

The Public Trustee and a Fair and Proportionate Fee Structure for Represented Persons

Background

Tasmania's Guardianship and Administration Board ('the GAB') has the important role of determining whether a person lacks the capacity to manage their own financial affairs due to a disability and thereby requires the assistance of a financial administrator.¹ Following a hearing in which medical evidence is examined and the views of the person, family and friends canvassed, the GAB may determine that the person needs, and it is in their best interests that they are subject to a financial administration order.² In circumstances where the person's family is unable or unwilling to act as an administrator of the person's funds, the GAB will often appoint a Financial Administrator from the Public Trustee.³

The creation of the Public Trustee more than 160 years ago was borne of an acknowledgement that individuals with decision-making disabilities required government assistance if they were to lead a life of full participation. Nowadays, the Public Trustee is a Government Business Enterprise owned by the Government on behalf of the Tasmanian community.⁴ Whilst the range of Public Trustee services has grown considerably over the last century, the provision of services to represented persons remains an essential function of the Public Trustee as demonstrated in the Government's ongoing provision of Community Service Obligation funding.

A Community Service Obligation according to the Productivity Commission arises when the Government 'specifically requires a public enterprise to carry out activities ... which it would not elect to do on a commercial basis, and which the government does not require other businesses in the public or private sectors to generally undertake, or which it would only do commercially at higher prices'.⁵ Community Service Obligations have traditionally been considered an

This briefing was prepared by Advocacy Tasmania Inc and Community Legal Centres Tasmania with the assistance of two volunteers, law student Aaron Moss and law graduate Andrew Topfer.

¹ Section 50 of the *Guardianship and Administration Act 1995* (Tas).

² Section 51 of the *Guardianship and Administration Act 1995* (Tas). Persons subject to administration orders are referred to as 'represented persons' and are often in possession of few assets and no income other than a Disability Support Pension.

³ Section 54(1) of the *Guardianship and Administration Act 1995* (Tas).

⁴ Schedule 1 of the *Government Business Enterprises Act 1995* (Tas).

⁵ Industry Commission, *Community Service Obligations: Policies and Practices of Australian Governments* (Australian Government: 1997) at 7. The Productivity Commission was formerly known as the Industry Commission.

essential service and as ‘critically important in ensuring those services are provided to lower income and/or socially disadvantaged groups...’.⁶

In Tasmania, the provision of Public Trustee administration to represented persons is a Community Service Obligation with funding provided to the Public Trustee for the administration of “assets for Represented Persons with a gross asset value of less than \$100,000”.⁷

Despite the Tasmanian Government’s recognition of the Public Trustee’s assistance of represented persons, the *Government Business Enterprises Act 1995* (Tas) expressly provides that the level of Community Service Obligation funding is wholly dependent on the Treasurer’s discretion.⁸ This has meant that in the more than fifteen years in which the Public Trustee has been a Government Business Enterprise it has never received sufficient Community Service Obligation funding to cover the full cost of the service to Represented Persons. As a result, the Public Trustee is required to charge fees or cross-subsidize from other services to make up the difference. Currently, the fees charged by the Public Trustee amount to approximately 7.4 per cent of a Represented Person’s \$766.00 per fortnight disability support pension.⁹

With the Public Trustee required to act commercially,¹⁰ many legal assistance services and non-government organisations have long observed significant financial hardship within their client bases. In 2006 for example, as a result of a large number of received complaints, Anglicare Tasmania conducted a national survey of Public Trustee fee structures. The survey results found that Tasmanians “are charged the highest fees and charges of any clients in such circumstances in Australia by a large margin”.¹¹

Almost a decade later the gap has not been closed as the following table demonstrates:¹²

⁶ House of Representatives Standing Committee on Financial Institutions and Public Administration, *Cultivating Competition: Report of the Inquiry into Aspects of the National Competition Policy Reform Package* (Canberra: 1997) at 43.

⁷ Department of Treasury and Finance, *Annual Report 2012-2013* (Hobart: 2013) at 54.

⁸ Section 63 of the *Government Business Enterprises Act 1995* (Tas).

⁹ According to payment rates provided by Centrelink, adult singles and couples separated due to ill-health receive a disability support pension maximum of \$766.00 per fortnight whilst members of a couple receive \$577.40 each. As found at

<http://www.humanservices.gov.au/customer/enablers/centrelink/disability-support-pension/payment-rates> (Accessed 26 May 2014).

¹⁰ For example, section 7 of the *Government Business Enterprise Act 1995* (Tas) provides that one of the principal objectives of the Public Trustee is to ‘operate in accordance with sound commercial practice and as efficiently as possible’ and ‘achieving a sustainable rate of return that maximises value for the State in accordance with its corporate plan and having regard to the economic and social objectives of the State’.

¹¹ Anglicare Tasmania, *Submission to the Review of State Government Concessions* (November 2007) at 15-16.

¹² The table was originally published by Anglicare Tasmania in a 2006 Report entitled *Submission to the Review of State Government Concessions* (November 2007) at 16. The charges have been amended and updated to take into account the changes that have occurred to fee structures over the past seven years.

Comparison of the Public Trustee's fee structure for persons under financial administration by order of the Guardianship Board (Centrelink Disability Support Pension only, i.e. where the represented person has no assets or other sources of income.)

	Cost of fees and charges as a percentage of income	Actual annual cost to a single pensioner	Fees and charges
Public Trustee Tasmania ¹³	7.4%	\$1476.45	6.6% of pension charged as income commission \$13.50 monthly account fee \$6.00 cheque drawing fee \$3.00 EFT payment
Public Trustee for the ACT ¹⁴	2.5%	\$0 - \$497.90	2.5% of pension charged for administering pension. Discretion to waive where hardship and/or other reasons established
The Public Trustee (WA)	0%	\$108	Fee of \$108.00 applies if value of assets less than \$5000
Public Trustee (Qld) ¹⁵	0%	\$100	Nominal fee charged regardless of cost of administration
NSW Trustee and Guardian	0 - 1.1%	\$8 - \$13.08	Year one approx. \$1.09 per month; Year 2 and ongoing \$8 or \$0.67 per month
The Public Guardian (NT) ¹⁶	0%	\$0	Fees are waived where pensioner has assets of less than \$20,000
The State Trustee (Vic) ¹⁷	3.3%	\$0	A maximum of 3.3% of pension is charged as administration fee. However, fees waived where pensioner has no assets or other income.
The Public Trustee (SA) ¹⁸	0%	\$0	No fees are charged where assets are less than \$4650.00.

This table is calculated on the single rate of a Disability Support Pensioner as at May 2014 (\$19,916.00)

¹³ Correspondence received by Government Business Scrutiny Committee 'B', Legislative Council on 9th December 2013. Importantly, the \$1476.45 fee has been calculated using only the minimum 6.6 per cent income commission fee and the \$13.50 monthly account fee. If EFT payments or cheque drawing are utilised, the amount will be higher.

¹⁴ Correspondence received from Andrew Taylor, Public Trustee for the Australian Capital Territory on 3rd March 2014.

¹⁵ Conversation with Clinton Miles, Director of Disability Services, Public Trustee of Queensland on 16th April 2014.

¹⁶ Correspondence received from Cheryl Harris, Acting Senior Manager/Senior Guardian, Office of the Public Guardian on 7th May 2014.

¹⁷ Conversation with Luke Wright, Team Leader, Personal Financial Administration, State Trustees on 22nd April 2014.

¹⁸ Conversation with John Elcombe, Team Leader, Personal Estates, Public Trustee of South Australia on 29th April 2014.

As the table demonstrates almost every jurisdiction other than Tasmania provides a service that is either free of charge or in which represented persons are required to make a nominal contribution. It should also be noted that significantly reduced fees have become the norm over the last decade with Victoria now joining South Australia and the Northern Territory in waiving costs entirely and Queensland, Western Australia and New South Wales only charging a nominal annual fee of between \$8.00-\$108.00. Only the Australian Capital Territory and Tasmania charge a fixed percentage fee with the Public Trustee in Tasmania charging almost \$1000.00 more annually than its ACT counterpart. Expressed another way, the Public Trustee in Tasmania charges for a service that the overwhelming majority of other jurisdictions provide either free of charge or for a nominal fee and charges almost three times as much to deliver the same service as the only other jurisdiction with a comparable fee structure.

The cost impost is significant with Advocacy Tasmania Inc (ATI) recently noting in a report to the Department of Treasury that clients are often “foregoing essential items such as food, electricity and appropriate, safe housing due to the restrictions these fees place on their budget”.¹⁹ As well, the hardship encountered by represented persons has meant that some referring agencies are reluctant to make applications for Public Trustee administrators, increasing the risk that funds will be administered in an unregulated, unauthorised and ultimately unaccountable manner.

Human Rights’ Considerations

A failure of previous governments to provide sufficient Community Service Obligation funding is concerning, particularly given the hardship encountered and the likelihood of unregulated administration. However, following Australia’s ratification of the *Convention on the Rights of Persons with Disabilities* it is likely that a failure to provide appropriate levels of funding will see a critical response from human rights’ organisations and Tasmania found to be in breach of its international human rights’ obligations.

Tasmania and the *Convention on the Rights of Persons with Disabilities*

In July 2008 the United Nations *Convention on the Rights of Persons with Disabilities* (‘the Disabilities Convention’) was ratified by the Australian Government and in April 2009, the Federal Government issued the *Convention on the Rights of Persons with Disabilities Declaration*, which declared that Act to be ‘an Act relating to Human Rights and Freedoms’ within the meaning of s 47(1) of the then *Human Rights and Equal Opportunity Act 1986* (Cth). This empowered the Human Rights and Equal Opportunity Commission to hear claims regarding breaches of this treaty. This power is now taken up by the Australian Human Rights Commission, who may receive complaints on this matter under section 11(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth) and Part 4 of the *Disability Discrimination Act 1992* (Cth).

¹⁹ Advocacy Tasmania, *Submission to Tasmanian Government State Budget 2014/2015* at 7 (October 2013). As found at http://www.advocacytasmania.org.au/publications/ATI_Budget_Priority_Statement_14-15.pdf (Accessed 26 May 2014).

Article 12 of the Disabilities Convention imposes a range of obligations on states to ensure that individuals with a disability, including decision-making disabilities, are afforded equal recognition before the law. The provision also regulates restrictions upon legal capacity, and as a result, is directly applicable to Tasmania's guardianship and administration orders.

Article 12(4) requires states to 'ensure that all measures that relate to the exercise of legal capacity provide for *appropriate and effective safeguards* to prevent abuse in accordance with international human rights law' (emphasis added). The provision then further expounds a five-step test for orders affecting legal capacity, requiring they:

- a) 'respect the rights, will and preferences of the person';
- b) 'are free of conflict of interest and undue influence';
- c) 'are proportional and tailored to the person's circumstances....to the degree to which such measures affect the person's rights and interests';
- d) 'apply for the shortest time possible';
- e) 'are subject to regular review by a competent, independent and impartial authority or judicial body'.

Article 12(5) contains a range of further protections to ensure individuals suffering from a disability can 'control their own financial affairs' and 'are not arbitrarily deprived of their property'.

Are the Public Trustees fees in breach of Article 12?

We believe that the service fees charged by the Public Trustee inflict such a disproportionate effect upon represented persons in Tasmania who are on lower incomes, that they fall foul of the 'proportionality' principle outlined in Article 12(4) (paragraph (c) above).

In interpreting this provision, the Committee on the Rights of Persons with Disabilities (CRPD), the UN body charged with monitoring and enforcing this treaty, has stated that 'there are no circumstances permissible under international human rights law in which ... [the rights under this provision] may be limited'.²⁰

The basic rules for treaty interpretation are outlined in the *Vienna Convention on the Law of Treaties* articles 31 and 32 and require treaties to be interpreted in 'good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

This means that when interpreting this treaty, the overriding consideration must be the treaty's aim, as outlined in Article 1 of the Disabilities Convention of 'promoting, protecting and ensuring the full and equal enjoyment of all human

²⁰ Committee on the Rights of Persons with Disabilities, *Draft - General Comment on Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/11/4 (25 November 2013) 2 at paragraph [5].

rights and fundamental freedoms by all persons with disabilities, and promoting respect for their inherent dignity'.²¹

The phrase 'abuse' in Article 12, the threshold against which legal capacity orders must be measured, is thus to be given a broad definition, extending to the 'all-pervasive' and 'unusually amorphous' nature of the types of rights violations which individuals suffering from disabilities face.²² Financial hardship, through charging high fees for the administration of a represented person's income, is likely to fall within this provision.

Article 12(4) requires safeguards to be placed on any orders affecting an individual's legal capacity to ensure that they are 'proportional and tailored to the person's circumstances'.

We believe that insufficient safeguards exist regarding the Public Trustee's fee scheme, and as a result, Tasmania's fee structure infringes this obligation as it imposes both disproportionately high fees, and a fixed fee structure which has a regressive effect, disproportionately disadvantaging individuals on particularly low incomes.

International human rights' law and jurisprudence has given little guidance or interpretation as to what 'proportional' means are under this specific treaty. Article 12(4) requires that the safeguards, and thus the effect of the measure, be balanced against the degree to which the individual's rights are affected, and that this must be tailored to the person's specific circumstances. Countervailing rights which may be affected by the Tasmanian Public Trustee fee structure include, most notably, the right not to be arbitrarily deprived of property in Article 12(5) of the Disabilities Convention.

This conclusion is buttressed by reference to the CRPD's follow-up report to Article 5 of the Optional Protocol to the Disabilities Convention, stating that proportionality 'requires that a fair balance is upheld between the benefits of a decision on an issue and the consequences the decision may have for opposing private interests'.²³

Australia's interpretive declaration on this provision, the *Convention on the Rights of Persons with Disabilities Declaration 2009* (Cth) further explains this test as giving states 'some discretion in determining the best means and policies to give effect to the Convention's obligations' and that the 'primary requirement' is to implement the Convention in 'good faith'.

²¹ Jean Allain, Treaty Interpretation and the United Nations Convention on the Rights of Persons with Disabilities (2009) As found at <http://www.disabilityaction.org/fs/doc/publications/legal-report-2-treaty-interpretation-and-the-un-convention-on-the-rights-of-persons-with-disabilities-2.doc> (Accessed 26 May 2014).

²² Frédéric Mégret, The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights? (2008) 30(2) *Human Rights Quarterly* 494 at 508.

²³ Committee on the Rights of Persons with Disabilities, *Interim Follow-Up Report Under Article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 10th sess, UN Doc CRPD/C/10/3 (7 November 2013) at 2-3.

We believe that the Public Trustee fee structure is not sufficiently 'proportionate' in its application as it satisfies neither the principle of 'necessity' (least interference) or the requirement that they be tailored to their effect on the represented person, and thus are outside Australia's obligations under this provision.

Article 12(4) has not been explicitly considered by the CRPD, and very little jurisprudence exists surrounding similar provisions. However, general principles of proportionality, and similar provisions in other conventions, are likely to be considered persuasive in interpreting this provision. These principles generally require an assessment of the degree to which the measures are appropriate, necessary (e.g. the least invasive possible) and are balanced against the objective sought.²⁴

The CRPD's decision in *HM v Sweden* is somewhat instructive in this respect. This complaint arose from the refusal of planning authorities to permit the construction of a hydrotherapy pool for the rehabilitation of a physically disabled person, as such a pool was deemed inconsistent with development requirements. The Committee held that this was an unjustifiable violation of the complainant's rights under articles 5(1), 5(3), 19(b), 25 and 26 of the Disabilities Convention. Relevantly for present purposes, however, is the CRPD's holding that 'a law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration.'²⁵

This decision may provide guidance as to the correct interpretation of the CRPD Article 12(4), and its application to the Tasmanian situation. Here, by applying a fixed fee structure without regard for the income level of the individuals upon whom they are charged, a potentially greater proportion of a represented person's income may be 'eaten up' in these administration charges. Clearly, this has significant effects for the already scant financial resources of represented persons on a Centrelink disability support pension.

Such a 'neutral' application of the rule, without regard for the substantive individual effects that such fees inflict upon represented persons then operates as a disproportionate imposition on their ability to control their own finances. Given that many represented persons are being charged for services that they may require but did not request it is a harsh outcome with a disproportionate effect.

As a result of these arguments – either individually or cumulatively – we believe that the Public Trustee's fee structure does not evidence the required proportionality, and thus places Tasmania in breach of its obligations under Article 12(4) of the Disabilities Convention.

²⁴ See for example. *Schröder HS Kraftführer GmbH & Co KG v Hauptzollamt Gronau* (C-265/87) [1989] ECR 2237, 2269.

²⁵ Committee on the Rights of Persons with Disabilities, *Views: Communication No 3/2011*, 7th sess, UN Doc CRPD/C/7/D/3/2011 (21 May 2012) 12 [8.3] (*HM v Sweden*).

Summary

In summary, the provision of appropriate government assistance for represented persons is required for a number of reasons. First, the Government has a moral obligation to ensure compliance with the Disabilities Convention and specifically the requirement that all measures that relate to the exercise of legal capacity are proportionate. Secondly, principles of fairness and equal treatment mandate that represented persons should not be financially worse off than other members of the community whose income is deposited with financial institutions such as a bank or credit union. And finally, if it is accepted that the service provided by the Public Trustee is essential, then it must be provided in a manner that does not create hardship.

Recommendation

In late 2013 the Public Trustee advised Advocacy Tasmania Inc that an additional \$227,000 per annum would create the capacity to waive fees for represented persons who are dependent upon Centrelink or other Government payments as their primary income source and with assets under \$10,000.²⁶ We strongly recommend that the Government commit to this additional funding as part of its 2014-15 budget.

²⁶ Advocacy Tasmania, *Submission to Tasmanian Government State Budget 2014/2015* at 7 (October 2013). As found at http://www.advocacytasmania.org.au/publications/ATI_Budget_Priority_Statement_14-15.pdf (Accessed 26 May 2014).