

31 January 2024

Office of the Tasmanian Economic Regulator  
By email: [Kristan.Long@economicregulator.tas.gov.au](mailto:Kristan.Long@economicregulator.tas.gov.au)

Dear Madam,

## **Review into Public Trustee's Fees and Charges**

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This submission is made on behalf of The Law Society of Tasmania, a regulatory and representative body of the legal profession in Tasmania which advocates for a fair and just legal system for all Tasmanians.

Among its various functions, the Public Trustee (PT) was rightly recognised by the Bugg review for an important role it plays, in that it:

*"...provides Government with the source of representation and advice and professional services for Tasmanians, particularly people who are disadvantaged and whose means do not enable them to readily access legal advice and representation (emphasis added) for the orderly management of their estate and affairs".*

The PT holds a position of trust also in offering commercial legal services to the public. This includes will/instrument drafting, estate and trust administration.

The various reviews into the PT services, particularly the failings identified from clients sampled by the Bugg review, highlight how critical it is to ensure that all Tasmanians charged for legal services by the PT, whether commercial or CSO based, receive a service that meets the minimum standards in the legal services market; and that related fees and charges are lawful and are subject to the same professional standards applicable to the broader legal services industry in Tasmania.

### **The Scope of the Review**

Legal services, whether considered a primary service or a sub-service of those 'Services' listed in the [Terms of Reference](#) (ToR), are integral to PT's operations across the board. Consequently, any legal fees charged by the PT in performing these services, by necessity fall within the scope of this inquiry. It is imperative to examine how these legal services are priced, managed, and regulated within the broader context of the PT's service delivery. Otherwise, any assessment of financial efficiency, industry best practice, and the equity of fee structures risks being inaccurate and incomplete.

Further, the Society considers that while the ToR focus on the assessment of fees and charges for clients 'mandated by legislation to utilise' the PT's services, there are several reasons why the ToR wording implicitly requires an examination of both commercial and non-commercial PT services (including legal services).

### **The Inseparability of the Public Trustee's Commercial and Non-Commercial Services**

The present operational model of the PT appears to involve an inseparable interdependence between commercial and non-commercial services. Given shortfalls in government funding, the financial sustainability of CSO obligations appears to be underpinned by the revenue generated from commercial services (which presumably includes fees for legal services). This interplay directly impacts the fee structures, overall service delivery, and costs of service provision at the PT. It would seem impossible to assess fees and charges in a fictional vacuum of non-commercial services only.

A holistic and comprehensive scrutinisation of both commercial and non-commercial service fees of the PT is therefore essential to informing a review of the nature broadly set out in the ToR.

### **Transparency and Equitability in Fee Structures**

Subject to any subsidisations applied as a result of government public interest funding for low asset holders, a more transparent and accountable billing process, where charges are directly linked to the specific services provided, rather than a blanket commission approach, ought be considered. This fee-for-service model is crucial in ensuring that charges are both fair and reflective of the actual work undertaken.

The ToR's emphasis on simplicity and equity in fee structuring must, by necessity, encapsulate all services, including legal ones, again due to the interrelationship and interdependency of all services as noted above. The review should therefore include an assessment whether the fee structures for *all* services provided by the PT, including legal services (whether commercial or non-commercial), are transparent, equitably applied, and reflect the value of the work done.

The commission-based system used by the PT seems to enable another type of cross-subsidisation which is inequitable, particularly to mandated clients, in that fees charged to clients which exceed the value of work done are effectively subsidising services for other clients. Yet there is no clear rationale as to why a client under a TASCAT order (for example) should subsidise the administration of intestate estates.

When re-evaluating the PT's charging model for equity, an important observation to add is that a market comparison limited to other public trustees may not necessarily result in a just or equitable standard. The mere alignment with charging practices of other public trustees nationally or globally does not equate to equitable treatment, particularly for vulnerable represented persons.

## Market Comparison Mandate / Alignment with Market Standards

The requirement to compare the PT's fees with those in comparable markets, both nationally and internationally, naturally extends to its legal services. This comparison is vital to ensure that the fee structures are in line with industry standards and reflect market realities. The obvious comparator for legal services — e.g. in 'Estate Administration' — is the private legal sector. Accordingly, assessing whether the PT's fees are consistent with market standards should at the minimum include a comparison with Tasmania's private legal service fee standards **and** the regulation of those services.

This is a consideration not only for the competitive environment in which the PT operates, but also in relation to any CSO based legal services.

## Compliance with International Conventions

The review should consider the PT's compliance with international standards, such as the [United Nations Convention on the Rights of Persons with Disabilities](#), ensuring that fee structures uphold the rights and interests of all clients. In particular, OTTER is requested to review whether there are sufficient safeguards in place in the PT's fee scheme, to ensure that the scheme does not result in disproportionately high fees that disadvantage individuals, particularly those with low incomes. This might also be considered an Access to Justice matter. Further, whether charging fees without regard for income levels or that does not reflect *the value of the work done* may have a disproportionate impact on the financial resources of individuals on disability support pensions.

## Ethical and Fiduciary Obligations

The unique position of the PT, especially in its dealings with represented persons and vulnerable clients, calls for a review of its fee structures under ethical and fiduciary lenses. This is particularly relevant given the PT's quasi-monopolistic position in certain areas of service. This falls within the purview of ensuring fees reflect efficient service costs and are structured equitably, as stipulated in the ToR. This has been the approach of other PT reviews elsewhere in Australia<sup>1</sup>.

It is also submitted that the PT's legal services, including fees and charges, should be made transparently subject to the *Legal Profession Act 2007*\* and the regulation of the Legal Profession Board of Tasmania; with easily accessible associated information made available on the PT's website.

\*This would involve, inter alia, amending the *Legal Profession Act 2007* to include the PT as being subject to the Costs Disclosure provisions and in particular [Section 291](#): Disclosure of costs to clients. This section currently only applies to those falling within the Act's definition of '[law practice](#)' which might be updated to include the PT.

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<sup>1</sup> For example, see the findings of the [Office of the Public Advocate's Public Trustee Fees, Charges and Practices Report, January 2021](#).

## **Powers to Charge for Legal Services**

As the Bugg Review noted, the legislative basis for the Public Trustee's fees and charges is section 11 of the *Public Trustee Act 1930* (Tas).

The Society requests that this Review examine and report on the legislative source of the PT's power to charge for *legal services*.

## **Impact of Legislative Changes**

The ToR inclusion of "any other matters" relevant to fees and charges grants latitude to consider recent or impending legislative changes (e.g. to the Guardianship & Administration legislation). These changes could significantly influence the PT's legal service delivery and pricing, thus falling within the review's scope.

## **Competitive Neutrality Principle**

The Society takes this opportunity to note that investigating the commercial legal services of the PT, including its fees and charges, is also crucial under the principle of competitive neutrality. Given the PT's unique market position, it is imperative to ensure that its commercial operations do not unfairly compete with or disadvantage private sector legal service providers. This aligns with OTTER's role in responding to concerns about government businesses competing with the private sector, as established under the *Economic Regulator Act 2009*.

In association with that inquiry, the Society encourages an examination of whether the PT, which provides legal advice and services to *members of the public* should be removed from the carve out provisions of section 13 as well as the deeming provision of section 41 of the *Legal Profession Act 2007*, such that they are subject to the full regulatory oversight of the Legal Profession Board of Tasmania and the Law Society of Tasmania.

## **Conclusion**

Finally, it would seem that a way to circumvent some of the issues arising operationally, structurally and financially at the PT may be for OTTER or the Government to examine and advise upon the possibility of separating out the CSO and commercial services of the PT into two independent yet collaborative arms of the organisation, the first of which is fully funded by government and the other, a competitive entity, partially regulated by the same regulator that regulates the private legal services sector. Given the interplay between the financial, operational and fees/charging models at the PT, this would appear to be within the remit of this review. If not, a recommendation for further review would be welcomed by the Society.

We appreciate the diligent efforts of OTTER in undertaking this review within the short timeframe provided to it. The Society is available to offer assistance or clarification in relation to any other matter raised herein, where/as deemed appropriate by the

Regulator.

Attached is an extract of (relevant) submissions previously made by the Law Society in association with the Bugg Review / Independent Inquiry into the PT, which may also be of assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'F. Beattie', with a stylized flourish at the end.

**FRANCESCA BEATTIE  
DEPUTY EXECUTIVE DIRECTOR**

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## **2. Fiduciary and other professional obligations of the Public Trustee**

In addition to various statutory and other legal duties, the Public Trustee has fiduciary duties that arise in its capacity as the provider of legal services to members of the public; as a guardian of finances under an administration order (as is a person who exercises a power of attorney); as a trustee to beneficiaries; and as an executor or administrator of an estate.

Generally the signs of a fiduciary relationship existing include:

- a relationship of trust and confidence;
- an inequality of bargaining power;
- an undertaking by one party to perform a task or fulfil a duty in the interests of another party;
- the scope for one party to unilaterally exercise a discretion or power that may affect the rights or interests of another; and
- a dependency or vulnerability on the part of one party that causes that party to rely on another party.

The fiduciary has a number of legal duties to the other person, who by the very nature of the relationship is in a position of vulnerability or dependency. These fiduciary duties exist to protect the vulnerable party to the relationship from exploitation and harm.

Two of the key duties of a fiduciary are:

The 'no conflict rule' – the result of which is that a fiduciary is legally bound not to put their client's best interests ahead of their own; and

The 'no profit rule' – that the fiduciary must not use their position to make an unauthorised profit and must account for any benefit or gain.

### **Fees**

- The Committee is concerned by the fees the Public Trustee charges which on a percentage basis may have no correlation to the work being performed or the level of expertise required. The Committee's view is that charging on a percentage basis is out of step with community expectations and that the amount to be charged should relate to the work being done.

- With respect to the fees being charged by the Public Trustee upon appointment by the Guardianship and Administration Board as financial administrator the Committee refers you to the document entitled 'The Public Trustee and a Fair and Proportionate Fee Structure for Represented Person's prepared by Advocacy Tasmania and Community Legal Centres Tasmania. A copy is annexed to this submission. The Committee notes that a 6.6% fee on all income is still being charged to all clients with assets in excess of \$100,000.00.
- Another cause for concern is the Public Trustee's approach to charging clients who have assets. For example, at the end of a financial administration: '*a commission of 2.2% is taken on the current value of the assets which have not been realised during the administration*'. The Committee is concerned that the Public Trustee may not have undertaken any work in respect of these assets it seeks a commission for.
- Another example that shows how the percentage fee structure can result in an unjust outcome for the 'client' is the way the Public Trustee says they claim fees on assets realised during the financial administration. The fee on the first \$200,000 of assets administered in this way is 4.5% (\$9000.00). If the Public Trustee was closing a bank account worth \$200,000 it would in theory charge the same as if it was selling a property worth \$200,000, despite the fact that the level of work involved is significantly different. Even within closing a bank account there can be different levels of work required, for example the Public Trustee notes that it charges the same fees for realising assets as it does in administering an estate. Closing a \$200,000 bank account under an administration order is less involved than say closing a deceased bank account as that would most likely require obtaining a grant of probate or letters of administration. With respect to the amount itself, the Committee notes that a legal practitioner that charges a client \$9000.00 to realise a bank account worth \$200,000.00 can expect to face a complaint of misconduct by way of overcharging (explored further below).
- As an administrator, the Public Trustee charges 6.6% commission on the *receipt* of all income such as interest, dividends, pensions and recent income (where the Public Trustee is managing the property). 3.3.% commission is charged on rental income where the Public Trustee is not even managing the property. Further, a 1.1% investment management fee is applied (or 'may apply, according to the wording on its website) to invested funds not directly managed by it. The Public Trustee is profiting from the funds it is the very trustee of.
- As alluded to earlier in this submission, the Committee has also heard stories from solicitors where their clients appear to have been effectively

paying twice for the management of their superannuation fund. This being the result of the Public Trustee charging thousands of dollars to “manage” their superannuation; when it was already managed by the superannuation fund, and for which the client was also incurring fees.

- It is worth noting that excessive charging is a breach of fiduciary duty and professional responsibility that would ordinarily be reportable to the Legal Profession Board of Tasmania (explored further below).

### **Disclosures**

- Related to the Committee’s concerns around fees being charged by the Public Trustee is the Public Trustee incentivising its appointment as executor or attorney and what disclosure is being made to clients about likely fees.
- The Public Trustee normally charges fees for the preparation of Wills, Enduring powers of attorney and Enduring guardianships. However, their website states:

“A standard Will and enduring power of attorney are **prepared free** for Seniors and Australian Government Pensioner concession card holders **when the Public Trustee is appointed as executor/attorney** (card must be presented and only applies to one appointment per year).”

- It is not clear to the Committee why the appointment of the Public Trustee as executor or attorney or both in exchange for the waiving of a \$280 fee for a single person is appropriate or in the public interest. Anecdotal experience of Committee members is that the appointment of the Public Trustee does in the majority of cases result in a greater cost to the Estate than if a family member had been appointed or if the estate were administered by a private solicitor. This is supported by the brief analysis of charging commission considered above.
- Further, the web page contains limited information about the application of executor and attorney fees, and only a link to the Public Trustee’s Estate Administration Fees and Charges page.
- The Committee is concerned that there may be insufficient disclosure by the Public Trustee to clients of the fees it will charge if it acts as executor or attorney, in that clients do not understand the real prospective cost, as opposed to a family member, friend or private solicitor.

A range of Public Trustee fees and practices suggest that there are real questions as to whether the Public Trustee may be in breach of some of its legal and



fiduciary duties. Questions arise whether the fees reflect the cost of providing the services to administration clients or whether they are paying a premium on their fees to subsidise other Public Trustee services and community service obligations. A model such as that outlined above, which, amongst other things, allows a trustee or financial guardian to profit from the value of their clients assets through disposal / sale, or, indeed investment (with the power to decide on the investment strategy itself and then earn revenue from the client's funds), and charge disproportionate fees (with no or limited ability to obtain an independent review, for example similar to a courts' taxing officers, or the Legal Profession Board of Tasmania where legal fees are concerned) is entirely at odds with the many capacities in which the Public Trustee acts.

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