

Guardianship and Administration Board Bill

EXPLANATORY MEMORANDUM

Outline

This Bill is based on the recommendations contained in the Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons.

The Committee recommended—

- (i) that decisions about the guardianship of handicapped persons should be made by a Guardianship Tribunal;
- (ii) that a guardian should only be able to make decisions in those areas in which the person lacks a decision making ability;
- (iii) that applications for guardianship should be heard with a minimum of delay;
- (iv) that all guardianship orders should be reviewed at least annually; and
- (v) that members of the public should have access to an information/advisory service provided by the Tribunal.

One of the key features of the Bill is the proposed establishment of a Guardianship Tribunal, which will be known as the Guardianship and Administration Board.

The Board will have two main functions—

- (i) the appointment of guardians in respect of persons with a disability; and
- (ii) the appointment of administrators of the estates of persons with a disability.

“Disability” is broadly defined in the Bill and encompasses both intellectual impairment as well as physical disability, mental illness, brain damage and senility.

Applications for the appointment of a guardian may be made by any person, but the Board may only order such an appointment if the various criteria specified in the legislation have been met.

These are that the person has a disability, is unable by reason of the disability to make reasonable judgments in respect of all or any of the matters relating to her or his person, and is in need of a guardian.

The Bill emphasises the rights of persons in respect of whom an order has been sought from the Board.

It specifically directs the Board, in determining whether a person is in need of a guardian, to consider whether the needs of the person could be met by less restrictive means. It prohibits the Board from appointing a guardian unless it is satisfied such an appointment would be in the person's best interests.

Above all, the Board is obliged to take into account such factors as the suitability of the proposed guardian, the wishes of the represented person, the desirability of preserving family relationships, the compatibility of the proposed guardian and whether she or he will be accessible to the represented person so as to fulfil the requirements of guardianship.

The Board may vest a guardian with plenary, or with limited powers. It may, thus, tailor-make an order to suit the particular needs of the represented person. The Board may appoint the Public Advocate as a guardian for a limited period and may also appoint alternate guardians.

The Board is also to be empowered to order the appointment of an administrator of the estate of a person with a disability.

The criteria for such an appointment are similar to those required for the appointment of a guardian.

Under the legislation, the Board may appoint the Public Trustee or any other person provided the proposed administrator is suitable, will act in the best interests of the represented person, and there is no potential conflict of interest, and if the person has a special expertise, or there is some other special reason why that person should be appointed as administrator.

Guardians and administrators may seek the advice of the Board in respect to the exercise of any power.

While the Board will be bound by the rules of natural justice (which is considered essential, bearing in mind that guardianship and estate administration involve a deprivation of civil liberties), the hearings of the Board are intended to be held in an informal atmosphere, free, as far as possible, from the adversary process which is the hallmark of court proceedings.

Guardianship and administration orders may be reviewed within 12 months, and must be reviewed within 3 years. They may be reviewed at any time on the Board's own motion, on the application of the represented person, or on the application of some other person.

Provision is made in the Bill for appeals to the Administrative Appeals Tribunal.

It cannot be stressed too strongly that the legislation will not compel any person to apply for guardianship, or for the appointment of an administrator. Indeed, in the vast majority of cases, persons with a disability will not be in need of guardianship or estate administration.

However, the legislation will make a major contribution to the provision of these services where a need exists and where benefits will accrue to a person with a disability in the community.

The other key feature of the Bill is the creation of an office of Public Advocate.

The Public Advocate will have a number of functions.

These include—

- (i) acting as guardian or administrator of last resort or as joint guardian with some other person;
- (ii) promoting community involvement in decision making and in the provision of services to disabled people;
- (iii) general advocacy on behalf of disabled people; and
- (iv) advising the Minister on the operation of the Act.

The Public Advocate will also have a responsibility for investigating complaints or allegations of abuse or exploitation of persons with a disability.

In many respects, the role of the Public Advocate will be to act as a watchdog on behalf of persons with a disability.

To ensure the independence of the Public Advocate, the office will not be associated with any Department providing services to persons with a disability.

The office will not be subject to the Public Service Act and the Public Advocate may only be dismissed by resolution of the Parliament.

The creation of the office of Public Advocate is an important innovation in protecting and promoting the rights and interests of persons with a disability and will ensure that greater consideration is given to the needs of persons with a disability in the life of the community.

Clause Notes

PART 1—PRELIMINARY

Clause 1 set out the purpose of the Act.

Clause 2 provides for the Act to come into operation on a day, or days, to be proclaimed.

Clause 3 is the definition clause.

Clause 4 sets out the objects of the Bill and expresses the intentions of the Parliament with respect to its interpretation.

PART 2—ESTABLISHMENT, CONSTITUTION AND PROCEDURE OF THE BOARD

Clause 5 establishes the Guardianship and Administration Board. It provides that the provisions of Schedule 1 are to have effect with respect to the members of the Board.

Clause 6 requires the appointment of an executive officer, and such other officers and employees as are necessary for the proper functioning of the Board.

Clause 7 requires proceedings before the Board to be held in public unless a request is made to the Board that the proceedings, or part of the proceedings, should be closed.

Clause 8 prohibits the broadcast or publication of any proceedings of the Board, unless the Board otherwise determines.

Clause 9 protects the confidentiality of any information acquired by a member of the Board, or by a person who has been present at any proceedings.

Clause 10 deals with the procedure of the Board including the giving of evidence and the summoning of witnesses. It also specifies that the provisions of Schedule 2 have effect with respect to the procedure of the Board.

Clause 11 empowers the Board to appoint a qualified legal practitioner, interpreter, medical practitioner or person with an appropriate expertise to assist it in any proceedings before the Board.

Clause 12 deals with appearances before the Board including legal representation.

Clause 13 requires the Board to give a statement of reasons for a determination if requested by a party to the proceedings within 28 days after the making of the determination.

PART 3—THE PUBLIC ADVOCATE

Clause 14 provides for the appointment of a Public Advocate and states that the provisions of Schedule 3 have effect with respect to the Public Advocate.

Clause 15 sets out the functions of the Public Advocate.

Clause 16 expresses the powers and duties of the Public Advocate.

Clause 17 provides for the appointment of such officers and employees as are necessary to enable the functions of the Public Advocate to be carried out.

Clause 18 enables the Public Advocate to delegate any of his or her powers, duties or functions to an officer or employee. The Public Advocate may delegate with the approval of the Board any or all of his or her powers and duties as guardian to an individual or organization.

PART 4—GUARDIANSHIP ORDERS

Division 1—Application for Guardianship Order

Clause 19 enables any person to apply to the Board for an order appointing a plenary guardian, or a limited guardian, in respect of a person with a disability.

Clause 20 requires the executive officer of the Board to give notice of the application to the various persons specified in the clause at least 14 days before it is to be heard.

Clause 21 requires the Board to commence hearing an application under clause 19 within 30 days of its receipt.

Division 2—Appointment of Guardian

Clause 22 empowers the Board to appoint a plenary or a limited guardian in respect of a person who has a disability, is unable by reason of a disability to make reasonable judgments in respect of all or any of the matters relating to her or his person or circumstances, and is in need of a guardian.

Clause 23 sets out the criteria for eligibility as a guardian, and goes on to empower the Board to appoint the Public Advocate as the plenary or limited guardian where no other person fulfils the specified requirements, or as a joint guardian where it is appropriate to do so.

Division 3—Powers and Duties of Guardian

Clause 24 describes the powers of a plenary guardian.

Clause 25 sets out the powers of a limited guardian.

Clause 26 enables the Board to empower a plenary guardian or a limited guardian to take such measures or actions as are specified in its order to ensure that a represented person complies with any decision of the guardian in the exercise of any of her or his powers and duties.

Clause 27 empowers the Board to order the Public Advocate, in company with a member of the police force, to visit a person with a disability in respect of whom an application has been made for guardianship for the purpose of making a report to the Board where the Board receives information on oath that the person is being unlawfully detained against her or his will, or is likely to suffer serious damage to her or his physical, emotional or mental health or well being unless immediate action is taken. After receiving such a report, and being satisfied that the person is being unlawfully detained, or is likely to suffer serious damage, the Board may order that the person be taken to and cared for at a place specified in the order until the application is heard.

Clause 28 requires a guardian to act in the best interests of the represented person.

Clause 29 authorizes a guardian to sign on behalf of a represented person and do such things as are necessary to give effect to any power or duty vested in the guardian by an order under the Act.

Clause 30 enables a guardian to apply for the advice of the Board upon any matter relating to the scope of the guardianship order or the exercise of any power by the guardian.

Clause 31 requires the guardian to report to the Board the death of a represented person.

Division 4—Temporary Orders

Clause 32 permits any person to apply for a temporary order appointing the Public Advocate as a guardian.

Clause 33 enables the Board to appoint the Public Advocate as a temporary guardian for a period not longer than 21 days.

Division 5—Appointment of Alternative Guardian

Clause 34 empowers the Board to appoint an alternative guardian at the time of making, or reviewing, a guardianship order.

Clause 35 authorizes an alternative guardian to immediately take over the duties of the guardian on the death of the original guardian, and requires the alternative guardian to notify the Board of such death.

Division 6—Powers of Board with respect to Medical Procedures

Clause 36 provides that the Division applies to a represented person in respect of whom a plenary guardian or a limited guardian with the power to consent to health care has been appointed by the Board, but excludes from its scope any emergency medical procedure.

Clause 37 prohibits major medical procedures as specified in guidelines with the consent of the guardian, unless the Board also consents.

Clause 38 prohibits a guardian from consenting to a procedure referred to in clause 37 without the consent of the Board.

Clause 39 requires the Board to give notice to the various specified parties of the hearing of any application.

Clause 40 requires the Board to commence hearing an application within fourteen days of its receipt.

Clause 41 provides for the wishes of the represented person to be ascertained.

Clause 42 empowers the Board to consent to a procedure referred to in clause 37.

PART 5—ADMINISTRATION ORDERS

Division 1—Application for Administration Order

Clause 43 enables any person to apply to the Board for an order appointing an administrator of the estate of a person with a disability.

Clause 44 requires the executive officer of the Board to give notice of the application at least 21 days before it is to be heard to the various persons specified in the clause.

Clause 45 requires the Board to commence hearing an application under clause 43 within 30 days of its receipt.

Division 2—Appointment of Administrator

Clause 46 empowers the Board to appoint an administrator in respect of the estate of a person with a disability, is unable to make reasonable judgments in respect of all or any part of her or his estate, and is in need of an administrator.

Clause 47 authorizes the Board to appoint as an administrator the Public Trustee or, where the Board considers there are special reasons why some other person should be appointed in preference to the Public Trustee, a person who is qualified under the provision to act as administrator.

Division 3—Powers and Duties of Administrator

Clause 48 sets out the powers and duties of an administrator.

Clause 49 requires an administrator to act in the best interests of the represented person.

Clause 50 authorizes an administrator to do all such things necessary to give effect to any power or duty vested in the administrator, but makes clear that this does not extend to making a will.

Clause 51 deals with the investment of the estate of a represented person by an administrator other than the Public Trustee.

Clause 52 voids every dealing, transfer etc. by a represented person in respect of any part of her or his estate under the control of an administrator unless the dealing, transfer etc. has been made for adequate consideration in favour of a person acting in good faith, who did not know that the represented person was a represented person.

Clause 53 provides that the interests of a represented person in any money or property arising from any sale or disposition by an administrator under powers given to the administrator by the Board and which have not been applied under those powers are not altered by such sale or disposition. The clause also requires an administrator to keep a separate account of such money or property and permits its investment in the same manner as trust funds under section 4 (1) of the *Trustee Act 1958*.

Clause 54 empowers the Board to open and read the will of a represented person.

Clause 55 enables an administrator to apply for the advice of the Board on any matter relating to the scope of an administration order or the exercise of any power by the administrator.

Clause 56 permits any person interested in an estate administered by an administrator whether as a creditor, beneficiary, next of kin or otherwise to apply to the Board upon any matter arising out of the administration of the estate.

Clause 57 requires the Board to give notice to an administrator where a person has ceased to be a represented person, but empowers an administrator to continue to act until she or he has received such notice.

Clause 58 requires an administrator other than the Public Trustee to lodge the accounts of an estate with the Public Trustee annually and provides for such accounts to be examined by the Public Trustee.

Division 4—Temporary Orders

Clause 59 enables a person to apply for a temporary order appointing the Public Trustee as the administrator of an estate.

Clause 60 enables the Board to appoint a temporary administrator for a period not longer than 21 days.

PART 6—REVIEWS OF ORDERS

Clause 61 enables the Board to review a guardianship order or administration order within twelve months of such an order being made, and requires the Board to review such order within three years. Orders may also be reviewed at any time on the Board's own motion or on application of the represented person or any other person.

Clause 62 requires the executive officer to give notice of a review hearing, at least fourteen days before the hearing is held, to the various persons specified in the clause.

Clause 63 permits the Board, as a result of a review, to amend, vary, continue, replace or revoke the order.

PART 7—GENERAL PROVISIONS

Clause 64 enables the Board to state a special case to the Supreme Court.

Clause 65 enables the making of rules relating to special cases.

Clause 66 enables the Supreme Court or County Court to remit appropriate cases to the Board for its determination.

Clause 67 provides for the Administrative Appeals Tribunal to review decisions of the Board.

Clause 68 requires the executive officer to keep a register of applications lodged, determinations of the Board, and the reasons for each determination.

Clause 69 makes it an offence to insult a member of the Board or to repeatedly interrupt proceedings of the Board.

Clause 70 protects any member, the executive officer and any other person acting under the direction of the Board from any action, liability, claim or demand, and exempts the Crown from any liability for compensation as a consequence of any damage, loss or injury sustained by a person because of an act or omission of a guardian or administrator.

Clause 71 contains the various machinery requirements relating to the service of notices under the Act.

Clause 72 provides that a hearing or determination of the Board is not invalidated only because of a failure to give notice to any person to whom notice is required to be given, other than the represented person.

Clause 73 requires courts and persons acting judicially to take judicial notice of the signature of the President, executive officer or member of the Board, and of the Public Advocate or Acting Public Advocate.

Clause 74 empowers the Board to award costs in particular cases.

Clause 75 deals with the keeping of accounts by the Board.

Clause 76 requires the Board to submit an annual report to the Minister and provides for the tabling of the report in Parliament.

Clause 77 deals with the keeping of accounts by the Public Advocate.

Clause 78 requires the Public Advocate to submit an annual report to the Minister and provides for the tabling of the report in Parliament.

Clause 79 provides for the audit by the Auditor-General of the financial statements of the Board and the Public Advocate.

Clause 80 is the general offence provision and fixes a penalty of not more than 20 penalty units for an offence if no penalty is expressly provided.

Clause 81 deals with offences by bodies corporate.

Clause 82 contains the heads of power for the making of regulations under the Act.

PART 8—AMENDMENT TO THE *PUBLIC TRUSTEE ACT 1958*

Clause 83 defines the Public Trustee Act as being the Principal Act for the purposes of the Part.

Clause 84 makes the consequential amendments necessary to the Principal Act.

Clause 85 deals with persons who are “protected persons” within the meaning of the Principal Act, and requires hearings to be held by the Guardianship and Administration Board to determine whether Guardianship or Administration orders should be made with respect to protected persons.

Clause 86 makes miscellaneous amendments to the Principal Act.

PART 9—AMENDMENTS TO THE *INSTRUMENTS ACT 1958*

Clause 87 amends the *Instruments Act 1958* in relation to enduring powers of attorney.