



29 April 2022

Moderator
Rev Andrew Gunton

Hon Shannon Fentiman MP
Attorney-General and Minister for Justice
Minister for Women and Minister for the Prevention of Domestic and Family Violence
Member for Waterford
1 William Street Brisbane Q 4000
GPO Box 149
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Dear Attorney-General,

Comments on the Public Advocate's Recommendations relating to the Public Trustee

The Uniting Church in Australia Queensland Synod (Queensland Synod) welcomes the opportunity to provide feedback on the specified recommendations of the Public Advocate's (2021) report, *Preserving the financial futures of vulnerable Queenslanders: A review of the Public Trustee's fees, charges and practices*. We commend the Queensland Government for undertaking this consultation in order to protect the rights of vulnerable Queenslanders. We are deeply concerned about the appointment of the Public Trustee as an administrator for people with impaired capacity without complete reform of the Public Trustee's policy and practices in this regard.

The Queensland Synod and its service delivery agencies, UnitingCare Queensland and Wesley Mission Queensland, are making a response that brings together our views and experiences. The Queensland Synod would welcome future opportunities to discuss this submission further. Should you require any more information, I can be contacted on 07 3377 9705.

Yours sincerely,

Rev. Andrew Gunton
Moderator, Uniting Church in Australia Queensland Synod

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Comments on the Public Advocate's Recommendations relating to the Public Trustee

Introduction

Queensland Synod

The Uniting Church in Australia Queensland Synod (Queensland Synod) is committed to working towards a society characterised by love, compassion, justice, inclusion and reconciliation so that all people, at every stage of life, can experience 'life in all its fullness' (John 10:10). Our faith calls us to the preferential care for the most marginalised in society and the Christian vision for a flourishing society includes valuing and promoting the compassionate service and love of the most vulnerable, based on the sanctity of all life. Throughout Queensland we have Uniting Church congregations contributing to wellbeing, bringing people together and building meaningful connections and communities.

UnitingCare Queensland

Uniting Care Queensland (UCQ) is the second largest Queensland based not-for-profit employer with 16,500 staff and 9,000 volunteers providing health, aged care, disability, and community services to over 400,000 people a year. UCQ is Queensland's largest aged care provider operating 48 aged care facilities in Queensland and providing in-home care to older Australians under BlueCare. UCQ also operates four private hospitals with over a thousand beds and 9% of the Intensive Care Unit (ICU) capacity in Queensland.

Wesley Mission Queensland

Since 1907, Wesley Mission Queensland (WMQ) has been helping people across Queensland build stronger and more inclusive communities. As an innovative and responsive not-for-profit community service provider, WMQ offers community support, mental health services, aged care and retirement living supporting people in Queensland through all stages of life. WMQ operates 13 residential aged care homes, three retirement villages, supported disability accommodation two hospices. WMQ also provides community services across the state and operates the Auslan interpreting services to 3,500 members of the Deaf community nationally.

WMQ operates as a parish mission activity of the Albert Street Uniting Church and is focused on providing flexible services to older people, those living with a disability or mental illness, Aboriginal and Torres Strait Islanders, refugees and vulnerable children and families.

The purpose of the Public Trustee

We believe that clarification of the purpose of the Public Trustee when appointed as administrator for a person with impaired decision-making capacity (impaired capacity) is urgently needed. We believe that the Public Trustee's interpretation of its role as administrator is to provide financial management, as if its clients under administration have freely chosen the Public Trustee as their provider and are fully informed about the details of the financial management services provided by the Public Trustee, and that as a commercial agency they have the right to make a profit from clients placed under administration, with little transparency of their processes.



We submit that the Public Trustee, in its current form, is unsuitable for use as an administrator appointed by the Queensland Civil and Administrative Tribunal for the approximately 10 000 vulnerable Queenslanders it currently has as clients under administration. The approach of the Public Trustee in responding to the Public Advocate's report to date has been to justify its decisions via financial arguments, rather than taking the approach that being appointed as an administrator means the primacy of their role is to safeguard a person with impaired capacity who is placed under the control of a substitute decision maker.

The lack of knowledge of staff, the culture of the Public Trustee of maximising its profits to be financially self-sustainable, and the apparent lack of skill in providing for clients with impaired capacity is not consistent with Australia's human rights obligations. This is not an appropriate approach to serve vulnerable Queenslanders who do not have the choice of who is appointed as their administrator.

In addition to the legislative amendments recommended in this submission, we urge the Queensland Government and the Public Trustee to:

- develop a Disability Action Plan for the Public Trustee, as suggested pursuant to Part 3 of the Disability Discrimination Act 1992. We note that the Public Trustee is registered as providing a Disability Action Plan, however the information linked to in the register is not a Disability Action Plan with the provisions under section 61 of the Disability Discrimination Act 1992.
- provide information and upskilling of families and friends to take on the role of administrator, and
- adhere to the National Decision-Making Principles, and the Safeguards Guidelines and Will, Preference and Rights Guidelines that support the National Decision-Making Principles, developed by the Australian Law Reform Commission (ALRC)¹. These are presented below and are consistent with article 12 of the United Nations Convention on the Rights of Persons with Disabilities.

¹ Australian Law Reform Commission (2014). Equality, capacity and disability in commonwealth laws. ALRC Report 124. https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_124_whole_pdf_file.pdf



National Decision-Making Principles

Principle 1: The equal right to make decisions

- All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support

- Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

Principle 3: Will, preferences and rights

- The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

Principle 4: Safeguards

- Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

Safeguards Guidelines

(1) General

Safeguards should ensure that interventions for persons who require decision-making support are:

- (a) the least restrictive of the person's human rights;
- (b) subject to appeal; and
- (c) subject to regular, independent and impartial monitoring and review.

(2) Support in decision-making

- (a) Support in decision-making must be free of conflict of interest and undue influence.
- (b) Any appointment of a representative decision-maker should be:
 - (i) a last resort and not an alternative to appropriate support;
 - (ii) limited in scope, proportionate, and apply for the shortest time possible; and
- (i) subject to review.



Will, Preferences and Rights Guidelines

(1) Supported decision-making

(a) In assisting a person who requires decision-making support to make decisions, a person chosen by them as supporter must:

- (i) support the person to express their will and preferences; and
- (ii) assist the person to develop their own decision-making ability.

(b) In communicating will and preferences, a person is entitled to:

- (i) communicate by any means that enable them to be understood; and
- (ii) have their cultural and linguistic circumstances recognised and respected.

(2) Representative decision-making

Where a representative is appointed to make decisions for a person who requires decision-making support:

(a) The person's will and preferences must be given effect.

(b) Where the person's current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers and other significant people in their life.

(c) If it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person's human rights and act in the way least restrictive of those rights.

(d) A representative may override the person's will and preferences only where necessary to prevent harm.

The Practice of the Public Trustee

The Queensland Synod, UCQ and WMQ support the full implementation of all 32 recommendations made by the Public Advocate as we remain concerned about the practices of the Public Trustee in relation to vulnerable Queenslanders. Recent anecdotal evidence reported to us about the practice of the Public Trustee in relation to people with impaired capacity who have the Public Trustee appointed as administrator includes:

- the lack of assistance from the Public Trustee in applying for flood assistance payments for clients.
- clients being charged 25% of their Disability Support Pension in Public Trustee fees and charges, despite having low-value assets.
- an ongoing trend of Public Trustee staff delegating tasks related to managing an adult's financial affairs to disability services staff. This results in disability service staff having an increased workload as a result of the Public Trustee failing to carry out its duties.
- punitive measures directed at clients, such as blocking clients' access to their finances when they do not conform to the Public Trustee's expectations of how many times a client should contact the Public Trustee to discuss their financial affairs.



- a lack of knowledge of disability, particularly intellectual disability. This results in the Public Trustee staff blocking clients from contacting the Public Trustee when Public Trustee staff are unable to provide reasonable accommodation to clients so that clients can access information about their finances. An example is refusing to fund cleaning services for a client with health issues and the Public Trustee demanding that disability service staff do the cleaning as part of their service delivery.
- a lack of knowledge of their roles, responsibilities and legal obligations as an administrator. An example is Public Trustee staff demanding from disability services staff a copy of their client's NDIS plan, which disability services staff cannot provide to the Public Trustee due to privacy legislation. The Public Trustee then blocked the client from accessing their own finances until the Public Trustee received a copy of the NDIS plan. This was only resolved through escalation of the issue through the disability service and the Public Trustee. Another example is the Public Trustee demanding that the disability service staff pay for an item or service that the client has requested through the Public Trustee, with the Public Trustee claiming they will reimburse the disability service. This is not an acceptable practice to alleviate the effect of the lengthy delays clients experience when needing to access their money in a timely fashion.
- the delays by the Public Trustee in paying client's bills, resulting in client's being financially penalised for late payment.
- the overarching consideration of the Public Trustee in keeping money for client's future needs, without any consideration of clients' current circumstances, which can result in a poor quality of life because of the lack of access to their finances. This has serious consequences, including leaving clients with no food, at risk of homelessness, and increased social isolation. An example is the Public Trustee not approving expenditure of small amounts of money that would have significant benefits for the client, such as refusing to allow a client funds to facilitate their participation in the community. Another example is the Public Trustee refusing to allow a client with mobility issues who has difficulty accessing public transport, to purchase a car, despite medical and occupational therapist reports supporting the purchase of a car. In addition, the Public Trustee is not recognising the recent increases in the cost of renting, by refusing to approve potential rentals that the Public Trustee has deemed to be too expensive.
- inconsistency in policies and procedures, resulting in different outcomes for different clients with similar circumstances.
- clients having to use their NDIS funding to fulfil the requirements of the Public Trustee. For example, the Public Trustee requires three quotes from clients for any purchase, resulting in clients expending their NDIS funding on transport to fulfil this unreasonable requirement.

Implementation of the recommendations will ensure that Queensland has met its obligations under the United Nations Convention on the Rights of Persons with Disabilities (the Convention), to which Australia is a signatory, as well as Queensland's *Human Rights Act 2019*. Under the *Human Rights Act 2019*, public entities are required to act and make decisions in a way that is compatible with human rights, including recognition and equality before the law. A number of articles within the Convention are relevant to the issues raised in *Preserving the financial futures of vulnerable Queenslanders: A review of the Public Trustee's fees, charges and practices*.



The current practices and processes of the Public Trustee that are highlighted for reform by the Public Advocate, unfairly target people with disabilities. Article 4 of the Convention provides that States Parties are required to “ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability”, including “to refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention”. In addition, Article 16 of the Convention, “Freedom from exploitation, violence and abuse” states that “States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects”.

Further responsibilities of States Parties relate to ensuring equality before the law for persons with disabilities and are contained in Article 5 of the Convention, including that “States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds”. Article 12, which covers equal recognition before the law, also stipulates that “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”.

The Convention’s definition of legal capacity is two-pronged, defined as the capacity to be both: a holder of rights which entitles persons to full protection of their rights by the legal system; and recognition that a person is an agent with the power to engage in transactions and create, modify or end legal relationships². Legal capacity is the key to accessing meaningful participation in society³.

In particular, Article 12, paragraph 5, requires States parties to take measures, including legislative, administrative, judicial and other practical measures, to ensure the rights of persons with disabilities with respect to financial and economic affairs, on an equal basis with others. Access to finance and property has traditionally been denied to persons with disabilities based on the medical model of disability⁴. The approach of denying persons with disabilities legal capacity for financial matters must be replaced with support to exercise legal capacity, in accordance with article 12⁵. Substitute decision-making regimes in forms such as guardianship and administration schemes, must be

² Committee on the Rights of Persons with Disabilities (2014). General comment No. 1 on equal recognition before the law. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

³ Committee on the Rights of Persons with Disabilities (2014). General comment No. 1 on equal recognition before the law. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

⁴ Committee on the Rights of Persons with Disabilities (2014). General comment No. 1 on equal recognition before the law. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

⁵ Committee on the Rights of Persons with Disabilities (2014). General comment No. 1 on equal recognition before the law. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>



abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others⁶.

The right to equality before the law is a civil and political right, and as such, the rights provided for in article 12 apply at the moment of ratification and are subject to immediate realization⁷. The State obligation to provide access to support in the exercise of legal capacity is necessary for the fulfilment of the civil and political right to equal recognition before the law. The development and implementation of legislation, policies and other decision-making processes that give effect to article 12, must be done in consultation with and actively involving individuals through their representative organisations.

Consultation Questions

1. 3 Consider the effect of fees when appointing the Public Trustee as administrator

The Guardianship and Administration Act be amended to require a court or tribunal, when considering appointing the Public Trustee as a person's administrator, to consider the level of the Public Trustee's fees and their likely effect on the person's financial circumstances over time. This is especially relevant when there may be an alternative appointment option of a family member or friend as administrator who would not charge fees. The court or tribunal may need to request that the Public Trustee provide an estimate of annual fees and other usual charges and expenses associated with providing its services, prior to deciding the appointment.

We support recommendation 3 in full.

We recommend that section 15 of the *Guardianship and Administration Act 2000* should be amended to include this requirement in the *appropriateness considerations*, and that the requirement under section 9 of the General Principles in the *Guardianship and Administration Act 2000*, relating to performance of functions and exercise of powers, should also be included in the *appropriateness considerations*.

An extra condition should be added under provision (1) that states "if the appointment is for financial matters, and is the Public Trustee, consideration should also be given to the likely effect on the adult of the impact of the Public Trustee's fees and charges, and how the Public Trustee will perform their function or exercise their power, in a way that promotes and safeguards that adult's rights, interests and opportunities, and in a way that is least restrictive of the adult's rights, interests and opportunities"

⁶ Committee on the Rights of Persons with Disabilities (2014). General comment No. 1 on equal recognition before the law. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

⁷ Committee on the Rights of Persons with Disabilities (2014). General comment No. 1 on equal recognition before the law. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>



General Principles

9 Performance of functions and exercise of powers

A person or other entity, in performing a function or exercising a power under this Act in relation to an adult, or in making a decision for an adult on an informal basis, must do so—

- (a) in a way that promotes and safeguards the adult's rights, interests and opportunities; and
- (b) in the way that is least restrictive of the adult's rights, interests and opportunities.

Guardianship and Administration Act 2000

15 Appropriateness considerations

(1) In deciding whether a person is appropriate for appointment as a guardian or administrator for an adult, the tribunal must consider the following matters (appropriateness considerations)—

- (a) the general principles and whether the person is likely to apply them;
- (b) if the appointment is for a health matter—the health care principles and whether the person is likely to apply the principles;
- (c) the extent to which the adult's and person's interests are likely to conflict;
- (d) whether the adult and person are compatible including, for example, whether the person has appropriate communication skills or appropriate cultural or social knowledge or experience, to be compatible with the adult;
- (e) if more than 1 person is to be appointed—whether the persons are compatible;
- (f) whether the person would be available and accessible to the adult;
- (g) the person's appropriateness and competence to perform functions and exercise powers under an appointment order, including whether the person has ever been a paid carer for the adult.

(2) The fact a person is a relation of the adult does not, of itself, mean the adult's and person's interests are likely to conflict.

(3) Also, the fact a person may be a beneficiary of the adult's estate on the adult's death does not, of itself, mean the adult's and person's interests are likely to conflict.

(4) In considering the person's appropriateness and competence, the tribunal must have regard to the following—

- (a) the nature and circumstances of any criminal history, whether in Queensland or elsewhere, of the person including the likelihood the commission of any offence in the criminal history may adversely affect the adult;
- (b) the nature and circumstances of any refusal of, or removal from, appointment, whether in Queensland or elsewhere, as a guardian, administrator, attorney or other person making a decision for someone else;
- (c) if the proposed appointment is of an administrator and the person is an individual—



- (i) the nature and circumstances of the person having been a bankrupt or taking advantage of the laws of bankruptcy as a debtor under the Bankruptcy Act 1966 (Cwlth) or a similar law of a foreign jurisdiction; and
- (ii) the nature and circumstances of a proposed, current or previous arrangement with the person's creditors under the Bankruptcy Act 1966 (Cwlth), part 10 or a similar law of a foreign jurisdiction; and
- (iii) the nature and circumstances of a proposed, current or previous external administration of a corporation, partnership or other entity of which the person is or was a director, secretary or partner or in whose management, direction or control the person is or was involved.

We recommend that section 16 of the *Guardianship and Administration Act 2000* should be amended to include an estimate of annual fees and other usual charges and expenses associated with providing its services. A new provision should be inserted under provision (f) which would state "if the Public Trustee is the proposed appointee, a schedule of annual charges, fees, and expenses for the adult".

Guardianship and Administration Act 2000

16 Advice from proposed appointee about appropriateness and competence

(1) An individual who has agreed to a proposed appointment (a proposed appointee) must advise the tribunal before the tribunal makes an order appointing the proposed appointee whether he or she—

- (a) is under 18 years; or
- (b) is, or has ever been, a paid carer for the adult; or
- (c) is a health provider for the adult; or
- (d) has any criminal history, whether in Queensland or elsewhere; or
- (e) has been, whether in Queensland or elsewhere, refused, or removed from, appointment as a guardian, administrator, attorney or other person making a decision for someone else; or
- (f) for a proposed appointment as administrator—
 - (i) is bankrupt or taking advantage of the laws of bankruptcy as a debtor under the [Bankruptcy Act 1966 \(Cwlth\)](#) or a similar law of a foreign jurisdiction; or
 - (ii) has ever been bankrupt or taken advantage of the laws of bankruptcy as a debtor under the [Bankruptcy Act 1966 \(Cwlth\)](#) or a similar law of a foreign jurisdiction; or
 - (iii) is proposing to make, or has ever made, an arrangement with his or her creditors under the [Bankruptcy Act 1966 \(Cwlth\)](#), part 10 or a similar law of a foreign jurisdiction; or
 - (iv) is or was a director, secretary or partner, or is or was involved in the management, direction or control of a corporation, partnership or other entity that is proposing to be, is or has been, under external administration.

Maximum penalty—40 penalty units.

(2) The proposed appointee must also advise the tribunal of any likely conflict between—

- (a) the duty of the proposed appointee if appointed as guardian or administrator towards the adult; and



(b) either—

(i) the interests of the proposed appointee or a person in a close personal or business relationship with the proposed appointee; or

(ii) another duty of the proposed appointee as guardian or administrator for another person.

Maximum penalty—40 penalty units.

(3) The proposed appointee must give the advice by statutory declaration or on oath or affirmation if required by the tribunal.

Maximum penalty—40 penalty units.

We are concerned that historically and currently, the Queensland Civil and Administrative Tribunal is not applying the appropriateness considerations under section 15 of the *Guardianship and Administration Act 2000*, when appointing the Public Trustee as an administrator. There is no publicly available information about how and when the Public Trustee applies the general principles as required under section 11B of the *Guardianship and Administration Act 2000*. There is no publicly available information about the extent to which the adult's and the Public Trustee's interests are likely to conflict when there are direct conflicts between the Public Trustee's obligations under the Prudent Person Rule and obligations under the *Guardianship and Administration Act 2000* for administrators (such as the general principles). There is no publicly available information about the accessibility and availability of Public Trustee staff to an adult and the Public Trustee has a mandated fees and charges regime which results in increased costs when more contact is required with the Public Trustee by the adult under administration.

2. 11 Do not profit from administration clients unless expressly permitted by law

As a fiduciary and financial administrator, the Public Trustee should not profit from administration client funds unless expressly permitted by legislation. Any such legislative provisions should set clear limits on the amount and purpose of any income or 'profit'.

In *Preserving the financial futures of vulnerable Queenslanders: A review of the Public Trustee's fees, charges and practices*, the Public Advocate highlights that the Public Trustee does not receive government funding for its Community Service Obligations. This lack of funding contributes to the amount and number of fees and charges that people with impaired capacity are required to pay when under administration. The purpose of any fees and charges should be for cost recovery only, not to make a profit from vulnerable Queenslanders who when placed under administration, frequently have no choice in who is appointed their administrator. This creates an unfair monopoly where the Public Trustee is the sole provider. In addition, in order to comply with the requirement in



article 12, paragraph 3, of the Convention, States parties must ensure that support for the exercising of legal capacity is available at **nominal or no cost** to persons with disabilities⁸.

Recommendation 1 from the Public Advocate specified that: The fees charged should not be inflated to cross-subsidise services provided to other Public Trustee clients, other organisational activities or to provide 'profit' for the Public Trustee, unless specifically permitted by legislation. We recommend that the government fully fund the Community Service Obligations of the Public Trustee.

People with impaired capacity who are under an administration order with the Public Trustee should not be discriminated against because they require support to exercise their capacity and autonomy in relation to their financial affairs, with the imposition of fees and charges. For example, the assessment for the Person Financial Administration fee under the *Public Trustee (Fees and Charges Notice) (No.1) 2021* for people with impaired capacity who are under administration, is inconsistent with the Convention. The process penalises people who require support to exercise their legal capacity and who live independently in the community.

In Victoria, section 175 of the *Guardianship and Administration Act 2019* provides for the remuneration of administrators. Provision 3 stipulates that remuneration determined by the Victorian Civil and Administrative Tribunal (VCAT) must not exceed the limit on fees that may be charged by a licensed trustee company under Chapter 5D of the *Corporations Act*.

Guardianship and Administration Act 2019

175 Remuneration of administrators

(1) An administrator (other than a person who carries on a business of, or including, the administration of estates) is not entitled to receive any fee, remuneration or other reward from the estate of a represented person or missing person for acting as administrator unless VCAT otherwise specifies in the administration order or administration (missing person) order, as the case requires. (2) Remuneration to which an administrator who carries on a business of, or including, the administration of estates is entitled must be—

(a) in accordance with a scale in relation to remuneration for administrators that is fixed by rules made under the VCAT Act; or

(b) as determined by VCAT.

(3) Despite subsection (2), remuneration determined by VCAT in relation to a licensed trustee company (within the meaning of section 601RAA of the Corporations Act) must not exceed the limit on fees that may be charged by a licensed trustee company under Chapter 5D of the Corporations Act.

(4) VCAT may request an administrator to provide VCAT with any account in the administrator's custody in relation to dealings and transactions relating to the financial matters specified in the

⁸ Committee on the Rights of Persons with Disabilities (2014). General comment No. 1 on equal recognition before the law. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>



administration order or administration (missing person) order (as the case requires) for the purpose of examining those accounts and determining whether the administrator has complied with the requirements of this Act, any order made by VCAT or any approval or specification made by VCAT in relation to remuneration under this section.

We recommend that a similar cap on fees and charges be implemented, with section 48 of the *Guardianship and Administration Act 2000* to be amended to incorporate a similar provision. Provision 3 should be amended to “The remuneration may not be more than the amount the tribunal considers fair and reasonable and must not exceed the limit on fees that may be charged by a licensed trustee company under Chapter 5D of the Corporations Act, having regard to –”.

Guardianship and Administration Act 2000

48 Remuneration of professional administrators

- (1) An administrator for an adult is entitled to remuneration from the adult if the tribunal makes an order that the administrator is to be remunerated by the adult.
- (2) The tribunal may make an order under subsection (1) only if the administrator carries on a business providing professional services.
- (3) The remuneration may not be more than the amount the tribunal considers fair and reasonable, having regard to—
 - (a) the nature and complexity of the service; and
 - (b) the care, skill and specialised knowledge required to provide the service; and
 - (c) the responsibility displayed in providing the service; and
 - (d) the time within which the service was provided; and
 - (e) the place where, and the circumstances in which, the service was provided.
- (4) Nothing in this section affects the right of the public trustee or a trustee company to remuneration or commission under another Act or the Corporations Act.

3. 15 Limit the amount of Public Trustee surpluses and reserves

There should be a limit on the amount of operating surpluses and reserves that the Public Trustee can accumulate. Any reserves exceeding the cap should be returned to clients in reduced or rebated fees.

We support this recommendation in full. People with impaired capacity who are under administration by the Public Trustee generally only receive income from the Disability Support Pension, which is approximately equal, or if including rent assistance slightly above, the Henderson Poverty Line. An analysis identified that in the 2018-19 financial year 55 percent of administration



clients had average assets of less than \$20,000, with around 90 percent having average assets of less than \$150,000⁹.

Therefore any returns to people with impaired capacity who are under administration by the Public Trustee, via reduced or rebated fees is essential¹⁰.

4. 24(c) Review the role and operations of the Official Solicitor

The Public Trustee initiate an urgent and comprehensive review of the role and operations of the Official Solicitor to the Public Trustee. The review should give particular consideration to:

c. whether lawyers providing legal advice and services to people under administration should be required to hold practicing certificates and be subject to oversight by the Legal Services Commission (this includes administration clients or their supporters being able to make a complaint to the Legal Services Commission)

We support this recommendation in full. This would ensure obligations under the Convention are met, particularly in relation to equality before the law. We note that the Public Trustee has recently introduced a policy to require all permanently appointed lawyers working in an Official Solicitor Office to hold a current practising certificate. However, this is not a legislative requirement, and does not apply to those lawyers employed on a non-permanent basis. We recommend that section 11 of the *Public Trustee Act 1978* be amended to state that “all lawyers working for the Office of the Public Trustee must hold a current practising certificate” which means that they are subject to oversight by the Legal Services Commission, and that people with impaired capacity who are under administration can lodge complaints with the Legal Services Commission, giving them access to their right to exercise legal capacity.

Public Trustee Act 1978

11 Staff of Public Trust Office

The staff of the Public Trust Office are to be employed under the Public Service Act 2008.

⁹ Public Advocate (2021). Preserving the financial futures of vulnerable Queenslanders: A review of the Public Trustee’s fees, charges and practices. <https://documents.parliament.qld.gov.au/tp/2021/5721T283.pdf>

¹⁰ Melbourne Institute: Applied Economic and Social Research (2021). Poverty lines: Australia, March quarter, 2021. https://melbourneinstitute.unimelb.edu.au/data/assets/pdf_file/0007/3889393/Poverty-Lines-Australia-March-2021.pdf



5. 26 Amend legislation so Public Trustee solicitors are overseen by the Legal Services Commission

Amend the Public Trustee Act to provide that solicitors employed by the Public Trustee must:

a. while performing their role, have regard to the ‘fundamental duties of solicitors’ as set out in the solicitors’ rules (as defined by section 217 of the Legal Profession Act); and

b. be subject to conduct and disciplinary investigations by the Legal Services Commission.

We support this recommendation in full. Holding a practising certificate, as recommended in the previous recommendation, would ensure under section 24 of the *Legal Profession Regulation 2017* that the solicitors rules apply to a solicitor employed to work in the Public Trustee. This requirement to hold a practising certificate would also ensure that solicitors who work in the Public Trustee can be subject to conduct and disciplinary investigations by the Legal Services Commission.

6. 29 Amend legislation to clarify how the Public Trustee can invest client funds

In the interests of clarity and transparency, and to remove all doubt about the lawfulness or propriety of the Public Trustee earning revenue from client funds, the Public Trustee Act should be amended to:

a. clarify the investments the Public Trustee is permitted to make using client funds, in particular addressing the issue of investments that are permitted that may amount to a conflict of interest, the circumstances in which it can earn revenue on those funds, and the conditions or limitations on those earnings; and

b. require the Public Trustee to report its earnings on client funds in its annual financial statements.

We support recommendation 29a in full.

Sections 22 and 23 of the *Trusts Act 1973* apply the Prudent Person Rule to investments that the Public Trustee can make. Section 23 (1) states that “a rule or principle of law or equity imposing a duty on a trustee exercising a power of investment continues to apply except so far as it is inconsistent with this or another Act or the instrument creating the trust”. The Queensland Civil and Administrative Tribunal has concluded that the Prudent Person Rule must be interpreted and applied in a way that accommodates the administrator applying the general principles as required under the *Guardianship and Administration Act 2000*. Section 23 (1) of the *Trusts Act 1973* also permits this.

This is despite the fact that the *Guardianship and Administration Act 2000* requires administrators including the Public Trustee, to invest client funds only in “authorised investments” which is defined in Schedule 4 of the *Guardianship and Administration Act 2000* as either:

- an investment in accordance with the Prudent Person Rule as defined in Part 3 of the *Trusts Act*; or
- an investment approved by QCAT.

To clarify that the general principles apply in terms of investment decisions by the Public Trustee for persons under an administration order, we recommend that section 51(2) of the *Guardianship and Administration Act 2000* be amended to state that “The administrator may invest only in authorised investments and must apply the general principles when making decisions to invest”.



Guardianship and Administration Act 2000

51 Power to invest and continue investments

- (1) This section applies if an administrator for an adult has power to invest.
- (2) The administrator may invest only in authorised investments.
- (3) However, if, when the administrator is appointed, the adult had investments that were not authorised investments, the administrator may continue the investments, including by taking up rights to issues of new shares, or options for new shares, to which the adult becomes entitled by the adult's existing shareholding.

In addition, we note that section 37 of the *Guardianship and Administration act 2000* covers conflict transactions of administrators. We recommend that this section be incorporated into the *Public Trustee Act 1978* under section 17, to improve compliance with this requirement.

Guardianship and Administration act 2000

37 Avoid conflict transaction

- (1) An administrator for an adult may enter into a conflict transaction only if the tribunal authorises the transaction, conflict transactions of that type or conflict transactions generally.
- (2) A conflict transaction is a transaction in which there may be conflict, or which results in conflict, between—
 - (a) the duty of an administrator towards the adult; and
 - (b) either—
 - (i) the interests of the administrator or a person in a close personal or business relationship with the administrator; or
 - (ii) another duty of the administrator.

Examples—

- 1 A conflict transaction happens if an administrator buys the adult's car.
- 2 A conflict transaction does not happen if an administrator is acting under section 55 to maintain the adult's dependants.
- (3) However, a transaction is not a conflict transaction only because by the transaction the administrator in the administrator's own right and on behalf of the adult—
 - (a) deals with an interest in property jointly held; or
 - (b) acquires a joint interest in property; or
 - (c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b).
- (4) A conflict transaction between an administrator and a person who does not know, or have reason to believe, the transaction is a conflict transaction is, in favour of the person, as valid as if the transaction were not a conflict transaction.



(5) In this section— joint interest includes an interest as a joint tenant or tenant in common.

Public Trustee Act 1978

17 Public trustee may fix fees and charges

(1) The public trustee may, by gazette notice, fix fees and charges for services the public trustee performs or provides.

(2) The fees and charges have effect from the day the notice is gazetted or a later day stated in the notice.

(3) The fees and charges must be reasonable having regard to the circumstances in which the service is provided.

(4) In particular, and without limiting subsection (3), the amount of a fee or charge must be decided having regard to the following—

- (a) the type and complexity of the service performed;
- (b) the degree of care, responsibility, skill or special knowledge required to perform the service.

(5) Also, the gazette notice may provide that a fee or charge for a service is to be worked out according to—

- (a) a stated hourly, daily or other rate; or
- (b) the number or type of documents perused.

(6) A gazette notice under this section is subordinate legislation and exempt subordinate legislation.

We support recommendation 29b in full, that the Public Trustee be required to report its earnings on client funds in its annual financial statements.



7. 31 Update the Public Trustee Act to better acknowledge rights and interests of people with impaired decision-making capacity

The Public Trustee Act should be reviewed to update and modernise the Act to ensure that it reflects contemporary views about the rights and entitlements of people with impaired decision-making capacity whose affairs are administered by the Public Trustee. The review of the Act should:

a. address issues relating to conflicts of interest or breaches of duty and ensure they are clearly acknowledged, the extent to which they are permitted and the limitations on those activities, including any profits that can be earned;

b. address provisions in the Act that appear to permit breaches of the trustee's fundamental duties; and

c. include amendments requiring greater accountability and transparency on the part of the Public Trustee about its fees and charges, various sources of revenue, including revenue earned from the Official Solicitor, on client funds invested in the Common Fund and from the management of other funds in which client money is invested.

We support this recommendation in full. We agree that it is essential to update and modernise the *Public Trustee Act 1978* to ensure that it reflects contemporary views about the rights and entitlements of people with impaired decision-making capacity whose affairs are administered by the Public Trustee. To facilitate this, we recommend that:

- requirements under the *Guardianship and Administration Act 2000* for administrators should be embedded in the *Public Trustee Act 1978* to provide clarity on requirements, and
- specific provision/s should be inserted into the *Public Trustee Act 1978* to provide for protecting the rights and interests of people with impaired capacity who are under administration by the Public Trustee.

We recommend that section 17 (3) of the *Public Trustee Act 1978* be amended as provided below, to include the general principles with which an administrator is required to apply in relation to people with impaired capacity who are under administration, as required under sections 11B, 15 and 34 of the *Guardianship and Administration Act 2000*: (3) *The fees and charges must be reasonable having regard to the circumstances in which the service is provided. For clients under an administration order, the administrator must have regard to the general principles under section 11b of the Guardianship and Administration Act 2000.*

Guardianship and Administration Act 2000

11B General principles

(1) The principles (the general principles) set out below must be applied by a person or other entity that performs a function or exercises a power under this Act.

(2) Also, a person making a decision for an adult on an informal basis must apply the general principles in making the decision.

(3) The community is encouraged to apply and promote the general principles.

General principles



1 Presumption of capacity

An adult is presumed to have capacity for a matter.

2 Same human rights and fundamental freedoms

(1) An adult's inherent dignity and worth, and equal and inalienable rights, must be recognised and taken into account.

(2) The rights of all adults to the same human rights and fundamental freedoms, regardless of a particular adult's capacity, must be recognised and taken into account.

(3) The principles on which an adult's human rights and fundamental freedoms are based, and that should inform the way those rights and freedoms are taken into account, include—

(a) respect for inherent dignity and worth, individual autonomy (including the freedom to make one's own choices) and independence of persons; and

(b) non-discrimination; and

(c) full and effective participation and inclusion in society, including performing roles valued by society; and

(d) respect for difference and acceptance of persons with impaired capacity as part of human diversity and humanity; and

(e) equality of opportunity; and

(f) accessibility; and

(g) equality between all persons regardless of gender.

3 Empowering adult to exercise human rights and fundamental freedoms

The importance of the following matters must be taken into account—

(a) empowering an adult to exercise the adult's human rights and fundamental freedoms;

(b) encouraging and supporting an adult—

(i) to perform social roles valued in society; and

(ii) to live a life in the general community and to take part in activities enjoyed by the community; and

(iii) to achieve maximum physical, social, emotional and intellectual potential and to become as self-reliant as practicable;

(c) an adult's right to participate to the greatest extent practicable in the development of policies, programs and services for people with impaired capacity for a matter.

4 Maintenance of adult's existing supportive relationships

(1) The importance of maintaining an adult's existing supportive relationships must be taken into account.

(2) Maintaining an adult's existing supportive relationships may, for example, involve consultation with—

(a) the adult, to find out who are the members of the adult's support network; and

(b) any persons who have an existing supportive relationship with the adult; and



(c) any members of the adult's support network who are making decisions for the adult on an informal basis.

(3) The role of families, carers and other significant persons in an adult's life to support the adult to make decisions should be acknowledged and respected.

5 Maintenance of adult's cultural and linguistic environment and values

(1) The importance of maintaining an adult's cultural and linguistic environment and set of values, including religious beliefs, must be taken into account.

(2) Without limiting subsection (1), for an adult who is an Aboriginal person or a Torres Strait Islander, the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment and set of values, including Aboriginal tradition or Island custom, must be taken into account.

6 Respect for privacy

(1) An adult's privacy must be taken into account and respected.

(2) An adult's personal information, including health information, must be protected on the same basis as other people's personal information is protected.

7 Liberty and security

(1) An adult's right to liberty and security on an equal basis with others must be taken into account.

(2) An adult should not be deprived of the adult's liberty except in accordance with the law.

8 Maximising an adult's participation in decision-making

(1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life must be recognised and taken into account.

(2) An adult must be given the support and access to information necessary to enable the adult to make or participate in decisions affecting the adult's life.

(3) An adult must be given the support necessary to enable the adult to communicate the adult's decisions.

(4) To the greatest extent practicable, a person or other entity, in exercising power for a matter for an adult, must seek the adult's views, wishes and preferences.

(5) An adult's views, wishes and preferences may be expressed orally, in writing or in another way, including, for example, by conduct.

(6) An adult is not to be treated as unable to make a decision about a matter unless all practicable steps have been taken to provide the adult with the support and access to information necessary to make and communicate a decision.

9 Performance of functions and exercise of powers

A person or other entity, in performing a function or exercising a power under this Act in relation to an adult, or in making a decision for an adult on an informal basis, must do so—

(a) in a way that promotes and safeguards the adult's rights, interests and opportunities; and

(b) in the way that is least restrictive of the adult's rights, interests and opportunities.



10 Structured decision-making

(1) In applying general principle 9, a person or other entity in performing a function or exercising a power under this Act in relation to an adult, or in making a decision for an adult on an informal basis, must adopt the approach set out in subsections (2) to (5).

(2) First, the person or other entity must—

(a) recognise and preserve, to the greatest extent practicable, the adult's right to make the adult's own decision; and

(b) if possible, support the adult to make a decision.

(3) Second, the person or other entity must recognise and take into account any views, wishes and preferences expressed or demonstrated by the adult.

(4) Third, if the adult's views, wishes and preferences can not be determined, the person or other entity must use the principle of substituted judgement so that if, from the adult's views, wishes and preferences, expressed or demonstrated when the adult had capacity, it is reasonably practicable to work out what the adult's views, wishes and preferences would be, the person or other entity must recognise and take into account what the person or other entity considers the adult's views, wishes and preferences would be.

(5) Fourth, once the person or other entity has recognised and taken into account the matters mentioned in subsections (2) to (4), the person or other entity may perform the function, exercise the power or make the decision.

15 Appropriateness considerations

(1) In deciding whether a person is appropriate for appointment as a guardian or administrator for an adult, the tribunal must consider the following matters (appropriateness considerations)—

(a) the general principles and whether the person is likely to apply them;

(b) if the appointment is for a health matter—the health care principle and whether the person is likely to apply it;

(c) the extent to which the adult's and person's interests are likely to conflict;

(d) whether the adult and person are compatible including, for example, whether the person has appropriate communication skills or appropriate cultural or social knowledge or experience, to be compatible with the adult;

(e) if more than 1 person is to be appointed—whether the persons are compatible;

(f) whether the person would be available and accessible to the adult;

(g) the person's appropriateness and competence to perform functions and exercise powers under an appointment order.

(2) The fact a person is a relation of the adult does not, of itself, mean the adult's and person's interests are likely to conflict.

(3) Also, the fact a person may be a beneficiary of the adult's estate on the adult's death does not, of itself, mean the adult's and person's interests are likely to conflict.

34 Apply principles



(1) A guardian or administrator must apply the general principles.

Note—

See section 11B.

(2) However, an administrator appointed under section 12A is not required to apply general principles 1, 3, 4, 7, 8 and 10(1) to (3) and (5).

(3) In making a health care decision, a guardian must also apply the health care principles

Public Trustee Act 1978

17 Public trustee may fix fees and charges

(1) The public trustee may, by gazette notice, fix fees and charges for services the public trustee performs or provides.

(2) The fees and charges have effect from the day the notice is gazetted or a later day stated in the notice.

(3) The fees and charges must be reasonable having regard to the circumstances in which the service is provided.

(4) In particular, and without limiting subsection (3), the amount of a fee or charge must be decided having regard to the following—

(a) the type and complexity of the service performed;

(b) the degree of care, responsibility, skill or special knowledge required to perform the service.

(5) Also, the gazette notice may provide that a fee or charge for a service is to be worked out according to—

(a) a stated hourly, daily or other rate; or

(b) the number or type of documents perused.

(6) A gazette notice under this section is subordinate legislation and exempt subordinate legislation.

Section 6, provision (2) of the *Public Guardian Act 2014* requires that “Persons performing functions or exercising powers under this Act for a matter in relation to an adult with impaired capacity must also have regard to the acknowledgements stated in the Guardianship Act, section 5 when performing the functions or exercising the powers.” We recommend that the *Public Trustee Act 1978* be amended to include a similar requirement, with section 5 of the *Guardianship and Administration Act 2000* to be incorporated into the *Public Trustee Act 1978*.

Public Guardian Act 2014

6 Principles for adults with impaired capacity for a matter

(1) The principles to be applied by persons performing functions or exercising powers under this Act for a matter in relation to an adult with impaired capacity for the matter are stated in the



Guardianship Act, schedule 1 (the general principles and, for a health matter or a special health matter, the health care principle).

(2) Persons performing functions or exercising powers under this Act for a matter in relation to an adult with impaired capacity must also have regard to the acknowledgements stated in the Guardianship Act, section 5 when performing the functions or exercising the powers.

The above amendment should also embed section 5 of the *Guardianship and Administration Act 2000* in the *Public Trustee Act 1978*, rather than just referring to the obligation:

Guardianship and Administration Act 2000

5 Acknowledgements

This Act acknowledges the following—

- (a) an adult's right to make decisions is fundamental to the adult's inherent dignity;
- (b) the right to make decisions includes the right to make decisions with which others may not agree;
- (c) the capacity of an adult with impaired capacity to make decisions may differ according to—
 - (i) the nature and extent of the impairment; and
 - (ii) the type of decision to be made, including, for example, the complexity of the decision to be made; and
 - (iii) the support available from members of the adult's existing support network;
- (d) the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent;
- (e) an adult with impaired capacity has a right to adequate and appropriate support for decision-making.

We recommend that the *Public Trustee Act 1978* be amended to include a section about the purpose of the Act, and the role and functions of the Public Trustee, in relation to people with impaired capacity who are under administration by the Public Trustee, similar to sections 5 (a), 10 (1) and 12 (1) (a) and (1)(i) of the *Public Guardian Act 2014*:

Public Guardian Act 2014

5 Purpose

The purpose of this Act is to establish the public guardian to promote and protect the rights and interests of—

- (a) adults with impaired capacity for a matter;

10 Role

(1) The public guardian's role in relation to adults who have impaired capacity for a matter is to protect their rights and interests.

12 Functions—adult with impaired capacity for a matter



(1) The public guardian has the following functions (adult guardian functions) in relation to an adult with impaired capacity for a matter—

(a) protecting the adult from neglect, exploitation or abuse;

(i) seeking help (including help from a government agency, or other institution, welfare organisation or provider of a service or facility) for, or making representations for, an adult with impaired capacity.

31 a. address issues relating to conflicts of interest or breaches of duty and ensure they are clearly acknowledged, the extent to which they are permitted and the limitations on those activities, including any profits that can be earned;

We support this in full. We reiterate our response to recommendations 3 and 29. We also recommend that section 35 of the *Guardianship and Administration Act 2000* be inserted into the *Public Trustee Act 1978*.

Guardianship and Administration Act 2000

35 Act honestly and with reasonable diligence

A guardian or administrator who may exercise power for an adult must exercise the power honestly and with reasonable diligence to protect the adult's interests.

Maximum penalty—200 penalty units.

31 b. address provisions in the Act that appear to permit breaches of the trustee's fundamental duties;

We support this in full. We reiterate our response to all recommendations.

31 c. include amendments requiring greater accountability and transparency on the part of the Public Trustee about its fees and charges, various sources of revenue, including revenue earned from the Official Solicitor, on client funds invested in the Common Fund and from the management of other funds in which client money is invested.

We support this in full. We reiterate our response to recommendations 3, 11 and 29.

In order to strengthen the accountability of the Public Trustee we recommend, that the *Public Trustee Act 1978* be amended to include similar provisions to section 72 of the Victorian *Guardianship and Administration Act 2019*, which provides for examination and inspection by an adult under an administration order, of the dealings and transactions made for their financial matters by an administrator:

Guardianship and Administration Act 2019

72 Former represented person entitled to inspection of accounts

Subject to an order under section 73, a person who has ceased to be a represented person (or the personal representative of such a person), before or after obtaining the restoration of all or any part of the person's money or other property from the administrator—

(a) may examine and inspect, or cause a legal practitioner or other authorised agent to examine and inspect, all books, accounts, notices and other documents in the custody of the administrator relating



to the dealings and transactions made for the financial matters specified in the administration order and make or cause to be made copies of, or extracts from, these items; and

(b) must be provided with—

(i) copies of or extracts from any book, account, notice or document relating to the dealings and transactions made for the financial matters specified in the administration order by the administrator; and

(ii) information relating to the dealings and transactions made for the financial matters specified in the administration order by the administrator that is reasonable to request and that can be given by the administrator.

Under article 12 of the convention, States parties are required to make any necessary modifications or adjustments to allow persons with disabilities to exercise their legal capacity, unless it is a disproportionate or undue burden. Such modifications or adjustments may include accessible information regarding decisions which have legal effect. This is also a requirement included in the general principles, section 11b of the *Guardianship and Administration Act 2000* which administrators are required to follow:

8 Maximising an adult's participation in decision-making

(1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life must be recognised and taken into account.

(2) An adult must be given the support and access to information necessary to enable the adult to make or participate in decisions affecting the adult's life.

(3) An adult must be given the support necessary to enable the adult to communicate the adult's decisions.

(4) To the greatest extent practicable, a person or other entity, in exercising power for a matter for an adult, must seek the adult's views, wishes and preferences.

(5) An adult's views, wishes and preferences may be expressed orally, in writing or in another way, including, for example, by conduct.

(6) An adult is not to be treated as unable to make a decision about a matter unless all practicable steps have been taken to provide the adult with the support and access to information necessary to make and communicate a decision.

To improve accountability and transparency of the processes of the Public Trustee, and to abide by the obligations under the Convention, we recommend that a section be inserted into the *Public Trustee Act 1978*, similar to the intent of section 20A of the Northern Territory's *Public Trustee Act 1979*.

This amendment should include the following requirements for information to be provided to people with impaired capacity under an administration order:

(a) adequately explain all the Public Trustees' obligations and service standards and their rights as clients

(b) ensure information is available in easy English and other accessible formats



- (c) provide regular budgets and account statements in a way that meets the communication needs and preferences of the individual client
- (d) ensure free translation and interpreting services, when required
- (e) make appropriate use of technology for clients to access information about their finances easily, such as SMS, automated voicemail, and online access.

PUBLIC TRUSTEE ACT 1979

20A Provision of information to beneficiaries of estate or trust

During the administration of an estate or trust, the Public Trustee must provide the beneficiaries or their representatives with appropriate information concerning the administration.

Despite the Public Trustee recently stating that it provides accessible information for clients with impaired capacity who are under administration¹¹, we note that resources such as the new Fees and Charges Ready Reckoner, the Complaints Form, the Public Trustee's Annual Report, as well as all the relevant information aimed at clients with impaired capacity who are under an administration order, on the website (as an example, see www.pt.qld.gov.au/other-services/investments/how-does-the-public-trustee-of-queensland-invest-customer-administered-funds), need to be provided in all accessible formats, to meet their human rights obligations and legislative obligations.

The Public Trustee's claim that "customers can understand the overall returns on those investments and the value of the interested differential retained by the Public Trustee", because the Public Trustee follows the Australian Accounting Standards and the Treasury Financial Reporting Guidelines for the Public Trustee's Annual Report, is in no way a correct understanding of providing accessible information. We recommend that the Public Trustee follow the Web Content Accessibility Guidelines Version 2 or Version 2.1 to the Level AA standard, as required in Australia to achieve appropriately accessible content and to fulfil its requirements under section 24 of the *Disability Discrimination Act 1992* (see <https://www.accessibility.org.au/guides/why-digital-access/#policy>). These requirements include web pages and other resources developed or maintained for purposes related to provision of services including professional services, banking, insurance, or financial services.

Accessibility of information also needs to include consideration of processes. We note that the Public Trustee has recently put in place processes to allow a customer to attend a Public Trust Office and review relevant legal advice to ensure that legal professional privilege, and the customer's interests, are protected. We remain concerned that this process will not be accessible for clients with impaired capacity who are under administration who have mobility issues and who cannot afford to travel to a Public Trustee Office (particularly in rural and remote areas of Queensland). Whether the Public Trustee has a procedure in place to ascertain client's preferred communication method, and

¹¹ The Office of the Public Advocate (2022). Implementation update: Preserving the financial futures of vulnerable Queenslanders: A review of Public Trustee fees, charges and practices, 10 March 2022. https://www.justice.qld.gov.au/data/assets/pdf_file/0008/709298/202203010-implementation-update-public-trustee-report-final.pdf



whether staff follow this preferred communication method, is unknown. We recommend that a process be developed to incorporate client's preferred communication methods in service delivery.

8. 32 Amend legislation to ensure the Public Trustee is an appointment of last resort and the appointment is periodically reviewed The Guardianship and Administration Act be amended to provide:

a. that the appointment of the Public Trustee as administrator for a person is an appointment of last resort; and

b. consistency with other administration appointments, the appointment of the Public Trustee and other trustee companies as a person's administrator be subject to periodic review, at least every five years (preferably more frequently).

We support recommendation 32a in full. This is consistent with the Australian Government's understanding of its obligations under article 12 of the Convention, that in Australia, substituted decision-making will only be used as a measure of last resort where such arrangements are considered necessary and are subject to safeguards¹². This is also reflected in the ALRC's (2014) recommendation 3-1, which recommended that reform of Commonwealth, state and territory laws and legal frameworks concerning individual decision-making should ensure that supported decision-making is encouraged, and representative decision-makers are appointed only as a last resort¹³.

Section 4A of the *Public Trustee Act 1979* of the Northern Territory, provides that one of the objectives of the Act is to "provide for a manager, administrator, executor or trustee of last resort". We recommend that a similar provision is included in section 7 (f) of the *Guardianship and Administration Act 2000*, by amending this to state "recognises the public trustee is available as a possible administrator of last resort for an adult with impaired capacity".

Guardianship and Administration Act

7 Way purpose achieved

This Act—

- (a) provides that an adult is presumed to have capacity for a matter; and
- (b) together with the Powers of Attorney Act 1998, provides a comprehensive scheme to facilitate the exercise of power for financial matters and personal matters by or for an adult who needs, or may need, another person to exercise power for the adult; and
- (c) states principles to be observed by anyone performing a function or exercising a power under the scheme; and

¹² Australian Government (2010). Australia's initial report under the Convention on the Rights of Persons with Disabilities. <https://www2.ohchr.org/SPdocs/CRPD/futuresession/CRPD.C.AUS.1-ENG.doc>

¹³ Australian Law Reform Commission (2014). Equality, capacity and disability in commonwealth laws. ALRC Report 124. https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_124_whole_pdf_file.pdf



- (d) encourages involvement in decision-making of the members of the adult’s existing support network; and
- (e) confers jurisdiction on the tribunal to administer particular aspects of the scheme; and
- (f) recognises the public trustee is available as a possible administrator for an adult with impaired capacity; and
- (g) provides for the appointment of the public advocate for systemic advocacy.

Section 14 of the *Guardianship and Administration Act 2000* provides criteria for the appointment of one or more eligible guardians and administrators. Provision (2) provides for the Public Guardian to be appointed as a guardian of last resort. To ensure that the appointment of the Public Trustee as administrator for a person is an appointment of last resort, we recommend that another provision be inserted underneath s14 provision (2) which states “Despite subsection (1)(b)(ii), the tribunal may appoint the public trustee or a trustee company under the *Trustee Companies Act 1968* as administrator for a matter only if there is no other appropriate person available for appointment for the matter”.

Guardianship and Administration Act 2000

14 Appointment of 1 or more eligible guardians and administrators

- (1) The tribunal may appoint a person as guardian or administrator for a matter only if—
 - (a) for appointment as a guardian, the person is—
 - (i) a person who is at least 18 years and not a paid carer, or health provider, for the adult; or
 - (ii) the public guardian; and
 - (b) for appointment as an administrator, the person is—
 - (i) a person who is at least 18 years, not a paid carer, or health provider, for the adult and not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the Bankruptcy Act 1966 (Cwlth) or a similar law of a foreign jurisdiction; or
 - (ii) the public trustee or a trustee company under the Trustee Companies Act 1968; and
 - (c) having regard to the matters mentioned in section 15(1), the tribunal considers the person appropriate for appointment.
- (2) Despite subsection (1)(a)(ii), the tribunal may appoint the public guardian as guardian for a matter only if there is no other appropriate person available for appointment for the matter.
- (3) Subject to section 74, no-one may be appointed as a guardian for a special personal matter or special health matter. Note— The tribunal may consent to particular special health care—see section 68 (Special health care).
- (4) The tribunal may appoint 1 or more of the following—
 - (a) a single appointee for a matter or all matters;
 - (b) different appointees for different matters;
 - (c) a person to act as appointee for a matter or all matters in a stated circumstance;



- (d) alternative appointees for a matter or all matters so power is given to a particular appointee only in stated circumstances;
 - (e) successive appointees for a matter or all matters so power is given to a particular appointee only when power given to a previous appointee ends;
 - (f) joint or several, or joint and several, appointees for a matter or all matters;
 - (g) 2 or more joint appointees for a matter or all matters, being a number less than the total number of appointees for the matter or all matters.
- (5) If the tribunal makes an appointment because an adult has impaired capacity for a matter and the tribunal does not consider the impaired capacity is permanent, the tribunal must state in its order when it considers it appropriate for the appointment to be reviewed. Note— Otherwise periodic reviews happen under section 28

We support recommendation 32b in full. Section 28 of the *Guardianship and Administration Act 2000* provides that a review of an appointment of an administrator other than the public trustee or a trustee company under the *Trustee Companies Act 1968* is to occur at least every 5 years. To ensure that the appointment of the Public Trustee and other trustee companies as a person’s administrator be subject to period review annually, we recommend that:

Section 28 of the *Guardianship and Administration Act 2000* be amended to remove the term of 5 years, and to insert the word “annually” instead; and

Provision (1) be amended to state that “The tribunal must review an appointment of a guardian or administrator including the public trustee or a trustee company under *the Trustee Companies Act 1968*”.

Guardianship and Administration Act 2000

28 Periodic review of appointment

- (1) The tribunal must review an appointment of a guardian or administrator (other than the public trustee or a trustee company under the *Trustee Companies Act 1968*)—
 - (a) for an appointment made because an adult has impaired capacity for a matter but the tribunal does not consider the impaired capacity is permanent—in accordance with an order of the tribunal, but at least every 5 years; or
 - (b) otherwise—at least every 5 years.
- (2) This section does not apply for a guardian for a restrictive practice matter under chapter 5B.

In addition, we recommend that section 14, provision 5 of the *Guardianship and Administration Act 2000* be amended to state that “If the tribunal makes an appointment because an adult has impaired capacity for a matter, the tribunal must state in its order that the appointment to be reviewed annually or sooner”.

Guardianship and Administration Act 2000

14 Appointment of 1 or more eligible guardians and administrators

- (1) The tribunal may appoint a person as guardian or administrator for a matter only if—



(a) for appointment as a guardian, the person is—

- (i) a person who is at least 18 years and not a paid carer, or health provider, for the adult; or
- (ii) the public guardian; and

(b) for appointment as an administrator, the person is—

(i) a person who is at least 18 years, not a paid carer, or health provider, for the adult and not bankrupt or taking advantage of the laws of bankruptcy as a debtor under the Bankruptcy Act 1966 (Cwlth) or a similar law of a foreign jurisdiction; or

(ii) the public trustee or a trustee company under the Trustee Companies Act 1968; and

(c) having regard to the matters mentioned in section 15(1), the tribunal considers the person appropriate for appointment.

(2) Despite subsection (1)(a)(ii), the tribunal may appoint the public guardian as guardian for a matter only if there is no other appropriate person available for appointment for the matter.

(3) Subject to section 74, no-one may be appointed as a guardian for a special personal matter or special health matter. Note— The tribunal may consent to particular special health care—see section 68 (Special health care).

(4) The tribunal may appoint 1 or more of the following—

- (a) a single appointee for a matter or all matters;
- (b) different appointees for different matters;
- (c) a person to act as appointee for a matter or all matters in a stated circumstance;
- (d) alternative appointees for a matter or all matters so power is given to a particular appointee only in stated circumstances;
- (e) successive appointees for a matter or all matters so power is given to a particular appointee only when power given to a previous appointee ends;
- (f) joint or several, or joint and several, appointees for a matter or all matters;
- (g) 2 or more joint appointees for a matter or all matters, being a number less than the total number of appointees for the matter or all matters.

(5) If the tribunal makes an appointment because an adult has impaired capacity for a matter and the tribunal does not consider the impaired capacity is permanent, the tribunal must state in its order when it considers it appropriate for the appointment to be reviewed. Note— Otherwise periodic reviews happen under section 28

Considerations around Recommendations

These recommendations are based upon the following considerations:

Assessment of capacity can vary according to the assessment tools and process used.

The *Guardianship and Administration Act 2000* does not mandate a specific capacity assessment tool, neither does the Queensland Capacity Assessment Guidelines. Although capacity is a legal concept, capacity is usually assessed by a health practitioner such as a psychologist or psychiatrist by



testing a person's cognitive abilities¹⁴. There is much debate among health practitioners as to which combination of cognitive abilities comprises decision-making capacity, and therefore there is much variability in the methods and measures used to evaluate decision-making capacity in the clinical context within and across jurisdictions¹⁵. Diagnostic tests of cognitive impairments do not provide "evidence" of capacity because they are not associated with a particular legal decision¹⁶.

Mental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity¹⁷. This is confirmed on the application for a declaration about capacity form which states "While anyone can carry out a capacity assessment, an assessment is just an opinion, and the results of the assessment can be reviewed or challenged"¹⁸.

In addition, assessment of capacity uses a 'bright line approach', where a person is considered either to have or not have the capacity to make decisions, rather than acknowledgement that a person's capacity can fluctuate¹⁹. Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity²⁰. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the

¹⁴ Clements, N., Clapton, J., & Chenoweth, L. (2010). Indigenous Australians and impaired decision-making capacity. *Australian Journal of Social Issues*, 45 (3), pp. 383-393. https://research-repository.griffith.edu.au/bitstream/handle/10072/36872/67312_1.pdf?sequence=1&isAllowed=y

¹⁵ John, S., Rowley, J., Bartlett, K. (2020). Assessing patients decision-making capacity in the hospital setting: A literature review. *Australian Journal of Rural Health*, 28 (2), pp. 141-148; Purser, K. J., & Rosenfeld, T. (2014). Evaluation of legal capacity by doctors and lawyers: the need for collaborative assessment. *Medical Journal of Australia*, 201 (8), pp. 483-485.

¹⁶ Barry, L. (2015). Capacity and vulnerability: How lawyers assess the legal capacity of older clients. *Journal of Law and Medicine*, 25 (1), pp. 267-282.

¹⁷ Committee on the Rights of Persons with Disabilities (2014). General comment No. 1 on equal recognition before the law. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

¹⁸ https://www.qcat.qld.gov.au/_data/assets/pdf_file/0005/100895/form-11-app-for-dec-about-capacity.pdf

¹⁹ Alston, B. (2017). Towards supported decision-making: Article 12 of the Convention on the Rights of Persons with Disabilities and guardianship law reform. *Disability, rights and law reform in Australia*, 35 (2), pp. 21-43. <https://journals.latrobe.edu.au/index.php/law-in-context/article/view/10/71#:~:text=Article%2012%20of%20the%20CRPD&text=This%20requires%20an%20ongoing%20emphasis,paternalistic%20'best%20interests'%20considerations>

²⁰ Committee on the Rights of Persons with Disabilities (2014). General comment No. 1 on equal recognition before the law. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>



exercise of legal capacity²¹. New, non-discriminatory indicators of support needs are required in the provision of support to exercise legal capacity.

Capacity for a person can fluctuate and/or be time-limited and can depend on the type of decision to be made.

The capacity assessment principles which are included in the Queensland Capacity Assessment Guidelines, state that capacity is decision-specific and time-specific, and that just because an adult lacks capacity for one decision does not mean they lack capacity to make other types of decisions.

The capacity assessment principles also state that capacity is specific to the time the decision needs to be made, and that an adult's capacity might change, for example, depending on the time of day. This is consistent with section 5 of the *Guardianship and Administration Act 2000*, where it is acknowledged that:

the capacity of an adult with impaired capacity to make decisions may differ according to –

- (i) the nature and extent of the impairment; and
- (ii) the type of decision to be made, including, for example, the complexity of the decision to be made; and
- (iii) the support available from members of the adult's existing support network.

Therefore, it is imperative to formally review the appointment of a substitute decision maker annually.

Substitute decision making is inconsistent with the Convention; supported decision making should be promoted.

The United Nations Committee on the Rights of Persons with Disabilities (the Committee) has repeatedly raised their concerns about Australia's interpretation of obligations under Article 12 of the Convention, in relation to substitute decision making regimes. For example, the most recent report raised concerns about Australia's lack of progress in abolishing the guardianship and administration system which is a substitute decision-making regime, and the lack of a time frame to replace the regime with supported decision-making systems²². The Committee recommended that Australia:

- review and withdraw the interpretative declaration on Article 12 of the Convention,

²¹ Committee on the Rights of Persons with Disabilities (2014). General comment No. 1 on equal recognition before the law. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

²² Committee on the Rights of Persons with Disabilities (2019). Concluding observations on the combined second and third periodic reports of Australia. <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsnzSGolKOaUX8SsM2PfxU7sdcBNJQCwIRF9xTca9TaCwj50InhspoVv2oxnsujKTREtaVWFXhEZM%2F0OdVJz1UEyF5leK6Ycmqrn8yzTHQCn#:~:text=The%20Committee%20considered%20the%20combined,held%20on%2020%20September%202019.>



- repeal any laws and policies and end practices or customs that have the purpose or effect of denying or diminishing the recognition of any person with disabilities as a person before the law, and
- implement a nationally consistent supported decision-making framework.

Capacity, as defined in Schedule 4 of the Guardianship and Administration Act 2000 and the Queensland Capacity Assessment Guidelines is for a matter or types of matters i.e. personal matters, health matters, and/or financial matters ²³.

There are no guidelines or requirements to differentiate between impaired capacity for a matter or types of matters, or permanent impaired capacity. The capacity assessment principles which are included in the *Queensland Capacity Assessment Guidelines*, and section 5 of the *Guardianship and Administration Act 2000*, acknowledge that capacity for an adult may fluctuate:

(c) the capacity of an adult with impaired capacity to make decisions may differ according to—

(i) the nature and extent of the impairment; and

(ii) the type of decision to be made, including, for example, the complexity of the decision to be made; and

(iii) the support available from members of the adult's existing support network.

Any restrictions on a person's exercise of legal capacity (a person with a disability is a holder of rights which entitles them to full protection of their rights by the legal system) should apply for the shortest time possible, be subject to regular review by an impartial authority, and proportional to the degree to which the restrictions affect the person's rights and interests.

This is required under Article 12 of the Convention, which states that:

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity (a holder of rights which entitles persons to full protection of their rights by the legal system) provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent, and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

This is consistent with section 5 of the *Guardianship and Administration Act 2000* which acknowledges that:

²³ The State of Queensland (2020). Queensland capacity assessment guidelines.
<https://www.publications.qld.gov.au/dataset/51d06fe1-10a5-4d33-ab13-0b86680e3640/resource/23e5bde1-40d7-4115-a15d-c15165422020/download/gld-capacity-assessment-guidelines-version-2-to-upload-28-04-21.pdf>



(d) the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent.

Cultural appropriateness of capacity assessment tools for assessing cognitive abilities of First Nations people and people from a CALD background

Research conducted with First Nations people in Queensland regarding their experiences of the Queensland guardianship and administration system found that tools commonly used to assess capacity are culturally inappropriate²⁴. Assessment tools and processes are usually culturally biased towards western Anglo-European culture, and therefore may produce incorrect results among people with CALD backgrounds.

Cultural appropriateness of the current guardianship and administration system for First Nations people and people from a CALD background.

The Queensland research also found that there are fundamental incompatibilities between the policies and practices of the guardianship and administration system, and First Nations people's values and culture²⁵. All informants replied that the guardianship and administration system in Queensland is very complex for white people, without introducing cultural differences. An example is the First Nations' cultural concept of 'shame', particularly about telling your business to someone else, and particularly a non-Indigenous person.

There is a stigma for Indigenous people about having other people making their decision, particularly white people. The process can be extremely damaging, they feel shame and humiliation.

A key cultural difference relevant for the system is that the framework is predicated on the individualistic nature of a culture, versus a cultural that is based on the collective. First Nations' cultural norms are based on group decision-making and the concept of reciprocity, whereas the guardianship and administration system does not allow for collective responsibilities, such as people sharing the financial responsibility for one person's debt. This is complicated when purchasing things

²⁴ Cadet-James, D., Cadet-James, Y., Chenoweth, L., Clapton, J., Clements, N., Pascoe, V., Rade, I K., & Wallace V. (2011). Impaired decision-making capacity and Indigenous Queenslanders, final report. School of Human Services and Social Work, Griffith University, Brisbane.

https://www.justice.qld.gov.au/_data/assets/pdf_file/0007/699208/indigenoqldersidmcfinalreport-dec-2011.pdf; The Office of the Public Advocate (2013). Research Insights Aboriginal and Torres Strait Islander Queenslanders with impaired decision making capacity.

https://www.justice.qld.gov.au/_data/assets/pdf_file/0003/447087/research-insights-atsi-people-with-impaired-capacity.pdf

²⁵ Cadet-James, D., Cadet-James, Y., Chenoweth, L., Clapton, J., Clements, N., Pascoe, V., Rade, I K., & Wallace V. (2011). Impaired decision-making capacity and Indigenous Queenslanders, final report. School of Human Services and Social Work, Griffith University, Brisbane.

https://www.justice.qld.gov.au/_data/assets/pdf_file/0007/699208/indigenoqldersidmcfinalreport-dec-2011.pdf; The Office of the Public Advocate (2013). Research Insights: Aboriginal and Torres Strait Islander Queenslanders with impaired decision making capacity.

https://www.justice.qld.gov.au/_data/assets/pdf_file/0003/447087/research-insights-atsi-people-with-impaired-capacity.pdf



such as cars and boats, where there is often collective ownership in First Nations' families and communities. This type of functional interdependence between family and community members is not catered for in the guardianship and administration system.

In addition, there is an understandable lack of trust in government agencies by First Nations' Queenslanders and their families:

The Public Trustee is not liked in general by Indigenous people. They say it's like going back to Mission Manager's days.

People feel there is not enough transparency and accountability to do with how their money is managed – particularly around the profit that the agency would make from investing the money they hold.

Questions were also asked about interest on monies held by the Trustee:

How much does the government and the Trustee benefit from use of "my money"?

Associated difficulties are the impacts of a lack of flexible policies and procedures with the guardianship and administration system for people living in rural and remote communities. A participant gave a lengthy report on the 'saga' of a person under the care of the Public Trustee who needed to buy new underwear. This person, who lived on an island, had to catch the ferry to the mainland, then a taxi to the shopping centre to get three quotes from shops for the underwear, then get the quotes to the public trustee. They then had to wait to get a cheque from the Public Trustee and finally try and cash the cheque which was a problem because there were no banks on the island.

A community member also stated that: *One old man walked an hour each week to get \$50 from the Trustee. Not only was it not enough for him to live on but he couldn't afford the bus ticket to get the money.*

Discussion highlighted the need to train and employ Indigenous people to work in the Office of the Public Guardian and the Public Trustee. There is a need for meaningful consultation and engagement with Indigenous people about a more culturally appropriate range of alternatives for First Nations people. Under section 11b of the Guardianship and Administration Act, the general principles which an administrator is required to consider, includes the following requirement:

5 Maintenance of an adult's cultural and linguistic environment and values

(1) The importance of maintaining an adult's cultural and linguistic environment and set of values, including religious beliefs, must be taken into account.

(2) Without limiting subsection (1), for an adult who is an Aboriginal person or a Torres Strait Islander, the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment and set of values, including Aboriginal tradition or Island custom, must be taken into account.

Supported decision-making could provide more autonomy for First Nations people and communities, reduce government intervention and lead to better outcomes for First Nations people with impaired capacity. Input by First Nations people into assessment tools and processes, communication mechanisms and service responses are vital to ensure a culturally appropriate, practical, and sustainable approach to supporting First Nations people with impaired capacity in the guardianship and administration system. This should also be replicated for people with CALD backgrounds.