

COMMUNITY LEGAL CENTRES TASMANIA

27 August 2021

Public Trustee Review
Department of Justice
Office of the Secretary
GPO Box 825
Hobart TAS 7001

via email: PublicTrusteeReview@justice.tas.gov.au

To the Department of Justice,
Re: Review of the Public Trustee

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to respond to the independent review of the administrative and operational practices of the Public Trustee.¹ Our response is focused broadly on the following three terms of reference:

- the extent to which the Public Trustee is effectively performing its main undertakings and community service obligations with reference to relevant matters including legislative responsibilities, the current legislative framework and stakeholder feedback; and
- the appropriateness of the current Community Service Obligation Agreement between the Crown and the Public Trustee; and
- the appropriateness of current fees and charges applied by the Public Trustee for its services, given its costs and objectives.

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

We strongly support the role of the Public Trustee in providing financial administration to represented persons where a suitable person or organisation is unable to assist. However, the power that the Public Trustee wields over persons subject to administration orders is immense. It is therefore imperative that the wishes

¹ CLC Tas would like to acknowledge those persons and organisations who gave freely of their time in assisting with our enquiries and answering our questions.

and best interests of the represented person remain central to the Public Trustee's mission. As the Victorian Ombudsman has previously noted:²

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

The Guardianship and Administration Board and the Public Trustee

Any person may make an application to the Guardianship and Administration Board for an administration order³ although they are usually sought by a health worker or a family member concerned that a person is struggling to manage their money or is vulnerable to exploitation. As the Full Court of the Supreme Court of Western Australia in *Re Guardianship and Administration Board* noted about analogous legislation, the purpose of an administration order is:⁴

to ensure that [the person's] financial affairs and other welfare is not jeopardised by improvident, or ill-considered personal decisions or action, or by unscrupulous or ill-advised influence of relatives, friends and others who may deliberately or inadvertently exploit the vulnerability of the person in need of assistance and protection.

Following a hearing, an administration order will be made where the Board is satisfied that by reason of a disability the person is unable to make reasonable judgements about their financial affairs and requires the assistance of a financial administrator.⁵

Family members, friends or trusted advisers are often appointed as administrators and private trustee companies may also be appointed, particularly where assets held by the person are significant. However, the Public Trustee is the only organisation funded by government and is usually appointed in circumstances where the person cannot afford to pay and no other suitable person or organisation can be found.⁶

An administrator must "act at all times in the best interests of the represented person".⁷ The *Guardianship and Administration Act 1995* (Tas) provides that this best interests principle is achieved by an administrator who acts as far as possible in such a way as to encourage and assist the represented person to become capable of

² Victorian Ombudsman, *Investigation into State Trustees* (June 2019) at 4. As found at <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-state-trustees/> (Accessed 27 August 2021).

³ Section 50(1) of the *Guardianship and Administration Act 1995* (Tas).

⁴ [2003] WASCA 268 at para. [43] per Heenan J; Anderson, Steytler, Miller and McLure JJ agreeing.

⁵ Section 51(1) of the *Guardianship and Administration Act 1995* (Tas).

⁶ Section 54 of the *Guardianship and Administration Act 1995* (Tas).

⁷ Section 57(1) of the *Guardianship and Administration Act 1995* (Tas).

managing his or her estate, and in consultation with the represented person, taking into account their wishes as far as possible.⁸

To ensure that the person's own autonomy is promoted and participation in decision-making is assured, it is clear that significant one-on-one engagement is required. According to the Public Trustee once they are appointed administrator they will arrange contact with the represented person and/or their support person and will seek to "achieve best possible outcomes" including meeting with the represented person and undertaking the following:⁹

- *Talk about our role and responsibilities;*
- *Explain the administration process, including investment of funds and managing any potential legal issues that may arise;*
- *discuss an affordable budget; and*
- *explain our fees and charges.*

Following this initial consultation and taking into account the represented persons wishes the Public Trustee will then:¹⁰

- *Develop a budget to help pay your bills; and*
- *Transfer money to and from your bank account and use your money to pay your bills; and*
- *Talk to Centrelink and organise Centapay deductions; and*
- *Redirect your income and have your pension paid directly to the Public Trustee; and*
- *Deal with your foreign pension if you are entitled to one; and*
- *Complete your income and assets assessment for your admission to aged care; and*
- *Identify whether anyone owes you money and request that it be paid; and*
- *Deal with Aurora, Telstra, TasWater and other companies for you; and*
- *Organise the insurance and sale or rental of any real estate you may own; and*
- *Contact anyone you owe money to and work out a plan for repayment; and*
- *Provide you with a financial statement setting out all of your income, assets and expenses at least once a year; and*
- *Complete your income tax return and deal with any other investment needs, including shares or other investments; and*
- *With your permission, talk with your support person/s and staff about your financial matters; and*
- *Investigate any legal issues to do with your finances.*

⁸ Section 57(2) of the *Guardianship and Administration Act 1995* (Tas).

⁹ Public Trustee, Financial Administration Brochure. As found at https://www.publictrustee.tas.gov.au/assets/files/public-trustee-financial-administraion_apr-21.pdf (Accessed 27 August 2021).

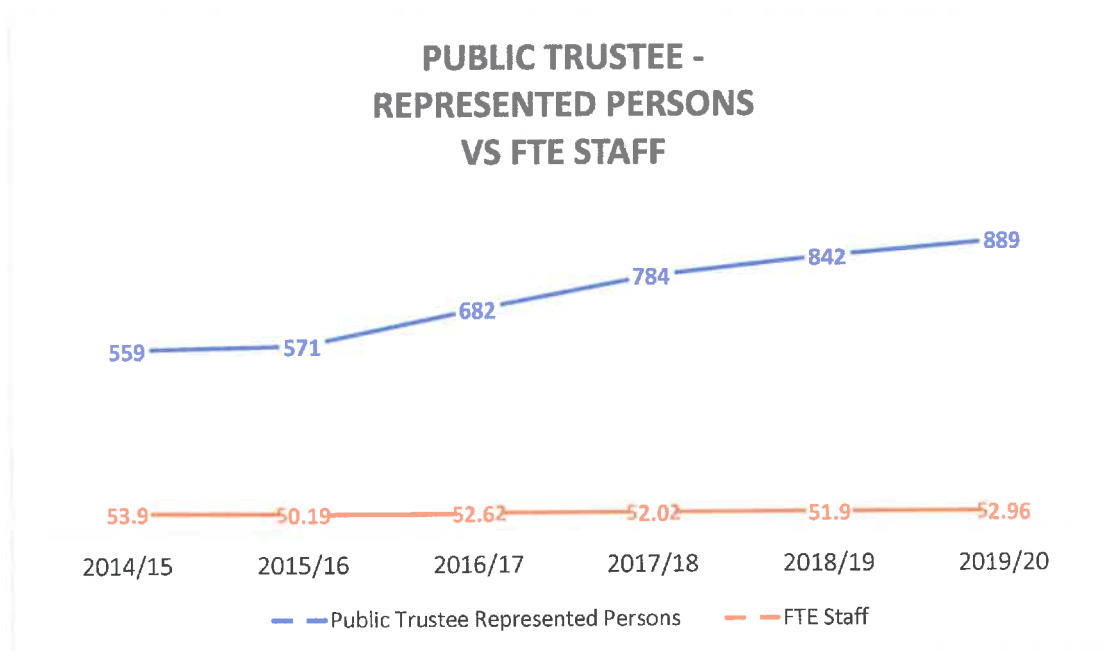
¹⁰ Public Trustee, Financial Administration Brochure. As found at https://www.publictrustee.tas.gov.au/assets/files/public-trustee-financial-administraion_apr-21.pdf (Accessed 27 August 2021).

As well as administering the represented persons financial affairs, the Public Trustee also has a statutory duty to encourage and assist the represented person to become capable of managing their own financial affairs.

Compliance with its statutory duties would mean that the Public Trustee organises regular meetings to consult and get instructions, ensure that bills are paid and put steps in place so that the represented person becomes capable of managing their own estate. It is clear that the role of administrator is both time consuming and time intensive.

Is funding of the Public Trustee keeping pace with its increased workload?

According to publicly available data, the number of represented persons whose financial affairs are managed by the Public Trustee has increased by 59 per cent over the last six years from 559 in 2014/15 to 889 in 2019/20. Over the same timeframe, the number of full-time equivalent staff has dropped slightly from 53.9 to 52.96 FTE staff.¹¹



It is our understanding that the Public Trustee employs Customer Account Managers (CAMs) to manage the financial affairs of represented persons. We were unable to locate any publicly available data demonstrating how many Public Trustee staff were employed as CAMs in 2014/15 or whether there had been a proportionate increase in CAMs in line with the increase in GAB orders in the years thereafter. However, anecdotally we are aware of a number of represented persons who have been dissatisfied with the level of service provided by the Public Trustee which may suggest high workloads and an overstretched workforce. In particular, we are aware of a number of represented persons who maintain that the Public Trustee has not acted in a consultative way, failed to meet with them or take their wishes into account.

¹¹ Data contained in Public Trustee Annual Reports 2014/15, 2015/16, 2016/17, 2017/18, 2018/19 and 2019//20. As found at <https://www.publictrustee.tas.gov.au/about/governance> (Accessed 27 August 2021).

The same represented persons maintain that the Public Trustee has also failed to assist them to become capable of managing their own financial affairs.

Recommendation 1: That the Public Trustee is appropriately funded to comply with its statutory duties including acting at all times in the best interests of the represented person.

Public Trustee fees and charges

In October 2014 Advocacy Tasmania Inc and Community Legal Centres Tasmania released a report entitled *The Public Trustee and a Fair and Proportionate Fee Structure for Represented Persons*. The report found that in Tasmania, represented persons in receipt of Government assistance were being charged 7.4 per cent or approximately \$1500.00p.a. of their pension in Public Trustee fees and charges. The report, which is included as an attachment at the end of this submission, called for reform of the Public Trustee's fee structure.

A year later, the Government acknowledged that "[t]he Public Trustee has traditionally had one of the highest fee structures for Community Service Obligation (CSO) Represented Persons – people with assets less than \$100,000 – compared to government operated public trustee organisations in other jurisdictions".¹² The then Attorney-General Vanessa Goodwin announced a "substantial reduction of fees charged by the Public Trustee for all Represented Persons with assets of less than \$100,000".¹³ As a result of the changes the Attorney-General noted that capital commissions, monthly account fees and income commissions on interest, dividends and pensions would be waived for represented persons with assets of less than \$10,000 and reduced to 2.75 per cent for represented persons with assets between \$10,000 - \$100,000.

It has now been almost six years since the Attorney-General announced the changes. As a result, we have sought to provide some comparative analysis of the fees and charges regimes of Public and State Trustees in other Australian jurisdictions. Our focus was represented persons in receipt of a Disability Support Pension or Age Pension and with few if any assets.

¹² Attorney-General, Vanessa Goodwin, 'Public Trustee fees to be significantly reduced for low-income clients', 3 December 2015. As found at <http://www.premier.tas.gov.au/releases/public-trustee-fees-to-be-significantly-reduced-for-low-income-clients> (Accessed 27 August 2021).

¹³ Attorney-General, Vanessa Goodwin, 'Public Trustee fees to be significantly reduced for low-income clients', 3 December 2015. As found at <http://www.premier.tas.gov.au/releases/public-trustee-fees-to-be-significantly-reduced-for-low-income-clients> (Accessed 27 August 2021).

Comparison of Public or State Trustee fees for persons under financial administration, in receipt of a Disability Support Pension/Age Pension and with limited assets

	Cost of fees as a percentage of income	Annual cost to a single pensioner	Fees and charges
NSW Trustee and Guardian ¹⁴	0%	\$0	No fees for clients with assets of less than \$25,000.
State Trustees (Vic) ¹⁵	0 - 3.3%	\$0 - \$817	Fees waived where pensioner has no assets and average daily account balance of less than \$3000. If more than this 3.3% of pension is charged as administration fee.
Public Trustee of Queensland ¹⁶	0%	\$100	Nominal fee charged regardless of cost of Administration.
Public Trustee (WA) ¹⁷	0% - 1.35%	\$0 - \$336	Fees are waived for clients with assets of less than \$5,000. There is a \$213 annual fee for clients with assets between \$5001 - \$10,000 and a \$336 annual fee for clients with assets between \$10,001 - \$30,000.
Public Trustee (SA) ¹⁸	0%	\$0	No fees are charged where assets are less than \$5300.
Public Trustee Tasmania ¹⁹	0 - 2.75%	\$0 - \$681	Fees are waived for clients with assets under \$10,000. 2.75 per cent is charged for assets between \$10,001 - \$100,000.
Public Trustee and Guardian (ACT) ²⁰	3.5%	\$0 - \$866	3.5 per cent of pension charged or administering pension. Statutory discretion to waive where hardship established.
Public Trustee (NT) ²¹	0%	0%	Fees are waived where pensioner has assets of less than \$20,000.

¹⁴ NSW Trustee & Guardian, Financial Management Fees. As found at <https://www.tag.nsw.gov.au/fees/financial-management-fees> (Accessed 27 August 2021).

¹⁵ State Trustees, Commissions, Fees & Charges. As found at <https://www.statetrustees.com.au/what-we-do/state-trustees-commissions-fees-charges> (Accessed 24 August 2021). Also see Victorian Ombudsman, *Investigation into State Trustees* (June 2019) at para. 254 which states "under the DHHS community services agreement with State Trustees, the department pays fees and commissions (excluding capital commissions and management fees) for clients with an average daily account balance of less than \$3,000". As found at <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-state-trustees/> (Accessed 27 August 2021).

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

¹⁷ Western Australian Government Gazette, *Public Trustee's Scale of Fees*, 18 June 2021. As found at [https://www.legislation.wa.gov.au/legislation/prod/gazettestore.nsf/FileURL/gg2021_105.pdf/\\$FILE/Gg2021_105.pdf](https://www.legislation.wa.gov.au/legislation/prod/gazettestore.nsf/FileURL/gg2021_105.pdf/$FILE/Gg2021_105.pdf) (Accessed 27 August 2021).

¹⁸ Correspondence received from the Acting Manager of Personal Estates, Public Trustee South Australia on 24 August 2021.

¹⁹ Public Trustee Tasmania, Financial Administration. As found at <https://www.publictrustee.tas.gov.au/financial-administration1.html> (Accessed 27 August 2021).

²⁰ Correspondence received from Andrew Taylor, Public Trustee and Guardian on 25 August 2021.

²¹ Correspondence received from Cheryl Harris, Acting Senior Manager/Senior Guardian, Office of the Public Guardian on 7th May 2014

The table above is calculated on the maximum rate of Disability Support Pension/Age Pension for a single person in August 2021 (\$24,770.20 per annum).²²

Our review demonstrates that the Tasmanian Public Trustee does have some of the lowest fees and charges in Australia with no fees charged for represented persons with assets of less than \$10,000. Only New South Wales and the Northern Territory have a higher fee waiver threshold. Nevertheless, we believe that Tasmania should adopt the best practice NSW model and waive all fees for represented persons with assets of less than \$25,000.

We also believe that the Public Trustee should not impose “standard charges” of \$3.20 for making client cash allowances, paying bills and reimbursing any payments made on behalf of the client. It is our understanding that these standard charges have been in place since at least 2016 and despite the improvements in electronic fund transfers remain relatively unchanged. As the CEO of the Public Trustee David Benbow noted in 2016, whilst many bills were formerly paid manually, technological improvements would probably result in improved productivity:²³

...we are looking for ways to improve productivity. I think represented persons are a really good example. What we do for those clients is pay their bills. We receive their pension, we work with them to set up a budget and then pay their bills. At the moment we pay their bills almost manually. If we could turn around and get optical recognition for bill payment, the administrator would not have to do and you could almost bring that service back to a pure client service function.

Given that five years have elapsed since these comments were made, it is likely that today most invoices including rent, electricity, telephone and pharmaceutical costs are paid both automatically and electronically. It is therefore difficult to understand how the Public Trustee can justify charging \$3.20 per transaction. Expressed in another way, we do not believe that there is any justifiable correlation between the \$3.20 charged per transaction and the cost of delivering the service. We also note that represented persons who are living more independently are likely to be charged more due to the higher number of transactions made. Finally, we note that it is only persons subject to administration orders who have to pay fees when they pay their rent, electricity, telephone or pharmaceutical costs. If the Government believes that a person’s liberty should be taken away from them, then it seems harsh and disproportionate to then make them pay. For all of these reasons, we believe that standard charges should be waived for represented clients with assets of less than \$25,000 and reviewed for represented persons with higher asset levels.

²² Australian Government, Payment rates. As found at <https://www.servicessaustralia.gov.au/individuals/services/centrelink/disability-support-pension/how-much-you-can-get/payment-rates>; <https://www.servicessaustralia.gov.au/individuals/services/centrelink/age-pension/how-much-you-can-get> (Accessed 27 August 2021).

²³ Parliament of Tasmania, *Hansard*, Government Businesses Scrutiny Committee, 8 December 2016.

Recommendation 2: That all fees and charges are waived for represented persons with assets of less than \$25,000 and reviewed for represented persons with higher asset levels.

The Public Trustee and Community Service Obligation Funding

In 2014 we provided the following explanation of a Community Service Obligation:²⁴

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'.²⁵ Community Service Obligations have traditionally been considered an essential service and as 'critically important in ensuring those services are provided to lower income and/or socially disadvantaged groups...'.²⁶

In 2015, following the Attorney-General's announcement that there would be a "substantial reduction of fees" charged by the Public Trustee, the State Government agreed to offset the financial loss to the Public Trustee by increasing its CSO funding by an additional \$250,000 from 2016-17.²⁷ However, the funding increase was still not sufficient to cover the cost of the fee reduction with the Government acknowledging "[t]he balance of the cost of the fee reduction can be met from the Public Trustee's operating budget".²⁸

The substantial reduction in fees charged by the Public Trustee from 1 December 2016 resulted in a significant increase in applications to the Guardianship and Administration Board to have the Public Trustee appointed as administrator. Between 2015/16 and 2017/18 there was a 37 per cent increase in the number of CSO represented persons (from 571 to 784). The reason for this was explained by the

²⁴ Community Legal Centres Tasmania and Advocacy Tasmania Inc, *The Public Trustee and a Fair and Proportionate Fee Structure for Represented Persons* (October 2014). As found at <http://www.clctas.org.au/wp-content/uploads/2014/10/PublicTrusteeFeesPaperF.pdf> (Accessed 27 August 2021).

²⁵ 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.

²⁶ 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.

²⁷ Attorney-General, Vanessa Goodwin, 'Public Trustee fees to be significantly reduced for low-income clients', 3 December 2015. As found at <http://www.premier.tas.gov.au/releases/public-trustee-fees-to-be-significantly-reduced-for-low-income-clients> (Accessed 27 August 2021).

²⁸ Attorney-General, Vanessa Goodwin, 'Public Trustee fees to be significantly reduced for low-income clients', 3 December 2015. As found at <http://www.premier.tas.gov.au/releases/public-trustee-fees-to-be-significantly-reduced-for-low-income-clients> (Accessed 27 August 2021). Also see Parliament of Tasmania, *Hansard*, Government Businesses Scrutiny Committee, 8 December 2016 in which the Public Trustee noted that there was a shortfall of CSO funding of around \$750,000.

CEO of the Public Trustee David Benbow during a Government Businesses Scrutiny Committee in December 2016:²⁹

at the moment we are seeing an increase predominantly as a result of the change to our fee structure. A number of nursing homes and organisations managed people's financial affairs, not under the order from the Guardianship and Administration Board but quite deliberately on the basis that they felt our fees were at a level that made it difficult for their clients. As a result of our review, those fees are now amongst the lowest in the country and we are seeing a number of directors of those organisation who are personally liable for managing those finances looking to transfer those represented persons to us by going to the Guardianship Administration Board and applying for block orders, up to 30 or 40.

In 2017 the State Government and the Public Trustee entered into a Community Service Obligation Agreement which was extended in 2020 (the Agreement).³⁰ The Agreement provides that over four years the amount of CSO funding would increase from \$2,023,000 in 2017/18 to \$2,163,000 in 2020/21:

	2017/18	2018/19	2019/20	2020/21
CSO Funding	\$2,023,000	\$2,068,000	\$2,115,000	\$2,163,000

Over the course of the agreement, the amount of CSO funding provided by the State Government increased by 6.9 per cent. But, over the same period the Consumer Price Index (CPI) increased by 5.3 per cent.³¹ In other words, the level of funding provided to the Public Trustee to provide an essential service was not sustainable at its commencement, was only 1.6 per cent above CPI over the course of a four year funding agreement and at the same time as there was a large increase in the number of CSO represented clients.³²

²⁹ Parliament of Tasmania, *Hansard*, Government Businesses Scrutiny Committee, 8 December 2016.

³⁰ Department of Treasury and Finance, Community Service Obligation Agreement 0 Public Trustee Deed of Variation and Extension (1 July 2017 – 30 June 2022). As found at [https://www.treasury.tas.gov.au/about-us/corporate-governance/routine-disclosure-of-information/disclosure-of-non-procurement-contracts-over-\\$2-million](https://www.treasury.tas.gov.au/about-us/corporate-governance/routine-disclosure-of-information/disclosure-of-non-procurement-contracts-over-$2-million) (Accessed 27 August 2021).

³¹ Australian Bureau of Statistics, Consumer Price Index, Australia. As found at <https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/consumer-price-index-australia/latest-release> (Accessed 27 August 2021). The CPI in June 2017 was 1.9 per cent; 2.1 per cent in June 2018; 1.6 per cent in June 2019 and -0.3 per cent in June 2019.

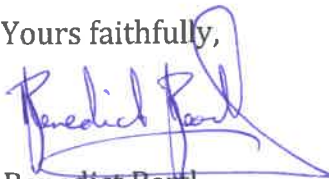
³² The 13 per cent increase does not take into account the 2020-21 financial year with the number of CSO represented persons not yet made publicly available.

The importance of appropriate CSO funding levels is highlighted in modelling carried out in the last few years by the Guardianship and Administration Board. The modelling predicted that the number of new applications received by the GAB would continue to increase “due to increased dementia and mental health disabilities, and an ageing population”.³³

Recommendation 3: That the Public Trustee receives community service obligation funding that is in line with the increase in represented persons.

If we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,



Benedict Bartl
Policy Officer

Community Legal Centres Tasmania

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

³³ Guardianship and Administration Board, *Annual Report 2018/19* at 3. As found at https://www.guardianship.tas.gov.au/data/assets/pdf_file/0006/597084/FINAL-Annual-Report-2019-20-25-September-2020.pdf (Accessed 27 August 2021).

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 Tasmania¹³	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 ACT¹⁴	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 Frédérick 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 Kraftfahrer 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).