Preserving the financial futures of vulnerable Queenslanders

A review of Public Trustee fees, charges and practices

Executive summary

January 2021

The Public Advocate
Influencing change to empower lives

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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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:

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. 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.

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 is 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 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.


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