

**GUARDIANSHIP AND ADMINISTRATION BOARD
HOBART**

**Mr H.I. on the application of THE DEPARTMENT OF HEALTH AND
HUMAN SERVICES**

GAB No. XXXX of 2008

REASONS FOR DECISION

Anita Smith (President)
Kim Barker (Member)
Malcolm Schyvens (Member)

Decision: 10 June 2008

Guardianship – employment – role of guardian in allowing disclosure of sensitive personal information to potential rehabilitation or employment providers
Guardianship and Administration Act 1995, ss 19, 20, 21, 25

1. The Department of Health and Human Services (DHHS) made an application pursuant to sections 19 and 50 of the *Guardianship and Administration Act 1995* (“the Act”) for the appointment of a guardian and administrator for Mr H.I. who resides at the Wilfred Lopes Centre according to the terms of a restriction order made by the Supreme Court of Tasmania. The Board appointed the Public Trustee as Mr H.I.’s administrator but adjourned the application for a guardian pending further submissions and consideration. This statement of reasons addresses the guardianship application only.
2. The application was heard at the Wilfred Lopes Centre (WLC) on 29 May 2008. The following people attended (with reference to their role):
 - Mr H.I. (Proposed Represented Person)
 - Margaret Colville (Deputy Public Guardian)
 - Justin Clifford (Representative of the Public Trustee)Members of DHHS staff:

Karen Owen RN (WLC Nurse)
Mary Evans (Forensic Disability Officer)
Nicholas Rooke (Psychologist)
Dr Michael Evenhuis (Psychiatric Registrar)

3. The Board had before it the documents listed in appendix “A”. The legislation relevant to the application is set out in appendix “B”.

Disability and Incapacity – Section 20(1)(a)&(b)

4. Dr Rosemary Schneider completed a pro forma Health Care Professional Report on 3 April 2008. She described Mr H.I.’s disability as an intellectual disability with an extremely low IQ. She reported that Mr H.I. is unable to reliably make reasonable plans and follow them through, nor reliably determine cause and effect relationships. He is occasionally prone to impulsive acts without reasonable consideration of the consequences and is susceptible to influence by others.
5. The specific issues that the application addressed were issues relating to how much information the team at WLC and Forensic Disability Services can provide to vocational rehabilitation providers and/or to potential employers about Mr H.I.’s history of offending and his rehabilitative requirements. Nicholas Rooke’s submission following the hearing indicated that:

“Mr H.I. lacks the capacity to understand matters involving consent. Mr H.I. suffers from an intellectual disability which places him in the lowest 0.1% of the population for general intellectual functioning (i.e. 999 out of 1000 people of Mr H.I.’s age would score more highly on such measures).

Specific item analysis from previous assessment indicated that Mr H.I. lacks the capacity to understand meanings of simple words, and cannot correctly answer questions such as “how many weeks are there in a year?”

Regarding the issues of consenting to release of information to potential employers, he said:

“In our opinion Mr H.I. is unable to adequately understand the concepts involved in such a process, as well as the ramifications of both releasing this information, and alternatively choosing not to divulge this information.”

6. The Board was satisfied that such decisions as are outlined in the application are beyond Mr H.I.’s capacity to make.
7. Mr H.I. did not express any wishes regarding the guardianship application. It would appear that the basis of the guardianship application was too complex for him to form any view or even an emotional response.

Need for a guardian – Section 20(1)(c)

8. The applicant stated that the need for a guardian arises thus:

“Mr H.I. if able to give informed consent would determine how much of a criminal record to divulge when applying for jobs as a gardener. However due to the nature of his disability it is felt that he is unable to give informed consent. Staff need guidance to determine how much of Mr H.I.’s criminal history should be discussed to protect his rights and the rights of the general community.”

9. The Board raised a number of concerns about an application on this basis: (i) Mr H.I.’s criminal record is a matter of public record; (ii) the Board questioned whether such decisions may fall within the purview of the Chief Forensic Psychiatrist; and (iii) the Board has no authority under the Act to take into account the “rights” of the general community, only the best interests of the proposed represented person. Accordingly the matter was adjourned for further consideration.

10. A submission was received from Dr Michael Evenhuis during the period of the adjournment which stated:

“Part of Mr H.I.’s rehabilitation plan will involve vocational programs with external service providers. These service providers exist outside of the Health and Justice departments. Given Mr H.I.’s history of sexual offending, it will be important to be able to provide service providers with information about his risk of offending and about strategies that can be employed to minimise this risk. Also, information about his behaviour outside of the Wilfred Lopes Centre will be useful in our treatment and discharge planning. We require Mr H.I.’s consent for the exchange of this information. Whilst some of this information is a matter of public record, some of the details of his offences and all of the clinical information we have that pertains to risk are not.”

11. The Board investigated whether such exchange of information could be authorised within existing powers of the Chief Forensic Psychiatrist but determined that while the Chief Forensic Psychiatrist has very wide powers for control and treatment of forensic patients, there appears to be fewer powers to facilitate meaningful rehabilitation.

12. The first two concerns of the Board were resolved with these investigations. Such decisions become a decision of a guardian because section 25(2)(c) provides that a guardianship power can include the power:

“to decide whether the represented person should or should not be permitted to work and if so –

(i) the nature or type of work; and

(ii) the person for whom the represented person is to work; and

(iii) any related matters;”

13. Clearly, divulgence of personal matters related to Mr H.I.’s history and present state of wellbeing to a potential employer or

rehabilitation provider would be a matter related to a decision regarding nature and type of work and identity of an employer.

14. In considering whether Mr H.I.'s needs could be met by other means less restrictive of his freedom of decision and action, for the purposes of section 20(2) of the Act, the Board takes into account that no person can give such consent in an informal manner and such needs cannot be met other than through the appointment of a guardian.

15. In considering whether the appointment of a guardian is in Mr H.I.'s best interests, for the purposes of section 20(3), the Board takes into account the following: In establishing any employment relationship, it is necessary to be candid about one's past. When a potential employee has a history of sexual offences, an employment relationship that is established without candour regarding such a history could meet an abrupt end and possibly endanger Mr H.I.. Therefore while candour regarding his prior offences may not promote his chances of obtaining employment, an inability on the part of WLC and Forensic Disability Services staff members to discuss such matters would have the potential for even more detrimental effects. In particular, if the WLC and Forensic Disability Services staff members are confident that safeguards or restrictions can be put in place to prevent the possibility of Mr H.I. offending whilst in employment, such prevention is in Mr H.I.'s best interests but could not be properly established without disclosure of prior events.

16. Therefore the Board is satisfied that consent to disclose Mr H.I.'s past history and strategies to avoid future offending is in Mr H.I.'s best interests. Further the reciprocity of information back from employers to WLC and Forensic Disability Services staff members will promote Mr H.I.'s best interests as well. The Board is satisfied

that there is a need for a limited guardian to consent to release of Mr H.I.'s personal information and such limitation may be based upon the issues discussed herein.

Persons eligible as guardians – Section 21

17. The Public Guardian was nominated in the application. The Deputy Public Guardian attended the hearing and stated that the office had not made such decisions in the past and was unsure how it would be enforced. The following is provided for guidance and not meant to fetter the discretion of the guardian within the terms of the limited order.

18. The Board assumes that the Public Guardian will attend meetings of WLC and Forensic Disability Services staff members to discuss the establishment of employment relationships. When that team develops a written plan to provide to potential employers, the Public Guardian can approve or disapprove of the details included in such plans. Where details might appear salacious and without rehabilitative foundation, she ought refuse their release. Where details are necessary to establish a rehabilitative foundation to employment then consent to release ought to be given. Of course, the guardian has no powers to release details of persons other than Mr H.I., e.g. the identity of any victim(s). The order does not include the ability to consent to or restrict the release of information that is on the public record.

Conclusion:

After hearing an application by Forensic Mental Health Services in respect of Mr H.I. of Wilfred Lopes Centre, Risdon (hereinafter called the 'represented person')

The Board was satisfied that the represented person

- is a person with a disability, and

- is unable by reason of the disability to make reasonable judgements in respect of his person and circumstances, and
- is in need of a limited guardian;

THE BOARD ORDERS

1. That Public Guardian be appointed as the represented person's guardian.
2. That the powers and duties of the guardian are limited to decisions about the release of information personal to the represented person to any person for whom the represented person is to work or any rehabilitation provider who might facilitate or attempt to facilitate an employment or employment-like relationship.
3. That a review of the order be held at the expiration of 18 months.
4. That this order remains in effect until the 3 June 2011.

DATED this 10 June 2008

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Anita Smith
PRESIDENT

APPENDIX "A"

Application:

Application for guardianship by Department of Health and Human Services dated 28 March 2008

Pro forma Health Care Professional Report completed by Dr Rosemary Schneider dated 3 April 2008

Other reports and correspondence:

Report of GAB Manager of Investigations and Liaison dated 13 May 2008

Letter to Board from A. Godfrey, Forensic Occupational Therapist, dated 16 May 2008

Letter to Board from Dr M. Evenhuis, Psychiatric Registrar, dated 3 June 2008

Letter from N. Rooke, Psychologist, dated 30 May 2008

APPENDIX “B”

Legislation:

The requirements for appointment of a guardian are contained within section 20 and 21 of the Act:

20. Guardianship order

(1) If the Board, after a hearing, is satisfied that the person in respect of whom an application for an order appointing a guardian or an order appointing an administrator is made—

- (a) is a person with a disability; and
- (b) is unable by reason of the disability to make reasonable judgements in respect of all or any matters relating to his or her person or circumstances; and
- (c) is in need of a guardian—

the Board may make an order appointing a full or limited guardian in respect of that person and any such order may be subject to such conditions or restrictions as the Board considers necessary.

- (2) In determining whether or not a person is in need of a guardian, the Board must consider whether the needs of the proposed represented person could be met by other means less restrictive of that person's freedom of decision and action.
- (3) The Board must not make an order under subsection (1) unless it is satisfied that the order would be in the best interests of the proposed represented person.
- (4) The Board must not make an order appointing a full guardian unless it is satisfied that an order for limited guardianship would be insufficient to meet the needs of the proposed represented person.
- (5) Where the Board makes an order appointing a limited guardian in respect of a person the order to be made is that which is least restrictive of that person's freedom of decision and action as is possible in the circumstances.
- (6) Two or more guardians of a person, each with different functions, may be appointed under one or more limited guardianship orders.

21. Persons eligible as guardians

(1) The Board may appoint as a full guardian or limited guardian any person who is of or over the age of 18 years and consents to act as guardian if the Board is satisfied that that person –

- (a) will act in the best interests of the proposed represented person; and
 - (b) is not in a position where the person's interests conflict or may conflict with the interests of the proposed represented person; and
 - (c) is a suitable person to act as guardian of the proposed represented person.
- (2) In determining whether a person is suitable to act as a guardian of a represented person, the Board must take into account –

- (a) the wishes of the proposed represented person so far as they can be ascertained; and
- (b) the desirability of preserving existing family relationships; and
- (c) the compatibility of the person proposed as guardian with the proposed represented person and with the administrator (if any) of his or her estate; and
- (d) whether the person proposed as guardian will be available and accessible to the proposed represented person so as to fulfil the requirements of guardianship of that person.

25. Authority of full guardian

- (1) A guardianship order appointing a full guardian confers on the full guardian in respect of the represented person all the powers and duties which the full guardian would have in Tasmania if he or she was a parent and the represented person his or her child.
- (2) Without limiting subsection (1), an order appointing a full guardian confers on the person named as full guardian the power –
 - ...
 - (c) to decide whether the represented person should or should not be permitted to work and if so –
 - (i) the nature or type of work; and
 - (ii) the person for whom the represented person is to work; and
 - (iii) any related matters; and
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27. Exercise of authority by guardian

- (1) A guardian must act at all times in the best interests of the person under guardianship.
- (2) Without limiting subsection (1), a guardian acts in the best interests of a person under guardianship if the guardian acts as far as possible –
 - (a) in consultation with that person, taking into account, as far as possible, his or her wishes; and
 - (b) as an advocate for that person; and
 - (c) in such a way as to encourage that person to participate as much as possible in the life of the community; and
 - (d) in such a way as to encourage and assist that person to become capable of caring for himself or herself and of making reasonable judgments relating to his or her person; and
 - (e) in such a way as to protect that person from neglect, abuse or exploitation.