

18 October 2021

NSW Trustee and Guardian

By Email consultations@tag.nsw.gov.au

Response to the NSW Trustee & Guardian Proposed Fee Changes Discussion Paper

Thank you for the opportunity to comment on NSW Trustee & Guardian's (NSWTG) Discussion Paper regarding increases to NSWTG fees.

Seniors Rights Service (SRS) is the leading rights-based community organisation representing the interests of seniors in NSW. Seniors Rights Service has been assisting older Australians across New South Wales (NSW) since 1986, providing individual and independent aged care advocacy and as a community legal center assisting vulnerable older people in retirement villages, aged care facilities and assisted accommodation across NSW. Last year we responded to over 9300 enquiries and provided over 2800 legal advices to older people. Our responses to the questions in the Discussion Paper are based on this experience of supporting older vulnerable people as they navigate the many different and complex areas of the law, including the areas of Trustee and Guardianship matters.

Our responses to the questions in the Discussion Paper are as follows:

Question 1 Do you have any feedback on our proposal to change the Wills and estate planning fees?

As a Community Legal Centre who every day assists older people who are disadvantaged and vulnerable, Seniors Rights Service opposes the basis of the proposed changes to the fee structure due to the adverse impacts that such fee increases will have on our clients.

The current NSW Trustee and Guardian Regulations 2017 allow the Trustee to charge fees for services. The criteria relating to the scope and size of fees the NSWT&G is allowed to change under the current Regulations are based on what a reasonable fee would be. The proposed amendments to the fee regime abandon the principle of "reasonableness" and a capped fee, for the size of the proposed fee regime and give the Trustee the power to charge whatever fee it thinks fit in accordance with market pricing.

While there are indications that fees might not be charged for certain services undertaken by the NSWT&G for persons on a full Centrelink benefit, the overall impact of the proposals is to undermine the T&G purpose of providing a service to the community at large, based on need and community service rather than based on fee for service.

This is particularly relevant to fees being charged for Estates' administration and Will drafting. This undermines the concept of ensuring all residents are testate rather than intestate when they die a concept that benefits society at large not just the testator and their beneficiaries. A properly drafted Will on appropriate legal advice will reduce Court time and litigation as well as securing the testator's wishes. The fees proposed for drafting wills are similar to those charged by private legal practitioners and so the person or couple who are not wealthy may avoid making a Will and the adverse consequences after they die will impact on social institutions as well as the beneficiaries. The alternative is for the person to attempt to draft their own "store bought" Will, which, experience shows is a difficult thing for many to do and will often end in litigation in any event.

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In relation to other planning ahead document drafting fees Seniors Rights Service makes the following comments

The effects of the proposed changes will be twofold. First older vulnerable disadvantaged residents of NSW may avoid appointing attorney's and guardians because they believe that they cannot afford them. Secondly those residents who do have a need for an attorney and guardian and decide to appoint one through the NSW T&G may have to forgo other needs for a time because they cannot afford to pay the fee and spend their limited resources on other essentials. This is despite the proposal to not charge a fee to full pension recipients.

There are many older people in NSW who are on incomes below the full pension or are intermittently so. Many self-funded retirees for instance may have incomes generated from their asset source that are less than the pension, at least from time to time. Invested assets for income sources are subject to variable returns. Many residents may be on a part pension, which is supplemented by variable work income. These groups of people will be excluded from the no fee for service pathway.

Seniors Rights Service also opposes any fee for the drafting of an Advanced Care Directive. Such instruments are generally best drafted in collaboration with a person's doctor and guardians and often are an organic document that will change over time as a person's health conditions change. As such we do not believe that it is in anyone's interests to put a fee barrier in place for the drafting of such an instrument.

Question 2 Do you have any feedback on our proposal to change the investment management fees?

The proposed increase in the fees charged for the management of funds held in the common fund is a three-fold increase over the current maximum fee that can be charged. The comments about the fees charged for Will drafting also apply to this fee increase proposal. Most residents who have their assets managed by the NSW T&G do not have a choice in the matter because they do not have the capacity to manage the estate themselves. Such fee increases could therefore be seen to be self-serving.

Question 3 Do you have any feedback on our proposal to change the investment planning fee?

Seniors Rights Service does not believe that the proposal to abandon the current fee structure with caps and to replace it with a market based fee structure for investment planning is justified. The reasons put forward in the proposal paper are inherently contradictory. On the one hand it proposes that the fee will be based on industry standards or market value, but on the other hand that such a fee will not cover the cost of providing the service. Private fund managers, who set the market for fees being charged, presumably make a profit or they would not be in business. The market value would ensure that the fee would cover the cost and provide a profit. Indeed, many private management companies have gained reputations for charging exorbitant fees. If the NSW T&G can determine its own fees the question must be asked: how long will fees, set initially at the lower end of the market, remain at that level before the inevitable increase occurs to reflect market value?

Question 4 Do you have any feedback on our proposal to change the fees for estate establishment and administration of estate?

Seniors Rights Service has no comment on the fee changes proposed for estate establishment and administration of estates.

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Question 5 Do you have any feedback on our proposal to change the annual cap on the direct management fee?

SRS has no comment on the proposed increase in the cap on the management fee.

Question 6 Do you have any feedback on our proposal to change the private financial management fees?

Seniors Rights Service notes that many privately managed estates are supervised by the T&G at the direction of the Tribunal or Court. As such they have no option in regard to fees being paid for that supervision. Seniors Rights Service approves of the retention of the lower asset value funds eligibility for reduced or waived fees.

Question 7 SRS has no comment on this question.

In conclusion, Seniors Rights Service, assists older people every day who are disadvantaged and vulnerable and as such we oppose the basis of the proposed changes to the scope of the NSW T&G fee structure due to the adverse impacts that such fee increases will have on our clients-disadvantaged and vulnerable older people many of whom have no other options available to them but to use the services of the NSW Trustee and Guardian.

We thank you for the opportunity to comment on the Discussion Paper.

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