Dear Ms Vaughan

FACS comments on the proposed NSW Trustee and Guardian Regulation 2017 and Regulatory Impact Statement

Thank you for the opportunity to provide comments on the proposed NSW Trustee and Guardian Regulation 2017 (Regulation) and Regulatory Impact Statement (RIS).

The Department of Family and Community Services (FACS) supports the proposed new Regulation and RIS, in principle, and proposes the following issues for your further consideration.

Including a non-exhaustive list of factors to be considered when determining a ‘just and reasonable’ fee into the legislation

The term ‘just and reasonable’ is used a number of times in the proposed Regulation. In particular, clauses 12, 18, 19, and 22 all authorise the NSW Trustee to charge a fee that it ‘determines to be just and reasonable’.

However, neither the NSW Trustee and Guardian Act 2009 (Act) nor the proposed Regulation provide any guidance on what constitutes a ‘just and reasonable’ fee or the factors that may be considered when determining if a fee satisfies this criteria. While the term ‘reasonable fee’ (when used in isolation in the proposed Regulation) is always limited by a maximum fee, typically expressed as ‘not exceeding specified amount’, no similar limitation is applied to a ‘just and reasonable’ fee in the legislation.

FACS considers that there would be some benefit in including a non-exhaustive list of circumstances to which the NSW Trustee must have regard when determining what is a ‘just and reasonable’ fee to be charged. Doing so will provide accountability for the NSW Trustee and clarity for its clients. FACS notes that subsections 17(3) and (4) of the Public Trustee Act 1978 (Qld) may be helpful on this issue.

Incorporating the factors contained in the NSW Trustee’s Fees – Waiver, Remission, Deferral and Reduction – Policy into the legislation

The Act authorises the NSW Trustee to charge fees in respect of its functions, and also gives it discretion to waive, remit or reduce any fees payable to it under subsections 111(1) and 111(3). Section 128(2)(c) further provides that regulations may be made for, or with respect to, the waiver or reduction of costs by the NSW Trustee.

However, neither the current nor the proposed Regulation provide for the waiver or reduction of fees charged by the NSW Trustee. As a result, there is no guidance (in statute) for clients who may want to avail themselves of these provisions.
We note that the NSW Trustee's Fees – Waiver, Remission, Deferral and Reduction – Policy currently lists factors that must be considered by delegated officers who are considering whether to waive, remit or reduce a fee. These factors include:

- the size of the estate
- the client's needs
- the estate's commitments and liabilities
- whether the payment of the fees can be deferred
- whether the estate could pay for the fees over time
- whether the estate can make a part payment
- whether the client would suffer any financial or other hardship in paying the fees
- the impact of any decision on NSWTG's funding should it be applied to similar estates.

FACS recommends that consideration be given to incorporating this list into the legislation as this will promote the accountability of the NSW Trustee and provide greater clarity for its clients. We note that a similar provision currently exists in the Public Trustee and Guardian Act 1985 (ACT), which explicitly provides that the public trustee and guardian can waive or reduce a fee if s/he is satisfied that payment of the fee would cause 'hardship' on a person or 'other circumstances exist to justify such action' (section 28(4)).

Clarifying the NSW Trustee's disclosure obligations when acting as a 'private law practice' under clause 10(2) of the proposed Regulation

Clause 10(2) of the proposed Regulation now makes it clear that the NSW Trustee may charge fees (and other costs) for providing legal advice or conducting legal proceedings, which would be calculated on a for profit basis as if the NSW Trustee were a private law practice and not a NSW Government agency. However, it is unclear if this provision is intended to create corresponding cost disclosure (or other) obligations upon the NSW Trustee under the Legal Profession Uniform Law (Legal Profession Law).

Section 174 of the Legal Profession Law requires law practices to disclose their costs to their clients, including – among other things – the basis on which legal costs will be calculated, estimated likely costs and changes in legal costs payable by the client. Law practices must also inform clients of their right to negotiate a costs agreement and a billing method, their right to receive and request an itemised bill, and their right to seek assistance to challenge legal costs.

On the information available to FACS, it is not clear if consideration has been given to the corresponding obligations that the NSW Trustee will need to satisfy when providing services (and charging fees) as a private law practice. FACS recommends that this issue be clarified, and appropriate information for clients developed.

If you have any questions about this comment, please contact Jemi Jeng, Senior Project Officer on (02) 8879 9098 or at jemi.jeng@facs.nsw.gov.au.

Yours sincerely

Alana Starke
General Counsel, FACS Legal

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