

Media Release

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ATTORNEY TABLES PUBLIC ADVOCATE REPORT ON PUBLIC TRUSTEE FEES, CHARGES AND PRACTICES

The Public Advocate has welcomed the government's response to her report, *Preserving the financial futures of vulnerable Queenslanders: A review of Public Trustee fees, charges and practices*, which was tabled today in the Queensland Parliament by Attorney-General and Minister for Justice, the Honourable Shannon Fentiman MP.

At the time of tabling, the Attorney-General announced that the government accepts in principle the majority of the report's 32 recommendations and would undertake further consultation with stakeholders. As a first step, Attorney-General announced the government will establish a Public Trustee board to provide oversight and direction to the Public Trustee and increase its transparency and accountability.

The Public Advocate, Mary Burgess, said she commenced the review in response to concerns expressed by people with impaired decision-making capacity under administration with the Public Trustee and their supporters about the negative impact of the Public Trustee's fees and charges on their financial outcomes.

"People under the financial administration of the Public Trustee are some of the most vulnerable members of our community. Many of these people experience a range of vulnerabilities arising from disability, injury or illness," Ms Burgess said.

"An additional vulnerability arises once the Public Trustee is appointed as their administrator. From that point, the Public Trustee is in a position of trust, controlling the person's money and property and having significant power over their lives."

The Public Trustee is an agency that represents the State of Queensland. It controls the finances of around 10,000 Queensland adults with impaired decision-making capacity.

The Public Trustee is appointed to protect the financial interests of people with impaired decision-making capacity. There are several fundamental obligations that accompany that responsibility, including to:

- act honestly and with reasonable diligence;
- act in accordance with the principles in the *Guardianship and Administration Act* in all decisions; and
- avoid conflict transactions.

“The Public Trustee is in, what is known under the law as, a fiduciary relationship with its administration clients which imposes significant responsibilities on the Public Trustee that make it unique as a public agency,” Ms Burgess said.

The Public Advocate’s report identifies a range of Public Trustee policies and practices that fall short of its legal and fiduciary duties and community expectations of a public trustee agency. These include:

- the level and complexity of the fees and charges, including charging multiple fees to manage the same funds;
- a lack of transparency about the Public Trustee’s fees, charges and investment practices;
- a lack of clarity about what services administration clients receive for their fees;
- the Public Trustee earning revenue from clients’ funds;
- the relationship between the relative cost of providing the services and the fees charged to administration clients for those services;
- 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 prescribed investment approach;
- the way the Public Trustee uses the Official Solicitor and charges legal fees to clients; and
- outdated legislation governing the operations of the Public Trustee.

One of the fees charged to administration clients by the Public Trustee is the Personal Financial Administration Fee. This fee is comprised of six levels and 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.

The report found that over half of the Public Trustee’s administration clients pay the two highest levels of the Personal Financial Administration Fee (levels 5 and 6). In 2019-20, there were 4,504 administration clients on the Level 5 Personal Financial Administration Fee who were liable to each pay an annual fee of \$6,403.80, and 898 people on Level 6 who each were liable to pay \$8,966.60.

“The highest level of the Personal Financial Administration Fee equates to almost 37 percent of the single-person rate of the Disability Support Pension (DSP),” Ms Burgess said.

“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 main source of income for many Public Trustee administration clients is the Disability Support Pension, aged pension or a payment from a superannuation fund. The Public Trustee has a fee rebate and hardship scheme that acts as a safety net, limiting the annual fees payable by administration clients. While the rebate scheme results in many Public Trustee clients paying few, or no, fees, the report found that a significant number of administration clients of moderate means and income, particularly those who own their own home and live on a pension, do not benefit from the rebate and hardship scheme.

Ms Burgess said that the fee rebate scheme mainly benefited clients who live under very constrained financial circumstances and for other clients, the level of the Public Trustee's fees and charges to manage their modest assets and income can place them under additional financial stress, and the rebate system does not provide relief.

"In some instances, the level of the fees and charges 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," Ms Burgess said.

"The Public Trustee has been aware for several years that administration clients with a certain combination of income and assets do not gain sufficient benefit from its fee rebate scheme for them to maintain their modest lifestyle. Clients who own their own home are particularly disadvantaged. This is acknowledged in one of the Public Trustee's internal manuals."

"Unless the Public Trustee's fees and charges regime and its flawed system of fee rebates is overhauled, a significant number of Public Trustee administration clients will continue to experience unfair and poor financial outcomes."

"My office continues to be contacted by people experiencing a rapid depletion of their modest assets as a result of the level of the Public Trustee's fees and charges."

"People with impaired decision-making capacity have a genuine and reasonable expectation that their assets and regular income will support their lifestyle well into the future. However, the financial outcomes for hundreds of administration clients of the Public Trustee have resulted in significant negative impacts on their lifestyle and, potentially, their wellbeing."

The Public Advocate's report makes 32 recommendations to address these and other issues identified in the report.

"The Public Trustee plays an essential role in Queensland public life and has done so for over a hundred years," Ms Burgess said.

“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 stakeholders. I hope that my recommendations will support the Public Trustee to achieve these outcomes.

“The Acting Public Trustee, Mr Samay Zhouand, has commenced a wide range of reforms to improve the operation of the agency. However there are significant issues in my report that remain to be addressed, particularly practices that breach the Public Trustee’s fiduciary duties to avoid conflicts of interest and not to make unauthorised profits at the expense of their clients.”

“The government needs to act swiftly to ensure the Public Trustee immediately ceases all practices that constitute breaches of fiduciary duty and other unacceptable practices. It is important to remember that vulnerable people are suffering now from the impacts of these poor policies and practices, and need relief.”

“Some of these issues will require carefully considered legislative reform. The Public Trustee’s funding base also requires a fundamental reconsideration, particularly the funding of its \$38M annual program of free services which it calls ‘community service obligations’ and which are being subsidised, to some degree, by clients’ fees and charges.”

“I look forward to contributing to the stakeholder consultation about the Public Trustee reforms announced by the Attorney-General today and working with the government to ensure that the rights and interests of people with impaired decision-making capacity are central to any reforms implemented,” Ms Burgess said.

The Public Trustee is a fully self-funding agency that receives no funding from the Queensland Government.

View the Public Advocate’s full report: [insert hyperlink to report on OPA website].

View the executive summary and recommendations: [insert hyperlink to OPA website].

ENDS

Note 1: The report includes several case studies that show the lived experience of some Public Trustee administration clients and demonstrate the ‘real world’ impact of some Public Trustee policies and practices on their clients’ financial and personal circumstances. The names and other details of the people featured in the case studies have been changed to protect their privacy and to comply with the law. A list of the case studies can be found on page x of the report.

Note 2: The Public Advocate, Mary Burgess is not proposing to do media interviews in relation to the report.

Note 3: [Click here](#) to access a short video of Ms Burgess talking about the report.

Note 4: [Click here](#) to access a recent photograph of Ms Burgess.

Additional information

Authority of the Public Advocate

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

The Public Advocate's functions are to:

- promote and protect the rights of adults with impaired decision-making capacity;
- promote their protection from neglect, exploitation or abuse;
- encourage the development of programs to help them achieve the greatest autonomy;
- promote the provision of services and facilities for them; and
- monitor and review the delivery of services and facilities to them.

The Public Advocate's functions do not include the investigation of individual complaints or allegations.

Under section 209A of the *Guardianship and Administration Act*, the Public Advocate may prepare systemic reports about matters arising from the performance of the Public Advocate's functions. These reports must be tabled by the Attorney-General in the Queensland Parliament.

The *Preserving the financial futures of vulnerable Queenslanders* report was prepared under section 209A of the *Guardianship and Administration Act*.

What is financial administration?

When a person does not have the capacity to make their own financial decisions, an attorney or administrator can be appointed to make financial decisions for them. An administrator is appointed by the Queensland Civil and Administrative Tribunal to ensure that the person's financial needs are met, and their financial interests protected.

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.

The role of an administrator can be performed by family members, friends or supporters, or a professional trustee such as a trustee company or the Public Trustee.

An administrator is given control over a person's money, property and assets, and can make financial decisions on behalf of the person for whom they are appointed. This means an administrator has significant power over the person under administration because, in most cases, they will have authority to make all of the financial decisions

that the person could make themselves. This includes paying household bills, buying or selling property, running a business, entering into contracts, applying for government benefits, making business decisions, managing investments, and bringing or defending legal proceedings of a financial nature.

Generally, a person cannot legally make any of their own financial decisions once they are placed under administration.

The responsibilities and obligations of administrators are set out in the *Guardianship and Administration Act*.

The Public Trustee

The Public Curator, the Public Trustee's predecessor organisation, was established in 1916, to provide a range of services to Queenslanders. This included the preparation of wills, administration of deceased estates, trust administration, and the management of the property of people who, through disability or injury, were unable to manage their own financial affairs.

The Public Curator was renamed the Public Trustee in 1978. It is the largest administrator in Queensland. In 2019-20 the Public Trustee provided administration services to over 10,000 Queenslanders. The number of Public Trustee administration clients has increased by 20 percent since 2014-15 and is expected to increase further due to a range of systemic pressures, demographic trends and changes in society.

The *Guardianship and Administration Act* allows administrators, including the Public Trustee, to be reimbursed for any reasonable expenses incurred while acting as an administrator. The reimbursement of these costs can be paid from the accounts of the person under administration.

Under the *Public Trustee Act*, the Public Trustee can set and charge fees for the services it performs. The fees and charges must be reasonable having regard to the circumstances in which the service is provided. Only professional trustees can charge fees to the people whose finances they administer. Private people who are appointed administrators for a friend or family member cannot charge fees for providing these services to the person under administration.

The Public Trustee is a self-funding agency. It does not receive any funding from the Queensland Government. The goal of self-sufficiency has always been a significant focus of the Public Trustee's business strategies and operations. This occurs despite there being no provisions in the *Public Trustee Act* requiring the Public Trustee to operate as a fully self-funded agency.

The Public Trustee funds itself through revenue sourced from fees and charges for services, fees earned on its investment products, the interest differential that it retains from earnings on client funds, and interest earned on its own reserves.

All other Public and State Trustees in Australia receive some financial assistance from their respective governments, particularly to reimburse them for the free services or 'community service obligations' they provide to the public.

The Public Advocate's decision to prepare a systemic report

In addition to the concerns raised with the Public Advocate by people with impaired decision-making capacity, their families and supporters, the Public Advocate has received frequent complaints about the Public Trustee over many years.

According to the Queensland Ombudsman's annual reports, the Public Trustee has been the most complained about statutory authority in 8 of the past 10 years.

The fees charged by the Public Trustee to administration clients was also raised by members of the public at a Legal Affairs and Community Safety Parliamentary Committee hearing for the *Guardianship and Administration and Other Legislation Amendment Bill 2017*. The Committee raised the issue with the Public Advocate who confirmed that similar concerns had been raised with her and her predecessor and she was considering raising the matter with the Public Trustee.

The Public Advocate is the only independent oversight body with jurisdiction to look into the way the Public Trustee delivers services to its administration clients from a rights and interests perspective. The Public Advocate is uniquely positioned to explore issues beyond the strict legality or administrative fairness of individual Public Trustee decisions, practices and policies, including examining the reasonableness and fairness of outcomes for clients in the broader context of their rights, autonomy and quality of life.

Focus of the review

An exploratory approach was taken to the review to gain a clear understanding of the roles, functions and operations of the Public Trustee and gain a comprehensive picture of the experiences and outcomes for some Public Trustee administration clients, especially in the context of the concerns raised with the Public Advocate.

The objectives of the review were to:

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

The review had an early focus on the Public Trustee's administration clients who received few, if any, rebates of their fees and charges. Some of these clients are wealthy and their income allows them to manage the fees and charges without impact on their lifestyle or erosion of their assets. Those who this review is concerned with have modest assets (e.g. a modest home and superannuation balance) and income (often from a pension) and receive few, if any, fee rebates due to the way their eligibility for the rebate is calculated. 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, resulting in depletion of their assets over time.

As the review proceeded, other Public Trustee policies and practices of concern that had a broader systemic application to administration clients were identified. These included issues relating to the Public Trustee's investment policies and practices, its use of external financial advisors and the Official Solicitor, its earnings on client funds, and the charging of management fees on investment funds when clients had already paid a management fee on their assets invested in those funds. Consequently, the scope of the review broadened beyond its original focus and objectives to examine other activities and practices of the Public Trustee for which administration clients were charged fees or that impacted their financial outcomes.

Recommendations from the review

The Public Advocate's report makes 32 recommendations for change at the Public Trustee or to legislation that affects the operations and obligations of the Public Trustee. The recommendations can be found throughout the report with supporting information.

A consolidated list of recommendations is available on pages xlix – lv in the report (as part of the executive summary).

What happens next with the recommendations?

The Public Advocate does not have the power to enforce recommendations.

The Public Advocate will continue to work with the Public Trustee and government to achieve the positive long-term changes required to preserve the financial futures of Queenslanders under administration with the Public Trustee.

What is the Public Trustee's response to the report?

The Public Advocate is required to provide procedural fairness to any person about whom any adverse information is included in a systemic advocacy report. This obligation requires the Public Advocate to give the person an opportunity to make submissions about the adverse information, and if the Public Advocate still proposes to include the information in the report, must ensure the person's submissions or position are fairly stated in the report.

To satisfy these obligations, each draft chapter of Public Advocate's report was provided to the Public Trustee for review. This process was for the purpose of clarifying and/or confirming the accuracy of information in the report, as well as providing the Public Trustee (both the person and the entity) with an opportunity to raise any concerns, views or other issues in relation to the content of the report or any adverse information it contains, before the report was published.

The Public Advocate considered the responses and views from the Public Trustee when finalising this report and is of the view they have been fairly represented in the report.

The Public Advocate provided the Public Trustee with a second opportunity to review the draft report for purposes of accuracy after the Public Trustee's original feedback was incorporated.

The responses of the Public Trustee to the draft chapters of the report are published in full at Appendix 2 in the report.

The Public Trustee's further feedback on the final draft report is reproduced in full at Appendix 1.

While every effort was made by the Public Advocate to fairly reflect the Public Trustee's views, due to the lateness of receipt of the final response document (11 January 2021), not all of those changes may be reflected in the text of this report. Accordingly, the Public Advocate encourages people to read the Public Trustee's letter and response document at Appendix 1.