

It has been the view of the Public Trustee that the reserves of the Public Trustee should be aligned with the customer's funds under management to minimise the chances of the government guarantee being called on ... it has been the view that it would be the expectation of the government that the Public Trustee would manage its reserves prudently to ensure that the government guarantee is not called on. As customer funds under management grow so should the reserves of the Public Trustee. The proportion of Public Trustee equity reserves to customer funds in the Common Fund has fallen from 44% in 2010 to 30% in 2019.

... the Public Trustee does not currently publish the rates of return for the interest earned on the Common Fund. The Public Trustee declares the costs and income received from the Common Fund in its Annual Report. However, consideration will be given as to how this can more clearly and transparently be reflected in the Annual Report moving forward.<sup>271</sup>

368. The Public Trustee's response does not address the key point being made about section 19A, that it does not provide for the Public Trustee to make surpluses or profits from operations and retain them in reserves. The then Attorney-General's statement that the 2002 amendment gave effect to the 'current state of play' was merely referring to the continuation of the provisions directing how the Public Trustee could spend its revenue from fees, charges and interest paid into the Common Fund. There is no reason to interpret his statement as specifically authorising activities that the amendment did not expressly address or permit — namely the accumulation of reserves from surpluses — irrespective of whether that may have been occurring at the time. There is no basis to suggest that because the Public Trustee had large reserves already in 2002 that it could, or should, continue to accumulate larger reserves without regard to section 19A, matters of fairness or its fiduciary duties.

<sup>269</sup> Ibid, p 9.

<sup>270</sup> Ibid, p 9.

<sup>271</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 14 August 2020, in response to draft report chapter 5, p 2.



369. Parliamentary speeches are not the law. They are an aid in interpreting the law. There is nothing in the Hon RJ Welford's speech, nor that of the Hon W Power that could be interpreted as suggesting that the Public Trustee can accumulate large reserves of funds.
370. In relation to the speech of the Hon W Power in 1956, the Public Advocate has never suggested that the Public Trustee's surpluses or profits from earnings on the Common Fund do not 'belong' to the Public Trustee. However, the Public Trustee is bound to expend those funds only in accordance with section 19A.
371. Further, the Public Advocate does not dispute the Public Trustee's entitlement to retain some of the earnings on the Common Fund, but questions the justification for the level of those earnings over time (e.g. the accumulation of an additional \$60.9M in reserves from surpluses over the past 12 years which included the period of the global financial crisis) and how this accords with section 19A of the *Public Trustee Act*.

## The Growth Trust

372. The Growth Trust was established in 1996<sup>272</sup> and is an investment wholly owned by the Public Trustee. It was established to 'provide clients of the Public Trustee with an investment option that provides capital growth and income from a diversified investment portfolio'.<sup>273</sup> It offered an alternative investment option for Public Trustee clients that complied with the strict investment requirements of the *Trusts Act* at the time.
373. In 2018-19 the Growth Trust held approximately \$346.7M,<sup>274</sup> with \$155M or 45 percent of this amount representing the funds of 1,406 administration clients.<sup>275</sup> Of this group, there were 1,234 administration clients with investible assets under \$450,000 who collectively held \$91.5M in the Growth Trust at an average of \$74,000 per person.
374. The Public Trustee's use of the words 'investment option' suggests choice. However, the discussion later in this chapter about the practices prescribed by the *Prudent Person Rule Manual*<sup>276</sup> makes it clear that administration clients have their funds allocated, almost as a matter of course, to the various Public Trustee investments, including the Growth Trust, in accordance with the standard Public Trustee Client Investment Strategy.<sup>277</sup> While the Public Trustee also obtains financial advice and develops financial management plans and budgets for clients, these activities invariably result in the clients' funds being invested and managed in accordance with the standard investment strategy outlined in the *Prudent Person Rule Manual*.
375. The Public Trustee acknowledges that for customers with less than \$450,000 in assets, the default position is to hold \$50,000 or 12.5 percent of investable assets in cash or the Term Investment Account, with the balance held in the Public Trustee Growth Trust.<sup>278</sup> However, it disagrees with the Public Advocate's view that this approach is 'applied as a matter of course'. The Public Trustee asserts that the customers' individual needs are considered and their funds may be invested in a variety of ways in the Common Fund and Growth Trust. While

<sup>272</sup> See discussion about the Queensland Supreme Court decision No. 5391 of 1996, later in this chapter relating to the establishment of the Growth Trust.

<sup>273</sup> The Public Trustee of Queensland, *Annual Report 2018-19*, p 109. The Public Trustee Growth Trust Product Profile states that '[t]he Public Trustee of Queensland (PTQ) is the trustee and manager of the Growth Trust and is responsible for determining the investment objectives and strategy of the Growth Trust, arranging for the proper investment of all monies, and ensuring that the Investment Manager achieves acceptable rates of return. QIC [Queensland Investment Corporation Limited] is the Investment Manager of the Growth Trust'. See *The Public Trustee of Queensland Growth Trust Product Profile*, October 2020, <<https://www.pt.qld.gov.au/media/1585/product-profile-growth-trust.pdf>>.

<sup>274</sup> The Public Trustee of Queensland, *Annual Report 2018-19*, p 105.

<sup>275</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 28 February 2020, in response to Information Notice No.5, p 29.

<sup>276</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, April 2020, Version 12.1, <<https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf>>.

<sup>277</sup> Those holding funds of \$50,000 and more in accordance with the Public Trustee of Queensland, *The Prudent Person Rule Manual*, April 2020, Version 12.1, Section 5 Investment Services Activities, pp 10-13. <<https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf>>.

<sup>278</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 14 August 2020, in response to draft report chapter 5, p 3.





this may occur, the Public Advocate has only observed one instance in which a client's funds (other than superannuation) were invested differently from the standard investment formula outlined in the *Prudent Person Rule Manual*. There is additional discussion about the *Prudent Person Rule Manual* later in this chapter.

376. The Public Trust Office Investment Board<sup>279</sup> (Board) controls and manages the investments of the Common Fund and provides advice to the Public Trustee on investment management within the Growth Trust.<sup>280</sup> The Board has invested all of the Growth Trust funds with the Queensland Investment Corporation<sup>281</sup> which independently manages the Growth Trust funds in a range of products in markets usually not available to most regular investors. The Queensland Investment Corporation is responsible for ongoing management decisions about how to invest the Growth Trust portfolio, with the Board regularly reviewing the corporation's investment portfolio performance.
377. There are management fees associated with running the Growth Trust. Administration clients whose funds are invested in the Growth Trust are paying up to three separate fees on those funds — the Asset Management Fee, the Public Trustee's Growth Trust Management Fee, and the Queensland Investment Corporation Investment Management Fee. As a matter of principle, the charging of multiple fees for the management of the same funds does not seem reasonable.

#### Public Trustee response

The Public Trustee does not agree with the Public Advocate's characterisation of the fees that apply to client funds in the Growth Trust, explaining them as follows:

The Asset Management Fee relates to the Public Trustee discharging his fiduciary responsibilities in managing the asset. The Growth Trust Management Fee charged on the Public Trustee's Growth Trust is an arm's length commercial fee charged for managing the investment product and the investors within the fund. Hence, the Asset Management Fee and the Annual Management Fee on the Public Trustee Growth Trust are two separate and distinct fees for performing two different functions.

The QIC Investment Management Fee is paid by the Public Trustee as part of its costs of managing the Growth Trust. Investors in the Growth Trust (including Financial Administration clients) do not pay this fee.<sup>282</sup>

378. The Public Trustee's explanation still does not clarify what specific and distinct services clients receive for the Asset Management Fee and the Growth Trust Management Fee. At the very least, it would seem reasonable that clients not be charged an Asset Management Fee on those funds invested in the Growth Trust for which they are paying a Growth Trust Management Fee to the Public Trustee. In relation to the Queensland Investment Corporation Investment Management Fee, the Public Advocate acknowledges that the fee is not charged to individual investors in the Growth Trust but is paid by the Public Trustee. However, the effect of the fee is that it reduces the total earnings on the Growth Trust and consequently the amount of individual client earnings on their investments.
379. These Growth Trust Management Fees represent income and expenses associated with both the Public Trustee and the Growth Trust.
380. The Growth Trust financial statements are published at the back of the Public Trustee Annual Reports.<sup>283</sup> The only expense item that usually appears in the Growth Trust financial statements is the Public Trustee fees, which for 2019-20 was \$5.2M (however, the reports for last year also include an entry for '[N]et losses on financial instruments held at fair value through profit or

<sup>279</sup> Public Trustee Act 1978 (Qld) s 21.

<sup>280</sup> The Public Trustee of Queensland, *Annual Report 2018-19*, p 33.

<sup>281</sup> The Queensland Investment Corporation was set up under the *Queensland Investment Corporation Act 1991* (Qld) and is wholly owned by the Queensland Government.

<sup>282</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 14 August 2020, in response to draft report chapter 5, attachment 1, p 9.

<sup>283</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 88-106.





loss' of \$13.6M).<sup>284</sup> In 2018-19, the Trustee fees were \$4.9M. Subsequent correspondence with the Public Trustee confirmed that this amount included \$1.6M in fees collected from clients under administration with funds in the Growth Trust. All other expenses associated with running the Growth Trust are paid by the Public Trustee and included in the Public Trustee's financial statements.<sup>285</sup>

381. The Public Trustee further advised that fee rebates for clients with money in the Growth Trust amounted to \$926,000 in 2018-19.<sup>286</sup> These figures are not shown separately in the financial statements, but instead are included as part of other costs described as 'Investment and registry fees' shown in the Public Trustee's financial statements.<sup>287</sup>
382. The \$1.6M Growth Trust Management Fees charged to clients under administration contributes almost one-third of the total Growth Trust Management Fees income of \$4.9M. Investment in the Growth Trust is imposed on administration clients in accordance with Primary Investment Strategy for Public Trustee clients (discussed later in this chapter). In making the decision to invest the money of people under administration in the Growth Trust, the Public Trustee is providing them with an opportunity to earn higher rates of interest on their funds. However, as part of that process the Public Trustee is also generating an additional source of income for itself in the form of fees.



### Recommendations

**Recommendation 11: Do not profit from administration clients unless expressly permitted by law**

As a fiduciary and financial administrator, the Public Trustee should not profit from administration client funds unless expressly permitted by legislation. Any such legislative provisions should set clear limits on the amount and purpose of any income or 'profit'. (See recommendations 29 and 31)

**Recommendation 12: Improve transparency of Public Trustee revenue sources**

The Public Trustee improve reporting of its sources of revenue, particularly revenue earned on administration client funds so that it is clear where clients' money is being invested, the overall returns on those investments, and the value of the interest differential that is being retained by the Public Trustee. The Public Trustee's revenue sources and use of administration client funds to raise revenue should be transparent and accountable so that people know how their money will be used and the likely returns on investments managed by the Public Trustee relative to their actual earnings.

**Recommendation 13: Clearly report the fees and costs of managing Public Trustee investments**

The Public Trustee clearly report the fees it charges and other costs associated with the operation and management of its various investments (in particular the Common Fund, interest bearing term deposits and the Growth Trust) and its effect on clients' investment returns.

<sup>284</sup> Ibid p 89.

<sup>285</sup> Email from the Public Trustee of Queensland to the Public Advocate, 10 February 2020, attachment, p 8.

<sup>286</sup> Ibid.

<sup>287</sup> Email from Public the Trustee of Queensland to the Public Advocate, 10 February 2020, attachment, p 8, which advised that these costs are part of 'Investment and registry fees' in The Public Trustee of Queensland, Annual Report 2018-19, Note 5, p 67, and see The Public Trustee of Queensland, Annual Report 2019-20, Note 5, p 50.



Recommendation 14: Stop requiring administration clients to pay double charges on their funds

Administration clients should not pay double charges on their funds, where they pay an annual Asset Management Fee on their funds and additional fees to the Public Trustee and/or other organisations to manage investments dealing with those funds.

Recommendation 15: Limit the amount of Public Trustee surpluses and reserves

There should be a limit on the amount of operating surpluses and reserves that the Public Trustee can accumulate. Any reserves exceeding the cap should be returned to clients in reduced or rebated fees.

## The Prudent Person Rule as applied by the Public Trustee

383. A key legal principle that guides the investment practices of trustees is the 'Prudent Person Rule'.
384. The Public Trustee has developed an internal policy document, the *Prudent Person Rule Manual*,<sup>288</sup> that is used to explain the operation of the Prudent Person Rule and guide staff in making decisions about the management and investment of client funds.
385. This section explains the Prudent Person Rule in the context of the Public Trustee's role as administrator under the *Guardianship and Administration Act*. It also examines the Public Trustee's *Prudent Person Rule Manual*, its interpretation of the Prudent Person Rule and its role in the management and investment of clients' assets. Another focus of this section of the report is the Public Trustee's reference in the Manual to a Supreme Court case which it cites as permitting it to engage in on-going conflict transactions involving the investment of client funds in its own investment products and whether these actions are transparent, reasonable and lawful.

## The Prudent Person Rule and the *Trusts Act*

386. As an administrator under the *Guardianship and Administration Act*, the Public Trustee is generally permitted to invest only in authorised investments.<sup>289</sup> There are two types of authorised investments:
- an investment in accordance with the 'Prudent Person Rule' as defined in Part 3 of the *Trusts Act*; or
  - an investment approved by QCAT.<sup>290</sup>
387. The *Trusts Act* consolidates the law relating to certain entities such as trustees and preserves existing rules and principles of law at the time of the commencement of the Act that impose a duty on trustees making investments.<sup>291</sup>

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<sup>288</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, Version 12.1, (April 2020), <<https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf>>.

<sup>289</sup> *Guardianship and Administration Act 2000* (Qld) s 51(2), however there is an exception to this rule if there were existing investments, see s 51(3).

<sup>290</sup> *Guardianship and Administration Act 2000* (Qld) sch 4 definition of 'authorised investments'.

<sup>291</sup> *Trusts Act 1973* (Qld) s 23(1).





## Prudent Person Rule

The Prudent Person Rule cannot be reduced down to a single statement of legal principle. It is comprised of a series of duties, principles and considerations that a trustee must apply when investing on behalf of a client or beneficiary.

Certain duties are imposed on trustees under the *Trusts Act* in relation to investment. These are:

- the duty to exercise the care, diligence and skill a prudent person engaged as a professional trustee would exercise in managing the affairs of the person under administration.<sup>292</sup>
- at least once per year review the performance, individually and as a whole, of investments.<sup>293</sup>

The *Trusts Act* preserves existing rules and principles of law or equity that impose a duty on a trustee making investments, unless they are inconsistent with the *Trusts Act*.<sup>294</sup> It also provides a non-exhaustive list of the duties that continue to apply if they had existed prior to the Rule being inserted into the *Trusts Act*:

- a duty to exercise powers in the best interests of all present and future beneficiaries of the trust;
- a duty to invest funds in investments that are not speculative or hazardous;
- a duty to act impartially towards beneficiaries and between different classes of beneficiaries; and
- a duty to obtain advice.<sup>295</sup>

When investing, trustees must also have regard to the following non-exhaustive list of matters:

- the purposes of the trust and the needs and circumstances of the beneficiaries;
- the desirability of diversifying trust investments;
- the nature of and risk associated with existing trust investments and other trust property;
- the need to maintain the real value of the capital or income of the trust;
- the risk of capital or income loss or depreciation;
- the potential for capital appreciation;
- the likely income return and the timing of income return;
- the length of the term of the proposed investment;
- the probable duration of the trust;
- the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment;
- the total value of the trust estate;
- the effect of the proposed investment for the tax liability of the trust;
- the likelihood of inflation affecting the value of the proposed investment or other trust property;
- the cost (including commissions, fees, charges and duties payable) of making the proposed investment; and
- the results of a review of existing trust investments.<sup>296</sup>

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<sup>292</sup> Ibid s 22(1)(a).

<sup>293</sup> Ibid s 22(3).

<sup>294</sup> Ibid s 23(1).

<sup>295</sup> Ibid s 23(2).

<sup>296</sup> Ibid s 24(1).



388. The Prudent Person Rule was inserted into the *Trusts Act* by the *Trusts (Investments) Amendment Act 1999* (Qld).<sup>297</sup> Prior to these changes, a trustee was only able to invest in a limited number of 'authorised trustee investments', often referred to as the 'statutory list' approach.<sup>298</sup> Under this approach trustees could only invest in:
1. what was permitted in the trust instrument that created the trust (if any);
  2. specific investments that were listed in the *Trusts Act* or any other statute; or
  3. another investment that the Supreme Court authorised the trustee to invest in.<sup>299</sup>
389. The *Trusts Act* was amended to address a number of problems that had been identified with the statutory list approach to investments. These included circumstances where trustees did not actively exercise their responsibilities to make a decision about whether a particular investment that was on the list was actually a prudent investment for the particular circumstances of the beneficiary, instead assuming that it was safe because it was on the list. Also, the inflexibility of a list meant that new investment options that were likely to be just as sound, and may have been more appropriate for beneficiaries, were not considered by trustees.<sup>300</sup>
390. Rather than setting a standard for the investment performance trustees must achieve, the principles underpinning the Prudent Person Rule define a standard of conduct to be observed by trustees when investing.<sup>301</sup> The following passage from a leading text on trustee investment was quoted by the then Attorney-General, the Hon Matt Foley, in his Second Reading speech for the Bill:
- Prudence is a test of conduct and not performance. Trustees will not be able to shelter behind a legal list of authorised investments. They are required to focus attention on the suitability of investments according to the circumstances of each individual trust and the circumstances and needs of beneficiaries.<sup>302</sup>
391. The obligation for trustees to take into consideration the individual circumstances of each trust and beneficiary has been emphasised by the courts in the application of the Prudent Person Rule. The Federal Court has noted that early interpretations of the rule 'placed great importance upon the need for caution in trust investment' acknowledging such a conservative approach was appropriate in an era where trusts were used to preserve capital rather than act as an investment vehicle.<sup>303</sup> In the modern era, trustees are expected to consider an overall investment strategy that is suitable for the particular circumstances of the trust,<sup>304</sup> including the 'potential for capital appreciation'.<sup>305</sup>
392. The Public Trustee's interpretation of its obligations under the Prudent Person Rule is addressed later in this chapter in the discussion about the *Prudent Person Rule Manual*.

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<sup>297</sup> It was described as introducing the 'most significant amendments to the *Trusts Act 1973* since its enactment'. See Queensland Parliamentary Library – Research Publications and Resources Section – *Legislation Note, No.6, July 1999, Trusts (Investments) Amendment Bill, 1999*, <<https://www.parliament.qld.gov.au/documents/explore/ResearchPublications/LegislationNotes/ln0699ks.pdf>>, accessed 25 November 2020.

<sup>298</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 8 June 1999, 2178 (MJ Foley) ('*Trusts (Investments) Amendment Bill Second Reading*').

<sup>299</sup> Ibid.

<sup>300</sup> Queensland Parliamentary Library – Research Publications and Resources Section – *Legislation Note, No.6, July 1999, Trusts (Investments) Amendment Bill, 1999*, <<https://www.parliament.qld.gov.au/documents/explore/ResearchPublications/LegislationNotes/ln0699ks.pdf>>, accessed 25 November 2020.

<sup>301</sup> Ibid.

<sup>302</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 8 June 1999, 2179 (MJ Foley) ('*Trusts (Investments) Amendment Bill Second Reading*') quoting 'Davis and Shaw, the authors of a major Australasian text on trustee investment... at page 103.'

<sup>303</sup> *Australian Securities and Investments Commission v Drake* (No 2) [2016] FCA 1552, at [267]-[268].

<sup>304</sup> Ibid at [269].

<sup>305</sup> *Trusts Act 1973* (Qld), s 24(1)(f).



## The Prudent Person Rule and the *Guardianship and Administration Act*

393. The Public Trustee's obligations to comply with the Prudent Person Rule when investing clients' money do not operate in isolation. As an administrator under the *Guardianship and Administration Act*, all other obligations of an administrator (as outlined in 'Chapter 2: Financial administration and the Public Trustee') continue to apply. Some of these obligations are specific, such as:
- avoiding conflict transactions;<sup>306</sup>
  - how decisions are to be made when there are multiple decision-makers;<sup>307</sup>
  - keeping records;<sup>308</sup>
  - keeping property separate;<sup>309</sup>
  - when gifts are appropriate;<sup>310</sup> and
  - rules around maintaining the dependents of a person under administration.<sup>311</sup>
394. There are also a number of general duties that apply to administrators and operate alongside the Prudent Person Rule,<sup>312</sup> including:
- the requirement to act honestly and with reasonable diligence to protect the adult's interests; and
  - the requirement to apply the General Principles under the *Guardianship and Administration Act* (see Appendix 3).
395. In a more general sense, the exercise of a power under the *Guardianship and Administration Act* must be read in the context of the purpose of the Act, which is to strike an appropriate balance between:
- the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making; and
  - the adult's right to adequate and appropriate support for decision-making.<sup>313</sup>
396. The General Principles in the *Guardianship and Administration Act*, which must be applied by guardians and administrators and all others exercising powers under the Act, are largely concerned with achieving the balance described in the purpose of the Act. They recognise the worth and dignity of the person under guardianship or administration as a valued member of society and their right to exercise their capacity.
397. Some of the more relevant General Principles include 'General Principle 7 – Maximum participation, minimal limitations and substituted judgement', and General Principle 10 that provides that 'power for a matter should be exercised by a guardian or administrator for an adult in a way that is appropriate to the adult's characteristics and needs'.<sup>314</sup>
398. QCAT has found that all of the General Principles (except for General Principle 10, see below) have the 'effect of modifying the reasonable diligence and prudent investment rules by adding things which must be taken into account when exercising the power, but they cannot prevail over those rules'.<sup>315</sup>
399. General Principle 10 is more prescriptive in its language, requiring the power to be exercised in a way that is appropriate to the particular person's characteristics and needs. Decision-makers such as administrators must consider all of the person's interests, not just the persons' financial interests. General Principle 10 assists in understanding what should be considered by

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<sup>306</sup> *Guardianship and Administration Act 2000* (Qld) s 37.

<sup>307</sup> *Ibid* ss 38-40.

<sup>308</sup> *Ibid* s 49.

<sup>309</sup> *Ibid* s 50.

<sup>310</sup> *Ibid* s 54.

<sup>311</sup> *Ibid* s 55.

<sup>312</sup> CRG [2019] QCAT 168.

<sup>313</sup> *Guardianship and Administration Act 2000* (Qld) s 6.

<sup>314</sup> *Ibid* sch 1, General Principles 7 and 10.

<sup>315</sup> CRG [2019] QCAT 168 at [31].



an administrator in terms of protecting a person's interests by requiring the exercise of powers in a way that is appropriate to the unique circumstances of every individual.

400. QCAT has described the relationship between these duties of an administrator as follows:

...there is no conflict when expenditure which might be imprudent when viewed from a purely financial standpoint is in fact in the interest of the adult because it is appropriate to the adult's characteristics and needs under General Principle 10. An example would be where the adult needs payment of expensive vet bills for a pet who provides considerable comfort for the adult.<sup>316</sup>

401. QCAT concluded that the Prudent Person Rule must be interpreted and applied in a way that accommodates the administrator applying the General Principles as required under the Act.<sup>317</sup>

## Prudent Person Rule Manual

402. As part of its financial planning resources for staff, the Public Trustee has developed a number of policies and manuals to guide staff in how to manage and invest client's assets. In particular, the Public Trustee has developed the *Operations Manual Chapter 28 Financial Planning* and the *Prudent Person Rule Manual* to guide staff in how to manage and invest clients' assets in accordance with its obligations as a trustee and fiduciary and the Prudent Person Rule. (Note: For the purposes of the following discussion the *Operations Manual Chapter 28 Financial Planning* (Last reviewed 11/9/2017) is referred to as the Financial Planning Manual and the Prudent Person Rule is referred to as 'the Rule'. References to the *Prudent Person Rule Manual* refer to version 12.1 of the Manual.)<sup>318</sup>

403. The Financial Planning Manual and the *Prudent Person Rule Manual* are routinely used by the Public Trustee as the rationale for many of its decisions about the management of the assets of an administration client. This includes decisions about seeking external financial advice (the subject of 'Chapter 6: Financial advice'), or when to liquidate or sell assets, that will convert them into cash.

404. When this project commenced, the Financial Planning Manual and the *Prudent Person Rule Manual* were not public documents. As noted in 'Chapter 3: Fees and charges for administration', until recently the Public Trustee viewed itself as a commercial entity, deciding that its internal policies, procedures and manuals guiding the decision-making of its staff were 'commercial-in-confidence' and should not be published. The Public Advocate could identify no reasonable basis for the Public Trustee adopting this position. People under administration are not a 'market' whose 'business' the Public Trustee is competing for. The Public Trustee holds a unique position of responsibility and trust in the Queensland community and in the lives of its clients. Accordingly, its decision-making, policies and practices must be accessible and transparent. More recently, the Public Trustee has reconsidered its position on these issues and is proposing to publish its policies, procedures and manuals. It commenced this process with the publication of its *Prudent Person Rule Manual* in 2020.<sup>319</sup>

## Primary Investment Strategy

405. The Financial Planning Manual introduces the concept of the Prudent Person Rule and the Primary Investment Strategy, stating in its Purpose section:

The Public Trustee of Queensland (PTQ) is committed to providing sound investment opportunities to clients for their funds under management. By ensuring client's funds are invested appropriately, PTQ can ensure that the returns earned provide sufficient income and capital growth to promote their financial security and quality of life. The introduction of the Prudent

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<sup>316</sup> Ibid at [32].

<sup>317</sup> Ibid at [38].

<sup>318</sup> The Public Trustee of Queensland updated *The Prudent Person Rule Manual* to version 12.1 in April 2020 to include references to the Human Rights Act 2019. The 12.1 April 2020 version is used in this report unless a specific reference is made to an earlier version of the manual <<https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf>>.

<sup>319</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, version 12.1, April 2020 <<https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf>>.





Person Rule (pursuant to the *Trusts Act 1973*) requires PTQ to exercise a duty of care by investing funds prudently on behalf of clients, taking into consideration their individual circumstances and needs. The Primary Investment Strategy and investment products offered by the Office reflect PTQ's adherence to the Prudent Person Rule.<sup>320</sup>

406. There are various statements in the introductory sections of the *Prudent Person Rule Manual* that suggest that clients' needs and circumstances should be considered when investing their funds.<sup>321</sup> However, these statements are effectively overridden in practice by the Public Trustee's 'Client Investment Strategy'<sup>322</sup> as its standard approach to the investment of client funds.<sup>323</sup>
407. Section 5 of the *Prudent Person Rule Manual* provides guidance about how client funds will be invested. It includes information about the circumstances under which a client will be referred to a financial planner for independent advice (this practice is examined further in 'Chapter 6: Financial advice').



### Client investment groups

The Public Trustee describes its Client Investment Strategy as a 'segment[ed] investment strategy'<sup>324</sup> based on the amount and types of assets held by the client. Essentially, clients are divided into four groups (or 'segments'):<sup>325</sup>

- Clients with assets between \$0 and \$450,000 (see discussion of the 'Primary Investment Strategy' below);
- Clients with assets between \$450,000 and \$999,999, or including a financial product that requires personal financial advice;
- Clients with assets over \$1,000,000 in Public Trustee investments, or \$100,000 or more of assets in non-Public Trustee investments (also requires personal financial advice);
- Clients with assets that are defined as 'complex'<sup>326</sup> by the Public Trustee, which includes having any superannuation or pension-type annuity (also requires personal financial advice).

<sup>320</sup> The Public Trustee of Queensland, *Financial Management Manual, Section 28, 'Financial Planning'* (internal unpublished document).

<sup>321</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, Version 12.1, April 2020, p 7 < <https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf> >.

<sup>322</sup> Ibid pp 13 -14.

<sup>323</sup> The Client Investment Strategy includes the Primary Investment Strategy, also referred to as the Internal Investment Strategy, and the External Investment Strategy. The Public Trustee of Queensland, *Financial Management Manual, 'Section 28 Financial Planning'*, 2017, paragraph 28.8.3 (internal unpublished document).

<sup>324</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, Version 12.1, April 2020, p 11 < <https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf> >.

<sup>325</sup> Ibid pp 11-14.

<sup>326</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, April 2020, Version 12.1, April 2020, defines assets into two classes: complex, or non-complex. Complex assets are not defined. Rather, they are defined in terms of non-complex assets which are described at page 13 as only the Public Trustee investment products, Cash, Term Investment Account and Growth Trust. Complex assets are therefore everything that is not Cash, Term Investment Account and Growth Trust.





## Primary Investment Strategy

The Primary Investment Strategy<sup>327</sup> is applied to all clients with 'non-complex assets' under \$450,000. It mandates the following investment strategy for this group:

- The first \$5,000 to be held in cash in the Public Trustee Cash Account;
- Additional funds up to \$45,000 will be held in the Public Trustee Term Investment Account;
- The balance of funds over \$50,000 (i.e. \$5,000 in Public Trustee Cash Account + \$45,000 Public Trustee Term Investment Account) will be held in the Public Trustee Growth Trust.

408. In relation to the Primary Investment Strategy, the Public Trustee states:

This strategy is recognised as an internal strategy as the entire process is automated through CIMS [the client information management system] ... and does not require any intervention from external sources, such as financial planners. The investment strategy will apply to approximately 90% of PTQ clients and has consequently been named the Primary Investment Strategy.<sup>328</sup>

409. The Public Trustee obtains annual financial advice from its preferred provider of financial advice services to manage the assets of most administration clients with 'complex assets'.<sup>329</sup> Around 1,500 of the Public Trustee's 9,500 administration clients have 'complex assets' because they have superannuation or annuities (see discussion below).<sup>330</sup> The Public Trustee defines non-complex assets as cash assets that are invested in Public Trustee investments, including the Public Trustee Cash Account, the Public Trustee Term Investment Account, and Public Trustee Growth Trust.
410. New or existing clients with investable assets (namely cash) under \$150,000 and no complex assets are not referred for financial advice. Their assets are dealt with in accordance with the Primary Investment Strategy.
411. New or existing clients with investable assets between \$150,000 and \$450,000 and no complex assets are referred for financial advice in the first instance, however, this will only happen once, after which their funds will be managed according to the Public Trustee's Primary Investment Strategy.
412. Clients who have complex assets, and clients with investable assets over \$450,000, are referred for financial advice every year. The Public Trustee advises that it exercises discretion about referring clients for external advice who have an asset balance under \$5,000<sup>331</sup> and superannuation under \$20,000.<sup>332</sup> However, the Public Trustee's Small Super Checklist only restricts referrals for external financial advice in very limited circumstances. Clients who are under 55 years and have a superannuation balance of over \$500 are required to have an

<sup>327</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, Version 12.1, April 2020, p 13 < <https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf> >.

<sup>328</sup> The Public Trustee of Queensland, *Financial Management Manual*, 'Section 28 Financial Planning', 2017, paragraph 28.3.3 (internal unpublished document).

<sup>329</sup> The Public Trustee of Queensland provides examples of a client's complex assets as including 'external shares, superannuation, and property other than a principal place of residence'. The Public Trustee of Queensland, *Financial Management Manual*, 'Section 28 Financial Planning', 2017 (internal unpublished document).

<sup>330</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 28 February 2020, in response to Information Notice No.5, p 29.

<sup>331</sup> Email from the Public Trustee of Queensland to the Public Advocate, 25 February 2020.

<sup>332</sup> The Public Trustee, *Checklist – Review of Small Super – (Under \$20,000 only)*, (unpublished), introduced in October 2017.



external financial advice, for which the client must pay. Only clients over 65 years, or those with superannuation balances under \$500 are exempt from obtaining annual external financial advice.<sup>333</sup> The Public Trustee advises that:

In most cases once a small superannuation asset is reviewed by the Investments team and or by the financial planner, future reviews may not be required to be undertaken by the Financial Planner.<sup>334</sup>

413. Even though the *Prudent Person Rule Manual* 'segments' or groups clients according to the amount of their assets, the only difference in how the assets are managed appears to be whether the Public Trustee obtains independent financial advice about how the clients' funds should be invested. The independent financial advice is called a Statement of Advice and is presented in a standard form to Public Trustee clients.<sup>335</sup> Interestingly, all of the external Statements of Advice viewed by the Public Advocate for this review (with the exception of one advice for a very wealthy client) recommended investments consistent with the Public Trustee's Client Investment Strategy. This raises a question about the necessity for administration clients to pay for independent financial advice when the advice that is received does not appear to vary from the Public Trustee's Client Investment Strategy. This is discussed in more detail in 'Chapter 6: Financial advice'.
414. All clients in all financial segments under the Client Investment Strategy (regardless of their individual circumstances or particular asset holdings), will have their cash funds invested in the Public Trustee Cash Account, the Term Investment Account, and the Growth Trust in the proportions outlined in the strategy. For existing clients this means the first \$450,000 of their cash assets (excluding funds in superannuation or recommended for investment in superannuation) will always be invested in the three Public Trustee products.
415. For clients with assets of more than \$450,000, the financial advisor recommends how their funds should be invested. Based on the financial advice provided to administration clients that the Public Advocate has been able to access, it seems that the financial advice for these larger wealth clients also usually recommends the Growth Trust to invest the additional funds, ultimately resulting in client moneys being invested exclusively in Public Trustee investments. As already noted, the Public Advocate is aware of only one case of a financial advice recommending an investment other than Public Trustee investment products.<sup>336</sup>
416. The *Prudent Person Rule Manual* acknowledges the need to ensure that there is value in obtaining financial advice stating, 'the cost of getting and implementing investment advice should be less than the value created by that advice. That is why we segment our advice and only send matters to the financial planners above a certain dollar value or when their client's needs are complex.'<sup>337</sup>
417. However, it must be questioned what value the Public Trustee's clients gain from this advice when, other than superannuation assets, it generally recommends the same investment approach as is used for clients managed under the Primary Investment Strategy. There does not appear to be any reasonable basis (based on the Statements of Advice reviewed by the Public Advocate), or value, in obtaining advice that never deviates from the standard Public Trustee investment template.

## Client risk profiles

418. Making investment decisions involves balancing the potential financial gain against the identified risks associated with various types of investments, taking into account the client's individual circumstances and their 'risk appetite' or profile. Understanding a person's risk profile becomes problematic when the person lacks capacity for making financial decisions.

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<sup>333</sup> Ibid p 2.

<sup>334</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 11 January 2021, in response to final draft report, p 3.

<sup>335</sup> *The Public Trustee of Queensland, The Prudent Person Rule Manual*, Version 12.1, April 2020 pp 12,13 <<https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf>>.

<sup>336</sup> Ibid p 13.

<sup>337</sup> *The Public Trustee of Queensland, The Prudent Person Rule Manual*, Version 12.1, April 2020 p 8 <<https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf>>.



419. To overcome this problem, the *Prudent Person Rule Manual* contains guidance for Public Trustee staff by setting out a Risk Profile for financial management and other clients,<sup>338</sup> reproduced in Table 8.

Table 8: *Prudent Person Rule Manual* Client Risk Profile

Age	Risk Profile	Consideration of
18-45 years	Assertive	PT Growth Trust
45-65 years	Growth	PT Growth Trust
65-80 years	Conservative	PT Growth Trust (reduced allocation)
80+ years	Very Low Risk	PT Term Investment Account

Source: The Public Trustee *Prudent Person Rule Manual* (Version 12.01) p 18.

420. The *Prudent Person Rule Manual* provides an explanation about how the table is to be used and also defines the Risk Profiles. It states:

'The client's risk profile is largely determined by client's life expectancy, (ITH) [Investment Time Horizon] and the client's budgetary requirements. Information about the client's personal and financial situation is documented in the RSOA [Request for Statement of Advice] which initiates the SOA [Statement of Advice from an external financial advisor] process. This demonstrates that the Office and the financial planner have a reasonable basis for advice. This is also consistent with our obligation to exercise the care, diligence and skills that a prudent person engaged in our business should exercise ...'<sup>339</sup>

The risk profiles determine appropriate investment recommendations and ensure that clients are placed in asset allocations appropriate for their age, life expectancy or investment time horizon and budgetary requirements. These profiles are reviewed by our financial planning providers every three years to ensure they remain relevant and appropriate.'<sup>340</sup>

421. The Risk Profile definitions in the *Prudent Person Rule Manual* suggest potentially significant differences in how client funds are managed. For example, the Risk Profile for an Assertive Investor says:

They are long term investors willing to consider strategies containing a high proportion of growth assets that will generate higher returns allowing increased volatility in the short to medium term. Investment strategy should provide:

- High levels of growth from capital invested
- Little income is required
- Medium level of capital volatility.<sup>341</sup>

422. This is in contrast with the Risk Profile for a Conservative Investor:

They seek good returns from their investments and accept that there should be some growth potential in their portfolio, even if this means an element of risk. They are concerned about the effects of taxation and inflation.

Investment strategy should provide:

- Stable income stream
- Modest growth from capital invested
- Medium to long-term capital security.<sup>342</sup>

<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

<sup>340</sup> Ibid.

<sup>341</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, Version 10, November 2018, attachment 2 (unpublished). Note: the Public Trustee did not make this manual publicly available until the most recent version (12.1) which is now available on its website ([www.pt.qld.gov.au](http://www.pt.qld.gov.au)). The online version of the manual refers to attachment 2 in its table of contents however the attachment is not included.

<sup>342</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, Version 10, November 2018, attachment 2 (unpublished). Note: the Public Trustee did not make this manual publicly available until the most recent version (12.1) which is now available on its website ([www.pt.qld.gov.au](http://www.pt.qld.gov.au)). The online version of the manual refers to attachment 2 in its table of contents however the attachment is not included.



423. These definitions describe significant differences in the investment goals of an 'Assertive Investor' compared with a 'Conservative Investor'. For example, the Assertive Investor seeks high levels of capital growth and little income, while the Conservative Investor seeks modest capital growth and stable income. However, the manual recommends the 'PT Growth Trust' as the investment to serve the needs of both profiles of investors. It appears contradictory that a single product, the Growth Trust, is considered appropriate to meet the needs of what appear to be such different investor risk profiles.
424. Further, despite the profile definitions, the *Prudent Person Rule Manual* acknowledges that the client's risk profile is largely determined by the client's age expectancy and budgetary requirements. The *Prudent Person Rule Manual* also acknowledges that for the vast majority of clients whose assets are managed by the Public Trustee in accordance with the Primary Investment Strategy, despite the risk profile definitions, the goal is merely 'wealth preservation'<sup>343</sup> rather than capital growth or income.
425. The key point arising from Table 8 is that the *Prudent Person Rule Manual* suggests that Public Trustee staff consider the Public Trustee Growth Trust as the investment of choice for clients' funds in all age categories and risk profiles under 80 years of age. For people over 80 years, only the Public Trustee Term Investment Account is recommended.
426. Accordingly, the current direction in the *Prudent Person Rule Manual* advising staff that 'we expect our financial planners to apply the risk profile definitions'<sup>344</sup> appears incorrect for investment strategy purposes. In practice, all clients' funds above \$50,000 are invested in the Public Trustee's Growth Trust.

## Discussion

427. The Client Investment Strategy, and in particular the Primary Investment Strategy, outlined in the Public Trustee's Financial Planning Manual and *Prudent Person Rule Manual* establish a standard template for the investment of all Public Trustee client funds in a very restricted range of investments held and managed by the Public Trustee. This approach is contrary to the Prudent Person Rule and General Principle 10 in the *Guardianship and Administration Act*, which stipulates that the person's individual circumstances should be considered in all decisions.
428. While, for the purposes of efficiency and practicality, there needs to be a level of uniformity in the investment approach adopted by the Public Trustee for its clients, the rigid application of a standard template investment approach with virtually no variation does not achieve this. In effect, it adopts an approach to investments similar to the former 'statutory list' approach that the 1999 amendments to the *Trusts Act* were designed to move away from.
429. The *Prudent Person Rule Manual* makes no provision for Public Trustee staff to consider the clients' previous decisions and actions to inform their investor risk profile. Such an approach would be consistent with General Principle 7(4) which requires:
- the principle of substituted judgment must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes.<sup>345</sup>
430. The manuals suggest that Public Trustee staff consider clients' risk profiles to make decisions about their investments, however, three of the four risk profiles recommend the same investments for clients. They give the impression of more consideration being given to investment decisions, on an individual client basis, than is actually occurring.

<sup>343</sup> Email from the Public Trustee of Queensland to the Public Advocate, 10 February 2020, attachment, p 8.

<sup>344</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, Version 12.1, April 2020, p 18.

<<https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf>>

<sup>345</sup> *Guardianship and Administration Act 2000* (Qld), sch 1, General Principle 7(4).



431. The manuals direct all client funds exclusively into Public Trustee investments. As already noted, the Public Trustee earns income and fees on the client funds in its investment products in addition to the general management fees it charges clients for providing administration services. These practices raise questions about whether the Public Trustee is breaching its fiduciary duties — **to avoid conflicts with its clients' interests and not to profit from its clients.**
432. Certain other principles outlined in the *Prudent Person Rule Manual* contribute to the misunderstanding and misapplication of the Rule. The *Prudent Person Rule Manual* lists four principles it suggests are a 'simple English' interpretation of the Rule which restate four duties listed in section 23 of the *Trusts Act*:
- a duty to exercise powers in the best interests of all present and future beneficiaries of the trust;
  - a duty to invest funds in investments that are not speculative or hazardous;
  - a duty to act impartially towards beneficiaries and between different classes of beneficiaries; and
  - a duty to obtain advice.<sup>346</sup>
433. However, as already noted, the *Prudent Person Rule Manual* fails to provide guidance to Public Trustee staff about the necessity to apply these duties in a way that also complies with **the Public Trustee's duties and obligations under the *Guardianship and Administration Act*.** For example, the duty to act in the interests of all present and future beneficiaries of the trust is not easily reconciled with the obligations under the *Guardianship and Administration Act*, which do not authorise the Public Trustee or any administrator to consider the needs of any person over those of the person under administration. However, a focus on this duty could **result in Public Trustee staff forming the view that they have an obligation to conserve clients' assets beyond their life for the benefit of others.**
434. The *Prudent Person Rule Manual* contains additional direction about the trustee's duty to avoid speculative or hazardous investments — **'the use of investment products approved and supplied by our Investments Services Program or recommended by our approved financial planner are intended to minimise risk'**.<sup>347</sup> This approach can lead to a number of negative outcomes.
435. The first is that it shifts the focus of client investments to a risk avoidance, rather than a risk minimisation, approach. Such an approach is not consistent with the Prudent Person Rule, as outlined by the Federal Court in *Australian Securities and Investments Commission v Drake (No 2)*<sup>348</sup> which noted that an approach that is overly cautious, emphasising the preservation of capital, is outdated.<sup>349</sup> Instead trustees should consider an overall investment strategy that is suitable for the particular trust.<sup>350</sup>
436. Specifically, this approach disregards certain matters that trustees are required to consider under section 24(1) of the *Trusts Act*, namely:
- the desirability of diversifying trust investments; and
  - the potential for capital appreciation.
437. It also does not encourage Public Trustee staff to understand, or enquire about, clients' risk preferences as is required by the Rule and General Principle 10 (as already outlined) to ensure their individual circumstances are taken into account, to at least some degree, when making investment decisions. For some clients who have a higher risk profile or tolerance, such a conservative approach can result in comparatively lower rates of return on their investments.
438. The direction in the *Prudent Person Rule Manual* also infers that it is only those products **'approved and supplied by our Investments Services Program or recommended by our approved financial planner'** that are fit for purpose for Public Trustee clients in accordance with the Rule. This reinforces an inflexible, template approach to client investment, with the

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<sup>346</sup> *Trusts Act 1973 (Qld)* s 23(2).

<sup>347</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, Version 12.1, April 2020, p 7 <<https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf>>.

<sup>348</sup> [2016] FCA 1552 [267]-[268].

<sup>349</sup> *Australian Securities and Investments Commission v Drake (No 2)* [2016] FCA 1552 [267]-[268].

<sup>350</sup> *Ibid* [269].





outcome that clients' funds are almost exclusively invested in Public Trustee products. This outcome may not be the most appropriate option for the administration client, in terms of their risk profile and history of investing, and the potential for capital appreciation from other alternative investment products (see case study 4, Beryl's case, for such an example). While the Public Advocate is not suggesting that the Public Trustee adopt a high risk or aggressive approach to investments on behalf of vulnerable clients, it is arguable that there is space for a more individualised approach to investing client funds and considering alternative investment options. The current approach exposes the Public Trustee to criticism that it is not exercising the expertise of a professional trustee or necessarily acting in the interests of its administration clients.

439. The *Prudent Person Rule Manual* also could potentially reinforce an approach to investment that the 1999 amendments to the *Trusts Act* were specifically intended to change. As discussed earlier in this chapter, those amendments were introduced to overcome issues with the 'statutory list' approach. However, the *Prudent Person Rule Manual* appears to revert to a list approach by adopting a rigid investment list for staff to follow, replacing the old 'statutory list' with a 'Prudent Person Rule Manual list'. This results in Public Trustee staff not actively exercising their responsibilities to make a decision about whether a particular investment is actually prudent, instead assuming that it is, without considering whether it is suitable for the particular client and their circumstances. The inflexibility of the *Prudent Person Rule Manual* means that alternative investment options that may be just as sound, or more appropriate for the client, are not being considered by Public Trustee staff.
440. In relation to obtaining independent advice, the *Prudent Person Rule Manual* requires Public Trustee staff to '[O]btain independent and impartial advice from the subject matter experts to ensure that the investment strategies and products we use are appropriate for our clients' needs'.<sup>351</sup> The Manual is quite prescriptive in its requirements for Public Trustee staff to obtain independent external financial advice and the circumstances in which this is to occur. The Manual mandates the investment options for clients with funds of less than \$450,000, and to a significant degree, all clients, irrespective of the value of their assets, to exclusively Public Trustee investment products. Accordingly, it seems unnecessary and potentially a waste of clients' funds, for the Manual to require external financial advice to confirm what appears to be a pre-determined investment outcome.
441. This analysis suggests the Financial Planning and *Prudent Person Rule Manual* are not suitable as a reference or guide for Public Trustee staff about how to invest client funds taking into account all of the Public Trustee's statutory and fiduciary duties and should be revised.

## Supreme Court case No 5391 of 1996

442. In addition to the contradictory information in the Manual, it also contains a curious passage relating to the issue of conflict arising from the Public Trustee's investment practices:

There may be a perception that the Public Trustee prefers its clients to be invested in its own products. This conflict is experienced by any financial services provider offering financial planning advice and their own investment products.

We acknowledge there is a conflict and note that this has been approved by Queensland Supreme Court decision No 5391 of 1996 dated 15 July 1996.<sup>352</sup>

<sup>351</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, Version 12.1, April 2020 p 7 < <https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf> >.

<sup>352</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, Version 12.1, April 2020, p 21 < <https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf> >.



443. Case No 5391 of 1996 is an unpublished court decision. To understand what the decision was about, the Public Advocate obtained a copy of the court file. There is no actual decision on the court file. It merely consists of affidavit material and other material filed by the Public Trustee, and a final order of the court on 15 July 1996, approving the establishment of an investment trust — the Public Trustee's Growth Trust. The order is reproduced below:
1. The Public Trustee of Queensland ("the Public Trustee") be granted the powers necessary and authority for it to carry into effect the terms of the Trust Deed Poll, being the Trust Deed Poll a copy of which is Exhibit "D" to the affidavit of Timothy Feely filed herein.
  2. Without limiting paragraph 1 of this Order, the Public Trustee specifically be granted the powers necessary and authority for it to invest funds belonging to "estate(s) under administration" as defined in the *Public Trustee Act 1978* in the purchase of units in investment trusts constituted or hereafter to be constituted under the said Trust Deed Poll, for the purpose of facilitating investment in Authorised Trustee Investments.
  3. Further, and without limiting Paragraph 1 of this Order, the Public Trustee, and the Public Trustee as trustee of such investment trust, specifically be granted the power and authority to mix trust funds to facilitate the investment and return of funds belonging to "estate(s) under administration" as defined in the *Public Trustee Act 1978* in and from such investment trusts of which the Public Trustee is the trustee.<sup>353</sup>
444. After reviewing the court file and the affidavit material, it is clear that the purpose of the application was for the Public Trustee to obtain court approval to invest money from the Public Trustee's 'Common Fund' into equities or shares.
445. Under the *Trusts Act* at the time, equities were not an authorised investment for trustees to make on behalf of beneficiaries and people under administration. To invest clients' money in an investment other than one on the *Trusts Act* statutory list, the Public Trustee was required to obtain the permission of the Supreme Court under section 94 of the *Trusts Act*. The Public Trustee applied to establish the investment trust (which has become known as the Growth Trust) and for approval to invest clients' funds in that trust because it was concerned that the limitations on investing client funds imposed by the *Trusts Act* did not allow for investment diversification and did not protect clients with smaller estates from the effects of inflation. The Trust Deed that established the Growth Trust permitted the trust to invest in equities. The Supreme Court granted the order sought by the Public Trustee to establish the Growth Trust and invest client funds in the trust.
446. The Public Advocate acknowledges the legitimacy and validity of the Growth Trust as a Public Trustee investment product. However, the Public Advocate questions the Public Trustee's claim in its *Prudent Person Rule Manual* that the investment of client funds in the Growth Trust is a conflict transaction that was approved by the granting of the Supreme Court order. There is nothing in the Supreme Court order or material on the case file to indicate that the Supreme Court specifically acknowledged or approved the Public Trustee's investment of client funds in the Growth Trust as a conflict transaction or that it provided a blanket authority for the Public Trustee to enter into future conflict transactions arising from the investment of client funds in its own products on an ongoing basis. The word 'conflict' is not mentioned in the order or in any of the affidavit material the Public Trustee filed in support of the application.
447. It appears that the only effect of the order was to approve the Public Trustee to operate the Growth Trust in accordance with the deed establishing the trust and as a trustee under the *Trusts Act* to be able to invest client funds into the Growth Trust. There is nothing in the order or the other material before the court which could be interpreted as excusing the Public Trustee from its legal responsibilities as a trustee in relation to conflict transactions.

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<sup>353</sup> Order of Moynihan SJA *In the matter of the Public Trustee of Queensland and in the matter of the Trusts Act 1973* (Supreme Court of Queensland, No. 5391 of 1996, 15 July 1996)



448. Even if the Court actually had considered the issue of a potential conflict of interest arising from the Public Trustee investing client funds in products from which it gains financial benefit, it is arguable that it cannot be used as a legal precedent or authority for other conflict transactions.
449. Legal precedent is a common law concept that requires courts to follow the decisions given in previous cases.<sup>354</sup> It is also referred to as the principle of *stare decisis*, or 'to stand on what has been decided'. The usual interpretation of this is to 'keep to the *rationes decidendi* of past cases'.<sup>355</sup>
450. Only the *rationes decidendi* (or 'the reasons for the decision') of a past case are binding.<sup>356</sup> A *ratio* is a 'ruling on a point of law', and is made when there was an issue in contention that required the court to make a ruling so that the court has given the matter its full consideration with the benefit of argument of counsel.<sup>357</sup>
451. As stated by the High Court, '[I]f a point is not in dispute in a case, the decision lays down no legal rule concerning that issue... the case can have no wider *ratio decidendi* than what was in issue in the case. Its precedent effect is limited to the issues.'<sup>358</sup>
452. It is clear from well-established legal doctrine that case No 5391 of 1996 cannot be regarded as setting a legal precedent, because it does not have the necessary features of a formal legal decision. The case and the order made do not show there was a ruling on a point of law, there was no issue in contention (the only party to the proceedings was the Public Trustee), the court could not have given consideration to arguments of any other side, and no reasons for the order were given.
453. In any event, legislation takes precedence over case law, and the subsequent enactment of the *Guardianship and Administration Act* and its specific provisions relating to the obligations of administrators to obtain QCAT approval of conflict transactions overrides any decision made by a court four years earlier. Accordingly, the *Prudent Person Rule Manual* should be reviewed to ensure there is no confusion about the effect of case No 5391 of 1996 and the Public Trustee's ongoing obligations in relation to conflict transactions.
454. Some of the obligations required under the *Guardianship and Administration Act* that operate in relation to conflict require QCAT to consider whether the proposed administrator may have any conflicts of interest,<sup>359</sup> and any proposed administrators to disclose any conflict between their own interests and that of the person under administration.<sup>360</sup> Any conflict transactions must be approved by the tribunal.<sup>361</sup>

## Public Trustee's obligations regarding conflict

455. This report has already outlined the duties of the Public Trustee to avoid conflicts in its duties and obligations as a fiduciary, and as an administrator under the *Guardianship and Administration Act* (see 'Chapter 2: Financial administration and the Public Trustee').
456. As noted above, even if case No 5391 of 1996 could be interpreted as providing approval at the time for the Public Trustee's conflict of interest arising from the investment of client funds in the Growth Trust, it cannot be relied upon as providing the Public Trustee with an exemption from fulfilling its obligations under the *Guardianship and Administration Act* to obtain tribunal authority for a conflict transaction, or conflict transactions generally.<sup>362</sup>

<sup>354</sup> Cook et al, *Laying down the Law* (LexisNexis Butterworths, 9th ed, 2015) 135.

<sup>355</sup> Rupert Cross and J W Harris, *Precedent in English Law* (Oxford University Press, 4th ed, 1991) 100, cited in Cook et al, *Laying down the Law* (LexisNexis Butterworths, 9th ed, 2015) 135.

<sup>356</sup> Cook et al, *Laying down the Law* (LexisNexis Butterworths, 9th ed, 2015) 138.

<sup>357</sup> *Ibid* 139.

<sup>358</sup> *Coleman v Power* (2004) 220 CLR 1, 44-5 per McHugh J.

<sup>359</sup> *Guardianship and Administration Act* 2000 (Qld) s 15.

<sup>360</sup> *Ibid* s 16(2).

<sup>361</sup> *Ibid* s 37(1).

<sup>362</sup> *Ibid*.



457. An administrator under the *Guardianship and Administration Act* must have tribunal approval to enter into conflict transactions.<sup>363</sup> The most concerning aspect of the *Prudent Person Rule Manual* is that the Public Trustee acknowledges the inherent conflict in its investment of client funds in the Growth Trust. The Public Trustee clearly benefits, or profits, from these investments. However, it has not obtained tribunal approval for each, or any, occasion it has invested administration client funds in its own products where it earns income or management fees.
458. The Public Trustee, by almost exclusively investing client funds in its own products (and earning income or profit from it) is potentially in breach of its fiduciary duties as well as acting contrary to its legal obligation to avoid conflict transactions under the *Guardianship and Administration Act*.



## Recommendations

**Recommendation 16: Review investment practices and discontinue activities that do not directly benefit clients**

The policies and practices of the Public Trustee relating to the investment of administration client funds be reviewed, and any investment activities involving their funds that do not maximise direct benefits to those clients be discontinued.

**Recommendation 17: Review and update the *Prudent Person Rule Manual***

Review and update the *Prudent Person Rule Manual* to ensure it appropriately reflects the law and the Public Trustee's obligations as a trustee and fiduciary. The review should include consideration, where appropriate, of a client investment approach that:

- a. ensures that decisions about investing client funds demonstrate that each decision was made in the interests of the client;
- b. seeks to achieve more for clients than just the preservation of their assets;
- c. moves away from an inflexible standard template approach to investing, to one that takes the clients' individual circumstances into account (wherever possible);
- d. relies on an actual assessment of clients' individual investor risk profiles (where possible), rather than assigning profiles based on clients' ages, and makes a meaningful distinction between each of the risk profiles and the types of investments considered appropriate for that profile.

**Recommendation 18: Publish the *Prudent Person Rule Manual***

The *Prudent Person Rule Manual* and all other Public Trustee manuals that guide the agency's decision-making about managing and investing administration clients' funds be published and re-written in accessible language.

**Recommendation 19: Review position on conflict transactions**

The Public Trustee review its reliance on Supreme Court case No 5391 of 1996 as providing legal authority for all potential conflict transactions involving the investment of administration client funds in its own products, particularly the Growth Trust.

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<sup>363</sup> Ibid.



Recommendation 20: Review the practice of only investing in Public Trustee investment products

The Public Trustee review its practice of investing administration client funds almost exclusively in its own investment products and seek advice about how it can fulfil its statutory and fiduciary obligations while managing client funds and earning revenue. Where the Public Trustee proposes to invest administration client funds in its own investment products it should seek appropriate approvals under the *Guardianship and Administration Act* or seek a specific legislative amendment to expressly permit these breaches of its obligations. Such arrangements should also be published in an accessible format and declared to clients.







459. The previous chapter examined the Public Trustee's investment strategy and its interpretation of the Prudent Person Rule in its *Operations Manual: Chapter 28: Financial Planning* (the Financial Planning Manual) and the *Prudent Person Rule Manual*. Those manuals also outline the circumstances that trigger the Public Trustee obtaining external financial advice about investing and managing clients' assets (including the assets of administration clients).
460. This chapter examines the circumstances in which the Public Trustee requests external financial advice for its clients. While the Public Trustee obtains this advice for all eligible clients with assets under its management, the Public Advocate's focus is on how these arrangements affect administration clients. This chapter also examines the contractual arrangements the Public Trustee has for the provision of this financial advice to clients and how these arrangements impact the advice obtained and consequent investment recommendations and outcomes.

## The trigger for obtaining financial advice

461. The Public Trustee's Financial Planning Manual first refers to the need to 'obtain advice' in a matrix that outlines the operation of its Client Investment Strategy. This matrix guides staff about the investment strategy that will apply to each client and whether the investment strategy 'will follow the internal or external path'.<sup>364</sup> That is, whether the Public Trustee will manage the investment according to the Primary Investment Strategy (internal) or the External Investment Strategy that includes seeking external advice from a financial planner.<sup>365</sup>
462. The *Prudent Person Rule Manual* first refers to the need to 'obtain advice'<sup>366</sup> when outlining the 'fundamental duties of trustees'. It states:
- Where a trustee has a duty to obtain advice about the investment decision-making process then it may pay the cost of that advice out of trust funds.<sup>367</sup>
463. Neither manual includes a specific discussion or direction for staff about the circumstances in which a trustee's duty to obtain advice about an investment decision arises. The closest any information in the manuals comes to providing this explanation is the following:
- In any case, the cost of getting and implementing investment advice should be less than the value created by that advice. That is why we segment our advice and only send matters to the financial planners above a certain dollar value or when their client's needs are complex.<sup>368</sup>
464. The Prudent Person Rule under the *Trusts Act* does not set financial limits on the considerations that should apply when a trustee is exercising a power to invest. The expectation is that the trustee will use their judgement, according to their expertise, when investing. The Public Trustee's 'segmenting' of advice for clients is based on a fairly rudimentary assessment of the value of the clients' assets and whether they are 'complex', according to the Public Trustee's very narrow definition of that term — which includes any assets other than Public Trustee investments or cash. It is unclear why the Public Trustee, a provider of professional trustee services, should apply such a simplistic approach to identify the clients it considers require external financial advice. The Public Trustee should have sufficient expertise to make investment decisions about what, in many cases, appear to be the quite ordinary financial circumstances of their administration clients. The result of this approach is that it seems financial advice is obtained for clients in many more cases than seems necessary. Accordingly, while the direction noted above requires consideration of the cost of getting investment advice, beyond the simple assessment of value and complexity, it does not

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<sup>364</sup> The Public Trustee of Queensland, *Financial Management Manual*, 'Section 28 Financial Planning', 2017, (internal unpublished document).

<sup>365</sup> Ibid p 4.

<sup>366</sup> The Public Trustee of Queensland, *The Prudent Person Rule Manual*, Version 12.1, April 2020, p 5 <<https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf>>.

<sup>367</sup> Ibid.

<sup>368</sup> Ibid p 21.



explain the reasons or circumstances in which the obligation to obtain that advice might arise.

465. The Public Trustee's investment manuals suggest that the practice of obtaining external financial advice is based on systematised triggers built into its client management systems rather than any individual assessment of a particular need for the external advice. It is understood that the NSW Trustee and Guardian, State Trustees (in Victoria) and the Public Trustee South Australia do not obtain any external financial advice for their clients, relying instead on the expertise of staff who are licensed to provide financial advice.<sup>369</sup> This financial advice is charged out by those Public and State Trustees at an hourly rate or a set fee, dependent on the asset value. The Public Trustee and Guardian (Australian Capital Territory) advises that **they prepare a client's investment strategy internally (utilising in-house experience and expertise)**, and do not charge for this service, considering it a component of the overall service provided to administration clients covered by their income and capital commission fees. External financial advice for which clients pay is only sought by exception, where the client holds significant and complex assets.<sup>370</sup>

#### Public Trustee response

The Public Trustee takes the view that financial advice services can be more cheaply and professionally delivered through an outsourced service provider and provide more individualised outcomes for customers compared with the work completed in-house. It also advises that 1,350 of its customers have a superannuation account and only about 50 percent receive an annual external financial advice because the superannuation asset has been reviewed and it does not require further advice.<sup>371</sup>



#### Circumstances that trigger external financial advice

The Public Trustee obtains financial advice from its external provider of financial advice services in the following circumstances:

- New or existing clients with investable assets between \$150,000 and \$450,000 and no complex assets are referred for financial advice, however, this will only happen once, **after which their funds will be managed according to the Public Trustee's Primary Investment Strategy.**<sup>372</sup>
- Clients who have complex assets, and clients with investable assets over \$450,000, are referred for financial advice every year.<sup>373</sup> The Public Trustee exercises discretion about referring clients for external advice who have an asset balance under \$5,000<sup>374</sup> and superannuation under \$20,000.<sup>375</sup> **However, the Public Trustee's Small Super Checklist only restricts referrals for external financial advice in very limited circumstances.** Clients who are under 55 years and have a superannuation balance of over \$500 are required to obtain an external financial advice for which they must pay. Only clients

<sup>369</sup> Letter from the Public Trustee of Queensland to Public Advocate, 20 November 2020, providing feedback on draft report, chapter 6, attachment 1.

<sup>370</sup> Email from the Public Trustee and Guardian (Australian Capital Territory) to the Public Advocate, 1 May 2020.

<sup>371</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 20 November 2020, providing feedback on draft report chapter 6, attachment 1.

<sup>372</sup> The Public Trustee of Queensland, *Financial Management Manual*, 'Section 28 Financial Planning', 2017, (internal unpublished document), section 28.8.3.4.

<sup>373</sup> The Public Trustee of Queensland, *Financial Management Manual*, 'Section 28 Financial Planning', 2017, (internal unpublished document), section 28.8.3.4. The Public Trustee provides examples of a client's complex assets as including 'external shares, superannuation, and property other than a principal place of residence'. The Public Trustee defines non-complex assets as cash assets that are invested in Public Trustee investments, including the Public Trustee Cash Account, the Public Trustee Term Investment Account, and Public Trustee Growth Trust.

<sup>374</sup> Email from Public Trustee of Queensland to Public Advocate, 25 February 2020.

<sup>375</sup> The Public Trustee, Checklist – Review of Small Super – (Under \$20,000 only), (unpublished), introduced in October 2017.



over 65 years with superannuation balances under \$20,000 are exempted from obtaining external financial advice.<sup>376</sup>

- New or existing clients with investable assets (namely cash) under \$150,000 and no complex assets are not referred for financial advice. Their assets are invested in accordance with the Primary Investment Strategy.

## Client Investment Strategy dictates advice outcomes

466. As noted in 'Chapter 5: Investment practices', the Public Trustee client files reviewed showed rarely any deviation from the prescribed approach to investing clients' funds as outlined in the manuals. The approach is simple and formulaic and is consistently applied. In this context, the cases where clients were charged a fee for independent financial advice raises genuine questions about the need for external advice when there was already a prescriptive policy about how the funds should be invested and the advice followed that policy.
467. Gary's experience in case study 3 ('Chapter 3: Fees and charges for administration'), demonstrates how the Public Trustee's practice of routinely obtaining financial advice, especially for relatively low value assets, can result in unnecessary costs to administration clients for services that have little bearing on investment outcomes, given that the investment strategy is already pre-determined by Public Trustee investment policies.

### Public Trustee response

When the Public Advocate asked why the Public Trustee requested financial advice in Gary's case, the Public Trustee advised that its view was that Gary's \$2,000 of superannuation was a 'complex' asset and therefore financial advice was required.<sup>377</sup>



### Case study 4: High earning shares sold and cash invested in Public Trustee investment

In August 2013, QCAT appointed the Public Trustee as financial administrator for 'Beryl' for 12 months.<sup>378</sup> Beryl had progressive vascular dementia and did not have the ability to make decisions about her financial affairs. Prior to that appointment Beryl's sons, Brian and Joe, had been managing her financial affairs under an enduring power of attorney.

The Public Trustee was appointed following a hearing where the Adult Guardian (now the Public Guardian) expressed concerns about Brian and Joe as attorneys not keeping records, making gifts and loans to family members, concerns about the costs of Beryl's living expenses, the use of her money to renovate her house and numerous unaccounted cash withdrawals from Beryl's bank account.

Beryl's property included a house worth over \$650,000, some cash and a significant portfolio of shares that she had acquired during her lifetime.

At the time of its appointment, the Public Trustee was also requested by the tribunal to investigate the actions of the attorneys.

At the end of the 12 month appointment, the parties returned to the tribunal for a decision about whether the Public Trustee's appointment should continue or if Beryl's sons could again assume the role of attorneys.

<sup>376</sup> Ibid p 2.

<sup>377</sup> Letter from Public Trustee of Queensland to Public Advocate, 20 November 2019, in response to Information Notice No.4, p 31.

<sup>378</sup> This case study is based on BGMJ [2014] QCAT 422.



At that later hearing in 2014, the Public Trustee reported on its investigation of the actions of the attorneys. The Public Trustee advised that the attorneys had provided explanations and/or documentation for some, but not all, of the expenses the attorneys said they incurred on their mother's behalf including travel, telephone calls, DVDs and expenses for treats, magazines and recreation.

The attorneys acknowledged their poor record keeping and the tribunal member was satisfied with their explanations of expenditure. The loans to family members were found to be consistent with Beryl's behaviour when she had decision-making capacity, for example, Beryl had previously purchased homes for some family members. Her attorneys did not secure repayments of additional loans they made on her behalf after she lost capacity and did not keep documentation. There were multiple withdrawals of \$200 for Beryl's incidental spending when she was living with family. These withdrawals ended when Beryl went into care, which occurred before the Public Trustee was appointed.

The Public Trustee also raised concerns about whether the sons obtained financial advice during the global financial crisis. However, the attorneys advised they sought advice from a financial planner at their mother's bank which was considered acceptable by the tribunal.

The tribunal was satisfied that the attorneys assisted their parents over many years and provided care for their mother as well as managing her home in her best interests.

The attorneys admitted they had been ignorant about the rules and failed to keep records but sought reinstatement and outlined how they would be more accountable if that occurred.

At the time of the later hearing, Beryl's assets included a house worth \$675,000, that was rented, and cash of \$422,000. During the temporary appointment, the Public Trustee had sold Beryl's significant portfolio of shares. At the time of the later hearing, Beryl's income included the rental from her house of \$1,100 per fortnight, a Department of Veterans Affairs pension of \$856 per fortnight and interest on the money from the sale of the shares of \$426 per fortnight. She had a surplus of income of \$130 per fortnight, but without the Public Trustee fees, that would increase by \$190 to \$320 per fortnight.

The Public Trustee submitted to the tribunal that it should remain Beryl's administrator as 'they are competent and more appropriate than the attorneys'.<sup>379</sup> The tribunal made the point that the original appointment of the Public Trustee 'overtook' (or suspended) the previous enduring power of attorney, rather than revoking it.<sup>380</sup> The tribunal formed the view that it was not satisfied that Beryl needed to have an administrator appointed on an ongoing basis.

While acknowledging the attorneys did not act in accordance with the Act, the tribunal was prepared to give them a second chance. Brian and Joe were directed to provide a financial management plan and various documents to the tribunal and were advised their actions would be supervised. They were directed not to make loans or gifts with Beryl's funds.

In its decision, the tribunal formally raised a number of 'issues of concern' with the Public Trustee.

The first was in relation to a financial advice provided by the Public Trustee's external financial advisor. The member referred to a section of the advice which said that within the terms of their engagement, the investments considered in the plan were restricted to the

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<sup>379</sup> BGMJ [2014] QCAT 422 at [22].

<sup>380</sup> Ibid at [2].



Public Trustee of Queensland Term Investment Accounts conservative fund, Growth Fund, Higher Growth Fund and the Australian equities fund. The tribunal member observed:

... the only investments that [the financial advisor] can consider are restricted to the Public Trustee funds.

It seems odd to me that an advisor can only recommend the Public Trustee funds. It suggests there are no others suitable. This cannot possibly be so. The Public Trustee should review its restrictions on the advice [the financial advisor] can give.<sup>381</sup>

The tribunal also raised concerns about what it described as 'the liquidation of [Beryl's] investment portfolio,'<sup>382</sup> or shares. It noted that the advisor recommended that the share portfolio 'which she had built up whilst she had capacity should be moved to cash investments on the basis that ... shares ... were high risk'.<sup>383</sup> The tribunal also noted that the bulk of the shares were sold in June 2014, only two months before the Public Trustee's temporary appointment was to end.

The tribunal considered that the Public Trustee should have realised that its appointment as administrator for Beryl was for only one year, and should have consulted with Brian and Joe before selling the shares. It noted that the Public Trustee did not give Beryl's sons the financial advice, but instead it was sent to Beryl, 'the point of which escapes me given her incapacity'.<sup>384</sup> The tribunal also noted that the income projected from the investment of Beryl's money in the Public Trustee Term Investment Fund would be significantly less than the income from the shares that were sold.

The tribunal was also critical of the legal advice and submissions of the Public Trustee during the hearing.

The final matter of concern was what appeared to be incorrect information provided by the Public Trustee to the tribunal. It was noted that the Public Trustee informed the tribunal that there were 'no exit fees from the portfolio when it was liquidated' (referring to the sale of the shares). However, on further inquiries it was subsequently revealed that there were brokerage fees of approximately \$1,470 for the sale of the shares.

The tribunal asked the Public Trustee to 'examine' the concerns it had raised.<sup>385</sup>

468. Beryl's case raises some significant questions about the terms of engagement of a financial advisor by the Public Trustee and whose interests the financial advice serves.

#### Public Trustee response

When asked by the Public Advocate why an independent financial adviser is used, the Public Trustee gave a variety of responses:

A fiduciary's duty ... is to call for the advice and then in view of all relevant matters, make decisions informed by the advice.<sup>386</sup>

... [T]he Public Trustee produces a brochure "A Guide for Financial Management Clients"<sup>387</sup> ... [that] is readily available on the Public Trustee's website ... In respect of advices, ... page 11 of the brochure provided to adults for whom the Public Trustee is appointed administrator [explains]:-

<sup>381</sup> Ibid at [27] and [28].

<sup>382</sup> Ibid at [29].

<sup>383</sup> Ibid.

<sup>384</sup> Ibid at [31].

<sup>385</sup> Ibid at [35].

<sup>386</sup> Letter from Public Trustee of Queensland to Public Advocate, 5 April 2019, in response to Information Notice No.1, p 90.

<sup>387</sup> *A Guide for Financial Management Client Management Clients* (sic), 2016 was replaced in January 2020 with an updated document, *A guide to Personal Financial Administration* <<https://www.pt.qld.gov.au/media/1094/guide-for-financial-management-clients.pdf>>.



We obtain independent and impartial advice from subject matter experts to ensure that the investment strategies and products we use are appropriate for your needs.<sup>388</sup>

469. These responses suggest there is a robust probity process around obtaining external financial advice for Public Trustee clients which is not borne out by the cases reviewed by the Public Advocate.

## Arrangements for external advice

470. Since 2013 there has been one provider of financial advice and planning services to the Public Trustee. In 2012, the Public Trustee issued an **Invitation to Offer (ITO) seeking 'the provision of financial planning and investment administration services as specified in the ITO document'**.<sup>389</sup> The Public Trustee has not conducted another purchasing process for appointment of an external financial advisor since 2012.

### Public Trustee response

The Public Trustee advises that:

[It] is committed to regularly reviewing its contract to ensure they are meeting the needs of its customers and representing value for money. Given the complexity and type of contract [with the financial advice provider], the view of the Public Trustee is that up to ten years is a reasonable contract length.<sup>390</sup>

471. On the basis of the concerns raised by Beryl's case (case study 4, above), the Public Advocate requested the Public Trustee provide information about its contractual arrangements with its external financial advisor. The Public Trustee provided a copy of the contract which had a number of attachments that formed part of the contract, including the ITO that was provided to the market inviting prospective suppliers to tender for the proposed work. The contract states that the ITO forms part of the 'Specifications' section of the contract. The discussion of the financial advice and planning services in this chapter is based on the contents of the ITO because it forms the basis of the contract entered into by the Public Trustee for advice about investing the assets of people under administration. In particular it examines the operation of certain clauses in the ITO attachment to the contract which may have the effect of limiting the range of advice and investments the advisor is permitted to recommend to Public Trustee clients.
472. The ITO is set out in five sections: Invitation to Offer Details, Conditions of Offer, Specifications, Offer Evaluation Process and Criteria, and Conditions of Contract. Only those areas requiring commentary are discussed below.
473. The 'Specifications' section of the ITO outlines the Public Trustee's Investment Services Program. Under that section, the ITO requires that the successful offeror must 'comply with the duty for financial advisers to act in the best interests of their clients and place the best interests of their clients ahead of their own when providing advice'.<sup>391</sup>

<sup>388</sup> The Public Trustee of Queensland, *A Guide for Financial Management Client Management Clients*, 2016, p.11. This statement does not appear in the replacement guide, *A guide to Personal Financial Administration*, 2020.

<sup>389</sup> The Public Trustee of Queensland, *Invitation to Offer No. PTQFPS01, For the provision of financial planning and investment administration services Section 1-5*, Version 004 – 1 July 2012, p 3, provided to the Public Advocate on 20 November 2019, in response to Information Notice No.4.

<sup>390</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 20 November 2020, providing feedback on draft report chapter 6, p 4.

<sup>391</sup> The Public Trustee of Queensland, *Invitation to Offer No. PTQFPS01, For the provision of financial planning and investment administration services Section 1-5*, Version 004 – 1 July 2012, Section 3 Specifications, Capability, Resourcing and Reputation, Clause 4, p 8, provided to the Public Advocate on 20 November 2019 in response to Information Notice No.4.





474. The 'Financial Planning Services' section, Item 2 outlines the requirements in relation to Statements of Advice which, among the other items listed, states that:

Statements of advice must:

- be prepared in accordance with the Prudent Person Rule in Part 3 of the Trusts Act 1973;
- be based on categories of Low, Medium and High level complexity as identified in section 3.5 [of the ITO]; and
- comply with PTQ standardised format and contain the following statements:

"This Statement of Advice is prepared in accordance with our Agreement with The Public Trustee of Queensland for the provision of Financial Planning Services."

"The recommended strategy meets the obligation of the Public Trustee of Queensland to manage the trust funds in compliance with the Prudent Person Rule." [Emphasis added]<sup>392</sup>

475. The third bullet-point above mandates the disclaimers to be used by the independent financial advisor on each Statement of Advice. The first of these, that '[T]his Statement of Advice is prepared in accordance with our Agreement with The Public Trustee of Queensland for the provision of Financial Planning Services' raises concerns on the basis that it suggests some confusion about who the client is, in terms of the provision of the financial advice.
476. While the ITO requires that the Statements of Advice are to provide advice 'in the best interests of the client',<sup>393</sup> other clauses in the ITO require that the Statements of Advice also be prepared 'in accordance with the agreement the financial adviser has with the Public Trustee'. The language of the ITO makes it difficult to determine who 'the client' of the financial advisor is, the Public Trustee or the person under administration receiving the advice.
477. The second statement that the ITO requires to be included in the Statements of Advice, that the 'recommended strategy meets the obligation of the Public Trustee of Queensland to manage the trust funds in compliance with the Prudent Person Rule', also raises concerns. It is a matter for the Public Trustee to satisfy itself that it has fulfilled its legal and fiduciary obligations. This is not an obligation that the Public Trustee can contract or transfer to another party.
478. It also appears the purpose of the statement is to provide confidence to Public Trustee's administration clients that the advice is prepared with 'the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons'.<sup>394</sup> That obligation cannot be satisfied merely by making a statement to that effect. It must be demonstrated through the trustee's conduct in the overall management and investment of the client's assets.
479. The rationale for the inclusion of the two disclosure/disclaimer statements in each Statement of Advice is unclear. One possible reason (or at least the effect thereof) for their inclusion is to justify investment decisions made by the Public Trustee for those clients and shift the risk for those decisions to the external financial advice provider, while clients pay the costs of the advice. In any event, the inclusion of the disclosure/disclaimers appears to benefit the Public Trustee.
480. Clause 6 in the 'Financial Planning Services' section of the ITO states:
- Risk profiles will be based on client age and investment time horizon as specified by PTQ and asset allocations will be agreed upon between the Successful Offeror and PTQ for each risk profile.<sup>395</sup>

<sup>392</sup> The Public Trustee of Queensland, *Invitation to Offer No. PTQFPS01, for the provision of financial planning and investment administration services Section 1-5*, Version 004 – 1 July 2012, Section 3 Specifications, p 9, provided to the Public Advocate on 20 November 2019 in response to Information Notice No.4.

<sup>393</sup> The Public Trustee of Queensland, *Invitation to Offer No. PTQFPS01, For the provision of financial planning and investment administration services Section 1-5*, Version 004 – 1 July 2012, Section 3 Specifications, Financial Planning Services p 8, provided to the Public Advocate on 20 November 2019 in response to Information Notice No.4.

<sup>394</sup> *Trusts Act 1973*, s 22(1)(a).

<sup>395</sup> The Public Trustee of Queensland, *Invitation to Offer No. PTQFPS01, For the provision of financial planning and investment administration services Section 1-5*, p.3, Version 004 – 1 July 2012, Section 3 Specifications, Financial Planning Services, p10, provided to the Public Advocate on 20 November 2019 in response to Information Notice No.4.



481. This clause appears to require the independent financial adviser to apply the risk profiles and asset allocations as specified or agreed with the Public Trustee, rather than appraise each client's risk appetite and individual investment and financial needs when providing advice.
482. The risk profiles based on client age, the investment time horizon and 'asset allocations' appear to mirror key elements of the Public Trustee's *Prudent Person Rule Manual* without specifically referring to them. Clause 6 is particularly concerning because, on its own, it requires the independent financial advisor to make its recommendations exclusively in accordance with the Public Trustee's directions.
483. The 'Scope of Services' section<sup>396</sup> in the ITO details the range of services required by the Public Trustee from the independent financial advisor. However, it first states:
- PTQ will be considered the client of the Successful Offeror. Clients of PTQ will not have direct contact with the Offeror unless pre-arrangement is made by PTQ.<sup>397</sup>
484. This clause clearly demonstrates that the 'client' whose best interests must be the concern of the financial advisor is actually the Public Trustee (not the client paying for the external financial advice) and clarifies earlier concerns about whose interests the financial advisor is required to serve. It was difficult to identify any direct benefit from the provision of external financial advice to the administration clients paying for those services, in the files reviewed by the Public Advocate. The investment strategies recommended were all generally in accordance with the those prescribed in the Public Trustee's Financial Management Manual.

Public Trustee response

The Public Trustee advises that it will ensure that future financial planning tenders, contracts and service agreements will clearly state that the advice being sought is for the Public Trustee's customers and that each customer is to be considered individually.<sup>398</sup>

485. The 'Scope of Services' section goes on to list the services the Public Trustee is seeking, including:
- annual reviews of clients requiring financial advice;
  - transition of clients to PTQ preferred superannuation provider<sup>399</sup>;
  - ...
  - consideration to recommendations being provided for new and existing clients with Public Trustee Investment Funds.<sup>400</sup>
486. There is no obvious reason why the Public Trustee has a rigid requirement to obtain annual external financial advice for clients. The *Trusts Act* requires trustees to undertake annual reviews of investments but does not specifically require that a trustee must obtain annual financial advice for each client. In the case of the Public Trustee, the annual review requirement could be fulfilled through an annual review of the performance of each of its investments and the usual annual review of individual clients' circumstances for the purposes of budgeting etc. A review conducted by way of obtaining external financial advice that the client has to pay for would appear to be unnecessary if the client's circumstances have not changed since the last advice was received, and there have been no significant changes in external factors affecting the client's financial position.
487. The requirement in the ITO that the independent financial advisor provide recommendations to transition clients to the 'PTQ preferred superannuation provider', AustralianSuper (see second dot point immediately above), also raises concerns. It is acknowledged that

<sup>396</sup> Ibid p 12.

<sup>397</sup> Ibid.

<sup>398</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 20 November 2020, in response draft report chapter 6, attachment 1.

<sup>399</sup> The Public Trustee of Queensland, *Invitation to Offer No. PTQFPS01, For the provision of financial planning and investment administration services Section 1-5*, Version 004 – 1 July 2012, Section 3 Specifications, Financial Planning Services, p 12, provided to the Public Advocate on 20 November 2019 in response to Information Notice No. 4.

<sup>400</sup> Ibid.



AustralianSuper is a well-regarded performer in the superannuation industry.<sup>401</sup> Accordingly, it is likely that clients with superannuation in comparatively poorly performing funds would be better off with such a move. However, this is unlikely to be the case in every instance. It is possible that some clients may be disadvantaged by such a move if their superannuation is in a higher performing provider than AustralianSuper.

488. The Public Advocate viewed the letter the Public Trustee wrote to Ella (see case study 2 in 'Chapter 1: The review') explaining its reasons for wanting to transfer her superannuation to AustralianSuper. It provided three reasons:

- (a) For ease of administration and reporting;
- (b) To reduce the fees and charges charged by the provider ...
- (c) To rebalance the portfolio in line with [Ella's] conservative risk profile.<sup>402</sup>

489. While there was a small benefit to the client, in terms of lower annual fees with AustralianSuper, there did not appear to be any comparative analysis of the returns on the funds, and as suggested by the order in which the reasons for moving Ella's superannuation were listed, the primary driver appeared to be administrative convenience for the Public Trustee. Further, presumably if there was an intention to 'rebalance' Ella's superannuation in line with her 'conservative risk profile', it is likely that this course would have resulted in lower growth in Ella's superannuation than she was currently enjoying. In the circumstances, it is difficult to identify the benefits for Ella from the proposed arrangements or the value of the financial advice (paid from Ella's funds), considering the recommendation to move the superannuation was driven by the contractual arrangements between the Public Trustee and the financial advisor rather than initiated by any independent assessment of the relative performance of QSuper by the financial advisor.

490. The requirement that the external financial advisor consider recommending the Public Trustee's investment funds to administration clients is a direct conflict of interest on the part of the Public Trustee. There appears to be very little value in referring clients to an external financial advisor, for which they are paying fees, for that adviser to be required by contract to consider only recommending the Public Trustee's own products as investments for its clients. Such an arrangement appears to potentially be improper for a trustee and fiduciary.

491. The 'Price' section of the ITO provides:

A fixed fee will be paid for the provision of Financial Planning Services, based on the complexity level of the client as set out in the table below.<sup>403</sup>

492. The 'Price' section was followed by a table titled 'Complexity levels' which listed levels of Low, Medium and High. The monetary thresholds and asset types listed mirrors the Public Trustee's 'segmented' approach to client investments outlined in the Financial Planning Manual and *Prudent Person Rule Manual*.<sup>404</sup> The use of these definitions and complexity levels for the pricing of financial advice appear intended to align the recommendations of the financial advisor with the Public Trustee's two Client Investment Strategies (the Primary Investment Strategy/Internal Investment Strategy and the External Investment Strategy) as outlined in those manuals.

<sup>401</sup> Canstar financial comparison and research agency, rated AustralianSuper's Balanced Fund in the top three performers in three of the four time-based assessment categories <<https://www.canstar.com.au/superannuation/top-performing-super-funds-rated-canstar/>> viewed 8 April 2020.

<sup>402</sup> Letter from the Public Trustee of Queensland to lawyer for 'Ella' [case study 2] dated 29 August 2017, provided by Ella's legal representative to the Public Advocate, 9 November 2017.

<sup>403</sup> The Public Trustee of Queensland, *Invitation to Offer No. PTQFPS01, For the provision of financial planning and investment administration services* Section 1-5, Version 004 – 1 July 2012, Section 3 Specifications, Price, p 13, provided to the Public Advocate on 20 November 2019 in response to Information Notice No.4.

<sup>404</sup> The Public Trustee of Queensland, *Financial Management Manual*, 'Chapter 28 Financial Planning', 2017, section 28. 8.3 'Investment Strategies' (internal unpublished document). [Note: this document does not have page numbers, only section numbers]



493. The 'Evaluation Criteria' section of the ITO states that offers will be evaluated against certain criteria, one of which is the '[a]bility and willingness to provide services as listed in the Specifications'.<sup>405</sup>

## Statements of Advice

494. The Public Advocate viewed a number of Statements of Advice prepared for administration clients of the Public Trustee by its external financial advisor. These clients' financial circumstances and assets ranged from very low levels of cash with a small amount invested in superannuation, to clients with assets (a house and superannuation) worth over \$1M to those with multi-million dollar holdings. A feature of the financial advices that was striking was that they were extremely similar in approach and the investment recommendations made. All of those Statements of Advice except one (for a client with multi-million dollar assets) recommended the clients' money be invested exclusively in Public Trustee investments, essentially in the same proportions or amounts as prescribed in the Financial Planning Manual and the *Prudent Person Rule Manual*.
495. In Beryl's case (as noted above), the Statement of Advice contained a statement advising that within the terms of the financial advisor's engagement with the Public Trustee, the investments considered in her plan were restricted to the Public Trustee of Queensland Term Investment Accounts conservative fund, Growth Fund, Higher Growth Fund and the Australian equities fund.
496. The Public Advocate has observed that this statement appears to have been a standard entry in the financial advisor's Statements of Advice to clients prior to 2018. More recent Statements of Advice viewed by the Public Advocate did not contain the statement noted in Beryl's Statement of Advice, but now include the following (apparently) standard paragraph:
- The Public Trustee has determined that any funds held on account of Financial Management clients where the value of investable funds of between \$150,000 and \$450,000 in total (sic), the first \$50,000 should only be invested in cash, with the balance being placed into the PT Growth Trust unless other extenuating circumstances apply. This strategy has been implemented in an effort to preserve wealth, and to reduce risk.<sup>406</sup>
497. For administration clients who have funds in superannuation, and are not at retirement age or those with cash assets that may reduce their pension entitlement, the Statement of Advice recommends a transfer of funds to AustralianSuper on the basis that '[T]he Public Trustee of Queensland has selected AustralianSuper as its preferred superannuation platform provider of choice'.<sup>407</sup> As already noted, this does not appear to be based on the performance of AustralianSuper in comparison to a client's current fund or any considerations around the suitability or risk of the administration client's own fund, or the clients' views and wishes.

### Public Trustee response

The Public Trustee advises that it regularly monitors the performance of AustralianSuper and holds regular meetings with them. It confirms that the joint tender undertaken by the Public Trustee together with other Public Trustees across Australia identified that AustralianSuper was consistently one of the best performing funds and was priced competitively.<sup>408</sup>

498. While the Public Advocate accepts these points, the decisions of the Public Trustee to transfer clients' superannuation to AustralianSuper in all cases disregards decisions that have been made by its clients when they had the capacity to choose their own superannuation

<sup>405</sup> The Public Trustee of Queensland, *Invitation to Offer No. PTQFPS01, For the provision of financial planning and investment administration services Section 1-5, Version 004 – 1 July 2012, Section 3 Specifications, Price*, p 15, provided to the Public Advocate on 20 November 2019 in response to Information Notice No.4.

<sup>406</sup> Clause included in various Public Trustee of Queensland client Statements of Advice viewed by the Public Advocate.

<sup>407</sup> Clause included in various Public Trustee of Queensland client Statements of Advice viewed by the Public Advocate.

<sup>408</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 20 November 2020, providing feedback on draft report chapter 6, attachment 1.



providers. While AustralianSuper is acknowledged as one of the country's high performing funds, the question remains whether it is appropriate in all cases where clients already have their superannuation in high performing funds that they have chosen for themselves, to move their superannuation to AustralianSuper to comply with Public Trustee policy.

#### Public Trustee response

The Public Trustee makes the point that 'it is important that customers' financial needs are taken into account ... as options such as to invest in superannuation (an exempt asset from DSP) to ensure a full entitlement of DSP is maintained'.<sup>409</sup>

499. The Public Advocate accepts this contention, however, this option is only available to certain Public Trustee clients with sufficient cash assets to benefit from such an arrangement and this is not a particularly complex financial issue.
500. Otherwise, the prescriptive provisions of the Public Trustee's contractual arrangements with its financial advisor result in investment recommendations in accordance with Public Trustee policies and the exclusive recommendation of Public Trustee products apparently without consideration of other alternatives for clients.

## Discussion

501. A preliminary issue relating to the Public Trustee's use of external financial advice is that the Public Trustee has had the same provider of financial advice and planning services for over eight years in a market where there are likely to be multiple providers who can fulfil the contract and provide expert financial advice. If the Public Trustee requires on-going external financial advice it would be more appropriate to review and refresh its current arrangements and establish a panel of financial advisors. Appointments to the financial advisor panel should also be limited in time, and their performance and value for money reviewed regularly. There may also be benefit in the Public Trustee reporting the contract amount paid to its financial advisor/s in the Queensland Contracts Directory.<sup>410</sup> The publishing of the contract expenditure is another avenue to improve the transparency of these processes and the amount of client funds expended obtaining external financial advice.
502. The provisions of the Public Trustee's contractual arrangements with its financial advisor appear to have the overall effect of limiting the advice that the advisor can provide, to the point that it potentially cannot be characterised as independent or impartial. The contract terms appear to leave little space for the financial advisor to exercise any real independence, in terms of providing individual advice tailored to clients' circumstances or assessing various investment options. Beryl's case study, and the statements the external provider have been required to include in the Statements of Advice, also support this conclusion.
503. Due to concerns about the number of Statements of Advice that recommended investments consistent with the Public Trustee's Client Investment Strategy in exclusively Public Trustee investment products, the Public Advocate sought the Public Trustee's explanation of the purpose of obtaining the external financial advice.

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<sup>409</sup> Ibid.

<sup>410</sup> Queensland Government, Open Data Portal, *Queensland Contracts Directory – Awarded Contracts* (October 6, 2020). This directory lists all awarded government contracts over \$10,000, as part of the Queensland Government's to open data. <<https://www.data.queensland.gov.au/dataset/queensland-government-contracts-directory-awarded-contracts>>.





#### Public Trustee response

The Public Trustee advises that, in accordance with the obligations of the advice provider under the Regulatory Guide 175 Licensing: Financial product advisers—Conduct and disclosure (at 175.161):

... the obligations of the advice provider ... when providing an SOA [Statement of Advice] to the client are to act in the best interests of the client, provide appropriate advice, warn the client if advice is based on incomplete or inaccurate information, and prioritise the interest of the client.<sup>411</sup>

It also stated that 'future financial planning tenders... will clearly state that the advice being sought is for customers and that each customer is considered individually'.<sup>412</sup>

504. It is difficult to reconcile the Public Trustee's statements above with its contractual arrangements with the financial advisor and the financial advice outcomes observed by the Public Advocate. While the Public Trustee clearly goes through a process of providing information to the financial advisor about the individual circumstances of each of the clients it refers for advice, the investment recommendations of the advisor suggest that the advice is not necessarily prepared based on that information.
505. It is also unclear what benefits the Public Trustee's administration clients receive from these arrangements, that require them to pay a fee for financial advice where the outcome of that advice is pre-determined by the Public Trustee's own investment policies and the range of investments is restricted.
506. Conversely, there are clear benefits for the Public Trustee from obtaining external financial advice.
507. The first is that independent, external, financial advice that supports the Public Trustee's Client Investment Strategy can be used to respond to complaints or criticisms about the Public Trustee's investments on behalf of clients. Seeking external financial advice can initially appear prudent and appropriately cautious, on the part of the Public Trustee, (without considering the costs and benefits to clients). Further, the advice provided always contains the mandatory statement about meeting the Public Trustee's 'obligation ... to manage the trust funds within the Prudent Person Rule'<sup>413</sup>.
508. As a consequence, and as already noted, obtaining external investment advice potentially shifts some of the risk borne by the Public Trustee when making investments on behalf of clients to the external financial adviser, albeit at the expense of the clients who must pay for the advice.
509. The advice also appears to justify and endorse investing Public Trustee client funds exclusively in Public Trustee investment products (a conflict of interest) on the basis that these investments were recommended by the independent financial adviser. The recommendation of Public Trustee's investments suggests they are competitive with other alternative investment options in the market in terms of returns to clients and capital growth. This may be so, however, the Public Advocate has not viewed a Statement of Advice from the external financial advisor that considers alternative investments or makes any such comparisons or analyses.

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<sup>411</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 20 November 2020, in response to draft report chapter 6, attachment 1; also see s 947B of the *Corporations Act 2001* (Cth).

<sup>412</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 20 November 2020, in response draft report chapter 6, attachment 1.

<sup>413</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 20 November 2019, in response to Information Notice No.4, attachment, p 343.





510. On the basis of the above, the Public Advocate is concerned that the financial advice obtained by the Public Trustee for its administration clients may not satisfy its own requirements to obtain 'independent and impartial advice from subject matter experts [who] ensure that the investment strategies and products [they] use are appropriate for [client] needs.'<sup>414</sup>

Public Trustee response

In relation to Beryl's case, the Public Advocate asked the Public Trustee what process it undertook to address the concerns raised by the tribunal member in his decision. The Public Trustee responded that it;

had not undertaken significant steps in response to the concerns [raised by the member] due to the view that the member misunderstood or did not consider certain elements of the Public Trustee's submissions. However, I have asked for a fresh review of the matter as a part of the Public Trustee's overall review approach to ensuring that its fees and charges and products and services are appropriate. Learnings and opportunities for improvement identified through the Public Advocate's inquiry as well as other inquiries will help to inform (sic) that the right decision is made in the interests of clients.<sup>415</sup>

In relation to the tribunal member's concerns about the terms of engagement of the financial advisor by the Public Trustee, the Public Trustee responded:

It is understandable that the Member had concerns as regards the message that appeared in the SOA [Statement of Advice]. It is acknowledged that the wording in [the financial advisor's] current SOA implies that there are limitations on the products it can consider.<sup>416</sup>

... the wording of the SOA is being amended to ensure that the SOA correctly reflects the Public Trustee's current instructions<sup>417</sup>.

511. However, it is concerning that the Public Trustee did not acknowledge the ethical and fiduciary conflicts in its arrangements with its financial advisor and review and alter its terms of engagement. The Public Trustee did not clarify its 'current instructions' to the financial advisor but advised that it merely asked its financial provider to 'consider the wording in their SOA'. This suggests that there has been no change to the arrangements that appear to amount to a fundamental breach of fiduciary duties, but instead the 'current instructions' may merely have the effect of masking those arrangements from external scrutiny.

Public Trustee response

In relation to the sale of Beryl's substantial share portfolio when the Public Trustee had only a temporary appointment, the Public Trustee stated:

The Public Trustee's appointment remained current until a further order of the Tribunal, but was reviewable and to be reviewed within 12 months. The view of the Public Trustee to date has been that its authority is not restricted by the appointment being reviewable within a particular timeframe. That is, the decision of an Administrator, properly made, is where the decision would be appropriate for the adult at that time, irrespective of whether the Administrator's appointment continues, or ceases for any reason. However the Public Trustee is open to further learnings and opportunities for improvement...to ensure that it continues to act in its clients' interests.<sup>418</sup>

<sup>414</sup> The Public Trustee of Queensland, *A Guide for Financial Management Clients*, 2016, p.11. This statement does not appear in the replacement guide, *A guide to Personal Financial Administration*, 2020.

<sup>415</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 20 November 2019, in response to Information Notice No.4, p 32.

<sup>416</sup> Letter from Public Trustee of Queensland to Public Advocate, 20 November 2019, in response to Information Notice No.4, pp 32-33.

<sup>417</sup> Ibid.

<sup>418</sup> Ibid p 33.



It later conceded:

that it is the usual practice of the Public Trustee to consult with the adult's existing support network [and advised] [T]he need to consult with the adult's support network will be reinforced to staff as part of the training that will be rolled out in relation to the *Human Rights Act 2019*.<sup>419</sup>

In relation to the confusion about the 'exit fees' from the sale of Beryl's shares, the Public Trustee explained that when that information was provided to the tribunal member the 'reference to "exit" fees was being used ... as a precise term, and not in a more general sense' as the tribunal member may have been using it. The Public Trustee advised that 'it was not intended to be misleading but was used for the purposes of accuracy'.<sup>420</sup>

In response to the tribunal member's concerns about the loss of income from the shares that were sold, the Public Trustee advised that Beryl's shares earned only \$14,000 in income in 2013-14, but that the financial advisor had forecast projected income of \$24,000 on the investment of Beryl's funds in the Public Trustee Term Investment Account.<sup>421</sup>

The Public Trustee also advised that the shift of Beryl's assets from shares to the Term Investment Account 'was a risk mitigation decision for the customer' and that 'consideration was given to the possibility of reduced income versus a real capital loss and given the customer's age it was recommended that our customer sell the shares to reduce any loss of capital.'<sup>422</sup>

512. The Public Trustee's response to the tribunal member's concerns about the loss of income from the shares that were sold does not acknowledge two critical facts. First, Beryl only owned the shares for nine months of 2013-14, before they were sold by the Public Trustee. Accordingly, the income from the shares for that year is likely to be understated by approximately 25 percent. Second, the projected earnings on the Term Investment Account of \$24,000, are not consistent with the evidence of income on Beryl's investment that was provided to the tribunal at its final hearing. At that time, the Public Trustee advised the tribunal that Beryl was earning fortnightly interest income of \$426, which amounts to only \$11,000 per year. Ultimately, it appears that the difference in Beryl's annual income between retaining the shares and selling them and earning interest on the proceeds in the Public Trustee investment could have amounted to a \$6,500 per year loss of income for Beryl.
513. The question also remains why the Public Trustee would take such a significant financial decision on behalf of a client when it had only a short-term appointment and the client's lifelong investment strategy demonstrated a high tolerance for investment risk.

#### Public Trustee response

When asked by the Public Advocate about whether it had responded to the tribunal member's various concerns the Public Trustee advised that it did not provide an advice to the tribunal member in relation to the concerns he raised because the member:

... asked the Public Trustee to examine the concerns, but did not direct the Public Trustee to report back to the Tribunal ... in the ordinary course of business the Public Trustee would not report back to the Tribunal unless directed to do so. In addition ... the Public Trustee had no further authority in relation to [Beryl] after the appointment was ended.<sup>423</sup>

<sup>419</sup> Ibid.

<sup>420</sup> Ibid 34.

<sup>421</sup> Ibid 33.

<sup>422</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 20 November 2020, responding to draft report chapter 6, attachment 1.

<sup>423</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 20 November 2019, in response to Information Notice No.4, p 34.



The Public Trustee also acknowledged that:

Notwithstanding, I accept that this might have been a matter where continued communications might have been of assistance and, in this regard, learnings and opportunities for improvement would be welcome.<sup>424</sup>

514. On the whole, it would appear that the concerns raised by the tribunal member in Beryl's case were not responded to in any material way by the Public Trustee until the Public Advocate's inquiries about the case. This is concerning on the basis that it suggests the Public Trustee does not have established internal processes to respond to external concerns or criticisms, or failed cases that could be used to learn and improve the skills and knowledge of staff, the Public Trustee's responsiveness to its clients and its performance as a whole. This cultural issue will be discussed further in 'Chapter 8: The road to here'.
515. The arrangements between the Public Trustee and the independent financial advisor are not transparent and do not appear to serve the interests of the Public Trustee's administration clients, in terms of providing value for money. While the Public Trustee is clear about its practice of seeking annual external financial advice, its clients, their families and supporters are not aware that the scope of the advice provided is limited by the terms of the contract between the Public Trustee and its financial advisor. These arrangements result in apparently 'independent' investment advice that, in all but exceptional circumstances, recommends only Public Trustee investment products in accordance with the Public Trustee's investment strategy under the Financial Planning Manual and the *Prudent Person Rule Manual*.
516. The Public Trustee's interpretation of sections 22 and 23 of the *Trusts Act*, as demonstrated in the development and use of its *Prudent Person Rule Manual* and Financial Planning Manual and the contract with the external financial advisor, appear designed to provide a publicly-defensible rationale for client investments which the Public Trustee maintains are in the interests of its clients. However, these mechanisms have the general effect of converting clients' assets into cash and centralising client investments in Public Trustee-controlled products from which it earns income. While people under administration obtain income benefit from these investments,<sup>425</sup> the Public Trustee remains a key beneficiary of these arrangements.



## Recommendations

### Recommendation 21: Adopt a new client investment strategy

The Public Trustee develop a new client investment strategy, the process for which should involve:

- a. Reviewing all internal policies, manuals and guidance documents relating to the management and investment of client assets to properly acknowledge and reflect the duties of a trustee and fiduciary.
- b. Reviewing the purpose and continuing need for an overarching Client Investment Strategy and Primary Investment Strategy. Any future strategy or investment approach should not over-ride consideration of the individual circumstances and other needs of administration clients.

<sup>424</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 20 November 2019, in response to Information Notice No.4, p 34.

<sup>425</sup> *Public Trustee Regulation 2012* (Qld).



- c. Implementing investment decision-making policies that will:
  - (i) ensure that the interests of administration clients are at the centre of all investment considerations and decisions affecting their financial interests;
  - (ii) use the client's individual financial and risk profile and living circumstances as the starting point for decision-making, before considering a change of investment strategy; and
  - (iii) determine the expressed or implied risk appetite of the administration client in accordance with General Principle 7(4) the principle of substituted judgement, the client's investment history and individual financial circumstances.
- d. Reviewing the definition of 'complex asset' (which currently includes shares and any amount of superannuation) in light of the Public Trustee's acknowledged high level of professionalism and skill as a trustee and administrator, to reflect a more current view of what constitutes a complex asset for management by a professional trustee.
- e. Reviewing the 'Value of Assets' approach as the principal mechanism that determines whether independent financial advice is required. This review should be conducted with the objective of considering an approach that is based on a holistic appraisal of the key issues affecting the client's life (e.g. legal action, involvements in partnerships, trusts or companies, or complex tax arrangements) as well as the value, diversity and location of their assets.

Recommendation 22: Reconsider routinely obtaining external financial advice for certain types of assets

In addition to recommendation 4 and in regard to the practice of routinely obtaining external financial advice for administration clients:

- a. External financial advice should only be obtained at a client's expense as an exception and when clients or their supporters request this advice or there is a justifiable basis for the expenditure based on the amount and complexity of the clients' assets and the potential investment benefits for the client.
- b. If the Public Trustee continues to contract external financial advice services (even on a more limited basis), it undertake an open tender process and appoint a panel of providers (no less than two) and review and reappoint panel members on a regular basis, at a minimum, every five years.

Recommendation 23: Obtain advice about refunding financial advice fees

In relation to the contractual arrangements the Public Trustee has with an external financial advisor for the provision of financial advice services to administration clients, the Public Trustee should:

- a. review the contractual arrangements to ensure they do not unduly limit the investments the advisor can recommend (by limiting those investments to Public Trustee products) or otherwise interfere with the independence of the advice provided to administration clients;
- b. suspend the practice of charging clients for external financial advice that merely recommends investments in accordance with the Client Investment Strategy while the review of contractual arrangements is occurring; and
- c. take advice about whether the fees charged to administration clients for the financial advice referred to in b. (above) should be refunded.



# Chapter 7: The Official Solicitor



517. During the preparation of this report, issues relating to the activities and fees of the Official Solicitor to the Public Trustee were a recurring theme. As noted in some of the case studies, the Official Solicitor is often retained by trust officers to provide advice in relation to a range of legal issues that may arise for administration clients.
518. This chapter examines concerns related to the operations of the Office of the Official Solicitor, particularly in the context of:
- the circumstances in which the Public Trustee uses the Official Solicitor for advice for administration clients;
  - who the Official Solicitor considers is its client when giving advice in relation to people under administration with the Public Trustee;
  - whether the Official Solicitor always acts in the interests of Public Trustee clients;
  - the arrangements between the Official Solicitor and the Public Trustee regarding their engagement and fees; and
  - professional oversight of the Official Solicitor and lawyers employed by the Public Trustee.

## The Official Solicitor and the Public Trustee

519. Under the *Guardianship and Administration Act*, an administrator can be appointed to make decisions for all financial matters, including for legal matters relating to the person's finances and property.<sup>426</sup> This allows the Public Trustee, as an administrator, to obtain legal advice and representation on behalf of its administration clients.
520. The Public Trustee can be reimbursed for expenses in relation to obtaining legal advice for clients. Administrators are also entitled to reimbursement for 'reasonable expenses' incurred while acting as the administrator.<sup>427</sup> The *Public Trustee Act* permits the Public Trustee to 'consult with and employ' solicitors, counsel and other people the Public Trustee 'considers necessary', to 'remunerate such persons', and 'be allowed and paid all charges and expenses so incurred'.<sup>428</sup>
521. The *Public Trustee Act* also creates the position of the Official Solicitor, described as the 'official solicitor to the public trustee',<sup>429</sup> and allows the making of a regulation 'providing for the fixing of fees for legal, conveyancing and other professional services rendered to the public trustee or the official solicitor, or by the public trustee or the public trustee's officers to the public'.<sup>430</sup>
522. The *Public Trustee Regulation* in turn empowers the Public Trustee to 'set a scale of fees for legal services provided by the official solicitor for the public trustee'.<sup>431</sup> The regulation further requires the Public Trustee, in setting the fee for a legal service, to set an amount that gives a fair and reasonable level of remuneration for the service having regard to matters including the nature and complexity of the service and the time spent in providing it.<sup>432</sup>
523. The Office of the Official Solicitor to the Public Trustee operates as an in-house team of lawyers who undertake legal work for the Public Trustee and 'select government clients' and instruct external legal firms in legal matters as appropriate.<sup>433</sup>

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<sup>426</sup> *Guardianship and Administration Act 2000 (Qld)* s 33, sch 2, definition of 'financial matter'.

<sup>427</sup> *Ibid* s 47.

<sup>428</sup> *Public Trustee Act 1978 (Qld)* s 16(1).

<sup>429</sup> *Ibid* s 16(3).

<sup>430</sup> *Ibid* s 142(2)(h).

<sup>431</sup> *Public Trustee Regulation 2012 (Qld)* r 7(1).

<sup>432</sup> *Ibid* r 7(2).

<sup>433</sup> The Public Trustee of Queensland, *The Official Solicitor*, (18 June 2019), <<https://www.pt.qld.gov.au/about/the-official-solicitor/>>.





524. Fees for 'legal services provided by the official solicitor' must be paid into the Public Trustee's Common Fund.<sup>434</sup> If legal costs are incurred and the client of the Public Trustee does not have sufficient cash assets to pay for the Public Trustee's fees and expenses, the Public Trustee can create a lien (or claim) on any of the client's property for payment of the Official Solicitor's fees.<sup>435</sup>

## When and why the Official Solicitor is used

525. There is no publicly available information about when and why the Official Solicitor's services are engaged by the Public Trustee.

### Public Trustee response

In response to a query about the circumstances in which the Public Trustee might seek legal advice from the Official Solicitor in relation to the affairs of an administration client, the Public Trustee advised:

It is not possible to identify with any precision "the circumstances that guide a Public Trust Officer to engage the Official Solicitor" when dealing with matters concerning an adult. There are extensive references throughout the Public Trustee's Manuals and training materials that outline when a referral to the Office of the Official Solicitor may be required.

... adults that fall under the GAA [*Guardianship and Administration Act*] confront legal issues or have a need for legal advice ... in the same circumstances that any adult with capacity might. Those "circumstances" do not lend themselves to specificity.

... the Public Trustee in his role as administrator will seek legal advice where it is reasonable to do so.<sup>436</sup>

The Public Trustee takes the view that 'when presented with possible legal issues, questions, rights or actions, [it] ought retain a lawyer, take advice and consider that advice when framing decisions'.<sup>437</sup> The Public Trustee cites a combination of the obligation under section 35 of the *Guardianship and Administration Act* to act 'honestly and with reasonable diligence' and the following extract from a textbook on trusts to support this position:

Trustees who have sought and acted upon advice frequently seek relief on that ground; and a trustee who reasonably believes that an advisor is qualified and impartial and who acts responsibly upon the advice received, after checking any statement of facts made by or to the advisor ... is unlikely to commit a breach of trust.<sup>438</sup>

It also quotes the Queensland Law Reform Commission:

Whether or not the trustee sought and acted on legal advice will be relevant to the reasonableness of the trustee's conduct.<sup>439</sup>

While the above sources, either alone or in combination, could not plausibly be interpreted as inferring that a trustee will only be considered to have acted 'reasonably' if it obtains legal advice in every case involving a legal issue, this appears to be the Public Trustee's position:

<sup>434</sup> *Public Trustee Regulation 2012* (Qld) r 7(3).

<sup>435</sup> *Public Trustee Act 1978* (Qld) s 17A.

<sup>436</sup> Letter from Public Trustee of Queensland to Public Advocate, 1 July 2019, in response to Information Notice No.2, p 3.

<sup>437</sup> *Ibid.*

<sup>438</sup> Ford, HAJ and Lee WA, *Ford and Lee: The law of Trusts*, 3rd Edition, loose-leaf, LawBook (Sydney) 1996- , at 18.430.

<sup>439</sup> Queensland Law Reform Commission, Discussion Paper, *A Review of the Trusts Act 1973*, December 2012, para 11.225, pp 514-515.



... it is not only appropriate but necessary in order to discharge the obligations provided for by s. 35 of the GAA [*Guardianship and Administration Act*] for an administrator in circumstances where legal issues are involved, to seek appropriate legal advice.<sup>440</sup>

The Public Trustee has advised that 'if a matter or decision [in relation to a client] is affected or informed by legal rights or obligations (that the client may have)', the client cannot participate in decision-making, and other requirements of General Principle 7 of the *Guardianship and Administration Act* cannot be complied with, unless legal advice is obtained about those rights or obligations. The Public Trustee maintains that for the person to participate in the decision or express their views and wishes about the relevant issues, he or she must have the benefit of legal advice about the options available to them.

Since providing the above advice in July 2019, the Public Trustee appears to have shifted its position, more recently advising:

... not every matter involving a legal issue is referred to the Official Solicitor for advice. Referrals are made ... where it is appropriate and reasonable to do so, in order to enhance and protect the interests of the customer.<sup>441</sup>

526. It is unclear when this 'new' policy was adopted and whether it is a formal written policy or a re-interpretation of the Public Trustee's former position.
527. The Public Trustee also has a policy of refusing to provide copies of its legal advice to clients without the express permission of the Office of the Official Solicitor.<sup>442</sup> When the Public Advocate queried the basis of this policy the Public Trustee responded as follows.

#### Public Trustee response

In many instances the advice that is being provided to the Public Trustee as administrator relate to members of the customer's support network. It has traditionally been the view that it may not always be in the customer's interest for a copy of the legal advice to be provided to the customer in circumstances where the customer may not fully appreciate the legal technicalities and importance of retaining legal professional privilege and the detrimental impact it may have if the legal advice is inadvertently disclosed to a third party. There is no way of regaining privilege once it is waived.

It is understood that this position is a result of concerns that trust officers might inadvertently waive privilege on Legal activities by on forwarding them, copying them or discussing them. Once privilege is waived, it cannot be retrieved. This procedure is in no way intended to suggest that the Trust Officer cannot discuss legal advice with a customer. It simply is placing boundaries around what the Trust Officer can do, without reference to a more senior person. Any such discussions are normally at a more senior level.

... However, the Public Trustee is exploring alternative options to ensure that customers are fully informed about the legal advice and involved in the decision-making process.<sup>443</sup>

528. It is difficult to reconcile the Public Trustee's position restricting the release of legal advice to clients with its support for them to participate in decision-making about their legal issues.
529. The risks of waiving legal professional privilege are certainly considerations requiring the Public Trustee to take reasonable precautions to protect their clients' interests. However, these concerns do not justify a blanket policy denying clients access to the legal advice that they have paid for. Further, it is questionable whether a person who has been found to lack decision-making capacity would be considered to have 'knowingly and voluntarily' waived their own legal professional privilege.

<sup>440</sup> Letter from Public Trustee of Queensland to Public Advocate, 1 July 2019, in response to Information Notice No.2, p 4.

<sup>441</sup> Letter from Public Trustee of Queensland to Public Advocate, 20 November 2020, providing feedback on draft report chapter 7, p 2.

<sup>442</sup> The Public Trustee of Queensland, *Financial Management Manual, Chapter 20, Section 20.1.5, 'Legal Referrals and Instructions'*, (unpublished internal document – last reviewed 28 March 2019).

<sup>443</sup> Letter from Public Trustee of Queensland to Public Advocate, 20 November 2020, providing feedback on draft report chapter 7, attachment 1, p 1.



530. This appears to be supported by the QCAT decision of *CDM* (see case study 5 about Callan later in this chapter). In that case, the Public Trustee sought an order from the tribunal to keep legal advice the Public Trustee received from the Official Solicitor and barrister about a possible compensation claim against Callan's former administrators confidential. The Public Trustee had already decided not to pursue the claim on behalf of the client and asked the tribunal to make an order preventing the release of that legal advice to the client and his new administrator. The tribunal refused the order, stating:

The legal advices were obtained for CDM and paid for by his funds. Due to his impaired capacity about financial matters, including legal matters about his finances, CDM cannot himself make a decision about the release of the legal advices obtained for his benefit. His administrator must make such a decision.<sup>444</sup>

531. The tribunal directed that the new administrator be provided with the legal advices to allow him to make ongoing decisions about Callan's legal and financial affairs. While this case resulted in a positive outcome for Callan, the Public Advocate has viewed numerous decisions of QCAT that have resulted in contrary outcomes for the client, with the legal advices the client has paid for being placed under a confidentiality order preventing their disclosure to any person.

532. Another point that should be considered by the Public Trustee in relation to the release of legal advice to an administration client is that it could be justified on the basis that the material was provided to allow the client to participate in decision-making as is the Public Trustee's obligation under the *Guardianship and Administration Act*.

533. In support of its position to seek legal advice from the Official Solicitor whenever possible, the Public Trustee also relies on a QCAT decision about a person referred to as 'RCP'.<sup>445</sup> In that case, QCAT examined the actions of the Public Trustee in obtaining legal advice from the Official Solicitor about the merits of making a family provision claim for an administration client against the estate of the client's deceased parent. The client's sister objected to the legal fees charged by the Public Trustee to take advice about RCP's legal options. The tribunal found it was reasonable for the Public Trustee to engage the Official Solicitor to provide that advice.<sup>446</sup>

534. While that case dealt with the specific, and limited, circumstance of a family provision application under a will, the Public Trustee appears to be relying on it as 'authority for the propositions ... where an adult's legal rights, interests or obligations might be involved it is appropriate, indeed necessary (in order to act 'reasonably') to obtain competent legal advice.'<sup>447</sup>

535. This approach appears overly simplistic and to extend the application of that decision well beyond the circumstances of that case, unnecessarily exposing clients to legal fees without proper consideration of the costs and benefits of those actions to their clients. Such an approach may also be in conflict with the duties and responsibilities of the administrator (which is discussed later in this chapter). While asserting that section 35 of the *Guardianship and Administration Act* and General Principle 7 require the obtaining of legal advice, the Public Trustee does not refer to any specific legal authority supporting this broader proposition. It is suggested that the obligation for an administrator to act 'reasonably' does not at all suggest that the administrator must 'where legal issues are involved ... seek appropriate legal advice' in every instance. Such a position may be supported for unqualified members of the public who are guardians or administrators, but not professional trust officers of the Public Trustee. Generally, many people under administration and their administrators do not have ready access to lawyers or the funds to retain them (as is the case for many members of the community). It is impractical, and perhaps even inappropriate, for all administrators to be required to obtain legal advice in every case when a matter is 'affected or informed by legal rights or obligations' and will likely result in significant and unnecessary expenditure of beneficiaries' funds.

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<sup>444</sup> CDM [2017] QCAT 135 at [88].

<sup>445</sup> RCP [2016] QCAT 278.

<sup>446</sup> Ibid 278 at [19].

<sup>447</sup> Letter from Public Trustee of Queensland to Public Advocate, 1 July 2019, in response to Information Notice No.2, p 5.



536. It is acknowledged that certain situations require administrators to obtain legal advice. The case of RCP<sup>448</sup> (referred to above) is authority for the principle that administrators are required to obtain legal advice in situations where a family provision claim could be made. This is understandable given the complexities of estate law, the often-large amounts of money involved, as well as the real issue of conflict that can arise for many administrators that may also have an interest in the estate. However, the tribunal in that case did not suggest that this obligation extends to all matters where legal issues may arise as suggested by the Public Trustee.
537. **The Public Trustee's reliance** on the quote from a trusts textbook (as noted above) to support the suggestion that trustees have a duty to obtain advice in every case is overly simplistic. The quote simply states that a trustee who reasonably obtains and acts on what it believes to be advice from an impartial and qualified advisor, is unlikely to commit a breach of trust. It does not mandate obtaining formal advice in every case involving consideration of a legal issue, nor does it suggest specific circumstances where advice should be obtained. Ultimately, these are decisions that trustees and administrators must make, taking into account the individual circumstances of the person whose interests they are responsible for, in each case. A trustee, in exercising its responsibilities to their beneficiary, must have regard to that **beneficiary's best interests**. This also requires the trustee to consider the proportionality of engaging expert legal advice with respect to the actual decision to be made.
538. **The Public Trustee's position on this issue** also disregards the operation of other General Principles in the *Guardianship and Administration Act*. For example, General Principle 10 requires administrators to exercise their powers in ways appropriate to the individual characteristics and needs of the person with impaired decision-making capacity. Logically, this must include the possibility that in certain situations it is not appropriate to take legal action or advice for a range of reasons. This could include consideration of:
- the client's circumstances, as a whole, in terms of whether the client can afford the legal advice or action and weighing the costs against the likely success and financial or other outcomes of any legal action;
  - whether taking legal action will cause conflict with family members or other negative outcomes (such as forcing the sale of the house the person is living in to pay for the legal action), that may adversely affect the client's quality of life or have other consequences that outweigh the possible benefits of the legal action.
539. In a number of cases reviewed by the Public Advocate, these types of issues did not appear to have been considered, or were disregarded when trust officers were deciding whether to seek legal advice or take legal action on behalf of administration clients. This raises the questions: 'Who is the client of the Official Solicitor?' and 'Whose interests does the Official Solicitor represent?'.

## Who is the client?

540. When the Public Trustee becomes the administrator for a person, it can be said to 'stand in the shoes' of the person, as it can do 'anything in relation to a financial matter that the adult could have done if the adult had capacity for the matter'.<sup>449</sup> An administrator is required to apply the General Principles, which include supporting the person's right to exercise their capacity and participate in decisions and to apply the principle of substituted judgment taking into account the views and wishes of the person.<sup>450</sup>

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<sup>448</sup> RCP [2016] QCAT 278 at [15].

<sup>449</sup> *Guardianship and Administration Act 2000* (Qld) s 33(2).

<sup>450</sup> *Ibid* sch 1 general principle 7.



541. The relationship between the Official Solicitor and the Public Trustee when the Official Solicitor is instructed to act on behalf of an administration client should be clear. The Official Solicitor acts for the Public Trustee as the person under administration. This relationship is the same for private administrators instructing a private lawyer on behalf of a person under their administration.

542. The Public Trustee has described the relationship as follows:

Where the Public Trustee is the administrator for financial matters for an adult and where the Public Trustee in that capacity retains the Office of the Official Solicitor on a legal matter for that adult, the Official Solicitor's customer is the Public Trustee as administrator for the adult. In that circumstance, the Official Solicitor conducts legal work for the benefit of and acts in the best interests of the adult.<sup>451</sup>

543. The relationship between a person under administration, their administrator and their legal advisors are well-established and are not controversial from a legal perspective. However, the practice of the Public Trustee and the Official Solicitor, relative to the interests of its administration clients, is not always consistent with the position outlined above. Some examples of inconsistency in the application of these principles, particularly the duty to act in the clients' interests, include:

- The Public Trustee's position is that the Public Trustee is 'the client' of the Official Solicitor,<sup>452</sup> and in respect to administration clients that the Official Solicitor 'has only one capacity; as legal advisor to and instructed by the Public Trustee of Queensland'.<sup>453</sup>
- When staff of the Office of the Official Solicitor provide written advice, it is usually addressed to either the Official Solicitor or the Director of Disability Services, not to the administration client. As already noted, it was historically the Public Trustee's policy that neither the advice – nor even a summary – was provided to the administration client to prevent the risk of the client disclosing the advice to third parties and inadvertently waiving legal professional privilege.<sup>454</sup> However, the Public Trustee has indicated that it is 'exploring alternative options to ensure that customers are fully informed about the legal advice and involved in the decision-making process.'<sup>455</sup>
- The Public Trustee has charged an administration client the costs of the Official Solicitor preparing submissions 'on behalf of the Public Trustee' (not the client), in response to a QCAT direction after the person applied to re-open a hearing on the basis that they did not have sufficient notice of the hearing or the medical evidence about their capacity to properly respond to the application.<sup>456</sup>
- The Public Trustee has successfully argued before the Information Commissioner that Official Solicitor invoices in respect of an administration client's file were subject to legal professional privilege in favour of the Public Trustee and cannot be released to the client.<sup>457</sup>

544. It is apparent that, at times, the Public Trustee does not have a clear conception of its various roles — as the representative of people under administration, as the executor of deceased estates, as a trustee of other funds, or as the corporate entity of the Public Trustee itself. This lack of clarity also appears to impact the Official Solicitor, which appears to have difficulty distinguishing between its role and responsibilities as the legal advisor and representative of the Public Trustee as administrator for its clients on the one hand, and as the legal advisor and representative of the Public Trustee, the corporate entity, on the other.

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<sup>451</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 28 February 2020, in response to Information Notice No. 5, p 24.

<sup>452</sup> *VSC v Public Trust Office*, Office of the Information Commissioner, Application No 210360, Decision date: 30 June 2008 p 6.

<sup>453</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 1 July 2019, in response to Information Notice No. 2, p 14.

<sup>454</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 28 February 2020, in response to Information Notice No. 5, pp 5-6.

<sup>455</sup> Letter from Public Trustee of Queensland to Public Advocate, 20 November 2020, providing feedback on draft report chapter 7, p 1, attachment 1.

<sup>456</sup> See the case study of 'Bryan' below.

<sup>457</sup> *VSC v Public Trust Office*, Office of the Information Commissioner, Application No 210360, Decision date: 30 June 2008.





545. As already noted, the Public Trustee has stated that the Official Solicitor 'has only one capacity; as legal advisor to and instructed by the Public Trustee'.<sup>458</sup> Further, that the Public Trustee 'will instruct the Official Solicitor to be involved [in a QCAT proceeding] where the Public Trustee reasonably forms the view that he requires the legal advice or services of the Official Solicitor'.<sup>459</sup> This approach does not distinguish between the Official Solicitor representing the Public Trustee as the corporate entity or as the personal representative for administration clients. In cases where allegations are made about the conduct or decision-making of the Public Trustee as administrator, the Public Trustee will often engage the Official Solicitor 'in order to properly and carefully respond to any issues, questions or allegations put'<sup>460</sup> and 'as a professional administrator (fiduciary), [the Public Trustee] can be reasonably expected to retain competent legal advice to respond to such applications'.<sup>461</sup>
546. It is unclear who pays the fees of the Official Solicitor in these apparent conflict situations, and how the Public Trustee ensures that it, and the Official Solicitor, act in the clients' interests in those hearings and when responding to such allegations.
547. The law has consistently held that where there is an actual conflict, and informed consent to that conflict cannot be obtained by the fiduciary (lawyer) to continue to represent the parties in conflict, then they should decline to act and ensure that independent representation is obtained for the client. A solicitor has a paramount duty to the administration of justice. It is inherent within that duty that a solicitor recognises actual conflict and manages it in accordance with the principles of the common law and equity.
548. The above discussion suggests the Public Trustee conflates its various roles in a way that is likely to cause confusion among staff of the Official Solicitor about who its client is, whose interests are being represented and protected, and who should pay the legal fees for the work of the Official Solicitor in the particular circumstances.

## The interests of the person under administration

### The role of fiduciary obligations

549. As noted in 'Chapter 2: Financial administration and the Public Trustee', the Public Trustee is in a fiduciary relationship with its administration clients.



#### Fiduciary duties

A fiduciary is under an obligation to act in the interests of those clients who, by the very nature of the relationship, are in a position of vulnerability or dependency.

Two clear duties of fiduciaries are to:

- not to put themselves in a position where there is a conflict between their personal interests and the interests of the person to whom they owe the duty; and
- not to use their position to make an unauthorised profit.<sup>462</sup>

<sup>458</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 1 July 2019, in response to Information Notice No. 2, p 14.

<sup>459</sup> Ibid p 15.

<sup>460</sup> Ibid p 20.

<sup>461</sup> Ibid p 21.

<sup>462</sup> *Breen v Williams* (1996) 186 CLR 71 at 113.





## The duties to act in the client's interests and avoid conflict

550. The Official Solicitor and its staff have an important role in the protection of Public Trustee administration clients' interests. Some examples of the type of work that the Official Solicitor undertakes to protect those interests include the recovery of misappropriated funds, applying to have transactions that disadvantage the client set aside, making claims for damages, or giving advice about the management of complex business enterprises.<sup>463</sup>
551. However, there are other cases where serious questions arise about the role of the Official Solicitor, such as when administration clients want to review the Public Trustee's appointment as their administrator, complain about the Public Trustee's management of their finances, or seek a declaration of capacity to demonstrate they no longer need administration. It can sometimes be unclear whose interests the Official Solicitor is representing in these types of proceedings — the administration client or the Public Trustee. Where the client asserts they have capacity, the Public Trustee should take no active role in the proceedings, unless it is to support the person's application. Otherwise, the Public Trustee or Official Solicitor should appear only to assist the tribunal, and at no cost to the client.
552. The Public Advocate is aware that tribunal members occasionally request that the Public Trustee provide 'submissions' in relation to particular legal issues in matters before the tribunal involving Public Trustee administration clients. In those cases, the Public Trustee will instruct the Official Solicitor to prepare the submissions.<sup>464</sup> In this regard the Public Trustee has advised:
- If the issues before QCAT, including issues or matters raised in material filed with QCAT in advance of an application expose legal issues, it might be that the Official Solicitor is retained to give advice and sometimes appear. Further, from time to time, QCAT on its own initiative will require a representative from the Office of the Official Solicitor to attend QCAT. This can be in relation to matters involving the Public Trustee, or matters unrelated to the Public Trustee but where QCAT is looking for general assistance in a legal concept that has arisen in a QCAT hearing.<sup>465</sup>
553. When this occurs, it can be unclear whether the Official Solicitor is acting as a form of 'Counsel assisting' the tribunal, representing the Public Trustee (the corporate entity) or representing the interests of the administration client.
554. In the cases reviewed by the Public Advocate, these issues were not directly addressed, with the result that the Official Solicitor appeared to be endeavouring to fulfil a number of roles in that process and was at risk of failing to support the Public Trustee to fulfil its primary function — to represent the interests of the administration client. In a number of these matters, the Public Trustee claimed reimbursement for the costs of the Official Solicitor's involvement in the proceedings from the administration client.
555. Trustees, fiduciaries and solicitors should always act in the interests of their beneficiaries and clients. This duty is not a passive obligation that can be met merely because the trustee, fiduciary or solicitor is not acting against the beneficiary's or client's interests. The distinction is simply one between work or activities undertaken in the interests of the client and that undertaken otherwise. The ultimate question is, does the work undertaken by the Official Solicitor (and that the client pays for) advance the administration client's interests?

### Public Trustee response

The Public Trustee advises that it is 'committed' to applying the General Principles<sup>466</sup> and considers the client's broader interests when making decisions, and that the Official Solicitor considers the General Principles when providing advice.<sup>467</sup>

<sup>463</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 1 July 2019, in response to Information Notice No. 2, pp 6-12.

<sup>464</sup> This occurred in the case study of Bryan (which is outlined later in this chapter).

<sup>465</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 1 July 2019, in response to Information Notice No. 2, p 11.

<sup>466</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 1 July 2019, in response to Information Notice No. 5, p 3.

<sup>467</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 28 February 2020, in response to Information Notice No. 5, pp 9-10.



556. This is difficult to reconcile with a number of case examples involving Public Trustee clients.
557. One relevant example is case study 2, 'Ella's case' (in 'Chapter 1: The review'), where an administration client made an application to QCAT for a declaration of capacity or a review of the Public Trustee's appointment as administrator. Unless the Public Trustee is supporting the client to argue their case or has concerns that the revocation of the appointment will result in harm to the client, it is questionable whether the Public Trustee should take any active role in such applications. There should be no need for the Public Trustee to instruct the Official Solicitor to appear in these matters, much less any requirement for the Official Solicitor to attend such hearings except to support the client to put their case before the tribunal. To instruct the Official Solicitor to make submissions other than in the interests of the administration client and consistent with the client's views and wishes could be a breach of the Public Trustee's obligations as an administrator, in both a fiduciary and legal sense. If not actively supporting the client's application, the Public Trustee's role should be limited to providing relevant evidence that it has in its possession to assist the tribunal to make a decision. In most cases there should be no need for the input or appearance of the Official Solicitor, especially considering the tribunal is a jurisdiction in which lawyers must seek leave to appear.
558. There are other examples of the Official Solicitor attending QCAT hearings in cases brought by the Public Trustee's administration clients and making submissions which did not advance the interests of the clients.<sup>468</sup>



#### Case study 5 Part 1: **Public Trustee opposes client's appeal because he 'lacks capacity'**

Callan<sup>469</sup> was an administration client of the Public Trustee. He requested the Public Trustee release funds for him to engage a solicitor to investigate concerns he had about the way his affairs were handled by the Public Trustee and the Adult Guardian (now known as the Public Guardian), during periods they were appointed to make decisions for him.<sup>470</sup> Following the request, the Public Trustee applied to QCAT for directions about whether it should release Callan's funds for this purpose.<sup>471</sup>

At the initial hearing, the Public Trustee conceded that 'a request for funds to be released in order to investigate its own actions while acting as administrator raises issues of apparent or perceived conflict of interest for the Public Trustee' and that was why the application for directions had been made.<sup>472</sup> [Comment: Rather than an 'apparent or perceived' conflict of interest, the circumstances of the case, with Callan alleging mismanagement of his funds by the Public Trustee, put the Public Trustee into a direct conflict with Callan's interests which should have been acknowledged and appropriate arrangements put in place to protect his interests and support him to put his case to the tribunal.]

The representative for Callan submitted to the tribunal that it had to decide whether Callan 'should be entitled to use his funds to exercise a basic human right, that is, to access justice'.<sup>473</sup>

The tribunal directed the Public Trustee not to release the funds for Callan to investigate a claim against the Public Trustee on the basis that he needed to 'raise more than an allegation or complaint' for the tribunal to direct the release of the funds for this purpose. [Comment: It is unclear how the tribunal expected Callan to access the evidence and present it in a form that would elevate it to a level that would meet the tribunal's threshold

<sup>468</sup> See Callan's case (the case of CDM) and Bryan's case later in this chapter.

<sup>469</sup> Not his real name.

<sup>470</sup> CM [2011] QCAT 693.

<sup>471</sup> It is usual practice for the Public Trustee to charge Official Solicitor fees to administration clients for these types of applications, initiated without consulting with the client. However, the Public Trustee advised the Tribunal in this case that it would not pass on any legal fees incurred to Callan. CDM [2011] QCAT 693 at 9.

<sup>472</sup> CM [2011] QCAT 693 at 8.

<sup>473</sup> Ibid 693 at 7.



for releasing the funds, especially when the relevant material was held by the Public Trustee.]

Callan appealed the tribunal's decision. At the appeal, the Public Trustee made submissions that Callan had no standing to bring the appeal, having already been found to lack capacity. The Appeal tribunal agreed with the Public Trustee's submission and dismissed Callan's appeal.

Both cases were 'heard on the papers', that is, the tribunal made its decision considering only written material that the parties had filed.

559. The Public Advocate has also identified other cases<sup>474</sup> where administration clients have applied to the tribunal for a declaration of capacity, to appeal or set aside a decision that the person had impaired decision-making capacity, or for a change of administrator and the Official Solicitor has appeared. In the cases observed, the submissions of the Official Solicitor did not appear to represent the clients' interests.
560. In Ella's case (case study 2 in 'Chapter 1: The review'), the Official Solicitor appeared alongside Ella's privately retained solicitor in the hearing of her application for a declaration of capacity. The Public Trustee later advised in correspondence to Ella's private lawyer that the Public Trustee 'was not opposed to' Ella's application.<sup>475</sup> However, the presence and involvement of the Public Trustee (and particularly the Official Solicitor) at the hearing could not be suggested to have been in Ella's interests (particularly when Ella had paid for a private lawyer for the hearing).
561. Ella's case and the case of Callan also raise genuine concerns about conflicts of interest and the need for the complexities of the relationship between the Public Trustee and its administration clients to be more clearly understood and acknowledged in these proceedings.
562. Ella's case is more troubling because she was also charged legal fees for the Official Solicitor's appearance that were deducted from her funds. Ella was later advised by the Public Trustee that this was an error and the fees were refunded. However, this only occurred after her lawyer had written to the Public Trustee and queried the charge. As noted previously, it is unclear whether these fees are routinely charged to clients and only reviewed and refunded when the client or their supporters complain (should they ever become aware of the fees being charged). In Ella's case, the Public Trustee's appointment was revoked in May 2017 and the error was not identified until her lawyer wrote and complained in August 2017. Ella's case also raises questions about the Public Trustee's internal processes for ensuring that the Official Solicitor fees charged are reasonable, correct and appropriate.



**Case study 6: Technical legal arguments raised against client's application to reopen hearing about capacity**

Bryan spent some months in hospital following a significant health event. Prior to his hospitalisation, Bryan was receiving some disability supports for a range of complex health issues (including a spinal condition that confined Bryan to a wheelchair). After returning home from hospital, Bryan's care provider expressed concerns that Bryan needed additional services above his funded government package and that he was refusing to pay for them. Bryan told his advocate that he refused to allow the provider access to his bank account to pay themselves unless he was first issued with an invoice for the additional services. The provider applied to QCAT for Bryan to be placed under administration.

<sup>474</sup> See the cases of Tony and Ella (case studies 1 and 2 in 'Chapter 1: The Review') and Bryan (whose case is outlined in this chapter).

<sup>475</sup> Letter from the Public Trustee to 'Ella's' lawyer, dated 29 August 2017, p 5.



Bryan became aware of the QCAT hearing less than a week prior to the date it was due to occur. He contacted an advocacy organisation for assistance. The advocacy organisation spoke to Bryan and considered he had capacity to instruct them.

Prior to the hearing, the advocate prepared written submissions explaining that Bryan had a number of complex health conditions and was physically reliant on carers for many of his day-to-day needs. However, his advocate submitted that Bryan understood his health issues, regularly saw his GP, had a good relationship with his local bank and had arranged for most of his services and utilities to be paid by direct debit. The advocate also confirmed that Bryan was financially secure, owning his own home outright, and having sufficient funds to pay for additional in-home support.

Bryan acknowledged that it might be easier for service providers to assist him in an aged care facility but that he did not want to make the decision to move to such a facility and was prepared to use his own resources to remain in his home. He had used his own funds to modify his home to accommodate his wheelchair.

The advocate advised that due to the short notice of the hearing they had not had an opportunity to review the medical evidence on the QCAT file and asked for an adjournment of the application. It was also explained that due to his health conditions, Bryan was advised by his doctor to not attend the hearing in person.

Bryan attended the QCAT hearing by phone with his advocate in attendance with him at his home.

Despite the request for an adjournment, the tribunal proceeded with the hearing and made an interim order appointing the Public Trustee as **Bryan's administrator, and the Public Guardian as his guardian to make decisions about Bryan's health care and service-provision.**

Shortly after, Bryan applied to QCAT to put the decision on hold and have the hearing about his capacity reopened. QCAT directed that the Public Trustee and Public Guardian **prepare submissions about Bryan's application.**

In his submissions asking for the reopening, Bryan said:

Due to the lack of paperwork and the informal approach from QCAT I did not appreciate the gravity of the matter nor the fact it was a final hearing as opposed to a mediation or arbitration process ...

I have not had an opportunity to review any material or reports that have assessed my decision making ability, or any assessed cognitive impairment. I am very concerned that there **were no medical reports attached to the application ...**

I would like the opportunity of gaining an assessment (independent), of my capacity, whilst the decision is stayed.

I was unable to attend the hearing in person as my doctor advised that my sugar levels were too high and I was generally unwell, but would like the opportunity to attend in person, with sufficient notice.

To re-open my matter, to give me the opportunity to attend to the above assessments and fully understand my service options places me at no further risk and is the least restrictive option ...

That the matter proceeded, despite the request of my advocate for an adjournment to seek further information and reports, was of great concern to me.<sup>476</sup>

In its submissions to the tribunal, the Official Solicitor stated 'the Office of the Official Solicitor acts on behalf of the Public Trustee'. The submissions also stated that the Public Trustee 'does not support or oppose the Applications but provides the information herein to the Tribunal to assist it in making its decision in the matter'.<sup>477</sup>

<sup>476</sup> Submissions of Bryan on his 'Application for reopening, correction, renewal or amendment; Application for a stay', 1 December 2016.

<sup>477</sup> Public Trustee submissions to QCAT in the matter of 'Bryan', 19 December 2016.



The Public Trustee took the view that it was unable to provide the tribunal with any further material to assist it in its determination about whether Bryan had a reasonable excuse for not being adequately prepared for the first hearing or other evidence in relation to Bryan's capacity. It is unclear whether the Public Trustee sought any information in relation to these matters from Bryan. However, the Public Trustee made the point that 'the onus is on [Bryan] to present his case and act in his own best interests' and referred the tribunal to the case of *Creek v Raine and Horne Mossman*.<sup>478</sup> That case involved an application to reopen a case by a former tenant in dispute with her landlord's real estate agent over a cleaning fee after vacating a rented house. The Public Trustee's submissions quoted Wilson J, saying:

The statutory regime under which QCAT operates places obligations upon parties themselves to take care in their dealings with Tribunal matters, and to act in their own best interests. QCAT's resources for the resolution of disputes are in high demand and serve, as the High Court has recently observed in relation to court resources, '... the public as a whole, not merely the parties to the proceedings'. Finality in litigation is highly desirable, because any further action beyond the hearing can be costly and unnecessarily burdensome on the parties.<sup>479</sup>

QCAT's consideration of Bryan's application to reopen the hearing was done 'on the papers', meaning that there was no hearing as such, and the tribunal member made their decision considering only the additional written material filed by the parties. QCAT refused Bryan's application, and the guardianship and administration appointments remained in place.

At the review of the interim appointment six months later, Bryan obtained a declaration of capacity and the interim guardianship and administration appointments were revoked.

The Public Trustee charged Bryan \$8,648 in fees and outlays during its six-month appointment including \$2,500 in legal fees. Bryan's advocate wrote to the Public Trustee querying the fees and requesting a refund or reduction in fees. In response, the Public Trustee clarified that the legal fees were incurred because of QCAT's direction to prepare submissions in response to Bryan's application to reopen the matter, and these submissions were prepared 'on behalf of the Public Trustee'. The Public Trustee justified the fees on the basis that they were; charged in accordance with the relevant Gazette Notice and ... considered reasonable for the work undertaken' and 'did not consider that a full or partial refund of fees is warranted in this instance'.<sup>480</sup>

563. The submissions of the Official Solicitor on behalf of the Public Trustee in Bryan's case clearly did not advance Bryan's interests. The submissions took a particularly legalistic approach for a matter involving a person with impaired decision-making capacity. Although the *Creek* case (referred to in the Official Solicitor's submissions) involved issues relating to the reopening of a case before the tribunal, it was in QCAT's commercial jurisdiction involving a dispute between a tenant with capacity and her landlord. The Official Solicitor's submissions did not acknowledge Bryan's particular needs for support or the needs of people experiencing impaired decision-making capacity generally, nor did they address the Public Trustee's or tribunal's obligations under the *Guardianship and Administration Act* to apply the General Principles when performing a function under the Act. In particular, consideration should have been given to providing Bryan with 'any necessary support, and access to information, to enable [him] to participate in decisions affecting [his] life',<sup>481</sup> as well as acting upon Bryan's views and wishes and his right to make his own decisions.<sup>482</sup>
564. The actions of the Public Trustee and the Official Solicitor in Bryan's case cannot be argued to have been in the interests of Bryan. It seems the Public Trustee took the view that it had an obligation to QCAT to respond to requests for submissions or assistance. While that may be so,

<sup>478</sup> *Creek v Raine and Horne Mossman* [2011] QCATA 226.

<sup>479</sup> See *Fox v Percy* (2003) 214 CLR 118 at 128 per Gleeson CJ, Kirby and Gummow JJ, cited in *Creek v Raine and Horne Mossman* [2011] QCATA 226 at [13].

<sup>480</sup> Letter from the Public Trustee of Queensland to Bryan's advocacy organisation, 8 August 2017.

<sup>481</sup> *Guardianship and Administration Act* (Qld), sch 1, General Principle, 7(3)(a).

<sup>482</sup> *Ibid* sch 1, General Principle, 7(2), 7(4).





the Public Trustee and the Official Solicitor cannot take a position that favours providing submissions or 'advice' to QCAT over the interests of its own clients. While a lawyer's first obligation is to the court and the administration of justice, that obligation requires that the lawyer is not to mislead the court or tribunal, not withhold relevant evidence or documents, or do anything else that might interfere with the proper administration of justice.<sup>483</sup> In Bryan's case, neither the Public Trustee nor the Official Solicitor took any steps to assist Bryan to prepare or advance his case. Rather, they prepared submissions to 'assist the tribunal in its deliberations' and charged Bryan legal fees for this work.

565. It is questionable whether administration clients should be charged for legal services provided by the Official Solicitor that are not directly in their interests. Both the Public Trustee and the Official Solicitor have fiduciary responsibilities that require them to act, at all times, in the interests of their beneficiaries/clients. In claiming a neutral position on Bryan's application, but preparing submissions in response to the tribunal's request that did not advance Bryan's interests or reflect his views and wishes, the Public Trustee and the Official Solicitor were at risk of being conflicted by their involvement in the matter while Bryan was left to advocate for himself or seek his own supports.

#### Public Trustee response

In response to the Public Advocate's queries about the circumstances in which the Official Solicitor will become involved in matters where a person is seeking a declaration of capacity, the Public Trustee responded:

It should be immediately apparent to the [Public] Advocate that if an application for a declaration of capacity demanded or likely would turn to consider the legal principles and meaning of the definition of capacity (and its application in a particular case) the Tribunal, and the Public Trustee is often well served and is reasonably justified in engaging the Office of the Official Solicitor.<sup>484</sup>

566. Again, this response confirms the Public Advocate's concerns that there is little, if any, focus by the Public Trustee or the Official Solicitor on the clients and supporting them to put their views and wishes before the tribunal in accordance with their obligations under the *Guardianship and Administration Act* and seemingly fails to identify for whom the retention of the Official Solicitor is 'justified'— for the clients or for the Public Trustee, the corporate entity.



#### Case study 5 Part 2: Public Trustee resisted appointment of alternative administrator who wanted to make a claim against it for lost funds

This case study continues the story of Callan (see case study 5 Part 1 earlier in this chapter). Callan was seriously injured in a motor vehicle accident as a small child, before he had commenced school. He suffered significant physical injuries and missed a lot of school for medical treatment over a number of years. Callan was later assessed as having average intelligence but with significant learning deficits. He had very limited arithmetic abilities and had difficulty recognising words. He became disruptive at school and had difficulty maintaining relationships. Callan was later diagnosed with a serious psychiatric illness.

As a result of the motor vehicle accident, Callan received \$460,000 compensation for his injuries. At the time of the original payout, the Public Trustee was appointed Callan's administrator. Two years later, Callan's mother and aunt were appointed as his administrators. However, after some unexplained expenditure of Callan's funds, the Public Trustee was again appointed Callan's administrator.

<sup>483</sup> G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters (Professional) Australia Limited, 6th ed, 2017) ch 17.

<sup>484</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 1 July 2019, in response to Information Notice No. 2, p 19.





The relationship between Callan, his family and the Public Trustee was characterised by conflict, and for many years Callan had no contact with his trust officer. During this time, decisions were made on Callan's behalf that he (and his step-father Tyrone) claimed were not in his interests. Various applications were made on Callan's behalf in QCAT over a period of about 10 years, challenging the decisions and actions of the Public Trustee.

The Public Trustee actively defended its actions in those applications represented by the Official Solicitor. It is unclear whether Callan had a legal representative appointed for him by QCAT in those applications. However, during that time he was not provided funding by the Public Trustee to engage his own lawyers to investigate his legal prospects for making a compensation claim against the Public Trustee.

By 2017, all that remained of Callan's original compensation award of \$460,000 was \$87,000 in cash invested with the Public Trustee, a car and some household goods. Callan's income was a disability support pension and rent assistance. At this time, Callan's step-father Tyrone applied to be Callan's administrator instead of the Public Trustee, arguing that Callan's funds were being rapidly depleted and that he would receive a greater return on his money in a term deposit on the open market.<sup>485</sup> Tyrone also submitted that:

... The Public Trustee is conflicted as a substituted decision-maker because it is a retailer of financial products that it sells to [Callan] who is an involuntary consumer with no market choice.

... the capacity of the Public Trustee as administrator to extract money from [Callan's] funds for its own legal fees defending its own interests against allegations by [Callan] is a disincentive for seeking justice.<sup>486</sup>

Tyrone also claimed the Public Trustee had not, and could not, involve Callan in decision-making and had a history of failing to consult with Callan when making decisions about him.

The Public Trustee acknowledged that Callan's annual budget was running at a \$23,000 deficit and that all of his funds would be exhausted by 2020 if that continued. The Public Trustee advised the tribunal that it would revise the budget if its appointment continued. It also defended its dealings with Callan and his family and its management of his funds.

The tribunal appointed a legal representative to put Callan's views before the tribunal. In its deliberations, the tribunal relied heavily on the submissions of Callan's representative and found that the general submissions of the Public Trustee did not directly respond to the more specific allegations raised by Tyrone.

Ultimately, the tribunal found that decisions about financial and legal matters had been made by the Public Trustee without obtaining Callan's views and taking them into account. It acknowledged the importance the Public Trustee places on acting within its fiduciary obligations and the Prudent Person Rules, but that such an approach had to be balanced with the use of practices that also involve the person in decision-making to the greatest extent possible.<sup>487</sup>

The tribunal also acknowledged that the Public Trustee was one of the potential litigants in the claims that Callan believed he could make to seek redress for lost funds and stated, '[I]t is difficult to see how any such claims can be investigated, let alone brought into a court, while one of the potential adversaries is the formal decision-maker for [Callan]'.<sup>488</sup>

The tribunal concluded that Tyrone was more appropriate for appointment as Callan's administrator than the Public Trustee for a range of reasons, including that Callan's step-father was not a 'potential adversary' of Callan, taking the view that the extent of any conflict between Callan's interest and those of his administrator was less if Tyrone was appointed than if the Public Trustee were to continue in the role.<sup>489</sup>

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<sup>485</sup> CDM [2017] QCAT 135.

<sup>486</sup> Ibid at [46].

<sup>487</sup> Ibid at [57] and [58].

<sup>488</sup> Ibid at [59].

<sup>489</sup> Ibid at [71].



Two years after being appointed administrator for Callan, Tyrone made a successful claim against the Public Trustee for the recovery of almost \$18,000 (with interest) that represented money loaned by the Public Trustee to Callan's father, along with other amounts given by the Public Trustee to his father in breach of its duties as administrator.<sup>490</sup>

567. While Callan ultimately obtained some redress against the Public Trustee and was successful in having a member of his personal network appointed as his administrator, that outcome only occurred after many years of conflict and litigation between Callan, his supporters and the Public Trustee. Had Callan not had the support of his family to take these legal actions, which is often the case for many Public Trustee clients, it is likely that he would never have had his claims against the Public Trustee about its management of his funds properly aired in a legal process, or obtained redress. The absence of a process to support Public Trustee clients claiming mismanagement of their funds, poor treatment or breaches of fiduciary duty, leaves them with few opportunities for redress.
568. An earlier QCAT appeal decision involving Callan and the Public Trustee<sup>491</sup> (referred to earlier in this chapter) demonstrates the difficulties facing clients of the Public Trustee wanting to raise concerns or make complaints about the management of their affairs. There is no clear process nor a clear pathway for people with impaired decision-making capacity to access support to assist them to raise concerns about the conduct and performance of Queensland guardianship and administration agencies.
569. The Public Trustee has confirmed that there have been only two applications brought in QCAT by a person under administration, through their support network, for a compensation order against the Public Trustee as the person's administrator.<sup>492</sup> While these figures could demonstrate the Public Trustee is performing its role in an exemplary manner, they could also be further evidence of the vulnerability of this cohort and the absence of clear processes and supports for them to bring complaints and applications for compensation, including giving them to access information in the control of the Public Trustee that would assist their claims.

#### Public Trustee response

When asked whether the Public Trustee provides any assistance to applicants and their supporters to bring evidence or to navigate the procedural steps to bring a compensation claim, the Public Trustee advised:

... the adult by the Public Trustee as administrator for financial matters for the adult (or as litigation guardian, depending on the jurisdiction) would seek compensation for the adult against the Public Trustee the corporation.

The Public Trustee as administrator for financial matters for an adult would be able to provide assistance to an adult applicant and their support network in relation to evidence belonging to the adult and to refer the adult to the material available on the QCAT website.<sup>493</sup>

570. The Public Trustee says it 'would be able to provide assistance' to a client to make a compensation claim. However, it does not provide any information about whether there is a formal process in place for this to occur or how the Public Trustee would assist clients to access 'evidence belonging to the adult' that is presumably in the Public Trustee's control. Nor does it provide any information about how frequently clients of the Public Trustee receive this type of assistance. Additionally, referral of a person with impaired decision-making capacity to information on another agency's website is not likely to satisfy the Public Trustee's obligations under the General Principles of the *Guardianship and Administration Act*. It would appear that Callan and his family did not receive assistance from the Public Trustee to pursue

<sup>490</sup> CRG [2019] QCAT 168.

<sup>491</sup> *CM v The Public Trustee of Queensland* [2013] QCATA 28.

<sup>492</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 28 February 2020, in response to Information Notice No. 5, p 21.

<sup>493</sup> *Ibid* pp 21-22.



his compensation claim, rather, the Public Trustee opposed the claim and defended its actions in the process.

571. The Public Trustee's statement above also does not explain how the Public Trustee as administrator for a person would seek compensation for that person against the Public Trustee, the corporation. In response to inquiries made by the Public Advocate, the Public Trustee has not provided any information that would suggest that there is a policy or guideline setting out a clear process for the Public Trustee to identify and progress a claim, or take legal action, on behalf of a client against itself.
572. The *Public Trustee Act* recognises the possibility that the Public Trustee, in one capacity, may need to bring litigation against itself in another capacity.<sup>494</sup> Section 137 provides:
- 137 Public trustee may sue himself or herself in different capacity
- (1) Notwithstanding any rule of law or practice to the contrary, the public trustee, acting in 1 capacity, may maintain proceedings against himself or herself acting in another capacity.
- (2) However, in every such case the public trustee may apply for and shall in any case follow the directions of the court as to the manner in which the opposing interests are to be represented.
573. The Public Advocate interprets this provision as requiring the Public Trustee in every case to apply for, and follow the directions of, the court as to how 'the opposing interests are to be represented'. However, the Public Trustee considers the provision is not directive or mandatory, and that it 'is not required to apply to court in every case'.<sup>495</sup> It is unclear in what circumstances the Public Trustee, when suing himself in a different capacity, would consider it appropriate not to apply to the court for directions about how to manage that conflict.
574. The Public Advocate is aware that, from time to time, the Public Trustee initiates litigation against itself on behalf of clients. However, it is unclear why some cases are actively pursued by the Public Trustee and some are not. The Public Trustee has advised it regularly brings applications in the Supreme Court representing a person making a claim against itself as the executor of a deceased estate where the applicant is seeking a larger share of the estate, remarking that the court 'has not raised concerns with the practice'. It is unlikely that the court would raise concerns, as such litigation is clearly envisaged by the *Public Trustee Act* and the court can direct the Public Trustee how to manage the conflicting interests. Additionally, in such a case, there is not necessarily a suggestion of any fault or mismanagement on the part of the Public Trustee. However, the *Public Trustee Act* is silent on the obligations of the Public Trustee where it does not act to bring proceedings against itself or to hold itself accountable where a client or other party is alleging some impropriety or mismanagement.
575. The fact that some claims not supported by the Public Trustee are ultimately successful, such as in Callan's case, suggests that there may be gaps or 'blind spots' in the Public Trustee's response to these various situations of conflict.
576. Clients of the Public Trustee and the Public Guardian have a unique relationship with these agencies that is different from the usual engagement that members of the public have with government agencies. Rather than merely receiving a one-off service, such as a person engaging with the Department of Transport and Main Roads to renew a driver's licence or a person obtaining a birth certificate from the registry of Births, Deaths and Marriages, people under administration and guardianship have an on-going relationship with the Public Trustee and the Public Guardian. They are dependent on these agencies to make key decisions in their lives, from where they live and what they can buy, to decisions about their healthcare and what medications they take. As already noted in this report, because of the unique nature of these fiduciary relationships they are treated differently at law.

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<sup>494</sup> *Public Trustee Act 1978 (Qld)* s 137.

<sup>495</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 11 January 2021, in response to final draft report, p 4.



577. Accordingly, the usual complaints and review processes of government agencies are not appropriate for responding to the complaints that administration clients may raise about breaches of fiduciary duty.
578. The Queensland Audit Office recently released a report reviewing how the Public Trustee responds to complaints from its clients with impaired decision-making capacity.<sup>496</sup> While it found the Public Trustee has complaint management policies and procedures that follow good practice, it also found that the process is not well-designed for people with impaired decision-making capacity. It is not easy to navigate or be understood by its customers, staff were not sufficiently trained in complaints management and customer feedback is not proactively sought.<sup>497</sup>
579. The Public Trustee needs to adopt a clear policy outlining its processes for managing and responding to complaints where there are allegations of breaches of fiduciary duty or that relate to its performance as administrator.
580. Considering the vulnerabilities of people with impaired decision-making capacity who have decision-makers appointed for them, and the special and complex nature of these fiduciary relationships, there may be some merit in considering an alternative independent complaint mechanism for this group. Such a process should, in appropriate circumstances, provide for the person to be supported to obtain independent advocacy and legal or financial advice to adequately explore their concerns and to present them for consideration, and where appropriate, to have them addressed.
581. It is clear from a number of matters examined during this review, that the Official Solicitor has faced challenges navigating its role through the various conflicts of interest between the Public Trustee and some of its administration clients. The decision some years ago to merge the roles of the Official Solicitor and the Deputy Public Trustee, potentially exacerbated these issues by creating a position with inherently conflicting roles and responsibilities.

## The duty not to profit

582. The Public Trustee refers its administration clients to the Official Solicitor for legal advice and representation and the Official Solicitor charges fees to those clients. Since the fees of the Official Solicitor benefit the Public Trustee, this arrangement raises questions about whether it breaches the Public Trustee's fiduciary duty not to make unauthorised profit from clients.
583. The fees charged by the Official Solicitor are set by an agreement between the Public Trustee and the Official Solicitor dating back to October 2018. The fees and the hourly rates charged for staff at various levels in the Official Solicitor's office are not listed in the Public Trustee's *Fees and Charges Notice*, nor have they been publicly available until very recently (see the Discussion section towards the end of this chapter). The Public Trustee has previously argued that the Official Solicitor's hourly charge-out rates are exempt from public disclosure on the basis that they contain commercially sensitive information, which would place the Public Trustee at a competitive disadvantage in relation to the work the Official Solicitor performs for other government departments.<sup>498</sup> This is an unusual position for a government agency that provides services to members of the public and represents the State of Queensland. It also highlights the inherent conflict of the position of the Public Trustee and the Official Solicitor in relation to their often-vulnerable clients and the commercial approach that has been taken by them in the charging of commercially competitive rates for legal services.
584. It is common for private legal firms to keep their fees out of the public domain. However, subject to a number of exemptions, practitioners are required to inform clients about their fees by means of 'disclosure'.<sup>499</sup> The disclosure process is very prescriptive as to the

<sup>496</sup> Queensland Audit Office, *Responding to complaints from people with impaired capacity, Part 1 The Public Trustee of Queensland*, Report 5: 2020–21 <<https://www.qao.qld.gov.au/reports-resources/reports-parliament/responding-complaints-people-impaired-capacity-part-1-public>>.

<sup>497</sup> Queensland Audit Office, *Responding to complaints from people with impaired capacity, Part 1 The Public Trustee of Queensland*, Report 5: 2020–21.

<sup>498</sup> *VSC v Public Trust Office*, Office of the Information Commissioner, Application No. 210360, Decision date: 30 June 2008.

<sup>499</sup> *Legal Profession Act 2007* (Qld), ss 308–309.



information which is to be provided and the right of clients to negotiate the terms of a costs agreement.<sup>500</sup> These requirements do not apply to the Official Solicitor to the Public Trustee or its staff because they are not subject to the same obligations as other legal practitioners under the *Legal Profession Act*. Nevertheless, even if they were subject to the same costs regime as practitioners in private practice, if the 'client' of the Official Solicitor is the Public Trustee (and not the ultimate beneficiary or administration client), the Official Solicitor would likely still be exempt from the costs disclosure regime prescribed by the *Legal Profession Act*.<sup>501</sup>

585. The Public Trustee has structured its working relationship with the Official Solicitor in such a way that the Official Solicitor operates notionally as a separate commercial entity within the Public Trustee. The services provided by the Official Solicitor to the Public Trustee and its clients are assessed and charged in the same way a private legal firm would charge fees to a private administrator client.
586. The Public Trustee characterises the Official Solicitor's fees as an outlay, rather than part of its fees, and seeks 'reimbursement' for these charges from administration clients just as it would for fees for building reports or other services provided by external providers. Once the Official Solicitor's work is completed, an invoice is raised by the Official Solicitor, sent to the trust officer and charged against the client's account as an outlay, with the Public Trustee ultimately earning revenue from this arrangement.
587. The way the Public Trustee uses the Official Solicitor appears to be at odds with its position in the case of *LER (No 2)*.<sup>502</sup> In that case, the wife of a man who had impaired decision-making capacity proposed the appointment of a lawyer who was a partner in a law firm as her husband's alternative administrator. The lawyer consented to the appointment on the condition that he was authorised to engage his legal firm to carry out legal and administrative work on behalf of the person under administration.
588. The Public Trustee made submissions that this constituted a conflict transaction which should not be authorised by the tribunal on the basis that it would put the lawyer in:

... an insoluble position of conflict because as a partner of [the legal firm] his duty is to maximise the firm's income while as administrator, his duty is to minimise the amount the [person] pays ... Moreover, [the lawyer] would stand to gain from work referred by him to the firm beyond the remuneration which he might otherwise receive as administrator.<sup>503</sup>

#### Public Trustee response

The Public Trustee takes the view that its relationship with, and use of the Official Solicitor, while administrator for clients is not analogous to that between a lawyer appointed as an administrator who is a partner in a legal firm. It makes the valid point that 'the Public Trustee is not an enterprise carried on collectively with a view to profit' and that 'the Public Trustee's self-funded status does not amount to a fiduciary duty to another party' as exists in a partnership.<sup>504</sup>

589. This distinction may be correct, however, it does not necessarily follow that the Public Trustee's various fees and charges and revenue-earning arrangements, as well as its relationship with, and use of, the Official Solicitor do not raise concerns about the potential for conflict with the interests of clients and the potential for unauthorised profit. These practices may amount to a breach of the fiduciary duties the Public Trustee has to its clients and beneficiaries.

<sup>500</sup> Ibid s 308.

<sup>501</sup> Ibid ss 311(1)(c)(i), 311(1)(c)(viii).

<sup>502</sup> *LER (No 2)* [2018] QCAT 431.

<sup>503</sup> Ibid at [59,60].

<sup>504</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 28 February 2020, in response to Information Notice No. 5, p 10.





#### Public Trustee response

The Public Trustee contends that, 'the perception of a conflict is anticipated and authorised by the legislation and is within the knowledge of the Tribunal or Court when appointing the Public Trustee to a role'.<sup>505</sup> It also contends that the:

legislation itself envisages the use of the Official Solicitor for the Public Trustee's customers. Further Courts and QCAT have been aware of the Public Trustee's use of the Official Solicitor and the Official Solicitor's charges and at no time have these organisations raised concerns that the public Trustee is receiving an "unauthorised" profit.

... it is not uncommon for the Public Trustee to have to advise Courts or Tribunals the Official Solicitor's fees that have been incurred. For example in every application to the District and Supreme Court for a Sanction of a compromise reached in a Family Provisions Application, the amount of the Official Solicitor's costs that have been incurred must be advised to the Court in affidavit material.<sup>506</sup>

590. However, the Public Trustee does not explain how a tribunal or court could have 'knowledge' of a perceived or potential conflict that arose after the appointment of the Public Trustee unless the Public Trustee (or the client or another party on behalf of that person) took steps to put that information before the court or tribunal in every case. Nor does it explain how the simple disclosure of costs and a subsequent order can be interpreted as an implicit endorsement by the court or tribunal of the fees generally, or the inherent conflict in the arrangements between the Public Trustee and the Official Solicitor.
591. The duties of a trustee and fiduciary are clear and strict. For those duties to be overridden or varied in any way, the legislation purporting to alter them would need to be clear and specific. While the courts recognise that legislation can override the common law, they have adopted the assumption that legislation is presumed not to alter established common law doctrines.<sup>507</sup> This is referred to as the 'principle of legality' and was very clearly stated in the case of *Al-Kateb v Godwin*:

In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.<sup>508</sup>

592. This principle has also been interpreted as applying to principles of equity,<sup>509</sup> such as the duties and obligations of a trustee and fiduciary.
593. Accordingly, while the *Public Trustee Act* recognises certain circumstances where the Public Trustee, acting in one capacity might bring an action against itself acting in another,<sup>510</sup> and makes oblique reference to the Public Trustee earning revenue **from interest on clients'** money invested in the Common Fund,<sup>511</sup> these legislative provisions cannot be interpreted as providing the legislative authority for the Public Trustee to breach its fundamental duties as a trustee otherwise than in those specific and limited circumstances. For such an interpretation to be made, the legislation should be clear and unequivocal in its intention to override those fundamental principles of law and equity and the specific circumstances in which that can occur. (The ambiguity of the *Public Trustee Act* in respect of these issues and the contribution of this ambiguity over many years to the evolution and acceptance of certain practices which could be viewed as a breach of the trustee's duties is examined further in 'Chapter 8: The road to here').

<sup>505</sup> Ibid p 11.

<sup>506</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 20 November 2020, in response to draft report chapter 7, attachment 1.

<sup>507</sup> Pearce, D, *Statutory Interpretation in Australia*, 9th Edition, 2019, LexisNexis Butterworths, at p 236.

<sup>508</sup> Gleeson CJ, [2004] HCA 37; (2004) 219 CLR 562; 208 ALR 124 at [19]-[20].

<sup>509</sup> *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687.

<sup>510</sup> *Public Trustee Act 1978* (Old) s 137.

<sup>511</sup> Ibid s 19(1)(c).





594. Another issue requiring consideration in relation to these arrangements is that the Official Solicitor is not required to compete in any tender or selection process to secure Public Trustee client legal work. There appears to be no process undertaken by the Public Trustee to ensure that the Official Solicitor's services are competitive and value-for-money compared with other potential legal service providers. It is reasonable to expect that, as a diligent administrator and trustee, the Public Trustee would have established processes to ensure that the providers of professional services, for which clients are paying potentially significant fees, have satisfied certain cost and quality standards before being retained by the Public Trustee.
595. It is unclear why the Public Trustee has established these artificial arrangements with the Official Solicitor. Ultimately, the structure of the relationship between the Public Trustee and the Official Solicitor results in the Public Trustee receiving a direct financial benefit from referring clients for legal advice to the Official Solicitor and the accrual and recovery of legal fees. It raises concerns about conflicts of interest and whether the Public Trustee is breaching its duty not to profit from its clients through the fees charged by the Official Solicitor. These concerns are exacerbated when considering the Public Trustee is the sole entity responsible for determining the amount and reasonableness of the Official Solicitor's fees.<sup>512</sup>

## Weighing the costs of legal advice against client outcomes



### Case study 7: **Proposal to spend almost double client's funds exploring a compensation claim against a close family member with no money**

The Public Trustee was appointed as financial administrator for Melinda for the purpose of investigating her entitlement to bring a family provision claim against the estate of her late mother.<sup>513</sup> Melinda's sister Patricia was Melinda's administrator and was also the executor and one of the beneficiaries of their late mother's estate. Melinda's mother had four daughters, including Melinda. Her estate was valued at approximately \$260,000 and she had left Melinda \$11,665.61. Patricia, as her sister's administrator, had not considered making a claim on behalf of Melinda seeking further provision from her mother's estate.

The Public Trustee was appointed by QCAT for one year to investigate Melinda's possible claim for compensation against her sister and report back to the tribunal. Patricia was directed to cooperate with the Public Trustee and to provide the Public Trustee with funds to undertake the investigation.

The original tribunal member who appointed the Public Trustee was satisfied that Melinda's sisters, including Patricia, were taking good care of Melinda and providing her with love and support.

The Public Trustee requested \$3,000 from Patricia to go towards the legal costs of the initial investigations. Patricia refused to pay the money.

As requested by the tribunal, the Public Trustee prepared a report about Melinda's potential claim. The preliminary investigations found that Melinda had a right to commence a family provision application, but the Public Trustee was not able to give an opinion on the amount of her claim without advice from a barrister. The Public Trustee recommended that Patricia be ordered to pay \$25,000 to the Public Trustee to cover legal costs up to that time for the preliminary investigations totalling more than \$15,000 plus \$5,000 for barrister's fees for an advice on the amount of Melinda's claim and a further \$5,000 in legal fees for the Public Trustee to make a final report to the tribunal.

<sup>512</sup> Further discussion about professional oversight of the Official Solicitor and the Official Solicitor's scale of fees occurs later in this chapter.

<sup>513</sup> This is a case study of the reported case of *MMD* [2015] QCAT 493. Melinda and Patricia are not the true names of the people involved in the case.



At that time, it was made clear to the tribunal that Patricia had no money to pay any compensation order that might be made against her and Melinda had only \$12,000 in her bank account.

Following the report, the tribunal dismissed the application for compensation and revoked the appointment of the Public Trustee. As the Public Trustee had incurred costs during its appointment as financial administrator, it was directed to submit a statement of its costs and outlays and make submissions in regard to its right to payment for the \$15,000 in legal fees. The other parties were also asked to express views on the Public Trustee's legal fees.

In making his determination, the tribunal member noted:

An administrator is required to apply the general principles and in particular, here general principle 10 Appropriate to Circumstances – power for a matter should be exercised by an administrator for an adult in a way that is appropriate to the adult's characteristics and needs. That includes the adult's financial circumstances and therefore when considering whether expenses are reasonable they must be reasonable having regard to the adult's financial circumstances.<sup>514</sup>

The tribunal acknowledged that the legal expenses incurred by the Public Trustee 'may have been objectively reasonable in terms of not being excessive', however, questioned whether they were 'reasonable having regard to the fact that [Melinda] had limited funds and there does not appear to have been any consideration given to the ultimate amount she may receive against any additional cost?'.<sup>515</sup>

The tribunal decided a reasonable amount for the expenses the Public Trustee incurred should total \$3,000, the amount originally sought by the Public Trustee.

Patricia and one of her sisters were ordered to pay \$3,000 to the Public Trustee.

596. Melinda's case is one of a number the Public Advocate has observed where the fees proposed to be charged by the Official Solicitor to undertake work for the administration client do not appear to be in the clients' interests in terms of the legal/financial outcomes likely to be achieved.

#### Public Trustee response

The Public Trustee advises it has a 'Communication and File Supervision Framework' for clients that emphasises the 'importance of keeping customers and/or their existing support network informed', and requires 'that the client should be contacted annually at a minimum, however for the majority of ... clients contact will occur on a more regular basis'.<sup>516</sup> The Public Trustee advises that '[p]olicy, procedures and training materials within the Public Trustee all stress the importance of consultation and communication with the customer and their support network'.<sup>517</sup>

Specifically, in relation to consultation with clients about legal work undertaken by the Official Solicitor, the Public Trustee advises there is a requirement to consult with the client and/or their support network in relation to the legal matter.

<sup>514</sup> MMD [2015] QCAT 493 at [16].

<sup>515</sup> Ibid [at [19].

<sup>516</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 28 February 2020, in response to Information Notice No. 5, p 2.

<sup>517</sup> Ibid p 3.



Clients and/or their support network are contacted, if possible, to obtain their views or wishes related to the legal action. These views and wishes are taken into account by the officers determining whether a referral to the [Office of the Official Solicitor] should be made. Other factors would influence this decision-making process as well including the financial impacts for the client.

...

In preparing instructions to the [Office of the Official Solicitor] the Public Trust Officers are required to provide copies of memoranda or a print out of records ... of all discussions that have occurred with the client regarding the matter being referred.<sup>518</sup>

597. However, it appears that the requirement to provide these written instructions demonstrating engagement with clients to the Official Solicitor were only instituted in 2019.<sup>519</sup>
598. The Public Advocate asked the Public Trustee what assessment it carries out about the value of the service compared to its cost and the client's financial position when engaging external legal services for clients. The Public Advocate, has, until very recently, viewed that the considerations should essentially be the same whether it is engaging external legal providers or the Official Solicitor.

#### Public Trustee response

The Public Trustee advised:

The adult's financial position is not a consideration in the engagement of [the legal firm]. The decision to engage [the legal firm] is made on the basis that there is a viable claim with reasonable prospects of success. The costs agreement is only entered into after these two conditions are met. However, it is acknowledged that there would be a benefit to incorporate consideration of the impact of a costs agreement and, in this regard, the Public Trustee will review its processes and would welcome learnings and opportunities for improvement.<sup>520</sup>

The Public Trustee 'acknowledged that there are no written procedures or guidance materials that instruct trust officers to assess the reasonableness of the fees incurred by the [Official Solicitor]', although all accounts from the Official Solicitor are reviewed by responsible officers and if there are concerns, a review of the account would be sought.<sup>521</sup>

It also advised:

It is recognised that in some cases a customer may benefit from legal advice but have limited funds available. This is why the Public Trustee has generous Community Service Obligations and financial hardship provisions. This includes the discretion to waive some, or all, legal fees for a customer.<sup>522</sup>

599. In contrast, the Public Trustee has a policy requiring that when it receives an invoice from external lawyers for legal costs greater than \$1,500, they must obtain advice as to the reasonableness of the charges from the Official Solicitor.<sup>523</sup> The Public Advocate has observed that the Official Solicitor often charges the client additional fees to review these external legal costs. The Public Advocate understands that rebates of legal fees are rarely granted.

<sup>518</sup> Ibid p 5.

<sup>519</sup> Ibid p 6.

<sup>520</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 28 February 2020, in response to Information Notice No. 4, p 30.

<sup>521</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 28 February 2020, in response to Information Notice No. 5, p 14.

<sup>522</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 11 January 2021, in response to draft final report, attachment, The Public Trustee Response, p 12.

<sup>523</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 28 February 2020, in response to Information Notice No. 5, p 14.



600. It is clear from the Public Trustee's response that, when its staff are making these types of decisions, they do not apply the risk/benefit considerations that ordinary members of the community usually would when making these decisions for themselves. This should involve weighing the costs of the legal advice and/or action and the prospects of success against the likely financial outcome to ensure that it ultimately results in a financial or other benefit for the client. Instead, it appears that in many cases the investigation and pursuit of prospective legal claims have become ends in themselves. This may be driven by the Public Trustee's view (a misinterpretation as previously outlined) that it must obtain formal legal advice in relation to all prospective legal issues to fulfill its fiduciary duties.
601. The incursion of significant legal and other costs by the Public Trustee on behalf of an administration client should be taken with the utmost care and diligence. In the same way that the Public Trustee is expected to exercise care and diligence in decisions relating to the spending or investment of clients' funds, it is reasonable to expect the same level of care and diligence when engaging professional services for clients. It is not appropriate for the Public Trustee, acting on behalf of an administration client, to incur fees on behalf of that person which significantly exceed the client's likely claim or their ability to pay. The Public Trustee should weigh the costs and potential benefits of obtaining the advice against the savings and risks to the client of not doing so. Additionally, the Public Trustee should, where possible seek the views of their client and the client's support network before commencing these processes and at key points along the way (see more on this below).
602. It should not always be assumed that it is appropriate to spend clients' money to obtain professional advice. The act of obtaining advice and thereby incurring fees, brings with it costs to the client that need to be justified. It is not sufficient for the Public Trustee to consider only whether it has superficially fulfilled its responsibilities to explore potential claims for clients. The decision to obtain advice must, in all of the circumstances, be in the clients' interests.

## Professional oversight of the Official Solicitor and its charging practices

603. In Queensland, concerns or complaints about the conduct of a lawyer or the reasonableness or appropriateness of their fees are usually referred to the Legal Services Commission for investigation and action (where the Legal Services Commissioner considers appropriate).
604. The Legal Services Commission was established in 2004 and continues under the *Legal Profession Act*, which provides for the regulation of legal practice in Queensland 'in the interests of the administration of justice and for the protection of consumers of the legal profession and the public generally'.<sup>524</sup>
605. As noted earlier, the Public Trustee has historically taken the position that neither the Official Solicitor nor any of the legal staff in the Office of the Official Solicitor are subject to the regulation or oversight of the Legal Services Commission, irrespective of the provisions of the *Legal Profession Act*.
606. The Official Solicitor to the Public Trustee and the lawyers employed in the Office of the Official Solicitor are regarded as 'government legal officers' as defined under the *Legal Profession Act 2007*.<sup>525</sup> The Legal Services Commissioner considers she has only 'qualified jurisdiction' over government legal officers.<sup>526</sup> The Commissioner advises:

The Australian Solicitors Conduct Rules (Rules) set out a basic code of ethical behaviour for lawyers (which are in addition to and/or expand the common law). A breach of the Rules is conduct capable of amounting to a finding of unsatisfactory professional conduct or professional misconduct as those terms are defined in the LPA [*Legal Profession Act*].

<sup>524</sup> *Legal Profession Act 2007* (Qld), s 3(a).

<sup>525</sup> Letter from the Legal Services Commissioner to the Public Advocate, 7 February 2020. Section 22 of the *Public Service Act 2008* (Qld) provides that the *Legal Profession Act* applies to a public service office mentioned in Schedule 1 of the *Public Service Act*. The 'Public Trust Office' is included in that schedule, meaning that lawyers employed by the Public Trustee are government legal officers as defined under section 12(1)(a) of the *Legal Profession Act*.

<sup>526</sup> Letter from the Legal Services Commissioner to the Public Advocate, 7 February 2020, p 3.



Regulation 24 of the *Legal Profession Regulation 2017* provides that the Rules do not apply to government legal officers who do not hold a practicing certificate. However, this does not mean that such officers do not have to comply with the general ethical obligations applicable to lawyers that apply through the common law and the LPA.<sup>527</sup>

607. Lawyers holding practicing certificates in Queensland are considered to be 'Australian legal practitioners'.<sup>528</sup> Anyone can make a complaint to the Queensland Legal Services Commissioner about an Australian legal practitioner or an Australian lawyer.<sup>529</sup> However, the Legal Services Commissioner is only able to consider complaints about a government legal officer if the complaint is made by another legal practitioner who holds a practicing certificate, the Queensland Law Society, the Bar Association of Queensland or the Chief Executive Officer of the agency employing the lawyer.<sup>530</sup>
608. This limitation leaves clients of the Public Trustee who are dissatisfied with the conduct or the fees of the Official Solicitor without an avenue of complaint to the Legal Services Commission, unless the complaint is made by another lawyer, the Public Trustee himself or one of the Queensland legal professional bodies. Over 54 percent of the complaints made to the Legal Services Commission last financial year about legal practitioners were made by clients or former clients of the lawyers.<sup>531</sup> For clients of the Public Trustee whose lawyers are regarded as government legal officers, the limitation on their ability to make a complaint about the services they receive to a legal professional body, and seek redress, puts them at a distinct disadvantage.
609. Public Trustee clients can make a complaint through the Public Trustee's usual client complaint processes, however, from the cases reviewed by the Public Advocate, such complaints usually result in a letter from the Public Trustee justifying the action and the fees.
610. It is possible that when the *Legal Profession Act* was drafted, it may not have been contemplated that government legal officers might provide legal services to private members of the community as occurs when the Official Solicitor provides services to Public Trustee clients.
611. Section 12(2) of the *Legal Profession Act* states:<sup>532</sup>
- A government legal officer is engaged in government work when the government legal officer is engaged in legal practice in the course of the officer's duties for the entity in relation to which the person is an employee or appointee.
- Example of engaged in government work—
- A public service officer employed by the Department of Justice and Attorney-General is engaged in legal practice at the Department of Education. The officer's duties for the Department of Justice and Attorney-General while working at the Department of Education include providing advice to that department as a client of the Department of Justice and Attorney-General.
612. This definition of government work and the example provided above suggest that the intention of section 12 was that government legal officers' 'clients' were the government agencies that employed or 'engaged' them to provide legal advice, not members of the public. Limiting who can complain about the conduct of a government legal officer to the Chief Executive Officer of the agency that employs the lawyer (as well as other legal practitioners<sup>533</sup> and legal regulatory agencies) is consistent with that interpretation.
613. As already noted, the Official Solicitor provides services to the Public Trustee in a range of capacities including providing legal advice to the Public Trustee, the corporate entity, and to the Public Trustee as the financial administrator or other representative of a person. Services

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<sup>527</sup> Ibid.

<sup>528</sup> *Legal Profession Act 2007* (Qld) s 6(1).

<sup>529</sup> Ibid s 429(1) and see s 417.

<sup>530</sup> Ibid s 429(2).

<sup>531</sup> Queensland Legal Services Commission, *Annual Report 2019-20*, p 13.

<sup>532</sup> *Legal Profession Act 2007* (Qld) s 12(2).

<sup>533</sup> An 'Australian legal practitioner' as defined by the *Legal Profession Act* is a lawyer who holds a practising certificate. If they do not hold a practising certificate, they may be an 'Australian lawyer' and/or a 'government legal officer'.





to the Public Trustee as the corporate entity are likely to include advice in relation to employment law, requirements around the establishment of Public Trustee investment products, and assistance with the purchase, sale and lease of buildings for Public Trustee offices, to name a few. The Official Solicitor might also represent the Public Trustee in litigation. Legal services provided to the Public Trustee as administrator are for the benefit of the person under administration, and the Public Trustee, as a fiduciary, is required to instruct the Official Solicitor to provide advice and act in the interests of that person.

614. As a result of the drafting and interpretation of the *Legal Profession Act*, the activities of the Official Solicitor and its staff, including its professional fees for services provided to people under administration, have not historically been subject to the level of professional oversight and accountability that applies to non-government lawyers.
615. The level of the Official Solicitor's fees is also not considered to be a matter within the scope of the jurisdiction of QCAT. QCAT has no jurisdiction to set aside a costs agreement or fix the costs payable by a consumer of legal services — that jurisdiction vests in the courts.<sup>534</sup> QCAT only has jurisdiction to deal with disciplinary matters involving legal practitioners brought by the Legal Services Commission in relation to allegations of overcharging or failing to disclose etc.<sup>535</sup>
616. In relation to the Official Solicitor's scale of fees, the Public Trustee says that it 'takes care and external advice' in setting the scale of fees for the Official Solicitor to ensure that the charges are fair and reasonable as required by regulation.<sup>536</sup> In 2016, and again in 2018, the Public Trustee engaged consultants to provide advice on the pricing of Official Solicitor legal services. The reviews compared the hourly fee rates of the Official Solicitor to a range of 'market rates' for legal services developed by the consultants, based on surveys of lawyers in private legal firms.<sup>537</sup> They also included a comparison with Crown Law fees. The comparison showed that the Official Solicitor's fees were less than the various market rates listed by the consultants, but more than Crown Law's fees.
617. It is a genuine matter for consideration whether a comparison of Official Solicitor fees with 'market' rates of private commercial legal firms is appropriate in terms of the fees charged to administration clients and the type of services provided to such clients. This group is recognised as vulnerable; they often experience financial disadvantage and are unable to choose their own lawyer or make a complaint to the Legal Services Commission about the legal services they receive from the Official Solicitor. It also goes to the reasonableness of the Official Solicitor's fees that they are generally higher than the fees charged by Crown Law to government agencies — and in some cases by as much as 27 percent.<sup>538</sup>

## Discussion

618. This chapter raises a range of concerns about the operations of the Official Solicitor, including the way it is referred work by the Public Trustee and its involvement in the various situations of conflict that inevitably arise in the relationships between the Public Trustee and its administration clients. On the basis of those concerns, administration clients of the Public Trustee and the Office of the Official Solicitor would benefit from a comprehensive review being undertaken with the objective of establishing fundamental principles to guide the role and operations of the Official Solicitor within, and relative to, the Public Trustee and its administration clients.

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<sup>534</sup> Legal Services Commission, Information Sheet, *Challenging Legal Costs*, <[https://www.lsc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0012/655977/challenging-legal-costs-july-2020.pdf](https://www.lsc.qld.gov.au/__data/assets/pdf_file/0012/655977/challenging-legal-costs-july-2020.pdf)>.

<sup>535</sup> See also RCP [2016] QCAT 278 at [16].

<sup>536</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 1 July 2019, in response to Information Notice No. 2, p 13.

<sup>537</sup> Letter from Public Trustee of Queensland to Public Advocate, 1 July 2019, in response to Information Notice No. 1, confidential attachments 18 and 19.

<sup>538</sup> This comparison relates specifically to the fees for Crown Law 2018-19 'Associate/Principal Lawyer per hour (tied)' compared to Public Trustee 'Associate/Principal Lawyer hourly fee' in September 2016. Letter from the Public Trustee of Queensland to the Public Advocate, 5 April 2019, in response to Information Notice No. 1, attachments 18 and 19.





619. The Public Trustee has initiated significant changes to the Office of the Official Solicitor since the Public Advocate commenced this review. The Office of the Official Solicitor has separated into two sections, 'Official Solicitor, Corporate Legal Services' and 'Official Solicitor, Customer Legal Services'. The Public Trustee advises the offices have been separated 'to minimise the risk of conflicts of interest' and to ensure the focus of Customer Legal Services is on the 'delivery of customer-centric legal services' with 'the customer at the centre of all considerations'.<sup>539</sup>
620. In response to concerns raised by the Public Advocate about the availability and transparency of the fees of the Official Solicitor, the Public Trustee initially took the view that the fees were commercial-in-confidence. More recently, the Public Trustee has reconsidered that position and advises that he has directed that Official Solicitor fees be published on the Public Trustee website (these were published on 6 January 2021).<sup>540</sup>
621. The Public Trustee has also established an internal QCAT Referral Panel as a pilot initiative 'to ensure matters are not referred to QCAT if more suitable alternatives exist ... with the aim of expediting decisions and therefore saving on potential costs for our customers'.<sup>541</sup> The Public Advocate supports this initiative however suggests that the panel have a broader remit to include reviewing the outcomes of all litigation in which the Public Trustee is involved to ensure that learnings resulting from the cases are actioned throughout the organisation.
622. These represent positive steps towards addressing some of the inherent conflicts applicable to the role of the Official Solicitor.
623. A number of the issues identified in this chapter will require some careful consideration which might best be addressed by undertaking a comprehensive review of the operations of the Office of the Official Solicitor. At the time of writing this report, the Public Advocate was aware that the Public Trustee was considering establishing a legal services advisory group to support and guide the staff of the Office of the Official Solicitor. The Public Advocate strongly supports this initiative and suggests that such a group could lead and oversee the suggested review.
624. A key focus of a review should be to advise the Public Trustee about establishing a process to deal with conflicts of interest to ensure that clients who allege mismanagement or have other complaints about the Public Trustee's management of their affairs can have access to a process that will support them to air their concerns and have them independently reviewed. It should also provide clear direction to the Public Trustee about the circumstances in which it is appropriate (if at all) to charge Official Solicitor or other legal fees to clients when dealing with allegations of mismanagement or other conflicts.
625. Other issues that could be examined as part of the review would be whether it is appropriate for the Official Solicitor to continue to have a role in providing legal advice and representation to administration clients of the Public Trustee at commercial rates or whether this work should be 'briefed out' by the Public Trustee to a panel of private legal firms and barristers that tender, and qualify, for this work. This might achieve improvements in quality, time and cost for Public Trustee clients.
626. A review could also direct the development of policies and guidelines for trust officers and Public Trustee lawyers about the circumstances in which to engage lawyers for clients and the considerations that should apply in terms of whether a legal claim should be pursued on behalf of a client.
627. In addition to its review role, the legal services advisory group could provide mentoring, professional and ethical guidance to Public Trustee lawyers to ensure that they have clarity around their role, their professional responsibilities to the Public Trustee and to Public Trustee clients, and how to manage conflicts of interest as and when they arise.

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<sup>539</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 20 November 2020, in response to draft report chapter 7, p 1.

<sup>540</sup> Ibid pp 1-2.

<sup>541</sup> Ibid.



628. If lawyers working for the Public Trustee continue to provide services to administration clients and other members of the public, they should be subject to greater external professional oversight. Consideration should be given to extending the Legal Services Commission's regulatory role to include lawyers working for the Public Trustee who are delivering legal services to members of the public as private citizens. Such arrangements are not new for lawyers working for government entities. Legal Aid Queensland lawyers, who provide legal assistance services to members of the public, hold conditional practicing certificates and are subject to Legal Services Commission oversight.
629. During this review the Public Trustee has developed a misappropriation manual for trust officers which details an investigation process to be followed, as well as requiring consideration of the client's financial circumstances, prior to the referral of a case to the Official Solicitor.<sup>542</sup>
630. The Public Trustee has also foreshadowed the development, during 2021, of a Legal Expert Transformation Panel to 'provide the Official Solicitor – Customer Legal Services with a pathway to seek guidance in relation to practice management and ethical issues (including billing).<sup>543</sup> The Public Trustee will also explore options to 'require all lawyers of the Official Solicitor to hold a current practicing certificate'.<sup>544</sup> This means that they would then 'fall within the jurisdiction of the Legal Services Commissioner'<sup>545</sup> for professional oversight.
631. In summary, the actions and reforms commenced or proposed by the Public Trustee that relate to the operations of the Official Solicitor include:
- splitting the Official Solicitor's Office into two teams, the Official Solicitor – Corporate Legal Services and the Official Solicitor – Customer Legal Services;
  - establishing a Legal Expert Transformation Panel to provide practice management and ethical guidance to the Official Solicitor – Customer Legal Services;
  - developing Official Solicitor policies to actively consider the interests of customers in legal decision-making;
  - continuing its internal Queensland Civil and Administrative Tribunal Referral Panel to assess and approve applications to QCAT to improve transparency in decision-making and potential to identify systemic issues and reduce costs;
  - investigating options for sharing legal advice with customers in a way that will not adversely impact the customer; and
  - exploring options to require all lawyers of the Official Solicitor to hold a current practising certificate, which would bring them into the jurisdiction of the Legal Services Commission.<sup>546</sup>



## Recommendations

### Recommendation 24: Review the role and operations of the Official Solicitor

The Public Trustee initiate an urgent and comprehensive review of the role and operations of the Official Solicitor to the Public Trustee. The review should give particular consideration to:

- a. the structure of the arrangements between the Public Trustee and the Official Solicitor and whether they are appropriate and sufficiently transparent;
- b. whether the use of the Official Solicitor to provide legal services to administration clients is appropriate considering the potential conflicts in the Official Solicitor's role, issues of legal professional privilege and the Public Trustee financially benefiting from the Official Solicitor's fees;

<sup>542</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 11 January 2021, in response to final draft report, p 5.

<sup>543</sup> The Public Trustee of Queensland letter to the Public Advocate, 11 January 2021, in response to final draft report, attachment, *The Public Trustee Response*, p 5.

<sup>544</sup> *Ibid* p 13.

<sup>545</sup> *Ibid*.

<sup>546</sup> *Ibid*.



- c. whether lawyers providing legal advice and services to people under administration should be required to hold practicing certificates and be subject to oversight by the Legal Services Commission (this includes administration clients or their supporters being able to make a complaint to the Legal Services Commission);
- d. reviewing the scale of fees of the Official Solicitor, with particular consideration of the reasonableness and appropriateness of the fees for Public Trustee administration clients;
- e. making the scale of fees of the Official Solicitor available to administration clients and/or their supporters, particularly when consideration is being given to obtaining legal advice for which the client will be required to pay; and
- f. whether the Public Trustee should establish a panel of solicitors and barristers to provide legal advice and services to Public Trustee administration clients that meet quality standards, deliver value-for-money, and whose fees are reasonable having regard to the vulnerabilities and financial disadvantage of many of the Public Trustee's administration clients.

Recommendation 25: Develop a policy to support administration clients to make complaints about the Public Trustee

Develop a policy for supporting administration clients to make complaints against the Public Trustee, including support to investigate claims, obtain legal advice and seek redress when a client alleges that the Public Trustee has, by act or omission, caused the client loss or harm. The policy should establish an appropriate process for referring client matters that warrant investigation, legal advice and/or redress to appropriate professionals for advice. Broad stakeholder consultation should be undertaken to develop an appropriate and **efficient model that protects people's rights while containing costs.** The final model for responding to client complaints and managing conflicts may need to be supported by legislation.

Recommendation 26: Amend legislation so Public Trustee solicitors are overseen by the Legal Services Commission

Amend the *Public Trustee Act* to provide that solicitors employed by the Public Trustee must:

- a. while performing their role, have regard to the 'fundamental duties of solicitors' as set out in the solicitors' rules (as defined by section 217 of the *Legal Profession Act*); and
- b. be subject to conduct and disciplinary investigations by the Legal Services Commission.

Recommendation 27: Review Official Solicitor policies and practices

If the Public Trustee continues to provide legal advice and representation to administration clients using the Official Solicitor, it should review and update its policies, procedures and other guidance to Public Trustee lawyers to develop a comprehensive set of policies and procedures that:

- a. clarify who the client is in all legal matters and distinguish between the interests of the Public Trustee as the corporate entity and the Public Trustee as the representative of the person under administration;
- b. outline the law in relation to the duties of trustees, fiduciaries and lawyers and their **duties to always act in their clients' interests;**



- c. require lawyers in every case to consider the costs and benefits of any prospective legal action and provide advice (consistent with Rule 7 of the Australian Solicitors Conduct Rules<sup>547</sup>) to ensure clients' funds are only spent when they are satisfied the expenditure is in the clients' interests, taking into account their individual needs, the risks, costs and likely outcomes;
- d. develop a policy around obtaining consent from administration clients (where appropriate), their guardians or personal support networks to engage a lawyer and disclose the likely costs, benefits and outcomes for the client, prior to embarking on any legal process;
- e. review the Official Solicitor's policy denying Public Trustee clients access to the legal advice they have paid for and to the invoices for that advice. The policy review should also consider the Public Trustee's role and duties under the *Guardianship and Administration Act*, including to support clients to participate in decisions affecting their lives; and
- f. as part of the process for issuing an invoice for legal fees, the Official Solicitor should review and assess the reasonableness of the fees in the context of the clients' overall financial circumstances and the likely outcomes and benefits of any proposed legal action.

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<sup>547</sup> Australian Solicitors Conduct Rules, commenced June 2012, *Legal Profession (Australian Solicitors Conduct Rules) Notice 2012*, <[https://www.lsc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0016/652120/australian-solicitors-conduct-rules-2012-fnl-3.pdf](https://www.lsc.qld.gov.au/__data/assets/pdf_file/0016/652120/australian-solicitors-conduct-rules-2012-fnl-3.pdf)>.



# Chapter 8: The road to here



632. This final chapter seeks to understand and explain how the Public Trustee arrived at this point. If the issues identified in this report are to be effectively addressed, it is necessary to understand the causes and drivers of decisions and actions over time, which have led to the current fees and charges regime and other practices of the Public Trustee resulting in unsatisfactory outcomes for some administration clients.
633. Some of the issues identified have occurred due to a range of factors impacting the Public Trustee's operating environment, including its funding arrangements, the financial markets, demand for administration services and the financial profiles of its clients. There are also historical factors that have contributed to these outcomes, including the Public Trustee's self-funding status, its conservative approach to transparency and accountability, and its inward-looking culture.
634. This chapter also examines the limitations of the legislation governing the operations of the Public Trustee and its predecessor organisation, the Public Curator, and its contribution to the Public Trustee's current issues. As has already been observed, in the more than 100 years since its commencement there has been very little change to the legislation that established the Public Curator, and later the Public Trustee. With only one review of their governing legislation in the history of these entities, and that review now 40 years past, it is unsurprising that the Public Trustee is struggling with this legacy and the limitations of the *Public Trustee Act*.
635. Before proceeding, it is appropriate to acknowledge that many of the issues identified in this report — practices such as multiple charges, earning revenue on clients' funds, charging additional management fees to manage client funds in its own investments and charging additional fees for professional services — are not unique to the Public Trustee in Queensland. Other State and Public Trustees engage in some of these practices to a greater or lesser extent. In 2019, the Victorian Ombudsman released a report about the State Trustees in Victoria that found cases of poor financial management and failure to communicate with clients about managing their money, their long-term financial goals or whether they wanted to engage in expensive litigation.<sup>548</sup> Many State and Public Trustees are agencies of long-standing that are proud of their histories but are also deeply conservative in their approach to their roles and their clients' financial management. The Public Trustee's long history of service to Queenslanders should be valued but it should not be an obstacle to positive change and reform. If we are to support people with disability to achieve the greatest level of autonomy and to live their best lives, it is important that the Public Trustee addresses and resolves these issues.

## A self-funding organisation

636. At its commencement in 1916, the Public Curator (the predecessor of the Public Trustee)<sup>549</sup> was intended to be a self-funding agency. In the first reading speech in support of the Public Curator Bill 1915, the then Premier of Queensland, the Hon TJ Ryan said:
- I am sure that it [the Public Curator's office] will be hailed with a good deal of satisfaction by the public of Queensland, because it will do a great deal of good, and it will do it without any expense to the taxpayers, because it is intended that this office, although it may have some highly paid officials, will be self-supporting, even if it does not produce some small revenue.<sup>550</sup>
637. Since its inception, the goal of self-sufficiency has been a significant focus of the Public Curator's, and later the Public Trustee's, business strategies and operations.

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<sup>548</sup> Victorian Ombudsman, *Investigation into State Trustees*, June 2019, <<https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-state-trustees/#full-report>>.

<sup>549</sup> *Public Trustee Act 1978* (Old).

<sup>550</sup> Queensland Parliament, *Parliamentary Debates – Public Curator Bill*, 20 Oct 1915, 1415 (TJ Ryan, Hon).





638. The Public Trustee's Annual Report 2010-11, noted:

... Our free Will making service is the largest of its kind in Australia.

This free service is a small part of the \$24.7M we give to the community each year. Funded from our business operations our Community Service Obligations are services and subsidies that do not cost the Queensland taxpayer.

For The Public Trustee to continue to fund these services and provide support at no cost to Government, we must prepare for future challenges.<sup>551</sup>

639. In that same year, one of the key objectives of the Public Trustee was '[G]enerating sufficient surpluses to fund a broad range of Community Service Obligations ...'.<sup>552</sup>

640. The Public Trustee's Annual Report 2018-19 reports an organisational objective to '[d]eliver a budget position which enables sustainable reinvestment to support business objectives'.<sup>553</sup> This objective was supported by the strategy to '[g]enerate sufficient revenue to guarantee ongoing viability, ensuring we cover the cost of our community service obligations'.<sup>554</sup>

641. The Public Trustee makes the point that it has broader strategic objectives than just focusing on maintaining its funding and revenue. Its Strategic Plan 2016-2020 included other objectives such as:

- tailoring services to meet client needs and diversity;
- delivering services that are valued by the community and government;
- transforming their business to improve quality and capacity; and
- developing its workforce.<sup>555</sup>

However, it also included an objective to '[D]eliver the surplus required to enable sustainable reinvestment that supports current and future business objectives' with performance indicators for this objective including '[R]evenue from services is increased' and '[N]ew revenue opportunities are actioned'.<sup>556</sup>

642. Despite the significant focus of the Public Trustee on financial self-sufficiency over its century of operation, and its view that the *Public Curator Act* established a 'statutory scheme for self-funding',<sup>557</sup> there are no provisions in the *Public Trustee Act* specifically requiring it to operate on this basis. Further, as noted previously in this report, all other Public and State Trustees in Australia receive some financial assistance from government, ranging from a little over \$0.5M<sup>558</sup> in the Australian Capital Territory (accounting for seven percent of its operating revenue) to \$24.3M in Western Australia where the Public Trustee is fully funded by the State Government and returned \$23M in fees and surplus interest to the government in 2018-19.<sup>559</sup>

643. As already noted, the Public Trustee funds itself through revenue sourced from fees and charges for services, fees earned on its investment products, the interest differential on client funds, and interest earned on its own reserves.

644. The self-funding model appears to have supported the operations of the Public Trustee well over its history. However, in recent decades, a number of changes have occurred in the Australian and global economic environment, demand for Public Trustee services, and client financial profiles that have posed new challenges for the Public Trustee and its ability to maintain its self-funding status.

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<sup>551</sup> The Public Trustee of Queensland, *Annual Report 2010-11*, p 7.

<sup>552</sup> *Ibid* p 11.

<sup>553</sup> The Public Trustee of Queensland, *Annual Report 2018-19*, p 15.

<sup>554</sup> *Ibid*.

<sup>555</sup> The Public Trustee of Queensland, *Strategic Plan 2016-2020*, (reviewed June 2016) <<https://pt.qld.gov.au/media/1058/2016-2020-strategic-plan.pdf>>.

<sup>556</sup> *Ibid* p 1.

<sup>557</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 5 April 2019, in response to Information Notice No. 1, p 3.

<sup>558</sup> ACT Trustee and Guardian, *Annual Report, 2018-19*, financial statements, p 83.

<sup>559</sup> Government of Western Australia, Department of Justice, *Public Trustee Annual Report, 2018-19*, p 25. The Northern Territory Public Trustee is also fully funded by the Northern Territory Department of the Attorney-General and Justice, and is a service delivery unit of that department, see Department of the Attorney-General and Justice, *Annual Report 2018-19*, p 12.



## Changes in the operating environment

645. Since 1990, Australia has experienced a progressive decline in the official cash interest rate. From an historic high of 17.5 percent in January 1990, the Reserve Bank of Australia's official cash interest rate has progressively reduced to its current level of 0.1 percent, set in November 2020.<sup>560</sup> These changes have significantly impacted Public Trustee earnings for clients as well as its own revenue from interest on reserves and from the interest differential that it earns on client money in the Common Fund.
646. The decline in interest rates results in lower income for Public Trustee clients, leading to lower levels of client assets. Lower levels of client assets also result in reduced Public Trustee revenue as the value of clients' assets determine the Asset Management Fees the clients pay.
647. Table 9 (below) shows trends in demand for Public Trustee services, including 'Financial management clients',<sup>561</sup> wills made by the Public Trustee and deceased estate matters. It also shows trends in revenue from different sources and the value of services provided as CSOs (including fee rebates, the cost of the Public Trustee's free will-making service and grants to other agencies) for 2013-14 to 2019-20.
648. The Public Trustee uses the term 'financial management' to include clients for whom it is the appointed administrator or financial attorney, and prisoners whose property requires administration. The vast majority of Public Trustee financial management clients are people under administration due to impaired decision-making capacity for financial matters.
649. In relation to Public Trustee revenue over the period, 'Net revenue', that is 'Revenue' less the cost of 'CSOs', decreased by 9 percent. Over the same period, revenue from 'Investments' decreased by 37 percent from \$33.3M in 2013-14 to \$21.0M in 2019-20. While the investment revenue in 2019-20 was reflective of the international financial downturn associated with the COVID-19 pandemic, Table 9 also shows there was an established downward trend in interest rates and Public Trustee revenue from investments prior to the last financial year. Between 2013-14 and 2019-20, revenue from 'Other' sources was also generally trending down (with some financial year exceptions, for example, 2018-19).
650. Table 9 also tracks revenue from the 'Administration of estates', which for the period 2013-14 to 2019-20 included revenue from administration clients, people for whom the Public Trustee acts as financial attorney, deceased estates and other professional fees (unspecified).<sup>562</sup> From 2013-14, revenue from the administration of estates increased from \$72.2M to \$91.0M in 2019-20 (a 25 percent increase), with the greatest growth in revenue from this source occurring in the three years from 2015-16 to 2018-19. This growth coincided with a period of significant contraction of income from investments. In the three years to 2018-19, Public Trustee revenue from the administration of estates increased by an average of \$4.7M per year compared with the three years 2013-14 to 2015-16, when it increased annually by an average of only \$1.9M.
651. These figures demonstrate that the Public Trustee has become increasingly dependent on revenue from the administration of estates, as other sources of revenue have declined.
652. In terms of demand for services, Table 9 shows that the number of financial management clients increased by 20 percent over the period. As noted in 'Chapter 4: Community Services Obligations and fee rebates', administration clients who are eligible for fee rebates due to low levels of assets outnumber those who are not eligible for rebates by four to one. This means that the pressure resulting from increases in fees from administration of estates is disproportionately borne by those clients considered able to pay.

<sup>560</sup> Reserve Bank of Australia, *Cash Rate Target*, 2020 <<https://www.rba.gov.au/statistics/cash-rate/>>.

<sup>561</sup> This includes clients with impaired decision-making capacity under administration, people for whom the Public Trustee was financial administrator and prisoner estates.

<sup>562</sup> It is unknown whether the Public Trustee recovers fees from prisoners whose estates are being administered by the Public Trustee due to the length of their sentence.



653. At the same time as administration client numbers have been increasing, the number of 'New deceased estates' and 'Trusts managed', which traditionally were strong sources of income for the Public Trustee, decreased. Ultimately, it appears that the Public Trustee has only maintained and increased its total and net revenue through growth in fees from administration of estates, which revenue is primarily sourced from administration clients.



Table 9: Public Trustee clients, services, sources of revenue and total CSOs

	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20 <sup>563</sup>	Change over period
Financial management clients <sup>564</sup>	8,380	8,403	9,162 <sup>565</sup>	9,592 <sup>566</sup>	9,811 <sup>567</sup>	9,957 <sup>568</sup>	10,071 <sup>569</sup>	+20%
Wills made	25,195	25,093	25,448	25,136	28,272	28,426	24,462	-3%
New deceased estates	2,137	2,156	2,049	2,142	2,221	2,135	2,069	-3%
Trusts managed	5,304	-	4,687	4,649	4,540	4,467	4,394	-17%
Revenue (\$M)								
Administration of estates <sup>570</sup>	72.2	74.0	76.0	80.5	85.7	90.1	91.0	+25% <sup>571</sup>
Trust fees <sup>572</sup>	6.2	5.4	4.5	4.7	4.9	4.8		
Auctions revenue	2.3	1.7	2.3	2.1	2.4	2.5		
Investments (interest revenue)	33.3	33.6	32.2	28.9	28.2	27.6	21.0	-37%
Other	4.9	5.4	4.0	3.9	3.3	4.1	3.7	-25%
Total revenue before CSO deduction (\$M) <sup>573</sup>	118.9	120.2	119.0	120.1	124.5	129.2	115.6	-3%
Total CSOs (\$M) <sup>574</sup>	28.4	30.4	31.3	33.8	35.6	37.1	38.4	+35%
Net revenue (\$M)	91.7	91.1	88.9	87.8	90.4	93.5	83.2	-9%
Net operating result (\$M)	11.2	9.5	8.8	2.4	3.4	(0.8)	(12.0)	

Source: The Public Trustee of Queensland, *Annual Reports 2013-14 to 2019-20*.

<sup>563</sup> Due to a change in accounting methods, it is not possible to provide figures comparable to previous years in all areas for 2019-20.

<sup>564</sup> As at 30 June in the relevant year.

<sup>565</sup> This table includes 8,919 financial management clients and 243 adults for whom the Public Trustee was financial attorney.

<sup>566</sup> This table includes 9,359 financial management clients and 233 adults for whom the Public Trustee was financial attorney.

<sup>567</sup> This table includes 9,048 adults with impaired decision-making capacity, 251 adults for whom the Public Trustee was financial attorney and 512 prisoner estates.

<sup>568</sup> This table includes 9,151 adults with impaired decision-making capacity, 258 adults for whom the Public Trustee was financial attorney and 548 prisoner estates.

<sup>569</sup> This table includes 9,316 adults with impaired decision-making capacity, 253 adults for whom the Public Trustee was financial administrator and 502 prisoner estates.

<sup>570</sup> This table includes revenue from clients under administration, people for whom the Public Trustee acts as financial attorney, deceased estates and other professional fees. In 2019-20, the Public Trustee reported these fees differently. Accordingly, this figure cannot be provided for that year.

<sup>571</sup> Due to changes in Public Trustee financial reporting for 2019-20, this figure is calculated using the 2018-19 'Admin of estates' figure.

<sup>572</sup> The Public Trustee receives trustee fees for acting as trustee of the Public Trustee of Queensland Investment Fund (Growth Trust). In 2019-20, the Public Trustee reported these fees differently. Accordingly, this figure cannot be provided for that year.

<sup>573</sup> Where clients are unable to pay the full amount of the Public Trustee's fees they may have all or part of the fees rebated in accordance with CSO arrangements. The Public Trustee financial statements offset certain CSOs against revenue. The amounts in this table show revenue prior to the offset of the CSOs.

<sup>574</sup> This table includes fees rebated to eligible clients, costs associated with the free will making service and grants and contributions made by the Public Trustee to the Office of the Public Guardian and the Legal Aid Civil Law Legal Aid Scheme.



654. Between 2013-14 and 2019-20, Public Trustee expenses also increased from \$80.6M in 2013-14<sup>575</sup> to \$95.2M in 2019-20<sup>576</sup> (an increase of 18 percent), increasing pressure on the Public Trustee's budget.
655. The trends in Public Trustee revenue and expenditure suggest that unless the Public Trustee looks to other sources of revenue, or reviews and restructures its current system of fees, charges and rebates, its traditional sources of revenue may soon be insufficient to maintain current operations and deliver a balanced budget. The slowing Australian economy, coupled with the impact of the COVID-19 pandemic on global markets, contributed to the Public Trustee reporting an operating deficit of \$12M in 2019-20.<sup>577</sup> Considering the Public Trustee's revenue and expense trends over the previous five years, a deficit result was likely in 2019-20, even before the pandemic.
656. In its 2019-20 Annual Report, the Public Trustee noted that its income from fees had increased from 66 percent of its total revenue in 2018-19 to 71 percent in 2019-20. At the same time its revenue from interest reduced from 30 percent of total revenue in 2018-19 to 25 percent in 2019-20.<sup>578</sup> These figures are consistent with the financial trends described above.
657. To maintain or increase its revenue to keep pace with expenses growth, the Public Trustee needs to explore ways of increasing revenue from all sources, including from earnings on its reserves, on client funds, and from fees and charges for services.
658. Table 10 below shows the increase in Public Trustee Personal Financial Administration Fees between 2013-14 and 2019-20. Increases in this fee occurred in line with the Queensland Government's approved fee increases of 3.5 percent per annum since 2013-14. Over the relevant period, the Personal Financial Administration Fee increased by over 21 percent. Over the same period (from March 2014 to March 2020), the Aged and Disability Support Pension increased by only 12 percent.<sup>579</sup>
659. Considering the high growth in Public Trustee revenue from fees on administration of estates and the negative impact the level of fees and charges is having on the financial outcomes of some administration clients, there are limited opportunities for the Public Trustee to significantly increase its revenue from these sources in the short-term. This is due to the diminishing asset base of this cohort of clients (which is due in part to the Public Trustee's fees and charges), as well as the challenge for the Public Trustee of ensuring that its fees are reasonable.

Table 10: Public Trustee Personal Financial Administration Fee increases<sup>580</sup>

Service level	2013-14 (\$)	2014-15 (\$)	2015-16 (\$)	2016-17 (\$)	2017-18 (\$)	2018-19 (\$)	2019-20 (\$)	Change over period
1	1,053.60	1,090.45	1,128.60	1,168.10	1,208.95	1,251.25	1,279.40	+21%
2	1,689.10	1,748.20	1,809.35	1,872.65	1,938.15	2,005.95	2,051.05	+21%
3	2,108.25	2,182.00	2,258.35	2,337.35	2,419.15	2,503.80	2,560.10	+21%
4	3,163.95	3,274.65	3,389.25	3,507.85	3,630.60	3,757.65	3,842.15	+21%
5	5,273.30	5,457.85	5,648.85	5,846.55	6,051.15	6,262.90	6,403.80	+21%
6	7,383.65	7,642.05	7,909.50	8,186.30	8,472.80	8,769.30	8,966.60	+21%

Source: Public Trustee (Fees and Charges Notices) 2013 to 2020.

<sup>575</sup> The Public Trustee of Queensland, *Annual Report 2013-14*, p 30.

<sup>576</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 40.

<sup>577</sup> Ibid p 69.

<sup>578</sup> Ibid p 35.

<sup>579</sup> Australian Government Department of Social Services, Pension Rates, (19 December 2014), <<https://www.dss.gov.au/our-responsibilities/seniors/benefits-payments/pension-rates>>, for information about rates for March 2014; Australian Government Services Australia, Payment Rates (24 September 2020), <<https://www.servicesaustralia.gov.au/individuals/services/centrelink/disability-support-pension/how-much-you-can-get/payment-rates>> for information about rates for 2020.

<sup>580</sup> The Public Trustee's fees, including the Personal Financial Administration Fees have increased in line with recommended government indexation of 3.5% per annum since 2013-14.



## Decreases in interest paid by the Public Trustee on Common Fund and term deposits

660. As the Public Trustee's fees and charges have been increasing, clients' earnings on their assets have been decreasing due to the decline in interest rates. Accordingly, clients are experiencing the twofold effect of decreased income and increased charges and expenses as the Public Trustee seeks to fund operations, including its CSOs, while maintaining a balanced or surplus budget position.
661. Table 11 below shows the change in interest rates payable by the Public Trustee on client investments in the Common Fund from 2013-14 to 1 October 2020 (when the most recent amendment to the regulation was passed). Over that time, the interest paid by the Public Trustee on investments in the Common Fund has gone from being 0.25 percent lower than the Reserve Bank cash rate of 2.75 percent in July 2013, to being double the cash rate in March 2020. The Public Trustee deferred lowering of the rate from 1 May 2020 to 31 August 2020 due to the impact of the COVID-19 pandemic on its vulnerable clients.<sup>581</sup> The current interest rate the Public Trustee pays on the Common Fund is 0.15 percent higher than the Reserve Bank cash rate.
662. While the Public Trustee's investment of client funds has little relevance to the cash rate, in terms of the returns it makes on those investments, the change in the rate of interest payable by the Public Trustee over the period reported in Table 11 shows an interesting trend. Since 2016, Public Trustee clients have enjoyed relatively good rates of return on their funds invested with the Public Trustee compared with other members of the public whose money is invested with banks and other financial institutions.
663. Reductions in earnings on client funds ultimately impact their assets either because they reduce at a greater rate because clients do not have enough income to cover their cost of living and other expenses, or their assets grow at a slower rate. In any event, these trends also impact the fee earnings of the Public Trustee if clients have lower levels of assets.

Table 11: Interest rates paid by the Public Trustee and the Reserve Bank cash rate

Date	Common Fund	Term Investment Accounts	Reserve Bank cash rate
1/07/2013	2.50%	-	2.75% (7 May 2013)
1/01/2014	2.00%	-	2.5% (3 December 2014)
1/04/2015	1.75%	2.50%	2.25% (3 February 2015)
1/05/2015	1.75%	2.25%	2.0% (5 May 2015)
1/07/2015	1.75%	2.00%	2.0% (8 July 2015)
1/09/2015	1.75%	1.85%	2.0% (2 September 2015)
1/11/2016	1.75%	1.75%	1.5% (2 November 2016)
1/10/2019	0.95%	1.40%	0.75% (1 October 2019)
1/11/2019	0.70%	1.30%	0.75% (6 November 2019)
1/12/2019	0.70%	1.20%	0.75% (4 December 2019)
1/01/2020	0.65%	1.05%	0.75% (4 December 2019)
1/02/2020	0.50%	0.85%	0.75% (5 February 2020)
31/08/2020	0.40%	0.75%	0.25% (19 March 2020)
1/10/2020	0.25%	0.40%	0.10% (4 November 2020)
1/01/2021	0.25%	0.30%	0.10%

Sources: Common Fund and Term investment account interest rates sourced from Public Trustee Regulation 2012, for the period July 2013 to October 2020. Public Trustee Regulation 2012, s 4(2), commenced 1 January 2021; Reserve Bank of Australia, Cash Rate Target, <<https://rba.gov.au/statistics/cash-rate/>>, October 2020.

<sup>581</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 10.





## Changes in the profile of clients

664. As noted earlier, Table 9 shows in the six years from 2013-14 to 2019-20, the number of financial management clients increased from 8,380 to 10,071 clients.<sup>582</sup> For many administration clients with impaired decision-making capacity, their sole source of income is a government pension and they have low levels of assets. Consequently, they are unlikely to be fee-paying clients or will be eligible for significant fee rebates and therefore represent a significant cost to the operations for the Public Trustee.
665. An analysis of the assets of Public Trustee clients undertaken by a consulting firm in early 2019 identified that in the 2018-19 financial year 55 percent of administration clients had average assets of less than \$20,000, with around 90 percent having average assets of less than \$150,000.<sup>583</sup>
666. The analysis also showed that 31 percent of administration clients with average assets of less than \$25,000 were assessed as liable to pay the highest level 5 and 6 Personal Financial Administration Fees.<sup>584</sup>
667. Table 9 shows that the number of new deceased estates coming to the Public Trustee each year has been decreasing, with only 2,069 new estates in 2019-20, a decrease of 3 percent since 2013-14. In fact, new deceased estates in 2019-20 were 21 percent lower than in 2002-03, when the Public Trustee reported 2,636 new estates.<sup>585</sup> This contrasts with growth in financial management clients over that period of 78 percent from 5,660 to 10,071 clients.<sup>586</sup>
668. This means that the Public Trustee now administers proportionally fewer deceased estates (which, historically have been a well-paid source of revenue)<sup>587</sup> and has more administration clients, with a greater proportion of them having no, or very low levels of, assets, and with their main source of income being a pension. The Public Trustee reports that more than 82 percent of its administration clients benefit from some form of fee rebate,<sup>588</sup> which is a key driver of growth in its CSOs.
669. As market conditions and client profiles have changed and negatively impacted revenue, the Public Trustee has had to keep adjusting its fees and charges to achieve a balanced budget. It has also had to explore additional ways to identify and recover fees for more of its activities on the basis that it was 'intended to be a 'self-supporting' agency, without expense to the tax payers'.<sup>589</sup> However, as the Public Trustee increases its fees to remain viable, it becomes less attractive as a prospective estate or personal administrator, leading to fewer Queenslanders actively choosing the Public Trustee as their executor or enduring attorney.

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<sup>582</sup> As noted previously, the figures for clients under financial management published by the Public Trustee in recent years include people under financial administration, people for whom the Public Trustee is financial attorney, and prisoners. The actual figure for people under administration in 2019-20 was 9,316; see the Public Trustee of Queensland, *Annual Report 2019-20*, p 5.

<sup>583</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 5 April 2019, in response to Information Notice No. 1, confidential attachment.

<sup>584</sup> Ibid.

<sup>585</sup> The Public Trustee of Queensland, *Annual Report 2002-03*, p 14.

<sup>586</sup> The Public Trustee of Queensland, *Annual Reports 2002-2003 to 2018-19*. It should be noted that the recent administration of estate figures include prisoners whose estates are managed by the Public Trustee of Queensland and people for whom the Public Trustee is financial attorney.

<sup>587</sup> While the Public Trustee of Queensland reports that it administers some 'uneconomical' deceased estates, these are much fewer proportionally than the number of administration clients who do not pay any fees or pay reduced fees due to the Public Trustee of Queensland's rebate system.

<sup>588</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 5 April 2019, in response to Information Notice No. 1, p 12.

<sup>589</sup> Ibid p 3.





## Recommendation 28: Considerations for the review of Public Trustee fees and charges

The review of the Public Trustee's fees and charges for administration clients (see recommendation 1) should include the following to help maintain the organisation's long-term financial viability:

- a. consideration of changes over time in the:
  - economic environment and financial markets;
  - **Public Trustee's sources of revenue; and**
  - financial profile of administration clients and other clients of the Public Trustee that may impact their ability to pay fees.
- b. examination of the various fees and charges applied by other State and Public Trustees to ensure consideration of a wide range of fee options that will assist it to adopt the most **fair and equitable system, taking into account clients' incomes and assets, and the value of the services provided;**
- c. **examination of the Public Trustee's costs of operation, including comparative analyses with other State and Public Trustees, which should include consideration of their levels of service provision, efficiency, productivity and service quality; and**
- d. consideration of alternative and innovative ways the Public Trustee can deliver services to administration clients at a lower cost.

# Transparency and accountability

## Availability of information

670. At the commencement of this review, there was very little accessible and publicly available information about the Public Trustee's fees and charges or the way they are calculated and applied. Technically, the gazetted fees of the Public Trustee have always been publicly available for those who knew where to look for them. However, the Fees and Charges Notices are formatted in a way that makes them difficult to understand. In addition, virtually no information was available about the way the Public Trustee made decisions about **managing its clients' assets, the way it earns revenue from those assets, the combination of fees that are charged for its services, or how the fee rebates or the hardship provisions apply.**
671. The absence of this critical information in an accessible and understandable format has made it very difficult for administration clients, their families and supporters to understand what fees are charged, when, and why. There has also been very limited information available about the specific services provided for the fees charged. This lack of information also makes it very difficult for people to challenge the fees and charges.

## Protection of client confidentiality

672. A person with decision-making capacity can make decisions about the people with whom they wish to share personal information. Many people share personal information with friends and family to ask for their advice or help to make various decisions in their lives or to understand complex financial or legal matters. People who have been found to have impaired decision-making capacity and are consequently under administration with the Public Trustee can encounter difficulties when they want to share their personal information with other people.



673. The Public Advocate has been informed of numerous cases where family members and supporters were unable to access information to understand what fees the person connected to them was being charged by the Public Trustee. When they made inquiries, they were often informed that for confidentiality reasons the Public Trustee could not provide information about its client.
674. The *Information Privacy Act* requires that information collected about a person must be kept secure and protected against loss, misuse, and unauthorised access. The *Guardianship and Administration Act* also has strict provisions to protect the privacy of people under administration and guardianship. The Public Trustee is subject to both of these Acts. The *Information Privacy Act* prevents the release of information about a person to anyone other than that person. As a consequence, the informal networks that people ordinarily rely upon to support their decision-making, including family or close associates, cannot always obtain information from the Public Trustee about the way the person's affairs are being administered.
675. While the approach of the Public Trustee to restricting the release of information is technically correct, the Public Trustee has the decision-making power to exercise its discretion to allow the release of the information on behalf of the client to legitimate supporters of the person. Strictly limiting the release of information results in a lack of transparency about the Public Trustee's actions because in many instances the client is unable to understand and evaluate the effect of those actions, and others who would support them cannot access this information. These issues can also reinforce feelings of frustration and mistrust of the Public Trustee held by some clients, their families and supporters.

#### Public Trustee response

##### In response to the Public Advocate's concerns the Public Trustee advised:

It is acknowledged that the Public Trustee has discretion to release information on the behalf of a customer to legitimate supporters of the person. The Public Trustee supports disclosure of information where it will advance a customer's interests. However, there may be complex circumstances where it is not always appropriate to release a customer's information. For example, a customer may request that a member of their support network not be provided with the information, or there may be concerns about [the]customer's support network, including misappropriation or financial elder abuse, which may involve undue influence and/or unconscionable conduct. These issues need to be carefully considered to ensure the customer's right to privacy is not adversely affected.<sup>590</sup>

## Commercial in confidence

676. The Public Trustee has a long-held position that its internal operational manuals used to guide staff in their decision making regarding the charging of fees and investment client funds, are 'commercial-in-confidence'. This was on the basis that the Public Trustee viewed itself as in commercial competition with other private trustee companies for business (this is discussed in 'Chapter 5: Investment practices'). Accordingly, until very recently, none of the Public Trustee's operational manuals were published in the way other government agencies' policies and procedures are available under the government's proactive disclosure of information and publication regimes.<sup>591</sup>
677. The Queensland Government *Information access and use policy* (IS33) requires government departments to adopt an 'information push' approach to the release of information. Included in the scheme is the requirement to provide information in ways openly available to the public for free or at minimal cost. Examples of information that can be made available are de-identified data, policies and procedures.
678. The *Information access and use policy* (IS33) does not apply to non-government entities such as statutory authorities and government-owned corporations. Release of information by a

<sup>590</sup> Letter from the Public Trustee to the Public Advocate, 20 November 2020, in response to draft report chapter 8, p 2.

<sup>591</sup> Sometime after 30 April 2020, the Public Trustee of Queensland published its *Prudent Person Rule Manual*, April 2020, Version 12.1, <<https://www.pt.qld.gov.au/media/1845/prudent-person-rule-manual.pdf>>.



statutory authority about administrative matters, such as a policy detailing the structure, application and remittance of fees, is a matter for that authority. The Public Trustee appears to have taken the view that it is not bound by this policy, although being a corporation sole that represents the State of Queensland, the Public Trustee is neither an independent statutory authority nor a government owned corporation.<sup>592</sup>

679. With all usual avenues for access to information blocked, some administration clients and their supporters have sought independent advice or applied to QCAT for a decision or direction about the Public Trustee's fees or actions. However, as noted in 'Chapter 7: The Official Solicitor', clients were generally not supported by the Public Trustee to pursue these avenues of redress, either because the Public Trustee refused to fund independent advice or made submissions opposing the clients' position in QCAT which, in most cases, had the effect of preventing clients advancing their issues and concerns.
680. On a positive note, over the past year the Public Trustee has been actively improving the quality and detail of information about its fees and charges on its website and in other publications (see the Public Trustee website for examples).

## Discussion

681. It may be appropriate for the Public Trustee to reconsider its particularly conservative approach to providing information to clients and their supporters.
682. As recommended in 'Chapter 3: Fees and charges for administration', the Public Trustee should adopt a publication and disclosure regime consistent with other government departments. Its internal operational manuals, policies and procedures should be published as part of the ordinary course of business. They should also be written in an accessible way to ensure they are easily understood by administration clients and the broader community. The Public Trustee should also reconsider viewing itself as a commercial entity vying for business in a commercial market and publish information about its system of fees and charges, including examples of how these fees and charges would apply in individual cases to help people to better understand the costs of its services.
683. As with many of the issues identified in this report, the issues faced by the Public Trustee around transparency and accountability have a long history. As previously noted, the Queensland Auditor-General undertook a special audit of the Public Trustee in 1996.<sup>593</sup> In relation to the Public Trustee's fees and charges, the Auditor-General recommended:

Following a rationalization of the fee structure, the PTO [Public Trust Office] needs to develop a means of providing clients with meaningful and complete information in respect of the fees and charges which are likely to be levied during the administration of their estates. This should also minimize the need for clients to request additional information and ought to improve relationships between the PTO and clients.

The format of client statements needs to be improved to provide clients with meaningful and clear explanations of transactions within their estates.

All charges raised for work undertaken by PTO staff should be described as such on client statements.

For all transactions a full accounting should be provided to clients in their statements.<sup>594</sup>

684. The Auditor-General also noted 'long delays in replying to client correspondence and ... replies often do not fully address matters raised in correspondence'.<sup>595</sup> It also identified shortcomings in the ability of staff to effectively communicate with clients.<sup>596</sup>

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<sup>592</sup> Public Trustee Act 1978 (Qld) s 8(1).

<sup>593</sup> Auditor-General of Queensland, *Report of the Auditor-General On a Special Audit of The Public Trustee of Queensland Relating to Certain Operational and Other Issues*, 1996.

<sup>594</sup> Ibid pp 21-23.

<sup>595</sup> Ibid p 30.

<sup>596</sup> Ibid p 13.



685. As already noted, the Public Trustee has recently begun updating the information on its website about its fees and charges and making them more accessible and understandable, including using scenarios to demonstrate how its fees and charges would be applied in different circumstances.<sup>597</sup>
686. Additionally, the Public Trustee should make information about its earnings on clients' funds publicly available. As discussed in 'Chapter 5: Investment practices', the Public Trustee earning revenue on clients' funds puts it into a position of conflict with its clients' interests and potentially breaches a trustee's fundamental duties of 'no conflict, no profit'.
687. The *Public Trustee Act* is silent or ambiguous about when and how the Public Trustee can 'profit' from clients, and/or earn revenue on clients' funds. The Act is substantially the same as the *Public Curator Act* passed in 1915. More is said later in this chapter about the structure of the Act and the need for it to be updated to support the operations of a contemporary Public Trustee. However, in relation to conflict and profit, the Act should be amended so that it states clearly what the Public Trustee can and cannot do with client funds, the circumstances in which it can earn revenue on those funds, and the conditions or limitations on those earnings. The Act should also require the Public Trustee to report its earnings on client funds in its financial statements to ensure complete transparency.



#### Recommendation 29: Amend legislation to clarify how the Public Trustee can invest client funds

In the interests of clarity and transparency, and to remove all doubt about the lawfulness or propriety of the Public Trustee earning revenue from client funds, the *Public Trustee Act* should be amended to:

- a. clarify the investments the Public Trustee is permitted to make using client funds, in particular addressing the issue of investments that are permitted that may amount to a conflict of interest, the circumstances in which it can earn revenue on those funds, and the conditions or limitations on those earnings; and
- b. require the Public Trustee to report its earnings on client funds in its annual financial statements.

## Oversight and accountability processes

688. The Public Trustee is subject to many of the same oversight and accountability mechanisms that apply to other government departments and agencies. These processes are outlined below.

### Annual Budget and Estimates processes and Parliamentary Committee hearings

689. The Public Trustee participates in the annual Budget and Estimates processes and appears before Queensland Parliamentary Committees.
690. The Public Trustee as a self-funding agency does not receive a specific Budget allocation (or funding) from the Queensland Government. Its proposed Budget for each financial year is submitted and approved as part of the annual government Budget process, however the Public Trustee funds its own operations. While participation in these processes is consistent with other government agencies, being a self-funded entity the Public Trustee's expenditure is unlikely to be subject to the same level of scrutiny as that of agencies seeking funds from government as part of the Budget process. The Public Trustee is also not required to seek Cabinet Budget Review Committee approval to self-fund projects involving significant expenditure, as occurs when other departments are seeking funding from government for specific projects.

<sup>597</sup> The Public Trustee of Queensland, *Fees and charges for financial management*, (26 October 2020) <<https://www.pt.qld.gov.au/financial-administration/fees-and-charges/>>.



691. Queensland Treasury has a role in ensuring fees and charges across government are applied consistently with approved whole-of-government fees and charges policy settings, which recognises that the legal authority to set user charges lies with the accountable officer of each department and statutory body. Discussions held by the Public Advocate early in this review with representatives of Queensland Treasury suggested there was limited oversight of the Public Trustee's fees and charges outside of the Budget process and the process for approving government agency annual fee increases. The process for annual fee increases does not involve consideration of whether the fees are reasonable in the circumstances, or the impact the fees have on clients, their financial outcomes or quality of life.
692. The Public Trustee participates in the annual Estimates Hearings of Parliament in the same way as other government departments and statutory bodies, and is required to appear before the relevant committee as one of the Attorney-General's portfolio agencies, and answer the questions of committee members about its operations, performance and expenditure.
693. The Public Trustee also appears on occasion before Parliamentary Committees when they are considering matters relevant to its operations or amendments to the *Public Trustee Act*, the *Guardianship and Administration Act*, the *Powers of Attorney Act* and so forth.

### Tabling of the annual Fees and Charges Notice

694. The Public Trustee sets its fees and charges by a notice in the *Queensland Government Gazette*.<sup>598</sup> The Gazette is the official government publication used to notify various actions and decisions by government. The Public Trustee's Fees and Charges Notice is considered 'subordinate legislation', similar to a regulation under an Act.<sup>599</sup>
695. The gazetting process requires that the gazette notice of the Public Trustee's fees and charges be tabled in the Queensland Parliament within 14 sitting days of it being published.<sup>600</sup> It is then open to the Queensland Parliament to 'disallow' or stop the subordinate legislation proceeding within 14 sitting days after tabling.<sup>601</sup>
696. In terms of the tabling process, the intention is to ensure that subordinate legislation is open to parliamentary scrutiny. All subordinate legislation must be tabled in the Legislative Assembly and open to disallowance by resolution of the House.<sup>602</sup>
697. There are also standing Committees of the Queensland Parliament that have the responsibility of examining and considering legislation and subordinate legislation. Currently, the gazetted Public Trustee fees and charges are the responsibility of the Legal Affairs and Safety Committee, as the Public Trustee is a portfolio agency of the Department of Justice and Attorney-General. This Committee has responsibility to examine Bills (that will become legislation) and subordinate legislation for the purpose of considering the policy they are putting into effect, the application of fundamental legislative principles and, in relation to subordinate legislation, its lawfulness.<sup>603</sup>
698. This process is not unique to the Public Trustee's fees and charges but applies to any subordinate legislation that is put before the Queensland Parliament.
699. A Parliamentary Committee has only once (in 2012) specifically reported on the Public Trustee's fees and charges.<sup>604</sup> The Committee's review was undertaken within its broad mandate to consider the policy, fundamental legislative principles and lawfulness of the Fees

<sup>598</sup> *Public Trustee Act 1978* (Qld) s 17(1).

<sup>599</sup> *Ibid* s 17(6).

<sup>600</sup> *Statutory Instruments Act 1992* (Qld) s 49(1).

<sup>601</sup> *Ibid* s 50 (1).

<sup>602</sup> Queensland Parliament, *Parliamentary Debates – Statutory Instruments Bill Second Reading*, 6 May 1992, 5005 (WK Goss, Hon).

<sup>603</sup> The Parliament of Queensland, 'Legal Affairs and Community Safety Committee', <<https://www.parliament.qld.gov.au/work-of-committees/committees/LASC>>.

<sup>604</sup> The Parliament of Queensland, Legal Affairs and Community Safety Committee, *SL 102 – Justice Legislation (Fees) Amendment Regulation (No.1) 2012: Exempt Subordinate Legislation – Public Trustees (Fees & Charges Notice) (No.1) 2012* (Report No. 13, November 2012).





and Charges Notice.<sup>605</sup> The Committee noted issues including the lack of an Explanatory Note and queried the legal basis of Public Trustee charges for specific functions under its Act (such as auditing of trusts). Regarding the latter issue, the Committee noted that the fees the Public Trustee charged did 'not appear to be unreasonable given the work, complexity and skill involved in carrying out the required work'.<sup>606</sup>

700. The gazetting and tabling process clearly exposes the Public Trustee's Fees and Charges notice to a level of scrutiny. However, it appears that other than those considerations outlined, the Committee does not examine issues such as the level of fees relative to the clients' financial circumstances or the impact they might have on clients' financial outcomes. There also does not appear to be any specific consideration of the fees and charges in the broader context of the Public Trustee's fiduciary duties.

## Complaints processes

701. The Public Trustee has a complaints management policy that has been developed with input from consultants and the Queensland Ombudsman. This policy was updated in late 2019 in preparation for the commencement of the *Human Rights Act 2019*.<sup>607</sup> The policy outlines formal complaints processes and responses consistent with those adopted by most government departments.
702. As noted earlier, the Public Trustee is also subject to the jurisdiction of the Queensland Ombudsman. The Queensland Ombudsman may only investigate an administrative action by the Public Trustee which was:
- taken contrary to law;
  - unreasonable, unjust, oppressive, or improperly discriminatory;
  - in accordance with a rule of law or a provision of an Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory in the particular circumstances;
  - taken for an improper purpose; or on irrelevant grounds; or having regard to irrelevant considerations;
  - an action for which reasons should have been given, but were not given;
  - based wholly or partly on a mistake of law or fact; or
  - wrong.<sup>608</sup>
703. Over recent years the Queensland Ombudsman has received a significant number of complaints about the Public Trustee (see 'Chapter 1: The review'), however, the Ombudsman does not record data about the subject matter of complaints nor the outcomes of those complaints. Accordingly, it is not possible to determine what proportion of the complaints to the Queensland Ombudsman about the Public Trustee related to fees and charges, what recommendations were made by the Ombudsman responding to the complaints, or whether any of the recommendations made were adopted by the Public Trustee.
704. The Queensland Audit Office recently released a report reviewing how the Public Trustee responds to complaints from its clients with impaired decision-making capacity. While it found the Public Trustee has complaint management policies and procedures that follow good practice, it also found that the complaints process is not well-designed for people with impaired decision-making capacity. This finding was made on the basis that the process is not easy to navigate or be understood by its customers and this could stop them from making a complaint. It also found staff were not sufficiently trained in complaints management and customer feedback is not proactively sought, meaning that the Public Trustee does not know whether its system is easy to use or where it can be improved.<sup>609</sup>

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<sup>605</sup> Ibid p 1.

<sup>606</sup> Ibid 10.

<sup>607</sup> The Public Trustee of Queensland, *Complaints Management Policy*, (December 2019), <<https://www.pt.qld.gov.au/media/1472/complaint-management-policy.pdf>>.

<sup>608</sup> *Ombudsman Act 2001* (Qld) s 49(2).

<sup>609</sup> Queensland Audit Office, *Responding to complaints from people with impaired capacity, Part 1 The Public Trustee of Queensland*, Report 5: 2020–21.



705. The Public Trustee is also subject to the jurisdiction of the Crime and Corruption Commission. The Commission has authority to investigate complaints about the conduct of a person that could affect the performance of the functions of a public agency or those of one of its officers, which if proved would be a criminal offence or a breach which would justify the termination of the person's employment.<sup>610</sup>
706. Provided the Public Trustee's fees and charges are applied in accordance with the *Public Trustee Act* and the *Fees and Charges Notice* and the notices are published and gazetted as required, there is no basis for these oversight mechanisms and agencies to review the decisions and actions of the Public Trustee in the setting and application of those fees and charges.

## Discussion

707. The Public Trustee is subject to a range of accountability mechanisms that also apply to other government departments and agencies. The question that arises is whether those processes are sufficient to achieve a satisfactory level of transparency and accountability between the Public Trustee and its administration clients, especially considering their vulnerability and relative lack of power.
708. It is possible that some of the issues and concerns raised about the Public Trustee's interactions with administration clients are attributable to a management style and organisational culture that has evolved over many years. Certainly, the Auditor-General identified many of the concerns outlined in this report in his 1996 audit report into the Public Trustee. It is also likely that some of the issues with the Public Trustee's style and culture date back to its origins, and more particularly, its original legislation. It is worthy of comment that the *Public Trustee Act* in 2020 is essentially the same legislation as that passed to establish the Public Curator in 1915. While both Acts supported their respective agencies to serve the people of Queensland well, it may be an appropriate time to consider whether legislation that was appropriate for the management of the financial affairs of people with impaired capacity in 1916 remains so for an accountable, transparent and contemporary Public Trustee in 2021.
709. A possible additional oversight mechanism could be to establish a Public Trustee board that would provide direction and oversight to the organisation. This type of structure exists in Queensland statutory commissions such as the Crime and Corruption Commission and Legal Aid Queensland. State Trustees in Victoria is also a state-owned corporation with a diverse and independent board of directors.<sup>611</sup>
710. A board provides the opportunity for board members, who could be selected on the basis of particular skills or expertise relevant to the Public Trustee's functions, to have a governance role as well as supporting senior management and guiding strategic decision-making. This board should be separate to, and have different functions from, the Public Trustee's current Investment Board<sup>612</sup> but might have members on the Investment Board as well as other sub-committees dealing with governance, risk, customer service etc. For example, State Trustees in Victoria has members with backgrounds in business, investment, superannuation, property, government, politics, disability, housing services, homelessness and community participation.<sup>613</sup>

<sup>610</sup> *Crime and Corruption Act 2001* (Old) s 15.

<sup>611</sup> State Trustees (Victoria), *About Us – Our People*, <<https://www.statetrustees.com.au/about-us/our-people>>.

<sup>612</sup> The Public Trustee of Queensland, *Annual Report 2019-20*, p 25.

<sup>613</sup> State Trustees (Victoria), *About Us – Our People, Board of Directors*, <<https://www.statetrustees.com.au/about-us/our-people>>.



711. The other benefit of a board is that the members bring a fresh perspective to the organisation and its day-to-day operations and can challenge the 'conventional wisdom' that may have historically informed the organisation's decisions or direction. A board also provides an alternative avenue of complaint for clients and others who are dissatisfied with the Public Trustee's decisions or actions.
712. An alternative oversight mechanism for the Public Trustee could be for it to report to a Parliamentary Committee, similar to the Crime and Corruption Commission and the Parliamentary Crime and Corruption Committee.
713. The principal functions of the Parliamentary Crime and Corruption Committee are:
- to monitor and review the performance of the functions, and the structure of the Crime and Corruption Commission (the Commission);
  - to report to Parliament on matters relevant to the Commission; and
  - to participate in the appointment of Commissioners and the Chief Executive Officer of the Commission.<sup>614</sup>
714. In monitoring the Crime and Corruption Commission's activities, the Committee can make specific inquiries into matters pertaining to the Commission, receive complaints, review Commission guidelines and policies and make suggestions for improvements to its practices.<sup>615</sup>



### Recommendation 30: Consider additional oversight mechanisms

The Queensland Government should consider whether the Public Trustee and its clients would benefit from additional oversight and/or reporting mechanisms to improve the Public Trustee's performance, transparency and public accountability.

## Public Trustee Act

715. As noted throughout this report, the Public Trustee was originally established in 1915 as the Public Curator. The Public Trustee and its staff are justifiably proud of their over-100-year history, helping members of the Queensland community in times of need.
716. The *Public Trustee Act* was passed in 1978 and was described as 'An Act to change the name and style of The Public Curator of Queensland to that of The Public Trustee of Queensland and to consolidate and amend the law relating to him and his office'.<sup>616</sup> At the time of its introduction, the Bill was not described as updating or modernising the law governing the powers, functions or operations of the new Public Trustee. In his Second Reading speech the Attorney-General at the time did not refer to any particular changes to the law effected by the *Public Trustee Bill 1978* (Qld).<sup>617</sup>
717. As mentioned, the main object of the 1978 Act was to change the name from the Public Curator to the Public Trustee, update some of the language in the previous Act and recognise some of the changes brought about by the *Trusts Act* and the *Property Law Act 1974* (Qld). Other than those specific issues, the *Public Trustee Act* retained most of the original provisions and structure of the *Public Curator Act*.

<sup>614</sup> Queensland Parliament, Parliamentary Crime and Corruption Commission, <<https://www.parliament.qld.gov.au/work-of-committees/committees/PCCC>>.

<sup>615</sup> Ibid.

<sup>616</sup> *Public Trustee Act 1978* (Qld), long title.

<sup>617</sup> Queensland Parliament, *Parliamentary Debates*, 21 November 1978, 2822-2823 (WD Lickiss, Hon).



## Act appears to permit conflicts and profit without specifically addressing the issues

718. The *Public Curator Act*, and later the *Public Trustee Act* provided that the Public Curator and the Public Trustee have the same powers and duties as private people appointed as trustees, administrators and executors, except where the Act provided otherwise.<sup>618</sup>
719. Since the case of *Keech v Sandford*<sup>619</sup> in 1726, one of the fundamental obligations of a trustee as a fiduciary is to avoid a conflict of interest and, if such a conflict arises, to account for any profit which may have been made.<sup>620</sup> **The stringency of the trustee's duties** to avoid conflict and profit extends to trustees generally not being permitted to be remunerated for their services.
720. In contrast, the *Public Curator Act* and the *Public Trustee Act* made specific provision for these bodies to be remunerated for their services. In the case of the Public Curator the fees were prescribed by regulation.<sup>621</sup> Under the *Public Trustee Act*, the Public Trustee may fix fees and charges for services it provides by gazette notice.<sup>622</sup> However, the fees and charges 'must be reasonable having regard to the circumstances in which the service is provided'. The Act sets out some considerations relevant to the question of reasonableness, including the type and complexity of the service and the degree of care, responsibility, skill or special knowledge required.<sup>623</sup>
721. The *Guardianship and Administration Act* also addresses the issue of remuneration for professional administrators (other than the Public Trustee) and states that the remuneration may not be more than the amount QCAT considers fair and reasonable having regard to a range of issues including the nature and complexity, care, skill and specialised knowledge required.<sup>624</sup> However, those provisions do not affect the right of the Public Trustee to remuneration under the *Public Trustee Act*.
722. The charging of fees by the Public Trustee for the Official Solicitor is less clear. The *Guardianship and Administration Act* **acknowledges an administrator's entitlement** to reimbursement of reasonable expenses incurred in acting as administrator.<sup>625</sup> The *Public Trustee Act* recognises the position of Official Solicitor to the Public Trustee and provides that the Official Solicitor is permitted to act as solicitor in any court or proceedings for the Public Trustee, and the Public Trustee is entitled to the same costs and expenses as if the Official Solicitor were a solicitor in private practice acting for the Public Trustee in the proceedings.<sup>626</sup>
723. While the *Public Trustee Act* provides for a position of Official Solicitor and the charging of **legal fees for the Official Solicitor's services, the Act does not address the obvious conflicts of interest** involved in the Public Trustee referring clients to the Official Solicitor for legal advice and representation and **earning revenue from the Official Solicitor's fees for these services**.
724. Both the *Public Curator Act* and the *Public Trustee Act* provided for client funds to be invested in the Common Fund<sup>627</sup> and interest at a rate that is prescribed from time to time, to be credited annually to the clients who have money in the fund.
725. From the commencement of their operations, it seems these provisions were intended to permit conduct and practices that would otherwise constitute a breach of the **trustee's** fundamental duties with the object of supporting the Public Curator, and later the Public Trustee, to be self-funding.

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<sup>618</sup> *Public Curator Act* 1916 (Qld), s 28(3); *Public Trustee Act* 1978, s 53(1).

<sup>619</sup> [1726] EWHC J76.

<sup>620</sup> Professor Samantha Hepburn, *Principles of Equity and Trusts*, (5th ed), 2016, The Federation Press, Leichhardt, New South Wales, p 526.

<sup>621</sup> *Public Curator Act* 1915 (Qld), as enacted, s 17.

<sup>622</sup> *Public Trustee Act* 1978 (Qld) s 17(1).

<sup>623</sup> *Ibid* s 17.

<sup>624</sup> *Guardianship and Administration Act* 2000 (Qld) s 48.

<sup>625</sup> *Ibid* s 47.

<sup>626</sup> *Public Trustee Act* 1978 (Qld) ss 16 (3), 16(4), 16 (6), 17B.

<sup>627</sup> *Public Curator Act* 1915 (Qld), as enacted, s 18; *Public Trustee Act* 1978 (Qld) s 19.



726. While it is clear from the speeches in support of the Public Curator Bill that it was the intention of the Queensland Parliament to permit some of these potential conflicts of interest and unauthorised profit, the loose drafting and consequent ambiguity of the legislation has potentially resulted in less accountability. As noted earlier, it is a principle of statutory interpretation that unless legislation is clear and unequivocal in its drafting, it will not be interpreted as intending to override established legal principles.
727. Accordingly, the *Public Curator Act* and the later *Public Trustee Act* should have acknowledged the potential conflicts and breaches of fundamental trustee duties and made specific provision to permit them, as well as setting the conditions or limits on those conflicts. This should have included the extent to which the Public Trustee can profit from its clients' investments and from earnings from the Official Solicitor providing services to clients.
728. A beneficiary (or person under administration) cannot provide informed consent to a trustee having a conflict of interest without being provided with all of the necessary information to understand and consent to the conflict.<sup>628</sup> Without making that information available to its administration clients and the public more generally, the Public Trustee cannot claim to be accountable and transparent.
729. In the circumstances, it may be beneficial to initiate a full legislative review of the *Public Trustee Act* with a view to updating and modernising it. This should include ensuring the conflicts inherent in some of the provisions are properly acknowledged and the extent to which the Public Trustee can benefit from the conflicts or earn profits is clearly defined, and the extent of those profits clarified. Specifically, the Act should clearly state that the Public Trustee should provide clear, accessible information to its clients and the public to ensure the transparency of its operations, fees and charges and the various sources of its revenue, including revenue earned from the Official Solicitor and client funds.

## Guardianship and Administration Act

### Public Trustee not administrator of last resort

730. At the time of writing, the Public Trustee was the appointed administrator for over 9,300 Queenslanders with impaired decision-making capacity.<sup>629</sup> The appointment of the Public Trustee is not required to be 'an appointment of last resort' under the *Guardianship and Administration Act* as is the case with the appointment of the Public Guardian.<sup>630</sup> It is unclear why this legislative anomaly exists between the appointments of the Public Trustee and the Public Guardian in Queensland and why it has persisted.
731. In its 1996 report, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, the Queensland Law Reform Commission recommended that both the Adult Guardian (now known as the Public Guardian) and the Public Trustee should be 'decision-makers of last resort'.<sup>631</sup> In its later 2010 report, *A Review of Queensland's Guardianship Laws*, the Queensland Law Reform Commission observed that the appointment of the Adult Guardian as one of last resort 'reflects the policy that where there are family or friends who are able and willing to provide the requisite decision-making support and assistance for the adult, it is preferable that they be allowed to do so rather than be displaced by the Adult Guardian'.<sup>632</sup> The Commission noted that its previous

<sup>628</sup> See, for example in the context of a solicitor's fiduciary's duty not to make a profit, Dal Pont 'Contextualising Lawyer Overcharging' (*supra*) at 291 and the reference of Ipp J (with whom Pidgeon and Franklyn JJ agreed) in *D'Allessandra v Legal Practitioners' Complaints Committee* (1995) 15 WAR 198 at 220 to the 'fiduciary obligation to adequately inform the client so that an informed decision could be made by the client as to the appropriateness of entering into a written agreement and as to the amount of agreed for profit costs'.

<sup>629</sup> See footnote 1 in The Public Trustee of Queensland, *Annual Report 2019-20*, p 5.

<sup>630</sup> *Guardianship and Administration Act 2000* (Qld) s 14(2).

<sup>631</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 183-4. These recommendations formed the basis of cls 85(a)(iii), 87(a) of the Draft *Assisted and Substituted Decision Making Bill 1996* which was included in vol 2 of that report.

<sup>632</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report Volume 3, Report No 67, September 2010, p 67.





recommendation regarding the appointment of the Public Trustee had not been adopted in the legislation and recommended the Act be amended to provide for the appointment of the Public Trustee as a last resort.<sup>633</sup>

732. In its discussion of the issue, the Commission noted that:

Notwithstanding that there are differences between the decision-making roles and responsibilities of a guardian and an administrator, the same policy considerations that guide the appointment of the Adult Guardian ... should also guide the appointment of the Public Trustee ...

The Public Trustee has suggested that if the Act were amended so that the Public Trustee is unable to be appointed where there is another appropriate appointee available, it might sometimes result in the appointment of a 'less appropriate' appointee. Where the alternative appointee is an individual, the relevant issue is simply whether the alternative appointee is appropriate for appointment.<sup>634</sup> This is a question of fact, the answer to which will always depend on the personal attributes of the individual and the adult's particular circumstances.<sup>635</sup>

733. The matters the tribunal can consider when deciding the appropriateness of a guardian or administrator for appointment are clear.<sup>636</sup> They focus on a range of considerations, including whether the person would apply the general and/or health principles under the *Guardianship and Administration Act*, risks of conflict, whether the person and the adult are compatible, whether the person would be available to the adult and their competence to perform the functions and exercise the powers under the appointment. The Act does not require the appointment of the potential administrator who has the most legal, financial or investment knowledge.

734. Unfortunately, it seems the assessment of a potential administrator's suitability for appointment in Queensland is sometimes reduced to a contest between the members of a person's support network and the Public Trustee.

735. If the *Guardianship and Administration Act* were amended to provide for the appointment of the Public Trustee as a last resort, it would most likely result in fewer appointments and less demand for services from the Public Trustee. This may reduce the number of appointments made to the Public Trustee and would address the inconsistency in the Queensland legislation about appointments of last resort between the Public Guardian and the Public Trustee.

736. The Australian Law Reform Commission in its 2014 report *Equality, Capacity and Disability in Commonwealth Laws* recommended that the appointment of any substitute decision-maker should be a last resort and not be a substitute for appropriate support.<sup>637</sup> The Commission also recommended that all substitute decision-making appointments should be subject to review.<sup>638</sup> The need to review administration appointments made to the Public Trustee is discussed below.

## Reviews of Public Trustee administration appointments

737. The *Guardianship and Administration Act* provides for the periodic review of the appointment of a guardian and administrator (other than the Public Trustee) at least every 5 years.<sup>639</sup> It is not clear why the Public Trustee is exempt from this periodic review of its appointment. In its 1996 report, *Assisted and Substituted Decisions*,<sup>640</sup> the Queensland Law Reform Commission

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<sup>633</sup> Ibid rec 14-15.

<sup>634</sup> *Guardianship and Administration Act 2000* (Qld) s 15(1) sets out a range of appropriateness considerations which the Tribunal must consider when deciding whether a person is appropriate for appointment. These include factors such as whether the person is likely to apply the General Principles, is compatible with the adult and other substitute decision-makers and is appropriate and competent to perform the functions and exercise the powers under the appointment order.

<sup>635</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report Volume 3, Report No 67, September 2010, pp 67-68.

<sup>636</sup> *Guardianship and Administration Act 2000* (Qld) s 15.

<sup>637</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 92 [Rec 3-4].

<sup>638</sup> Ibid.

<sup>639</sup> *Guardianship and Administration Act 2000* (Qld) s 28.

<sup>640</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49, Vol 2, p 213.





recommended that legislation provide for the tribunal to periodically review the appointment of a decision-maker for a person. In its recommendations, the Commission did not distinguish between appointments of guardians or administrators nor between the Public Trustee and trustee companies and other appointed administrators. In its discussion of this issue, the Commission expressed the view that setting a mandatory appointment period of five years, which was the requisite period in some of the legislation it reviewed, was 'too long to provide effective protection for the rights of people who are subject to a decision-making order.' It recommended that appointments be periodically reviewed at any time on the tribunal's initiative or on the application of the person under the order or another interested person, but in any event no less than every three years.<sup>641</sup> It is not clear why the current section 28<sup>642</sup> was ultimately adopted exempting the Public Trustee and other trustee companies appointed as administrators from periodic reviews of their appointment.

738. The benefit of a periodic review is that it provides scrutiny of the way the substitute decision-maker has exercised their authority. Periodic reviews of Public Trustee administration appointments would provide an opportunity for regular third-party oversight of the Public Trustee's fees and charges and their effect on clients' financial outcomes. Periodic reviews also create an opportunity for people under administration or their supporters to raise concerns about the impact of the Public Trustee's fees and charges on the financial position of the person under administration, especially over time. The review process may also provide administration clients and their supporters greater access to information about the Public Trustee's fees and charges and the person's financial circumstances than they would have been able to obtain in ordinary circumstances, and for them to put forward alternative administrators.
739. Another benefit of the periodic review of an appointment is that it allows for reconsideration of whether the appointment is still required. Not all people will experience impaired decision-making all their lives. For some people, impaired decision-making capacity may be episodic or temporary, requiring intensive supports at specific times in their lives. Other people may require lifelong support with decision-making and communicating their choices and decisions. Reviewing an appointment allows for the possibility that the person has regained or improved their capacity to manage their financial affairs, and for the revocation of the order.
740. A project undertaken by the NSW Trustee and Guardian showed that some people with impaired decision-making capacity for financial matters have been able to improve their financial literacy skills with support and training. At the end of the project, the majority of project participants expressed the confidence and desire to take on more responsibility for their finances or to have their administration order revoked.<sup>643</sup> Mandatory periodic reviews of administration appointments might also encourage the Public Trustee to implement similar programs to encourage clients to improve their financial literacy (such as the program it has recently introduced – Steps to Financial Independence),<sup>644</sup> and ultimately, achieve greater autonomy.



## Recommendations

**Recommendation 31: Update the *Public Trustee Act* to better acknowledge rights and interests of people with impaired decision-making capacity**

The *Public Trustee Act* should be reviewed to update and modernise the Act to ensure that it reflects contemporary views about the rights and entitlements of people with impaired decision-making capacity whose affairs are administered by the Public Trustee.

<sup>641</sup> Ibid p 216.

<sup>642</sup> *Guardianship and Administration Act 2000* (Qld).

<sup>643</sup> Purcal, C., Hill, T., Johnson, K., & Kayess, R. (2017). *Evaluation of the Supported Decision Making Phase 2 (SDM2) project: Final report* (SPRC Report 14/17). Sydney: Social Policy Research Centre, UNSW Sydney, p 20-27.

<sup>644</sup> Letter from the Public Trustee of Queensland to the Public Advocate, 11 January 2021, in response to draft final report, attachment, Public Trustee Response, p 5.



The review of the Act should:

- a. address issues relating to conflicts of interest or breaches of duty and ensure they are clearly acknowledged, the extent to which they are permitted and the limitations on those activities, including any profits that can be earned;
- b. address provisions in the Act that appear to permit breaches of the trustee's fundamental duties; and
- c. include amendments requiring greater accountability and transparency on the part of the Public Trustee about its fees and charges and various sources of revenue, including revenue earned from the Official Solicitor, on client funds invested in the Common Fund and from the management of other funds in which client money is invested.

Recommendation 32: Amend legislation to ensure the Public Trustee is an appointment of last resort and the appointment is periodically reviewed

The *Guardianship and Administration Act* be amended to provide:

- a. that the appointment of the Public Trustee as administrator for a person is an appointment of last resort; and
- b. consistency with other administration appointments, the appointment of the Public Trustee and other trustee companies as a person's administrator be subject to periodic review, at least every five years (preferably more frequently).

## Conclusion

- 741. Before concluding this report, there are a number of matters that remain to be addressed.
- 742. The first is to acknowledge the efforts and commitment of the staff of the Public Trustee (and the Public Curator), who have delivered services to vulnerable Queenslanders for over 100 years, supporting their clients to live safe and financially secure lives. It should be recognised that many of the Public Trustee's staff have chosen these roles because they want to do work that is meaningful to them and 'makes a difference in people's lives'.
- 743. It is likely that the issues that have been highlighted in this report may cause concern and distress to Public Trustee staff. In no way should this report, its observations or recommendations, be interpreted as questioning or detracting from the commitment and hard work of the Public Trustee's staff. The problems and issues identified in this report have developed over a substantial period of time and, as noted above, primarily stem from the original funding arrangements for the Public Curator and the lack of clarity in the legislation about the scope and nature of conflict transactions and profits permitted under the Act.
- 744. It is also appropriate to recognise the essential role the Public Trustee plays in Queensland public life and the importance of it continuing to fulfill that role in the future. It is critical to the on-going successful operation of the Public Trustee that it has the confidence and trust of the Queensland community and other key institutions. It is hoped that the recommendations of this report will help to achieve this outcome.
- 745. The catalyst for this project was concerns about the effect of the Public Trustee's fees and charges on the financial outcomes of some of its clients. The objective of this project and report was to encourage changes to the Public Trustee's operations and to its fees and charges regime to improve these outcomes. During the project the Public Trustee and his staff were actively engaged with the issues and have commenced a significant program of work to address them. Naturally, there are issues on which we have had differing views, however, despite this, we have maintained a positive working relationship. The Public Trustee has had the benefit of reviewing chapters of the report as they were being written and has provided



feedback on those. The Public Trustee also prepared a final response to the report. These documents are reproduced in appendices 2 and 1 respectively of this report.

746. Appendix 1 also includes a document titled, *The Public Trustee Response*, that outlines the actions taken by the Public Trustee to date to respond to the issues and concerns that have been highlighted in this report. It also charts a comprehensive reform agenda designed to modernise and streamline the Public Trustee's operations and processes, including:
- adopting a Customers First Agenda, putting customers at the centre of all that they do;
  - undertaking a comprehensive review of fees and charges to ensure fees are fair, reasonable and sustainable, including the fees of the Official Solicitor;
  - Increasing transparency by:
    - publishing the *Prudent Person Rule Manual*;
    - providing accessible information about its fees and charges;
    - reviewing customer letters and statements to make them clearer, easier to understand and accessible for customers and their supporters;
    - implementing processes for customers to review legal advice that will not risk waiving legal professional privilege;
    - providing customers with legal invoices on request;
    - publishing hourly fees of lawyers in the Official Solicitor's Office;
  - embedding a Structured Decision-Making Framework to support clients to have greater involvement in decisions that affect them, including legal decisions;
  - splitting the Official Solicitor's Office into two teams, the Official Solicitor – Corporate Legal Services and the Official Solicitor – Customer Legal Services;
  - establishing a Legal Expert Transformation Panel to provide practice management and ethical guidance to the Official Solicitor – Customer Legal Services;
  - developing Official Solicitor policies to actively consider the interests of customers in legal decision-making;
  - investigating options for sharing legal advice with customers in a way that will not adversely impact the customer;
  - exploring options to require all lawyers of the Official Solicitor to hold a current practising certificate, which would bring them into the jurisdiction of the Legal Services Commission;
  - a new process to allow Trust Officers to query the invoices of the Official Solicitor – Customer Legal Services to provide assurance to customers that there is additional scrutiny of fees;
  - establishing an Independent Complaints Review Process which will allow customers to lodge a complaint with a third party if they believe it was not handled adequately in the first instance;
  - developing an Accessibility, Inclusion and Diversity Plan 2021-2025;
  - adopting a learner-improver culture to empower staff and ensure knowledge is shared to effect meaningful change within the organisation;
  - continuing the Queensland Civil and Administrative Tribunal Referral Panel to assess and approve applications to QCAT to improve transparency in decision-making and potential to identify systemic issues and reduce costs; and
  - undertaking a financial advice procurement process in 2021 which will include consideration of the benefits of establishing a panel of providers.
747. The Public Advocate welcomes this extensive program of change within the Public Trustee and appreciates the Public Trustee's receptiveness to the issues raised during the project. This program of work represents significant steps towards effecting positive change, with the Public Trustee's customers and their interests at the centre of these activities.
748. Even with this program of work, there remain significant areas where change may need to be effected through carefully considered legislative reform and a fundamental reconsideration of the Public Trustee's funding base, in particular the funding of its extensive program of CSOs. Other significant issues that will require serious policy and legal consideration include the way the Public Trustee manages client funds, its dominant practice of investing client funds in its own products and the earning of revenue from client funds.



749. The Public Advocate is committed to working with the Public Trustee and the government to achieve fair and equitable outcomes for clients that are financially sustainable into the future.
750. Ultimately, the primary goal of this review has been to protect the rights and interests of people with impaired decision-making capacity and improve their lives by supporting them to achieve **greater autonomy and dignity**. This aspiration is shared by all of Queensland's guardianship and administration agencies. The Public Advocate will continue to work with the Public Trustee to implement a reform agenda that advances this goal.



# Appendices



# List of appendices

Appendix 1: Public Trustee response to draft final report

Appendix 2: Public Trustee responses to draft chapters

Appendix 3: General Principles

Appendix 4: Client Statement of Account





444 Queen Street Brisbane Qld 4000  
GPO Box 1449 Brisbane Qld 4001



For reply please quote: S&G/JF – T21/1 – D21/597

11 January 2021

Ms Mary Burgess  
Public Advocate  
GPO Box 149  
BRISBANE QLD 4001

Dear Ms Burgess

Thank you for your letters of 16 and 23 December 2020 regarding your inquiry into the Public Trustee fees and charges for people under administration (the Report).

Thank you for granting an extension until 11 January 2021 for the Public Trustee response to your Report. I appreciate your understanding and recognition of the work involved in preparing the response.

Please find attached and electronically enclosed, the Public Trustee response to the draft report. This has been prepared as a chapter which can be included in the Report. I understand that it is at your discretion to include the response as a chapter of the Report or as an appendix.

Thank you also for providing responses to the feedback provided by the Public Trustee to the draft Report. I acknowledge that at various points throughout your feedback you have formed the view that the Public Trustee has changed its position or been unclear. I would like to reassure you that every effort has been made to assist you in finalising your Report and providing the information required as part of your inquiries.

However, upon reflection, it appears that many of the questions that have been responded to have been of a closed or very specific nature. Some of the questions relate to matters which occurred some years ago and as such do not reflect current practice. I am of the view that this approach may ultimately have led to concerns that the Public Trustee was not being transparent or was changing its position. Again, it was not the intention to cause any confusion and I apologise if this has been the case.

In terms of the feedback, there are a few key points that I would like to bring to your attention to assist in finalising the report.

### ***Financial outcomes***

In relation to the reasonableness of the Public Trustee's fees and charges you state "*if clients are not enjoying good 'financial outcomes' under PT management as a result of the level of fees they are paying, how can the fees be regarded as reasonable?*" While this may be an area of respectful disagreement, I again raise that the Report does not clearly

#### **The Public Trustee**

- Will-making
- Enduring powers of attorney

**1300 360 044**

- Executor services
- Estate administration

**[www.pt.qld.gov.au](http://www.pt.qld.gov.au)**

- Disability services
- Trust administration

**ABN 12 676 939 467**

- Real estate auctions and sales
- Charitable trusts

consider the financial outcomes for customers. The financial outcomes are broader than fees and charges alone. It should consider the result for the customer factoring in investment returns, Community Service Obligations including fee rebates and the effects of other activities undertaken by the Public Trustee for the customer.

If the Public Advocate's preferred approach is to consider financial outcomes only in the context of fees and charges, it may assist the reader for this to be defined early in the Report.

### **██████ Benchmarking Report**

In relation to the ██████ Benchmarking Report of the Public Trustee's fees and charges, the Public Advocate's view is acknowledged. The ██████ Report provides a useful comparison of the fees and charges of the Public Trustee compared to other interstate jurisdictions. Notwithstanding the views of the Public Advocate, it may assist the reader to be advised of the findings of the ██████ Report and the reasons it has been disregarded by the Public Advocate, rather than not referring to it at all.

In response to the issues you have raised, the Public Trustee has commissioned additional benchmarking to ensure that a comparative analysis of the its fees and charges on specific groups identified in the Public Advocate report are also taken into consideration.

### **Common Fund**

In relation to paragraph 638 of the draft Report (previously 612), it is stated *"the rate of earnings by the Public Trustee on the Common Fund have been as high as 12 percent per annum last financial year, even though the Reserve Bank cash rate was only 0.75 percent."*

It appears that the 12 percent per annum figure has been derived by the total income earned from the investments of the Common Fund and has expressed them as a percentage of the reserves rather than a percentage of total investments. This calculation does not provide any meaningful indicator of performance.

The return on the financial assets of the Common Fund, inclusive of interest, realised and unrealised gains, for the 12 month period ended 30 June 2020 was 3 per cent. The table below outlines the estimates of interest earned over the last three financial years:-

<b>Year</b>	<b>Financial Assets as at 30 June</b>	<b>Interest Revenue</b>	<b>Estimated interest earned</b>
2019-20	\$903,902,000	\$20,964,000	2.3%
2018-19	\$911,955,000	\$27,604,000	3.0%
2017-18	\$896,464,000	<u>\$28,176,000</u>	3.1%

### ***Activity Based Costing (ABC)***

In the feedback, you state that it is your understanding that the ABC was based on staffing billing 4.5 hours per day, but accounting for their costs for working a full 7.25 hours per day.

ABC costing in the Public Trustee is based on full cost recovery. It is used to assist senior management to make informed decisions about the cost recovery of service lines and can be used for comparisons between individual offices and trends over time. Its use is intended as one tool among many to assist with informed decision making

ABC costing is not based on billable hours, it is based on actual salaries and the percentage of time spent by staff on each activity (plus relevant overhead costs).

Staff time is split among a number of activities, some of which includes non-fee earning activities such as training and personal development. These are included in the cost calculation much in the same way as overheads are, because whilst they may not directly count towards the fee-earning activity, they still form a part of the cost to the business to deliver the service.

The cost examples given in your feedback are not indicative of the Public Trustee's ABC cost process. ABC uses actual costs (taken directly from the General Ledger) broken down by cost centre and allocated across service lines based on staff activity surveys and overhead assumptions. There may be some confusion between the process to determine fees and charges and the ABC methodology. While there are clearly links between the two, ABC costing is a discrete exercise performed to identify trends over time and make comparisons between offices and service lines.

### ***Small superannuation***

I note from your feedback that there appears to be some confusion about the treatment of small superannuation balances. While every effort has been made to provide the information as clearly as possible, I apologise if in any way our response has caused confusion.

I am advised that the Small Superannuation Checklist was introduced in October 2017. In an email to your office on 25 February 2020, the Public Trustee advised that discretion is applied and used superannuation as an example.

A Superannuation asset is flagged as a complex asset within the workflow rules, accordingly the External Investment Strategy path will be chosen by workflow and will require the Trust Officer to complete a Request for Statement of Advice (RSOA). The RSOA contains all the applicable information (as a financial planner would collect under the "know your client" principle) which assists in determining the customers' financial needs including assets and liabilities details, budget requirements, cash flow and capital requirements and applicable government benefits.

Once the Trust Officer has completed the RSOA, the workflow submits the document to the supervisor for review. The supervisor, upon review of the information; including assets, liabilities budget client needs and wishes etc. accepts or rejects the document within

workflow and if rejected the Trust Officer is required to consider the reason for rejection, attend to the issue, and resubmit through workflow (it could be as simple as an asset was not confirmed and therefore not all income was being allowed for in the budget). When accepted by the supervisor, the workflow presents the RSOA document to the Investment Operation Team. The checklist is a decision support document used by staff in the Investment Services Program.

In most cases once a small superannuation asset is reviewed by the Investments team and or by the financial planner, future reviews may not be required to be undertaken by the Financial Planner and our workflow is updated accordingly. We are always conscious that our customer's circumstances may change and that the workflow assists our staff in capturing these changes and any other relevant information.

I trust this information is of assistance.

### ***Section 137(2) Public Trustee Act 1978***

The Report has misquoted section 137(2) of the Public Trustee Act 1978. It is noted in your feedback that you state "the Public Advocate does not see how the provision has been misquoted". The report states *'however, the Public Trustee is required 'in every such case' to apply for, and follow the directions of, the court as to how 'the opposing interests are to be represented.'*

Section 137(2) is not directive or mandatory in the way that is suggested in the Report. Section 137(2) provides –

137 the Public Trustee may sue himself or herself in different capacity

...

However, in every such case the public trustee **may** apply for and shall in any case follow the directions of the court as to the manner in which the opposing interests are to be represented (emphasis added).

In any case where the Public Trustee applies for directions, it is required to follow the directions given. The Public Trustee is not required to apply to court in every case.

### ***Statement of Advice***

In response to the information provided to the Public Trustee in regard to the Chapter 6, paragraph 414, you advised that the feedback provided does not address the point you are making that there are no directions for staff about when it is appropriate to obtain advice about an investment decision.

In addition to the feedback provided, your office has been provided with a copy of the template Request for Financial Advice which indicates at section 9 the requirement that the customer and/or their support be contacted and their expectations ascertained and recorded in the request. Further, the checklist on the second page of the document supports this requirement.

It may therefore be misleading to state that there is no discussion or direction to assist staff.

### ***Use of the Official Solicitor and Legal professional privilege***

Not every matter involving legal issues is referred to the Official Solicitor for advice, but legal advice is sought when it is appropriate and reasonable to do so in order to enhance and protect the interests of the customer.

The relationship between the Public Trustee, the Official Solicitor and the customer could be clearer in the report. The advice provided by the Official Solicitor Customer Legal Services is for the sole purpose of advancing the rights and interests of the customer. The Public Trustee as the representative for the customer is the 'client' in all cases.

By way of example, Part 64.8.1 of the Misappropriation Manual (**attached**) contemplates that investigations will be carried out by the trust officer before referring to legal services and that a referral may not occur.

### ***Official Solicitor attendance at QCAT***

in response to the Public Trustee's feedback, you have advised "*It is unclear what is the relevance of pointing out that the OS cannot appear without the consent of QCAT*".

The relevance is the threshold that must be met for the Official Solicitor to have leave to appear. QCAT must see some merit in there being legal representation.

The Report appears to be of the view that in most cases that there should be no need for the Official Solicitor to appear. While this is one view, it may be that QCAT has a different view.

It may assist the reader if the Report clarified not only that lawyers must seek leave to appear before QCAT, but also the criteria against which an application for leave to appear is assessed.

### ***Reasonableness of the Official Solicitor fees and charges***

In response to the Public Trustee's feedback that the considerations that the Trust Officer is to take into account when considering the Official Solicitor's fees has now been published to them.. you requested a copy of the policy.

Section 20.16 of the Financial Management Manual on the review of Official Solicitor invoices, and the relevant flowchart, was published on 22 September 2019 (extract **attached**).

### ***Queensland Treasury oversight of the Public Trustee's fees and charges***

At paragraph 664 of Chapter 8 provided to the Public Trustee on 16 November 2020, the opening sentence states:

Discussions early in this review with representatives of Queensland Treasury suggested there was little or no oversight of the public Trustee's fees and charges outside of the Budget process, and the process for approving government agency annual fee increases.

As you would be aware, Queensland Treasury's role is to administer fees and charges policy, noting accountable officers of each department of authority to set user charges for services provided by their agency.

Based on this, paragraph 664 as currently written is not an accurate reflection of the position on fees and charges policy as it applies to the Public Trustee, or more generally.

As such, I recommend that the opening sentence be replaced with the following:

Queensland Treasury has a role in ensuring fees and charges across Government are applied in a manner consistent with approved whole-of-Government fees and charges policy settings, noting that the legal authority to set user charges lies with each accountable officer of a department and each statutory body.

### ***Correction to the Public Trustee Response***

In the final draft Report provided, the boxed section headed "Public Trustee Response" in para 580 it states "although both the Director and Trust Officer in the Customer Experience and Delivery team review all accounts from the Official Solicitor ..."

I wish to clarify the Public Trustee's earlier response provided as the Director does not review all accounts from the Official Solicitor. It would be appreciated if the reference to the Director be removed. I apologise for any confusion and inconvenience this may have caused.

### ***Inclusion of previous feedback as an appendix***

I acknowledge the advice you have received that you should include all the previous Public Trustee feedback on the draft chapters of the report as an appendix as a final report. I am supportive of this in-principle. I have requested my Information Privacy Officer to undertake a review of the responses provided to ensure that there is no inadvertent release of customer or sensitive information.

I trust this information is of assistance. If you require any further assistance in finalizing your Report, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Samay Zhou', with a large, stylized flourish extending to the right.

Samay Zhou and  
**Acting Public Trustee of Queensland and CEO**



## **64.8.1 INVESTIGATIONS TO BE CARRIED OUT BY TRUST OFFICERS IF MISAPPROPRIATION IS ALLEGED OR THOUGHT TO HAVE OCCURRED**

### **64.8.1.1 Collection of Evidence**

Trust Officers should begin their investigation by gathering sufficient evidence so that the appropriate course of action can be determined. Trust Officers should compile all evidence relating to their investigation in a separate folder within the Customer's physical file, clearly labelled 'Investigation of Possible Misappropriation'. This is to ensure that all available evidence relating to the investigation is easily able to be located, should the outcome of the investigation result in a referral to Legal Services.

Should the outcome of the investigation result in a referral to Legal Services, Trust Officers will need to be able to provide a clear summary of the matter, detailing and explaining the findings of their investigation. This is to enable Legal Services to have an understanding of what has caused the complaint of misappropriation or alleged misappropriation to be brought and also why the Trust Officer believes misappropriation has occurred.

The information that Trust Officers are required to obtain, and that may be required to be provided to Legal Services should the matter be referred, may include the following:-

#### **64.8.1.1.1 Information Provided by Previous Attorney/s and/or Administrator/s**

- Copies of records from all previous attorneys and/or administrators, showing all financial transactions that they undertook on behalf of the adult or in relation to the adult's funds and/or property;
- Details of the financial standing and any supporting documentation (including a bankruptcy search) for the person who is alleged to have misappropriated the money or assets;

Where the previous attorney or administrator refuses or fails to provide the information requested by the Public Trustee an application can be made to the Tribunal for an order. The order will require the previous attorney or administrator to file in the tribunal and serve on the applicant a detailed account of dealings and transactions for the adult.

If officers are in attendance at a hearing where misappropriation has been alleged and the Tribunal is appointing the Public Trustee, the officer should request the tribunal make such an order pursuant to s153 *Guardianship and Administration Act 2000*.

#### **64.8.1.1.2 Information Provided by the Person/s of Interest**

- Reasons given by the persons as to why they misappropriated the assets or funds which either corroborates or opposes the version of events given by family members or others. A letter is required to be sent to the former attorney, administrator or person of interest seeking further information. Please refer to the following CLCOR documents:
  - **CLCOR: PM & AGPF / Misappropriation / [Letter to Doctor](#)**
  - **CLCOR : PM & AGPF / Misappropriation / [Letter to Other Party](#)**

#### **64.8.1.1.3 Information Provided by the Customer or Support Network**

- Records of comments made by the customer or their existing support network as to whether or not they believe property or money has been misappropriated or whether in fact it was a proper gift;
- Details of the financial standing and any supporting documentation for the person who is alleged to have misappropriated the money or assets;

#### **64.8.1.1.4 Official and Statutory Documents**

- Copy/ies of the enduring power/s of attorney used in the misappropriation;
- QCAT decision
- QCAT's transcript of proceedings;
- OPG's record of investigations;
- Compensation decisions made by QCAT see **s.64.8.3 Compensation and Accounting for Profits**.

#### **64.8.1.1.5 Bank Statements**

- Copy/ies of bank statement/s evidencing the alleged misappropriation. It is not acceptable to simply provide copies of bank statements and allege that money has been taken. Trust Officers need to have detailed all suspect withdrawals in a schedule of all transactions and forwarded it to the former attorney, administrator or person of interest for completion.
- Details from the banks in relation to all accounts held by the customer and not just the ones from which a Trust Officer suspects money has been taken. Remember they may have Superannuation accounts, joint accounts and accounts in the names of Companies in which they have an interest;
- Copies of any authorities to operate accounts signed by the customer, former attorney or administrator or person of interest;
- Confirmation from the banks as to whether they obtained a copy of any relevant Powers of Attorney and if so, copy/ies of the Powers of Attorney they obtained;
- Copies of any cheques that may have been written on the account;
- Confirmation as to whether the Bank follow the Australian Banker's Association Industry Guidelines and incorporate them into its internal processes, procedures and policies;

#### **64.8.1.1.6 Property**

- If there was a misappropriation of property, copies of all legal documents e.g. contracts, deeds of gift etc. or other documents that relate to the transfer of the property in question. If a Solicitor has been involved, obtain a complete copy of that Solicitor's file. If there has been a transfer of property, obtain a copy of the Form 1 Transfer which is the form lodged in the Titles Office, if there is not one amongst the customer's records;

#### **64.8.1.1.7 Tax Statements**

- Copies of income tax records indicating movements in a bank account in previous years;

#### **64.8.1.2 Examination Of Evidence**

Trust Officers must carefully examine the evidence collected to identify when the misappropriation or alleged misappropriation commenced. The following are possible examples:-

- Approximate date the attorney commenced acting on the enduring power of attorney document
- Approximate date bank keycard was obtained
- Approximate date signatory to bank account was put in place
- Date adult was said to be incapable evidenced by medical reports or by declaration of capacity
- Evidence provided by witnesses
- Date of redirection of pension
- Approximate date bank account balance started to decrease
- Date a property was sold and the proceeds paid into a bank account followed by a large or several large withdrawals
- Date proceeds from sale of asset placed into a bank account
- Date pension payments commenced to be almost immediately withdrawn in full
- Date an adult entered a nursing home or similar
- The date that bank withdrawal patterns changed e.g. where history shows that the adult withdrew \$200.00 per fortnight the day after the pension was received and then at a certain point in time this changed and multiple withdrawals were being made against the adult's bank account.

#### **64.8.1.3 Consultation With Customer/Existing Support Network**

Trust Officers should first advise the customer and/or their existing support network of the value of the misappropriated funds and/or property and alert them that there could be costs associated with pursuing the matter further. Once the customer and/or their existing support network have had an opportunity to weigh up the viability of taking further action, Trust Officers should seek the views of the customer and/or their existing support network as to whether they wish PTQ to attend to an investigation of the possibly misappropriated funds and/or property.

Regardless of what the customer and/or their existing support network decide, it is still at the discretion of PTQ as to whether the matter is pursued further.

#### **64.8.1.4 Consideration Given To Referral Of Matter To Legal Services**

The Trust Officer must consult with their Assistant Manager / Regional Manager for advice as to whether or not the matter of misappropriation or alleged misappropriation should be referred to Legal Services. The Assistant Manager / Regional Manager should consider whether it is economically viable for Legal Services to conduct further investigations into the misappropriation or alleged misappropriation after taking into account the value of the misappropriated assets or funds. Details of the funds available to the adult need to be advised to Legal Services and, if known, the financial standing of the former attorney or administrator or person of interest.

## **20.16 Review of Invoices from the OOS**

Officers have an important role in ensuring that any invoices paid on behalf of our customers are fair, reasonable and accurate. This duty includes the payment of legal invoices.

### **20.16.1 Invoice review process**

The following process should be used to ensure legal invoices paid are deemed fair and reasonable. This process applies to all invoices received from the Office of the Official Solicitor (OOS), Customer and Corporate. Invoices from external lawyers should be sent to the OOS for review.

All concerns and decisions throughout this process should be recorded in CIMS within the CLNOT screen.

#### **20.16.1.1 Initial consideration**

Itemised invoices should be obtained to provide an account of the legal fees charged. Officers should ensure they review all invoices received from the OOS just as they would view any invoice to be paid, giving consideration to the points outlined in [s.20.16.2](#). In matters where concerns are held as to the accuracy or reasonableness of legal invoices, trust officers should discuss the matter with their supervisor (AO5 delegation or more senior) in the first instance.

Officers may also give consideration to whether a Community Service Obligation (CSO) rebate may apply to the legal fees – refer to [s.9.3.9.5](#) of the QACI Manual for further information.

#### **20.16.1.2 Enquiry to invoicing lawyer**

Should supervisors (AO5 delegation or more senior) hold concern regarding the accuracy and reasonableness of charges bearing in mind the considerations in [s.20.16.2](#), they may advise if an enquiry to clarify points of concern may be made to the invoicing lawyer. Any such enquiries must outline the specific queries.

#### **20.16.1.3 Further action**

If concerns remain following this enquiry, the matter must be referred to the Regional Manager. The Regional Manager may consider one or more of the following courses of action:

- Payment of the invoice
- Further consultation with the invoicing lawyer and/or their managing lawyer
- Request for an informal fee review

In determining the most appropriate course of action, Regional Managers may seek advice and direction from their Regional Director and escalate matters in accordance with the [Service Level Agreement](#) between CED and the OOS.

### **20.16.2 Considerations**

Trust officers and supervisors should give consideration to the following points with regards to legal invoices:

- All entries:
  - are clear and make sense
  - relate to the customer matter
  - correspond with the instructions given
- The views of customer
- The customer is not charged for corporate legal advice sought in relation to the matter
- The customer is not charged for multiple reviews due to change of lawyer
- The fees are charged in accordance with the latest [\*\*OS Fees and Charges Agreement\*\*](#) [effective from 1 October 2018].



# The Public Trustee Response

1. The Public Trustee has served the Queensland community for more than 104 years, providing trustee, estate, financial administration and Will services. We have been a pillar of the community through prosperous times and challenging times including recessions, droughts, fires, floods and cyclones.
2. This response will explore some of the themes raised throughout the Public Advocate's report, including the Public Trustee's fees and charges for people under administration, and the work the Public Trustee has underway as part of its Customers First Agenda
3. We have some of the most junior but dedicated public servants in the Queensland Government, serving groups in the community with complex and often distressing and traumatic circumstances, with diligence, care, compassion and commitment across the state. The Public Trustee is grateful for the professionalism, dedication and resilience of its staff in their commitment to serving the community and securing the best outcomes for our customers.
4. While the Public Trustee has a rich history steeped in providing security and peace of mind for thousands of Queenslanders, we acknowledge that there are opportunities to improve the way we provide our services to our customers.
5. As an agency, the Public Trustee is focused on continuous improvement to ensure that we can continue to enhance and protect the rights, dignity and interests of our customers now and into the future.
6. The Public Trustee has embarked on a purposeful and targeted program of works to improve the customer experience. More than 40 initiatives designed to improve outcomes for our customers have already been launched over the past 12 months, and an ambitious strategy has been developed for the next 5 years.
7. The Public Trustee appreciates the Public Advocate's findings which will support us to make changes for the benefit of our customers. We need to be more transparent with our fees and charges, and better support our customers and staff.
8. We apologise to our customers, staff and delivery partners that may not have received the level of service expected.
9. The Report comes at an important juncture in the Public Trustee's history. We are on a transformational journey to become a more modern, customer-centric, professional, ethical and sustainable organisation that provides valuable services for Queenslanders, including our financial management customers.
10. Since late 2019, the Public Trustee has been implementing its Customers First Agenda to ensure that our customers are the centre of all that we do. The changes that we have already made in the way that we deliver our services have been some of the most significant in the organisation's modern history.
11. We have implemented a new streamlined, customer-focused, and service delivery oriented functional structure that ensures a clear separation between service delivery, and strategy and planning functions. The new structure is supported by an energetic and high-performing Board of Management and a reinvigorated Executive Leadership Team.
12. We have introduced the Public Trustee's first Social Responsibility Charter which outlines our commitment to engage with, and enhance the lives of, our customers, staff and the community.
13. The Public Trustee's Financial Independence Pathway is a new program which has been implemented to assist our customers who seek to have more control over their money, with the aim of achieving financial independence. More information on the program is provided later in this response.
14. The Public Trustee has participated in an important Australian Research Council research project into decision-making for people with cognitive incapacity, over the past 18 months. As a result, we have implemented an evidence-based Decision-Making Framework designed to support customers and their support networks to reach more collaborative and outcomes-focused decisions, aligned to the *Guardianship and Administration Act 2000*, the *Powers of Attorney Act 1998* and the *Human Rights Act 2019*.
15. The Public Trustee appreciates the findings of the Report and the efforts of the Public Advocate in completing the Report. The Public Advocate's findings will support the Public Trustee to advance its Customers First journey. We are pleased to note that actions are already progressing to address many of the recommendations, including an independent and comprehensive review of the Public Trustee fees and charges.
16. To assist in understanding the issues and findings raised in the Public Advocate's Report, the Public Trustee would like to give some additional clarification and context in relation to some findings and recommendations, including the conduct of the inquiries.



## Process of Inquiries

17. The Report is based on a very limited number of case studies and feedback the Public Advocate has received and, as a result, should not be generalised and assumed to be representative for all Public Trustee customers.
18. Similarly, some of the case studies referenced in the Report are quite dated. For example, the case study of Beryl is from 2013 which is not reflective of the current practices or views of the Public Trustee.
19. The level of shared understanding of the industry environment is another important consideration in the interpretation of the issues contained in the report. The Public Trustee offered to engage an independent industry expert to provide advice on a number of matters raised in the Report, including the investment practices, to support a shared understanding of the technical and unique environment in which financial administrators operate. While this offer has not been taken up, there does appear to be some different assumptions or understanding of the environment in which financial administrators operate or should operate in.
20. The Public Advocate's Report also does not consider in detail the financial outcomes for customers but is focused predominately on fees and charges. For example, the Report does not consider in detail the returns on investments made on behalf of customers or benefits from the Public Trustee's appointment but is focused predominately on fees and charges. While fees and charges are an important consideration, the financial outcomes for customers are also a key factor in determining reasonableness for customers.
21. In addition, the Public Trustee is mindful that the Public Advocate's Report does not only consider systemic issues but may also be viewed to venture into some operational matters. This is reflected in a number of the recommendations that focus on operational matters such as:
  - a. Recommendation 7: Review Community Service Obligations
  - b. Recommendation 9: Limit the level of Community Service Obligations
  - c. Recommendation 12: Improve transparency of Public Trustee revenue sources
  - d. Recommendation 14: Limit the amount of Public Trustee surpluses and reserves
  - e. Recommendation 16: Review and update the Prudent Person Rule Manual
  - f. Recommendation 17: Publish the Prudent Person Rule Manual
  - g. Recommendation 26: Review Official Solicitor policies and practices.
22. Overall, the Public Trustee appreciates the Public Advocate's findings and recommendations as they will support the Public Trustee to advance its Customers First journey. As indicated earlier, we are pleased to note that actions are already progressing to address many of the recommendations, including an independent and comprehensive review of the Public Trustee fees and charges.

## Customers First Agenda – The Way Forward

23. While the Public Trustee supports thousands of customers each year, it is clear from the Public Advocate's Report that there are opportunities for us to do better for our customers, our staff and the community.
24. Since the appointment of the Acting Public Trustee, the agency has been on a transformative journey to become a more modern, customer-centric and transparent agency – our Customers First Agenda.
25. The Customers First Agenda is based on Queensland's important human rights reforms and the Public Trustee becoming a more modern, socially and financially responsible service that values human rights, puts the customer first and continues to embed greater levels of trust, transparency and engagement.
26. The Customers First Agenda is about putting the customer at the centre of all that we do and aims to deliver:
  - a. customer-centric, fair and equitable experiences;
  - b. socially responsible services;
  - c. an agile and responsible organisation that optimises opportunities for improvement;
  - d. engaged, empowered and connected people; and
  - e. ethical and fiscally responsible leadership and governance.
27. To further build on customer and community confidence, a Customer Reference Group and Government Reference Group have been established to provide strategic advice, insights and guidance to the development of the Customers First Agenda. Representatives on these groups include key external customer stakeholders, and representatives from Queensland government agencies.

28. The Customer Reference Group engages key external stakeholders to ensure that the voice of the customer is considered, to share information, provide advice, analyse trends and issues, and discuss insights about the quality of service and potential impacts on customers. The following organisations have been invited to participate on the Reference Group:
  - a. Ageing and Disability Advocacy Australia
  - b. Council on the Ageing (COTA) Queensland
  - c. Queensland Advocacy Incorporated
  - d. Centacare (Group Housing, Disabilities, Seniors)
  - e. Queensland Alliance for Mental Health
  - f. QLD Disability Advisory Council – Regional representative
  - g. St Vincent de Paul Society
  - h. Micah Projects
  - i. Carers Qld
  - j. Endeavour Foundation
29. Similarly, the Government Reference Group provides engagement across key Queensland Government agencies through the provision of strategic advice and insights, and guiding the development and implementation of the Customers First Agenda. The Government Reference Group members are senior officers from:
  - a. Department of the Premier and Cabinet
  - b. Queensland Treasury
  - c. Department of Justice and Attorney-General
  - d. Crime and Corruption Commission
  - e. Department of Communities, Disability Services and Seniors
  - f. Queensland Integrity Commissioner
  - g. Public Advocate
30. Four internal working groups were also established to develop and implement evidence-based action plans as part of the Customers First Agenda. These groups are guided by the Customer and Government Reference Groups, and are made up of Financial Services, Product and Services, People and Culture, and Trust and Transparency.
31. The Public Trustee has implemented a customer-focused functional structure. The structure separates customer service delivery and corporate service delivery from strategy and planning, and financial functions. Four geographic regions have also been established across Queensland: North, Central, SEQ South and SEQ East. Borders of the regions were modified to ensure better alignment with offices outside of the south east corner, and to balance staff numbers and customer volumes. This represents a significant change to drive enhanced regional service delivery led by experienced, customer-focused senior officers.
32. The Public Trustee has also established a National Redress Scheme Unit to assist customers who have experienced institutional child sexual abuse to make a claim through the National Redress Scheme. The Unit actively supports customers who are thinking about applying for redress to understand what support services are available to them as well as help guide them through the whole application process.
33. To guide the strategic direction of the agency, the Public Trustee launched its Social Responsibility Charter and Strategic Plan 2020 – 2024 in July 2020.

## Case Study: Social Responsibility Charter

Being socially and fiscally responsive, making decisions that enhance the dignity, rights and interests of Queenslanders, and continuous improvement are just some of the core principles of the Public Trustee's customer commitment outlined in the agency's first Social Responsibility Charter.

The needs of our customers, the people of Queensland, and particularly those experiencing vulnerability, must always be at the core of our service delivery.

Public Trustee employees use the key principles that our corporate social responsibility is based upon. These are:

**Customers First:** We are responsive and treat our customers with respect while making a positive difference to the lives of Queenslanders. Our customers are at the centre of all we do.

**Leadership:** We value diversity and our employees are safe and respected. We are focused on continuous improvement.

**Integrity:** We are open and transparent, ensure good corporate governance and we act ethically at all times.

**Financially Responsible:** We are efficient and financially responsible, only charging customers for the services they require. Our fees and charges are transparent.

**Care for the Community:** We are inclusive with our customers and their support network and we contribute to our communities through our work.

**Engagement:** We engage meaningfully with the community to improve quality of life for Queenslanders.

Combined with our Strategic Plan, the Social Responsibility Charter delivers on our vision to provide security and peace of mind for Queenslanders and to provide respected, valuable services for the Queensland community into the future.



34. To support customers and their support network, the Public Trustee has published its fees and charges on its public website in an easy to read format. This is supported by case studies to provide context and assist customers to identify the fees that may be charged in their individual circumstances.
35. The Public Trustee's Financial Independence Pathway is helping our customers to have more control over their money with the aim of achieving financial independence. The Public Trustee has established a Structured Decision-Making Framework to enable front-line staff to deliver services aligned to and in compliance with the *Human Rights Act 2019*, and the recent changes to the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*.
36. The Public Trustee has changed the way it delivers some services to allow customers to engage with the Public Trustee through alternative channels. This includes providing customers with the option to have Will appointments by phone, or by video conference at some locations.
37. As part of the Customers First Agenda, the Public Trustee is undertaking a range of initiatives to build on the culture of the organisation. This work includes the development of a cultural framework. Consultation will occur with external stakeholders such as the Public Service Commission.
38. The momentum from the Customers First journey will continue into 2021 as the Public Trustee:
  - a. undertakes a comprehensive and independent review into our fees and charges to provide greater clarity on our fees and charges and provide assurance to our customers that our fees and charges are fair, reasonable and sustainable
  - b. embeds a Structured Decision-Making Framework to support our staff to act in accordance with the *Human Rights Act 2019* and the General Principles within the *Guardianship and Administration Act 2000* and *Powers of Attorney Act 1998*
  - c. establishes a Legal Expert Transformation Panel to provide the Official Solicitor – Customer Legal Services with a pathway to seek guidance in relation to practice management and ethical issues (including billing)
  - d. embeds an Independent Complaints Review Process which allows for our customers to lodge a complaint with a third party if they believe a complaint was not handled adequately by us
  - e. launches its Accessibility, Inclusion and Diversity Plan 2021 – 2025
  - f. adopts a learner-improver culture across all aspects of our work to empower our people and ensure knowledge is shared effectively to make meaningful changes within the organisation
  - g. continues to roll out the Queensland Civil and Administrative Tribunal (QCAT) Referral Panel to assess and approve any applications to QCAT for greater transparency in decision-making and allowing greater opportunity to recognise systemic issues and reduce costs.
39. The findings from the Public Advocate's report will help to inform the next phases of the Customers First journey.

## Background

40. Our customers come from all walks of life and from across all areas of the state. Our services and programs are fundamentally aligned to the notion that the Public Trustee is uniquely placed to make a positive difference to the lives of Queenslanders.
41. We are mindful of our responsibilities to our customers and their communities. The Public Trustee supports customers to meaningfully engage with the guardianship system and support their independent and positive engagement with the community.
42. The Public Trustee provides financial administration support to more than 9,600 Queenslanders with impaired decision-making capacity. More than 60 per cent of customers identify as living with an intellectual disability or living with a psychiatric disability.
43. The Report notes that it is focused on a very small cohort of our customers, noting that the vast majority of Public Trustee customers enjoy a high level of service for very little cost. The Public Trustee estimates that the report's scope focuses on around 418 customers, or approximately 4 per cent of financial management customers. However, we are committed to providing a high level of service to all customers.
44. The Public Trustee works with its customers to understand their financial needs and develop budget solutions that are appropriate for their individual circumstances.
45. The appointment of the Public Trustee as financial administrator can be challenging for our customers. The decision to appoint the Public Trustee is made by the Queensland Civil and Administrative Tribunal (QCAT) or the Courts.
46. In 2019 – 2020, the Public Trustee launched its Steps to Financial Independence, a program that supports our frontline staff to educate, support and empower our customers to manage their money to a greater capacity.

47. The Financial Independence Pathway helps our customers to learn and practice the skills needed to manage their own finances by teaching them how to create and manage their own budget as well as pay some of their own bills. This initiative is also helping to identify more customers who may be guided and who are capable of being transitioned to managing their own finances.

## Case Study: Financial Independence

### **Richard, who has a cognitive disability, has worked with his support network and his Public Trust Officer to gain financial independence.**

When the Public Trustee was appointed by QCAT to support Richard in making decisions about his finances, he began working with his Public Trust Officer and broader support network to manage his budget.

After just one year of support and assistance from his Public Trust Officer, QCAT recommended the Public Trustee give Richard more control over his money.

Richard was very excited about the possibility of regaining his financial independence. Richard was supported to set up a savings account, internet banking and gain an understanding of how to manage his budget.

With increasing confidence, Richard was able to apply to QCAT to regain full control of his finances. Richard explained to QCAT how he was managing his money, including his personal expenditure.

QCAT found that Richard was now able to manage his own money and that he knew how to ask for help if he needed it.

Richard's case is a great example of what can be achieved when the Public Trustee works with a customer towards a common goal to increase their control of their financial wellbeing.

## Fees and Charges for financial administration customers

48. As a Public Service Office, it is important that the Public Trustee's fees and charges are fair and reasonable, but also sustainable. In determining its fees and charges, the Public Trustee must consider the type and complexity of the service performed, and the degree of care, responsibility, and knowledge required to perform the service.
49. The Public Trustee operates in a complex environment. We have more than 9,000 financial management customers who are often Queenslanders experiencing vulnerability, and we must carefully balance the customers' needs with our obligations to them.
50. The financial decisions we make on behalf of our customers are supported by specialist advice and expert knowledge, both internal and external to the organisation, to make sure that we are achieving the best possible outcomes.
51. It is acknowledged that our fees and charges model can be complex. Part of this complexity has been driven by trying to make the fees and charges as equitable as possible, ensuring customers only pay for services they use.
52. The Public Trustee does not agree with inferences throughout the Report that customers may be double charged or charged fees for no service. The Public Trustee's fees and charges are in line with industry standards and are reflective of the costs involved in providing financial administration services to our customers.
53. To support our customers and their support network, we have published our fees and charges on our public website in an easy to ready format. This is supported by case studies to provide context and assist our customers to identify the fees that may be charged in their individual circumstances. We are also currently developing different channels to convey information via easy to understand media such as videos.
54. The Public Trustee is also developing a fees and charges ready reckoner to further support our customers to understand individual fees.
55. To ensure that our fees and charges are fair and reasonable, the Public Trustee undertakes regular benchmarking to provide confidence that we are in line with the industry. Benchmarking by an independent expert consultant found that the Public Trustee's charges were relatively low and had comparable fees compared to other jurisdictions for many of our customers. The Public Trustee has commissioned additional benchmarking so as to ensure that a comparative analysis of its fees and charges on specific groups identified in the Public Advocate Report are also taken into consideration.
56. More than 82 per cent of the Public Trustee's financial management customers receive reduced fees or fully rebated fees through Community Service Obligations (CSOs). The funding of Public Trustee's CSOs is assisted by the revenue it receives from its corporate investment activities.
57. Despite our generous CSOs, it is acknowledged that the current fees and charges model may have unintended outcomes for a small group of customers.
58. The Public Trustee is undertaking a comprehensive review of all its fees and charges to ensure that they are fair, reasonable, sustainable, efficient and cost effective for our customers. The independent review will include customer and stakeholder consultation as part of the process.



## Increases in Fees and Charges and cross-subsidisation

59. The Public Advocate is of the view that the Public Trustee has been increasing its fees for financial management customers to cover the rising cost of CSOs and to offset declines in revenue in other parts of the business.
60. The Public Trustee does not agree with the conclusions of the Public Advocate.
61. Fees and charges have only increased by the Government Indexation rate set by Queensland Treasury since the current fees and charges model was introduced. In 2019–20, the fees and charges were increased by 1.8 per cent in line with the broader Government.
62. The Public Trustee uses Activity Based Costing (ABC) to determine the viability of its service lines, including financial management and deceased estates etc.
63. ABC in Public Trustee is based on full cost recovery. It is used to assist senior management to make informed decisions about the cost recovery of service lines and can be used for comparisons between individual offices and trends over time. Its use is intended as one tool among many to assist with informed decision-making.
64. The ABC accounts for staff working a full 7.25 hour day.
65. Staff time is split among a number of activities, some of which includes non-fee earning activities such as training and personal development. These are included in the cost calculation much in the same way as overheads are, because while they may not directly count towards the fee-earning activity, they still form a part of the cost to the business to deliver the service.
66. The ABC, which was provided to the Public Advocate, shows that the Public Trustee made a loss of \$43 million on financial management services over the last six years, and even after including income from managing financial management customer funds, the Public Trustee has made a loss of \$6 million over the last six years.
67. This shows that the services to financial management customers is in fact being subsidised by the revenue earned by other parts of the business such as unclaimed money and real estate.

## Community Service Obligations

68. The Public Trustee's Community Service Obligations (CSOs) are an important part of protecting the rights and dignity of some Queenslanders experiencing vulnerability, while also giving back to the community.
69. Our CSOs have helped countless Queenslanders over the years and have been supported by successive Queensland Governments.
70. The Public Trustee's CSOs have grown to a record \$38.4 million in 2019–20 which has been funded by the agency without relying on appropriation from the Queensland Government. This has been possible through the Public Trustee's sound financial management and prudent investment decisions within the Common Fund.
71. The Public Trustee provides CSOs to more than 82 per cent of its financial management customers to assist with fees and charges, and in some cases legal fees and outlays. For example, fees are rebated for financial management customers where the Public Trustee's fees and charges would be more than five per cent of the adult's assets. For the purposes of this automated CSO calculation, any fees charged by the Official Solicitor – Customer Legal Services are not included.
72. Customers who qualify for a CSO pay on average \$1,888 per year for financial management services.
73. The Public Trustee also has financial hardship provisions to support customers when they need it most.
74. The financial hardship provisions are broad and can include rebating any of the Public Trustee's fees including legal fees and outlays.
75. While the Public Trustee's financial hardship provisions are broad, there are some expenses which are outside of the Public Trustee's control and cannot be rebated. For example, outlays for services from external service providers and costs associated with maintaining the customer's property.
76. The Public Trustee works closely with all customers, including those experiencing financial hardship, to minimise the use of external providers wherever possible. However, the safety, wellbeing and interests of our customers is paramount. That is why sometimes it is necessary to continue to incur maintenance, security or safety expenses to ensure a customer can remain comfortable and safe in their own home.
77. The Public Trustee cares for its customers and it is anticipated that there will be an ongoing need for generous CSOs now and into the future. The independent fees and charges review will consider the current CSO arrangements, including funding method, to ensure it is sustainable, cost effective and beneficial for our customers.



## Financial outcomes for customers

78. The Public Trustee's fees and charges is only one part of the story. The Public Trustee plays many roles as financial administrator ranging from advocate for our customers' entitlements, investigator for misappropriations, through to mediator.
79. By way of example, the case study of Ella highlights the importance of considering the financial outcomes for customers. Ella was charged \$9,601 (excluding outlays) per year to manage her assets of \$1.2 million, which equates to just 0.8 per cent per annum.
80. However, the majority of the Public Trustee's customers do not have substantial assets, including superannuation, such as in Ella's case. In fact, it is often the case that the Public Trustee is appointed at a time when the customer is already going through difficult financial times.
81. As financial administrator, the Public Trustee has a duty to ensure that customers receive their correct government benefits e.g. Centrelink. We consult with our customers and review their circumstances to ensure the various government entities have the correct information to provide our customers their entitlements.
82. In 2019 – 2020 alone, the Public Trustee successfully advocated for the recovery of more than \$860,000 in Income Support Payments and Aged Care Fee adjustments on behalf of our customers.
83. In addition, each year the Public Trustee successfully advocates on behalf of its customers to have debts waived where the customer is not able to pay, or where the debt has been the result of financial abuse against the customer.
84. In 2019 – 2020, the Public Trustee opened 120 family provisions investigations — seeking an adequate provision from a deceased estate where none may have been made — advocating for the human right of our customers to recognition and equality before the law.
85. We also instigated 50 investigations relating to the potential misappropriation of our customers' funds, often by those charged with their care. These actions are necessary to ensure our customers' rights, dignity and future opportunities are protected.
86. The Public Trustee actively works with customers and their support network to develop a budget that meets their individual circumstances. This includes discussions as to the prudent use and investment of their assets.
87. Through the Public Trustee's investment in the Public Trustee Common Fund, customers typically benefit from returns higher than the four major Australian banks for deposits with the same terms and conditions. This income supports our customers to meet their needs and aspirations.
88. Unfortunately, in some cases, a customer may have expenses which exceed their income and difficult decisions must be made. While the Public Trustee's preference is always to support a customer to remain in their home, this isn't always possible.
89. Over the last year, the Public Trustee has supported financial management customers to sell their property on 17 occasions. In four of these cases, the property was sold as the customer had entered aged care, either voluntarily or following a decision by the Public Guardian. In a further ten cases, the customer, their family or private guardian either requested the property be sold or supported and/or agreed with the sale. In one case the property was not the customer's home, rather the property was inherited in an estate. In the remaining two cases the Public Guardian made the decision for the customer to move out of their home.
90. The Public Trustee is exploring options to further reduce the number of instances of customers being required to sell their homes or assets to meet their needs.
91. As a learning organisation, the Public Trustee recognises that while it achieves many positive financial outcomes for its customers, there may be instances where there may be unintentional negative outcomes.
92. That is why the Public Trustee is undertaking a comprehensive review of all fees and charges, which will consider the net outcomes for customers after CSOs. We remain committed to a continuous improvement approach to our service delivery to ensure that we remain relevant, sustainable, efficient and cost effective for our customers.

## Case Study: Positive Financial Outcomes

**Gary is a young man who prematurely retired from work due to disability. At the time he stopped work, Gary had \$2,700 in his bank account, \$2,000 in superannuation, and approximately \$20,000 in debts.**

The Public Trustee was appointed as Gary's financial administrator in 2015.

The Public Trustee sought an initial Statement of Advice from its expert financial advisor at a cost of \$176. As part of the advice, it was identified that Gary may be eligible to make a Total and Permanent Disability claim (TPD claim) on his superannuation.

A claim process was initiated in 2015 when the Public Trustee referred Gary's possible TPD claim to an insurance claim specialist. The TPD claim was successful, and in March 2018 the Public Trustee was advised that a lump sum of \$120,748 would be paid to Gary's existing superannuation fund.

The external cost of the TPD claim was \$11,000 (GST inclusive).

The Public Trustee obtained expert financial advice regarding the use of the net funds received from the TPD claim. The financial advice recommended repaying Gary's debts, paying a car loan and legal fees, and investing the remainder in superannuation and the PT investment account.

During the time the Public Trustee was appointed as Gary's financial administrator, the Public Trustee provided a number of services which significantly benefited Gary including:

- undertaking considerable work with Gary and Centrelink to have his Disability Support Pension and entitlements granted
- assisting Gary to communicate with Centrelink about changes in Gary's circumstances, ensuring the correct entitlements were being received for Gary, including rent assistance.
- monitoring the arrangement of paying off Gary's debt with the State Penalties Enforcement Registry.

During the time the Gary was a customer of the Public Trustee, he was charged approximately \$21,830 in Personal Financial Management fees and \$1,031 in Asset Management Fees. Gary benefited from generous CSO rebates of approximately \$17,335 which meant his out of pocket expense to the Public Trustee, including outlays, was only around \$6,741.

The Public Trustee was supportive of Gary recovering management of his own financial matters once his TPD claim was resolved. The Public Trustee arranged for Gary's pension to be paid directly to him, to assist Gary in demonstrating his capacity to manage his own finances to QCAT.

As a result of the Public Trustee's prudent financial management, Gary left the Public Trustee in January 2019 in a significantly improved financial position as a result of the successful claim. Having come to the Public Trustee with approximately \$2,700 in cash, \$2,000 in superannuation and debts of \$20,000, Gary left with approximately \$97,000 in cash and superannuation after the payment of his debts.

# The Public Trustee's fiduciary, statutory and professional obligations

93. As noted earlier, the Public Trustee operates in a highly complex environment that is governed by multiple pieces of state and federal legislation, as well as the common law.
94. Staff at the Public Trustee have additional duties over and beyond those of other professional administrators and attorneys. As Public Service employees, Public Trustee staff must comply with the Code of Conduct, the *Information Privacy Act 2009* and the *Human Rights Act 2019*.
95. When undertaking investments on behalf of its customers, the Public Trustee must comply with the duties set out in Part 3 of the *Trusts Act 1973*. These duties are commonly called the Prudent Person Rule (PPR).
96. The PPR is a legal requirement for an administrator or attorney making financial decisions to ensure investments are made in line with what a person seeking reasonable income and preservation of capital might undertake for his or her own portfolio.
97. The majority of the Public Trustee's customers under financial management have limited means, and as such, their assets are managed under the Public Trustee's Customer Investment Strategy (CIS).
98. The CIS focuses on investments on behalf of its customers that support wealth preservation rather than wealth accumulation.
99. The CIS provides a framework for investing assets for customers who have less than \$450,000 in assets (excluding their principal place of residence). Under the CIS, a customer's assets are invested in the Public Trustee Common Fund and the Public Trustee Growth Trust.
100. The CIS is based on the bucket strategy pioneered by US financial planning expert, Harold Evensky, in 1985 together with liability matching investing.
101. Bucket strategies are designed to balance the need for income stability and capital growth. The overarching goal is to ensure a customer's financial security, while providing the flexibility to make lump sum withdrawals for expenses when needed. Bucket strategies are still used by respected financial planning experts and are supported by considerable academic research.
102. The CIS has recently been independently reviewed and assessed as appropriate and consistent with best practice.
103. It is important, however, to note that the CIS is not automatically applied. Each customer's individual circumstances are considered to determine if the CIS is right for them. In some cases, this means the Public Trustee needs to obtain expert financial advice to provide the customer and their support network with the assurance that the CIS is right for them or to make informed decisions about the alternatives. For example, sometimes it may be more advantageous to the customer to invest their money into superannuation.
104. The Public Trustee may also need to obtain expert financial advice where the customer has assets such as superannuation (including non-compliant self-managed superannuation), shares or equities. Even a small amount of superannuation or shares may require external advice for a variety of reasons.
105. For many people, superannuation is their largest asset other than the family home, which is why it is important that it is managed appropriately. It is acknowledged that the Public Advocate raises concerns about superannuation being classified by the Public Trustee as a complex asset.
106. The interaction between superannuation, tax and pension eligibility is complex, meaning that many Australians struggle to engage with their superannuation accounts and utilise them effectively. It is for these reasons that the Public Trustee considers it important to obtain expert financial advice on behalf of customers when appropriate.
107. For the majority of customers, expert financial advice will only be obtained initially to confirm the CIS or treatment of assets such as superannuation, shares or equities. Further expert financial advice may only be required again if there is a significant change to the customer's personal circumstances.
108. The Public Trustee acknowledges the Public Advocate's views about the Public Trustee's practice of obtaining external expert financial advice. However the Public Trustee takes the view that it is reasonable to get an expert assessment as to whether the default path of the CIS is the right investment strategy for customers, and in turn for customers to be provided with the peace of mind that the CIS is right for them.
109. To bring this service in-house to the Public Trustee would result in the need for additional research capabilities, specialist staff, and specialised financial planning and compliance systems, that would result in higher costs for customers.
110. The Public Trustee is committed to continuous improvement and implementing changes that will advance our customers' interests. The CIS was recently independently reviewed. It was found to be consistent with industry standards, and only minor changes were recommended, that reflected the current economic and financial environment. These recommendations were implemented to ensure the strategy is exceeding financial standards.

111. The Public Trustee is also undertaking a review of its Prudent Person Manual to ensure it reflects current requirements and aligns with prudent investment strategies. The Public Advocate's findings will be considered as part of this review.

## Expert Financial Advisor

113. The Public Trustee has negotiated an agreement with an Expert Financial Advisor to provide professional financial planning services at a significantly discounted cost for its customers.

114. The Public Trustee is committed to charging customers only for services that are of a benefit to them. That is why only approximately 10 per cent of the Public Trustee's 9,500 financial management customers received financial advice from an Expert Financial Advisor.

115. For example, not all customers with complex assets are referred for financial advice. The Public Trustee has 1,350 customers with superannuation and, of those, only 750 had a Statement of Advice (SOA) from an Expert Financial Advisor completed in the 12 months to February 2020. Approximately half of customers are not receiving an SOA because their superannuation has been reviewed and does not require further advice.

116. An initial SOA ranges from \$341 to \$880 for highly complex matters, and the annual review fees ranges from \$176 to \$495.

117. This is contrasted with the private sector, which according to research by Investment Trends, the average amount charged to a customer for full financial advice is \$2,700 (where the average assets were \$700,000). Further, the ongoing advice fee for customers with \$500,000 in assets is approximately \$2,500, while for customers with assets of between \$250,000 to \$500,000, the ongoing advice fee is approximately \$2,200.

118. The Public Trustee acknowledges the Invitation to Offer process for the engagement of the Expert Financial Advisor does not reflect current best practice and could lead to confusion.

112. It is acknowledged that it is timely that the Public Trustee reviews its current arrangement for obtaining expert financial advice. The Public Trustee will be undertaking a formal procurement process for expert financial advice services in 2021.

119. It has never been the intention of the Public Trustee to delegate its duty to comply with the Prudent Person Rule to a financial advisor. It has always been the Public Trustee's view that this responsibility lies with the Public Trustee.

120. The Public Trustee makes investments for financial management customers in a way that promotes and safeguards the rights, interests and opportunities of our customers. In line with the General Principles, customers are involved in making and participating in decisions regarding their investments to the greatest extent practicable.

121. The Report puts forward that the recommendations of the Expert Financial Advisor are not individualised. This is incorrect.

122. The Expert Financial Advisor is required to comply with the duty for financial advisors to act in the best interests of the customer and place the interests of the customer ahead of their own when providing advice.

123. This means the focus of the financial adviser is always on the customer, not how that investment might impact the Public Trustee's revenue as the Report may suggest.

124. The purpose of the Customer Investment Strategy and grouping customers into investment categories is to achieve economies of scale, and to ensure that customers have access to funds when needed.

125. For example, investing customer funds in the Public Trustee Term Investment Account ensures that funds can be quickly accessed if required.

126. The Public Trustee will be undertaking a procurement process in 2021, and the benefits of establishing a panel of financial advice service providers, as against having a single provider, will form part of the considerations for the procurement process. The decision will be informed by the cost of services to be provided to the customer.

127. The Public Advocate's views will help to inform this process.

## Total and Permanent Disability Claim

128. The Report discusses the case study of Gary who was supported by the Public Trustee to make a Total and Permanent Disability (TPD) claim.
129. The Public Trustee appreciates that many superannuation providers endeavour to make the TPD claim process as simple as possible. In practice, this can be a time consuming and lengthy process.
130. As part of the process to pursue a TPD claim, the insurer may require:
  - a. tax return and assessment notices
  - b. specialist medical reports
  - c. additional medical reports
  - d. independent medical examination
  - e. clinical records
  - f. workers compensation records
  - g. Centrelink records
  - h. Pharmaceutical Benefits Scheme/Medicare records
  - i. Employer information.
131. The definition of a TPD claim can vary from provider to provider. For example, it may be defined as “unable to work”, or “unlikelihood to ever return to work” etc.
132. Gathering all this information can be a difficult and time-consuming process. In many cases, the Public Trustee does not have access to all of the customer’s information that is required for a TPD claim. The Public Trustee has found that it is more cost effective and efficient to engage an insurance claim specialist to ensure that the customer’s TPD claim can be processed as quickly as possible.

## The Official Solicitor

133. The Public Trustee’s appointment as financial administrator can often come at a challenging time in our customers lives. Sometimes, the Public Trustee needs to obtain expert legal advice to support our customers through this period.
134. For example, the Public Trustee can be appointed during times of family conflict where there may be suspected financial abuse. In 2019–20, the Official Solicitor opened 50 legal files relating to misappropriation of funds.
135. The Official Solicitor has been a critical function of the Public Trustee since its inception.
136. The Public Trustee has made some significant changes to the Official Solicitor since the Public Advocate’s inquiries commenced. This includes the separation of the Official Solicitor into the Official Solicitor — Corporate Legal Services and the Official Solicitor — Customer Legal Services.
137. The separation of the legal services in this way minimises the risk of conflicts of interest, while ensuring the Official Solicitor — Customer Legal Services’ focus is on the delivery of customer-centric legal services.
138. The advice provided by the Official Solicitor - Customer Legal Services is for the sole purpose of advancing the rights and interests of the customer.
139. As noted by the Public Advocate, the Public Trustee in its representative capacity is the ‘client’ of the Official Solicitor — Customer Legal Services.
140. It is important to note that the Public Trustee’s lawyers cannot act on the instructions of a person with impaired decision-making capacity. Therefore, it is necessary for the Public Trustee as representative for the customer to be the ‘client’ rather than the end customer.

## Fees

141. The Official Solicitor fees are required to be fair and reasonable based on the nature and complexity of the service, the number of documents perused or prepared, the level of skill and specialist knowledge required, and the time spent on the service.
142. That is why the Official Solicitor Fees are regularly independently reviewed and benchmarked against the fees charged by other private and public organisations. The Official Solicitor Fees are below standard market rates for a mid-tier law firm.
143. The Public Trustee has recently published the hourly rates for its lawyers on the Public Trustee’s website to increase transparency.
144. It is recognised that in some cases a customer may benefit from legal advice but have limited funds available. This is why the Public Trustee has generous Community Service Obligations and financial hardship provisions. This includes the discretion to waive some, or all, legal fees for a customer.
145. We have also introduced a new process to empower our frontline Trust Officers to query the invoices of the Official Solicitor — Customer Legal Services. This is an added layer of scrutiny to provide assurance to our customers and stakeholders that they are only being charged reasonable fees for the work involved.

146. As part of its ongoing commitment to continuous improvement, the Public Trustee has committed to establishing a Legal Expert Transformation Panel to provide the Official Solicitor – Customer Legal Services with a pathway to seek guidance in relation to practice management and ethical issues.
147. A key priority for the Legal Expert Transformation Panel will be to provide guidance on the billing practices to ensure that customers are only charged for legal work that is required to be undertaken for the customer.
148. In addition, Official Solicitor fees are being considered as part of the comprehensive independent review of the Public Trustee's fees and charges.

## The interests of the customers

149. The Public Trustee is committed to enhancing and protecting the rights, dignity and interests of our customers.
150. As part of the Public Trustee's Structured Decision-Making Framework developed in alignment with the *Guardianship and Administration Act 2000*, the *Powers of Attorney Act 1998* and the *Human Rights Act 2019*, the customer now has greater involvement in legal decisions that affect them.
151. In addition, the Official Solicitor – Customer Legal Services is proactive in challenging instructions if they are considered unnecessary or contrary to the customers interests.
152. The Public Trustee is in the process of establishing legal panels for family law, property claims, personal injuries claims, total and permanent disability claims, dust disease claims, and the National Redress Scheme.
153. The Public Trustee has also established a Queensland Civil and Administrative Tribunal (QCAT) Referral Panel as an additional internal decision point for more complex or difficult customer matters. The Panel determines if an application to QCAT is necessary and appropriate, to ensure unnecessary costs are not incurred and to identify any systemic issues.
154. The Public Trustee is committed to transparency and providing customers with the information that will support them. However, as noted by the Public Advocate, there are situations where it would not be in the customers' interests to provide them with a copy of the legal advice obtained by the Public Trustee. For example, the Public Trustee may be seeking legal advice about potential financial abuse against a customer by a member of the customer's support network.
155. The Public Trustee is committed to supporting its customers and increasing transparency. The Official Solicitor – Customer Legal Services is investigating options to share the legal advice with the customer in a way that will not adversely impact the customer. Options include arranging for the customer to see the advice at the Public Trustee offices.
156. As part of the Public Trustee's role in supporting the guardianship regime and the customer, the Public Trustee must also support QCAT to make the most appropriate decisions for the customer by providing all relevant material to QCAT.
157. This information may not always be information that our customer or our customer's support network wishes to be placed before QCAT. Further, lawyers from the Official Solicitor's Office have duties under the Australian Solicitors' Conduct Rules which must be adhered to when the lawyer is drafting submissions to, or appearing before, QCAT.

## Professional oversight of the Official Solicitor

158. Lawyers of the Official Solicitor are subject to the same professional oversight as other public servants, including Crown Law solicitors.
159. In addition, government lawyers can be referred to the Legal Services Commission if a complaint is made by another lawyer or the Chief Executive Officer of the agency.
160. However, to provide customers with greater confidence in its legal services, the Public Trustee is currently exploring options to require all lawyers of the Official Solicitor to hold a current practising certificate. They would then fall within the jurisdiction of the Legal Services Commissioner.
161. Currently, the Official Solicitor — Customer legal Services and Official Solicitor — Corporate Legal Services hold current practising certificates.
162. In addition, the Public Trustee will establish a Legal Expert Transformation Panel which will provide a pathway for the Official Solicitor — Customer Legal Services to seek guidance in relation to practice management and ethical issues (including billing).



# The Operations of the Public Trustee

163. Throughout the Report, the Public Advocate raises concerns about the self-funding model of the Public Trustee, particularly in relation to Community Service Obligations (CSOs) and the impact on fees and charges for customers.
164. As noted in the Report, the Public Trustee has been self-sufficient for more than 100 years, supporting thousands of Queenslanders at no expense to the taxpayer.
165. The Report highlights some of the challenges being faced by the Public Trustee with increasing demand for CSOs, challenging interest rate environment, and a decrease in some services. However, the Public Trustee does not support the argument that financial management customers are subsidising other parts of the business.
166. As noted earlier, the Public Trustee has only increased fees and charges in line with the whole-of-government indexation rate.
167. It is acknowledged that many customers are reliant on pensions which have grown at a slower rate than the indexation rate. The Public Trustee would support any moves by the Federal Government to increase pension rates. However, in the meantime, we will continue to support and care for our customers through our generous CSOs.
168. The Report highlights that we need to be more innovative and agile to ensure our ongoing financial sustainability. Through the Customers First Agenda we are doing just that.
169. As part of Customers First, we are focusing on smarter investment strategies, better efficiencies, and new business opportunities. By doing this, and responding to changes in the economic environment, it is not inconceivable that the Public Trustee could be self-sufficient for a further 100 years.

## Oversight and accountability

170. Having operated for more than 100 years, the practices of the Public Trustee has been subject to the ongoing scrutiny of the Government of the day, the Courts, and its customers.
171. The Public Trustee does not support the Public Advocate's review that the oversight and accountability of the agency has been lacking.
172. As noted in the Report, the Public Trustee is subject to the same rigorous oversight and accountability mechanisms that apply to other government departments and agencies.
173. While the Public Trustee does not receive appropriations from the Government, our budget is reviewed and scrutinised by the central agencies, including Queensland Treasury, and Parliament.
174. The Public Trustee must attend the annual estimates hearing and answer questions asked by the Legal Affairs and Community Safety Committee. As noted in the Report, the Committee can also review the Public Trustee's fees and charges at any time.

## Public Trustee Act 1978

175. The *Public Trustee Act 1978* has been extensively considered by the Courts, including the Supreme Court of Queensland. Further, the practices of the Public Trustee are regularly questioned and considered by QCAT.
176. The *Public Trustee Act 1978* continues to support the Public Trustee to provide essential services to Queenslanders.
177. The Public Trustee is, however, supportive of reviewing the *Public Trustee Act 1978* to ensure that it is contemporary and reflective of best practice and continues to meet the needs of the community.
178. A key priority for the Public Trustee in 2021 is to undertake an extensive review of the Act and make recommendations to the Attorney-General and Minister for Justice on potential changes.
179. It is also acknowledged that the *Guardianship and Administration Act 2000* does not expressly provide for the Public Trustee to be an appointment of last resort. However, in practice, the Public Trustee is often the appointment of last resort as there are either no family or friends willing or able to accept the appointment, or there are concerns about an adult's support network, including potential misappropriation of the adult's funds.

## Transparency

180. The Public Trustee supports increased transparency. Through the Customers First Agenda, we have introduced some of the highest levels of accountability and transparency in the industry.
181. We support the proactive disclosure of information to the public. The Public Trustee provides an administrative access scheme for members of the community to request information relating to Enduring Powers of Attorney, Wills, investment, executor and financial administrator services.
182. A number of actions have been undertaken to increase transparency for example:
- a. publishing the Prudent Person Rule manual
  - b. providing accessible information about our fees and charges
  - c. reviewing customer letters and statements to make them clearer, easier to understand and accessible for our customers and support networks
  - d. implementing processes for customers to review legal advice that won't risk waiving legal professional privilege
  - e. providing customers with legal invoices on request.
183. While positive progress has been made, the Public Trustee will continue to explore options to increase transparency.

## Response to recommendations

184. The Public Trustee supports in-principle most of the recommendations made in the Report. However, many of the recommendations contain imputations or inferences which the Public Trustee does not agree with.
185. The recommendations of the Public Advocate's Report will need to be considered by the Queensland Government, however, the Public Trustee's response to the recommendations is reflected in the table below and will be implemented as part of its Customers First Agenda.

# Recommendations

Recommendation	Response
<p><b>Recommendation 1:</b> <b>Undertake a full fees and charges review</b></p> <p>Review the Public Trustee's fees and charges regime for administration clients to achieve:</p> <ul style="list-style-type: none"> <li>a. a simpler fee regime for administration clients. Administration clients and their supporters must be able to easily understand the Public Trustee's fees, what services are provided for the fees, and how and when the fees will be charged;</li> <li>b. fees that are more equitable and take into account clients' financial circumstances and their level of income. All clients should pay something towards the cost of the Public Trustee services they receive. The fee regime should include a mechanism that ensures the fees payable to the Public Trustee by administration clients with limited income do not reach a level where the fees become financially oppressive and negatively impact clients' lives, deplete their assets and/or drive them into poverty;</li> <li>c. fees that reflect the actual cost to the Public Trustee of providing the services. The fees charged should not be inflated to cross-subsidise services provided to other Public Trustee clients, other organisational activities or to provide 'profit' for the Public Trustee, unless specifically permitted by legislation.</li> <li>d. no duplication or overlap in fees. Where clients have been charged an Asset Management Fee on an asset, the Public Trustee should not impose any additional charges for the management or investment of those clients' funds.</li> <li>e. cease the practice of charging administration clients' fees on assets (such as superannuation fund holdings or other investments) managed by third parties and for which the clients are already paying management fees to those third parties. At a minimum the Public Trustee should charge a lower fee for superannuation fund holdings where it can be shown that there is annual 'active' management of the clients' funds.</li> <li>f. a fee structure that supports and encourages administration clients to exercise autonomy and lead independent lives. Administration clients should not be charged higher fees where they require more support to exercise their capacity and autonomy in relation to their financial affairs.</li> </ul>	<p><b>Partially supported in-principle</b></p> <p>The Public Trustee is committed to delivering services that are valued by the community and the Government, and to providing service excellence.</p> <p>The Public Trustee recognises the need to provide financially and ethically responsible leadership and governance to ensure that we can continue to meet our obligations to our customers and the broader community.</p> <p>The Public Trustee has committed to undertake an independent and comprehensive review of all of its gazetted and non-gazetted fees and charges. The review focuses on ensuring its fees and charges are transparent, fair, reasonable and reflective of the service provided.</p> <p>The view that there is currently duplication or overlap in fees, or fee for no service is not accepted. However, the Public Trustee is committed to providing information on its fees and charges which is clear, simple and transparent.</p>
<p><b>Recommendation 2:</b> <b>Improve the transparency of fees and charges</b></p> <p>The Public Trustee adopt the following practices to improve the transparency of its fees and charges:</p> <ul style="list-style-type: none"> <li>a. Provide clear and accessible information to administration clients about its fees and charges and the services clients will receive for those fees.</li> </ul>	<p><b>Accepted in-principle</b></p> <p>The Public Trustee is committed to placing the customer at the centre of all that we do. We endeavour to be responsive to customer enquires in relation to our fees and charges. That is why the Public Trustee is continually looking at ways to improve the accessibility of this information.</p>

<p>b. The Public Trustee's policies and manuals that guide what services administration clients receive and how the fees and charges for those services are calculated and applied be published in accessible language and format. This information should include scenario examples to clearly demonstrate the fees they will pay for that service.</p> <p>c. Public Trustee fees and charges for people under administration   29</p> <p>d. On appointment and annually, the Public Trustee send each client personal correspondence detailing the services they will receive and the fees for those services. This should also occur after any significant change to the client's financial circumstances. This communication should be written in plain English with clear explanations of terms used. All correspondence to administration clients should explain how to locate relevant fees and charges information, policies and manuals on the Public Trustee website. Where clients do not have access to the internet, the Public Trustee should make this information available in hard copy on request.</p> <p>e. Review its policies and practices to ensure they actively encourage staff to be responsive to clients and their supporters, particularly in relation to explaining its fees and charges. This is likely to improve information transparency, client participation in the management of their financial affairs and client satisfaction with Public Trustee services.</p> <p>f. The information presented in client Statements of Account be improved to make the statements more transparent and easier to understand. The statements should include summary information about categories of income and expenses and provide a total of the Public Trustee's fees and charges for the relevant period. Any special purpose or professional services payments should be the subject of separate correspondence that fully explains these costs and why they were incurred.</p>		<p>The Public Trustee website provides accessible information on its fees and charges, including case studies which assist customers to relate the fees and charges to their individual circumstances.</p> <p>We are continually looking at ways to improve how we engage with our customers. We have recently commenced a project to provide Easy English versions of some of our key correspondence. We are currently reviewing our customer correspondence, including customer statements, to ensure their readability and meet the needs of our customers and their support network.</p> <p>We will continue to support our customers to exercise their independence and autonomy in the community by working with customers to increase their financial literacy and independence.</p> <p>As part of the Public Trustee's Customers First agenda and commitment to continuous improvement, we will continue to explore options to make information about fees and charges more accessible.</p> <p>The Public Trustee has an initiative underway to publish relevant policies and manuals on its website. This has already resulted in clearer information on the Public Trustee's fees and charges, and the Prudent Person Rule Manual being published.</p>
<p><b>Recommendation 3: Consider the effect of fees when appointing the Public Trustee as financial administrator</b></p> <p>The <i>Guardianship and Administration Act</i> be amended to require a court or tribunal, when considering appointing the Public Trustee as a person's administrator, to consider the level of the Public Trustee's fees, and their likely effect on the person's financial circumstances over time. This is especially relevant when there may be an alternative appointment option of a family member or friend as administrator, who would not charge fees. The court or tribunal may need to request the Public Trustee to provide an estimate of annual fees and other usual charges and expenses associated with providing its services, prior to deciding the appointment.</p>	<p><b>Accepted in-principle</b></p>	<p>The <i>Supreme Court Practice Direction No. 15</i> of 2018 includes a Checklist for applications to the court for the sanction of a settlement for a person under a disability pursuant to S.59 of the <i>Public Trustee Act 1978</i>. Paragraph 7 of the Checklist requires that an Affidavit from the proposed administrator is filed in the Court which lists out an estimate of the fund management cost. Further, the standard format of the Order that has been issued as part of the Practice Direction specifically identifies the amount of moneys that are to be paid as management fees for the proposed administration.</p> <p>When Orders are being made by QCAT to appoint the Public Trustee as administrator, QCAT will usually only make such an appointment if there is no one else appropriate and available to accept the appointment.</p>

		Amendments to the <i>Guardianship and Administration Act 2000</i> are a matter for the Government. However, the Public Trustee would welcome the opportunity to participate in discussion around this recommendation to work towards better outcomes for its customers and Queenslanders in general.
<p><b>Recommendation 4: Reconsider the practice of routinely obtaining external financial advice</b></p> <p>The Public Trustee review its practices of routinely obtaining annual financial advice from an external financial advisor and external legal advice to make Total Permanent Disability (TPD) insurance claims under clients' superannuation arrangements. The review should consider whether:</p> <ul style="list-style-type: none"> <li>a. obtaining external financial advice for most Public Trustee clients is reasonably necessary, considering the Public Trustee's expertise as a professional trustee;</li> <li>b. obtaining the external financial advice represents value for money for clients, considering: <ul style="list-style-type: none"> <li>– the Public Trustee's conservative investment policies which limit where and how clients' funds can be invested, and the returns they</li> <li>– the relatively low value of client assets for which the Public Trustee routinely obtains independent advice;</li> <li>– the thresholds for obtaining external financial advice should be reviewed and raised significantly to ensure clients are not bearing the cost of the Public Trustee's low tolerance of risk exposure for its own decisions;</li> </ul> </li> <li>d. financial advice should generally only be obtained in relation to assets over a specified value or where clients indicate they want the advice; and</li> <li>e. after an initial external financial advice is obtained, follow-up financial advice should only be sought where there has been a change in the clients' financial circumstances or in financial markets that would justify the cost of a review of their current investments, and there is a genuine likelihood that the advice will lead to a change in the way clients' assets are invested;</li> <li>f. obtaining external legal advice routinely to make TPD insurance claims under clients' superannuation arrangements is reasonably necessary and represents value for money, considering the relative simplicity of TPD claims processes.</li> </ul>	Partially supported	<p>The Public Trustee is committed to continuous improvement and identifying opportunities to streamline processes that result in improved outcomes for customers.</p> <p>The Public Trustee has undertaken a review of its Prudent Person Rule Manual with a view to ensuring it is current and continues to reflect prudent investment practices.</p> <p>The Public Trustee continues to be of the view that obtaining external financial advice is appropriate in some circumstances to ensure the best financial outcomes for the customer are achieved.</p> <p>Developing the capacity for internal financial planners is not supported at this time. The cost of providing internal financial advice would be prohibitive and would likely lead to higher costs for customers.</p> <p>The Public Trustee is committed to undertaking a procurement process for financial advice services in 2021.</p>
<p><b>Recommendation 5: Discontinue general fees for incidental outlays</b></p> <p>The Public Trustee cease the practice of charging general fees for incidental outlays to administration clients and only charge the actual costs of these outlays on each client's file, if they are capable of being accurately costed.</p>	Accepted in-principle	Incidental outlays are being considered as part of the independent fees and charges review.

<p><b>Recommendation 6: Seek a Goods and Services Tax exemption</b></p> <p>The Public Trustee, with the support of the Queensland Government, seek a Goods and Services Tax exemption from the Australian Taxation Office on its fees and charges for administration clients.</p>	<p><b>Accepted in-principle</b></p>	<p>The Public Trustee understands that the New South Wales Trustee and Guardian obtained a Private Ruling from the Australian Taxation Office for GST exemption to charges which are recoveries and not fees.</p> <p>The same argument would not be applicable to the Public Trustee's self-funding arrangements which occur in Queensland. Nevertheless, the Private Ruling will be considered as part of the comprehensive and independent fees and charges review.</p>
<p><b>Recommendation 7: Review Community Service Obligations</b></p> <p>The Public Trustee's Community Service Obligations be reviewed, and consideration given to whether the Public Trustee's current Community Service Obligations should continue to be provided in their current form, and at current levels.</p>	<p><b>For further consideration</b></p>	<p>The Public Trustee will continue to support generous Community Service Obligations (CSOs) as we value and care for our customers and the community.</p> <p>Any decision to change the form or levels of CSOs is a matter for the Government.</p>
<p><b>Recommendation 8: Discontinue client subsidisation of Community Service Obligations</b></p> <p>The Public Trustee cease using revenue raised through administration clients' fees and charges to fund or subsidise the cost of providing Community Service Obligations on the basis that a fiduciary should not use the funds of one client to fund services to another.</p>	<p><b>Not support</b></p>	<p>The Public Trustee does not fund or subsidise its CSOs from the fees and charges of financial management customers.</p> <p>Fees and charges, including CSOs, are being considered as part of the independent review of fees and charges.</p>
<p><b>Recommendation 9: Limit the level of community service obligations</b></p> <p>The Public Trustee's Community Service Obligations should be capped at a level that can be reasonably funded from revenue earned on its investments.</p>	<p><b>For further consideration</b></p>	<p>The Public Trustee will continue to support generous Community Service Obligations (CSOs) as we value and care for our customers and the community.</p> <p>Any decision to change the form or levels of CSOs is a matter for the Government.</p>
<p><b>Recommendation 10: Review fee rebate and financial hardship provisions to ensure client assets are not depleted by fees and charges</b></p> <p>The Public Trustee review its fee rebate and financial hardship schemes to:</p> <ol style="list-style-type: none"> <li>achieve more equitable outcomes for administration clients, especially those with limited incomes, such as pensions, who own their own home. The review should consider raising the level of assets for financial hardship eligibility above \$5,000 and ending the practice of including the value of clients' principal place of residence in the value of assets for calculating fee rebates;</li> <li>ensure no administration client will experience an unavoidable depletion of assets because of the amount of Public Trustee fees they pay and the inadequacy of the rebates;</li> <li>develop a new stand-alone Fee Rebate and Financial</li> </ol>	<p><b>Accepted in-principle</b></p>	<p>The Public Trustee is committed to the financially responsible and transparent management of our customers' funds.</p> <p>The Public Trustee does not accept the inferences in the recommendation that its fees are inequitable or result in the unavoidable depletion of assets. As noted, financial management customers benefit from generous CSOs and financial hardship rebates.</p> <p>The recommendation will be considered as a part of the comprehensive and independent fees and charges review.</p>



Hardship Policy that is accessible and easy to understand to ensure that administration clients and members of the public know how the policy operates.		
<p><b>Recommendation 11:</b>  <b>Do not profit from administration clients unless expressly permitted by law</b></p> <p>As a fiduciary and financial administrator, the Public Trustee must not profit from administration client funds unless expressly permitted by legislation. Any such legislative provisions should set clear limits on the amount and purpose of any income or 'profit'</p>	<b>No action required</b>	The authorising legislation and powers of the Public Trustee have been tested for more than 100 years by entities such as the Courts, Parliament, oversight agencies and the public. As such the Public Trustee remains of the view that it has a clear mandate for its role and functions. Nevertheless, we will continue to review our operations to ensure that we continue to have strong legal and community confidence.
<p><b>Recommendation 12:</b>  <b>Improve transparency of Public Trustee revenue sources</b></p> <p>The Public Trustee improve reporting of its sources of revenue, particularly revenue earned on administration client funds so that it is clear where clients' money is being invested, the overall returns on those investments and the value of the interest differential that is being retained by the Public Trustee. The Public Trustee's revenue sources and use of administration client funds to raise revenue should be transparent and accountable so that people know how their money will be used and the likely returns on investments managed by the Public Trustee.</p>	<b>Supported</b>	<p>The Public Trustee is committed to increasing transparency and to financially and ethically responsible leadership and governance.</p> <p>The Public Trustee declares the costs and income received from the Common Fund in its Annual Report in accordance with Australian accounting standards. However, consideration will be given as to how this can more clearly and transparently be reflected in the Annual Report moving forward.</p>
<p><b>Recommendation 13:</b>  <b>Clearly report the fees and costs of managing Public Trustee investments</b></p> <p>a. The Public Trustee clearly report the fees it charges, and other costs associated with the operation and management of its various investments (the Common Fund, interest bearing term deposits and the Growth Trust) and their effect on clients' investment returns.</p> <p>b. Administration clients should not pay double charges on their funds, where they pay an annual Asset Management Fee on their funds and additional fees to the Public Trustee and/or other organisations to manage investments containing those funds.</p>	<b>Partially supported</b>	<p>The Public Trustee is committed to increasing transparency and to financially and ethically responsible leadership and governance.</p> <p>The Public Trustee declares the costs and income received from the Common Fund in its Annual Report in accordance with Australian accounting standards. However, consideration will be given as to how this can more clearly and transparently be reflected in the Annual Report moving forward.</p> <p>There is no cost to the customer investing in the Public Trustee Common fund and the Term Investment Account.</p> <p>The Public Trustee Growth Trust Product Profile which provides information about its features including costs is available on our web site and is also sent to customers who invest in the Growth Trust.</p> <p>However, the Public Trustee rejects the assertion that customers pay double charges. The Public Trustee will be shortly publishing a fee ready reckoner to provide a concise overview of the different fees and charges applicable to financial management customers.</p>

<p><b>Recommendation 14: Limit the amount of Public Trustee surpluses and reserves</b></p> <p>There should be a limit on the amount of operating surpluses and reserves that the Public Trustee can accumulate. Any reserves exceeding the cap should be returned to clients in reduced or rebated fees.</p>	<p><b>For further consideration</b></p>	<p>The Public Trustee aims to deliver a balanced budget each year. Higher than expected returns or changes to the economic environment can result in operating surpluses or deficits.</p> <p>Sufficient reserves are required by the Public Trustee to enable us to continue to operate as a self-funded agency during difficult economic circumstances such as the current COVID-19 pandemic.</p> <p>Any limits on the level of annual operating surpluses are a matter for the Government.</p>
<p><b>Recommendation 15: Review investment practices and discontinue activities that do not directly benefit clients</b></p> <p>The policies and practices of the Public Trustee relating to the investment of administration client funds be reviewed, and any investment activities involving their funds that do not maximise direct benefits to those clients, be discontinued.</p>	<p><b>Partially supported</b></p>	<p>The Public Trustee is committed to the continuous improvement and review of its services to ensure they are efficient and cost effective.</p> <p>All investment activities undertaken on behalf our customers are for their direct benefit. Investment activities are informed by the customer's preferences, customer needs, Public Trustee's extensive investment experience, risk, and expert financial advice (where applicable).</p> <p>The investment practices of the Public Trustee will continue to be regularly reviewed.</p>
<p><b>Recommendation 16: Review and update the Prudent Person Rule Manual</b></p> <p>The Prudent Person Rule Manual be reviewed and updated to ensure it appropriately reflects the law and the Public Trustee's obligations as a trustee and fiduciary. The review should include consideration, where appropriate, of a client investment approach that:</p> <ul style="list-style-type: none"> <li>a. ensures that decisions about investing client funds demonstrate that each decision was made in the interests of the client;</li> <li>b. seeks to achieve more for clients than just the preservation of their assets; seeks to achieve more for clients, in terms of investment outcomes than just the preservation of their assets;</li> <li>c. moves away from an inflexible standard template approach to investing, to one that takes the clients' individual circumstances into account (wherever possible);</li> <li>d. relies on an actual assessment of clients' individual investor risk profiles (where possible), rather than assigning them based on clients' ages, and makes a meaningful distinction between each of the risk profiles and the types of investments considered appropriate for that profile.</li> </ul>	<p><b>Supported in-principle</b></p>	<p>The Prudent Person Rule has recently been reviewed to ensure that it complies with industry best practice.</p> <p>The Public Trustee's Structured Decision-Making Framework will ensure that customers and their support networks are actively involved in all decisions that affect them, including investment of their funds.</p> <p>The Public Trustee does not support a shift from asset preservation at this time. Asset preservation is about keeping a customer's money safe and secure. Regular interest or a growth in values allows it to grow over time. This is the most prudent strategy for the majority of the Public Trustee's customers, who often have limited assets and are unable to support higher risk investments.</p> <p>The Public Trustee does not accept that its investment strategies are inflexible. However, the Public Trustee's customers benefit from the economies of scale that are obtained through the Public Trustee's investment strategies. Without these economies of scale, it is likely that customers would incur increased costs and weaker outcomes.</p>

		<p>The Prudent Person Rule Manual is reviewed annually. The Public Trustee will continue to review the Prudent Person Rule Manual to ensure it continues to meet customer expectations and aligns with industry best practice.</p>
<p><b>Recommendation 17: Publish the Prudent Person Rule Manual</b></p> <p>The Prudent Person Rule Manual and all other Public Trustee manuals that guide the agency's decision-making about managing and investing administration clients' funds be published and re-written in accessible language.</p>	<p><b>Supported in-principle</b></p>	<p>The Public Trustee is committed to being open and transparent with its customers and stakeholders.</p> <p>The Prudent Person Rule Manual has been published online since 14 May 2020.</p> <p>The majority of the Public Trustee's manuals are written for internal use and are not currently in a form which is user friendly or easy to digest for our customers or stakeholders. However, we are committed to increasing transparency and will consider the further release of manuals as they are reviewed and rewritten in accessible language</p>
<p><b>Recommendation 18: Review position on conflict transactions</b></p> <p>The Public Trustee review its reliance on Supreme Court case No. 5391 of 1996 as providing legal authority for all potential conflict transactions involving the investment of administration client funds in its own products, particularly the Growth Trust.</p>	<p><b>Not supported</b></p>	<p>The Public Trustee's expert financial advisor can consider a range of investment products outside of the Public Trustee's products, depending on the customers individual circumstances. Less than 50 per cent of customers fund are invested in the Common Fund or the Public Trustee Growth Trust. 32 per cent of customer assets are invested in the Common Fund and 15 per cent invested in the Public Trustee Growth Trust.</p> <p>As noted previously, customers benefit from the economies of scale that are possible through the investment in the Public Trustee's products.</p> <p>The Public Trustee will continue to review its investment practices to ensure they comply with industry standards.</p>
<p><b>Recommendation 19: Review the practice of only investing in Public Trustee investment products</b></p> <p>The Public Trustee review its practice of investing administration client funds almost exclusively in its own investment products and seek advice about how it can fulfil its statutory and fiduciary obligations while managing client funds and earning revenue. Where the Public Trustee proposes to invest administration client funds in its own investment products it should seek appropriate approvals under the Guardianship and Administration Act or seek a specific legislative amendment to expressly permit these breaches of its obligations. Such arrangements should also be published in an accessible format and declared to clients</p>	<p><b>Not supported</b></p>	<p>The Public Trustee's expert financial advisor can consider a range of investment products outside of the Public Trustee's products, depending on the customers individual circumstances. Less than 50 per cent of customers fund are invested in the Common Fund or the Public Trustee Growth Trust. 32 per cent of customer assets are invested in the Common Fund and 15 per cent invested in the Public Trustee Growth Trust.</p> <p>As noted previously, customers benefit from the economies of scale that are possible through the investment in the Public Trustee's products.</p> <p>The Public Trustee will continue to review its investment practices to ensure they comply with industry standards.</p>

<p><b>Recommendation 20:</b> <b>Adopt a new client investment strategy</b></p> <p>The Public Trustee adopt a new client investment strategy, which process should involve, or deliver, the following:</p> <ul style="list-style-type: none"> <li>a. review all internal policies, manuals and guidance documents relating to the management and investment of client assets to properly acknowledge and reflect the duties of a trustee and fiduciary;</li> <li>b. review the purpose and continuing need for an overarching Client Investment Strategy and Primary Investment Strategy. Any future strategy or investment approach should not over-ride consideration of the individual circumstances and other needs of administration clients. Any future strategy or investment approach should not over-ride consideration of the individual circumstances, risk appetite and other needs of administration clients;</li> <li>c. implement investment decision-making policies that will: <ul style="list-style-type: none"> <li>(i) ensure that the interests of administration clients' are at the centre of all investment considerations and decisions affecting their financial interests;</li> <li>(ii) use the client's individual financial profile and living circumstances as the initial basis to assess the client's future investment needs before considering a change to other investment options;</li> <li>(iii) determine the expressed or implied risk appetite of the administration client in accordance with General Principle 7 (4) the principle of substituted judgement, the client's investment history and individual financial circumstances.</li> </ul> </li> <li>d. review the definition of 'complex asset' (which currently includes shares and any amount of superannuation) in light of the Public Trustee's acknowledged high level of professionalism and skill as trustee and administrator in the areas of financial planning and investing to reflect a more current view of what constitutes a complex asset for management by a professional trustee.</li> <li>e. review the 'Value of Assets' approach as the principal mechanism that determines whether independent financial advice is required. This review should be conducted with the objective of considering an approach that is based on a holistic appraisal of the key issues affecting the client's life (e.g. legal action, involvements in partnerships, trusts or companies, or complex tax arrangements) as well as the value, diversity and location of their assets.</li> </ul>	<p><b>Not supported</b></p>	<p>The Customer Investment Strategy was recently externally reviewed and found to be appropriate and in accordance with industry best practice.</p>
<p><b>Recommendation 21:</b> <b>Reconsider routinely obtaining external financial advice for certain types of assets</b></p> <p>In addition to recommendation 4, above, regarding the practice of routinely obtaining external financial advice for administration clients:</p> <ul style="list-style-type: none"> <li>a. External financial advice should only be obtained at a client's expense as an exception and when clients or their</li> </ul>	<p><b>Not supported</b></p>	<p>The Public Trustee obtains external financial advice in circumstances where it is reasonable and appropriate to do so to further the customer's interest and comply with its fiduciary duties.</p> <p>Suspending external financial advice is not supported at this time. There are times when the expert financial advisor recommends an</p>

<p>supporters request this advice or there is a justifiable basis for the expenditure based on the amount and complexity of the clients' assets.</p> <p>b. If the Public Trustee continues to contract external financial advice services, (even on a more limited basis), it undertake an open tender process and appoint a panel of providers (no less than two) and review and reappoint panel members on a regular basis, at a minimum, every five years.</p>		<p>approach which is different to the Customer Investment Strategy. For example, there are situations where the Customer Investment Strategy may appear to be appropriate for a customer, however the expert financial advisor will recommend that it is in the customer's best interests to invest their funds in superannuation. Without this advice, the customer may be disadvantaged by having their funds invested through the Customer Investment Strategy. However, the Public Trustee will continue to review its investment practices to ensure they are appropriate and aligned with our Customers First values.</p> <p>Under the <i>Public Trustee Act 1978</i>, the Public Trustee is entitled to recover reasonable costs that have been properly incurred. All requests for external financial advice are lawful and reasonable in the circumstances.</p>
<p><b>Recommendation 22:</b> <b>Obtain advice about refunding financial advice fees</b></p> <p>In relation to the contractual arrangements the Public Trustee has with an external financial advisor for the provision of financial advice services to administration clients, the Public Trustee:</p> <p>a. review those contractual arrangements to ensure they do not unduly limit the investments that the advisor can recommend (by limiting those investments to Public Trustee products) or otherwise interfere with the independence of the advice provided to administration clients;</p> <p>b. suspend the practice of charging clients for external financial advice that merely recommends investments in accordance with the Client Investment Strategy, while the review of contractual arrangements is occurring; and</p> <p>c. take advice about whether the fees charged to administration clients for the financial advice referred to in (b.), should be refunded.</p>	<p><b>Not supported</b></p>	<p>The Public Trustee obtains external financial advice in circumstances where it is reasonable and appropriate to do so to further the customer's interest and comply with its fiduciary duties.</p> <p>Suspending external financial advice is not supported at this time. There are times when the expert financial advisor recommends an approach which is different to the Customer Investment Strategy. For example, there are situations where the Customer Investment Strategy may appear to be appropriate for a customer, however the expert financial advisor will recommend that it is in the customer's best interests to invest their funds in superannuation. Without this advice, the customer may be disadvantaged by having their funds invested through the Customer Investment Strategy. However, the Public Trustee will continue to review its investment practices to ensure they are appropriate and aligned with our Customers First values.</p> <p>Under the <i>Public Trustee Act 1978</i>, the Public Trustee is entitled to recover reasonable costs that have been properly incurred. All requests for external financial advice are lawful and reasonable in the circumstances.</p>
<p><b>Recommendation 23:</b> <b>Review the role and operations of the Official Solicitor</b></p> <p>The Public Trustee initiate an urgent and comprehensive review of the role and operations of the Official Solicitor to the Public Trustee. The review should give particular consideration to:</p> <p>a. the structure of the arrangements between the Public Trustee and the Official Solicitor and whether they are appropriate and sufficiently transparent;</p>	<p><b>Supported in-principle</b></p>	<p>The Official Solicitor function was recently reviewed as part of the Public Trustee's interim governance and functional structure review. The review recommended the separation of the Official Solicitor Function into an Official Solicitor – Corporate Legal Services, and Official Solicitor – Customer Legal Services.</p>

<p>b. whether the use of the Official Solicitor to provide legal services to administration clients is appropriate considering the potential conflicts in the Official Solicitor's role, issues of legal professional privilege and the Public Trustee financially benefiting from the Official Solicitor's fees;</p> <p>c. whether lawyers providing legal advice and services to people under administration should be required to hold practicing certificates and be subject to oversight by the Legal Services Commission (this includes administration clients or their supporters being able to make a complaint to the Legal Services Commission);</p> <p>d. reviewing the scale of fees of the Official Solicitor, with particular consideration of the reasonableness of the fees for the particular cohort of vulnerable people that comprise the majority of the Public Trustee's administration clients;</p> <p>e. making the scale of fees of the Official Solicitor available to administration clients and/or their supporters, particularly when consideration is being given to obtaining legal advice for which the client will be required to pay; and</p> <p>f. whether the Public Trustee should establish a panel of solicitors and barristers to provide legal advice and services to Public Trustee administration clients that meet quality standards, deliver value-for-money, and whose fees are reasonable having regard to the vulnerabilities and financial disadvantage of many of the Public Trustee's administration clients.</p>		<p>The separation of the legal services in this way minimises the risk of conflicts of interest, while ensuring the Customer Legal Services focus on the delivery of customer-centric legal services that ensure the customer is at the centre of all considerations.</p> <p>Currently both the Official Solicitor – Customer Legal Services and the Official Solicitor – Corporate Legal Services hold practising certificates. The Public Trustee is currently investigating the requirement for lawyers of the Official Solicitor Offices to hold practising certificates.</p> <p>The Official Solicitor Fees will be considered as part of the comprehensive and independent fees and charges review. This will be supported by the Legal Expert Transformation Panel.</p> <p>The Public Trustee is in the process of establishing legal panels for family law, property claims, personal injury claims, total and permanent disability claims, dust disease claims, and whether to bring a claim against the National Redress Scheme.</p>
<p><b>Recommendation 24:</b> <b>Develop a policy to support administration clients to make complaints about the Public Trustee</b></p> <p>Develop a policy for supporting administration clients to make complaints against itself, including support to investigate claims, obtain legal advice and seek redress when a client alleges that the Public Trustee has, by act or omission, caused the client loss or harm. The policy should establish an appropriate process for referring client matters that warrant investigation, legal advice and/or redress to appropriate professionals for advice. Broad community consultation is recommended to develop an appropriate and efficient model that protects people's rights while containing costs. The final model for responding to client complaints and managing conflicts may need to be supported by legislation.</p>	<p><b>Supported in-principle</b></p>	<p>The Public Trustee supports feedback and encourages customers to raise concerns if they are unhappy with a decision or the actions of the Public Trustee.</p> <p>The Queensland Audit Office has recently completed a Performance Audit on the responsiveness of Queensland's guardianship and administration system to complaints and investigations.</p> <p>The Audit examined the system and its effectiveness for complaints relating to customers where the Public Trustee has been appointed financial administrator or financial attorney. Complaints relating to other Public Trustee services including Wills and deceased estate administration were not in-scope.</p> <p>The report includes six recommendations to enhance the accessibility, effectiveness and responsiveness of our complaints management system.</p> <p>The Public Trustee has introduced several initiatives to improve their responsiveness to complaints, including:</p>



		<ul style="list-style-type: none"> <li>• Structured Decision-Making training for all staff focusing on the customer and their support networks that takes into account a customer's human rights, views, wishes and preferences when it comes to decision-making.</li> <li>• Enhanced reporting of Complaints data published in Public Trustee Annual Reports.</li> <li>• Weekly and quarterly complaints reports, with content including complaint response times and issues and trends, which will be used to improve customer service.</li> </ul> <p>The Public Trustee will be implementing a number of further changes throughout the 2020-21 financial year as a result of the findings of this audit and in line with its Customers First Agenda, which includes:</p> <ul style="list-style-type: none"> <li>• Further training for all staff involved in responding to complaints, delivered by the Queensland Ombudsman.</li> <li>• Development of Easy English materials to support customers with impaired decision-making to understand their rights and to lodge a complaint.</li> <li>• A review of the Public Trustee's Complaints Management information technology system to ensure a system that is efficient, cost effective and supports best practice complaints management.</li> </ul>
<p><b>Recommendation 25:</b> <b>Amend legislation so Public Trustee solicitors are overseen by the Legal Services Commission</b></p> <p>Amend the Public Trustee Act to provide that solicitors employed by the Public Trustee must:</p> <ol style="list-style-type: none"> <li>a. while performing their role, have regard to the 'fundamental duties of solicitors' as set out in the solicitors' rules (as defined by section 217 of the Legal Profession Act); and</li> <li>b. be subject to conduct and disciplinary investigations by the Legal Services Commission</li> </ol>	<p><b>Partially supported in-principle</b></p>	<p>The Public Trustee is committed to providing professional services that meet the high standards rightly expected by the community and those that advance the legal profession.</p> <p>The fundamental duties of solicitors apply to all solicitors, including government lawyers. As such any amendment to the <i>Public Trustee Act 1978</i> in this regard would be superfluous.</p> <p>Government lawyers are already subject to the oversight of the Legal Services Commission in circumstances where they are referred by another legal practitioner. Further, the Public Trustee is investigating options to require all lawyers of the Official Solicitor to hold current practising certificates. The lawyers then fall within the jurisdiction of the Legal Services Commission.</p> <p>Any decision to amend the <i>Public Trustee Act 1978</i> is a matter for the government.</p>
<p><b>Recommendation 26:</b> <b>Review Official Solicitor policies and practices</b></p> <p>If the Public Trustee continues to provide legal advice and representation to administration clients using the Official Solicitor, it should review and update its policies, procedures</p>	<p><b>Partially supported in-principle</b></p>	<p>The Official Solicitor function was recently reviewed as part of the Public Trustee's interim governance and functional structure review. The review recommended the separation of the Official Solicitor function</p>

<p>and other guidance to Public Trustee lawyers to develop a comprehensive set of policies and procedures that:</p> <ol style="list-style-type: none"> <li>clarify who the client is in all legal matters and distinguish between the interests of the Public Trustee as the corporate entity, and the Public Trustee as the representative of a person under administration;</li> <li>outline the law in relation to the duties of trustees, fiduciaries and lawyers and their duties to always act in their clients' interests;</li> <li>require lawyers in every case to consider the costs and benefits of any prospective legal action and ensure clients' funds are only spent when they are satisfied the expenditure is in the clients' interests, taking into account their individual needs, the risks, costs and likely outcomes;</li> <li>develop a policy around obtaining consent from administration clients (where appropriate), their guardians or personal support networks, to engage a lawyer and disclose the likely costs, benefits and outcomes for the client, prior to embarking on any legal process;</li> <li>review the Official Solicitor's policy denying Public Trustee clients access to the legal advice they have paid for and to the invoices for that advice and develop a policy that is more appropriate to the Public Trustee's role and duties under the <i>Guardianship and Administration Act</i>, including to support clients to participate in decisions affecting their lives; and</li> <li>as part of the process for issuing an invoice for legal fees, staff of the Office of the Official Solicitor review and assess the reasonableness of the fees in the context of the clients' overall financial circumstances, and the likely outcomes and benefits of the proposed legal action.</li> </ol>		<p>into an Official Solicitor – Corporate Legal Services, and Official Solicitor – Customer Legal Services.</p> <p>The separation of the legal services in this way minimises the risk of conflicts of interest, while ensuring the Official Solicitor – Customer Legal Services focus on the delivery of customer-centric legal services that ensure the customer is at the centre of all considerations.</p> <p>As part of the current practice, lawyers for the Official Solicitor consider the commerciality of the case, the customer's interests and views, the Human Rights Act 2019, and the benefit to the customer of the legal action.</p> <p>The Legal Expert Transformation Panel will be available for the Official Solicitor – Customer Legal Services to provide guidance regarding any policies of the office. The question of access to invoices and legal advice is ultimately a matter for the Public Trustee in its representative capacity.</p> <p>In the interim, the Public Trustee has put in place processes to allow a customer to attend a Public Trust office and review the legal advice to ensure that legal professional privilege is protected, while increasing transparency.</p>
<p><b>Recommendation 27:</b> <b>A review of Public Trustee fees and charges</b></p> <p>The review of the Public Trustee's fees and charges for administration clients (see recommendation 1) should include the following to help maintain the organisation's long-term financial viability:</p> <ol style="list-style-type: none"> <li>consideration of changes over time in the: - economic environment and financial markets; - Public Trustee's sources of revenue; and - financial profile of administration clients and other clients of the Public Trustee that may impact their ability to pay fees.</li> <li>examination of the various and charges applied by other State and Public Trustees to ensure consideration of a wide range of fee options that will assist it to adopt the most fair and equitable system, taking into account clients' incomes and assets, and the value of the services provided;</li> <li>examination of the Public Trustee's costs of operation, including comparative analyses with other State and Public Trustees, which should include consideration of their levels of service provision, efficiency, productivity and service quality; and</li> </ol>	<p><b>Supported in-principle</b></p>	<p>The Public Trustee recognises the need to provide financially and ethically responsible leadership and governance to ensure that we can continue to meet our obligations to our customers and the broader community</p> <p>The Public Trustee has committed to undertake an independent and comprehensive review of all its gazetted and non-gazetted fees and charges. The review focuses on ensuring its fees and charges are transparent, fair, reasonable and reflective of the service provided.</p> <p>The fees and charges review will consider benchmarking of other state and Public Trustees.</p>

d. consideration of alternative and innovative ways the Public Trustee can deliver services to administration clients that may be able to be delivered at a lower cost.		
<p><b>Recommendation 28:</b>  <b>Amend legislation to clarify how the Public Trustee can invest client funds</b></p> <p>In the interests of clarity and transparency, and to remove all doubt about the lawfulness or propriety of the Public Trustee earning revenue from client funds, the Public Trustee Act should be amended to:</p> <p>a. clarify the investments the Public Trustee is permitted to make using client funds, in particular addressing the issue of investments that are permitted that may amount to a conflict of interest, the circumstances in which it can earn revenue on those funds, and the conditions or limitations on those earnings; and</p> <p>b. require the Public Trustee to report its earnings on client funds in its annual financial statements.</p>	<b>For further consideration</b>	<p>The operations of the Public Trustee have been extensively scrutinised for more than 100 years. This includes its investment practices.</p> <p>Any amendments to the legislation are a matter for the Government.</p>
<p><b>Recommendation 29:</b>  <b>Consider additional oversight mechanisms</b></p> <p>The Queensland Government should consider whether the Public Trustee and its clients would benefit from additional oversight or reporting mechanisms to improve the Public Trustee's performance, transparency and public accountability.</p>	<b>For further consideration</b>	<p>The Public Trustee is subject to the same extensive scrutiny and oversight that applies to other government agencies.</p> <p>The Public Trustee has introduced increased governance and accountability measures through its Customers First Agenda which are some of the most stringent across state and public trustees in Australia.</p> <p>While the Public Trustee supports any moves to increase transparency and accountability, careful consideration would need to be given to any unintended consequences including potential cost increases for customers.</p> <p>The oversight of the Public Trustee is a matter for the Government, however, we would be pleased to participate in any discussions or reviews of the matter.</p>
<p><b>Recommendation 30:</b>  <b>Modernise the Public Trustee Act to better acknowledge rights and interests of people with impaired decision-making capacity</b></p> <p>The Public Trustee Act should be reviewed to update and modernise the Act to ensure that it reflects contemporary views about the rights and entitlements of people with impaired decision-making capacity whose affairs are administered by the Public Trustee.</p> <p>the review of the Act should:</p> <ul style="list-style-type: none"> <li>- address issues relating to conflicts of interest or breaches of duty and ensure they are clearly acknowledged, the extent to which they are permitted and the limitations on those activities, including any profits that can be earned; and</li> <li>Some provisions in the Act appear to permit breaches of the trustee's fundamental duties; and</li> </ul>	<b>Supported in-principles</b>	<p>It is recognised that the <i>Public Trustee Act 1978</i> has been effective in achieving its objectives, however, would benefit from modernisation.</p> <p>The Public Trustee will establish a Policy Unit which will review the <i>Public Trustee Act 1978</i> and make recommendations to the Attorney-General and Minister for Justice on potential amendments. However, any amendments to legislation is a matter for the Government.</p>

<ul style="list-style-type: none"> <li>- include amendments requiring greater accountability and transparency on the part of result in the Public Trustee about its fees and charges, various sources of revenue, including revenue earned from the Official Solicitor, on client funds invested in the Common Fund and from the management of other funds in which client money is invested.</li> </ul>		
<p><b>Recommendation 31: Amend legislation to ensure the Public Trustee is an appointment of last resort and the appointment is periodically reviewed</b></p> <p>The Guardianship and Administration Act be amended to provide:</p> <ul style="list-style-type: none"> <li>- that the appointment of the Public Trustee as administrator, is an appointment of last resort; and</li> <li>- consistent with other administration appointments, the appointment of the Public Trustee and other trustee companies as a person's administrator be subject to periodic review, at least every five years.</li> </ul>	<p><b>For further consideration</b></p>	<p>It is generally the case that the Public Trustee is the appointment of last resort by the Queensland Civil and Administrative Tribunal (QCAT). The Public Trustee is usually only appointed if there is conflict within a person's support network or there is no one willing or able to accept the appointment.</p> <p>QCAT currently has the jurisdiction to periodically review the Public Trustee's appointment.</p> <p>Any changes to legislation are a matter for the Government.</p>

444 Queen Street Brisbane Qld 4000  
GPO Box 1449 Brisbane Qld 4001



For reply please quote: S&G/JF – G20/662

19 May 2020

Ms Mary Burgess  
Public Advocate  
GPO Box 149  
Brisbane Qld 4001

Dear Ms  Burgess

Thank you for your letter of 24 April 2020 providing draft versions of the first four chapters of your report: *the Value of Trust: a report into Public Trustee fees and charges for people with impaired decision-making capacity under financial administration* (the Report).

The Public Trustee is committed to a customer-centric culture that puts the customer at the centre of all that we do. This includes protecting our customer's financial interests.

As you would be aware, the global economy has been significantly impacted as a result of the COVID-19 pandemic. To support our customers during this time, the Public Trustee has put a freeze on any reduction in interest rate changes for moneys held in the Common Fund for six months. This will result in improved financial outcomes for all of our customers.

The Public Trustee appreciates the opportunity to support your review of our fees and charges. The findings in your Report will help the Public Trustee in its pursuit of continuous improvement to deliver improved outcomes for our customers.

The Public Trustee has some of the longest serving, hardest working and dedicated public servants in the sector. Our people are committed to serving the Queensland Community and achieving positive outcomes for our customers. However, as your Report identifies, there appear to be some long running systemic issues that may have resulted in sub-optimal outcomes for some customers. I believe it is important, as we work through the Report and consider these issues, that the focus is on the customers and continuous improvement.

Officers from my agency have reviewed the first four chapters with the objective of supporting you to finalise your Report. We share the mutual interest of ensuring that the Report presents an accurate representation of the work of the Public Trustee and the outcomes for our customers. It is in this context that the Public Trustee provides the feedback in this letter.

### ***Financial outcomes***

At a high-level, the Public Trustee agrees broadly with your findings that the current fees and charges model is complex, and that there may be a cohort of customers that are

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- Real estate auctions and sales
- Charitable trusts



unintendedly impacted by the fees. Significantly, it has been the view of the Public Trustee to-date that the current fees and charges are comparable to other service providers, which in turn has been a factor for continuing with its fees and charges system up to this point. Recent benchmarking by [REDACTED] which has been provided to your office, has found that the Public Trustee's fees and charges were relatively low or comparable to other jurisdictions for the majority of its customers. While there is still room for improvement, we remain of the view that this context will further assist the reader in understanding the fees and charging model used in Queensland and the sector more broadly.

The Public Trustee is of the view that it may support the reader to understand the fees and charges structure, if it was clearly articulated that outlays for financial advice or other services such as lawn mowing, plumbing and electrical work are not recoverable by the Public Trustee. These are outlays which are billed directly to the customer and paid from the customer's cash account. As these are direct expenses being billed to the customer, it has been the view of the Public Trustee to date that it is not appropriate to rebate these fees, as they do not fall within the ambit of a Community Service Obligation.

While we understand that the focus of the Report is on the Public Trustee's fees and charges, the Public Trustee believes that there is a risk that focusing on fees alone may be viewed to not portray an accurate picture of the Public Trustee or the holistic outcomes for its customers. The Public Trustee is of the view that the Report, including in the case studies, would be enhanced if it reflects the financial outcomes for customers. The financial outcomes would consider the overall outcomes for the customer factoring in the fees, Community Service Obligations (CSOs) and financial outcomes of the investments made. That is, consideration could be given to the services provided for the fees charged and the financial outcome of the provision of those services.

For example, the [REDACTED] Benchmarking report shows 78 per cent of customers within PFA level 5 receive CSOs. This would seem to mean that 1705 customers across all PFA levels do not receive some form of a CSO. Customers who qualify for a CSO paid an average fee of \$1,888. In this regard, the Report could be further enhanced by factoring this information into the calculations used in parts of the relevant chapters (for example Chapter 3, paragraph 103).

Likewise, the case studies presented so far could be enhanced if there was a fuller depiction of the financial outcomes for the customer. The case study of Ella in Chapter 1 for example could consider the savings and returns the customer received as a result of the decision to change her superannuation to Australian Super. Further, it may assist the reader if the fees are annualised. Ella incurred fees of \$9601 per year to manage assets of \$1.2 million which equates to 0.80 per cent per annum (excluding outlays of \$1590.75).

### ***Superannuation***

There appears to be a difference of view in the Report in how superannuation is classified and managed. The Public Trustee has been of the view to-date that superannuation is a complex asset that requires active management by the organisation. It is understood that all Public Trustees in Australian jurisdictions share this view, with superannuation included in asset management fees.



Superannuation is an important tool in financial planning and formulating whole of life outcomes for customers. It is important that a customer's superannuation is reviewed at a minimum annually to ensure the customers' needs are met particularly for customers who have complex options to consider in terms of Total and Permanent Disability (TPD) claims, rollovers, withdrawals and investment alternatives whilst trying to balance the fund they may need. Some of the considerations for the Public Trustee when managing a customer's superannuation include:

- member fees
- investment options
- investment performance
- investment fee
- efficiency of administration
- availability of reporting
- insurance availability, product quality and premiums
- assessment and treatment of account balances less than \$6000
- frequency and type of transactions in the account.
- insurance claims options (TPD).
- rollovers
- pension amount determination (%)
- consideration of Contributions and associated limits
- changes to risk profile
- tax impacts
- contemplation of moving to pension phase
- consideration of binding death nominations
- assessing eligibility to access super early through an eligibility criteria
- topping up accounts to cover fees (generally an Insurance is attached to these policies)

Through the Statement of Advice process, the Public Trustee can receive advice about whether a customer may have a TPD claim with their existing superannuation provider as well as address the other options. These claims are complex and require specialist review to determine if a claim exists.

### ***Financial advice***

It is noted that the Report considers in detail the Public Trustee's practice of obtaining financial advice to assist in informing investment decisions for customers.

The Public Trustee, as a fiduciary, has an obligation to review at least annually the performance of the investments made, individually and as a whole, on behalf of its customers. For customers with assets exceeding \$450,000, the Public Trustee seeks annual advice from [REDACTED] in the form of a Statement of Advice. Of the Public Trustee's 9500 financial management customers, approximately 10 per cent receive financial advice from the external financial planner.

The Statement of Advice is an important tool that assists the Public Trustee to discharge his fiduciary obligations. It is always important that the Public Trustee works with our customers to identify all of our customers current and future needs. It is just as important to consider these when our customers have a change of circumstances such as a successful TPD claim. Advice is then sought on what appropriate funds remain within an superannuation

environment, with some funds drawn down to meet the cost of the insurance claim, pay off any loans the customer may have taken out and the immediate to short term cash requirements are catered for the customers.

The Public Trustee is committed to continuous improvement to deliver improved customer-focused outcomes. In light of the information in the draft Report, the Public Trustee will undertake a review of its use of Statements of Advice for all customers, particularly for customers for whom the Customer Investment Strategy applies.

### ***Reasonableness of the Public Trustee's fees and charges***

The view of the Public Trustee to date has been that the cost of the service provided and financial outcomes for customer are integral to ascertaining the reasonableness of the Public Trustee's fees and charges. The Report does not appear to provide sufficient evidence or linkages to the Public Trustee's fees and charges system that support the statement that the Public Trustee's fees may be unlawful.

It is generally accepted that the current fees have not been comprehensively reviewed in over 20 years. However, it is the view of that the Public Trustee's fees have a legislative basis under the *Public Trustee Act 1978*, and is subject to scrutiny through the Parliamentary Committee Process, and the annual State Budget and Estimates processes.

The discussion in the Report on the reasonableness of the Public Trustee's fees is important. To enable a better understanding of the issues and context, this important part of the report could be further enhanced if there was additional consideration and incorporation of the benchmarking reports, the financial outcomes for customers and any other relevant points of comparison for the conclusions drawn.

The Public Trustee has continued with its fees and charges system up until now as it has been the view that the current fees and charges are comparable to other service providers. This includes the fees charged by the Office of the Official Solicitor which were benchmarked in 2018 to ensure that the lawyers' fees were reasonable and justifiable. The lawyers' fees have not been changed since 1 October 2018. Nonetheless the Public Trustee is sympathetic to the issues raised by the Public Advocate and looks forward to reviewing and learning from the final Report.

### ***Community Service Obligations (CSOs)***

The Public Trustee provides CSOs to more than 82 per cent of its customers to assist with fees and charges. For example, fees are rebated for customers where the Public Trustee's fees and charges would be more than five per cent of the adult's assets.

Further, the Public Trustee in many situations has paid and will continue to pay Official Solicitor fees and outlays (ie. for example, Counsel's fees) as a CSO. This is often in circumstances where an investigation is being made into the potential for a family provision application for a financial management client, or perhaps investigating a misappropriation for a financial management customer. This is in circumstances where the customer does not have sufficient assets to be able to pay the cost of the Official Solicitor's fees and outlays. It should be noted that the Public Trustee provides this community service in good faith and as financial administrator is not obliged to expend its own money on any of the expenses that it incurs.

The Public Trustee is sympathetic to the issues raised by the public Advocate but remains of the view that its CSOs satisfy the Government's requirements, noting that the Public Trustee's budget is subject to the annual State Budget process, and has been supported by the Government of the day.

The Public Trustee meets its CSO obligations from its self-funding model without relying on appropriation from the Queensland Government.

It is noted that the report forms the view that financial management customers have been subsidising the provision of CSOs since 2016–17 and in turn subsidising other services such as free wills, prisoner management and the Civil law Legal Aid scheme. In 2018–19, the Public Trustee provided more than \$37.1 million in CSOs, with approximately \$27.9 million in fee rebates and support for financial management customers.

### ***Activity Based Costing***

When considering the cost of providing the financial management services to its customers, including CSOs, the financial management arm of the Public Trustee typically operates at a loss.

The Public Trustee uses Activity Based Costing (ABC) to determine the viability of its services lines, including financial management, deceased estates, wills and so on. It is acknowledged that different allocation methods are used depending on the nature of the overhead to be allocated. For example FTE staff levels providing each service are used to allocate central leadership costs to each service line.

Decisions around the correct allocation basis for overhead costs necessarily involve the exercise of professional judgement. However the Public Trustee has been using and refining this methodology for a number of years and is of the view that the results are materially correct and are a useful input into management decision making processes.

The attached table provides the last six years of ABC analysis for the Public Trustee reconciled back to our published Financial Results per the Annual Report. The Service Lines Section shows the result by the Public Trustee service lines taking the revenue earned by the service lines (reduced by CSOs) and deducting the full costs of delivering those services including a share of ABC allocated overhead costs. As is expected for a benevolent institution like the Public Trustee most of these service lines (including Financial Management) run at a loss.

The Fund Management section shows the income that the Public Trustee earns through the interest differential and fund management fees. For clarity we have separated out the income earned by the Public Trustee on funds managed for financial management customers. The Public Trustee has made a loss of \$43m on financial management services over the last six years and even after including income from managing financial management customer funds, the Public Trustee has made a loss of \$6 million over the last six years.

If you would like to discuss the ABC results provided further, I would be pleased to facilitate a meeting with my [REDACTED].

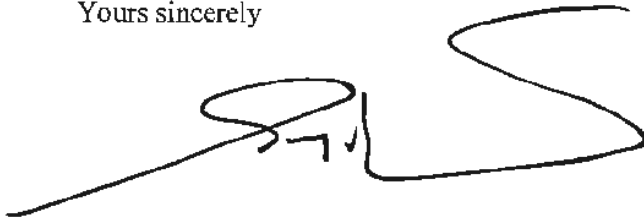
In addition to the points raised in this letter, please find attached a list of factual errors that may support you in finalising your report.

Thank you again for providing the Public Trustee with the opportunity to assist you in finalising your Report and to provide feedback on the draft chapters. It is hoped that the Public Trustee response has been helpful and constructive so as to ensure an accurate and balanced report. My Office will provide advice on the remaining draft chapters as they become available.

I look forward to receiving your final draft report that incorporates the feedback in this letter in due course.

If you have any questions or would like to discuss any of the information in this letter, please do not hesitate to contact [REDACTED]

Yours sincerely

A handwritten signature in black ink, appearing to be 'S. Zhouand', written over a horizontal line.

Samay Zhouand  
**Acting Public Trustee of Queensland and CEO**

### PTQ Activity Based Costing Analysis

	2014	2015	2016	2017	2018	2019
<b>Service Lines</b>						
<b>Financial Management</b>	<b>-7,038</b>	<b>-6,419</b>	<b>-6,752</b>	<b>-7,405</b>	<b>-7,141</b>	<b>-8,743</b>
Willis	-5,089	-4,591	-4,791	-5,106	-4,741	-4,772
Deceased Estates	-3,635	-2,815	-4,279	-4,918	-4,532	-4,498
Other	81	288	-880	-434	-1,038	-734
<b>Total Customer Experience &amp; Delivery</b>	<b>-15,680</b>	<b>-13,537</b>	<b>-16,703</b>	<b>-17,864</b>	<b>-17,451</b>	<b>-18,747</b>
<b>Property Services</b>	<b>-1,171</b>	<b>-1,935</b>	<b>-1,300</b>	<b>-1,981</b>	<b>-1,239</b>	<b>-1,199</b>
Legal Services	593	547	225	1,436	992	115
Other Services (Taxation, Undaimed money e	2,700	1,822	3,137	127	1,299	2,335
Real Estate/Custodial Services	3,239	1,874	2,560	2,199	1,922	1,066
<b>Fund Management</b>						
Common Fund (PTQ Reserves)	6,357	6,251	4,302	3,941	3,498	5,783
<b>Common Fund (Financial Management)</b>	<b>4,570</b>	<b>5,616</b>	<b>6,097</b>	<b>5,343</b>	<b>5,264</b>	<b>4,290</b>
Common Fund (Other)	7,291	5,940	8,034	7,547	7,333	6,033
<b>Growth Fund Fees (Financial Management)</b>	<b>1,551</b>	<b>1,150</b>	<b>838</b>	<b>786</b>	<b>758</b>	<b>792</b>
Growth Fund Fees (Other)	1,738	1,496	1,077	999	1,026	1,055
<b>Total Funds Managment</b>	<b>21,507</b>	<b>20,452</b>	<b>20,348</b>	<b>18,617</b>	<b>17,879</b>	<b>17,953</b>
<b>PTQ Net Financial Results</b>						
<b>Net Financial Management</b>	<b>-917</b>	<b>347</b>	<b>183</b>	<b>-1,276</b>	<b>-1,119</b>	<b>-3,661</b>
Net Other Service Lines	12,104	8,876	8,084	3,809	4,521	5,184
Operating Surplus/(Deficit)	11,187	9,223	8,266	2,533	3,402	1,522
Other Items (Athena/Business Improvement)	0	230	-157	-96	8	-2,312
<b>PTQ Financial Results</b>	<b>11,187</b>	<b>9,453</b>	<b>8,109</b>	<b>2,437</b>	<b>3,410</b>	<b>-790</b>
<b>PTQ Financial Results Per Annual Report</b>	<b>11,187</b>	<b>9,453</b>	<b>8,109</b>	<b>2,437</b>	<b>3,410</b>	<b>-790</b>

Activity Based Costing (ABC) is a accounting methodology used by businesses with multiple product/service lines to determine the total cost associated with each revenue earning product/service so they can determine the profitability or otherwise of individual products or services. This is done by using "cost drivers" to allocate overhead costs to each service line.

PTQ uses the SAS ABC product to produce an ABC analysis of all our service lines to determine profitability of those service lines. Different allocation methods are used depending on the nature of the overhead to be allocated. For example FTE staff levels providing each service are used to allocate central leadership costs to each service line.

Decisions around the correct allocation basis for overhead costs necessarily involves the exercise of professional judgement. However the PTQ has been using and refining this methodology for a number of years and is of the view that the results are materially correct and are a useful input into management decision making processes.

The attached table provides the last 6 years of ABC analysis for PTQ reconciled back to our published Financial Results per the Annual Report. the Service Lines Section shows the result by PTQ service lines taking the revenue earned by the service lines (reduced by CSOs) and deducting the full costs of delivering those services including a share of ABC allocated overhead costs. As you would expect for an institution like the PTQ most of these service lines (including Financial Management) run at a loss.

The Fund Management section shows the income PTQ earns through the interest differential and fund management fees. For clarity we have separated out the income earned by PTQ on funds managed for Financial Management customers. You will note PTQ has made a loss of \$43m on Financial Management services over the last 6 years and even after including income from managing Financial Management custome funds PTQ has made a loss of \$6m over the last 6 years.

Chapter	Section	Statement	Public Trustee Comments
2	57	The Public Trustee is the largest financial administrator in Queensland. In 2018-19, it was financial administrator for 9,151 Queensland adults. This number is expected to increase due to a range of systemic pressures, demographic trends and changes within society.	<p>The total number of customers under financial management is 9409.</p> <p>The 18/19 Public Trustee annual report (page 9) identifies the following categories:</p> <ul style="list-style-type: none"> <li>financial management for 9151 adults with impaired decision-making capacity</li> <li>managing the estates of 548 prisoners</li> <li>acting as financial attorney for 258 clients</li> </ul> <p>The total amount of customers under financial Management is <math>9151 + 258 = 9409</math>. Prisoners are excluded from this calculation.</p>
2	79	The Public Trustee employs staff from different professions to provide professional services to clients, for example, tax accountants, property valuers and financial advisers	The Public Trustee does not employ any staff whose role is to provide property valuation services and financial advice.
3	113	It is noted that the examples cited on the Public Trustee's website about when this fee would be charged do not accurately reflect the types of instances identified in this review where this fee was charged. This review identified numerous examples of the additional service fee being charged for relatively ordinary and predictable activities on clients' accounts, such as requesting, and then reading, a financial advice (referred to as a Statement of Advice) about how to manage or invest the clients' assets. The Public Trustee requests this financial advice annually for clients with 'complex assets' or assets exceeding \$450,000. The Public Trustee defines 'complex assets' as including 'external shares, superannuation, or property other than a principal place of residence'. <sup>91</sup> When this advice is sought, and again when the advice is received and reviewed, clients are often charged individual additional service fees for the trust officers' work.	<p>The Public Trustee does not charge additional service fee (or a separate fee) for the preparation (requesting) of financial advice on behalf of our customers.</p> <p>The Public Trustee also does not charge additional service fee (or a separate fee) to review financial advice from our Financial Planner.</p>
3	116	An examination of Public Trustee client files show a range of charges for outlays that include fees for necessary professional services, valuations, pest and property inspections, all of which can generally be regarded as necessary fees and expenses to maintain and protect clients' property and financial interests. However, there are a range of other fees that raise questions about their reasonableness and whether they can be ethically and legally justified. These outlays include: <ul style="list-style-type: none"> <li>fees for incidental outlays;</li> <li>fees for financial advice; and</li> <li>Official Solicitor fees.</li> </ul>	<p>Fees for financial advice is not a Public Trustee fee (i.e. it is not a gazetted fee), rather it is an outlay.</p> <p>The Public Trustee does not charge a Financial Planning Fee.</p>



3	145	<p>Clients whose money is invested in the Growth Trust are not directly informed of the fees charged on the fund . Details about the Growth Trust fees are published in the Public Trustee of Queensland Growth Trust Product Information Statement, which is available on the Public Trustee's website. However, neither a copy of this document nor a summary of those fees is given to clients with money invested in the Growth Trust.</p>	<p>The Growth Trust Product Profile (Product Summary including Fees) is received by all customers who invest in the Growth Trust. An investment in the Growth Trust is only made via two processes;</p> <p>External Investment Strategy - All clients receive a Statement of Advice (SOA) document which attaches the Growth Trust Product Profile if a recommendation is to purchase the Growth Trust.</p> <p>Client Investment Strategy - if a SOA is not provided to a customer, the Client Investment Strategy process is applied and a letter (welcome letter) is automatically sent to the client which contains a Product Profile for the Growth Trust and Term Investment Account and this process is automated within the CIS workflow.</p>
3	189	<p>The Public Trustee also includes the value of the clients' superannuation funds as part of the value of assets when calculating the clients' asset management fees. Client money in a superannuation fund is 'managed' by the third-party superannuation fund . The superannuation fund managers also have fiduciary responsibilities to make decisions about the best ways to increase client wealth through prudent investments, and they charge annual fees for this service. The Public Trustee does not make any decisions about 'managing' the clients' superannuation fund so it is not providing any services in return for this management fee. In the context of the recent Banking Royal Commission, this could be regarded as a 'fee for no service' . These practices were roundly condemned by Commissioner Haynes. However, the circumstances in which these fees are being charged to financial administration clients are more serious, in terms of the Public Trustee's obligations as a fiduciary to always act in the clients' interests and, considering the particular vulnerabilities of those clients.</p>	<p>One of the primary reasons that superannuation is recommended for our customers is because it is exempt from the Centrelink asset test, however, managing superannuation in this way is an active position and not a set and forget and must be reviewed at least annually to ensure that our customers' needs are met. In relation to Superannuation, we understand it is important tool in financial planning and formulating whole of life outcomes for customers. Some of the items and processes considered are as follows:</p> <ul style="list-style-type: none"> <li>• member fees</li> <li>• investment options</li> <li>• investment performance</li> <li>• investment fee</li> <li>• efficiency of administration</li> <li>• availability of reporting</li> <li>• insurance availability, product quality and premiums</li> <li>• assessment and treatment of account balances less than \$6000</li> <li>• Frequency and type of transactions in the account.</li> <li>• Insurance claims options (TPD).</li> <li>• Rollovers</li> <li>• Pension amount determination(%)</li> <li>• Consideration of Contributions and associated limits</li> <li>• Contemplation of moving to pension phase</li> <li>• Consideration of binding death nominations</li> <li>• Assessing eligibility to access super early through an eligibility criteria</li> <li>• Topping up accounts to cover fees (generally an Insurance is attached to these policies)</li> </ul> <p>The Benchmarking report undertaken by [REDACTED] showed that all our counterparts have super as an asset associated with an asset fee.</p>

4	246	<p>The second consequence of the Public Trustee not being funded by government for its CSOs is their rate of growth. The Public Trustee, as a self-funded agency does not participate in the usual government Budget processes. There appear to be few or no questions asked of the Public Trustee about the growth in the CSOs or how they will be funded, so long as the Public Trustee delivers a balanced budget. Accordingly, the value of the CSOs has increased significantly over time, as there has not been any limitation or cap on their cost as would be the usual approach to government funded-services. In the 19 years since the introduction of the current fee structure, the value of the Public Trustee's CSOs has increased by 277 percent, while CPI increased by only 150 percent. This is a level of growth that could not be supported in other government services.</p>	<p>The Public Trustee's budget is submitted in the same manner as any other government body and scrutinised by Queensland Treasury and Department of Justice and Attorney-General as a part of the State Government budget process. The Public Trustee's budget forms part of the Annual Parliamentary Appropriations, through the Attorney-General, but funds are not appropriated to the Office (because it is self-funding).</p>

4	252	<p>There are other Public Trustee fees or charges that are not rebated and will continue to be charged even when the person's assets fall below \$5,000. These include:</p> <ul style="list-style-type: none"> <li>• Additional Service Fees;</li> <li>• Incidental fees such as costs associated with postage, photocopying and telephone calls;</li> <li>• charges for legal services provided by the Office of the Official Solicitor; and</li> <li>• any other service provided by an external provider where that provider charges the Public Trustee for that service, e.g. external investment advice and valuation fees.</li> </ul>	<p>The Public Trustee does rebate incidental outlays for Financial Management customers, in 18/19 Financial Year approximately \$400K (gst exclusive) was rebated. Clients with funds under \$5,000 are included in this amount.</p>
4	278	<p>Figure xx also shows the income and expenses reported by the Public Trustee each year. Over the last six years, all sources of Public Trustee revenue (other than fees from the administration of estates) have decreased, while expenses have increased. Revenue from the administration of estates experienced consistent growth, with income from this source increasing by approximately \$5M in each of the last three financial years. This growth is primarily accounted for by increases in fees and charges, rather than an increase in demand. Between 2015-16 and 2018-19, financial management clients increased by 2.6 percent from 8,919 to 9,151, while over the same period, revenue from this source increased by 18.6 percent.</p>	<p>The 2015/16 figure of 8919 includes prisoner matters whilst the equivalent in the 18/19 is 9957 page 3 of the annual report which equates to approximately 11.5% increase</p> <p>The 18/19 Public Trustee annual report (page 9) identifies the following categories:</p> <ul style="list-style-type: none"> <li>• financial management for 9151 adults with impaired decision-making capacity</li> <li>• managing the estates of 548 prisoners</li> <li>• acting as financial attorney for 258 clients</li> </ul> <p>The total amount of customers under financial Management is <math>9151 + 258 + 548 = 9957</math>. Inclusive of Prisoners numbers.</p> <p>The compound annual growth rate of customers who receive CSO's was 4.5% for the last five years to the 18/19 financial year, particularly emphasised by non CSO clients at 2.0%.</p>
4	280	<p>The Public Trustee manages a range of philanthropic trusts for which it provides administration and other management services from its resources. It also provides rebates of its fees associated with management of the investment of funds of those philanthropic trusts in the Growth Trust (this is discussed further in Chapter X). While these fee rebates are not reported as CSOs by the Public Trustee, they represent a cost to the Public Trustee, in terms of income it has waived for the benefit of these trusts. It appears that the fees and charges raised from financial administration clients are also subsidising the financial consequences of these decisions.</p>	<p>The fees for managing trusts which includes philanthropic trust are gazetted. Please be advised that not all trusts have an investment in the Growth Trust. Each customer is treated as an equal investor in the Growth Trust. All clients, including Financial management clients, are subject to the same rebate structure.</p> <p>The rebate of the Growth Trust Trustee Fee is a commercial fee arrangement relating to all investments in the Growth trust regardless of the financial circumstances of the investor and therefore is not a CSO.</p>

444 Queen Street Brisbane Qld 4000  
PO Box 1449 Brisbane Qld 4001



For reply please quote: S&G/JF – T201 – D20/17721

14 August 2020

Ms Mary Burgess  
GPO Box 149  
Brisbane Qld 4001

Dear Ms Burgess

Thank you for providing a draft of Chapter five of your report: *The Value of Trust: Public Trustee fees and charges for people under financial administration* (the Report).

My officers and I have appreciated the opportunity to assist with your inquiries and provide additional information to support your report. The open and constructive dialogue between our offices is supporting the Public Trustee to advance its Customers First Agenda and transition to a culture of continuous improvement.

Officers from my agency have considered the draft of the fifth Chapter of the Report with the objective of supporting you to finalise your Report. As I have advised previously, we share the mutual interest of ensuring that the Report presents an accurate portrayal of the work of the Public Trustee and the outcomes for our customers. It is in this context that I provide the feedback contained in this letter, and acknowledge that it is your complete and unfettered discretion to not accept some or all suggestions made for the purpose of ensuring an objective and balanced report. **Attachment 1** contains a summary of minor suggested amendments and additional information which may be of assistance.

### ***Common Fund***

It is noted that it is your view in the Report, that as a self-funding agency that it is questionable whether the Public Trustee should be running surpluses and accumulating reserves.

The concept of the Common Fund is not unique to the Public Trustee, but a mechanism used by trustee companies generally. According to Davis and Shaw (1997) the intent of allowing an organisation to pool the investments of a large number of estates and trusts for which they are trustee is to provide efficiency of management.

Since the introduction of the Public Curator Bill in 1915, the Public Trustee has been intended to be a 'self-supporting' agency, 'without expense to the tax payers'. Since the inception of the Public Trustee, it has met a component of its expenses from the margin between the earnings of the Common Fund and the interest paid to trusts and estates, and the fees that are charged for services.

For context, the Public Trustee budgets for a balanced budget position each year. That is, we do not budget for surpluses. The surpluses that have historically been observed have been a result of the broader economic situation and associated interest rate environment. You will note for instance that the Public Trustee made a significant loss during the Global Financial Crisis and is anticipating a similar loss as a result of the COVID-19 economic downturn. Our investment portfolio contains fixed interest investments which have earned significant profits throughout the bond bull market of the last decade. The table below shows the budget forecast compared to the actual budget dating back to 2007.

Year	Original budget \$'000	Actual \$'000
30 June 2019	(3,565)	(790)
30 June 2018	35	3,410
30 June 2017	98	2,437
30 June 2016	65	8,109
30 June 2015	31	9,453
30 June 2014	68	11,187
30 June 2013	36	12,387
30 June 2012	27	2,233
30 June 2011	130	293
30 June 2010	(2,487)	7,574
30 June 2009	433	(9,587)
30 June 2008	1,104	4,665
30 June 2007	233	9,574

The funds held in the Common Fund are protected by Government guarantee. The Public Trustee maintains \$30 million to guarantee the funds in the Common Fund. Additional funds are used for income stabilisation.

It has been the view of the Public Trustee that the reserves of the Public Trustee should be aligned with the customer's funds under management to minimise the chances of the government guarantee being called on. This is it has been the view that it would be the expectation of the government that the Public Trustee would manage its reserves prudently to ensure that the government guarantee is not called on. As customer funds under management grow so should the reserves of the Public Trustee. The proportion of Public Trustee equity reserves to customer funds in the Common Fund has fallen from 44% in 2010 to 30% in 2019.

As you have noted, the Public Trustee does not currently publish the rates of return for the interest earned on the Common Fund. The Public Trustee declares the costs and income received from the Common Fund in its Annual Report. However, consideration will be given as to how this can more clearly and transparently be reflected in the Annual Report moving forward.



### ***Growth Trust***

When investing funds for financial management customers, the Public Trustee has to date aimed to make such investments in accordance with what it understands to be the 'prudent person rule'. The Prudent Person Rule refers to the duties of a trustee as described in Part 3 of the *Trusts Act 1973*, particularly sections 22 to 23. The relevance of the *Trusts Act 1973* to a financial management customer is found in the definition of "authorised investment" in the *Guardianship and Administration Act 2000* and in section 84 of the *Powers of Attorney Act 1998*.

In addition to acting in accordance with the Prudent Person Rule, the Public Trustee also engages with its financial management customers to develop financial management plans and budgets in accordance with section 16 and 17 of our Financial Management Manual. Through these processes, the Public Trustee considers the customers' risk appetite and investment preferences.

For Customers with less than \$450,000 in assets, the default position of the Public Trustee is to hold \$50,000 or 12.5 per cent of investable assets in Cash or the Term Investment Account with the balance held in the Public Trustee Investment Fund Growth Trust (Growth Trust). However, this approach is not applied as a matter of course. The customer's individual needs are considered, and depending on the cash flow requirements, all of their funds may be held in the Common Fund or split between the Common Fund and the Growth Trust.

The draft report identifies that there are management fees associated with the running of the Growth Trust and considers that these fees do not seem reasonable. While there are a number of different fees associated with the Growth Trust, each one is for a different valuable service. For example, in 2018–19 the Public Trustee paid \$814,000 to QIC Limited ACN ("QIC") as the investment manager for the Growth Trust. In addition, \$348,000 was paid to BDO (QLD) Pty Ltd for administration and registry services and \$926,000 was the management fees rebates paid to customers of the Growth Trust. The abovementioned expenses and other Growth Trust expenses, including the management fee rebates to our customers are paid from the Public Trustee Corporate account.

The fee revenue associated with the Growth Trust is disclosed in the Public Trustee's profit and loss statements in accordance with accounting standards.

The staffing costs associated with the running of the Growth Trust are reflected in the Public Trustee's corporate costs. These staffing costs are sourced from the Public Trustee's activity based costing report. The Public Trustee charges a commercial fee for the services provided to the Growth Trust and incurs costs to provide those services. The revenue and expenses are reported in the Public Trustee's accounts.

### ***The Prudent Person Rule***

The Public Trustee acknowledges the differing views in the application of the Prudent Person Rule. Davis and Shaw (1997) state 'Notwithstanding that there may be compelling reasons for trustees to expose a trust to some risk in order that the real value of capital is preserved, it is however reasonable to say that the safety must be paramount, for without the capital there is no possibility of future income'. This has been the accepted view of the



Public Trustee to date, and as such the customer investments strategies have been focused on wealth preservation rather than wealth accumulation.

The Public Trustee acknowledges its obligations to comply with the general principles in the *Guardianship and Administration Act 2000*, as well as the Prudent Person Rule. It is noted that in *CRG [2019] QCAT 168*, Member Gordon stated:

*One point to make is that all the General Principles, except for 10, require the taking into account of the principle. This means that the General Principles, leaving aside 10 for the moment, have the effect of modifying the reasonable diligence and prudent person investment rules by adding things which must be taken into account when exercising the power, **but they cannot prevail over those rules.** (my emphasis)*

Member Gordon further went on to state:

*In practical terms this means that pursuant to section 22(1), when exercising a power of investment, the Public Trustee must exercise the care, diligence and skill that a prudent person engaged in the profession of acting as a trustee or investing money for other persons would exercise in managing the affairs of other persons. This must be read in the light of section 24 which requires the trustee to have regard to the purposes of the trust and the needs and circumstances of the beneficiaries in so far as appropriate to the circumstances of the trust. It is notable that this latter provision is closely similar to General Principle 10 with which the Public Trustee must comply. And in addition to the above, the Public Trustee must take into account the other General Principles. So, it is right that an administrator appointed under the GAA should consider the benefit to the adult of a particular investment and could make an investment which would confer a particular benefit on the adult provided of course it satisfied the prudent person investment rule.*

Member Gordon articulates the duties on the Public Trustee to satisfy the requirements of the Prudent Person Rule when making investment decisions on behalf of an adult with impaired-decision making capacity.

### ***Primary Investment Strategy***

The Public Trustee's Primary Investment Strategy (PIS), which applies to customers with assets of between \$0.00 and \$450,000, is based on the bucket strategy pioneered by US financial planning expert Harold Evensky in 1985. Bucket strategies are designed to balance the need for income stability and capital growth. The overarching goal is to ensure customers' financial security, while providing the flexibility to make lump sum withdrawals for expenses when needed. Bucket Strategies are still used by respected financial planning experts such as PWC and Kaplan, and are supported by considerable academic research.

The PIS is to hold customers' funds in three buckets:

- 1) \$5000 in the Public Trustee Cash Account for day to day expenses;
- 2) \$45,000 in the Public Trustee Term Investment Account plus any capital expenditure identified and or budget deficits; and
- 3) the remainder of funds in the Public Trustee Growth Trust.

For new customers with assets of between \$150,000 and \$450,000, the Public Trustee obtains expert financial advice to ensure that the PIS is appropriate for the customer. For customers for whom the PIS applies, expert financial advice is only obtained once, unless there is a significant change to their financial circumstances. In some cases, the expert financial advisor may recommend a different approach to the PIS. For example, it was recently recommended that a customer invest their funds in a new superannuation account which enabled them to continue to have access to their full Disability Support Pension (DSP), and provided the option to withdraw the funds from the superannuation account early if needed. This was a better financial outcome for the client, who previously was not receiving the full DSP.

The customer may also request their funds be invested differently or object to the PIS. In these circumstances the expert financial advisors recommends other products which are appropriate for the Customer. However, a review of the Public Trustee records indicates that there are not a lot of objections from customers about the use of the Growth Trust.

The Public Trustee also obtains expert financial advice for complex assets, including superannuation. For superannuation accounts with up to \$20,000, the Public Trustee completes a "small superannuation" checklist to determine if expert financial advice is required. If the account does not meet the conditions of the checklist it is not sent for expert advice.

In relation to the superannuation accounts which are referred for financial advice, the Public Trustee has been of the view that the cost of obtaining expert financial advice is prudent and justified. The cost of the expert financial advice is low at \$341 for an initial Financial Plan and \$176 for a review. The low cost of the financial advice means it can be appropriate to obtain the advice given the potential benefits and savings to the customer, for example, through a total and permanent disability insurance claim, maintaining insurances within the account, reviewing fees and the performance of the account. The Public Trustee is considering ways to improve its processes and the use of expert financial advice for customers with small superannuation accounts.

### ***Client risk profiles***

As part of the Public Trustee's application of the Prudent Person Rule, consideration is given to the customer's risk profile. It is noted at paragraph 370 of the Report, reference is made to a client risk profile taken from the Prudent Person Rule Manual. The table referenced from page 17 of the Manual, only applies to customers whom the PIS strategy applies. Attachment 2 of the Prudent Person Rule Manual (attached) references the risk profiles used by the Public Trustee's expert financial advisor. It includes the categories of very low risk, conservative, growth and assertive.

It appears that the Report confuses the risk profiles used by the expert financial advisor, with the risk profiles referenced for PIS customers. Customers with different asset allocations may end up with different strategies and approaches being taken, as noted previously in regard to superannuation.

It is noted that the Report raises concerns that for customers who are over the age of 80 years, only the Public Trustee Term Investment Account is considered. This is part of the Public Trustee's glide path bucket approach. The bucket strategy is based upon matching assets with liabilities to meet expenditure requirements when they fall due. The bucket

theory of investing is segmenting funds into distinct time horizons, and allocating appropriate funds to these time horizons that meet the customer's needs. Generally, funds are allocated into buckets that represent immediate requirements, short term needs, medium and long term needs. However more buckets can be applied to meet specific needs. The buckets that are usually allocated to medium and long term needs generally hold a higher allocation to growth assets. This principle is applied through the Primary Investment Strategy:

- Immediate requirements – Public Trustee Cash Account
- Short/medium term needs – Term Investment Account
- Medium/long – Growth Trust
- Long term – Superannuation, Shares.

I understand our Financial Management customers have a reduced life expectancy when compared to general life expectancy tables and our data consistently show us this relationship. We believe that it is appropriate to hold funds in cash when it is suitable for the customer.

#### ***Draft Chapters 1–4***

I understand that you have considered the Public Trustee's feedback to the draft Chapters one to four, and are amending parts of the Report. I look forward to having the opportunity to consider the revised Chapters in due course.

As noted in my previous letter, I believe it is important context for the reader and decision-makers considering the report to be aware of the outcomes for Public Trustee Customers. To assist, officers from my agency are reviewing the case studies in the report and providing additional information where appropriate. Attachment 2 is an amended case study which is referred to as case study 3 in Chapter 3. As can be seen, the customer left the Public Trustee in a substantially improved financial position as a result of the services provided.

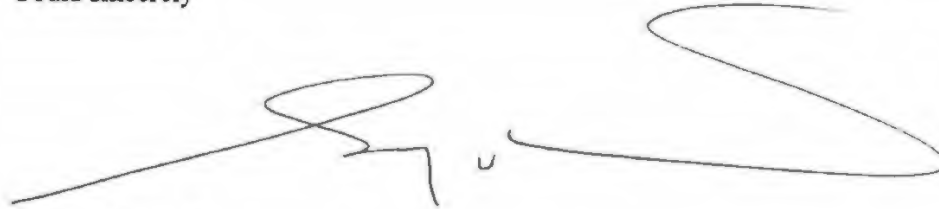
My officers will continue working through the remaining case studies and I will provide you with further advice in due course.

Lastly, in the spirit of open and constructive engagement, I acknowledge that some of the advice the Public Trustee is providing is of a technical nature which it understands is specific to the unique environment in which it operates. If it would be of assistance, I would like to offer a proposal to engage an independent expert to provide advice to both the Public Trustee and you on a number of matters raised in your report. If you would be interested in exploring this further, I would welcome your feedback.

Thank you again for providing the Public Trustee with the opportunity to assist you in finalising your Report. I hope that we can continue to have an open and constructive dialogue between our offices so as to ensure an accurate and balanced Report.

If you have any questions or would like to discuss any of the information in this letter further, please do not hesitate to contact [REDACTED]

Yours sincerely

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the left.

Samay Zhou and  
**Acting Public Trustee of Queensland and CEO**

Chapter	Section	Statement	Public Trustee Comments
5	303	The conflicts inherent in this funding arrangement are fundamentally incompatible with the duties and obligations of a trustee and fiduciary to not profit from its clients and to avoid conflicts.	<p>This is a model that has been in place since the Public Curator (as the Public Trustee was then known) was created by the <i>Public Curator Act 1915</i>. Ever since its inception the Public Trustee has met its expenses (including capital funds for buildings, etc.) from the margin between the earnings of the Common Fund and the interest paid to trusts and estates and the fees received from its services.</p> <p>When the Public Curator Bill was introduced by the then Premier to the Queensland Parliament on 20 October 1915 it was made quite clear that the role of the Public Trustee was one that was to be “self-supporting” and “without expense to the tax payers”. Further, on the 27 October 2015, during the Second Reading Speech, the Premier stated that “The intention is that the office shall pay its way, without being after huge dividends...”</p> <p>The way in which the Common Fund interest is used was referred to in Parliament during the Second Reading Speech of <i>the Justice and Other Legislation (Miscellaneous) Provisions Bill</i> on 8 August 2002 at which time Mr Lawlor states that from:</p> <p>“the interest earned by investments made from the Common Fund and fees and charges received in performing services under the act, the Public Trustee shall, firstly pay interest to the estates having investments in the Common Fund and after such interest is paid, pay operating and capital expenses of the Public Trust Office. Such operating and capital expenses are not solely related to administering the beneficiaries’ estates. The operating and capital expenses also support the Public Trust Office’s services to other clients, as directed by the Cabinet Budget Review Committee; that is, its community service obligations. These services include preparing Wills for free, conveyancing for some clients and discounts on some services. In 2001-02, these community service obligations were estimated to cost \$10.2 million.”</p> <p>Mr Lawlor also referred to the use of the Public Trustee’s funds to contribute to the funding of the Adult Guardian (as it was then known), a payment which fitted into the category of the Public Trustee’s community service obligation.</p> <p>The concept of a Common Fund is not one that is unique to the Public Trustee, but a mechanism used by trustee companies generally (see s. 36 <i>Trustee Companies Act 1968 (Qld)</i> as at the date of commencement of the legislation). The intent of allowing companies and the Public Trustee to pool the investments of a large number of estates and trusts for which they are a trustee is in order to provide efficiency of management (see para. 9.6.3 <i>Trustee Investment, the Prudent Person Approach, Second Edition, Davis and Shaw</i>).</p>
5	317	It must be acknowledged that there are a range of factors that contribute to a surplus. In addition to earning income from fees and charges, the Public Trustee also earns income from interest on its invested reserves, the interest differential (as already discussed), Growth Trust management fees (discussed below), and from a range of other activities. However, the most significant source of income is from fees and charges, the majority contributor being people under financial administration. In 2018-19 the Public Trustee’s total	The Public Trustee is unable to verify the \$129.5M figure. It appears this should be \$129.2.

		income was \$129.5M and of this, administration of estates and trusts and other professional fees contributed \$90.1M,[28] or approximately 70 percent of its total income.	
318	<p>As at 30 June 2019, the Public Trustee had \$186M in the Common Fund that was described as ‘accumulated surpluses’.[29] Considering the Public Trustee is a self-funding organisation and its income is mainly sourced from interest on investments (of clients’ funds and its accumulated surpluses) and fees and charges, it is questionable whether the Public Trustee should be running surpluses and accumulating a large reserve of funds rather than providing more services to more clients or reducing its fees and charges, as the State Trustees Victoria did as part of its strategic pricing review in 2018.[30] Further, as noted in the previous section about the interest differential, it may not be consistent with section 19A of the Public Trustee Act to be accumulating surplus funds.</p> <p>[29] The Public Trustee, Annual Report 2018-19, p 58.</p> <p>[30] State Trustees Victoria, Annual Report 2018-19, pp 5 and 11.</p>	<p>The Explanatory Notes to the <i>Justice and Other Legislation (Miscellaneous Provisions) Bill 2002</i>, (when s. 19A was inserted into the <i>Public Trustee Act 1978</i>, the introduction of s. 19A was only necessary due to the incidental consequences of amendments in 1999 to the <i>Financial Administration and Audit Act 1977</i>. By 2002 the Public Trustee already held significant reserves.</p> <p>The Honourable RJ Welford (as he was then), the then Attorney-General and Minister for Justice, in the Second Reading speech for the <i>Justice and Other Legislation (Miscellaneous Provisions) Bill 2002</i> stated that the intention of s. 19A was to give “effect to the current state of play” and that the Parliament was “simply restoring a provision that makes it clear that the existing practice which has been in place for decades ensures that the Public Trustee’s costs can be paid out of the capital fund. There are no financial implications other than that. It simply maintains the existing practice”.</p> <p>At the initiation to an amendment to the <i>Public Curator Act 1915</i> on 23 October 1956, the then Attorney-General, the Honourable W Power spoke to the intent behind the Common Fund and stated that:-</p> <p>“Moneys vested in the Public Curator now a part of the common fund and must be invested by the Public Curator. The interest earned by such investments also forms part of the common fund. The estates to which the moneys belong are credited within interest at a rate determined by the Governor in Council but any profit from the investments belongs to the Public Curator”.</p>	
321	<p>The Public Trustee’s use of the words ‘investment option’ suggests choice. However, the discussion later in this chapter about the Prudent Person Rule Manual[35] makes it clear that financial administration clients have their funds allocated to the Growth Trust in accordance with the standard Public Trustee investment strategy as a matter of course.[36]</p> <p>[35] The Prudent Person Rule Manual is discussed later in this chapter.</p> <p>[36] Those holding funds of \$50,000 and more in accordance with the Public Trustee Prudent Person Rule Manual, Section 5 Investments Services Activities, pp 10-13.</p>	<p>The section references the Prudent Person Rule, however it may also be beneficial to consider the Public Trustee’s engagement with customers through financial management plans and budget (refer to sections 16 and 17 of the Financial Manual).</p> <p>The statement “as a matter of course” is factually inaccurate. The funds may be invested all in the Common Fund, or invested in the Common Fund and Growth Trust. It is subject to the needs and outcomes for the customer.</p>	
323	<p>There are management fees associated with running the Growth Trust. Financial administration clients whose funds are invested in the Growth Trust are paying up to three separate fees on their funds — the Asset Management Fee, the Public Trustee’s Growth Trust Management Fee, and the OIC investment</p>	<p>The Asset Management Fee relates to the Public Trustee discharging his fiduciary responsibilities in managing the asset. The Growth Trust Management Fee charged on the Public Trustee Growth Trust is an arm’s length commercial fee charged for managing the investment product and the investors within the fund. Hence, the Asset Management Fee and the Annual Management Fee on the Public Trustee</p>	



		management fee. As a matter of principle, the charging of multiple fees for the management of the same funds does not seem reasonable	<p>Growth Trust are two separate and distinct fees for performing two different functions.</p> <p>The QIC Investment Management Fee is paid by the Public Trustee as part of its costs of managing the Growth Trust. Investors in the Growth trust (including Financial Administration clients) do not pay this fee.</p>
324	<p>These Growth Trust management fees represent income and expenses associated with both the Public Trustee and the Growth Trust. Conventionally, income and expense information is reported in an organisation’s financial statements. However, a thorough search of the Public Trustee and Growth Trust financial statements did not disclose sufficient information to understand the total fees charged, or the income earned, on the Growth Trust. Further enquiries revealed:</p> <ul style="list-style-type: none"><li>• The investment objective of the Growth Trust is to generate average returns (net of fees and costs) of CPI + 2.4 percent per annum over rolling five year periods;[40]</li><li>• The total management costs of the Growth Trust (payable to the Public Trustee) are between 1.72 percent and 1.82 percent;</li><li>• Of this, the Trustee fee is 1.52 percent which is deducted from the person’s capital balance in the Growth Trust each month;</li><li>• Estimated QIC expenses are also included in the above figure. These expenses are currently 0.20-0.30 percent, and are deducted from the capital balance held by the QIC. [41]</li><li>• The Public Trustee fee is used to ‘pay all expenses associated with operating the Growth Trust, including fees and costs payable to QIC for its investment management services’;</li><li>• ‘Fees paid to QIC for the investment management of the Growth Trust are not an additional cost to the Growth Trust. The fees paid to QIC for the investment management of the Growth Trust are paid by PTQ [Public Trustee Queensland] from its own funds’;</li><li>• Clients with balances in the Growth Trust over \$100,000 receive a rebate on their fees and these</li></ul>	<p>The following statement is factually incorrect and “Payable to the PT” to be omitted</p> <p>“• The total management costs of the Growth Trust (payable to the Public Trustee) are between 1.72 percent and 1.82 percent;”</p> <p>A fee of 1.61% fee GST is paid to the Public Trustee for managing the Growth Trust. After a tax rebate for Reduced Input Tax Credit (RITC) is applied within the Growth Trust the investor pays 1.52%.</p> <ul style="list-style-type: none"><li>• Estimated QIC expenses are also included in the above figure. These expenses are currently 0.20-0.30 percent, and are deducted from the capital balance held by the QIC.[41]</li></ul> <p>The 0.20%-0.30% is an estimate QIC Fund Expenses which are deducted from the assets of the applicable underlying QIC Fund and may vary over time. The total amount of fees paid by the investor is referred to as an “indirect cost ratio (ICR)” the ICR includes items as Performance fees, compliance/legal, auditing and accounting fees and should represent the full cost that the investor pays for cost of running the fund. i.e. 1.72% to 1.82%.</p> <p>The statement “is deducted from the person’s capital balance in the Growth Trust each month” is not accurate, and it is suggested that this be removed.</p> <p>“Of this, the Trustee fee is 1.52 percent which is deducted from the person’s capital balance in the Growth Trust each month;”</p> <p>“accrues daily based on the net asset value of the Growth Trust and is reflected in the unit price. It is paid monthly in arrears from the assets of the Growth Trust, thereby reducing your investment returns.”</p>	

		<p>rebates increase with larger balances.[42]</p> <p>[40] The Public Trustee, Annual Report 2018-19, p 24.</p> <p>[41] The Public Trustee, The Public Trustee of Queensland Growth Trust Product Information Statement, 2018, p 7.</p> <p>[42] The Public Trustee, The Public Trustee of Queensland Growth Trust Additional Information, 2018, pp 2-3.</p>	
	325	<p>The total management costs for the Growth Trust, namely the Public Trustee fee plus the QIC fees, amount to a major expense of the Growth Trust (otherwise considered a 'material expense' in accounting terms). [43] A review of the Growth Trust Financial Statements Year Ended 30 June 2019[44] did not disclose information about the amount of these fees (or expenses). The failure to publish these fees results in the Growth Trust financial statements not fully disclosing the management costs and investment costs, and consequently does not show clients the financial impacts of these expenses on the performance of the Growth Trust. Failure to report a material expense in the financial statements is generally considered to mean that they lack transparency. [45]</p> <p>[43] See Australian Accounting Standards Board Standard AASB 1031 Materiality.</p> <p>[44] The Public Trustee, Annual Report 2018-19, pp 103-121.</p> <p>[45] Australian Accounting Standards Board, AASB 1031 Materiality, 2011, p 1 states that: Information is material if its omission, misstatement or non-disclosure has the potential, individually or collectively, to: influence the economic decisions of users taken on the basis of the financial statements, or affect the discharge of accountability by the management or governing body of the entity.</p>	<p>The Public Trustee Annual Report 2018-19 clearly articulates the Trustee Fees incurred by the Growth Trust (\$4,983page 104) and is located in The Public Trustee of Queensland Growth Trust's Statement of Comprehensive Income in the section titled Expenses and named as Trustee Fees. Further, Note 14 on page 118 provides an explanation of Related Party Transactions.</p> <p>These are the fees charged by the PT to the Growth Trust. As a separate matter the PT rebates to Growth fund investors a proportion of the trustee fees based on the amount invested in the Growth Trust. Net fees earned by the PT after paying this rebate and other expenses are significantly less than the gross costs charges to the Growth Trust.</p> <p>Page 67 of the Annual Report contains the expense item "Investment and Registry Fees of \$2,575,000 under the heading 'Suppliers and Services'. This Line item contains expense items (for suppliers) for the Growth Trust. This amount also includes the management fee rebate paid to clients.</p>
	331	<p>There is no staff expenses associated with operating the Growth Trust. The Notes to the Financial Statements of the Growth Trust [51] show that accounting expenses are included in the services represented by the Trustee Fee. This means that the</p>	<p>The PT provides Trustee Services to the Growth Trust at an arm's length commercial rate. To provide these services the PT uses a range of internal and external resources. The fees charged by the PT to the Growth Trust are reported appropriately as costs and revenue in the financial statements of the PT and the Growth Trust.</p> <p>The costs incurred by the PT in providing those services are also reported appropriately in the PT Profit &amp; Loss</p>

		<p>wages of staff who maintain the accounting records for the Growth Trust are paid by the Public Trustee. Based on publicly available information, it is not possible to ascertain what these running costs would be based on; however, these expenses would be material to the Public Trustee's financial statements because they are undisclosed expenses representing work done for a different entity, which affects the financial sustainability of the Public Trustee. These costs also amount to undisclosed cross-subsidisation of the operation of the Growth Trust by people under financial administration who are not investors in the Growth Trust.</p> <p>[51] The Public Trustee, Annual Report 2018-19, Note 14.(ii), p 118.</p>	<p>statement.</p> <p>The PT provides Trustee Services to a range of trusts under a range of contractual arrangements. Fees earned are reported appropriately as Trust Fees in the PT Financial Statements (page 65) and the costs of providing those services are reported in accordance with the Australian Accounting Standards as Employee Expenses (page 66), Supplies and Services (page 67) or Other Expenses (page 68).</p> <p>There is no cross subsidization of the Growth Trust by people under Financial Management (see ABC data provided previously).</p> <p>The Activity Based Costing Report reflects the time incurred by Public Trustee staff on the Growth Trust.</p>
342	<p>The Public Trustee's obligations to comply with the Prudent Person Rule when investing clients' money do not operate in isolation. As an administrator under the <i>Guardianship and Administration Act</i>, all other obligations of an administrator (as outlined in Chapter 2) continue to apply. Some of these obligations are specific, such as:</p> <ul style="list-style-type: none"><li>• avoiding conflict transactions;[69]</li><li>• how decisions are to be made when there are multiple decision-makers;[70]</li><li>• keeping records;</li><li>• keeping property[71]</li><li>• keeping property separate;[72]</li><li>• when gifts are appropriate;[73] and</li><li>• rules around maintaining the dependents of a person under administration.[74]</li></ul> <p>[69] Guardianship and Administration Act 2000 (Qld) s 37.</p> <p>[70] Guardianship and Administration Act 2000 (Qld) ss 38 – 40.</p> <p>[71] Guardianship and Administration Act 2000 (Qld) s 49.</p> <p>[72] Guardianship and Administration Act 2000 (Qld) s 50.</p> <p>[73] Guardianship and Administration Act 2000 (Qld) s 54.</p> <p>[74] Guardianship and Administration Act 2000</p>	<p>At paragraph 347 the quote from CRG [2019] QCAT 168 is missing part of the sentence, thereby arguably changing the meaning of the statement that was being made by the Tribunal Member. The full quotation is set out below:-</p> <p>“One point to make is that all the General Principles, except for 10, require the taking into account of the principle. This means that the General Principles, leaving aside 10 for the moment, have the effect of modifying the reasonable diligence and prudent person investment rules by adding things which must be taken into account when exercising the power, <b>but they cannot prevail over those rules.</b>” (my emphasis)</p> <p>It was the Public Trustee's own submissions to QCAT that stated that the administrator must not only take into account the Prudent Person Rule, but also the General Principles, when making a decision (see paragraph 38 of CRG [2019] QCAT 168).</p> <p>Other statements made by Member Gordon in CRG [2019] QCAT 168 are particularly relevant to the question of the way in which an administrator applies the Prudent Person Rule. Member Gordon states at paragraph 39:</p> <p>“In practical terms this means that pursuant to section 22(1), when exercising a power of investment, the Public Trustee must exercise the care, diligence and skill that a prudent person engaged in the profession of acting as a trustee or investing money for other persons would exercise in managing the affairs of other persons. This must be read in the light of section 24 which requires the trustee to have regard to the purposes of the trust and the needs and circumstances of the beneficiaries in so far as appropriate to the circumstances of the trust. It is notable that this latter provision is closely similar to General Principle 10 with which the Public Trustee must comply. And in addition to the above, the Public Trustee must take into account the other General Principles. So, it is right that an administrator appointed under the GAA should consider the benefit to the adult of a particular investment and could make an investment which would confer a particular benefit on the adult provided of course it satisfied the prudent person investment rule.”</p> <p>As is stated by Davis and Shaw, <i>Trustee Investment, The Prudent Person Approach</i>, Second Edition at paragraph 5.2:-</p>	

		(Qld) s 55.	“Notwithstanding that there may be compelling reasons for trustees to expose a trust to some risk in order that the real value of capital is preserved, it is however reasonable to say that <b>the safety must be paramount for without the capital there is no possibility of future income</b> ”. (my emphasis)
385	<p>The first is that it shifts the focus of client investments to risk avoidance, rather than a risk minimisation, approach. Such an approach is not consistent with the Prudent Person Rule, as outlined by the Federal Court in <i>Australian Securities and Investments Commission v Drake (No 2)</i>[103] which noted that an approach that is overly cautious, emphasising the preservation of capital is outdated.[104] Instead trustees should consider an overall investment strategy that is suitable for the particular trust.[105]</p> <p>[103] [2016] FCA 1552 [267]-[268]. [104] <i>Australian Securities and Investments Commission v Drake (No 2)</i> [2016] FCA 1552 [267]-[268]. [105] <i>Australian Securities and Investments Commission v Drake (No 2)</i> [2016] FCA 1552 [269].</p>	<p>The observations relied upon from Edelman J in <i>Australian Securities and Investments Commission (ASIC) v Drake (No 2)</i> highlight the varied nature and object of trusts and accordingly the degree of caution the Prudent Person Rule requires of investments when guided by the purpose and “business” set out in the trust instrument. The observations should however be properly considered in the context of that case. In <i>Drake (No. 2)</i>, the alleged breach of duty pertained to the directors of a corporate trustee for a managed investment scheme, a trust described by the court as</p> <p>“an aggressive fund with reasonably high risk. It was aimed at wholesale and sophisticated investors who accessed the fund through financial planners... It had a very broad investment mandate. It was marketed as an aggressive fund with higher returns than what was on offer from some other funds... The sophisticated investors would have been immediately aware from the information memoranda and investment application that the fund was far from low risk.”</p> <p>A settlor in those circumstances might stipulate very wide terms of investment in a trust instrument, receptive to a high level of risk. It does not follow that the Prudent Person Rule should or will be interpreted this way where the long-term interests of a person under a legal disability are concerned. The Public Trustee is not aware that <i>Drake (No. 2)</i> has been adopted to that effect.</p> <p>The Tribunal has indicated that, even through the application of the General Principles and the views, wishes and preferences of the adult, investments must otherwise satisfy the Prudent Person Rule (see CRG [2019] QCAT 168 at para 39) having regard to all factors set out in the <i>Trusts Act 1978</i>. A client may express a preference for high risk investment, which the Public Trustee takes into account in its investment strategy by the means above, but the duties and principles under the <i>Guardianship and Administration Act 2000</i> do not permit an administrator, acting with reasonable diligence, to treat an adult’s assets purely as an “investment vehicle” or a “trust established for the purposes of speculation” as contemplated in <i>Drake (No. 2)</i>.</p>	
396	<p>However, in terms of the suggestion that the case was authority for conflict transactions by the Public Trustee, there is nothing in the order or material on the case file to indicate that the Supreme Court approved this investment after consideration of the Public Trustee having a conflict of interest. The word ‘conflict’ is not mentioned in the order or any of the affidavits the Public Trustee filed in support of the application.</p>	<p>The Public Trustee’s Application to the Supreme Court of Queensland in 1996 for permission to create a new investment vehicle for Public Trustee clients was made at a time when s. 21 of the <i>Trusts Act 1973</i> did not allow for the investment of trusts monies in equities without the consent of the Court. The Public Trustee was concerned that the limitations on the Public Trustee in investing in its own Common Fund and the authorised trustee list did not allow for “the implementation of orthodox financial practices of diversification” nor did it cater well “for the effects of inflation and has proven ineffective in smaller estates whose size have precluded diversification or even investment in traditional orthodox investment such as real estate”: see para 3 of supporting Affidavit of Timothy Feely executed 12 July 1996. The Application was made as the Public Trustee believed that the proposed new investment vehicle would benefit many of the Public Trustee’s clients by allowing them to invest in equities.</p>	

			<p>Justice Moynihan made orders on the 15th of July 1996 in the terms set out in paragraph 393 of the Public Advocate’s report.</p> <p>There was extensive material provided to the Supreme Court in support of the creation of the new investment vehicle. The Public Trustee made it clear to the Court that:-</p> <ul style="list-style-type: none"> <li>• the new investment vehicle (Unit Trusts known as the Public Trustee of Queensland Income Trust and the Public Trustee of Queensland Growth Trust collectively called “The Public Trustee Investment Funds”) would be used for clients other than solely financial management clients;</li> <li>• any fees charged by the Public Trustee as the trustee of the Public Trustee Investment Funds would be charged against the assets of the Unit Trusts and would be set by Government as part of an overall review of the fee structure of the Public Trust Office (the current fees are published in s. 39, <i>Public Trustee (Fees and Charges Notice) (No. 1) 2020</i>).</li> <li>• Queensland Investment Corporation (QIC), was to be the manager of the Public Trustee Investment Funds and QIC’s management fees, accounting, registry and audit fees would be payable by the Public Trustee to QIC as an expense of the Public Trustee Investment Funds and these fees were in addition to any fees the Public Trustee charged as trustee of the Public Trustee Investment Funds.</li> </ul> <p>The Public Trustee was represented by Mr Robert Gotterson QC.</p> <p>It was clear on the face of the Application to the Supreme Court that the Public Trustee was in a fiduciary relationship with its “estates under administration” as that term is defined in the <i>Public Trustee Act 1978</i>, and that the Public Trustee would also be in a different fiduciary role by being the Trustee of the Public Trustee Investment Funds. The Public Trustee disclosed to the Court the position of “conflict” the Public Trustee was placing himself in by the proposed creation of the Public Trustee Investment Funds and the proposed investment of Public Trustee client funds in the Public Trustee Investment Funds.</p> <p>A Supreme Court Order does not expire. The approval of the Court for the Public Trustee to invest funds of estates under administration into the Public Trustee Investment Funds remains valid. Section 136 of the <i>Public Trustee Act 1978</i> protects the Public Trustee acting in pursuance of an Order of the Court.</p>
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**Attachment 2**

**Case Study 3: Charged two fees for unnecessary financial advice**

Gary is a young man who prematurely retired from work due to disability. At the time he stopped work, Gary had \$2,700 in his bank account and \$2,000 in superannuation.

The Public Trustee was appointed as Gary's financial administrator.

The Public Trustee sought an initial statement of advice from its expert financial advisor at a cost of \$176. As part of the advice, it was identified that Gary may be eligible to make a total and permanent disability claim on his superannuation.

A claim process was initiated on the 10 September 2015 where the Public Trustee referred Gary's possible claim to an Insurance claim specialist.

After confirming that Gary had a viable claim against his insurance benefit, the external insurance claim specialist received instructions from the Public Trustee to proceed.

The external Insurance claim specialist advised the Public Trustee in March 2018 that they had won the superannuation disability claim and a lump sum amount of 120,748.00 would be paid to Gary's existing Superannuation Fund.

The Insurance claim specialist also advised the Public Trustee that their fee for the superannuation disability claim was \$11,000 (GST inclusive).

Following the significant lump sum amount, and in line with the Public Trustee's duties to review its customers' investments at least annually, the Public Trustee obtained expert financial advice. The financial advice recommended repaying the customers debts, including a car loan and legal fees, and investing the remainder in superannuation and the PT investment Account.

During the time the Public Trustee was appointed as Gary's financial administrator, it provided a number of services provided significant benefits to Gary including:

- undertaking considerable work with Gary and Centrelink to have his Disability Support Pension and entitlements granted
- assisted Gary with the communication with Centrelink about changes in Gary's circumstances ensuring the correct entitlements were being received for Gary, including rent assistance.
- monitored the arrangement of paying off Gary's debt from the State Penalties Enforcement Registry.

As a result of the Public Trustee's prudent financial management, Gary left the public trustee in January 2019 in a significantly improved financial position as a result of the successful claim, having come to the Public Trustee with approximately \$3,000 in assets and left with approximately \$97,000 in cash and superannuation after the payment of Gary's Debts.



444 Queen Street Brisbane Qld 4000  
GPO Box 1449 Brisbane Qld 4001



For reply please quote: S&G/JF – T20/141 – D20/25202

20 November 2020

Ms Mary Burgess  
Public Advocate  
G P O Box 149  
BRISBANE QLD 4001

Dear Ms Burgess

Thank you for providing a draft of chapter six of your report: *The Value of Trust: Public Trustee fees and charges for people under financial administration* (the Report).

The Public Trustee appreciates the opportunity to review the draft chapters and to provide feedback where it will assist you to finalise the Report. In this regard, I am supportive of you including quotes from the Public Trustee's feedback where it will assist the readers' understanding of the issue, or to provide procedural fairness. I trust that quotes from the Public Trustee's feedback will be reproduced either in their entirety or in such a way as to not diminish the context or intent of which they were provided.

I acknowledge that we have previously discussed including a chapter in the Report for the Public Trustee's response. To confirm my understanding is that the Public Trustee has been invited to provide comment on factual errors in the draft Chapters provide to-date, and the Public Trustee will be afforded the opportunity to provide an overarching response which will be included as a chapter in the Report. I would like the Public Trustee's response to be included in full as part of the Report.

To enable the Public Trustee to provide its overarching response to the report as quickly as possible, it would be greatly appreciated if you would please provide the final full version of your report as soon as is reasonably possible.

I acknowledge that it is your complete and unfettered discretion to not accept some or all suggestions made by the public Trustee for the purposes of ensuring an objective and balanced report. I remain of the view that the Report would be enhanced by considering the holistic outcomes for Public Trustee customers. For example, it may assist the reader if the report reflects the financial outcomes for customers including factoring in fees, Community Services Obligations and financial outcomes of the investments made.

**Attachment 1** contains a summary of minor suggested amendments and additional information which may be of assistance.

### *The trigger for obtaining financial advice*

The draft report notes that the Public Trustee' Financial Management Manual (FMM) and the Prudent Person Rule Manual refer to the need to obtain advice. It appears in this chapter, references to the FMM refer to Chapter 28.

#### **The Public Trustee**

- Will-making
- Enduring powers of attorney

#### **1300 360 044**

- Executor services
- Estate administration

#### **[www.pt.qld.gov.au](http://www.pt.qld.gov.au)**

- Disability services
- Trust administration

#### **ABN 12 676 939 467**

- Real estate auctions and sales
- Charitable trusts

The FMM is a comprehensive manual of 66 chapters which set out and guide how Trust Officers interact with customers. Trust Officers have numerous touch points with our customers which are detailed in other sections of the FMM which are not repeated in section 28. The following chapters of the FMM outline the consultation that our Trusts Officer have with our customers to ascertain their needs, views and wishes which relate back to section 28 of the FMM:

- Section 52. Electronic General Report (EGR) For disability Services: The EGR for Disability Services is designed to record in CIMS the necessary information gathered by the Customer Liaison Officer to enable The Public Trustee to administer the financial affairs of Disability Services clients as efficiently and accurately as possible.
- Section 15. Set up and plan for management: After receipt of formal authority to manage a client's financial matters the next stage is for the Trust Officer to work with the customer and their existing support network to develop and implement a plan for future management.
- Section 11. Recording of assets and liabilities: the Trust Officer must confirm the assets and liabilities of the customer
- Section 16. Application of Customer's Funds: the Trust Office develops the Customers Budget and other financial matters.
- Section 44. Communication and File Supervision Plan
- Section 1. Introduction and Philosophy of the Public Trustee
- Section 3. Guardianship and Administration Act 2000.

As can be seen, the holistic engagement and touchpoints with the customer are explored in various chapters in the FMM, which I understand have previously been provided to your office. It is the result of all of these touchpoints and work with the customer that will determine whether expert financial advice is required. If it would be of benefit, I would be pleased to arrange for an overview of the customer journey to be presented to you and your officers at the earliest opportunity.

While the Public Trustee has been of the view that superannuation is a complex asset, not all customers with superannuation are referred for expert advice each year. For example, 1350 financial management customers have a superannuation account. Of those, 750 were referred for expert advice. For instance, where customers hold existing superannuation it may require further advice.

The Public Trustee completed over 90 per cent of customer annual financial reviews internally in the first instance. For customers with assets over \$450,000 expert financial advice is obtained. It has been the view of the Public Trustee that it is prudent to obtain financial advice for customers with large funds under management or complex matters.

### ***Client investment strategy dictates advice outcomes***

The Public Trustee notes the view expressed in the report that the Public Trustee's financial planning and investment policies 'have the general effect of converting client funds into cash that the public Trustee invests in its own investments produces in accordance with the Client Investment Strategy'.

It is noted from the table provided at figure 6.1 that approximately 47 per cent customer assets are invested in Public Trustee products. It may assist the reader if the table reflected the property values held by customers. This was approximately \$449 million as at 30 June 2020.

As previously noted, the Public Trustee has been of the view that the Client Investment Strategy is the most efficient way to meet our customers' needs, while also meeting our operational requirements. However, the Public Trustee aims to work with our customers to identify the best outcomes that meet their needs. For example if a customer has the option to retain shares and their wishes will be honoured if it is possible. Although, it is not always possible to honour a customer's wishes in every situation, and this inherent tension between the customer's assets, liabilities and budget requirements is often the reason that Public Trustee is appointed as financial administrator.

### **Observations**

The Public Trustee notes that the Public Advocate discusses the case study of 'Gary' and states 'it is difficult to understand how a \$2000 superannuation fund holding could be considered 'complex' by a professional trustee'.

The Public Trustee is concerned that the description of the case study of Gary at paragraph 424 does not present an accurate portrayal of the circumstances of the case. The Public Trustee has provided detailed information about Gary's circumstances in response to the Public Advocate's further information notice of 26 August 2019.

Through the Public Trustee's prudent management, Gary was successful in obtaining \$120,748 from a successful total and permanent disability insurance claim. Expert financial advice was obtained as there was a need to withdraw funds to address Gary's cash flow deficit, including legal fees and vehicle loan. The outcome was that Gary left the Public Trustee in a substantially improved financial position as can be seen from the table below.

<b>Public Trustee Fees and Charges</b>	<b>Year 1</b>	<b>Year 2</b>	<b>Year 3</b>	<b>Year 4 (Half year)</b>
Personal Financial Management Fee	\$6,365.32	\$5,846.47	\$6,051.10	\$3,057.60
Asset Management Fee	Nil	\$43.04	\$429.04	\$559.20
Property Fee	Nil	Nil	Nil	Nil
Incidental outlays	\$62.00	390.00	390.00	461.50
Transaction Fees	\$24.57	\$33.39	30.87	13.44
Taxation fee	\$91.34	Nil	Nil	Nil
Special Fee (checking cost agreement)	\$228.35	Nil	Nil	Nil
<b>Total</b>	<b>\$6,771.58</b>	<b>\$6,312.90</b>	<b>\$6,901.01</b>	<b>\$4,091.74</b>
<b>Less Rebate of Fees</b>	<b>\$6,262.16</b>	<b>\$5,946.20</b>	<b>\$4,293.51</b>	<b>\$833.37</b>
<b>Actual fees charged to Customer</b>	<b>\$509.42</b>	<b>\$366.70</b>	<b>\$2,607.50</b>	<b>\$3,258.37</b>
Assets Under Management	\$2,945.69	\$15,711.51	\$110,222.90	\$9,357.03 Cash \$87,614.07 Super <b>Total \$96,971.10</b>

Similarly, the references to the case studies of Tony and Beryl may benefit from additional context about their individual circumstances. For example, Tony's expenses were in excess



of his capacity to pay for his living arrangements. The Public Trustee does explore alternative options for customers including review mortgages or pension loans; however the application rules are very specific. Unfortunately in Tony's case, the only viable option was to sell his shares to meet his needs and expenses.

As part of the comprehensive fees and charges review, the Public Trustee will ensure that due consideration is given to customers in Tony's circumstances. That is customers who own a property and a small amount of assets to ensure the fees and charges are sustainable.

### ***The Invitation to Offer***

The Public Trustee has a contract with [REDACTED] to provide expert financial advice on behalf of its customers. The contact has been on foot since 2012. The Public Trustee is committed to regularly reviewing its contract to ensure they are meeting the needs of its customers and representing value for money. Given the complexity and type of contract with [REDACTED], the view of the Public Trustee is that up to ten years is a reasonable contract length.

The Invitation to Offer/Contract with [REDACTED] is explicit that the service provided is for Public Trustee customers and not the corporation. [REDACTED] is required to comply with the duty for financial advisers to act in the best interest of their clients (financial management customer) and place the best interests of their clients ahead of their own when providing advice.

### ***Clarification to response to draft Chapter 5***

Draft Chapter 5, Investment Practices, discusses potential conflict transactions in relation to the Public Trustee's investment in the Common Fund, Growth Trust and Public Trustee Investment Fund. The Public Trustee has been of the view that such transactions are permitted by Queensland Supreme Court Case no 5391 of 1996, and it is not unique to the Public Trustee. I wish to clarify that while this is the position of the Public Trustee, we are open to alternative views and reviewing this approach.

The Public Trustee appreciates the Public Advocate's advice that the relationship between the financial planner and the customer could be made clearer. The Public Trustee will ensure that all future financial planning tenders, subsequent contracts and service level agreements clearly articulate that the advice being sought is for our end customers and that each customer is to be considered individually.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'S. Zhouand', written over a horizontal line.

Samay Zhouand  
**Acting Public Trustee of Queensland and CEO**

Attachment 1

Chapter	Section	Statement	Public Trustee Comments
6	414	<p>Neither manual includes a specific discussion or direction for staff about the circumstances in which a trustee's duty to obtain advice about an investment decision arises and the reasons for that. The closest any information in the manuals comes to providing this explanation is the following:</p> <p>In any case, the cost of getting and implementing investment advice should be less than the value created by that advice. That is why we segment our advice and only send matters to the financial planners above a certain dollar value or when their client's needs are complex</p>	<p>Section 28 of the Financial Management Manual (FMM) is written as a section of a broader manual referred to as the Financial Management Manual for Trust Officers. The other 66 sections of the FMM set out and guide Trust Officers how we interact customers.</p> <p>Trust Officers have numerous touch points with our customers in other sections of the FMM, it is expected that these areas are explored with our customers and this is why these are not duplicated in Section 28 of FMM. We refer to the below sections of the manual where Trust Officers are discussing our customers need views and wishes which relate back to Section 28 of the FMM</p> <ol style="list-style-type: none"> <li>1. The Client Liaison Officer has completed the Section 52. "Electronic General Report (EGR)" of the Financial Management Manual (FMM)</li> <li>2. The Trust Officer has started the Financial Management Plan process by following Section 15 "Set Up and Plan for Management" of the FMM</li> <li>3. The Trust Officer confirms the asset and liabilities of the customer Section 11 "Recording of Assets and Liabilities"</li> <li>4. The Trust Officer has completed the Budget and related matters by Following Section 16 "Application of clients Funds" of the FMM</li> <li>5. Relative communications are being undertaken by the Trust Office as per the "Communication and File Supervision Plan" Section 44 of the FMM</li> <li>6. Sections 1 &amp; 3 of the FMM "Introduction and Philosophy of the Public Trustee" &amp; "Guardianship and Administration Act 2000" respectively are taken into Account.</li> </ol> <p>Sections of the FMM should not be read in isolation of each other.</p>
6	415	<p>The Prudent Person Rule under the Trusts Act does not set financial limits on the considerations that should apply when a trustee is exercising a power to invest. The expectation is that the trustee will use their judgement, according to their expertise when investing. The Public Trustee's 'segmenting' of advice for clients is based on a fairly rudimentary assessment of the value of the clients' assets and whether they are 'complex' according to the Public Trustee's very narrow definition of that term — which includes any assets other than Public Trustee investments or cash. It is unclear why the Public Trustee, a provider of professional trustee services should use such a simplistic approach for identifying the clients for whom it obtains external financial advice. The Public Trustee should have sufficient expertise to make investment decisions about what, in many cases, appear to be quite ordinary financial arrangements of their administration clients. The result of this approach is that financial advice is obtained for clients in many more cases than appears reasonably necessary. Accordingly, while the direction noted above requires consideration of the cost of getting</p>	<p>Over 90 per cent of our customers annual financial reviews are completed internally in the first instance and for matters over \$450,000 it will be sent for an external review. The Public Trustee believes it is prudent to obtain independent and individual financial advice for customers who have large funds under management or complex matters.</p> <p>For example, 1350 of our customers have a superannuation account and of those customers 750 have a Statement of Advice (SOA) completed in that year. Approximately 50 per cent of customers are not receiving a SOA because the asset has been reviewed and it does not require further advice.</p> <p>The Public Trustee has been of the view that our customers benefit by utilising an external provider as this provides an economical and individualised outcome for customers compared to being complete in-house.</p>

		investment advice, beyond the simple assessment of value and complexity, it does not explain the reasons why the obligation to obtain that advice might arise.	
6	416	An examination of the Public Trustee's investment manuals, suggests that the practice of obtaining external financial advice is based on systematised triggers built into its client management systems rather than any individual assessment of a particular need for the external advice. This is in contrast with practices in other jurisdictions, for example, the New South Wales Trustee and Guardian, the largest public trustee in Australia, does not obtain any external financial advice for its clients, relying instead on the expertise of its staff [6]. The Public Trustee and Guardian (Australian Capital Territory) only obtains external financial advice for clients by exception, where the client holds significant and complex assets [7].	<p>It is understood that New South Wales and Victoria are licensed through ASGUARD and provide in-house financial advice. Similar, South Australia provides services in-house and the Western Australian model is being designed through Mercer.</p> <p>Those jurisdictions that provide services in-house have a team of planners (state entities cannot be licensed and do not have legislative powers over government). The Public Trustee does not have any Financial Planners in-house to provide this service. The Public Trustee view to-date has been that this service can be more cheaply and professionally delivered through the outsourced service provider.</p>
6	419	The Public Trustee controls significant funds on behalf of clients, including people under financial administration and deceased estates that the Public Trustee is administering. As noted in Chapter 5, the Public Trustee's financial planning and investment policies have the general effect of converting client funds into cash that the Public Trust	For customers with less than \$450,000 in assets, the Public Trustee has been of the view that the Customer Investment Strategy (CIS) is the most efficient way to meet customers' needs and meet business requirements. The Public Trustee's financial planning systems allow us to identify customers who may, due to circumstances, have to sell assets to pay for liabilities. In these situations, the Public Trustee works with customers to look for the best outcomes available based on their needs.
6	422	Together, the Cash Account and the Term Investment Account equal \$328.4M (33 percent) of the total asset holdings for financial administration clients. As already noted, this money is used by the Public Trustee to generate interest income through the interest differential (discussed in Chapter 5). The funds in the Growth Trust are held separately from the Cash Account and the Term Investment Accounts. As Figure 6.1 shows, financial administration clients' funds contributed \$155M to the Growth Trust. This represented approximately 45 percent of the total Growth Trust balance of \$346.7M. Financial administration clients also potentially contribute the same proportion of the \$4.9M Public Trustee Fees charged to the Growth Trust for that period, namely \$2.2M	The management fee rebate for funds held in the Growth Trust does not appear to have been considered in the scenario and as a result the fees presented are higher than the net fees to the customer.
6	424	"Gary's experience in Case Study 3 (Chapter 3 p. xx), demonstrates how the Public Trustee's practice of routinely obtaining financial advice, especially for relatively low value assets, can result in unnecessary costs to financial administration clients because the	<p>Gary left the Public Trustee with assets of 96,000, due to the Public Trustee actively initiating and pursuing an insurance claim through Gary's Superannuation Fund.</p> <p>Overall, the outcome for Gary was very positive, for minimal financial planning fees he received net \$96,000 upon leaving the Public Trustee.</p>



		<p>investment outcome is already pre-determined by Public Trustee investment policies. When the Public Advocate asked why the Public Trustee requested financial advice in Gary's case when the outcome for Gary was already determined by its policies, the Public Trustee advised that its view was that Gary's \$2,000 of superannuation was a 'complex' asset and therefore a financial advice was required [12]. It is difficult to understand how a \$2,000 superannuation fund holding could be considered 'complex' by a professional trustee that manages over \$1B worth of assets for people under financial administration.</p> <p>[12]Public Trustee, Response to Public Advocate 4th Notice, 26 August 2019, response dated xx, p 31."</p>	<p>The full response from the Public Trustee states "At the time of relevant matter, the view at the Public Trustee was that [REDACTED] superannuation was a "complex" asset. The Primary Investment Strategy only applied to clients with non-complex investable assets. As such, it was viewed that section 5(a) would not apply to [REDACTED] circumstances and therefore financial advice was required."</p> <p>The Public Trustee identified the asset as a "complex investable asset" which requires further review. If the Public Trustee had not identified [REDACTED] \$2,000 superannuation as a complex investable asset, and took no action, [REDACTED] would not have benefitted from the substantial insurance claim. The Public Trustee's systems, policies and procedures were developed to identify and capture these scenarios for the benefit of our customers.</p> <p>It should be noted that [REDACTED] insurance claim occurred at a cross-over period while the Public Trustee embedded processes with [REDACTED] to assess potential TPD insurance claims. It is now the process that a customer's superannuation is not referred for expert financial advice for small superannuation accounts where a referral has also been made for advice on a potential TPD claim. Rather, the customer is referred for expert financial advice once the quantum of a successful TPD claim is known.</p>
6	426	<p>For example, Case Study 1 (in Chapter 1), told the story of Tony, who inherited \$34,000 of shares. Based on external financial advice (paid for by Tony), the Public Trustee sold the shares. However, if Tony had kept the shares, their value could not have been reduced by the Public Trustee's fees and charges (as happened with the cash from their sale) and he would have had an additional ongoing source of income. The decision to sell Tony's shares had the joint outcome of depriving him of that additional source of income from the share dividends and franking credits, and the cash from the sale being completely depleted within two years, by the Public Trustee's fees and charges</p>	<p>In these situations, the Public Trustee looks at other options for the customers e.g. reverse mortgage, or pension loans. The Financial Planner can look at that this as an option, however the application rules are very specific and depend on a number of factors.</p> <p>The factors to be considered include the following:</p> <ul style="list-style-type: none"> <li>• The loan to valuation ratio for loan.</li> <li>• The state of the property to be held as security</li> <li>• The age of the adult. The younger the Adult, the less attractive it is to borrow money due to the effect of compound interest over the longer term.</li> <li>• The capacity of the adult to repay the loan within an agreed timeframe.</li> </ul> <p>However, we note that the type of asset ie., shares, fixed interest assets, property or managed funds is not a mitigating factor on whether they may be required to be sold to fund the adult's required expenses.</p> <p>In the scenario referred to, the customer had limited options, as his expenses were in excess of his capacity to pay due to his living arrangements. The Public Trustee will ensure the fees and charges review considers the impact of fees and charges on customers in similar circumstances (owned a property and small amount of assets under \$50,000).</p>
6	439	<p>The second statement that the ITO requires to be included in the Statements of Advice, that the 'recommended strategy meets the obligation of the Public Trustee of Queensland to manage the trust funds in compliance with the Prudent Person Rule', also raises concerns. It is a matter for the Public Trustee to satisfy itself that it has fulfilled its legal and fiduciary obligations. This is not an obligation</p>	<p>The Public Trustee was of the view that it needed to ensure that any prospective financial planners not only understood the prudent person rule but they would be able to apply the fundamentals.</p> <p>Statements of advice must: <i>be prepared in accordance with the Prudent Person Rule in Part 3 of the Trusts Act 1973; take into account cash flow requirements of clients and utilise a 'bucket' strategy approach;</i></p>

		that the Public Trustee can contract or transfer to another party.	
6	442	<p>Clause 6 in the 'Financial Planning Services' section of the ITO states:</p> <p>Risk profiles will be based on client age and investment horizon as specified by PTQ and asset allocations will be agreed upon between the Successful Offeror and PTQ for each risk profile[29]</p> <p>[29] The Public Trustee, Invitation to Offer No. PTQFPS01, For the provision of financial planning and investment administration services, Version 004 – dated 1 July 2012, Section 3 Specifications, Financial Planning Services, p.10</p>	<p>The Public Trustee has been of the view that 8 years with [REDACTED] is not unusual for a contract of this complexity and type.</p> <p>Risk profiles - The risk profiles were developed in consultation with the financial planner [REDACTED]</p> <p>Invitation of Offer/Contract makes it very clear that it's for services for our clients not for the Public Trustee corporation – best interest of the 'end' customer. This complies with the duty for financial advisers to act in the best interests of their clients and place the best interests of their clients ahead of their own when providing advice;</p> <p>The Public Trustee will ensure that future Financial Planning Tenders, subsequent contracts and Service Level Agreements that we will clearly state that the advice being sought is for our customers and that each customer is considered individually.</p>
6	445	<p>"The 'Scope of Services' section [30] in the ITO details the range of services required by the Public Trustee from the independent financial advisor. However, it first states:</p> <p>PTQ will be considered the client of the Successful Offeror. Clients of PTQ will not have direct contact with the Offeror unless pre-arrangement is made by PTQ[31]</p> <p>[30] The Public Trustee, Invitation to Offer No. PTQFPS01, For the provision of financial planning and investment administration services, Version 004 – dated 1 July 2012, Section 3 Specifications, Financial Planning Services, p 12.</p> <p>[31] The Public Trustee, Invitation to Offer No. PTQFPS01, For the provision of financial planning and investment administration services, Version 004 – dated 1 July 2012, Section 3 Specifications, Financial Planning Services, p 12."</p>	<p>The Intention of that clause is to advise that the customer would not be providing information directly to the Financial Planner or directly instructing the financial planner. Our Financial Management customers cannot form a contract with anyone due to them having impaired decision-making capacity. As such, the Public Trustee has to be the client of the customer to form the contract.</p>
6	447	<p>The 'Scope of Services' section goes on to list the services the Public Trustee is seeking, including:</p> <ul style="list-style-type: none"> <li>*annual reviews of clients requiring financial advice;</li> <li>*transition of clients to PTQ preferred superannuation provider;</li> <li>*consideration to recommendations being provided for new and existing clients with Public Trustee Investment Funds[32]</li> </ul> <p>[32] The Public Trustee, Invitation to Offer No.</p>	<p>The Public Trustee's Investment Services team reviews all initial requests for financial advice and approximately 75 per cent are overridden to the Primary Investments Strategy and therefore not sent to the Financial planner. This process limits the amount of customers paying for financial advice. The workflow system identifies/flags complex asset (which raises the need for a RSOA) so the assets/liabilities are reviewed. e.g. if a customer has a \$40,000 liability a RSOA would be required.</p> <p>If the investments team is satisfied that an appropriate loan repayment plan is in place then this customer would not need a financial plan and would be overridden to the Primary Investment Strategy. Similarly customers with high bank balances, term deposits, and other liabilities fall into this scenario.</p> <p>Generally, the annual review is reviewed by the investments team before going to the financial planner. Unless a customer's</p>

		PTQFPS01, For the provision of financial planning and investment administration services, Version 004 – dated 1 July 2012, Section 3 Specifications, Financial Planning Services, p 12.	circumstances change they generally stay within the internal Primary Investment Strategy.
6	458	<p>The Public Advocate has observed that this statement was a standard entry in the financial advisor's Statements of Advice to clients prior to 2018. More recent Statements of Advice viewed by the Public Advocate did not contain the statement noted in Beryl's SOA, but now include the following (apparently) standard paragraph:</p> <p>The Public Trustee has determined that any funds held on account of Financial Management clients where the value of investable funds of between \$150,000 and \$450,000 in total (sic), the first \$50,000 should only be invested in cash, with the balance being placed into the PT Growth Trust unless other extenuating circumstances apply. This strategy has been implemented in an effort to preserve wealth, and to reduce risk.[38]</p>	It is important that customers financial needs are taken into account with initial funds held over \$150,000, as options such as to invest in superannuation (an exempt asset from DSP) to ensure a full entitlement of DSP is maintained which can be of great ongoing financial benefit for our customers.
6	459	For financial administration clients who have funds in superannuation, and are not at retirement age or those with cash assets that may reduce their pension entitlement, the Statement of Advice recommends a transfer of funds to AustralianSuper on the basis that '[T]he Public Trustee of Queensland has selected AustralianSuper as its preferred superannuation platform provider of choice'.[39] This does not appear to be based on the performance of AustralianSuper in comparison to a client's current fund or any considerations around the suitability or risk of the financial administration client's own fund	<p>The Public Trustee regularly monitors the performance of Australian Super and holds regular meetings with them. Our Financial Planner has an obligation to review all aspects of a superannuation comparison including performance and fees.</p> <p>The joint tender undertaken by the Public Trustee together with other Public Trustees within Australia identified that Australian Super were consistently one of the best performing funds and was priced competitively.</p>



6	463	<p>"Due to concerns about the number of Statements of Advice that recommended investments consistent with the Public Trustee's Client Investment Strategy in exclusively Public Trustee investment products, the Public Advocate sought the Public Trustee's explanation of the purpose of obtaining the external financial advice. The Public Trustee advised that:</p> <p>the obligations of the advice provider....when providing an SOA (Statement of Advice) to the client are to act in the best interests of the client, provide appropriate advice, warn the client if advice is based on incomplete or inaccurate information, and prioritise the interests of the client[40]</p> <p>[40] Public Trustee response to the Public Advocate Information Notice number 4. Response dated 20 November 2020, p 7."</p>	<p>It may assist the reader to include the references for context to the statement, as the full response from the Public Trustee states:</p> <p>"It is understood that the obligations of the advice provider (references: RG 175.161 &amp; Corporations Act 2001 – section 947B) when providing an SOA to the client are to act in the best interests of the client, provide appropriate advice, warn the client if advice is based on incomplete or inaccurate information, and prioritise the interest of the client". It is suggested that including the whole statement as will provide context to the reader and to the matter at hand.</p> <p>Omitting the references to the obligations of Financial Planners may diminish the original statement. Inclusion of the statement also provides further context as to why an independent Financial Adviser is important for our customers.</p> <p>RG171.161 excerpt below:</p> <p>RG 175.161 While the obligations relating to preparing and providing an SOA are imposed on the providing entity, there are conduct obligations in Div 2 of Pt 7.7A that apply to the advice provider. These are the obligations to:</p> <p>(a) act in the best interests of the client;</p> <p>(b) provide appropriate advice;</p> <p>(c) warn the client if advice is based on incomplete or inaccurate information; and</p> <p>(d) prioritise the interests of the client: see Section E.</p> <p>Note: See RG 175.33 for a definition of 'advice provider'.</p>
6	477	<p>In relation to the confusion about the 'exit fees' from the sale of Beryl's shares, the Public Trustee explained that when that information was provided to the Tribunal member the 'reference to "exit" fees was being used ... as a precise term, and not in a more general sense' as the Tribunal member may have been using it. The Public Trustee advised that 'it was not intended to be misleading but was used for the purposes of accuracy'[48]</p> <p>[48] Public Trustee response to the Public Advocate Information Notice number 4. Response dated 20 November 2020, p 34.</p>	<p>Shares do not have exit fees or buy sell spreads, rather brokerage fees are applied. However a buy/sell spread is not taken into account when selling an investment product, rather the value of the product in relation to capital gains or losses is the factor which is considered.</p>
6	478	<p>In response to the Tribunal member's concerns about the loss of income from the shares that were sold, the Public Trustee advised that Beryl's shares earned only \$14,000 in income in 2013-14, but that the financial advisor had forecast projected income of \$24,000 on the investment of Beryl's funds in the Public Trustee Term Investment Account. However, this explanation does not acknowledge two critical facts. First, Beryl only owned the shares for nine months of 2013-14, before they were sold by the Public Trustee. Accordingly, the income from the shares for that year is likely to be understated by approximately 25</p>	<p>It is understood that shifting from shares to the Term Investment account was a risk mitigation decision for the customer. Consideration was given to the possibility of reduced income verses a real capital loss and given our customers age it was recommended that our customer sell the shares to reduce any loss of capital.</p>

	<p>percent. Second, the projected earnings on the Term Investment Account of \$24,000 are not consistent with the evidence of income on Beryl's investment that was provided to the Tribunal at its final hearing. At that time, the Public Trustee advised the Tribunal that Beryl was earning fortnightly interest income of \$426, which amounts to only \$11,000 per year. Ultimately, it appears that the difference in Beryl's annual income between retaining the shares and selling them and earning interest on the proceeds in the Public Trustee investment amounts to about a \$6,500 per year loss of income for Beryl</p>	
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444 Queen Street Brisbane Qld 4000  
GPO Box 1449 Brisbane Qld 4001



For reply please quote: S&G/JF – T20/208 – D20/28087

20 November 2020

Ms Mary Burgess  
Public Advocate  
G P O Box 149  
BRISBANE QLD 4001

Dear Ms Burgess

Thank you for providing a draft of chapter seven of your report: *The Value of Trust: Public Trustee fees and charges for people under financial administration* (the Report).

As you are aware, the Public Trustee is making changes to the way we interact with our customers and the way we do business. This is largely driven by our Social Responsibility Charter. Under the Charter, the Public Trustee is committed to providing services that are Customer focused, demonstrate integrity and leadership, financially responsible and exhibit our care for the community and encourages stakeholder engagement.

The learnings and feedback provided as part of your Inquiry will assist the Public Trustee in its relentless pursuit of continuous improvement to ensure that we continue to enhance and protect the rights, dignity and interests of Queenslanders now and into the future.

Officers from the Public Trustee have considered the draft chapter with the aim of supporting you to finalise the Report. Again, I acknowledge that it is your complete and unfettered discretion to access some or all the suggestions made for ensuring an objective and balanced report. **Attachment 1** contains a summary of suggested amendments and additional information which may be of assistance.

At the outset, it is important to recognise that there have been some significant changes to the Official Solicitor since your enquiries began. This includes the separation of the Official Solicitor into the Official Solicitor – Corporate Legal Services and an Official Solicitor – Customer Legal Services. The separation of the legal services in this way is to minimise the risk of conflicts of interest, while ensuring the Customer Legal Services' focus is on the delivery of customer-centric legal services. This ensures that the customer is at the centre of all considerations.

The inaugural Official Solicitor – Customer Legal Services, [REDACTED], was appointed through a competitive, merit based process which included the head of the Queensland Law Society Ethics and Practice Centre on the recruitment panel.

In addition, a Queensland Civil and Administrative Tribunal (QCAT) Referral Panel has been established as a pilot initiative. Chaired by the Executive Director, Strategy and Governance, the QCAT Referral Panel provides an additional internal decision point for more complex or difficult matters, to ensure matters are not referred to QCAT if more

**The Public Trustee**

- Will making
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- Disability services
- Trust administration

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- Real estate auctions and sales
- Charitable trusts



suitable alternatives exist. The Panel considers alternative options for each case, with the aim of expediting decisions and therefore saving on potential costs for our customers.

### ***Use of the Official Solicitor and Legal Professional Privilege***

I would like to clarify that not every matter involving a legal issue is referred to the Official Solicitor for advice. However, in some cases, it may be necessary to obtain legal advice to support the customer to make an informed decision, based on their legal rights, prospects or potential quantum of claim. In this regard, referrals are made to the Official Solicitor where it is appropriate and reasonable to do so, in order to enhance and protect the interests of the customer.

It may assist the reader to clarify the relationship of the Official Solicitor with the Customer and the Public Trustee. The advice provided by Customer Legal Services is for the sole purpose of advancing the rights and interests of the customer. The Public Trustee is the 'client' only in so far as the Public Trustee has a representative capacity for the customer. However, it is important to note that the Public Trustee's lawyers cannot act on the instructions of a person with impaired decision-making capacity, who may not be able to provide proper, lawful, and competent instructions. This is why it is necessary for the Public Trustee to be the 'client' as opposed to the end customer. The Queensland Law Society Ethics and Practice Centre has provided their strong endorsement of this position.

I also acknowledge the concerns that you raise about the Office of the Official Solicitor not providing legal advice to customers without the express permission of the Official Solicitor.

For context, it is important to acknowledge that unfortunately, the Public Trustee is often appointed financial administrator where there may be concerns about customer's support network, including misappropriation or financial elder abuse, which may involve undue influence and/or unconscionable conduct. Further, The Public Trustee is cognisant that in some situations, it may be necessary to seek legal advice to protect a customer's interests, even if this may cause conflict with the customer's family or be contrary to the customer's wishes. In this regard, it is relevant to note that QCAT regularly directs the Public Trustee to obtain legal advice for a customer in situations where there may be some questionable actions undertaken by family members or their support network.

For this reason, it has traditionally been the view of the Public Trustee that it may not always advance a customer's interests to provide them with a copy of the advice in circumstances where the customer may not fully appreciate the legal technicalities and importance of retaining legal professional privilege. The concern is that once privilege is waived it cannot be regained, and this may have a detrimental impact on the customer.

It is acknowledged that there are valid arguments about whether a customer with impaired-decision making capacity would have the requisite capacity to waive their Privilege. However, the Public Trustee's concerns predominately relate to the risk of the advice falling into the hands of a third party, such a person who may be subject to the legal action. For example, should the legal advice be provided to a person subject a misappropriation investigation, the damage will already have been done and the Customer's rights and prospects of a claim may be jeopardized.

Regarding, the release of legal services invoices to the customer, the Public Trustee would like to clarify that the views and practices that may have been adopted in 2008, no longer

reflect current practice. Legal services invoices may contain information which is subject to legal professional privilege. However, unless there would likely be some harm caused to the customer by releasing the invoice, it is the Public Trustee's usual practice to provide the customer with a copy of the invoice if requested.

The reference to the harm that may be caused to the customer, reflects the unfortunate reality that there are situations where the support network that are closely involved in a customer's life read all documents that the customer receives. Where there is litigation or anticipated litigation against a member of the support network, there is a risk that access to privileged information would harm the litigation or potential litigation to be undertaken on behalf of the customer.

It has been the view of the Public Trustee that the need to keep certain legal work confidential is recognized by QCAT by making Confidentiality Orders. QCAT also makes Confidentiality Orders where a customer may be involved in litigation outside the Tribunal. For example, QCAT recently made a Confidentiality Order to protect a customer's financial information that been disclosed to the tribunal from being obtained by the customer's estranged spouse for use in family law proceedings, where that spouse could circumvent a binding agreement made in the family law proceedings by accessing the customer's financial information through QCAT.

### ***Separation of duties to the Public Trustee and the Customer***

It is acknowledged that you have raised concerns about the distinction between when the Official Solicitor provides advice to the Public Trustee in a corporate capacity and when it provides advice as the personal representative for financial administration customers.

As noted earlier, the Official Solicitor has now been separated into the Official Solicitor – Corporate Legal Services and the Official Solicitor – Customer Legal Services to minimize the risk of conflict of interests arising where legal service may be engaged to represent the Public Trustee as a corporate entity.

In relation to situations where the Official Solicitor is requested to assist QCAT, it is noted that Rule 3.1 of the Australian Solicitors Conduct Rules states that:

*A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.*

It has been the view of the Public Trustee to-date that if it is directed by QCAT to provide advice or submissions that it must abide by that duty. The circumstance of the Public Trustee being directed to provide submissions to QCAT on legal issues that may not act against the customer's interest directly arise because of the Public Trustee's appointment as administrator. While the Public Trustee is unable to influence the directions given by QCAT, it is open to any alternative views on the matter.

There are also circumstances where the Public Trustee may bring matters to QCAT for determination or advice on the way it has managed a customer's affairs. For example, in the case study of Callan, it was the view of the time that proactively bring the matter to QCAT's attention was in the interest of the customer. It may assist the reader and provide context to Member Pam Goodman's comments at paragraph 32 of CM [2011] QCAT 693:

*The Tribunal is untroubled that the application was lodged by the Public Trustee or that the Official Solicitor was involved. Those organisations do not hold any greater importance or influence at the Tribunal than other parties involved in this matter. The acceptance by QCAT of an application from the Public Trustee or from the Official Solicitor is not material to the ultimate outcome of proceedings. That is to say, no advantage is gained by the applicant simply because they lodged the application. It is enough that the matters raised are now before the Tribunal and that all parties have been afforded a fair opportunity to make submissions.*

The Public Trustee acknowledges that if a similar matter to Callan was to come before the tribunal, the Public Trustee would not make a submission that the customer had no standing to bring an Appeal.

The Public Trustee is also considering changes to its practices where there is a potential claim against the Public Trustee in its corporate capacity. One of the options being considered is to apply to QCAT for a separate independent representative for the customer. We would welcome any views that you may on the options available.

### ***Oversight of the Official Solicitor***

The draft chapter forms the view that there is limited options for customers who disagree with the legal fees they are charged or with the way their affairs are managed other than through the Public Trustee's complaints management process or through QCAT.

The Public Trustee has established complaints management systems in place. A recent audit by the Queensland Audit Office found that the Public Trustee has appropriate complaints management policies and procedures in place that provide clear guidance on how to receive, record, respond to and report on complaints, which is consistent with good practice. The Queensland Audit Office also identified opportunities for the Public Trustee's to enhance its complaints management system which have been accepted and are being implemented.

For customers who remain dissatisfied with how their complaint has been handled, they have the option of escalating their complaint to the Queensland Ombudsman and for potential system issues, the Queensland Audit Office or the Office of the Public Advocate. Public Trustee lawyers are also subject to a range of statutory obligations specific to the public sector, including the Model Litigant Principles, and Public Service Code of Conduct. It may assist the reader to clarify that the oversight of the Public Trustee's legal services is the same for other Queensland Government agencies, including its guardianship partner, the Public Guardian.

Further, while government lawyers are not subject to the *Legal Profession Act 2007*, our client agreements specify that the Public Trustee will comply with it in regards to its legal fees and charges. In addition, it remains available for government lawyers to be referred to the Legal Services Commission by the agency Chief Executive or other lawyers.

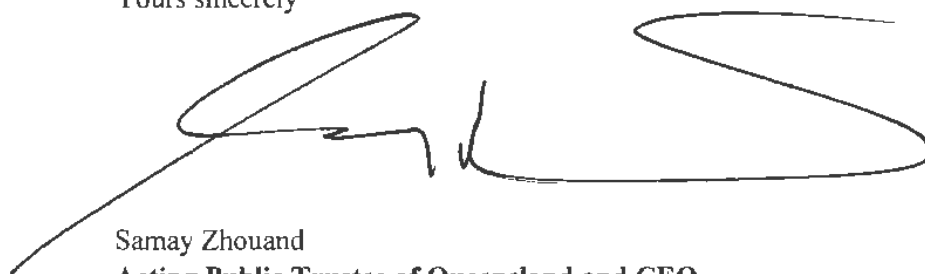
### ***Legal services fees***

It is acknowledged that the Report raises concerns about the fees of the Official Solicitor, in particular a perceived lack of transparency. I understand that it has been the view previously

that the Official Solicitor's fees were commercial-in-confidence. While there may have been justification for this position in the past, I am of the view that it is no longer relevant. As such, as part of the Public Trustee commitment to increasing transparency, I have asked for the Official Solicitor fees to be published on the Public Trustee website.

Again, thank you for the opportunity to assist with finalising your Report. I look forward to considering the draft consolidated report which incorporates the Public Trustee's feedback in due course.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Samay Zhouand', with a long horizontal flourish extending to the right.

Samay Zhouand  
**Acting Public Trustee of Queensland and CEO**

Attachment 1

Chapter	Para	Statement	Public Trustee Comments
7	494	While the above sources, either alone or in combination, could not plausibly be interpreted as inferring that a trustee will only be considered to have acted ‘reasonably’ if it obtains legal advice in every case involving a legal issue, this appears to be the Public Trustee’s position: ... it is not only appropriate but necessary in order to discharge the obligations provided for by s. 35 of the GAA [ <i>Guardianship and Administration Act</i> ] for an administrator in circumstances where legal issues are involved, to seek appropriate legal advice.	The Public Trustee may form the view that it is appropriate to seek legal advice on a particular legal issue. It is the current position of the Public Trustee that not every matter involving a legal issue is referred to the Official Solicitor for legal advice. Referrals are made to the Official Solicitor where it is appropriate and reasonable to do so, in order to protect the adult’s interests.
	495	The Public Trustee has advised that ‘if a matter or decision [in relation to a client] is affected or informed by legal rights or obligations (that the client may have)’, the client cannot participate in decision-making, and the other requirements of General Principle 7 of the <i>Guardianship and Administration Act</i> cannot be complied with, unless legal advice is obtained about those rights or obligations. The Public Trustee maintains that for the person to participate in the decision or express their views and wishes about the relevant issues, he or she must have the benefit of legal advice about the options available to them.	For an adult to make an informed decision, they need to be informed as to what their legal rights are. It has been the view to date that it is unrealistic to expect an adult with impaired capacity to make an informed decision without some advice on prospects or quantum.  It is acknowledged that legal advice is not required in every instance and it is not the current practice of CED to refer every legal issue to the Official Solicitor.
	496	However, the Official Solicitor has a policy that its legal advice is not to be provided to Public Trustee clients without the express permission of the Official Solicitor. It is difficult to reconcile the view supporting clients’ participation in decision-making about their legal issues with this policy. The Public Trustee justifies its position on the basis of its concern about the risk of the client waiving legal professional privilege in that advice should the client disclose it to a third party. This is certainly a consideration, however, it is questionable whether a person who lacks decision-making capacity can ‘knowingly and voluntarily’ waive their own legal professional privilege.	It is suggested that reference to the full statement made by the Public Trustee would assist the reader by providing context and removing ambiguity. It appears the report is referring to the following statement:  “In many instances the advice that is being provided to the Public Trustee as administrator relate to members of the customer’s support network. It has been traditionally been the view that it may not always be in the customer’s interest for a copy of the legal advice to be provided to the customer in circumstances where the customer may not fully appreciate the legal technicalities and importance of retaining legal professional privilege and the detrimental impact it may have if the legal advice is inadvertently disclosed to a third party”. There is no way of regaining privilege once it is waived.  It is understood that this position is the result of concerns that trust officers might inadvertently waive privilege on Legal advices by on forwarding them, copying them, or discussing them. Once privilege is waived, it cannot be retrieved. This procedure is in no way intended to suggest that the Trust Officer cannot discuss legal advice with a customer. It simply is placing boundaries around what the Trust Officer can do, without reference to a more senior person. Any such discussions are normally at a more senior level.  It has been the view to-date that irrespective of whether the adult with the incapacity has not waived legal professional privilege, this does not overcome the mischief that the Public Trustee is trying to avoid. That mischief is that the close family member (who, for example, has misappropriated funds or property) obtains legally privileged information in relation to the legal claim that the adult has against the family member  In acting in this way the Public Trustee is exercising his powers “honestly and with reasonable diligence to protect the adult’s interests” as required by s. 35 of the GAA and ensuring that the General Principles are applied in a way that are “consistent with the adult’s proper care and protection” as required under s. 7(5) of the General Principles.  However, the Public Trustee is exploring alternative options to ensure that customers are fully informed about the legal advice and involved in the decision-making process.
	504	The Public Trustee’s reliance on a quote from a trusts textbook (as noted above) to support the suggestion that trustees have a duty to	The Public Trustee is concerned that the inference that the Public T Trustee is relying on a quote from a Trust text book to support the Public Trustee having a duty to obtain advice in every case as being “overly simplistic and a misinterpretation”

Chapter	Para	Statement	Public Trustee Comments
		obtain advice in every case is also overly simplistic and a misinterpretation. That quote merely states that a trustee who reasonably obtains and acts on what it believes to be advice from an impartial and qualified advisor is unlikely to commit a breach of trust. The quote does not mandate obtaining formal advice in every case requiring consideration of a legal issue, nor does it suggest specific circumstances where advice should be obtained. Ultimately, these are decisions that trustees and administrators must make taking into account the individual circumstances of the person whose interests they are responsible for, in each case. The trustee in exercising its responsibilities to the beneficiary must have regard to that beneficiary's best interests. This also requires the trustee to consider the proportionality of engaging expert legal advice with respect to the actual decision to be made.	may be taken out of context by the reader, and may be referred out of context in the intent to which it was originally provided. The reference to a quote in a text book is not an unusual practice to support a position; however it does not suggest that CED obtain legal advice in single case.
	505	The Public Trustee's position on this issue also disregards the operation of other General Principles in the <i>Guardianship and Administration Act</i> . For example, General Principle 10 requires administrators to exercise their powers in ways appropriate to the individual characteristics and needs of the person with impaired decision-making capacity. Logically, this must include the possibility that in certain situations, it is not appropriate to take legal action or advice for a range of reasons. This could include consideration of: the client's circumstances, as a whole, in terms of whether the client can afford the legal advice or action and weighing the costs against the likely success and financial outcomes of any legal action; whether taking legal action will cause conflict with family members or other outcomes, such as forcing the sale of the house the person is living in (to pay for the legal action), that will obviously adversely affect the client's quality of life or have other consequences that outweigh the benefits of the legal action.	By way of context, it is not uncommon for QCAT to appoint the Public Trustee in situations where there has been some action taken by family members that is questionable and requires investigation. In fact at times, QCAT will direct the Public Trustee to obtain legal advice in such circumstances. This in itself often causes a conflict and accordingly it is not a straightforward matter of not taking legal action where it will cause conflict. If the Public Trustee is directed to investigate a legal matter on behalf of the adult, the Public Trustee is bound to do so; however, it does not necessarily follow that further action will be taken as a consequence of that investigation, in all of the circumstances.  The Public Trustee carries out his duties as administrator in accordance with the principles contained in the <i>Guardianship and Administration Act 2000 (Qld)</i> and <i>Human Rights Act 2019 (Qld)</i> and this includes consideration of the General Principles in each case.
	508	The relationship between the Official Solicitor and the Public Trustee when the Official Solicitor is instructed to act on behalf of an administration client is clear. The Official Solicitor acts for the Public Trustee as the person under administration. The Public Trustee makes decisions on behalf of that client and instructs the Official Solicitor accordingly, and both must always act in the interests of the person under administration. These obligations are the same for private administrators instructing a private lawyer on behalf of a person under their administration.	The Public Trustee considers that the correct reference is that the "Official Solicitor acts for the Public Trustee in its representative capacity".
	509	These arrangements are well-established and are not controversial from a legal perspective. However, the practice of the Public Trustee and the Official Solicitor, relative to the interests of its administration clients does not always align with the position outlined above. Some examples of inconsistency in the application of these principles, particularly the duty to act in the clients' interests, include: The Public Trustee's position is that Public Trustee is 'the client' of the Official Solicitor and, in respect to administration clients, that the Official Solicitor 'has only one capacity; as legal advisor to and	Whilst the Public Advocate raises a valid argument regarding the capacity of the adult to waive privilege, from a practical point of view, once a third party has a copy of the legal advice, and in the event that the third party is in fact the very person against whom legal action is either anticipated or has already been commenced, then the "harm" to the Public Trustee's customer is already done and there is no way back.  It may assist the reader to understand the full context to the paragraph of the Information Commissioner Decision of 2008 referred to :  "34. The PTQ submits <b>as the applicant's administrator;</b>



Chapter	Para	Statement	Public Trustee Comments
		<p>instructed by the Public Trustee of Queensland’.</p> <p>When staff of the office of the Official Solicitor provide written advice, it is usually addressed to either the Official Solicitor or the Director of Disability Services, not to the client under financial administration. As already noted, it is the Public Trustee’s policy that neither the advice – nor even a summary – is provided to the financial administration client to prevent the risk of the client disclosing the advice to third parties and inadvertently waiving legal professional privilege.</p> <p>The Public Trustee has charged a financial administration client the costs of the Official Solicitor preparing submissions ‘on behalf of the Public Trustee’ (not the client), in response to a QCAT direction after the person applied to re-open the hearing on the basis that he did not have sufficient notice of the hearing or the medical evidence about his capacity to properly respond to the application.</p> <p>The Public Trustee has successfully argued before the Information Commissioner that Official Solicitor invoices in respect of an administration client’s file were subject to legal professional privilege in favour of the Public Trustee and cannot be released to the client.</p>	<ul style="list-style-type: none"> <li>• It instructed the Official Solicitor to act as its solicitor in relevant matters</li> <li>• It was the client and the Official Solicitor was the solicitor in the solicitor-client relationship” (my emphasis)</li> </ul> <p>However, it would be of assistance to the reader to clarify that the position that the Public Trustee may have adopted in 2008 in the Office of Information Commissioner decision does not reflect the current practices of the Public Trustee.</p> <p>While it has been the view of the Public Trustee that there is usually material in an Official Solicitor’s invoice that is subject to legal professional privilege, that privilege is in favour of the Public Trustee in its representative capacity, and unless there was likely to be some “harm” caused to the adult should the invoice be released to the adult, in the usual course, the Public Trustee’s current practices would be to provide the adult with a copy of the invoice if requested.</p> <p>To clarify the reference to “harm”, there are situations where the support network that are closely involved with the adult’s life will be reading all material that the adult receives, and in circumstances where there is litigation or anticipated litigation against a member of the support network who would be likely to have access to the privileged documents, there is a great risk that this would cause “harm” to the litigation or potential litigation to be undertaken on behalf of the adult.</p> <p>One view that may be considered is that the need to keep the work of the Official Solicitor confidential is recognised by QCAT by the making of Confidentiality Orders over the advices of the Official Solicitor. The reason is to protect the privilege and to protect the claim that the adult has against a family member (who would otherwise have possession of privileged advices) It would be to the adult’s detriment for the legal advices to be released in this way as once the privilege is waived it cannot be retracted.</p> <p>A further example where a Confidentiality Order (and non-disclosure of legal advice) is appropriate is where an adult may be involved in litigation outside the Tribunal. For example, in a recent matter involving proceedings commenced in the Family Law Court, a Confidentiality Order was made in order to protect the adult’s financial information that had been disclosed to the Tribunal from being obtained by the adult’s estranged spouse. Disclosure of this information would have prejudiced the adult’s position in the Family Law proceedings, and would have allowed the estranged spouse to circumvent the terms of a Binding Financial Agreement (which required non-disclosure of financial information) made by the adult when he had capacity.</p>
	511	<p>As already noted, the Public Trustee has stated that the Official Solicitor ‘has only one capacity; as legal advisor to and instructed by the Public Trustee’. Further, that the Public Trustee ‘will instruct the Official Solicitor to be involved [in a QCAT proceeding] where the Public Trustee reasonably forms the view that he requires the legal advice or services of the Official Solicitor’. This approach does not distinguish between the Official Solicitor representing the Public Trustee as the corporate entity or as the personal representative for financial administration clients. In cases where allegations are made about the conduct or decision-making of the Public Trustee as administrator, the Public Trustee will often engage the Official Solicitor ‘in order to properly and carefully respond to any issues, questions or allegations put ‘and ‘as a professional administrator (fiduciary), [the Public Trustee] can be reasonably expected to retain competent legal advice to respond to such applications’.</p>	<p>The separation of the role of the Official Solicitor for Corporate Legal Services and Customer Legal Services is viewed to address the Public Advocate’s concern that the Official Solicitor might be engaged to represent the Public Trustee as the corporate entity (as opposed to his representative capacity).</p>
	517	<p>However, there are other cases where serious questions arise about the role of the Official Solicitor, such as when administration clients want to review the Public Trustee’s appointment as their administrator, complain about the Public Trustee’s management of their finances, or seek a declaration of capacity to demonstrate they</p>	<p>It may assist the reader to make it clearer that the Official Solicitor cannot appear unless the Tribunal consents to the appearance. The Tribunal is required to have all relevant information before it and it must be in the interests of the customer for the Tribunal to do so. The majority of matters involving appearances before the Tribunal do not include representations by the Official Solicitor.</p>

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		no longer need financial administration. It can sometimes be unclear whose interests the Official Solicitor is representing in the proceedings — the financial administration client or the Public Trustee. Where the client asserts they have capacity, the Public Trustee should take no active role in the proceedings, but should appear only to assist the Tribunal.	
	521 (518, 519)	Trustees, fiduciaries and solicitors should always act in the interests of their beneficiaries and clients. This duty is not a passive obligation that can be met merely because the trustee, fiduciary or solicitor <u>is not acting against</u> the beneficiary's or client's interests. The distinction is simply one between work or activities undertaken in the interests of the client and that undertaken otherwise. The ultimate question is, does the work undertaken by the Official Solicitor (and that the client pays for) advance the financial administration client's interests?	<p>It is noted that rule 3.1 of the Australian Solicitors Conduct Rules states that "A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty". If the Official Solicitor is directed by the Tribunal to provide advice or submissions to the Tribunal, the Official Solicitor must abide by that duty.</p> <p>It is not uncommon for the Public Trustee to be directed by QCAT to put in submissions on matters that will involve Legal issues. This can often involve matters that might be said to be "not acting against" the customer's interests. The sole reason for the activity undertaken by the Public Trustee is to comply with the Tribunal's order against the Public Trustee, which has only arisen because of the Public Trustee's appointment as Administrator.</p>
	523	One relevant example is Case Study 2, 'Ella's case', where a financial administration client made an application to QCAT for a declaration of capacity or a review of the Public Trustee's appointment as administrator. Unless the Public Trustee is supporting the client to argue their case or has concerns that the revocation of the appointment will result in harm to the client, it is questionable whether the Public Trustee should take any active role in such applications. There should be no need for the Public Trustee to instruct the Official Solicitor to appear in these matters, much less any requirement for the Official Solicitor to attend such hearings, except to support the client to put their case before the Tribunal. To instruct the Official Solicitor to make submissions other than in the interests of the administration client and consistent with the client's views and wishes would be a breach of the Public Trustee's obligations as an administrator, in both a fiduciary and legal sense. If not actively supporting the client's application, the Public Trustee's role should be limited to providing relevant evidence that it has in its possession to assist the Tribunal to make a decision. In most cases there should be no need for the input or appearance of the Official Solicitor, especially considering the Tribunal is a jurisdiction in which lawyers must seek leave to appear.	Some of the relevant information for QCAT might relate to complex legal material which requires the assistance/input of the Official Solicitor. The majority of QCAT matters that involve the Public Trustee do not involve the Official Solicitor.
	524	<p>There are other examples of the Official Solicitor attending QCAT hearings in cases brought by the Public Trustee's administration clients and making submissions which did not advance the interests of the clients.</p> <p><b>Case study X: Public Trustee opposes client's appeal because he 'lacks capacity'</b></p> <p>A young Aboriginal man named Callan was an administration client of the Public Trustee. He requested the Public Trustee release funds for him to engage a solicitor to investigate concerns he had about the way his affairs were handled by the Public Trustee and the Adult Guardian (now known as the Public Guardian), during periods they were appointed to make decisions for him. Following the request, the</p>	<p>The Public Trustee is currently considering changes to its practices where there is a potential claim against the Public Trustee, the Corporation. One of the options being considered is to apply to QCAT for a separate independent representative for the adult. However, this raises a potential issue as to who pays for the separate representative if a pro bono separate representative cannot be sourced.</p> <p>In relation to the case study, it may assist the reader to clarify that the Tribunal did not appear to have any concerns with the approach taken by the Public Trustee. At para. 32 of CM [2011]QCAT 693, Member Pam Goodman states:-</p> <p>"The Tribunal is untroubled that the application was lodged by the Public Trustee or that the Official Solicitor was involved. Those organisations do not hold any greater importance or influence at the Tribunal than other parties involved in this matter. The acceptance by QCAT of an application from the Public Trustee or from the Official Solicitor is not material to the ultimate outcome of proceedings. That is to say, no advantage is gained by the applicant simply because they lodged the application. It is enough that the matters raised are now before the Tribunal and that all parties have been afforded a fair opportunity to make</p>

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		<p>Public Trustee applied to QCAT for directions about whether it should release Callan's funds for this purpose.</p> <p>At the initial hearing, the Public Trustee conceded that 'a request for funds to be released in order to investigate its own actions while acting as administrator raises issues of apparent or perceived conflict of interest for the Public Trustee' and that was why the application for directions had been lodged. [Comment: Rather than an 'apparent or perceived' conflict of interest, the circumstances of the case, with Callan alleging mismanagement of his funds by the Public Trustee, put the Public Trustee into a direct conflict with Callan's interests which should have been acknowledged and appropriate arrangements put in place to protect his interests and support him to put his case to the Tribunal.]</p> <p>The representative for Callan submitted to the Tribunal that it had to decide whether Callan 'should be entitled to use his funds to exercise a basic human right, that is, to access justice'.</p> <p>The Tribunal directed the Public Trustee not to release the funds for Callan to investigate a claim against the Public Trustee on the basis that he needed to 'raise more than an allegation or complaint' for the Tribunal to direct the release of the funds for this purpose. [Comment: Although it is unclear how the Tribunal expected Callan to access the evidence and present it in a form that would elevate it to a level that would meet the Tribunal's threshold for releasing the funds, especially when the relevant material was held by the Public Trustee.]</p> <p>Callan appealed the Tribunal's decision. At the appeal, the Public Trustee made submissions that Callan had no standing to bring the appeal, having already been found to lack capacity. The Appeal Tribunal agreed with the Public Trustee's submission and dismissed Callan's appeal.</p> <p>Both cases were 'heard on the papers', that is, the Tribunal made its decision considering only written material that the parties had filed.</p>	<p>submissions".</p> <p>The Public Trustee acknowledges the Public Advocate's views in relation to the Public Trustee's involvement in the Callan QCAT hearing. The Public Trustee has established a QCAT Referral Panel to provide greater transparency in decision-making for matters being referred to QCAT and to ensure that benefits to customers are achieved. It will also help to build capabilities in Public Trustee staff through peer assessment, as well as improve record-keeping and identify systemic issues.</p>
	531	<p>It is questionable whether administration clients should be charged for legal services provided by the Official Solicitor that are not directly in their interests. Both the Public Trustee and the Official Solicitor have fiduciary responsibilities that require them to act, at all times, in the interests of their beneficiaries/clients. In claiming a neutral position on Bryan's application, but preparing submissions in response to the Tribunal's request that did not advance Bryan's interests or reflect his views and wishes, the Public Trustee and the Official Solicitor were at risk of being conflicted by their involvement in the matter while Bryan was left to advocate for himself or seek his own supports.</p>	<p>The Public Trustee considers that the decision of CDM [2017] QCAT 135 may assist with clarification of the legal fees that can be reimbursed for an appearance by the Official Solicitor at QCAT.</p> <p>At para 100 of the decision of CDM [2017] QCAT 135 Senior Member Endicott noted that "Legal fees incurred by an administrator in bringing an application to the Tribunal or indeed in responding to another person's application are normally able to be reimbursed from the funds of the adult if the fees are reasonable. "</p>
	533	<p>Again, this response confirms the Public Advocate's concerns that there is little, if any, focus by the Public Trustee or the Official</p>	<p>It may assist the reader to know that the Public Trustee does, as far as he can, advise the Tribunal of the information it has regarding the position of the adult, however it must be recognised that the Public Trustee's customers have not requested the</p>



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		<p>Solicitor on the clients and supporting them to put their views and wishes before the Tribunal in accordance with their obligations under the Guardianship and Administration Act.</p> <p>Case Study X: Public Trustee resisted appointment of alternative administrator wanting to make a claim against it for lost funds</p> <p>This case study continues the story of Callan (see case study X earlier in this chapter). Callan was seriously injured in a motor vehicle accident as a small child, before he had commenced school. He suffered significant physical injuries and missed a lot of school for medical treatment over a number of years. Callan was later assessed as having average intelligence but with significant learning deficits. He had very limited arithmetic abilities and had difficulty recognising words. He became disruptive at school and had difficulty maintaining relationships. Callan was later diagnosed with a personality disorder and schizophrenia.</p> <p>As a result of the motor vehicle accident, Callan received \$460,000 compensation for his injuries. At the time of the original payout, the Public Trustee was appointed Callan's administrator. Two years later, Callan's mother and aunt were appointed as his administrators. However, after some unexplained expenditure of Callan's funds, the Public Trustee was again appointed Callan's administrator.</p> <p>The relationship between Callan, his family and the Public Trustee was characterised by conflict, and for many years Callan had no contact with his trust officer. During this time, decisions were made on his behalf that he (and his step-father Tyrone) claimed were not in Callan's interests. Various applications were made on Callan's behalf in QCAT over a period of about 10 years, challenging the decisions and actions of the Public Trustee.</p> <p>The Public Trustee actively defended its actions in those applications represented by the Official Solicitor. It is unclear whether Callan had a legal representative appointed for him by QCAT in those applications. However, during that time he was not provided funding by the Public Trustee to engage his own lawyers to investigate his legal prospects to make a compensation claim against the Public Trustee.</p> <p>By 2017, all that remained of Callan's original compensation award of \$460,000 was \$87,000 in cash invested with the Public Trustee, a car and some household goods. Callan's income was a disability support pension and rent assistance. Tyrone applied to be Callan's administrator instead of the Public Trustee, arguing that Callan's funds were being rapidly depleted and that he would receive a greater return on his money in a term deposit on the open market. Tyrone also submitted that:</p> <p>... The Public Trustee is conflicted as a substituted decision-</p>	<p>appointment of the Public Trustee as their administrator and accordingly the relationship between the Public Trustee and the customer can be often a difficult one. It can often be the case that the adults do not wish to engage with the Public Trustee. It is for this very reason that QCAT, when it believes that it is in the adult's interest to do so, will appoint a separate representative.</p> <p>It may also assist the reader to know that it was acknowledged by QCAT in its later decision of CDM [2017] QCAT 135, at para. 2, "there had been a great deal of antagonism directed toward the Public Trustee from CDM's family and TJ his stepfather is seeking appointment as the administrator for CDM if the Tribunals (sic) decides that an appointment of an administrator is necessary". Further at para [47] TJ submitted to QCAT that the Public Trustee had a "toxic relationship" with CDM and his family. The Public Trustee was taking the correct step of bringing the matter to the Tribunal's attention for a matter that was being raised by the adult and his stepfather. Section 125 of the GAA provides that the Tribunal may appoint a separate representative to represent the adult's views, wishes and interests and this does not require a specific application. It is a mechanism that QCAT regularly use should they believe there is any need for the adult's views, wishes and interests to be conveyed to the Tribunal.</p> <p>The Public Trustee is open to alternative views but the view to date has been, which may assist the reader to know, is that the lack of funding was not due to the Public Trustee's actions. The Public Trustee took the matter to the Tribunal, as a prudent administrator should, and followed the directions of the Tribunal, which were not to advance funds.</p>

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		<p>maker because it is a retailer of financial products that it sells to [Callan] who is an involuntary consumer with no market choice ... the capacity of the Public Trustee as administrator to extract money from [Callan's] funds for its own legal fees defending its own interests against allegations by [Callan] is a disincentive for seeking justice.</p> <p>Tyrone also claimed the Public Trustee had not, and could not, involve Callan in decision-making and had a history of failing to consult with Callan when making decisions about him.</p> <p>The Public Trustee acknowledged that Callan's annual budget was running at a \$23,000 annual deficit and that all of his funds would be exhausted by 2020 if that continued. The Public Trustee advised the tribunal that it would revise the budget if its appointment continued. It also defended its dealings with Callan and his family and its management of his funds.</p> <p>The Tribunal also appointed a legal representative to put Callan's views before the Tribunal. In its deliberations, the Tribunal relied heavily on the submissions of Callan's representative and found that the general submissions of the Public Trustee did not directly respond to the more specific allegations raised by Tyrone.</p> <p>Ultimately, the Tribunal found that decisions about financial and legal matters had been made by the Public Trustee without obtaining Callan's views, and taking them into account. It acknowledged the importance the Public Trustee places on acting within its fiduciary obligations and the prudent person rules, but that such an approach had to be balanced with the use of practices that also involve the person in decision-making to the greatest extent possible.</p> <p>The Tribunal also acknowledged that the Public Trustee was one of the potential litigants in the claims that Callan believed he could make to seek redress for lost funds, and stated, '[I]t is difficult to see how any such claims can be investigated, let alone brought into a court, while one of the potential adversaries is the formal decision-maker for [Callan]'.</p> <p>The Tribunal concluded that Tyrone was more appropriate for appointment as Callan's administrator than the Public Trustee for a range of reasons, including that Callan's step-father was not a 'potential adversary' of Callan, taking the view that the extent of any conflict between Callan's interest and those of his administrator was less if Tyrone was appointed than if the Public Trustee were to continue in the role.</p> <p>Two years after being appointed administrator for Callan, Tyrone made a successful claim against the Public Trustee for the recovery of almost \$18,000 (with interest) that represented money loaned by the Public Trustee to Callan's father, along with other amounts given by</p>	

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		the Public Trustee to his father in breach of its duties as administrator.	
	536	The Public Trustee has confirmed that there have been only two applications brought in QCAT by a person under administration, through their support network, for a compensation order against the Public Trustee as the person's administrator. While these figures could demonstrate the Public Trustee is performing its role in an exemplary manner, they could also be evidence of the vulnerability of this cohort and the absence of clear processes and supports for them to bring successful complaints and applications for compensation, including providing for them to access information in the control of the Public Trustee that would assist with their claims.	The Public Trustee is establishing new mechanisms which will provide a point for Customers who wish to explore possible compensation orders if they have been through the Public Trustee's complaint management process to internal review and remain dissatisfied.
	540	It is acknowledged that the <i>Public Trustee Act</i> recognises the possibility that the Public Trustee, in one capacity, may need to bring litigation against itself in another capacity. However, the Public Trustee is required 'in every such case' to apply for, and follow the directions of, the court as to how 'the opposing interests are to be represented'. The Public Advocate sees no reasonable basis to interpret this provision as permitting the Public Trustee to engage in conflicts of interest on a routine basis, nor for it to provide a blanket exemption for the Public Trustee from its obligation to avoid conflict. On the contrary, the provision specifically requires the Public Trustee to apply to the court for directions 'in every such case' where the Public Trustee may be maintaining litigation against itself in different capacities, about how the opposing interests are to be represented, and presumably protected. (See further discussion about the interpretation of the <i>Public Trustee Act</i> later in this chapter under 'The duty not to profit'.)	It appears section 137(2) of the <i>Public Trustee Act 1978</i> may have been inadvertently misquoted – " <i>however, in every such case the public trustee may apply for and shall in any case follow the directions of the court as to the manner in which the opposing interests are to be represented.</i> "
	541	The Public Advocate is aware that, from time to time, the Public Trustee initiates litigation against itself on behalf of clients, however, it is unclear why some cases are actively pursued by the Public Trustee and some are not. The Public Trustee has advised it regularly brings applications in the Supreme Court representing a person making a claim against itself as the executor of a deceased estate where the applicant is seeking a larger share of the estate, remarking that the court 'has not raised concerns with the practice'. It is unlikely that the court would raise concerns, as such litigation is clearly envisaged by the Act and the court can direct the Public Trustee how to manage the conflicting interests. Additionally, in such a case, there is not necessarily a suggestion of any fault or mismanagement on the part of the Public Trustee. However, the Public Trustee Act is silent on the obligations of the Public Trustee where it <u>does not act</u> to bring proceedings against itself or to hold itself accountable where a client or other party is alleging some impropriety or mismanagement.	It may assist the reader to know that the view of the Public Trustee (which it is happy to review) has been that whether the Public Trustee initiates litigation against itself on behalf of clients is, as with any other matter that is managed by the Public Trustee in its representative capacity, governed by consideration of the legal advice that is obtained and the instructions that are provided. Specifically, the role of a government lawyer is to give frank and fearless advice and the paramount interests are for the client that the Official Solicitor representing, that is, the Public Trustee in its representative capacity for the adult. In some cases external advice is obtained as to whether the Public Trustee in its representative capacity should bring litigation against the corporation. The matters are treated no differently to any other potential claim against a third party other respondent.
	542	The fact that some claims that were not supported by the Public Trustee are ultimately successful, such as in Callan's case, suggests that there may be gaps or 'blind spots' in the Public Trustee's response to these various situations of conflict.	It may assist the reader to know that from the Public Trustee's point of view, the matter of Callan's case was one in which there was a need for a balancing of the General Principles. Further, it may assist the reader to know that the views of one administrator and the views of another administrator may not always align and the extent to which the views of the adult are taken into account as against the risk of proceeding in the way the adult wishes the administrator to proceed will often lead to a differing results. However the existing legal processes and the procedures of QCAT demonstrated that the existing system works as Callan was able to pursue his claim against the Public Trustee. Notably, your review has helped to identify important learnings for the Public Trustee.



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	552	The Public Trustee characterises the Official Solicitor's fees as an outlay, rather than part of its fees, and seeks 'reimbursement' for these fees from financial administration clients just as it would for fees for building reports or other services provided by external providers. It is understood that the Public Trustee does not actually pay the Official Solicitor for its services the way it would a building inspector or other external contractor and then reimburse itself from its client's funds. Once the work is completed, an invoice is raised by the Official Solicitor and is sent to the trust officer and charged against the client's account as an outlay, with the Public Trustee ultimately profiting from this arrangement.	<p>It may assist the reader to clarify that Trust Officers are required to treat the Official Solicitor fees in the same way as it would an invoice from a building inspector or other external contractor. That is the expense is paid for directly from the ledger for the Customer. It is not the case that for financial management customers the Public Trustee pays the services from corporate funds and then reimburses itself from client's funds.</p> <p>The Tribunal has acknowledged that the Official Solicitor's fees are fees that fall within section 47 of the <i>Guardianship and Administration Act 2000</i>, i.e. being payment of the administrator's "expenses" (see Para20 of RCP [2016] QCAT 278).</p>
	556	This distinction may be correct, however, it does not necessarily follow that the Public Trustee's various fees and charges and revenue-earning arrangements, as well as its relationship with, and use of, the Official Solicitor do not raise concerns about the potential for conflict with the interests of clients and the resulting unauthorised profit.	<p>It may assist with your considerations to know that the Public Trustee is mindful of the connotations of the references to earnings from any Official Solicitor's fees as being "unauthorised profit". The legislation itself envisages the use of the Official Solicitor for the Public Trustee's customers. Further Courts and QCAT have been aware of the Public Trustee's use of the Official Solicitor and the Official Solicitor's charges and at no time have these organisations raised concerns that the Public Trustee is receiving an "unauthorised" profit.</p> <p>The Public Trustee has recently implemented changes to its organisational structure to separate the Official Solicitor into two positions – Official Solicitor – Corporate Legal Services, Official Solicitor – Customer Legal Services. The separation of the legal services in this way is to minimise the risk of conflicts of interest, while ensuring the Customer Legal Services' focus is on the delivery of customer-centric legal services. The Public Trustee is also undertaking a comprehensive review of all of its gazetted and non-gazetted fees and charges which includes Official Solicitor fees.</p>
	557	In response to these concerns, the Public Trustee contends that, 'the perception of a conflict is anticipated and authorised by the legislation and is within the knowledge of the Tribunal or Court when appointing the Public Trustee to a role'. However, it does not provide any further explanation for this statement. Nor does it explain how a Tribunal or Court could have 'knowledge' of a perceived or potential conflict that arose after the appointment of the Public Trustee, unless the Public Trustee (or the client or another party on behalf of that person) took steps to put that information before the Court or Tribunal in every case.	It may assist the reader to know that it is not uncommon for the Public Trustee to have to advise Courts or Tribunals the Official Solicitor's fees that have been incurred. For example in every application to the District and Supreme Court for a Sanction of a compromised reached in a Family Provisions Application, the amount of the Official Solicitor's costs that have been incurred must be advised to the Court in affidavit material.
	562	<p>It is unclear why the Public Trustee has established these artificial arrangements with the Official Solicitor. Ultimately, the structure of the relationship between the Public Trustee and the Official Solicitor results in the Public Trustee receiving a direct financial benefit from referring clients for legal advice to the Official Solicitor and the accrual and recovery of legal fees. It raises concerns about conflicts of interest and whether the Public Trustee is breaching its duty not to profit from its clients through the fees charged by the Official Solicitor. These concerns are exacerbated when considering the Public Trustee is the sole entity responsible for determining the amount and reasonableness of the Official Solicitor's fees.</p> <p>Weighing the costs of legal advice against client outcomes</p> <p>Case Study X: Public Trustee proposes spending almost double client's funds to explore a compensation claim against a close family member with no money</p> <p>The Public Trustee was appointed as financial administrator for</p>	<p>It may assist the reader to know that the Public Trustee viewed itself to be in the invidious position of being directed by the Tribunal to provide a report. The Trust Officers are not qualified to provide advices to the Tribunal in relation to family provisions applications. It was viewed by the Public Trustee to be appropriate and necessary for legal advice to be obtained. The Public Trustee's view to date has been that the same processes are necessary in gathering material and considering the claim of the adult, the extent of the estate, and any competing interest, irrespective of the funds that the adult currently holds or the amount of the deceased estate. It is noted that there were submissions made that "the Member should have considered all of the circumstances in regard to MMD's monetary position and the potential cost before issuing the Direction". One possible view is that the Member was not aware (and consequently the Public Trustee was not aware) that the person who was the beneficiary and executor of the estate was impecunious and that there was little prospect of that person ever paying compensation for failure to bring a family provisions application. Further, at the time, the adult only had \$12,000 in her bank account.</p> <p>It may assist the reader to know that the Office of the Official Solicitor has considerable experience in relation to Family Provisions Application and in that capacity, is likely to be more cost-effective in providing advice than many law firms. It is common practice in such matters for Counsel's advice to be obtained. In a situation where the Tribunal was specifically requiring Public Trustee to obtain legal advice, the Public Trustee was placed in a position where it must complete the task prudently to ensure that the proper steps were taken to obtain advice that was reliable.</p> <p>Tribunal Members have no power to determine the amount of Official Solicitor fees recovered from the client. Senior Member</p>

Chapter	Para	Statement	Public Trustee Comments
		<p>Melinda for the purpose of investigating her entitlement to bring a family provision claim against the estate of her late mother. Melinda's sister Patricia was Melinda's administrator and was also the executor and one of the beneficiaries of their late mother's estate. Melinda's mother had four daughters, including Melinda. Her estate was valued at approximately \$260,000 and she had left Melinda \$11,665.61. Patricia, as her sister's administrator, had not considered making a claim on behalf of Melinda seeking further provision from her mother's estate.</p> <p>The Public Trustee was appointed by the Tribunal for one year to investigate Melinda's possible claim for compensation against her sister and report back to the Tribunal. Patricia was directed to cooperate with the Public Trustee and to provide the Public Trustee with funds to undertake the investigation.</p> <p>The original Tribunal member who appointed the Public Trustee was satisfied that Melinda's sisters, including Patricia were taking good care of Melinda and providing her with love and support.</p> <p>The Public Trustee requested \$3,000 from Patricia to go towards the legal costs of the initial investigations. Patricia refused to pay the money.</p> <p>As requested by the Tribunal, the Public Trustee prepared a report about Melinda's potential claim. The preliminary investigations found that Melinda had a right to commence a family provision application, but the Public Trustee was not able to give an opinion on the amount of her claim without advice from a barrister. The Public Trustee recommended that Patricia be ordered to pay \$25,000 to the Public Trustee to cover legal costs up to that time for the preliminary investigations totalling more than \$15,000 plus \$5,000 for barrister's fees for an advice on the amount of Melinda's claim and a further \$5,000 in legal fees for the Public Trustee to make a final report to the Tribunal.</p> <p>At that time, it was made clear to the Tribunal that Patricia had no money to pay any compensation order that might be made against her and Melinda had only \$12,000 in her bank account.</p> <p>Following the report, the Tribunal dismissed the application for compensation and revoked the appointment of the Public Trustee. As the Public Trustee had incurred costs during its appointment as financial administrator, it was directed to submit a statement of its costs and outlays and make submissions in regard to its right to payment for the \$15,000 in legal fees. The other parties were also asked to express views on the Public Trustee's legal fees.</p> <p>In making his determination, the Tribunal member noted:</p> <p style="text-align: center;">An administrator is required to apply the general</p>	<p>Endicott in the matter of RCP [2016] QCAT 278 stated that "...the Tribunal has limited scope to adjudicate on the amount of legal fees charged by the Official Solicitor. It was not established that the Tribunal had any relevant power to set aside the costs agreement between the Public Trustee and the Official Solicitor nor to a fixed amount of fees that the Public Trustee can incur on behalf of an adult's subject to an administration order."</p>

Chapter	Para	Statement	Public Trustee Comments
		<p>principles and in particular, here general principle 10 Appropriate to Circumstances – power for a matter should be exercised by an administrator for an adult in a way that is appropriate to the adult’s characteristics and needs. That includes the adult’s financial circumstances and therefore when considering whether expenses are reasonable they must be reasonable having regard to the adult’s financial circumstances.</p> <p>The Tribunal acknowledged that the legal expenses incurred by the Public Trustee ‘may have been objectively reasonable in terms of not being excessive’, however, questioned whether they were ‘reasonable having regard to the fact that [Melinda] had limited funds and there does not appear to have been any consideration given to the ultimate amount she may receive against any additional cost?’.</p> <p>The Tribunal decided a reasonable amount for the expenses the Public Trustee incurred should total \$3,000, the amount originally sought by the Public Trustee.</p> <p>Patricia and one of her sisters were ordered to pay \$3,000 to the Public Trustee.</p>	
	563	Melinda’s case is one of a number the Public Advocate has observed where the fees charged by the Official Solicitor to undertake work for the client do not appear to be in the clients’ interests to incur in terms of the legal/financial outcomes likely to be achieved.	<p>It may assist the reader to know that the Public Trustee has been of the view (which it is reconsidering) that in a great many of the legal matters referred to the Office of the Official Solicitor, the work required to obtain the necessary background information is the same irrespective of whether the claim is for \$10,000 or \$500,000. The view has been that these matters cannot be characterised in the same way as the recovery of the debt where the amount of the debt is known at the beginning of the matter. Because the legal concepts can be complex involving trust and equity law and, in some cases, particular knowledge regarding family provisions applications, it has been difficult to provide informed legal advice without consideration and analysis of all relevant information. It is not until a comprehensive review and analysis of all relevant information and issues is done that there is any real certainty as to the value of the claim.</p> <p>The difficulty with knowing what the legal/financial outcomes likely to be achieved are until the investigation is conducted has been recognised by the Tribunal. As Senior Member Endicott stated at para 19 at RCP [2016] QCAT 278, “a proper investigation of a claim requires more than evidence gathering by a trust officer. It must involve consideration of the evidence, reading of documents relevant to the proposed claim and then formulating legal advice on the feasibility of the claim.”</p>
	568	Specifically regarding the Official Solicitor, the Public Trustee ‘acknowledged that there are no written procedures or guidance materials that instruct trust officers to assess the reasonableness of the fees incurred by the [Official Solicitor].’ Although both a director and trust officer in the Customer Experience and Delivery team review all accounts from the Official Solicitor and if there are concerns in relation to the fees, a review of the account would be sought.	The considerations that the Trust Officer is to take into account when considering the Official Solicitor’s fees has now been published to them.
	570	It is clear from the Public Trustee’s response that, when its staff are making these types of decisions, they do not apply the risk/benefit considerations that ordinary members of the community usually would when making these decisions for themselves. This should involve weighing the costs of the legal advice and/or action and the prospects of success against the likely financial outcome to ensure that it ultimately results in a financial or other benefit for the client. Instead, it appears that in many cases the investigation and pursuit of	It may assist the reader with context to note that the difference with ordinary members of the community weighing up whether to bring a legal claim is that members of the community normally have at hand all the relevant material that is of relevance to the consideration of whether to make a claim. Further, the Public Trustee has a range of additional obligations that might not otherwise apply to ordinary members of the community such as the duty “protect the adult’s interests”.



Chapter	Para	Statement	Public Trustee Comments
		prospective legal claims have become the ends in themselves. This may be driven by the Public Trustee's view (a misinterpretation as previously outlined) that it must obtain formal legal advice in relation to all prospective legal issues to fulfill its fiduciary duties.	
	576	Lawyers holding practising certificates in Queensland are considered to be 'Australian legal practitioners'. A complaint can be made to the Queensland Legal Services Commissioner about an Australian legal practitioner by a client of the lawyer or legal practice, the Queensland Law Society or the Bar Association of Queensland. However, the Legal Services Commissioner is only able to consider complaints about a government legal officer if the complaint is made by another legal practitioner holding a practising certificate, the Queensland Law Society, the Bar Association or the Chief Executive Officer of the agency employing the lawyer.	<p>Lawyers who fall within the definition of government legal officers pursuant to section 12 of the <i>Legal Profession Act 2007</i> (Qld) are not required to hold practising certificates in order to provide legal services to the organisations which employ them. However, the view of the Public Trustee has been that the absence of a practising certificate does not release an admitted solicitor or barrister from their duties as officers of the court.</p> <p>Rule 4.1.4 of the Australian Solicitors Conduct Rules provides the fundamental duties of a solicitor are:</p> <p>4.1 A solicitor must also:</p> <p>4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;</p> <p>4.1.2 be honest and courteous in all dealings in the course of legal practice;</p> <p>4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;</p> <p>4.1.4 avoid any compromise to their integrity and professional independence; and</p> <p>4.1.5 comply with these Rules and the law.</p> <p>These duties are invoked by admission as a lawyer, and in the view of the Public Trustee to-date, apply regardless of whether the lawyer is employed in private or government practice, and whether or not the lawyer holds a practising certificate.</p> <p>The view of the Public Trustee has also been that Government lawyers act for the organisation by which they are employed (or in the case of Crown Law, Legal Aid or the Australian Government Solicitor, for the clients of those organisations), and not for the employees or officers of that organisation.</p> <p>While the Australian Solicitor Conduct Rules themselves may not apply to government lawyers, the view of the Public Trustee is that government lawyers are subject to a range of statutory obligations specific to the public sector that may intersect with their obligations as legal practitioners, including the Model Litigant Principles and the Public Service Code of Conduct.</p>
	586	It is a genuine matter for consideration whether a comparison of Official Solicitor fees with 'market' rates of private commercial legal firms is appropriate in terms of the fees charged to financial administration clients and the type of services provided to such clients. This group is recognised as vulnerable; they often experience financial disadvantage and are unable to choose their own lawyer or complain to the Legal Services Commission about the legal services they receive. It also goes to the reasonableness of the Official Solicitor's fees in that they are generally higher than the fees charged by Crown Law to government agencies — and in some cases by as much as 27 percent.	<p>The hourly rates for the Official Solicitor were set based on an independent consultant's advice. The advice included benchmarking against the fees charged by other private and public organisations.</p> <p>The Public Trustee provides Community Service Obligations to customers experience financial hardship. This includes the discretion to waive some, or all, legal fees for a customer. The Public Trustee is committed to ensuring that customers only pay for legal fees that advance the customers interests.</p> <p>The Public Trustee is undertaking a comprehensive review of all of its gazetted and non-gazetted fees and charges to ensure that they are transparent, fair and reflective of the services provided to our customers. Legal fees will be considered as part of the review.</p>
	589	Some of the issues that need to be addressed by a review are whether it is appropriate for the Official Solicitor to continue to have a role in providing legal advice and representation to clients of the Public Trustee or whether this work should be 'briefed out' by the Public Trustee to a panel of private legal firms and barristers that tender, and qualify, for this work. This would address issues about conflicts of interest between the Official Solicitor's obligations to the Public Trustee and to the Public Trustee's clients as well as concerns about the Public Trustee profiting from the fees charged by the Official	External legal panels are being established for matters involving personal injuries, dust diseases, disability and superannuation claims, family law, and National Redress Scheme.

Chapter	Para	Statement	Public Trustee Comments
		Solicitor to its clients.	





444 Queen Street Brisbane Qld 4000  
GPO Box 1449 Brisbane Qld 4001



For reply please quote: S&G/JF – T20/249 – D20/29878

20 November 2020

Ms Mary Burgess  
Public Advocate  
GPO Box 149  
BRISBANE QLD 4001

Dear Ms Burgess

Thank you for your letter of 10 October 2020 providing a copy of draft Chapter 8 of your report: *The Value of Trust: Public Trustee fees and charges for people under financial administration* (the Report).

The Public Trustee appreciates the opportunity to review the draft chapters and to provide feedback where it will assist you to finalise the Report. In this regard, I am supportive of you including quotes from the Public Trustee's feedback where it will assist the readers' understanding of the issue, or to provide procedural fairness. I trust that quotes from the Public Trustee's feedback will be reproduced either in their entirety or in such a way as to not diminish the context or intent of which they were provided.

I acknowledge that we have previously discussed including a chapter in the Report for the Public Trustee's response. To confirm my understanding is that the Public Trustee has been invited to provide comment on factual errors in the draft Chapters provided to-date, and the Public Trustee will be afforded the opportunity to provide a response to the Report which will be included as a chapter in the Report. I would like the Public Trustee's response to be included in full as a chapter of the Report. To enable the Public Trustee to provide its response to the report as quickly as possible, it would be greatly appreciated if you would please provide the final full version of your report as soon as is reasonably possible.

Officers from the Public Trustee have considered the draft chapter 8 with the aim of supporting you to finalise the Report. Again, I acknowledge that it is your complete and unfettered discretion to access some or all the suggestions made for ensuring an objective and balanced report. **Attachment 1** contains a summary of suggested amendments and additional information which may be of assistance.

### ***Privacy***

It is acknowledged and appreciated that it is the view of the Public Advocate that the operations of the Public Trustee has been predominately driven by the need to be a self-funding agency. While the need to be self-sufficient has been a consideration since the agency's inception, it would not be accurate to say this has been the overriding criteria which has guided the agency.

#### **The Public Trustee**

- Will-making
- Enduring powers of attorney

#### **1300 360 044**

- Executor services
- Estate administration

#### **[www.pt.qld.gov.au](http://www.pt.qld.gov.au)**

- Disability services
- Trust administration

#### **ABN 12 676 939 467**

- Real estate auctions and sales
- Charitable trusts

For example, Chapter 8 at paragraph 600 refers to the Public Trustee's *Strategic Plan 2016–2020*. The strategy to 'generate sufficient revenue to guarantee ongoing viability, ensuring we cover the cost of our community obligations' is one of many strategies aimed at supporting our customers and the community. For example, the objectives of the *Strategic Plan 2016–2020* were to:

- drive value for clients through tailored services to meeting changing needs
- deliver a budget position which enables sustainable reinvestment to support business objectives
- deliver services that are valued by the community and Government
- embrace business transformation to enhance capacity and provide service excellence
- ensure our workforce is engaged, empowered and agile.

As with any Government department or private sector entity, there is acknowledgement within the Public Trustee that providing financially and ethically responsible leadership and governance is necessary to ensure that we can continue to meet our obligations to our customers and the broader community.

### ***Commercial-in-Confidence***

The Public Trustee is subject to the *Information Privacy Act 2009* and the *Guardianship and Administration Act 2000* which have strict provisions to protect the privacy of people under administration and guardianship. The Report recognises that the Public Trustee's application of the acts in protecting customer's privacy has been correct.

It is acknowledged that the Public Trustee has discretion to release information on the behalf of a customer to legitimate supporters of the person. The Public Trustee supports disclosure of information where it will advance a customer's interests. However, there may be complex circumstances where it is not always appropriate to release a customer's information. For example, a customer may request that a member of their support network not be provided with the information, or there may be concerns about customer's support network, including misappropriation or financial elder abuse, which may involve undue influence and/or unconscionable conduct. These issues need to be carefully considered to ensure the customer's right to privacy is not adversely affected.

### ***Changes in the Public Trustee's Operating Environment***

The report states at paragraph 10 that the "Public Trustee has become increasingly dependent on revenue from administration of estates as its other sources of revenue declined". It is acknowledged in broad terms that this statement is accurate in that the administration of Estates as a proportion of total revenue has increased from 61 per cent to 70 per cent over that period, while investment revenue has decreased from 28 per cent to 21 per cent. However, for context, financial management fees and charges only represent 54 per cent of this revenue. Analysis of financial management revenue shows that increases are split between fees, volume and product mix. As such, it may be incorrect to suggest that the rise in revenue is a due to increased fees alone.

Other increases have also occurred in Legal & Conveyancing, taxation revenue and particularly Unclaimed Moneys which is why total revenue increases more in the later years compared with the earlier years.

The report at paragraph 617 also states that the 'go to' option for the Public Trustee is to increase its fees and charges. It is acknowledged that this is the view of the Office of the Public Advocate, however the Public Trustee respectfully suggests that this statement may inadvertently mislead the reader. The statement could imply that the Public Trustee calculates costs and then increases fees and charges to cover the costs. This is in conflict with the current practice which has been in place since 2001, where the Public Trustee increases fees and charges in line with the Queensland Government inflation index and then delivers services within this revenue.

***Decreases in interest paid by the Public Trustee on common fund and term deposits***

At paragraph 612, the report states "the rate of earnings by the Public Trustee on the Common Fund have been as high as 12 per cent per annum last financial year". We have not been able to verify the context of this figure. If it would assist you for the Public Trustee to verify the 12 per cent, per annum, [REDACTED] would be pleased to assist with reviewing how this was calculated.

***[REDACTED] Benchmarking Report***

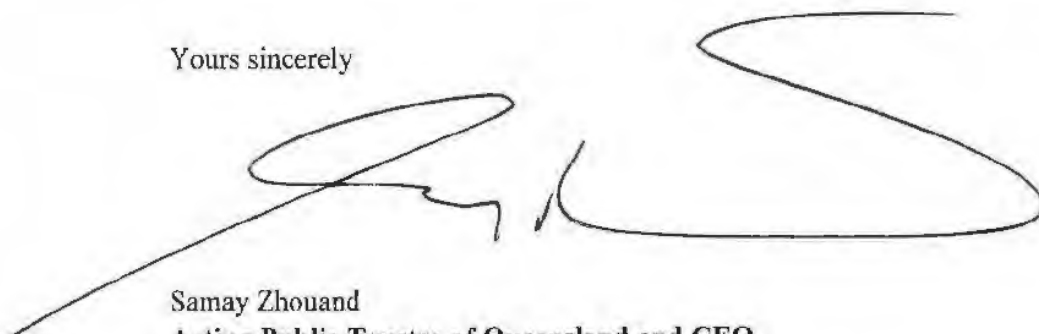
You recently raised some questions about the footnotes in the [REDACTED] Report *Benchmarking: Personal Financial Management Asset Management and other service fees*. The footnotes are in relation to the comparison of the Personal Financial Administration Fees (PFA) and state that 'the asset value shown excludes property including place of residence'.

I understand that the principal place of residence is excluded from the calculation as it makes no difference to the level of fee charged. The PFA fee is based on the level of support and the same regardless of a customer's assets or income.

I trust this information supports the finalisation of your report. If it would be of assistance in finalising the report, I would be pleased to arrange a meeting with you and the relevant subject matter experts from the Public Trustee to answer any questions you may have.

Again, thank you for the opportunity to assist with finalising your Report. I look forward to considering the draft consolidated report which incorporates the Public Trustee's feedback in due course.

Yours sincerely

A large, stylized handwritten signature in black ink, appearing to read 'Samay Zhou', is written over the signature line.

Samay Zhou and  
Acting Public Trustee of Queensland and CEO

Attachment 1

Chapter	Section	Statement	Public Trustee Comments																																																															
8	610	<p>Figure X also shows revenue from ‘Administration of estates’. This figure includes revenue from financial administration clients, people for whom the Public Trustee acts as financial attorney and deceased estate [13] From 2014, revenue from administration of estates increased from \$77.2M to \$90.1M in 2019 (a 25 percent increase), with the greatest growth in revenue from this source occurring in the last three years, coinciding with the period of most significant contraction of income from investments. In the three years to 2018-19, Public Trustee revenue from administration of estates increased by an average of \$4.7M per year compared with the three years, 2013-14 to 2015-16, when it increased annually by an average of only \$1.9M. These figures demonstrate that the Public Trustee has become increasingly dependent on revenue from administration of estates as its other sources of revenue declined. - Correct</p> <p>[13] It is unknown whether the Public Trustee recovers fees from prisoners whose estates are being administered by the Public</p>	<p>It appears that there may be a typo in revenue from administration of estates. It should be \$72.2 million, and not \$77.2 million.</p>																																																															
8	611	<p>As Figure X shows, the number of ‘New deceased estates’ administered by the Public Trustee over the period remained static, while the number of ‘Trusts managed’ and revenue from ‘Trust fees’ decreased. Ultimately, it appears that the Public Trustee has only been able to maintain and increase its total and net revenue through growth in fees from administration of estates, which is primarily revenue from administration clients</p>	<p>The table referred to appears to have inadvertently used a CSO rebate figure s which includes items which are already included in expenses, and may have double counted these items (Legal Aid and Public Guardian Contribution). The table below has been adjusted to correct this -</p> <table><tr><td></td><td>2013-14</td><td>2014-15</td><td>2015-16</td><td>2016-17</td><td>2017-18</td><td>2018-19</td></tr><tr><td>Total administration clients (as at 30 June)</td><td>8,380</td><td>8,649</td><td>9,162</td><td>9,592</td><td>9,811</td><td>9,957</td></tr><tr><td>Wills made</td><td>25,195</td><td>25,093</td><td>25,448</td><td>25,136</td><td>28,272</td><td>28,426</td></tr><tr><td>New deceased estates</td><td>2,137</td><td>2,156</td><td>2,049</td><td>2,142</td><td>2,221</td><td>2,135</td></tr><tr><td>Total trusts managed</td><td>5,304</td><td>-</td><td>4,687</td><td>4,649</td><td>4,540</td><td>4,467</td></tr></table> <p>Revenue (\$'000)</p> <table><tr><td>Administration of estates</td><td>72,227</td><td>74,042</td><td>75,990</td><td>80,511</td><td>85,717</td><td>90,125</td></tr><tr><td>Trust fees</td><td>6,205</td><td>5,440</td><td>4,540</td><td>4,674</td><td>4,873</td><td>4,841</td></tr><tr><td>Auction revenue</td><td>2,308</td><td>1,698</td><td>2,313</td><td>2,087</td><td>2,363</td><td>2,534</td></tr><tr><td>Investments</td><td></td><td></td><td></td><td></td><td></td><td></td></tr></table>		2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	Total administration clients (as at 30 June)	8,380	8,649	9,162	9,592	9,811	9,957	Wills made	25,195	25,093	25,448	25,136	28,272	28,426	New deceased estates	2,137	2,156	2,049	2,142	2,221	2,135	Total trusts managed	5,304	-	4,687	4,649	4,540	4,467	Administration of estates	72,227	74,042	75,990	80,511	85,717	90,125	Trust fees	6,205	5,440	4,540	4,674	4,873	4,841	Auction revenue	2,308	1,698	2,313	2,087	2,363	2,534	Investments						
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				33,302	33,611	32,205	28,927	28,176	27,604
			Other	4,901	5,361	3,988	3,864	3,346	4,127
			Total Revenue	118,943	120,152	119,036	120,063	124,475	129,231
			CSO Rebates	27,198	29,081	30,163	32,252	34,034	35,717
			Net Revenue	91,745	91,071	88,873	87,811	90,441	93,514
			Expenses (\$'000)	80,558	81,618	80,764	85,374	87,031	94,304
			Net Operating result (\$'000)	11,187	9,453	8,109	2,437	3,410	790
			Staff FTE	561	571	584	614	609	630
			Staff (MOHRI)	548	537	553	573	584	606
8	614	<p>In its 2019-20 Annual Report, the Public Trustee noted that its income from fees had increased from 66 percent of its total revenue in 2018-19 to 71 percent in 2019-20. At the same time its revenue from interest reduced from 20 percent of total revenue in 2018-19 to 25 percent in 2019-20. These figures are consistent with the financial trend noted above [22]</p> <p>[22] The Public Trustee of Queensland Annual Report 2019-20, p.35.</p>	<p>In interest revenue has reduced from 30 per cent of total revenue in 2018–19 to 25 per cent in 2019–20.</p>						
8	619	<p>Considering the high level of growth in Public Trustee revenue from fees on administration of estates (25 percent, see Figure X above), and the negative impact the level of fees and charges is having on the financial outcomes of some administration clients who are considered able to pay, the potential for significant growth in revenue from this source is limited in the short-term</p>	<p>It is noted that the data for 2019–20 financial year is not referenced throughout the report except for Figure Y Public Trustee Financial Administration Fees Increases. It is suggested that it may assist the reader of the report for the data to be presented in consistent time periods.</p> <p>It is also respectfully suggested that the statement that “the high level of growth in Public Trustee revenue from fees on administration of estates” may inadvertently mislead the reader. It may assist to identify that the growth of revenue is consistent with CPI and customer numbers.</p>						
8	622	<p>While the Public Trustee’s investments of client funds have little relevance to the cash rate, in terms of the returns it makes on those investments, the change in the rate of interest payable by the Public Trustee over the period considered in Figure Z shows an interesting trend. Since 2016, Public Trustee clients have enjoyed relatively good rates of return on their funds invested with the Public Trustee, compared with other members of the public whose money is invested with</p>	<p>The Public Trustee has been unable to verify the context of the 12 per cent figure quoted.</p>						

		banks and other financial institutions. However, as noted in chapter X, the rate of earnings by the Public Trustee on the Common Fund have been as high as 12 percent per annum last financial year, even though the Reserve Bank cash rate was only 0.75 percent	
8	623	<p>As Figure X shows, in the five years from 2013-14 to 2018-19, the number of clients whose estates are being managed by the Public Trustee increased from 8,380 to 9,957 [27] For many of these clients with impaired decision-making capacity, their sole source of income is a pension and they have low levels of assets. Consequently, they are unlikely to be fee-paying clients and therefore represent a significant financial burden for the Public Trustee.</p> <p>[27] Reserve Bank of Australia, Cash Rate Target, <a href="https://rba.gov.au/statistics/cash-rate/">https://rba.gov.au/statistics/cash-rate/</a>, October 2020.</p> <p>As noted previously, the figures for financial management provided by the Public Trustee in recent years include people under financial administration, people for whom the Public Trustee is financial attorney, and prisoners. The actual figure for people under financial administration in 2019-20 is 9,316; see The Public Trustee Annual Report 2019-20, p 5.</p>	<p>Please refer to the attached [REDACTED] which was informed by the Office of Public Advocate dated 20 June 2019.</p> <p>Page 4 of the report identifies the growth of non CSO customers and CSO customers. The Growth rate of non - CSO customers only decreased slightly over the periods reported on.</p>



- 1 Presumption of capacity  
An adult is presumed to have capacity for a matter.
- 2 Same human rights
  - (1) The right of all adults to the same basic human rights regardless of a particular adult's capacity must be recognised and taken into account.
  - (2) The importance of empowering an adult to exercise the adult's basic human rights must also be recognised and taken into account.
- 3 Individual value  
An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.
- 4 Valued role as member of society
  - (1) An adult's right to be a valued member of society must be recognised and taken into account.
  - (2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.
- 5 Participation in community life  
The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.
- 6 Encouragement of self-reliance  
The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.
- 7 Maximum participation, minimal limitations and substituted judgment
  - (1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.
  - (2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.
  - (3) So, for example—
    - (a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and
    - (b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and
    - (c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights.
  - (4) Also, the principle of substituted judgment must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes.

<sup>1</sup> The general principles are reproduced from the *Guardianship and Administration Act 2000* prior to 2019 *Guardianship and Administration Act Amendment Act*, enacted on 30 November 2020

- (5) However, a person or other entity in performing a function or exercising a power under this Act must do so in a way consistent with the adult's proper care and protection.
  - (6) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.
- 8 Maintenance of existing supportive relationships  
The importance of maintaining an adult's existing supportive relationships must be taken into account.
- 9 Maintenance of environment and values
  - (1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.
  - (2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom), must be taken into account.

Notes—

  - 1 *Aboriginal tradition* has the meaning given by the [Acts Interpretation Act 1954, schedule 1](#).
  - 2 *Island custom* has the meaning given by the [Acts Interpretation Act 1954, schedule 1](#).
- 10 Appropriate to circumstances  
Power for a matter should be exercised by a guardian or administrator for an adult in a way that is appropriate to the adult's characteristics and needs.
- 11 Confidentiality  
An adult's right to confidentiality of information about the adult must be recognised and taken into account.

## 11B General principles

- 1) The principles (the *general principles*) set out below must be applied by a person or other entity that performs a function or exercises a power under this Act.
- 2) Also, a person making a decision for an adult on an informal basis must apply the general principles in making the decision.
- 3) The community is encouraged to apply and promote the general principles.

### General principles

#### 1 Presumption of capacity

An adult is presumed to have capacity for a matter.

#### 2 Same human rights and fundamental freedoms

- (1) An adult's inherent dignity and worth, and equal and inalienable rights, must be recognised and taken into account.
- (2) The rights of all adults to the same human rights and fundamental freedoms, regardless of a particular adult's capacity, must be recognised and taken into account.
- (3) The principles on which an adult's human rights and fundamental freedoms are based, and that should inform the way those rights and freedoms are taken into account include-
  - (a) respect for inherent dignity and worth, individual autonomy (including the freedom to make one's own choices) and independence of persons; and
  - (b) non-discrimination; and
  - (c) full and effective participation and inclusion in society, including performing roles valued by society; and
  - (d) respect for difference and acceptance of persons with impaired capacity as part of human diversity and humanity; and
  - (e) equality of opportunity; and
  - (f) accessibility; and
  - (g) equality between all persons regardless of gender

#### 3 Empowering adults to exercise human rights and fundamental freedoms

The importance of the following matters must be taken into account-

- (a) empowering an adult to exercise the adult's human rights and fundamental freedoms;
- (b) encouraging and support an adult-
  - i. to perform social roles valued in society; and
  - ii. to live a life in the general community and to take part in activities enjoyed by the community; and
  - iii. to achieve maximum physical, social, emotional and intellectual potential and to become as self-reliant as practicable;
- (c) an adult's right to participate to the greatest extent practicable in the development of policies, programs and services for people with impaired capacity for a matter.

#### 4 Maintenance of adult's existing supportive relationships

- (1) The importance of maintaining an adult's existing supportive relationships must be taken into account.

<sup>2</sup> The general principles are reproduced from the *Guardianship and Administration Act 2000*, current from 30 November 2020.

- (2) Maintaining an adult's existing supportive relationships may, for example, involve consultation with-
    - (a) the adult, to find out who are the members of the adult's support network; and
    - (b) any persons who have an existing supportive relationships with the adult; and
    - (c) any members of the adult's support network who are making decisions for the adult on an informal basis.
  - (3) The roles of families, carers and other significant persons in an adult's life to support the adult to make decisions should be acknowledged and respected.
- 5 Maintenance of adult's cultural and linguistic environment and values
  - (1) The importance of maintaining an adult's cultural and linguistic environment and set of values, including religious beliefs, must be taken into account.
  - (2) Without limiting subsection (1), for an adult who is an Aboriginal person or Torres Strait Islander, the importance of maintain the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment and set of values, including Aboriginal tradition or Island custom, must be taken into account.
- 6 Respect for privacy
  - (1) An adult's privacy must be taken into account and respected.
  - (2) An adult's personal information, including health information, must be protected on the same basis as other people's personal information is protected.
- 7 Liberty and security
  - (1) An adult's right to liberty and security on an equal basis with others must be taken into account.
  - (2) An adult should not be deprived of the adult's liberty except in accordance with the law.
- 8 Maximising an adult's participation in decision-making
  - (1) An adults right to participate, to the greatest extent practicable, in decision affecting the adult's life must be recognised and maintained.
  - (2) An adult must be given the support and access to information necessary to enable the adult to make or participate in decision affecting the adult's life.
  - (3) An adult must be given the support necessary to enable the adult to communicate the adult's decisions.
  - (4) To the greatest extent practicable, a person or other entity, in exercising power for a matter for an adult, must seek the adult's views, wishes and preferences.
  - (5) An adult's views, wishes and preferences may be expressed orally, in writing or in another way, including, for example, by conduct.
  - (6) An adult is not to be treated as unable to make a decision about a matter unless all practicable steps have been taken to provide the adult with the support and access to information necessary to make and communicate a decision.
- 9 Performance of functions and exercise of powers
 

A person or other entity, in performing a function or exercising a power under this Act in relation to an adult, or in making a decision for an adult on an informal basis, must do so-

  - (a) In a way that promotes and safeguards the adult's rights, interests and opportunities; and
  - (b) In the way that is least restrictive of the adult's rights, interests and opportunities.
- 10 Structured decision-making
  - (1) In applying general principle 9, a person or other entity in performing a function or exercising a power under this Act in relation to an adult, or in making a decision for

- an adult on an informal basis, must adopt the approach set out in subsections (2) to (5).
- (2) First, the person or other entity must-
    - (a) recognise and preserve, to the greatest extent practicable, the adult's right to make the adult's own decision; and
    - (b) if possible, support the adult to make the decision.
  - (3) Second, the person or other entity must recognise and take into account any views, wishes or preferences expressed or demonstrated by the adult.
  - (4) Third, if the adult's views, wishes and preferences can not be determine, the person or other entity must use the principle of substituted judgement so that if, from the adult's views, wishes and preferences, expressed or demonstrated when the adult had capacity, it is reasonably practicable to work out what the adult's views, wishes or preferences would be, the person or other entity must recognise and take into account what the person or other entity considers the adult's views, wishes and preferences would be.
  - (5) Fourth, once the person or other entity has recognised and taken into account the matters mentioned in subsections (2) to (4), the person or other entity may perform the function, exercise the power or make the decision.

# Statement of Assets & Liabilities



www.pt.qld.gov.au

Client Reference: [REDACTED]

Statement of Assets & Liabilities [REDACTED]

Public Trustee Activity: PM/1

Statement Period from [REDACTED]

Description	Recorded Value	Valuation Date
<b>ASSETS</b>		
[REDACTED]	345,000.00	22-APR-15
[REDACTED] DATSUN [REDACTED]	500.00	16-FEB-15
[REDACTED] ACCOUNT - [REDACTED]	0.37	31-JUL-15
MERCEDES BENZ [REDACTED]	5,000.00	16-FEB-15
PUBLIC TRUSTEE - CASH ACCOUNT	458.60	20-NOV-15
PUBLIC TRUSTEE - TERM INVESTMENT ACCOUNT	105,754.73	20-NOV-15
[REDACTED] ACCUMULATION ACCOUNT	3,452.74	30-JUN-15
[REDACTED] SUPERANNUATION PENSION	569,762.34	13-MAR-15
[REDACTED] ACCOUNT [REDACTED]	1,500.00	23-FEB-15
<b>Totals</b>	<b>1,031,428.78</b>	
<b>LIABILITIES</b>		
[REDACTED] CREDIT CARD DEBT	1.62-	07-MAY-15
<b>Totals</b>	<b>1.62-</b>	
<b>Total Assets</b>		
1,031,428.78	<b>Total Liabilities</b>	<b>Net Recorded Value</b>
	1.62-	1,031,427.16

services

| Will Making - Free Service  
| Disability Services  
| Enduring Powers of Attorney

| Probate Services  
| Trusts  
| Deceased Estate Administration

| Auctions  
| Property  
| Real Estate  
| Motor Vehicles



# Statement of Transactions



www.pt.qld.gov.au

Client Reference: [REDACTED]

Statement of Transactions [REDACTED]

Public Trustee Activity: PM/1

Statement Period from [REDACTED]

Reference: PUBLIC TRUSTEE - TERM INVESTMENT ACCOUNT (TERM/1)

Date	Transaction Details	Payments	Receipts
Opening Balance as per Statement of Account Dated 20/05/2015			118,534.40
OTHER PAYMENTS AND RECEIPTS			
31-MAY-15	NET PUBLIC TRUSTEE INTEREST 31/05/2015		226.51
30-JUN-15	NET PUBLIC TRUSTEE INTEREST 30/06/2015		219.63
31-JUL-15	NET PUBLIC TRUSTEE INTEREST 31/07/2015		202.10
17-AUG-15	PUBLIC TRUSTEE TERM INVESTMENT ACCOUNT - WITHDRAWAL	5,000.00	
31-AUG-15	NET PUBLIC TRUSTEE INTEREST 31/08/2015		198.34
30-SEP-15	NET PUBLIC TRUSTEE INTEREST 30/09/2015		188.02
14-OCT-15	PUBLIC TRUSTEE TERM INVESTMENT ACCOUNT - WITHDRAWAL	9,000.00	
31-OCT-15	NET PUBLIC TRUSTEE INTEREST 31/10/2015		185.73
Closing Balance			105,754.73
Opening Balance		Total Payments	Total Receipts
118,534.40		14,000.00	1,220.33
Net Public Trustee Fees		0.00	
GST Paid on Public Trustee Fees		0.00	

# Statement of Transactions



www.pt.qld.gov.au

Client Reference: [REDACTED]

Public Trustee Activity: PM/1

Statement of Transactions [REDACTED]

Statement Period from [REDACTED]

Date	Transaction Details	Payments	Receipts
Opening Balance as per Statement of Account Dated 20/05/2015			10,216.57
[REDACTED]			
31-MAY-15	REALTY FEE	166.34	
31-MAY-15	REBATE REALTY FEE		166.34
03-JUN-15	BANK TRANSACTION FEE	0.21	
03-JUN-15	PEST INSPECTION [REDACTED]	220.00	
30-JUN-15	REALTY FEE	67.43	
30-JUN-15	REBATE REALTY FEE		67.43
14-JUL-15	BANK TRANSACTION FEE	0.21	
30-JUL-15	PROPERTY RATES [REDACTED]	203.85	
31-JUL-15	REALTY FEE	71.92	
31-JUL-15	REBATE REALTY FEE		71.92
04-AUG-15	BANK TRANSACTION FEE	0.21	
04-AUG-15	WATER RATES [REDACTED]	173.58	
10-AUG-15	BANK TRANSACTION FEE	0.21	
10-AUG-15	REPLACE SWITCHBOARD [REDACTED]	809.60	
31-AUG-15	REALTY FEE	71.92	
31-AUG-15	REBATE REALTY FEE		71.92
30-SEP-15	REALTY FEE	69.60	
30-SEP-15	REBATE REALTY FEE		69.60
14-OCT-15	BANK TRANSACTION FEE	0.21	
30-OCT-15	PROPERTY RATES [REDACTED]	203.85	
31-OCT-15	REALTY FEE	71.92	
31-OCT-15	REBATE REALTY FEE		71.92
02-NOV-15	BANK TRANSACTION FEE	0.21	
[REDACTED] DATSUN [REDACTED]			
24-JUN-15	BANK TRANSACTION FEE	0.21	
08-JUL-15	VEHICLE REGISTRATION [REDACTED]	344.55	
[REDACTED] MERCEDES BENZ [REDACTED]			
23-MAY-15	VEHICLE INSURANCE [REDACTED]	584.88	
13-JUL-15	BANK TRANSACTION FEE	0.21	
01-AUG-15	VEHICLE REGISTRATION [REDACTED]	525.10	

Client Reference: [REDACTED]  
Public Trustee Activity: PM/1

Statement of Transactions [REDACTED]  
Statement Period from [REDACTED]

Date	Transaction Details	Payments	Receipts
<b>SUPERANNUATION PENSION</b>			
28-MAY-15	SUPERANNUATION PENSION - [REDACTED]		2,500.00
29-JUN-15	SUPERANNUATION PENSION - [REDACTED]		2,500.00
28-JUL-15	SUPERANNUATION PENSION - [REDACTED]		2,500.00
28-AUG-15	SUPERANNUATION PENSION - [REDACTED]		2,500.00
28-SEP-15	SUPERANNUATION PENSION - [REDACTED]		2,500.00
28-OCT-15	SUPERANNUATION PENSION - [REDACTED]		2,500.00
<b>OTHER PAYMENTS AND RECEIPTS</b>			
20-MAY-15	BANK TRANSACTION FEE	0.21	
21-MAY-15	[REDACTED] PENSION - [REDACTED]		223.83
21-MAY-15	REIMBURSEMENT OF EXPENSES - [REDACTED]	6,720.78	
27-MAY-15	LIVING EXPENSES - [REDACTED]	300.00	
27-MAY-15	BANK TRANSACTION FEE	0.21	
27-MAY-15	BANK TRANSACTION FEE	0.21	
28-MAY-15	GAS ACCOUNT - [REDACTED]	75.00	
31-MAY-15	PERSONAL FINANCIAL ADMINISTRATION FEE - LEVEL 5	1,106.52	
31-MAY-15	ASSET MANAGEMENT FEE - LEVEL 9	670.85	
03-JUN-15	LIVING EXPENSES - [REDACTED]	300.00	
03-JUN-15	BANK TRANSACTION FEE	0.21	
03-JUN-15	BANK TRANSACTION FEE	0.21	
03-JUN-15	INTERNET ACCOUNT - [REDACTED]	119.90	
04-JUN-15	[REDACTED] PENSION - [REDACTED]		88.83
10-JUN-15	LIVING EXPENSES - [REDACTED]	300.00	
10-JUN-15	BANK TRANSACTION FEE	0.21	
17-JUN-15	LIVING EXPENSES - [REDACTED]	300.00	
17-JUN-15	BANK TRANSACTION FEE	0.21	
18-JUN-15	[REDACTED] PENSION - [REDACTED]		88.83
19-JUN-15	BANK TRANSACTION FEE	0.21	
22-JUN-15	BIRTH CERT - [REDACTED]	42.00	
24-JUN-15	LIVING EXPENSES - [REDACTED]	300.00	
24-JUN-15	BANK TRANSACTION FEE	0.21	
24-JUN-15	BANK TRANSACTION FEE	0.21	
24-JUN-15	BANK TRANSACTION FEE	0.21	
24-JUN-15	MEDICAL EXPENSES - [REDACTED]	400.00	
24-JUN-15	REIMBURSE MEDICAL EXPENSE - [REDACTED]	698.75	
26-JUN-15	BANK TRANSACTION FEE	0.21	
26-JUN-15	INTERNET ACCOUNT - [REDACTED]	59.95	
29-JUN-15	BANK TRANSACTION FEE	0.21	
30-JUN-15	OVERPAYMENT - DEPT OF HUMAN SERVICES-COLLECTOR OF PUBLIC MONIES	586.50	

Client Reference: [REDACTED]  
Public Trustee Activity: PM/1

Statement of Transactions [REDACTED]  
Statement Period from [REDACTED]

Date	Transaction Details	Payments	Receipts
30-JUN-15	LIVING EXPENSES - [REDACTED]	300.00	
30-JUN-15	BANK TRANSACTION FEE	0.21	
30-JUN-15	PERSONAL FINANCIAL ADMINISTRATION FEE - LEVEL 5	448.59	
30-JUN-15	ASSET MANAGEMENT FEE - LEVEL 9	271.96	
30-JUN-15	NET PUBLIC TRUSTEE INTEREST 30/06/2015		94.82
02-JUL-15	[REDACTED] PENSION - [REDACTED]		88.83
08-JUL-15	LIVING EXPENSES - [REDACTED]	300.00	
08-JUL-15	BANK TRANSACTION FEE	0.21	
15-JUL-15	LIVING EXPENSES - [REDACTED]	300.00	
15-JUL-15	BANK TRANSACTION FEE	0.21	
16-JUL-15	[REDACTED] PENSION - [REDACTED]		94.08
17-JUL-15	BANK TRANSACTION FEE	0.21	
17-JUL-15	GAS ACCOUNT - [REDACTED]	192.50	
22-JUL-15	LIVING EXPENSES - [REDACTED]	300.00	
22-JUL-15	BANK TRANSACTION FEE	0.21	
22-JUL-15	BANK TRANSACTION FEE	0.21	
29-JUL-15	ELECTRICITY ACCOUNT - [REDACTED]	106.20	
29-JUL-15	LIVING EXPENSES - [REDACTED]	300.00	
29-JUL-15	BANK TRANSACTION FEE	0.21	
30-JUL-15	[REDACTED] PENSION - [REDACTED]		94.08
31-JUL-15	MEDICARE REFUND - MEDICARE AUSTRALIA		639.45
31-JUL-15	PERSONAL FINANCIAL ADMINISTRATION FEE - LEVEL 5	478.45	
31-JUL-15	ASSET MANAGEMENT FEE - LEVEL 9	290.07	
04-AUG-15	BANK TRANSACTION FEE	0.21	
04-AUG-15	INTERNET ACCOUNT - [REDACTED]	59.95	
05-AUG-15	LIVING EXPENSES - [REDACTED]	300.00	
05-AUG-15	BANK TRANSACTION FEE	0.21	
10-AUG-15	BANK TRANSACTION FEE	0.21	
10-AUG-15	REIMBURSE MEDICAL ACCOUNT - [REDACTED]	380.00	
13-AUG-15	[REDACTED] PENSION - [REDACTED]		94.08
13-AUG-15	LIVING EXPENSES - [REDACTED]	300.00	
13-AUG-15	BANK TRANSACTION FEE	0.21	
17-AUG-15	TRANSFER FROM PUBLIC TRUSTEE TERM INVESTMENT ACCOUNT		5,000.00
19-AUG-15	LIVING EXPENSES - [REDACTED]	300.00	
19-AUG-15	BANK TRANSACTION FEE	0.21	
19-AUG-15	BANK TRANSACTION FEE	0.21	
19-AUG-15	BANK TRANSACTION FEE	0.21	
20-AUG-15	REVIEW STATEMENT OF ADVICE - [REDACTED]	396.00	
20-AUG-15	REVIEW STATEMENT OF ADVICE - [REDACTED]	396.00	
26-AUG-15	LIVING EXPENSES - [REDACTED]	300.00	

Client Reference: [REDACTED]  
Public Trustee Activity: PM/1

Statement of Transactions  
Statement Period from [REDACTED]

Date	Transaction Details	Payments	Receipts
26-AUG-15	BANK TRANSACTION FEE	0.21	
27-AUG-15	[REDACTED] PENSION - [REDACTED]		94.08
27-AUG-15	BANK TRANSACTION FEE	0.21	
27-AUG-15	INTERNET ACCOUNT [REDACTED]	59.95	
31-AUG-15	PERSONAL FINANCIAL ADMINISTRATION FEE - LEVEL 5	478.45	
31-AUG-15	ASSET MANAGEMENT FEE - LEVEL 9	290.07	
02-SEP-15	LIVING EXPENSES [REDACTED]	300.00	
02-SEP-15	BANK TRANSACTION FEE	0.21	
09-SEP-15	LIVING EXPENSES [REDACTED]	300.00	
09-SEP-15	BANK TRANSACTION FEE	0.21	
10-SEP-15	[REDACTED] PENSION - [REDACTED]		98.23
16-SEP-15	LIVING EXPENSES [REDACTED]	300.00	
16-SEP-15	BANK TRANSACTION FEE	0.21	
23-SEP-15	LIVING EXPENSES [REDACTED]	300.00	
23-SEP-15	BANK TRANSACTION FEE	0.21	
24-SEP-15	[REDACTED] PENSION [REDACTED]		107.16
30-SEP-15	LIVING EXPENSES [REDACTED]	300.00	
30-SEP-15	BANK TRANSACTION FEE	0.21	
30-SEP-15	PERSONAL FINANCIAL ADMINISTRATION FEE - LEVEL 5	463.02	
30-SEP-15	ASSET MANAGEMENT FEE - LEVEL 9	280.71	
07-OCT-15	LIVING EXPENSES [REDACTED]	300.00	
07-OCT-15	BANK TRANSACTION FEE	0.21	
08-OCT-15	[REDACTED] PENSION - [REDACTED]		112.50
14-OCT-15	LIVING EXPENSES [REDACTED]	300.00	
14-OCT-15	BANK TRANSACTION FEE	0.21	
14-OCT-15	TRANSFER FROM PUBLIC TRUSTEE TERM INVESTMENT ACCOUNT		9,000.00
16-OCT-15	OFFICIAL SOLICITOR FEES	9,430.36	
21-OCT-15	LIVING EXPENSES [REDACTED]	300.00	
21-OCT-15	BANK TRANSACTION FEE	0.21	
22-OCT-15	[REDACTED] PENSION - [REDACTED]		112.50
26-OCT-15	BANK TRANSACTION FEE	0.21	
27-OCT-15	BANK TRANSACTION FEE	0.21	
27-OCT-15	INTERNET ACCOUNT [REDACTED]	119.90	
28-OCT-15	LIVING EXPENSES [REDACTED]	300.00	
28-OCT-15	BANK TRANSACTION FEE	0.21	
31-OCT-15	ELECTRICITY ACCOUNT [REDACTED]	47.69	
31-OCT-15	PERSONAL FINANCIAL ADMINISTRATION FEE - LEVEL 5	478.45	
31-OCT-15	ASSET MANAGEMENT FEE - LEVEL 9	290.07	
04-NOV-15	LIVING EXPENSES [REDACTED]	300.00	
04-NOV-15	BANK TRANSACTION FEE	0.21	

Client Reference: [REDACTED]  
Public Trustee Activity: PM/1

Statement of Transactions [REDACTED]  
Statement Period from [REDACTED]

Date	Transaction Details	Payments	Receipts
05-NOV-15	[REDACTED] PENSION - [REDACTED]		112.50
10-NOV-15	BANK TRANSACTION FEE	0.21	
10-NOV-15	HOLIDAY EXPENSES [REDACTED]	2,346.50	
10-NOV-15	LEGAL FEES [REDACTED]	605.00	
10-NOV-15	PSYCHOLOGIST ACCOUNT [REDACTED]	1,178.00	
10-NOV-15	REPAIRS INVOICE [REDACTED]	459.80	
10-NOV-15	ELECTRONICS [REDACTED]	110.00	
11-NOV-15	LIVING EXPENSES - [REDACTED]	300.00	
11-NOV-15	BANK TRANSACTION FEE	0.21	
18-NOV-15	LIVING EXPENSES [REDACTED]	300.00	
18-NOV-15	BANK TRANSACTION FEE	0.21	
19-NOV-15	[REDACTED] PENSION - [REDACTED]		112.50
Closing Balance			458.60
Opening Balance		Total Payments	Total Receipts
10,216.57		41,533.40	31,775.43
		Closing Balance	
		458.60	
Net Public Trustee Fees		5,547.21	
GST Paid on Public Trustee Fees		504.30	



