

# **Regulatory Impact Statement**

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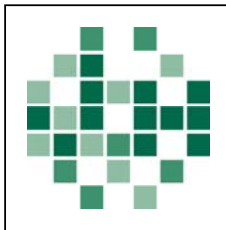
## **Protected Estates Regulation 2003:**

**To be made under the  
Protected Estates Act 1983**

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***Office of the Protective Commissioner***

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**1. EXECUTIVE SUMMARY**

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**(a) Background**

The Protected Estates Regulation 1995 is being reviewed because the Subordinate Legislation Act provides for Regulations to have a limited life. In most cases regulations are automatically repealed 5 years after they are made. When a Regulation is due for repeal, the responsible agency must review the Regulation, its social and economic impacts, and make a decision about whether the Regulation should be remade. A Regulatory Impact Statement (RIS) must examine alternatives to the remaking of the regulation, and their costs and benefits. The results of this review are required to be published in a RIS and submissions invited from the public.

It is proposed to make a new regulation, to be called the Protected Estates Regulation 2003, under s.81 of the Protected Estates Act 1983. The Protected Estates Act 1983 establishes the Office of the Protective Commissioner and the framework for managing the property and affairs of people who are incapable of managing on their own because of a disability

An important focus of the existing regulation and the proposed regulation is the setting of fees that the Protective Commissioner may charge for the services provided by the Office of the Protective Commissioner (OPC).

**(b) Summary of Proposal**

The proposed regulation is largely the same as the existing regulation.

The only significant proposed changes relate to the fees that OPC may charge its clients (protected persons whose estates are managed by OPC). These are dealt with in clause 4 of the existing regulation.

It is not proposed at this time to change the fees payable in respect of the role performed by OPC in authorising and directing other persons appointed as managers of the estates of protected persons. These are found in clauses 4(1)(d),(g) and (h) of the existing regulation.

At present OPC charges clients a fee on the gross capital realised or collected in an estate (cl.4(1)(a)). The fee is charged on a sliding scale from 4 per cent on the first \$100,000 to 1 per cent on the excess above \$300,000. The proposal is to abolish this fee.

OPC also charges a fee on the gross income received in an estate, other than by way of rents that are subject to an agency charge for collection (cl.4(1)(b)). This fee

is set at a maximum of 5.25 per cent, although in practice OPC charges only 2.5 per cent on Centrelink benefits. The proposal is to abolish this fee.

OPC charges a fee on the gross income received by way of rents that are subject to an agency charge for collection. This fee is set at a maximum of 2.5 per cent. The proposal is to abolish this fee.

The proposed new Regulation would introduce a new fee for the ongoing management of client estates. It is proposed to charge during the first year of OPC's management a fee of 2.1 per cent of the total value of the client's assets. In subsequent years, a fee of 1.1 per cent of the total value of the client's assets would be charged.

The total value of the client's assets for the purposes of the ongoing management fee will not include the value of the client's principal place of residence.

It is also proposed to introduce a new fee for the management of client investments in OPC's investment funds. A fee of 0.5 per cent of the value of those investments will be charged.

The existing power to charge a fee for the investigation, preparation or lodgment of a return required of a client by a taxation authority (cl.4(1)(e)) and to charge a reasonable fee for other services provided or other disbursements incurred in the management of a client's estate (cl.4(1)(h)) are retained in the proposed Regulation.

OPC's proposed fee structure is outlined in the Table below, together with a comparison with the current Regulation fee structure.

Fee Category	Proposed 2003 Fee	1995 Fee Regulation
Capital Fee on Assets	None	Asset "up front" fee on capital calculated on a sliding scale as follows: <ul style="list-style-type: none"> <li>• 4% on the first \$100,000 received;</li> <li>• 3% on the second \$100,000;</li> <li>• 2% on the third \$100,000;</li> <li>• 1% on funds over this amount.</li> </ul>
Fee on Income	None	Fees on client income ranging from 2.5% (e.g. of pensions) to 5.25% (e.g. of dividends).
Ongoing Management (in respect of the value of all client assets, excluding client's principal place of residence)	2.1 % in Year 1 1.1% p.a. thereafter	None
Investment Management	0.5 p.a. of investment value	None
Income Fee – Private Mgt only	No change to 1995	4% per annum on the net annual income

Fee Category	Proposed 2003 Fee	1995 Fee Regulation
Tax Return preparation and lodgement	No change to 1995	Such reasonable fee ..... as the Protective Commissioner may fix.
Financial Plan development	No change to 1995	Such reasonable fee ..... as the Protective Commissioner may fix.
Filing, examination & passing of accounts – Private Mgt only	No change to 1995	Such fee (not exceeding \$100) ..... as the Protective Commissioner may fix.
Other Services	No change to 1995	Such reasonable fee ..... as the Protective Commissioner may fix.
Goods and Services tax	No change to 1995	May charge the amount of any GST payable.
Other Funds	Contribution by Gov't No change	Not explicitly provided for Section 55 Transfer

### (c) Effect of Proposal

The anticipated effect of the proposed changes to the Regulation is that OPC clients will, in total, pay less than they presently pay.

OPC considers that the revenue raised by fees will increase from its present level and clients will pay more in fees. However, the total amount paid by clients will be less because OPC anticipates there will no longer be any need to take money from client investments under s.55(1)(c)(i) of the Protected Estates Act. At present the transfer of this money to help pay for the cost of OPC's operations effectively imposes a cost on clients even though it is not called a fee.

Some examples of the amounts presently charged by OPC and the amounts proposed to be charged can be found commencing at page 25 of this Regulatory Impact Statement.

The proposed fee structure will also reduce the present cross-subsidisation by some clients of other clients. This is because the Government will fund some of OPC's costs in providing services to clients who cannot afford to fully pay for those services.

The Government has agreed to make an appropriation for OPC to make up the difference between the amount OPC would have received in fees and transfers under the existing arrangements and the amount it will receive under the proposed regulation. It is anticipated this amount will be in the vicinity of \$9 million in the first year of the new fees.



## 2. INTRODUCTION

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### 2.1 Purpose of This Document

This document is a Regulatory Impact Statement (RIS) for the proposed Protected Estates Regulation 2003. The regulation is proposed to be made under the Protected Estates Act 1983 and will prescribe, among other things, the fees that may be charged for the services provided by the Office of the Protective Commissioner (OPC).

The proposed Regulation will replace an existing Regulation titled Protected Estates Regulation 1995.

### 2.2 What is a Regulatory Impact Statement?

The preparation of a Regulatory Impact Statement is required under the *Subordinate Legislation Act 1989*.

In an effort to reduce unnecessary regulation, this Act requires departments and authorities to consider the economic costs and social aspects of any new regulation and to consider different ways of meeting that regulation's objectives.

The Act requires public consultation before making a Regulation and requires the identification of the option which produces the greatest net benefit to the community or least net cost to the community.

The RIS must include:

- A statement of the objectives of the regulation and the reason for them.
- An identification of the alternative options by which those objectives can be achieved, either wholly or in part.
- An assessment of the costs and benefits of the proposed regulation, including the costs and benefits relating to resource allocation, administration and compliance.
- An assessment of the costs and benefits of each alternative to the making of the regulation, including the costs and benefits relating to resource allocation, administration and compliance. This assessment must include the alternative of not proceeding with any action.
- An assessment as to which of the alternatives involves the greatest net benefit to the community or least net cost.
- A statement of the consultation program to be undertaken.

## 2.3 Submissions

Submissions are invited on any aspect of the proposed Regulation.

The final date for receipt of submissions is Monday 8<sup>th</sup> September 2003.

Please send submissions to:

Protected Estates Regulation Review  
Legislation and Policy Division  
Attorney General's Department  
GPO Box 6  
Sydney NSW 2001

or

Facsimile : 02 9228 8563

Submissions may also be delivered to:

Level 20 Goodsell Building  
8 – 12 Chifley Square, Sydney

## 2.4 Additional Information

Additional copies of this RIS are available from the Attorney General's Department website at [www.lawlink.nsw.gov.au/lpd](http://www.lawlink.nsw.gov.au/lpd) or by telephoning (02) 9228 8103.

Copies of the Protected Estates Act 1983 and the Protected Estates Regulation 1995 are available from:

- NSW Government Bookshop, Goodsell Building, 8 – 12 Chifley Square, Sydney; and
- The internet at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au)

## 2.5 Development of the Regulation Content

### 2.5.1 Review of OPC's Present Fees and Funding Arrangements

A number of reviews have been undertaken by the following bodies over recent years which have raised concerns regarding the fairness and ability to clearly identify the source of OPC's fees and funding arrangements:

- Independent Pricing & Regulatory Tribunal of New South Wales, 2003;
- Council on Cost and Quality of Government, 2001;

- Public Bodies Review Committee of the NSW Legislative Assembly, 2001; and
- NSW Audit Office, 1999.

The results of these reviews have influenced the proposed Regulation content.

## 2.5.2 Proposed Regulation Content

The proposed Regulation contains the provisions outlined in the Table below.

**Table 1: Proposed Regulation Content**

Clause	Title
1	Name of Regulation: Protected Estates Regulation 2003
2	Commencement date: 1 October 2003
3	Definitions: as per the definitions in clause 3 of the existing Regulation
4	Fees payable to the Protective Commissioner
5	Information relating to Magistrate's inquiry as to patient's capability to manage affairs: as per existing Regulation
6	Form of order or interim order that estate be managed under the Act: as per existing Regulation
7	Medical superintendent to notify Protective Commissioner of certain orders: as per existing Regulation
8	Medical superintendent to notify Protective Commissioner of certain events: as per existing Regulation
9	Review by ADT of estate management decisions of Protective Commissioner: as per clause 8A of the existing Regulation
10	Restriction on Protective Commissioner's discretion to deal with certain estates – prescribed amount: as per clause 9 of the existing Regulation
11	Saving
Schedule 1	Information to be given to a person detained: as per existing Regulation
Schedule 2	Information to be given to nearest relative, guardian and friends of person detained: as per existing Regulation
Schedule 3	Notice of order or interim order for management: as per existing Regulation

As noted above, many of the provisions of the 1995 Regulation have not been changed as they are essentially machinery provisions. These provisions are not considered in detail and include clauses 1,2,3,5,6 and 12.

Furthermore it is not proposed to retain clause 11. Although this transitional provision is not scheduled to expire until November 2003, it is considered that OPC already complies with the Act's investment provisions and the need for the transitional provision has passed.

Those remaining clauses that affect the rights of individuals and have an impact on the community are considered in detail in section 6.3.4, namely clauses 4, 7,8,9 & 10.

## 2.6 Consultation

This RIS is being provided to the following bodies in accordance with the requirement of s.5 (2)(b) Subordinate Legislation Act 1989 that consultation is to take place with the public and appropriate representatives of consumers, relevant interest groups, and any sector of industry or commerce, likely to be affected by the proposed statutory rule (regulation):

- Supreme Court;
- Guardianship Tribunal;
- Mental Health Review Tribunal;
- Office of the Public Guardian;
- Alzheimer's Association;
- Brain Injury Association;
- Council for Intellectual Disability;
- Council on the Ageing;
- Disability Council of NSW;
- Intellectual Disability Rights Service;
- Mental Health Co-ordinating Council;
- Multicultural Disability Advocacy Association;
- People with Disabilities;
- Schizophrenia Fellowship of NSW;
- Law Society;
- Bar Association;
- NSW Department of Aging, Disability and Home Care;
- Public Trustee;
- Perpetual Trustee; and
- Community Legal Centres.

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### 3. OPC BACKGROUND

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#### 3.1 Who is the Protective Commissioner?

The Protective Commissioner is an independent public official appointed to protect and manage the financial affairs and property of people unable, because of disability, to make financial decisions for themselves. The Protective Commissioner also supervises private managers (family members, friends, professional managers and trustee companies) who have been appointed by the Guardianship Tribunal or NSW Supreme Court to administer an individual's financial affairs.

The Office of the Protective Commissioner was established in 1985 in its present form under the Protected Estates Act 1983.

#### 3.2 Where do the Protective Commissioner's Functions come from?

The Protective Commissioner's functions are found in:

- Protected Estates Act 1983;
- Guardianship Act 1987; and
- Mental Health Act 1990.

The Protected Estates Act 1983 provides for the management of the property and affairs of persons who are incapable of managing their own affairs by reason of mental or other disability.

#### 3.3 How does the Protective Commissioner become involved?

An application for a financial management order is usually made to the NSW Guardianship Tribunal or the NSW Supreme Court, Mental Health Review Tribunal or Magistrate by someone with a concern for the welfare of a person who is having serious difficulty in managing their own affairs. In most instances, the applicant is a family member, friend, social worker or health care professional.

A financial management order is a legal decision to appoint the Protective Commissioner (or a private individual or trustee company, under the supervision of the Protective Commissioner), to manage the financial affairs of a person.

For the period 1 July 2002 to 30 June 2003 1,366 orders were made in total from the following sources:

- 50 - Supreme Court;

- 1,063 – Guardianship Tribunal;
- 53 – Magistrate; and
- 200 – Mental Health Review Tribunal.

### **3.4 Who Are OPC's Clients**

#### **3.4.1 Disability Diversity**

People whose financial affairs are managed by OPC usually have a cognitive disability. Broadly, this disability may be caused by the following factors:

- Psychiatric illness;
- Dementia;
- Age-Related disabilities;
- Brain Injury;
- Developmental disability;
- Physical & other disabilities.

The diversity of these disabilities and the various degrees of severity within each presents OPC with a wide range of client needs. This diversity means that some clients require a greater number of services than other clients. In addition, for any particular service, such as distribution of a regular living allowance, some clients require a more frequent degree of interaction with OPC than others. For example, some clients require daily cash advances from the Client Service Centre. Others have the capacity to attend a banking institution and withdraw funds set aside by OPC for their living allowance on a less frequent basis, managing their cash flow for the intervening periods.

To ensure the needs of clients and their dependents are met, clients are consulted and, for those who may not be able to clearly express their needs, OPC often consults with family members and friends. This consultation is to ensure client lifestyle ambitions are understood and can continue to be met to a standard matching the client's financial resources. This participation and consultation process can add a layer of complexity to the task of making financial decisions on behalf of clients. For example, there can be confusion or doubt amongst friends or family members as to the appropriateness of such decisions requiring careful explanation by OPC to achieve a level of agreement that the decision is appropriate to the client's needs.

In particular OPC needs to have regard for:

- the person's previous, current and hoped for lifestyle;
- the person's immediate and long term needs;
- the availability of financial resources;
- any request, plan or objective of any guardian of the person;
- the person's family commitments and obligations;
- any arrangement made by the person when competent; and
- any other relevant factor.

### 3.4.2 What Services do Client's Need

Services provided by OPC include:

- protecting assets and legal rights;
- facilitating the buying and selling of a home;
- organising an adequate cash flow for day-to-day needs;
- dealing with financial and legal institutions;
- managing a business; and
- making investments.

OPC services can be grouped into the following Programs:

1. Financial and Asset Management;
2. Funds Management;
3. Private Management Support;
4. Community Education and Advocacy.

For further details of OPC programs and services refer to **Attachment A**.

### 3.4.3 Impact of Diversity of Client Needs on Estate Management Costs

The diversity of client needs has resulted in OPC designing three service delivery methods outlined in the Table below.

**Table 2: OPC Service Delivery Methods**

Service Style	Delivery	Explanation
OPC Managed		This is the most common form of financial management where an assigned OPC staff member (titled "Estate Manager") coordinates the provision of the full range of services required by the client.
Client Service Centre		For clients with more challenging behavioural issues a specialised service centre has been established in Sydney's city centre which provides more immediate access to OPC's services. These services include the controlled release of client funds for day to day living expenses.
Monitoring List		These clients may only require a limited range of services. For example, persons in nursing home care where payments for their care only may be required.

The severity of a client's disability will also be reflected in the amount of time an OPC Estate Manager devotes to their financial management.

A recent analysis <sup>1</sup> compared estate management time (and cost) across disability types, level of service required and service delivery methods revealing high, average and low costs per client per annum. It is apparent that due to the greater frequency of interaction with clients undertaken by the Client Service Centre, this is a more costly OPC method of service delivery.

The results of this analysis are presented in the Table below.

**Table 3: Estate Management Cost per Client per annum by Disability Type**

Disability Type	OPC Managed			Client Service Centre			Monitoring List \$
	High \$	Ave \$	Low \$	High \$	Ave \$	Low \$	
Psychiatric	3,399	1,796	878	5,551	4,147	1,985	569
Dementia & Age Related	8,258	5,442	1,036	-	-	-	171
Brain Injury	7,990	4,650	1,888	9,108	-	2,085	961
Developmental	2,719	2,458	557	-	4,689	-	466
Physical & Other	2,076	1,959	249	-	-	-	-
Finalisation List <sup>2</sup>		919					

<sup>1</sup> Office of the Protective Commissioner Fees Review, Final Report IPART, May 2003 page 8.

<sup>2</sup> These are clients who may have regained their capacity, or are deceased.



### 3.4.4 Client Asset Values

#### (a) OPC Managed Clients

The ability of clients to pay for the financial management services they receive from OPC is dependent on their available cash, other assets and investments.

When a new client relationship commences, a review of the client's financial position is undertaken, generally referred to as a "fact find". All income, awards and compensation payments are collected and initially directed into OPC's main investment fund called the Access Fund. All client expenses to be paid on an ongoing basis are also drawn out of the Access Fund. The balance in the Access Fund at any one time represents client savings or money that is held by OPC on their behalf, much like a bank account balance. Each client's cash funds are represented by one or more accounts in the investment funds.

Financial planning arrangements are then made for the client whereby funds identified for investment purposes are then withdrawn from the Access Fund and invested in a range of diversified investment funds<sup>3</sup>. The range of investment funds are collectively referred to as the "common fund".

The financial plan will also identify other client assets which require OPC management such as shares, which the client owned when they came under management and want to keep, superannuation and real estate. OPC estimates the value of these additional client assets to be approximately \$550 million, although approximately \$400 million of this amount relates to the value of the clients' principal places of residence.

In Table 4 below, the common fund balance of \$953 million is broken into a range of bands for the purpose of displaying the wide variation in client asset values.

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<sup>3</sup> OPC invests funds on behalf of clients in a diversified investment portfolio comprising a mix of Australian cash, bonds, shares, listed property, and International shares, bonds and an Australian Access Fund.

The unaudited figures for 30 June 2003 are provided by OPC as follows:

**Table 4: Client Asset Value Bands: 30 June 2003**

Estate Value Band	No of Clients	% of total Clients	Average Value per Client \$	Total Value in Band \$
0	42	0.5		
1c - \$25K	4,651	61.3	6,571	30,562,698
\$25K - \$50K	852	11.2	35,819	30,517,767
\$50K - \$100K	672	8.8	70,303	47,243,504
\$100K – \$150K	295	3.9	123,466	36,422,472
\$150K - \$200K	175	2.3	172,423	30,174,095
\$200K - \$250K	116	1.5	222,058	25,758,712
\$250K - \$500K	321	4.2	349,252	112,109,945
\$500K - \$1M	252	3.3	695,947	175,378,742
\$1M +	215	2.8	2,164,270	465,317,956
<b>Common Fund <sup>4</sup></b>	<b>7,591</b>	<b>100.0</b>	<b>125,607</b>	<b>953,485,001</b>
Other Assets (excl principal place of residence)				150,000,000
<b>Total Clients' Assets</b>				<b>1,103,485,001</b>

It can be determined from the Table above that over 60% of clients have common fund balances averaging only \$6,571.

Many of these clients with low fund balances are recipients of pensions, the majority of which is spent on living expenses resulting in little opportunity for growth in these savings.

These clients account for only 2.8% of the total value of estates under management (\$30,562,698/\$1,103,485,001).

Furthermore 67% of the total value of the common fund assets <sup>5</sup> is represented by those 6% of OPC clients <sup>6</sup> who have estates in excess of \$500,000. It is important to note that those fewer clients with high common fund investments have disabilities, and despite being asset-rich cannot be regarded as rich in the conventional sense. Some are “rich” only because they have received large compensation or insurance claim payments, which were designed to meet their lifetime costs of care.

<sup>4</sup> This term is used collectively for all OPC investment fund balances held on behalf of OPC managed clients.

<sup>5</sup>  $(\$175,378,742 + \$465,317,956) / \$953,485,001$ .

<sup>6</sup>  $(215 + 252 / 7,591)$ .

**(b) Privately Managed Clients**

As at 4 April 2003 OPC supervised the activities of Private Managers appointed to manage the financial affairs of 1,970 protected persons.

Of these privately managed protected persons, 654 had \$111,867,872 invested with OPC. This money is held by OPC as security from Private Managers on behalf of the Supreme Court. The remaining 1,316 protected persons had no funds with OPC.

**(c) Other Clients**

OPC performs the services of a banker for another 898 persons. These persons had \$15,156,164 of funds invested with OPC as at 4 April 2003.

**(d) Total Assets Held by OPC on Behalf of Clients**

A summary of assets (excluding the clients' principal places of residence) managed by OPC is provided in the Table below.

**Table 5: Summary of Assets Managed by OPC**

Client	Investments <sup>7</sup>	Other Assets	Total
OPC Managed	\$953,485,001	\$150,000,000	\$1,103,485,001
Privately Managed	\$111,867,872	0	\$111,867,872
Banker Service	\$15,156,164	0	\$15,156,164
<b>Total</b>	<b>\$1,080,509,037</b>	<b>\$150,000,000</b>	<b>\$1,230,509,037</b>

**3.5 Application of the Legislation and the Power to Charge Fees**

OPC is a government agency that relies in part on charging fees to provide its services. The power to charge fees for services is found in Section 8 of the Protected Estates Act. These fees are used to fund a wide variety of professional skills and expertise to manage the financial affairs of people with disabilities.

The Protective Commissioner also has discretion to reduce or waive fees.

Fees fall into two categories:

1. where the Protective Commissioner has been appointed financial manager; and

<sup>7</sup> OPC Managed client investment is unaudited 30 June 2003 figures. Other clients are actuals as at 4 April 2003.

2. where a private manager has been appointed, subject to the direction and supervision of the Protective Commissioner.

In addition, there is a power in Section 55 of the Protected Estates Act which allows money in an investment fund to be applied to the costs incurred by the Protective Commissioner in the exercise of the Protective Commissioner's functions under the Act.

To enable this transfer, the Protective Commissioner must make an application to the Director-General of the Attorney General's Department and seek approval of the amount of the transfer.

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## 4. OPC REVENUE AND EXPENDITURE

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### 4.1 Regulated Fees

One source of OPC funding is through the Protected Estates Regulation 1995 fee provisions.

These provisions are outlined in the Sections below.

#### 4.1.1 Fees when the Protective Commissioner is Financial Manager

Fees are chargeable (see Protected Estates Regulation 1995, clause 4) on all funds received by OPC, as follows.

##### (a) Up Front Fee on Assets (referred to as the Capital Fee)

This fee applies to property sales, compensation settlement payments, bank account collections, etc. Such receipts attract one “up front” fee only. This fee is calculated on a sliding scale as follows:

- 4% on the first \$100,000 received;
- 3% on the second \$100,000;
- 2% on the third \$100,000;
- 1% on funds over this amount.

##### (b) Fees on Income

Fees on income received by OPC on behalf of a client are:

- where the income is from CentreLink payments, pensions, superannuation and rent (where property is managed by a real estate agent) - 2.5%;
- all other income, including property not managed by a real estate agent, share dividends, etc. - 5.25%

##### (c) Other Fees

Fees are also chargeable for the following services provided although the amount of the fee is not prescribed in the Regulation. The fees set by the Protective Commissioner for these services, published in hard copy from time to time and available also on the OPC website, include:

- \$25 per annum for regular direct payment of an allowance into a bank account;
- \$60 to \$250 for preparation and lodgement of an income tax return, depending on the complexity of the return;
- \$100 per hour for checking income tax returns prepared by external tax agents;
- \$50 for preparation and lodgement of instalment activity statements;
- \$100 per hour for lodgement of applications for refunds of imputation credits;
- \$50 to \$90 per hour for property inspections, arranging repairs, preparing inventories and arranging the storage of possessions, etc;
- \$140 per hour for legal advice and representation; and
- financial planning fees based on a sliding scale aligned with different client asset value bands. Commencing at \$50 for an initial plan or \$25 for a subsequent annual review, fees range up to \$1,000 for an initial plan and \$500 for a subsequent annual review.

**(d) Special Fee**

Under certain circumstances a special fee may be levied, at the discretion of the Protective Commissioner, for administrative work which is considered outside normal parameters of service provision.

**4.1.2 Fees when a Private Manager is Appointed and is subject to the Supervision of the Protective Commissioner**

Following the compulsory auditing of annual accounts of private managers, fees are levied as follows:

**(a) Auditing Fee**

A fee of up to \$100 for the filing, examination and passing of the annual accounts filed by private managers.

**(b) Percentage of Income Fee**

A fee calculated at 4% of net income derived from the estate.

CentreLink and Department of Veteran Affairs pensions are not included in a fee calculation if that pension represents more than 50% of the total net income, up to a maximum of \$11,250 p.a

**(c) Special Fee**

Under certain circumstances a special fee may be levied, at the discretion of the Protective Commissioner, for administrative work which is considered outside normal parameters of service provision.

**4.2 Other Funding Sources****4.2.1 Section 55 Transfer**

As noted in Section 3.5 above, Section 55 of the Protected Estates Act allows the Protective Commissioner to apply money from the common fund towards meeting the cost of services provided.

A significant proportion of OPC's running costs are obtained by way of section 55 transfers. The annual amount of the s 55 transfer is disclosed in Table 6 below.

**4.2.2 Government Contribution**

The Government provided direct funding to OPC for the year ended 30 June 2003 totalling \$4,810,000.

**4.3 Sources of Revenue to Meet OPC Expenditure****4.3.1 Revenue and Expenditure**

OPC revenue and expenditure is outlined in Table 6 below.

**Table 6: Revenue and Expenditure**

Category	2002-2003 Unaudited (\$'000)	2001-2002 Actual (\$'000)
<b>Revenue</b>		
Fees and Charges	9,164	10,494
Other Revenue	517	449
<b>Total Revenue</b>	<b>9,681</b>	<b>10,943</b>
<b>Expenses:</b>		
Operating Expenses		
Salary and Related	19,002	17,203
Operating Expense	4,984	4,993
Maintenance	1,086	934
<b>Total Operating Expenditure</b>	<b>25,072</b>	<b>23,130</b>
Total Capital Expenditure	1,519	1,096
<b>Total Expenditure</b>	<b>26,591 *</b>	<b>24,226 *</b>
(* Includes superannuation liability adjustment. Does not include depreciation)		

Category	2002-2003 Unaudited (\$'000)	2001-2002 Actual (\$'000)
<b>Funding Shortfall:</b>	<b>16,910</b>	<b>13,283</b>
Draw down on Common Fund Transfers:	10,583	12,821
Government contribution	4,810	0
<b>Total Funds Transferred</b>	<b>15,939</b>	<b>12,821</b>
Shortfall carried forward	1,517	462

#### 4.3.2 Shortfall of Funds

The fees outlined above generate revenue to recover only 36% <sup>8</sup> of OPC's 2002/2003 annual expenditure of \$26,591,000.

OPC has had to rely on Section 55 transfers to enable recovery of much of the remaining annual expenditure. The amount transferred under s.55 in 2002/03 was \$10,583,000. This sum amounted to approximately 40% of OPC's annual running costs and represented 0.92% of the value of the common fund as at 30 June 2003 <sup>9</sup>.

Additional Government appropriations for the 2002/03 year totalled \$4,810,000.

#### 4.4 Cross-Subsidisation

##### 4.4.1 Cross-subsidisation as a Result of Section 55 Transfers

The transfer of funds to OPC from the common fund investments creates an unfair situation for some clients brought about by cross-subsidisation of the large number of asset-poor clients by those fewer clients who have higher common fund investments.

Asset-rich clients are losing the opportunity of higher returns due to this transfer of funds.

The investment fund value at 30 June 2003 was estimated in Section 3.4.4(d) as \$1,080 million. OPC has advised that since diversification of its investment this figure varies on a daily basis according to market forces.

In Table 6 it was noted that OPC required additional funding of \$10.6 million which was transferred from the investment fund.

This amount represents approximately 1% of the total investment fund value.

<sup>8</sup>  $\$9,681,000/\$26,591,000 = 36\%$

<sup>9</sup> These figures are subject to audit.



The Table below quantifies 1% of client average investment funds across the various estate value bands.

**Table 7: Additional OPC Funding as a Percentage of Client Investment Funds**

Estate Asset Value Band	No of Clients	Average Value per Client \$	1% Transfer per Client pa \$
0	42		
1c - \$25K	4,651	6,571	66
\$25K - \$50K	852	35,819	358
\$50K - \$100K	672	70,303	703
\$100K – \$150K	295	123,466	1,235
\$150K - \$200K	175	172,423	1,724
\$200K - \$250K	116	222,058	2,221
\$250K - \$500K	321	349,252	3,493
\$500K - \$1M	252	695,947	6,959
\$1M +	215	2,164,270	21,643
<b>Total</b>	<b>7,591</b>	<b>Ave 125,607</b>	<b>Ave 1,256</b>

As discussed earlier, those fewer clients with high common fund investments have disabilities, and despite being asset-rich cannot be regarded as rich in the conventional sense. Some are “rich” only because they have received large compensation or insurance payments, which were calculated to meet their lifetime costs of care. Cross-subsidisation thus erodes the value of the compensation payment and compromises the ability of their funds to generate the level of income required to meet their lifetime costs of care.

#### 4.4.2 Cross-Subsidisation avoided as a result of Government Funding

In the absence of a special Government appropriation of \$4.8 million for the year ended 30 June 2003, the total funds that would have needed to be transferred from the investment fund would have approached \$15.4 million (\$10.6 million plus \$4.8 million).

This amount represents 1.4% of the total investment fund value.

#### 4.4.3 Other Levels of Potential Cross-Subsidisation

While the Section 55 transfer discussed above reflects cross-subsidisation between clients, cross-subsidisation is also evident in the current fee structure.

The recent IPART cost analysis <sup>10</sup> reveals that there are several different ways that cross-subsidisation can occur:

- between client groups – where, on average, one client group pays in excess of costs and another pays below cost for the services received;
- between clients – where the fees paid by some clients over-recover the costs incurred in providing the services they receive, while those paid by others under-recover these costs. A certain level of this kind of cross-subsidisation is likely to occur, even within private service firms (eg tax agents who charge a flat fee, despite varying complexity to ensure simplification of billing procedures);
- between service areas – where, on average, one service area recovers more than the costs it incurs and another service area pays less.

In the IPART analysis referred to above, cross-subsidisation potential was reviewed in relation to the fees charged for the services noted in the Table below.

**Table 8: Cross-subsidisation Analysis**

Service Provided	Nature of Cross-subsidisation
Estate Management	Estate management costs are driven by disability type, management type and level of service required. This is not necessarily a reflection of the underlying estate value.  This suggests a “one size fits all” funding structure based on income and assets will still contain cross-subsidies.
Funds Management	Funds management costs appear to be driven by the value of the client’s funds under management.  As OPC does not charge a separate fee for this service, fees in other service areas may be cross-subsidising this activity.  This also suggests an income and asset-based fee structure is likely to reflect actual costs in this service area.
Taxation Services	Three fixed fees are charged, \$65 if no tax is payable, \$130 for a standard return and \$250 for a complex return.  Taxation service costs appear to be driven by the value of the client’s funds under management.  This suggests an income and asset-based fee structure is likely to reflect actual costs in this service area.
Financial Planning	The financial planning fee is structured on a sliding scale depending on client funds under management. There would not appear to be any cross-subsidisation occurring between clients or client groups.

<sup>10</sup> Office of the Protective Commissioner Fees Review, IPART, May 2003, page 14

From the IPART analysis in the Table above, OPC's current income and asset-based fees charged on the basis of client asset values do not fairly represent the complexity of work involved in estate management.

OPC's revenue generated from taxation and financial planning fees do not create cross-subsidisation problems for clients.

Furthermore, a fund management fee, were it to be imposed as a percentage of funds invested, would reflect the cost of service provision and therefore not create a cross-subsidisation problem.

#### 4.5 Costs by Service Area

Earlier it was noted that the level of service and effort within each of OPC's programs is driven by different client attributes and requirements. The IPART analysis <sup>11</sup> provides an estimate of the proportion of costs borne by each of the service delivery areas within OPC. This proportion was then extrapolated to reflect OPC's 2002/2003 expenditure revealing estate management to be the largest service delivery cost centre and the highest average annual cost per client serviced.

**Table 9: Costs by Service Area**

Service Area	% of Total	Costs Actual 2003	No. Clients	Ave Cost/Client
Estate Management	78	\$20,740,980	7,591	\$2,732
Private Management	11	\$2,925,010	1,970	\$1,485
Banker Only	1	\$265,910	898	\$ 296
Funds Management	4	\$1,063,640	9,143 <sup>12</sup>	\$ 116
Financial Planning	3	\$797,730	7,591	\$ 105
Taxation Services	2	\$531,820	7,591	\$ 70
Community Education & Advocacy	1	\$265,910	n/a	-
<b>Total</b>	<b>100</b>	<b>\$26,591,000</b>		

<sup>11</sup> Office of the Protective Commissioner Fees Review, IPART, May 2003, page 7

<sup>12</sup> Includes the 7,591 clients under OPC management, 654 privately managed clients who have funds invested with OPC and 898 banker clients who also have funds invested with OPC.

## 5. **OBJECTIVES OF THE PROPOSED REGULATION**

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### 5.1 **Objectives of the Regulation**

The objectives of the proposed Regulation have been derived from an analysis of OPC's role, client needs, programs and tasks undertaken for clients:

- *To ensure OPC is provided with the resources which will enable it to fairly and efficiently undertake its role in the management of the financial affairs of persons unable to do so.*
- *To reduce cross-subsidisation directly through fees; and*
- *To increase OPC's ability to recover its costs more directly and transparently.*

## **6. IMPACT ANALYSIS OF PROPOSED REGULATION**

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### **6.1 Development of the Proposed Fee Structure**

#### **6.1.1 Full Cost Recovery Principle**

It was noted in Section 4.5 above, that the annual cost per client of OPC's estate management services averaged \$2,732. If a maximum fee of \$2,732 per client were established then 100% of OPC's Estate Management costs would in theory be met without the need for transfers from the common fund or from some other sources of funding.

However, it was further noted in Section 3.4.4 above, that in excess of 60% of OPC's clients had an average estate value of only \$6,571. Such client estates would not be able to support a per client fee set on the basis of full cost recovery. Within 2 ½ years these lower value estates would be eroded leaving the client with no funds out of which to meet a \$2,732 fee per annum.

Analysis provided in Table 3 has shown that the cost per annum per client for Estate Management ranges from \$171 to \$9,108 due to the great variation in disability types, different types of management and the level of service demands. Data is not available to determine whether the client who is serviced for \$171 per annum has high asset values, nor whether the client who is serviced at a cost of \$9,108 has low asset values.

#### **6.1.2 Who Should Pay the Shortfall?**

A large proportion of OPC clients lack the funds to pay for the services provided by OPC, hence there is a need for someone to pay the shortfall.

Currently the "wealthier" clients contribute a greater proportion of the shortfall through the transfer of money from the common fund.

It was recommended by IPART in its recent review of fees that the shortfall should be funded from consolidated revenue. This source of funds appropriately reflects the benefit received by the community from the good order and management of the affairs of those people who lack the permanent or temporary capacity to do so themselves.

IPART considered this funding source as the best option as it:

- promotes fairness and transparency;
- is administratively easy to implement;

- gives OPC greater budget certainty; and
- allows Treasury the ability to exercise greater fiscal oversight of OPC.

### 6.1.3 Fee Setting Principles

The following IPART principles for setting fees have been followed in the design of the proposed Regulation fee structure.

**Table 10: IPART Principles for Setting OPC Fees**

IPART Principle	Explanation
Fairness	Fee structure should be fair to all clients
Reflects Cost of Service	Fees should reflect the costs of providing the service as far as practical, to minimise cross-subsidisation between activities and client groups
Transparency	Makes the source of funds obvious to service recipients and the community

In addition, the following principles have been followed:

- Fee structure should be easily understood and not be overly complex or costly to implement; and
- Clients should pay no more for the services provided by OPC than they would if the services were provided by a commercial organisation operating in a competitive market <sup>13</sup>.

In general, protected persons do not choose to become clients of OPC. They are subject to a financial management order by a Court or Tribunal to have their financial affairs managed by OPC <sup>14</sup>. It is therefore important that clients are not disadvantaged as a result of this order being made.

## 6.2 Fees Payable

### 6.2.1 Categories of Fees

OPC's proposed fee structure is outlined in the Table below, together with a comparison with the current Regulation fee structure.

<sup>13</sup> It is acknowledged that from time to time, commercial organisations may discount their publicly quoted service fees in order to gain competitive advantage. The principle adopted in establishing OPC fees is to ensure that OPC does not charge higher than a published fee of a commercial organisation.

<sup>14</sup> While a mechanism exists which enables clients to appeal a financial management order, there is little evidence that significant numbers of clients undertake a transfer from OPC management to a Private Manager.

**Table 11: Proposed Regulation Fee Structure Comparison**

Fee Category	Proposed 2003 Fee	1995 Fee Regulation
Capital Fee on Assets	None	Asset "up front" fee on capital calculated on a sliding scale as follows: <ul style="list-style-type: none"> <li>• 4% on the first \$100,000 received;</li> <li>• 3% on the second \$100,000;</li> <li>• 2% on the third \$100,000;</li> <li>• 1% on funds over this amount.</li> </ul>
Fee on Income	None	Fees on client income ranging from 2.5% (e.g. of pensions) to 5.25% (e.g. of dividends).
Ongoing Management (in respect of the value of all client assets, excluding client's principal place of residence)	2.1 % in Year 1 1.1% p.a. thereafter	None
Investment Management	0.5% p.a. of investment value	None
Income Fee – Private Mgt only	No change to 1995	4% per annum on the net annual income
Tax Return preparation and lodgement	No change to 1995	Such reasonable fee ..... as the Protective Commissioner may fix.
Financial Plan development	No change to 1995	Such reasonable fee ..... as the Protective Commissioner may fix.
Filing, examination & passing of accounts – Private Mgt only	No change to 1995	Such fee (not exceeding \$100) ..... as the Protective Commissioner may fix.
Other Services	No change to 1995	Such reasonable fee ..... as the Protective Commissioner may fix.
Goods and Services tax	No change to 1995	May charge the amount of any GST payable.
Other Funds	Consolidated Revenue Contribution by Gov't No change	Not explicitly provided for Section 55 Transfer

The key difference between the 1995 fees and the proposed 2003 fees is the:

- abolition of the "up-front" capital fee and income based fees for directly managed clients; and
- introduction of an ongoing management fee and an investment management fee based upon the assets under management (other than the client's principal place of residence).

It is not proposed at this time to change fees paid to OPC by client's whose assets are privately managed. Nor is it proposed to change fees paid to OPC for other services.

Furthermore, options for shortfall funding have been assessed and the contribution by government to funding OPC services, as recommended in the recent IPART report <sup>15</sup>, has been selected.

### 6.2.2 Potential Revenue Generated

The estimated revenue provided in the Table below is outlined in detail below.

**Table 12: Proposed Regulation Fee Revenue Comparison**

Fee Category	Estimated Revenue under 1995 Fee Structure <sup>16</sup>	Estimated Revenue under Proposed 2003 Fee Structure
Ongoing Management	\$0.0 m	\$12.5 m
Investment Management	\$0.0 m	\$5.5 m
Up front Fee on Assets & Fee on Income	\$8.35 m	\$0.0 m
Fees for other Services <sup>17</sup> & Other Revenue	\$1.35 m	\$1.1 m
<b>Total Revenue From Fees</b>	<b>\$9.7 m</b>	<b>\$19.1 m</b>
Government Funding	\$4.8 m	\$9.0 m
Section 55 Transfer	\$10.6 m	\$0.0 m
<b>TOTAL REVENUE</b>	<b>\$25.1 m</b>	<b>\$28.1 m</b>

#### (a) Ongoing Estate Management Fee

The ongoing estate management fee is expected to deliver revenue as follows:

- 1.1% of total estate value of \$1,100 million is \$12.1 million.
- The first year fee will generate additional revenue of \$0.4 million per annum.

<sup>15</sup> Office of the Protective Commissioner Fees Review, IPART, May 2003, page 23.

<sup>16</sup> Based on 2002 – 2003 actuals (unaudited) per Table 6 above.

<sup>17</sup> It is anticipated that OPC's Supreme Court Registry function will transfer to the Supreme Court during 2003/2004 and that revenue of approximately \$200,000 will no longer be received.



**(b) Investment Management Fee**

In June 2003 OPC had eight investment funds, with approximately \$1,100 million invested in those funds. If an average fee of 0.5% were charged on funds, total revenue of \$5.5 million would be generated.

**(c) Other Income**

Private Management and other services undertaken by OPC are expected to deliver income similar to that received in prior years totalling \$1.1 million per annum.

**(d) Funding Shortfall**

The fee revenue generated from the above categories is summarised in the Table below together with the estimated funding shortfall.

It is proposed that the shortfall be funded through consolidated revenue as discussed in Section 6.1.2 above. It is noted that Section 55 transfers from the Common Fund will still be available to OPC under the Protected Estates Act, nevertheless this would be a funding source of last resort, rather than the norm.

**Table 13: Funding Shortfall**

Fee Category	Amount of Revenue Generated
Ongoing Management Fee	\$12.5 million
Investment Management Fee	\$5.5 million
Other Fees – various services	\$1.1 million
<b>Total Fee Generated Revenue</b>	<b>\$19.1 million</b>
Expected Annual Expenditure	\$28.1 million
<b>Funding Shortfall – consolidated revenue</b>	<b>\$9 million</b>

**6.3 Impact on Client Groups**

To ensure OPC clients are not unduly disadvantaged by the proposed fees an example of the impact on a range of clients is outlined in the scenarios below. These scenarios compare what clients would have paid under the 1995 Regulation with what it is they will pay under the proposed Regulation.

Based on the scenarios assessed, clients will be better off under the proposed fee structure than the current fee and funding arrangements.

**6.3.1 Scenario 1: Client Estate \$6,571**

The Table below outlines the fees and revenue derived by OPC from a client with an estate of \$6,571. This scenario reflects the average estate value for the 4,651 clients with estates valued between \$0.01 and \$25,000.

The following assumptions are made:

- once the client's financial plan is completed the entire estate is promptly transferred into the diversified investment fund where it will earn a return averaging 5% per annum generating \$329 income per year;
- it is assumed that the client receives a pension of \$15,000 per annum;
- under the 1995 Regulation the client would bear a Section 55 transfer equivalent to 1.4% of their investment fund balance as per the calculation in Section 4.4 above.

**Table 14: Estate Value \$6,571 Fee Comparison**

1995 Fee Structure	1995 Fees	Proposed 2003 Fee Structure	2003 Fees
<b>Year 1:</b>			
Capital Fee:		Ongoing Management:	
• \$6,571 @ 4%	\$263	• \$6,571 @ 2.1%	\$138
Investment Income:		Investment Management:	
• \$329 @ 5.25%	\$17	• \$6,571 @ 0.5%	\$33
Pension income @ 2.5%	\$375		
S 55 Transfer @ 1.4%	\$92		
Other Fees:		Other Fees:	
• Simple tax return	\$65	• Simple tax return	\$65
• Financial Plan	\$50	• Financial Plan	\$50
<b>Total</b>	<b>\$862</b>	<b>Total</b>	<b>\$286</b>
<b>Year 2 &amp; Thereafter:</b>			
		Ongoing Management:	
		• \$6,571 @ 1.1%	\$72
Investment Income	\$17	Investment Management	\$33
Pension Income	\$375		
Section 55 Transfer	\$92		
Other Fees:		Other Fees:	
• Simple tax return	\$65	• Simple tax return	\$65
• Financial Plan	\$25	• Financial Plan	\$25
<b>Total</b>	<b>\$574</b>	<b>Total</b>	<b>\$195</b>

**6.3.2 Scenario 2: Client Estate \$70,303**

The Table below outlines the fees and revenue derived by OPC from a client with an estate of \$70,303. This scenario reflects the average estate value for the 672 clients with estates valued between \$50,000 and \$100,000.

The following assumptions are made:

- once the client's financial plan is completed the entire estate is promptly transferred into the diversified investment fund where it will earn a return averaging 5% per annum generating \$3,515 income per year;
- it is assumed that the client receives a pension of \$15,000 per annum;
- under the 1995 Regulation the client would bear a Section 55 transfer equivalent to 1.4% of their investment fund balance.

**Table 15: Estate Value \$70,303 Fee Comparison**

1995 Fee Structure	1995 Fees	Proposed 2003 Fee Structure	2003 Fees
<b>Year 1</b>			
Capital Fee:		Ongoing Management:	
• \$70,303 @ 4%	\$2,812	• \$70,303 @ 2.1%	\$1,476
Investment Income:		Investment Management:	
• \$3,515 @ 5.25%	\$185	• \$70,303 @ 0.5%	\$352
Pension Income:			
• \$15,000 @ 2.5%	\$375		
S 55 Transfer @ 1.4%	\$984		
Other Fees:		Other Fees:	
• Standard tax return	\$130	• Standard tax return	\$130
• Financial Plan	\$200	• Financial Plan	\$200
<b>Total</b>	<b>\$4,686</b>	<b>Total</b>	<b>\$2,158</b>
<b>Year 2 &amp; Thereafter</b>			
		Ongoing Management:	
		• \$70,303 @ 1.1%	\$773
Investment Income	\$185	Investment Management	\$352
Section 55 Transfer	\$984		
Pension Income	\$375		
Other Fees:		Other Fees:	
• Standard tax return	\$130	• Standard tax return	\$130
• Financial Plan	\$100	• Financial Plan	\$100
<b>Total</b>	<b>\$1,774</b>	<b>Total</b>	<b>\$1,355</b>

**6.3.3 Scenario 3: Client Estate \$222,058**

The Table below outlines the fees and revenue derived by OPC from a client with an estate of \$222,058. This scenario reflects the average estate value for the 116 clients with estates valued between \$200,000 and \$250,000.

The following assumptions are made:

- once the client's financial plan is completed the entire estate is promptly transferred into the diversified investment fund where it will earn a return averaging 5% per annum generating \$11,103 income per year;
- the client is no longer earning income with the exception of the return on their investments noted above;
- under the 1995 Regulation the client would bear a Section 55 transfer equivalent to 1.4% of their investment fund balance.

**Table 16: Estate Value \$222,058 Fee Comparison**

1995 Fee Structure	1995 Fees	Proposed 2003 Fee Structure	2003 Fees
<b>Year 1</b>			
Capital Fee:		Ongoing Management:	
• \$100,000 @ 4%	\$4,000	• \$222,058 @ 2.1%	\$4,663
• \$100,000 @ 3%	\$3,000		
• \$22,058 @ 2%	\$441		
Total Capital Fee	\$7,441		
Investment Income:		Investment Management:	
• \$11,103 @ 5.25%	\$583	• \$222,058 @ 0.5%	\$1,110
S 55 Transfer @ 1.4%	\$3,109		
Other Fees:		Other Fees:	
• Standard tax return	\$130	• Standard tax return	\$130
• Financial Plan	\$400	• Financial Plan	\$400
<b>Total</b>	<b>\$11,663</b>	<b>Total</b>	<b>\$6,303</b>
<b>Year 2 &amp; Thereafter</b>			
		Ongoing Management:	
		• \$222,058 @ 1.1%	\$2,443
Investment Income	\$583	Investment Management	\$1,110
Section 55 Transfer	\$3,109		
Other Fees:		Other Fees:	
• Standard tax return	\$130	• Standard tax return	\$130
• Financial Plan	\$200	• Financial Plan	\$200
<b>Total</b>	<b>\$4,022</b>	<b>Total</b>	<b>\$3,883</b>

**6.3.4 Scenario 4: Client Estate \$695,947**

The Table below outlines the fees and revenue derived by OPC from a client with an estate of \$695,947. This scenario reflects the average estate value for the 252 clients with estates valued between \$500,000 and \$1,000,000.

The following assumptions are made:

- once the client’s financial plan is completed the entire estate is promptly transferred into the diversified investment fund where it will earn a return averaging 5% per annum generating \$34,797 income per year;
- the client is no longer earning income with the exception of the return on their investments noted above;
- under the 1995 Regulation the client would bear a Section 55 transfer equivalent to 1.4% of their investment fund balance.

**Table 17: Estate Value \$695,947 Fee Comparison**

1995 Fee Structure	1995 Fees	Proposed 2003 Fee Structure	2003 Fees
<b>Year 1</b>			
Capital Fee:		Ongoing Management:	
• \$100,000 @ 4%	\$4,000	• \$695,947 @ 2.1%	\$14,615
• \$100,000 @ 3%	\$3,000		
• \$100,000 @ 2%	\$2,000		
• \$395,947 @ 1%	\$3,959		
Total Capital Fee	\$12,959		
Investment Income:		Investment Management:	
• \$34,797 @ 5.25%	\$1,827	• \$695,947 @ 0.5%	\$3,480
S 55 Transfer @ 1.4%	\$9,743		
Other Fees:		Other Fees:	
• Complicated tax return	\$250	• Complicated tax return	\$250
• Financial Plan	\$650	• Financial Plan	\$650
<b>Total</b>	<b>\$25,429</b>	<b>Total</b>	<b>\$18,995</b>
<b>Year 2 &amp; Thereafter</b>			
		Ongoing Management	
		• \$695,947 @ 1.1%	\$7,655
Investment Income	\$1,827	Investment Management	\$3,480
Section 55 Transfer	\$9,743		
Other Fees		Other Fees:	
• Complicated tax return	\$250	• Complicated tax return	\$250
• Financial Plan	\$325	• Financial Plan	\$325
<b>Total</b>	<b>\$12,145</b>	<b>Total</b>	<b>\$11,710</b>

**6.3.5 Scenario 5: Client Estate \$2,164,270**

The Table below outlines the fees and revenue derived by OPC from a client with an estate of \$2,164,270. This scenario reflects the average estate value for the 215 clients with estates valued at more than \$1,000,000.

The following assumptions are made:

- once the client's financial plan is completed the entire estate is promptly transferred into the diversified investment fund where it will earn a return averaging 5% per annum generating \$108,214 income per year;
- the client is no longer earning income with the exception of the return on their investments noted above;
- under the 1995 Regulation the client would bear a Section 55 transfer equivalent to 1.4% of their investment fund balance.

**Table 18: Estate Value \$2,164,270 Fee Comparison**

1995 Fee Structure	1995 Fees	Proposed 2003 Fee Structure	2003 Fees
<b>Year 1</b>			
Capital Fee:		Ongoing Management:	
• \$100,000 @ 4%	\$4,000	• \$2,164,270 @ 2.1%	\$45,450
• \$100,000 @ 3%	\$3,000		
• \$100,000 @ 2%	\$2,000		
• \$1,864,270 @ 1%	\$18,643		
Total Capital Fee	\$27,643		
Investment Income:		Investment Management:	
• \$108,214 @ 5.25%	\$5,681	• \$2,164,270 @ 0.5%	\$10,821
S 55 Transfer @ 1.4%	\$30,300		
Other Fees:		Other Fees:	
• Complicated tax return	\$250	• Complicated tax return	\$250
• Financial Plan	\$750	• Financial Plan	\$750
<b>Total</b>	<b>\$64,624</b>	<b>Total</b>	<b>\$57,271</b>
<b>Year 2 &amp; Thereafter</b>			
		Ongoing Management:	
		• \$2,164,270 @ 1.1%	\$23,807
Investment Income	\$5,681	Investment Management	\$10,821
Section 55 Transfer	\$30,300		
Other Fees:		Other Fees:	
• Complicated tax return	\$250	• Complicated tax return	\$250
• Financial Plan	\$375	• Financial Plan	\$375
<b>Total</b>	<b>\$36,606</b>	<b>Total</b>	<b>\$35,253</b>

## **7. ALTERNATIVES TO PROPOSED FEE STRUCTURE**

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### **7.1 Alternatives to Proposed Fee Structure**

#### **7.1.1 Review Fee Structures**

Five fee structure options are considered below:

1. Retention of the current fee structure;
2. Perpetual Trustee Company Limited (Perpetual Trustee);
3. Public Trustee of New South Wales;
4. Public Trustee of Queensland; and
5. State Trustees Limited in Victoria.

#### **7.1.2 Other Alternatives**

In addition, other non-regulatory alternatives to having a fee set by regulation have been examined, including:

1. Reducing the costs of OPC; and
2. Withdrawing the provision of services.

### **7.2 Option 1: Retention of the Current Fee Structure (Do Nothing Option)**

Under the “Do Nothing” option, no action would be taken to change the fees and the regulation would be remade without change.

Revenue in the short term would be as shown in Table 6 on page 15 above. However, the continued availability of these funds depends upon the ability to apply funds under s.55 of the Protected Estates Act. With an annual expenditure budget for 2003/04 of \$28.1 million and fee revenue based on the 1995 Regulation anticipated as shown in Table 12 above to generate revenue of only \$9.7 million, a shortfall approaching \$18.4 million would require funding.

In its 1999 performance audit report on OPC’s complaints and review processes, the Audit Office referred to the lack of transparency in the use of the then s.57 (now s.55) to fund OPC and recommended a more transparent method be adopted. The Public Bodies Review Committee of the NSW Parliament, in its 2001 report, supported the Audit Office call for a fee review.

The retention of the current fee structure would also retain the present level of cross-subsidisation between clients, between client groups and between service areas. This would continue the benefit enjoyed by some clients but at a cost to other clients.

### 7.3 Option 2: Perpetual Trustee Fee Model

#### 7.3.1 Legislative Environment

The fees charged by private sector trustee companies are regulated under the Trustee Companies Act 1964.

#### 7.3.2 Perpetual Trustee Company Limited

Perpetual Trustee has been selected as providing an appropriate fee model because it is understood by OPC to provide comparable services. It offers a "Full Personal Care" service, similar to that provided by OPC, "designed for clients who ... are too ill or incapacitated to take care of their financial affairs". In addition to managing and acting as custodian of clients' investments, Perpetual can attend to details such as paying clients' household and medical bills, collecting refunds - for example from Medicare or a private health fund - through to arranging, supervising and organising payment for home help or a home carer (Perpetual Portfolio Management Service brochure dated 1 July 2000).

Published fees charged by Perpetual for this service are provided in Table 19.

**Table 19: Perpetual Trustee Fees Charged Inclusive of GST**

Fee Item	Fee Base	Rate / Amount	Comment
Establishment	Portfolio / Estate Value	1.1%	Min \$3,300
Ongoing Mgmt	Portfolio / Estate Value	1.925% First \$300,000 1.375% Next \$700,000 0.825% Above \$1m	Min \$3,850
Full Personal Care	Medical Refunds	\$20.00 per receipt	
	Bill Payments	\$5.00 per payment	
Professional Services	Hours of Service	\$300.00 per hour	
Investment	Invested Amount	0.55% of amount invested	Transaction Cost
	Portfolio Value	0.88% of amount invested	Annual Mgmt Fee
	Brokerage Fee	0.385% of amount invested	Listed shares



It is understood that Perpetual from time to time may discount the above fees in order to gain competitive advantage.

Other fees may be applicable on a case by case basis and include:

- Transaction fees (the first 50 per annum are free, thereafter charge is \$27.50 per transaction);
- Fees for the Provision of Information is \$30 for first 15 minutes, thereafter at \$80 per hour,
- Fees for Assets held in Client's Name at an additional 0.25% of the amount so invested, and
- Early Termination fee.

### 7.3.3 Assessment of Perpetual Fee Structure

The fee structure of Perpetual is assessed against the following fee criteria below.

**Table 20: Perpetual Fee Structure Assessment**

Fee Criteria	Assessment
Fairness	The full personal care service charges clients on a fee for service basis. Some clients, as a result of their disability, may require repetitive contact by their manager compared to others. Under this model while acknowledging the real costs these clients impose on their manager, they would effectively be penalised based on their disability. At the same time, these clients should not be subsidised by other clients.
Reflects Cost of Service	Perpetual's structure appears to be the most cost reflective. However, as a private sector organisation which acts as a Private Manager, it is not clear whether each service provided over-recovers or alternatively may be provided as a "loss leader" (i.e. where the fee is intentionally set below cost in an effort to attract customers who may then be attracted to purchase the full range of services, many of which are profitable).
Complexity	The structure provides a mix of fee for service and percentage of assets. It is of equal complexity to the proposed OPC fee structure.
Transparency	Fee structure is transparent and allows funds to be traced to a more detailed level. To enable the adoption of this structure, a client billing and work recording system would be required.

### 7.3.4 Application of the Perpetual Fee Structure to OPC

It is proposed to adopt a fee structure similar to the Perpetual structure in relation to the following fee categories:

- ongoing management; and
- investment management.

OPC presently lacks the data to determine the advisability or otherwise of charging on a fee for service basis.

The fee amounts have been established by OPC at a percentage of assets lower than that charged by Perpetual, recognising the low value of assets possessed by the majority of OPC clients and the fact that OPC clients cannot choose to be managed by OPC and should not therefore be charged at rates exceeding those of a commercial organisation.

#### 7.4 Option 3: Public Trustee of NSW Fee Model

##### 7.4.1 PTNSW Fee Structure

The Public Trustee of NSW (PTNSW) also has a small group of clients to whom it provides services comparable to those provided by OPC. PTNSW may acquire a client for which it becomes financial manager as a result of an enduring power of attorney.

This commercial, non-regulated service is called Active Assist through which PTNSW can be appointed to manage the day-to-day financial tasks of clients including the collection of income, bill payments, maintenance and management of property, processing of health fund accounts and investment of surplus savings.

The published fees (exclusive of GST) charged by PTNSW for Active Assist are listed in the Table below. Fees for additional services are commercially confidential and could be subject to discount or negotiation. These fees, however, follow the regulated fees contained in the Public Trustee Regulation 2001. The fees have been set to ensure cost recovery and to avoid cross subsidisation. These fees are disclosed in the client agreement.

**Table 21: PTNSW Fee Schedule Active Assist**

Fee Category	Fee Amount excluding GST
Establishment Fee	\$300
Ongoing Fees	1.0% of the value of income producing assets (excluding principal place of residence) Minimum \$600 per annum
Account Keeping Fee	\$8 per month
Additional Services	For an additional charge, PTNSW can also assist with portfolio reviews, tax returns and the buying and selling of real estate (interest in retirement villages, etc) – not published or regulated
Investment Management	Up to 0.5% per annum on capital sums invested in the common fund during the period in which the income is received or allocated.

##### 7.4.2 Assessment of PTNSW Fee Structure

The fee structure of PTNSW is assessed against the following fee criteria below.

**Table 22: Public Trustee NSW Fee Structure Assessment**

Fee Criteria	Assessment
Fairness	A fixed dollar fee does not recognise the difference in the size and complexity of an estate and the different level of effort required to be expended by PTNSW.  Some clients may subsidise the work undertaken for others.
Reflects Cost of service	A fixed minimum fee does not ensure that the fee will recover the costs.
Complexity	Simple structure and easy to implement.
Transparency	The fixed fee nature is transparent in the fee structure but in doing so leads to cross-subsidies making it harder to identify where government contributions may be warranted.

### 7.4.3 Application to OPC

#### (a) Fee Structure

The proposed fee structure is similar to PTNSW for the following fee categories:

- ongoing fees;
- additional services; and
- investment management fee.

Rather than charge a separate establishment fee, it is proposed to structure the ongoing management fee into two scales, a higher Year 1 fee to reflect the additional work required in establishing a new client relationship and a lower annual fee from Year 2 and each year thereafter.

It is not proposed that each of the additional services have a legislative prescribed maximum although OPC will continue to publish a fee schedule which outlines the fees charged for these services to ensure clients are aware in advance of the proposed charges.

#### (b) Fee Amounts

The fee rates proposed for OPC are identical to PTNSW for investment management.

It is not possible to compare the rates charged for additional services as the PTNSW rates are commercially driven and not available publicly.

It is not proposed to charge a fixed establishment fee of \$300 nor set a minimum ongoing management fee of \$600. It is therefore not possible to directly compare the rates proposed.

To ensure OPC clients are not disadvantaged in comparison to the PTNSW ongoing fees, an example of the impact on a client is outlined in the Table below.

**Table 23: OPC and PTNSW Ongoing Fee Comparison**

Client Attributes	PTNSW Fee	OPC Fee
Estate Value of \$10,000:		
• Establishment Year 1	\$300	0
• Fee Year 1	\$100 + \$500 = \$600 min Yr 1	\$210 Yr 1
Total Year 1	<u>\$900 Yr 1</u>	<u>\$210 Yr 1</u>
• Fee Year 2 & Thereafter	\$100 + \$500 = \$600 min p.a	\$110 p.a
Investments of \$5,000	\$25 p.a	\$25 p.a

The PTNSW fee structure becomes more attractive for clients when the estate value exceeds \$54,545 as it is at this point that the minimum annual fee of \$600 equates to the OPC fee at 1.1%. With almost three-quarters of OPC clients with estates less than \$50,000, the majority of OPC's clients will not be disadvantaged compared to PTNSW by OPC's slightly higher ongoing fee rate.

## 7.5 Option 4: Public Trustee of Queensland Fee Model

### 7.5.1 PTQLD Fee Structure

The Public Trustee of Queensland (PTQLD) undertakes the roles combined, that in NSW are separately undertaken by PTNSW and OPC.

In 2001 a new fee-for-service pricing model was introduced together with the installation of a new billing system enabling a very complex schedule of fees.

A schedule of the fees for similar services to OPC's is provided in the Table below.

**Table 24: Public Trustee Queensland Fee Structure**

Service Category	Details	Fee Amount excluding GST
Disability Services	Personal Financial Administration	\$660 to \$4,620
	Asset Management	\$100 to \$6,800
	Real Property	\$495 per property
Taxation Services	Prepare and lodge tax return	\$132 per hour
	Reconstruct, set up and/or maintain asset	\$132 per hour

Service Category	Details	Fee Amount excluding GST
Property Services	register	
	Property Management Fees:	
	• Storage of vehicles / estate goods	\$20.90 per week
	• Property inspection	\$83.64 per hour
	• Arranging tenancy	Max 1 week rent or \$71.82
	• Management of rental / trust properties	7.5% of gross rent plus \$4.55 per month
	Valuation:	
	• Residential properties	\$159.09 to \$300
	• Commercial / rural properties	negotiated
	• Furniture, plant, implements, chattels	\$132 per hour (min \$73.64)
Investment Services	Public Trustee investment funds:	
	• Entry fee % of value invested	Up to 3.64%
	• Management fee % of value invested	Up to 1.95%
Special Fees	No specified fee	\$132 per hour

### 7.5.2 Assessment of PTQLD Fee Structure

The fee structure of PTQLD is assessed against the following fee criteria below.

**Table 25: Public Trustee QLD Fee Structure Assessment**

Fee Criteria	Assessment
Fairness	Structure is fair in that it is a “user pays” principle. For the fee for service model to be fair to all, the fee waiver mechanism would have to ensure that clients without the financial capacity to pay are still provided with an acceptable level of service.  PTQLD can divert investment income to fund its operations after satisfying interest payments to clients. This is similar to OPC’s ability to draw down on the common fund which has been assessed as neither equitable nor transparent. Refer Section 4.4 above.
Reflects Cost of Service	Yes, highly reflective of costs.
Complexity	Structure is very detailed and complex requiring an assessment to be made of each client’s needs and service level commensurate with those needs. Working time needs to be recorded by staff and captured by the PTQLD system. Quality of data captured and used for billing clients needs to be robust.
Transparency	Under a fee for service model coupled with an appropriate fee waiver mechanism, the cost of any shortfall would be clearly identified.

### 7.5.3 Application to OPC

OPC presently lacks the data to determine the advisability or otherwise of charging on a fee for service basis and therefore will still need to set a simplified structure based on percentage of assets and fixed fees for services.

The fee amounts have been established for OPC at a percentage of assets and investment lower than that charged by PTQLD for those fee categories able to be compared. For example PTQLD charges an ongoing investment management fee up to 1.95% of the value invested. It is proposed that OPC will charge 0.5%, a significantly lower amount.

## 7.6 Option 5: State Trustees Limited in Victoria Fee Model

### 7.6.1 STL Fee Structure

State Trustees Limited (STL) provides an extensive range of financial and legal management services for people with disabilities including:

- Collection of income;
- Payment of bills and accounts;
- Property management;
- Investment advice;
- Preparation of tax documentation;
- Provision of legal advice;
- Referrals and submissions to government agencies.

The fees charged by STL for appointed administrations are provide in the Table below.

**Table 26: State Trustees Victoria Fee Structure**

Fee Category	Details	Fee Amount excluding GST
Capital Commission	Charged on the gross value of assets in the estate (once only charge)	4%
Common Funds Investment Management Fee	Charged on the capital sum invested in STL's common fund	1% or min \$600
Income collection	Charged per annum on gross income received	Max 6%
	Charged per annum on pension	3%
Other Services	Taxation – manual review	\$116 per hour
	Taxation – computer aided review	\$58 per hour
	Temporary administration orders	\$120 per hour
	Financial Planning – Plan fee	\$400 to \$5,000
	Financial Planning – Review fee	\$250 to \$3,000

### 7.6.2 Assessment of STL's Fee Structure

The fee structure of STL is assessed against the following fee criteria below.

**Table 27: State Trustees VIC Fee Structure Assessment**

Fee Criteria	Assessment
Fairness	Similar structure to OPC but does not mirror the cross-subsidy problem. This is due to the requirement for the responsible Minister to provide community service obligation funding to STL to provide services to those the Minister deems not to have the resources to attain the services themselves.
Reflects Cost of Service	Similar to OPC's current structure except STL percentages are higher. Does not clearly demonstrate recovery of cost of service provision.
Complexity	Simple to implement.
Transparency	Minister is responsible for providing protective services to the low capacity clients via an agreement with STL, other trustees, persons or body thus providing the transparency needed in relation to the source of funds and their usage.

### 7.6.3 Application to OPC

It is proposed that OPC will move away from a fee structure based on capital and income commission for the recovery of estate management service costs due to the cross-subsidy problems identified in Section 4.4.3 above.

A comparison of OPC's proposed fees and those charged by STL for those categories of fees which are identical is provided in the Table below. It is clear that OPC's clients are no worse off than if they were to be managed by STL.

**Table 28: OPC and STL Fee Comparison**

Fee Category	STL	OPC
Investment Management	1% or minimum \$600 p.a	0.5% p.a
Taxation computer aided	\$58 per hour	\$60 flat fee (equivalent to 1.03 hours of STL)
Taxation manual review	\$116 per hour	\$250 flat fee for complex (equivalent to 2.15 hours of STL)
Financial Plan Fee	\$400 to \$5,000 scaled	\$50 to \$1,000 scaled
Financial Plan Review Fee	\$250 to \$3,000 scaled	\$25 to \$500 scaled

OPC has identical needs in terms of funding for clients with low capacity to pay.

### 7.7 Option 6: Reduce Costs

Another option considered was a review of OPC's service delivery with a view to identifying cost reduction potential.

As noted in Section 2.5.1 above, a number of reviews of OPC's activities have been undertaken in the past with a view to determining appropriate fees to charge and the cost and quality of the services delivered to clients. No specific recommendations have been made which target particular areas of cost reduction potential.

OPC is already committed to a number of key performance indicators designed to improve productivity, lower the average cost of service per client and reduce the ratio of administrative staff to client services staff.

With this cost reduction target being pursued OPC contends it is not cost-effective for resources to be devoted to further analysis of additional areas of OPC cost reduction potential at this stage.

### 7.8 Option 7: Withdraw Provision of a Service

A review of the list of services delivered by OPC as outlined in **Attachment A** was undertaken.

The only activities undertaken by OPC not directly related to service delivery are community education and advocacy. The community education and advocacy roles were created to assist in the dissemination of information to the community and in particular to the friends, carers, family and guardian of protected persons.

Cost attributable to this role were identified in Table 9 on page 19 above at \$265,910 representing only 1% of total operating costs. This role is an investment by OPC to prevent confusion, dissatisfaction and potential litigation. It is not considered warranted to withdraw such a service.



## 8. ADDITIONAL IMPACTS OF PROPOSED REGULATION

### 8.1 Machinery Clauses

As noted in Section 2.5.2 there are a number of machinery provisions which will not be subject to impact assessment. These provisions are the same as those in the 1995 Regulation and are listed below.

**Table 29: Machinery Clauses**

Clause	
1 – 3, 12	Name, commencement, definitions & saving
5	Information relating to Magistrate's inquiry as to patient's capability to manage affairs (this clause gives effect to Schedules 1 and 2)
6	Form of order or interim order that estate be managed under the Act (this clause gives effect to schedule 3)
11	Transitional provision consequent on enactment of Protected Estates Amendment (Investment) Act 2000 – to be repealed

Together with Schedules 1 and 2, clause 5 ensures that where a medical superintendent intends to bring a patient before a Magistrate for the purpose of inquiry by the Magistrate as to whether the person should be detained in hospital, the medical superintendent must give to that person and to the nearest relative, guardian and any personal friend of that person notice that the Magistrate may also make an order in relation to the person's property and affairs. The information that the medical superintendent must give includes information that the person has a right to appeal to the Supreme Court if the person disagrees with the Magistrate's decision.

It is proposed these provisions be retained. It is considered that the medical superintendent is the most appropriate person to give the notice to the patient as the medical superintendent is also required to provide information to the patient under the Mental Health Act 1990 at the same time. Requiring another person to provide the prescribed information would be inefficient and may be confusing for the patient.

Deletion of the requirement to provide the information may infringe the civil rights of the patient.

Clause 6 requires a Magistrate or the Mental Health Review Tribunal to complete a notice of an order or interim order made by the Magistrate or the Tribunal that the estate of a person be subject to management under the Protected Estates Act. Schedule 3 specifies the form of that notice.

It is proposed these provisions be retained. Under s.23A of the Protected Estates Act the power of a person to deal with his or her estate is suspended once an order has been made that the person's estate has been made subject to management under the Protected Estates Act. It is appropriate that such an important step be properly recorded and that the Magistrate or Tribunal making the order should complete the notice. Deletion of this requirement could lead to there being a lack of evidence of the order having been made, with consequent potential damage to, or loss of, the person's estate.

## 8.2 Additional Clauses Impacting the Community

The proposed Regulation also makes provision for the following matters, the impact of which is assessed in detail below.

**Table 30: Additional Clauses to be Assessed**

Clause 7	Medical superintendent to notify Protective Commissioner of certain orders
Clause 8	Medical superintendent to notify Protective Commissioner of certain events
Clause 9	Review by ADT of estate management decisions of Protective Commissioner
Clause 10	Restriction on Protective Commissioner's discretion to deal with certain estates – prescribed amount

## 8.3 Duties of Medical Superintendent to Notify: Clauses 7 & 8

### 8.3.1 Overview

It is proposed to retain the same wording for clauses 7 and 8 as that contained in the equivalent provision in the 1995 Regulation.

These clauses impose a statutory duty on a hospital Medical Superintendent to notify the Protective Commissioner when:

- a financial management order is made in relation to a detained hospital patient; and
- the hospital status of that detained protected person changes.

As noted in section 3.3 above, for the period 1 July 2002 to 30 June 2003 253 financial management orders were made by Magistrates and the Mental Health Review Tribunal (MHRT) appointing OPC as manager.

The objective of clause 7 is to ensure that people who are detained in hospital, for whom a financial management order has been made, have their financial affairs promptly transferred into the management of OPC.

Without notice being given to OPC, that office would not become aware of the order and would not take steps to secure the assets of the patient from potential damage or loss. Centrelink benefits and the like need to be redirected to OPC to ensure they do not go astray. The Medical Superintendent is considered the most appropriate person to give the notice.

Clause 8 requires the Medical Superintendent of a hospital to notify OPC of the patient's discharge from the hospital, transfer from the hospital or absence from the hospital. In addition, the Medical Superintendent is required to notify OPC of the patient's death at the hospital.

Under section 38 of the Protected Estates Act the Protective Commissioner is required to consider whether a protected person who has been discharged from hospital is capable of managing his or her affairs and to terminate management if so satisfied. Without notification of a patient's discharge from hospital, the Protective Commissioner may not be aware of the need to consider whether management of the former patient's estate should be terminated. Again, the Medical Superintendent is considered to be the most appropriate person to notify OPC of a patient's discharge.

Similarly, it is important that OPC is aware of the location of a client in order to provide assistance to that client. Without a requirement that OPC be notified of a patient's absence or return to the hospital, OPC's ability to manage its client's estate may be made more difficult, resulting in damage to, or loss of, the client's estate.

Under s.42 of the Protected Estates Act the Protective Commissioner has certain discretion and has certain duties where a client dies. For example, OPC is required to pay all money standing to the client's credit and hand over all chattels and documents belonging to the client to the client's legal personal representative. Under s.28 the Protective Commissioner may pay for a client's funeral expenses. Under s.43 the Protective Commissioner may continue to manage a client's estate until notified of the client's death. Accordingly, it is of importance that OPC be notified of a client's death as soon as practicable. Failure to notify OPC of a client's death may result in OPC taking inappropriate action or failing to take appropriate action.

Given that the protected person is detained in hospital at the initiation of the Medical Superintendent, it is considered appropriate for the Medical Superintendent, given their responsibilities for patient record keeping, to be responsible for informing the Protective Commissioner.

The duties of the Medical Superintendent include the requirement to keep records and make these records available to the Director-General in respect of the admission, treatment, discharge, removal, absence with or without leave or death of each patient admitted to the hospital. The Medical Superintendent is a medical

practitioner of a hospital appointed under the Mental Health Act 1990 to that position.

### 8.3.2 Alternatives to Medical Superintendent Notification

Two alternatives to clause 7 have been reviewed:

- Not remake clause 7; and
- Amend Schedule 3 to accommodate OPC notification.

If clause 7 did not exist it is possible that the communication of a proportion of the 253 orders made per annum would fail to be notified to OPC. In addition, OPC may fail to be kept informed of their clients whereabouts in a timely manner.

It is understood that some persons detained in psychiatric hospitals can be of risk to themselves in terms of preserving their financial affairs in good order.

Deleting clause 7 would put the property and assets of persons undergoing treatment for a cognitive disability at risk of inappropriate disbursement.

An alternative to Clause 7 could be the amendment of Schedule 3 to include a requirement for the Magistrate or MHRT to inform the Protective Commissioner directly rather than impose this duty on the Medical Superintendent. This would require the creation of communication protocols and may result in additional administrative duties for Magistrates or Tribunal members. This may also result in the separation of client paperwork where decisions regarding a patient's detention in hospital are then separated from the financial management order.

The protected person is detained in hospital at the initiation of the Medical Superintendent. It is considered appropriate for the Medical Superintendent, given their responsibilities for patient record keeping, to be responsible for informing the Protective Commissioner.

Similarly, if clause 8 was not remade, the Protective Commissioner would not be aware of the location of the client in order to provide assistance, whether management of that persons' assets should be terminated, whether funeral expenses will need to be paid, whether carers need to be contacted and so on. Again, as the protected person is detained in hospital at the initiation of the Medical Superintendent, it is appropriate for the Medical Superintendent to be responsible for informing the Protective Commissioner.

## 8.4 Review of Decisions by Administrative Decisions Tribunal (ADT): Clause 9

### 8.4.1 Overview

Clause 9 of the proposed Regulation ensures decisions made by the Protective Commissioner in exercise of the following functions under the Protected Estates Act 1983 can be subject to review by the ADT:

- powers as to property (s24),
- the power to employ agents (s25),
- execution of documents (s26),
- payments into trust fund (s27)
- disposition of money in the hands of the Protective Commissioner (s28).

Clients, spouses or any person which the ADT believes has a legitimate interest in the estate can seek a review of a decision.

The objective of this provision is make explicit this right for clients, their spouse or any person which the ADT believes has a legitimate interest in the estate to have the above decisions reviewed.

The right of review by the ADT is best explicitly stated in the law under which OPC made the above decisions, i.e. the Protected Estates Act 1983 and the Protected Estates Regulation 2003.

The provision has only been in force since 16 May 2003 and to date only one request for a review has proceeded to the ADT. Review by the ADT is seen as an important step in ensuring that OPC is accountable for the decisions it makes and that OPC achieves best practice in substitute decision making. Decision review by the ADT is in accordance with the recommendations of the Public Bodies Review Committee of Parliament and the Bill introducing decision review by the ADT received the unanimous support of Members of Parliament when enacted.

The role and function of the ADT in relation to its review of OPC decisions is explained in detail below.

### 8.4.2 What is the ADT?

The Administrative Decisions Tribunal (ADT) commenced operation in October 1998. The ADT was established to provide a central, cost effective and convenient way for the people of NSW to obtain an independent review of administrative

decisions and to have certain general complaints, such as discrimination and professional misconduct, resolved.

The ADT is made up of six Divisions, each responsible for particular areas. They are the General Division and five specialist Divisions named the Community Services Division, the Revenue Division the Equal Opportunity Division, the Retail Leases Division and the Legal Services Division.

The ADT plays a key role in promoting high quality decision-making in the provision of government services and programs. It works to achieve the goal set by Parliament - to foster an atmosphere in which administrative review is viewed positively as a means of enhancing the delivery of services and programs to the citizens of New South Wales.

#### **8.4.3 Reviews of Administrative Decisions**

One of ADT's key responsibilities is reviewing administrative decisions made by government agencies.

As noted above, a person's right to request a review of a decision by the ADT can only be initiated if this right is set out in the law under which the government agency made the decision.

The law applicable to OPC which gives rights to ADT review is Section 28A of the Protected Estates Act 1983 and clause 9 of the proposed Regulation specifies, for the purpose of Section 28A, which of OPC's decisions are reviewable. In the absence of Clause 9, no decisions would be prescribed as reviewable by the ADT.

This legislative right to have decisions reviewed assists OPC in ensuring:

- high quality decision-making; and
- enhancement of the delivery of services and programs.

#### **8.4.4 Internal Review to have been Finalised Prior to Appeal**

A person may apply to the ADT for a review of a reviewable decision only if an internal review is taken to have been finalised. This means that the person wanting to apply for a review of the decision must first have made a written request to the administrator, in this case the Protective Commissioner, to review the decision. The request must be made within 28 days of notification of the decision. The administrator has 21 days to respond. Following the notification of the result of the internal review an application for review can then be lodged with the ADT.

#### 8.4.5 What are the Review Outcomes?

In most cases, if the General Division of the ADT makes a decision in favour of the person seeking the review, the Tribunal can make various orders, including:

- reversing the decision completely or in part;
- substituting a new decision for the original decision; or
- ordering the agency to reconsider the decision in light of the ruling.

#### 8.4.6 Alternatives to ADT Review

One alternative to Clause 9 is to remove this provision from OPC's legislation.

If the availability of a review of a decision by the ADT was removed, OPC clients and others wishing to challenge an OPC decision would be required to commence proceedings in the Supreme Court.

Review by the ADT is considered to be easier, cheaper and less intimidating.

#### 8.4.7 Changing the Scope of ADT Review

The Protected Estates Regulation presently provides in clause 8A that all decisions made by the Protective Commissioner under Division 3 of Part 3 of the Protected Estates Act are reviewable. That Division makes provision for most but not all of the Protective Commissioner's functions in the management of client estates.

The present scope of the ADT's power of review could be decreased or increased. Were the scope of the ADT's review powers to be decreased, there is a danger that the spirit of the review legislation would not be honoured. The functions referred to in Division 3 of Part 3 (and referred to generally at paragraph 6.4.4.(a) of this RIS) are wide ranging and important. A reduction in the scope of the ADT's power to review decisions made in the exercise of those functions may adversely affect the ADT's general oversight of OPC decision-making and reduce the accountability of OPC.

The scope of decisions reviewable by the ADT may also be extended. For example, OPC's investment function is provided for in Part 4 of the Protected Estates Act and decisions in relation to reciprocal arrangements with other states are dealt with in Part 6. The ADT's review function could be extended to include these and other areas. However, review of decisions by the ADT commenced only in May 2003 and it is considered that ADT's reviews should focus at this time on those decisions of most immediate concern to clients. Consideration of a possible increase in the scope of reviewable decisions would benefit from the experience gained by the ADT and OPC in relation to those decisions that are presently reviewable. Accord-

ingly, it is believed that any possible extension of the scope of decisions reviewable by the ADT should be considered at a later date.

### **8.5 Protective Commissioner's Discretion: Clause 10**

Under s.42(1)(a) of the Protected Estates Act the Protective Commissioner has the discretion to pay a sum of money or hand over chattels from a deceased client's estate to any person claiming to be entitled in the distribution of the estate or as legatee under the client's will, notwithstanding that probate or letters of administration have or have not been obtained. This provision allows the Protective Commissioner to provide assistance to a deceased client's family or friends who may suffer hardship whilst awaiting the grant of probate or letters of administration. Under clause 10 (clause 9 of the current 1995 Regulation), the maximum amount OPC can pay in such circumstances is \$10,000. Similarly the maximum value of chattels that can be handed over is \$10,000.

It is proposed to retain this limit. Whilst s.42(1)(a) provides the Protective Commissioner with the ability to provide assistance to a family member or friend of a deceased client, it is considered important to place a limit on the assistance that can be provided. Otherwise a client's total estate could be dissipated through such payments, leaving no remaining money or assets for others who are entitled to participate in the distribution of the client's estate. A limit of \$10,000 has proven to be an adequate sum to provide reasonable assistance to family members or friends who have been placed in need as a result of a client's death. The effect of inflation has and will erode the degree of assistance that OPC can offer following the death of a client but to date no undue hardship has resulted from the limit imposed. An increase in the limit may allow OPC to provide more assistance to needy family members and friends but may lead to dissipation of the estate to the detriment of other family members and friends. A decrease in the limit may not allow OPC to provide adequate interim assistance to a family member or friend but may result in there being more money or assets available to others entitled to participate in the distribution of the client's estate. Whilst the limit placed on the amount of money or value of assets that may be paid or handed over is a matter of balancing possible competing claims, it is considered that the present limit achieves a reasonable balance.



## 9. CONSULTATION

### 9.1 Past Consultation

IPART staff held two meetings with members of the OPC Advisory Council in April 2003. Those in attendance are listed in the Table below.

**Table 31: IPART Consultation**

Name	Description
Brian Cohen	Former Supreme Court Justice
Phillip French	Lawyer, advocate for consumers with disabilities
Barbara Squires	NSW Committee on Ageing
Roger Stancliffe	Centre for Development Disability Studies
Lloyd Draney	Retired head of AMP foundation
Beverley Mackie	Mother of an OPC client
Janet Meagher	Board member of World Federation for Mental Health
Jenny Green	Former head of TAFE disability services

The following key issues were identified:

1. There are difficulties in applying fee setting principles such as “efficient costs” to the method of OPC service delivery due to the varying levels of consultation undertaken with clients, family members, friends and guardian and encouragement of their participation in the process. It is not possible, for example, to establish a standard client contact policy which sets a maximum number of meetings to be held per client per annum, or per transaction. In an endeavour to minimise the cost of servicing the client this may in fact lead to a range of unforeseen costs, such as client and family distress, litigation;
2. Concepts of “user pays” should be followed where possible to avoid discrimination between client groups and the fee structure should be capable of being clearly explained;
3. The fee structure should be mindful of the community wide impacts in terms of both costs to the community in terms of funding and benefits to the community from the good order and management of the financial affairs of disadvantaged persons.
4. Methods of applying fees and the waiver policy should be addressed in any fee review; and
5. The funding shortfall issue should be resolved.

## **9.2 Proposed Consultation**

Consultation on the content of the proposed Regulation will be undertaken as follows:

1. Advertisement in Sydney Morning Herald advising stakeholders of a 21 day period of public consultation during which submissions will be sought and analysed.
2. Distribution of RIS and draft Regulation to key stakeholders as noted in Section 2.6 above.

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## 10. CONCLUSION

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### 10.1 Discussion

The current fee structure fails to fully recover the cost of OPC service provision resulting in a significant shortfall each year. The structure also contains the following weaknesses:

- it is not obvious to the clients or the community how the transfers from the common fund to meet the shortfall are affecting individual client returns. This has led to complaints and reviews over the last five years;
- there are elements of cross-subsidisation between categories of services and between clients.

If OPC were to fully recover from clients the cost of services provided, an average of \$2,732 per client per annum would need to be charged for estate management alone. This is not feasible since over 60% of clients have an average common fund balance of only \$6,571 and to do so would reduce these client balances to zero in less than 2 ½ years.

Recent analysis provided in Table 3 has shown that the cost per annum per client for estate management ranges from \$171 to \$9,108 due to the great variation in disability types, different types of management and the level of service demands. Data is not readily available to determine whether the client who is serviced for \$171 per annum has high asset values, nor whether the client who is serviced at a cost of \$9,108 has low asset values.

The proposed fee structure has therefore been developed by assessing the positive and negative features of fee structures currently adopted by private sector organisations and agencies in NSW and other States.

Furthermore, the proposed fee amounts have been designed to ensure that clients for whom financial management orders have been made requiring their financial affairs to be managed by OPC are not charged rates higher than those charged by a commercial organisation operating in a competitive market.

Finally, given the relatively large number of clients with low value estates, a transfer from consolidated revenue of the amount of the shortfall, estimated at \$9 million per annum has been recommended.

## 10.2 Implementation Issues

The data, upon which the fee model and resultant revenue was formulated, was based on the following assumptions which should be periodically reviewed to ensure their continued validity:

- Value of client estates is represented by their investment funds of \$953,000,000 together with an estimated \$150,000,000 of additional assets (excluding the protected persons' principal places of residence);
- Costs incurred by OPC are for efficiently undertaken activities.

The fee revenue generated by the proposed Regulation will need to be monitored, initially within 6 months of implementation and then annually, to ensure:

- fees do not generate revenue in excess of OPC's costs;
- the Government funds provided do not continue to increase beyond the \$9 million that it is proposed be committed;

OPC continues to examine the merits of an activity based management system which will provide the foundation for a transition to a mixed fee for service and asset based fee structure so eliminating the remaining unfairness created by cross-subsidisation between clients.

## 10.3 Conclusion

As indicated throughout this RIS the proposed regulation is substantially the same as the existing regulation. The only significant changes proposed are those relating to fees OPC may charge its clients.

The proposed fee structure is considered to be superior to the present fee structure and those against which it has been compared in this RIS because:

- it is easily understood and comparatively simple to administer;
- the source of OPC's funding will be more clearly apparent;
- it will reduce cross-subsidisation by some clients of other clients; and
- those clients who are unable to fully pay for the services provided by OPC will be subsidised by Government appropriations.

It is considered that, with the exception of clause 11, the remaining provisions of the existing regulation require no change. In part, these relate to information to be

provided to patients detained in a hospital and to their family and friends and information to be provided to OPC about these patients. The provisions also detail the notice to be given of an order made by a Magistrate or the MHRT committing a person's estate to management and determine the limit on the Protective Commissioner's discretion to assist the person claiming to be entitled to participation in the distribution of the deceased client's estate. It is considered that each of these provisions remains relevant and needed.

The present transitional provision consequent on the enactment of the Protected Estates Amendment (Investment) Act 2000 (clause 11 of the existing regulation) is no longer required and would, in any event, have expired in November 2003.

## **OPC Programs and Services**

The objectives of OPC are delivered through a number of services grouped into the following Programs:

1. Community Education and Advocacy;
2. Financial and Asset Management;
3. Funds Management;
4. Private Management Support.

Each of these services is described in greater detail below.

### **Community Education and Advocacy**

Services provided under this program include:

1. Website;
2. Client newsletter;
3. Private Manager newsletter;
4. Service Provider newsletter;
5. Community Education and Awareness Seminars;
6. Community Education and Awareness Brochures & Facts Sheets;
7. Information/liaison officer located at the Guardianship Tribunal.

### **Financial and Asset Management**

Services provided under this program include:

#### **(a) Establishment of new clients**

1. Provision of information on services and service standards to client/carers;
2. Establishment of liaison database of available client information, eg contact details, family/carer details;
3. Identification and securing of client's assets and entitlements;
4. Identification of client's liabilities;

## Attachments

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5. Payment of client's immediate and short term liabilities and needs;
6. Creation of schedule for payment of client's "routine" bills and management of client's longer term liabilities;
7. Provision / arrangement of initial advice from disabilities specialist on aspects of client's circumstances;
8. Provision / arrangement of initial legal advice;
9. Development of a client plan in consultation with the client and appropriate others, incorporating:
  - the client's short, medium and long term personal and financial objectives;
  - the client's short, medium and long term needs, eg personal care;
  - the client's and appropriate others' preferred means of contact;
  - any cultural, ethnic, religious etc views / issues that need to be respected;
  - annual budget to meet ongoing financial needs and objectives;
  - strategy to address any outstanding issue relating to the client's disability/ies, eg need for special accommodation and/or equipment;
  - financial plan for investment of the client's funds;
  - strategy to address any outstanding legal issue.

### **(b) Ongoing Management of clients' financial affairs**

1. Management of issues identified but not resolved during establishment of relationship, eg Family Provision Act claim;
2. Collection of regular income due to the client, eg Centrelink payments, rent;
3. Collection of money due to the client, eg damages award;
4. Evaluation of claims for payment for past care etc;
5. Payment of routine bills, eg rates, rent, utilities;
6. Arrangement of and payment for insurance policies;
7. Provision of advice on and negotiation of client – carer agreements;
8. Payment of carer fees/wages;

## Attachments

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9. Payments in support of the client's dependents;
10. Provision of security for the client's personal assets, eg jewellery, title deeds;
11. Acquisition/arrangement of acquisition of major asset, eg residence, motor vehicle;
12. Sale/arrangement of sale of major asset;
13. Management of dwelling construction;
14. Management of dwelling modification, refurbishment etc;
15. Management of dwelling repairs;
16. Management of leased/rented property;
17. Inspection of and provision of report on real property;
18. Securing dwelling contents upon vacation by the client;
19. Exercise of shareholder rights etc in relation to the client's business;
20. Provision/arrangement of advice on the client's circumstances and needs from disabilities specialist;
21. Provision/arrangement of legal advice and representation to protect client's assets/rights;
22. Preparation of income tax and land tax returns;
23. Seeking of Australian Taxation Office rulings;
24. Arrangement of and payment for interpreter and translation services for client contact;
25. Provision of reports to clients/others on the client's assets, liabilities, income, expenditure as needed or at least six monthly (income/expenditure) or twelve monthly (assets/liabilities);
26. Review of annual budget, financial plan and client plan as needed or at least annually;
27. Provision of Reports and Proposals to the Supreme Court for determination of:
  - major issues concerning, eg management of the client's business interests;



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## Attachments

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- a disputed claim for past care of the client;
28. Provision of reports on the client's circumstances to the Supreme Court, Guardianship Tribunal or Mental Health Review Tribunal to assist review of financial management orders.

### **(c) Finalisation of Management**

1. Payment upon revocation/discontinuance of the client's funds;
2. Payment upon the client's death of funeral expenses and some liabilities;
3. Provision upon the client's death of a statement of assets and liabilities; payment of the client's funds; and release of security documents to the client's legal personal representative.

### **Funds Management**

1. Investment of client funds, either directly or via an external funds manager;
2. Management of the client's financial assets portfolio, including the purchase and sale of shares; participation in bonus share offers, rights issues etc; receipt of dividends, distributions;
3. Provision of advice on market trends and status of the client's assets.

### **Private Management Support**

#### **(d) Establishment of New Clients**

1. Provision of information on services and service standards to the private manager;
2. Establishment of liaison database, eg contact details, family/service provider details;
3. Determination of a management plan, including a financial plan, for the client by the issue of Authorities and Directions to the private manager;
4. Establishment of security requirements to protect the client's assets;
5. Provision of information and support to the private manager on the legislative and other functions of a private manager.

#### **(e) Ongoing Supervision and Support of Private Managers**

1. Provision of advice, support and guidance to private managers in the ongoing management of the client's financial affairs;

## Attachments

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2. Examination and passing of accounts submitted by the private manager;
3. Arrangement of visits and reports, eg by an authorised visitor, on the client's needs and circumstances;
4. Monitoring of implementation and, if appropriate, review of the client's management plan and the authorities and directions given to the private manager;
5. Provision of reports to the private manager on the client's funds, held by OPC as security or pending determination of a management plan, as needed or at least six monthly;
6. Authorisation of a proposal by a private manager to enter into an agreement for and on behalf of the client, eg for the purchase or sale of a dwelling, motor vehicle etc;
7. Authorisation of a proposal by a private manager to obtain legal advice and representation for and on behalf of the client, eg to protect assets;
8. Provision of Reports and Proposals to the Supreme Court for determination of:
  - major issues concerning, eg, management of the client's business interests;
  - a disputed claim for past care of the client;
9. Provision of reports on the client's circumstances to the Supreme Court and Guardianship Tribunal to assist review of financial management orders;
10. Preparation of financial plan for the investment of the client's funds.

### **(f) Finalisation of Management**

1. Payment upon revocation/discontinuance of the client's funds held by OPC;
2. Authorisation of payment upon the client's death of funeral expenses;
3. Provision upon the client's death of a statement of the client's funds held by OPC; payment of the client's funds; and release of security documents to the client's legal personal representative.