



Preserving the financial futures of vulnerable Queenslanders

A review of Public Trustee fees, charges and practices

List of recommendations

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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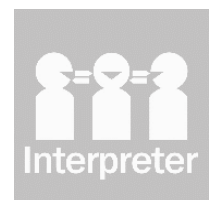
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Recommendation 1: Undertake a full fees and charges review

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).



