Ms Melinda Tubolec
Strategic Policy
Department of Justice and Attorney General

By email: Melinda.Tubolec@justice.qld.gov.au

Dear Ms Tubolec

RE: RESPONSE TO REQUEST FOR CONSULTATION – PUBLIC ADVOCATE RECOMMENDATIONS FOR GOVERNMENT

1. We acknowledge the Attorney-General's letter to us of 8 March 2022 about some of the recommendations identified in that letter. Comment was requested in relation to Recommendations 3, 11, 15, 24(c), 26, 29, 31 and 32, by 29 April 2022.

Impact of economic policy

2. Some matters raised involve economic policy in relation to which STEP is unable to comment apart from noting that it has, for centuries, been an important function of the State to protect vulnerable members of the community. While there may be no principled objection to vulnerable persons contributing to the management of their own affairs by a substituted decision-maker such as the Public Trustee, there is an objection in principle to some vulnerable persons subsidising (by the payment of fees) the provision of services to other vulnerable persons of lesser means. We consider that this practice must stop and, to the extent that there is a shortfall in the Public Trustee's operating budget, the State must fulfil its historic and moral obligation to fund that shortfall.

3. Consider the Effect of Fees when Appointing the Public Trustee as Administrator

3. We consider that the effect of fees should be considered when any administrator, including the Public Trustee, is under consideration for appointment. Thus, our view applies as much to the private trustee companies as it does to the Public Trustee. In order for useful comparisons to be made, it should be a requirement that persons under consideration for appointment (including the Public Trustee and the private trustee companies) provide information about their fees in a form that enables useful comparison.

11. Do Not Profit from Administration Clients Unless Expressly Permitted by Law

4. Subject to what we said under the heading, "Impact of Economic Policy", we support this recommendation. To the extent that persons under administration have the capacity to contribute to

the management of their own affairs by a substitute decision-maker, at least insofar as the Public Trustee is concerned, their contribution should not exceed the cost of providing services to them and should not subsidise:

(a) the provision of services to other vulnerable persons of lesser means, in relation to whom the State should fulfil its historic and moral obligation to fund the shortfall;

(b) the provision of other public services, eg, the part funding of legal aid and other CSOs (even if that is done through surpluses).

5. To an extent, it is inherent in the role it must fulfil that the Public Trustee will have a conflict, but that may be accepted if authorised by legislation, as obviously, the vulnerable persons for whom the Public Trustee acts will be unable to authorise the conflict. But the conflict so authorised should be limited and recognise the role the Public Trustee is discharging when acting as administrator for vulnerable persons. In short, when acting as an administrator, the Public Trustee should not occupy any more privileged position in relation to conflicts than any other administrator.

15. Limit the Amount of Public Trustee Surpluses and Reserves

6. If it is a matter of requiring specific legal permission to return a surplus, we should support that. The idea of returning surpluses above a given cap to clients appears attractive in principle but difficult in practice, and we are not sure what model is currently used to manage surpluses (and deficits), and the matter may require actuarial advice.

24(c) Review the Role and Operations of the Official Solicitor

7. The particular issue here is whether lawyers, providing legal advice and services to people under administration, should be required to hold practising certificates and be subject to oversight by the LSC.

8. In practice, for this oversight to be effective, it would be necessary to ensure that administration clients (who may lack the capacity or ability themselves to make a complaint to the LSC) can have a complaint made on their behalf by family members or supporters.

9. Lawyers acting in governmental roles are particularly exposed to complaint by citizens, and particularly given some of the difficult and emotive family situations in which the Public Trustee is thrust as an administrator for a vulnerable person, there is perhaps a higher risk of vexatious complaints being made. The decisions that may have to be made by an administrator, acting objectively, in accordance with their duty and in accordance with advice, will not always meet with the approval of family members and supporters. So long as that is recognised and adequate support mechanisms are in place for an officer facing complaint, there is no principled reason to oppose the idea of lawyers employed within the Official Solicitor's office meeting the same ethical and practice

requirements as lawyers employed in a private office doing similar work, particularly if the Official Solicitor is charging fees on a commercial basis but keeping the work in-house rather than competing for that work with commercial law firms.

10. The LSC is designed as a specialist regulator, and may be in a better position to deal with complaints, than existing mechanisms.

11. There are occasions of which our members are aware where legal advice is obtained from the Official Solicitor, and where the Official Solicitor seeks advice from external legal practitioners, such as barristers, where that could be criticised as overly cautious, and in some cases, done to afford the Public Trustee protection against criticism. We agree that there ought be a base level of expertise, both among the Public Trustee's officers and the Official Solicitor's, to ensure that advice is sought not as a matter of course, but only when reasonably required. However, that is likely to require improved staff training and support, and the retention of experienced staff who are prepared to make decisions, rather than sub-contract the making of decisions.

12. But on the other hand, it must be appreciated that in the discharge of an administrator's duty, (whether the administrator is the Public Trustee or someone else) legal advice will have to be sought, considered and acted upon. As we have said, the decisions that may have to be made by an administrator, acting objectively and in accordance with their duty, will not always meet with the approval of the vulnerable person, their family or supporters. Indeed, family members or supporters may themselves have a conflict of interest which makes it difficult for them to criticise, eg, where there has been misappropriation of the vulnerable person's assets by a family member or supporter, or where a family provision application is recommended to be made on behalf of a vulnerable person in circumstances where that may affect the interests of family members or supporters. In contentious circumstances it will be entirely appropriate for an administrator, including the Public Trustee, to take advice from an appropriately experienced legal practitioner, whether within the Official Solicitor's office or externally.

13. In doing that, it seems clear that the Official Solicitor's client cannot be, or should not be, regarded as being the Public Trustee. When the Public Trustee acts as an administrator, it acts as an agent not as a trustee, and as such, the Official Solicitor's client is the vulnerable person subject to administration. That is the guiding principle which should be borne in mind when the Official Solicitor is retained by the Public Trustee on behalf of an administration client.

14. Where there is the potential for the Public Trustee's corporate interests to be affected by advice sought for or in relation to an administration client, then with respect, it is entirely inappropriate for the Official Solicitor to act for the Public Trustee itself and also on behalf of the administration client. In that regard, we consider that there should be a clear delineation which preferably would be achieved by the creation of completely separate offices, namely:

(a) the office of the Official Solicitor, whose function is **only** to act in relation to matters in which it is retained by the Public Trustee on behalf of an administration client, or as a personal representative or trustee, or administrator of prisoner's property, etc. Like any other client, if advice is properly and reasonably obtained, the "client" should pay for it;

(b) an entirely separately staffed and situated office of the Corporate Solicitor to the Public Trustee, whose function is limited to advising and acting for the Public Trustee in its corporate capacity. The cost of providing this legal advice should be met not by administration clients, or estates under administration, etc, but by the Public Trustee through its operating budget.

15. We agree also that, as a matter of law, legal advice obtained by the Public Trustee on behalf of a vulnerable person could not be regarded as privileged as between the Public Trustee and the vulnerable person. Such advice is effectively sought by the Public Trustee on behalf of the vulnerable person, and thus, it belongs to the vulnerable person. But the disclosure of that advice raises difficult problems. In many cases, there will be no utility in providing such advice to the vulnerable person, because they will not be able to consider and respond to it, or at least, consider and respond to it in their own objective interests. That raises the question whether such advice should be disclosed to the vulnerable person's family members or supporters so as to ensure transparency and accountability. In principle, that would be desirable. But it could only occur if:

(a) the person to whom the advice is disclosed has no conflict of interest in relation to the subject matter of the advice; and

(b) confidentiality and legal professional privilege are preserved. That is something that may be difficult to achieve.

16. Ultimately, where there is tension between transparency and accountability on the one hand, and the protection of the interests of the vulnerable person on the other, the latter must prevail. But consideration should be given to whether a mechanism can be devised which would enable some degree of oversight by family members or supporters without compromising the vulnerable person's interests. A suggestion, in that regard, is made below.

17. We think the Public Trustee should always be circumspect where it participates in proceedings in QCAT concerning, eg, whether an administration client has capacity, reviews of its appointment, or its replacement as administrator. It should almost never take a partisan or adversarial stance in such proceedings. Its role should be to act in a manner analogous to an *amicus curiae*, by providing relevant information to assist the decision-making body, whether that be QCAT or the court, and then to abide the decision. Where the Public Trustee is an administrator, it should facilitate any application that the vulnerable person may wish to make to review their own capacity to make decisions or the Public Trustee's appointment as their administrator, including by facilitating the adult being independently legally represented.

18. There should be a transparent process to, in effect assess, fees and outlays charged to administration clients by the Official Solicitor.

26. Amend Legislation so Public Trustee Solicitors are Overseen by the Legal Services Commission

19. This recommendation is more specific than the one dealt with under the previous heading. Regardless of the means of regulation, it would seem appropriate that solicitors employed by the Public Trustee should be subject, while performing their roles, to the fundamental duties of solicitors as set out in the Australian Solicitors Conduct Rules ("ASCR").

20. As noted above, there is no principled reason to object to the LSC being able to conduct and prosecute disciplinary matters. The only caveat we point to in that regard is whether it is considered that existing accountability mechanisms are better adapted to the role undertaken by such an employee provided such mechanisms ensure that accountability is measured against the fundamental duties of solicitors as set out in the ASCR.

21. Whichever regulatory model is chosen, there must be transparency, starting with a "no wrong door" approach to making a complaint about service by a lawyer engaged by the Public Trustee.

29. Amend Legislation to Clarify how the Public Trust can Invest Client Funds

22. The recommendation could not be objected to in principle. Clarification which particularly addresses areas where an investment might amount to a conflict of interest would be of assistance, as it would provide guidance to the Public Trustee in performing its public role.

23. Some of our members are concerned by the "one-size-fits-all" approach that is taken to investment, and the nearly invariable practice of investing in the Public Trustee's own preferred investment products, which often puts the Public Trustee in a position of conflict through the "earning" of management fees. That conflict is an obvious one that should be addressed when defining the fees which it is permissible for the Public Trustee to charge.

24. In perhaps the majority of cases in which the Public Trustee is appointed as administrator, the vulnerable person will have few assets and a small income, often a pension. In those cases, the best course may be to invest in the Public Trustee's own investment products.

25. In other cases, administration clients may have very substantial assets. For example, they may receive large damages awards or receive large inheritances. In other cases, administration clients might already have their own investments in place. In each case a bespoke approach to investment decisions is required, and it ought be within the scope of the Public Trustee's operating budget to employ its own qualified financial advisers. In some cases, it will remain necessary to seek external financial advice.

26. Where an administration client has their own investments in place, the Public Trustee (and other professional administrators, such as the private trustee companies), should first consider whether any change is required rather than, as they seem currently to do, to move immediately to realise existing investments and then invest in their own investment products. *First*, the classic treatises suggest that it was "a ruling principle … not to interfere with the lunatic's property more than the circumstances of the case require": *Theobald on Lunacy*, 1924 ed, p 440. The current law suggests no different principle – it will only be where a prudent person would not leave an administration client's existing investments in place that a change of investment will be required. *Secondly*, changing investments as a matter of course involves "churn", which may result in unnecessary taxes and fees being incurred and may not result in any better investment return which would make the exercise worthwhile. *Thirdly*, changing investments as a matter of course may upset the administration client's succession planning. And *finally*, a reason why professional administrators bring investments in house is to minimise their own risk of liability, which of course, involves yet another conflict between interest and duty.

27. Insofar as the Public Trustee is concerned, these may be matters that should be addressed via internal policy documents, rather than legislatively. But that is a matter for further consideration.

31. Update the *Public Trustee Act* to Better Acknowledge Rights and Interests of People with Impaired Decision Making Capacity

28. We consider that the *Public Trustee Act* is in need of review and modernisation generally.

29. We are not convinced that that necessarily requires the Act to restate principles acknowledging the rights and interests of people with impaired decision-making capacity where those rights are already elucidated in the legislation which governs the Public Trustee when it is acting as an administrator, namely the *Guardianship and Administration Act*.

32. Amend Legislation to Ensure Public Trustee is an Appointment of Last Resort and the Appointment is Periodically Reviewed

30. We support the proposal, but would prefer to express it somewhat differently. What should occur is that the decision-making body, usually QCAT, should *first* consider whether there is an appropriate appointee or appointees apart from the Public Trustee (and, we might add, the private trustee companies).

31. Where nonetheless the Public Trustee is considered for appointment, consideration should be given to whether:

    (a) there is an appropriate family member or supporter of the vulnerable person who should be a co-appointee with the Public Trustee. Most of the time, the needs and wishes of a vulnerable person will be best known to their closest family members or supporters. They are not

susceptible to being known by a bureaucratic organisation. The appointment of an appropriate family member or supporter (where there is such a person able and willing to act) will likely result in better and more timely decisions being made, and also provide a level of oversight and accountability;

(b) if there is no family member or supporter able and willing to be appointed as a co-administrator, it may nonetheless be the case that there is such a person who can be designated as a person with whom the Public Trustee, as administrator, should regularly consult in relation to the vulnerable person's needs and wishes. Such a designated person could also be given standing to make complaints or bring matters of concern before QCAT.

32. This area of law – the appointment of administrators for vulnerable persons who have power to make decisions not only affects that person's financial affairs – affects those persons (and their families and supports) in the most personal and intimate ways. The ramifications of the decisions that are made can affect people in their lives in ways that are as serious as any matter dealt with in even our highest courts, yet the making of these decisions is committed to our lowest tribunal, QCAT, which, with great respect, frequently makes low-quality decisions on the basis of low-quality material where parties are not permitted legal representation without leave.

33. The area is one in which high-quality decision-making is a must – both as to the appointment and review of the appointment of administrators, and by administrators themselves. The system that is in place, with respect, does not lead to that outcome:

(a) Self-represented parties are often unable to adequately represent themselves;

(b) Evidence is frequently basic, general or scant. The rules of evidence do not apply, but that should not mean, in such an important area, that life-shaping and changing decisions can be made on the basis of unsatisfactory material;

(c) Decisions seem to be frequently made in advance of hearings and cannot be altered by advocacy at hearings: in other words, decisions can have the feel of being a *fait accompli*. Alternatively, decisions are not made at all and the "can gets kicked down the road".

34. We consider that broader consideration should be given to improving these decision-making processes so that:

(a) There is a presumption that parties who wish to be legally represented can be;

(b) The quality of the evidential material on which QCAT acts is improved;

(c) Decisions are made by persons having the status of District Court judges, given the life-shaping and life-changing decisions that are being made.

35. We trust that the above is useful in forming policy. The written word can only take us so far, however, and we would welcome the opportunity for further formal or informal engagement, at your convenience.

Submission by Society of Trust and Estate Practitioners – Queensland Branch

Friday, 6 May 2022

Sent by:

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About STEP:
We the Society of Trust & Estate Practitioners Queensland (STEP Qld) represent professionals from across Queensland who are specialists in trusts, estate planning and in supporting the needs of families (young and old, wealthy and modest). The objective of a STEP Professional is to advance the interests of families across generations. This often involves us in identifying issues of relative importance to families and bringing these to the attention of those who can make a positive difference. This is the purpose of this submission.