



The Law Reform Commission

INTRODUCTION OF THE OFFICE OF THE
ADMINISTRATOR-GENERAL IN THE CAYMAN ISLANDS

FINAL REPORT
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The Law Reform Commission

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INTRODUCTION OF THE OFFICE OF THE ADMINISTRATOR-GENERAL IN THE CAYMAN ISLANDS

INTRODUCTION

1. Pursuant to a referral by the Attorney General in January 2011, the Law Reform Commission agreed to examine the feasibility of the introduction of the office of Administrator-General.
2. An Administrator-General carries out duties and functions similar to those of a public trustee or of a public guardian and in some jurisdictions the office is known as the Administrator-General/Public Trustee office.¹ There is a variety of nomenclature for such office, for example public guardian, official solicitor or official receiver depending on the duties assigned to the office.
3. In 2009 when the Law Reform Commission was reviewing the need for enduring powers of attorney (EPA) in the Cayman Islands, the Commission concluded that such powers should only be introduced if there was an oversight body such as a Public Trustee or Administrator-General to guard against abuse of such powers. The Legal Department stated that there was a need for the office of Public Guardian generally and more particularly if enduring powers of attorney were introduced. In his response to the review, the Chief Justice recommended the establishment of the office of Official Receiver whose duties would include ensuring that donors get proper legal advice before granting an EPA, assessing whether the incapacity triggering the operation of the EPA has occurred, monitoring the actions of attorneys and bringing court proceedings to protect the donor's or any beneficiary's interests.
4. The Public Trustee, which has its origins in New Zealand, was once described by one of the opponents² to it during the passage of legislation to establish the office as "one of the most extraordinary that ever entered in to the imagination of any persons out of the limit of those buildings which were appointed for the custody of persons not able to take care of their own property".
5. The first Public Trustee in New Zealand was proposed as early as 1870³ and established in 1873. It was proposed by E.C.J. Stevens, a member of parliament, to resolve the difficulty colonists had in finding reliable private trustees in the colony⁴. The society was a young, mobile one and colonists found it difficult to find friends or relatives willing and qualified to undertake the duties of trustees.⁵ This was a matter of great concern particularly where beneficiaries were minors. To combat this and to find a

¹ Kenya, Uganda

² Henry Sewell, Colonial Secretary, 1872

³ See Raymond Joseph Polaschek "Public Trust", Encyclopaedia of New Zealand 1966

⁴ Wikipedia

⁵ Ante, note 3

permanent and qualified person to act, a Bill establishing the Public Trustee was introduced in 1870 and, after much criticism⁶ and opposition, was passed on 25 October 1872.⁷

6. The first duty of the New Zealand Public Trustee was to administer estates of deceased persons where such persons had named him executor in their wills. After an amendment to the Act in 1873 powers were widened to include administering the estates of persons who died intestate, acting as trustee of settlements and undertaking the management of properties on behalf of living persons; administering the estates of mental patients and carrying out certain functions in respect of estates or moneys due to minors, the aged and the infirm.

7. Jamaica followed shortly thereafter with the enactment of the Administrator-General's Act which was passed in August 1873. When the office was established the authorised officer was bound to administer the estates of which the personalty amounted to £50 and upwards and of persons who died intestate without leaving a widower, widow, brother or whose relatives would not take out letters of administration within three months of the death of the deceased. The Administrator-General was made subject to the control of the Supreme Court of Judicature and, being an officer of that Court, was accountable to it for the discharge of his duties.⁸

8. Australia faced similar problems to New Zealand in the early days of settlement and proposals for the establishment of a state trustee were made as early as 1860 in Victoria. South Australia was the first Australian state to follow New Zealand in 1881.

9. The post is a well known one in many other Commonwealth jurisdictions- it was established in England in 1906 and the need for such an office in England appeared to have arisen because of concern in the late 1880's about the frauds carried out by trustees and solicitors⁹. There are also public trustees in most Australian states and in Caribbean countries such as the Bahamas, Barbados and Trinidad. There are Administrator-General's offices in countries such as India, Kenya, Uganda and Zambia.

10. In Canada, the first Public Trustee Office was established in 1919 in Ontario and there are offices in most other provinces. The primary purpose behind the establishment of the Public Trustee in Canada has been to provide a public body to administer the financial affairs of adults unable to look after their own property or legal interests or others unable to protect their own interests, such as children. Prior to the establishment of such an office, in many provinces the financial affairs of inpatients of an institution were managed by an official of that institution or a government body. For example, in 1853 the Bursar of Toronto Lunatic Asylum became the automatic committee of the estate of any

⁶ Ante note 2

⁷ Ibid;

⁸ Information obtained from website www.agd.gov.jm

⁹ "The Public Trustee in England, 1906-1986: The Failure of an Experiment?" - Patrick Polden

person who was committed. In British Columbia, the public official responsible for the administration of mentally incapable adults before 1963 was the Official Committee.¹⁰

11. The Public Guardian also plays a prominent part in the Canadian provinces. The first established office of Public Guardian was in Alberta in 1975 and Alberta is the only large province to have separate Public Trustee and Public Guardian offices. In some other provinces such as British Columbia and Ontario the combined office is known as the Public Guardian and Trustee. The focus of the office of the public guardian is to provide a body which makes decisions for the personal care of those who cannot make those decisions for themselves or who have no one else to do so.

12. The above history and functions of the office of Public Trustee/ Administrator-General were discussed by the Commission in a paper to which was appended a draft Bill. These were submitted for public comment in March 2012 after initial input by the judiciary and by the Attorney General.

13. The discussion paper examined how similar offices operated in countries such as the UK, Jamaica, Barbados and the Bahamas and the failures and successes of such operations. Our research showed that the main pitfalls which faced such offices over the years were underfunding, understaffing and lack of accountability.

14. The paper and Bill were published on www.gov.ky and www.lrc.gov.ky and in the local press on 22 March, 2012. It was also submitted directly to the following persons or organisations-

- The Attorney General
- Acting Solicitor General, the Portfolio of Legal Affairs
- The Cayman Islands Law Society
- The Cayman Islands Law School
- The Caymanian Bar Association
- The Ministry of Community Affairs, Gender and Housing
- The Department of Children and Family Services
- The Chief Justice
- The Society of Trust and Estate Practitioners.

15. The deadline for submission of comments was 3 May, 2012. The Commission received comments only from the Acting Solicitor General of the Portfolio of Legal Affairs. Below is a summary of the Administrator-General Bill, 2012 which the Commission recommends for consideration by the Government.

¹⁰ See “Canadian Trends: Guardianship in British Columbia And Other Provinces”- Jay Chalke, Law Reform Commission Annual Conference Dublin, Ireland, December 2, 2005

SUMMARY OF THE ADMINISTRATOR-GENERAL BILL, 2012

Appointment of the Administrator-General

16. The main precedents used in the drafting of the legislation were the Administrator-General Act of Jamaica and the Public Guardian and Trustee Act of British Columbia.

17. Clause 3 of the Bill provides for the appointment of the Administrator-General and other officers. It is provided that the Governor will appoint an Administrator-General to carry out the duties under this Law. The Administrator-General should be a public officer who is an attorney-at-law of seven or more years call to the Bar. The Bill provides that a person who already holds another public office may be appointed Administrator-General where the Governor is of the opinion that that person can properly hold two public offices together. It is proposed that the Administrator-General should be supervised in the performance of his duties by the Chief Justice.

18. There is also provision for the appointment by the Governor of a deputy to assist the Administrator-General, and a deputy so appointed should be a public officer who is an attorney-at-law of five or more years call to the Bar and who would be subject to the control of the Administrator-General. The deputy must be competent to discharge any of the duties and exercise any of the powers of the Administrator-General, and when discharging such duties or exercising such powers, will have the same privileges and be subject to the same liabilities as the Administrator-General. The Administrator-General and the Deputy Administrator-General will be considered to be officers of the Grand Court.

Administration of estates

19. The Bill provides for the administration of estates by the Administrator-General where a person dies intestate. The provisions in the draft legislation regulating this function of the office are based primarily on the Jamaican precedent. In Jamaica for example, apart from applying for letters of administration, the Administrator-General's functions¹¹ in this area include the investigation and confirmation of the assets of the deceased. This involves, for example, where the deceased had cash assets, liaising with financial institutions holding the funds for the deceased and employers with respect of employee's benefits including National Housing Trust contributions and where the deceased person owned property, securing the relevant documents with regards to ownership.

20. The draft Bill deals with the administration of two types of estates- those which are categorised as small estates and those which are not. A small estate is defined as an estate the value of which is proved to the satisfaction of the Administrator-General to be

¹¹ www.agd.gov.jm

less than twenty thousand dollars or such other amount as may be prescribed. Any person who, in the opinion of the Administrator-General, would be entitled to apply to the court for an order for the administration by the court of a small estate of a deceased person, may apply to the Administrator-General for him to administer the estate.

21. Where an application is made for the administration of a small estate by the Administrator-General and it appears to the Administrator-General that the persons beneficially entitled are persons whom the Administrator-General determines to be of small means, the Administrator-General must administer the estate unless he gives a good reason for refusing to do so. In the interest of transparency, where the Administrator-General receives an application for the administration of a small estate, he will be required to publish in the Gazette notice of his intention to proceed for a period of not less than fourteen days before taking any action. At any time before the end of the fourteen day period any person to whom the court may grant letters of administration or probate in relation to the estate, may apply to the court for the grant to himself of letters of administration or a grant of probate. The court may only grant such letters or probate if the court is of the opinion that it would be economical to the estate to do so.

22. It is proposed that where no one applies or is granted letters of administration or grant of probate, the Administrator-General shall, after the end of the notice period, undertake, by declaration in writing given to the court and published in the Gazette, to administer the estate and any trust property, other than stock, shall by virtue of the Law, vest in him. When an estate vests in the Administrator-General from the date of such vesting any trustee entitled under the trust to administer the estate will be discharged from all liability attaching to the administration, except in respect of past acts.

23. The Bill also proposes that where proceedings have been instituted in the court for the administration of an estate and, by reason of the small value of the estate, it appears to the court that the estate can be more economically administered by the Administrator-General than by the court, the court may order that the estate shall be administered by the Administrator-General subject to any directions by the court. The estate would then be administered as if it fell within the definition of a small estate.

24. Clause 7 of the Bill, which deals with estates which are not small estates, provides that the Administrator-General, upon notice of a death being given to him by the Registrar-General, must apply for letters of administration-

- (a) to the estates of all persons who have died intestate without leaving any person who would be entitled to take out letters of administration or who has left such a person but no such person has taken out letters of administration within three months, or within such longer or shorter time as the court may direct; and
- (b) to the estates of all persons who have died leaving a will but no executor, or no executor who will act, and no relative of the deceased or any other person who would be entitled to take out letters of administration has, within the time specified in paragraph (a), taken out letters of administration to the estate.

25. It is proposed¹² that at any time after grant of letters of administration to the Administrator-General any person to whom the court might have granted letters of administration or probate if such grant had been made, may apply to the court for revocation of the grant and for the grant to himself of letters of administration or probate. However, letters of administration to the Administrator-General shall not be revoked unless the application is made within six months after the grant to the Administrator-General and the court is satisfied that there has been no unreasonable delay in making the application. This does not apply in the case of small and other estates being administered by the Administrator-General under clause 6 of the legislation.

26. If any letters of administration granted to the Administrator-General are revoked, he will not be required to pay any of the costs of such revocation unless the court is satisfied that he acted improperly in obtaining administration or in opposing the revocation thereof.

27. Clause 11 provides that on the grant of letters of administration to the Administrator-General, the property of the deceased shall vest in the Administrator-General, and shall be assets in his hands for the payment of the debts and liabilities of the deceased, in the same way, and to the same extent in all respects, as such property would have vested in and been assets in the hands of any other administrator, as if the Law had not been passed. The Administrator-General shall discharge the debts and liabilities of the deceased, and shall distribute the surplus, in the same way, and in the same order of priority, and to the same extent, that any other administrator would have been bound to discharge such debts and liabilities, and to distribute such surplus, as if the legislation had not been passed.

28. The Bill provides¹³ that a testator may appoint the Administrator-General to be the sole executor of his will. The Administrator-General will be prohibited from acting as co-executor with any other person, and if any testator appoints any person as co-executor with the Administrator-General, the appointment of such person will be void and the Administrator-General shall be the sole executor.

29. The Administrator-General will not be required¹⁴, on taking out letters of administration, or on proving any will, to file any declaration of the value of the property, or to give any administration bond, or will bond, or to take any oath to bring into the Clerk of the Court an inventory of the estate of the deceased, or to take any oath to administer such estate. The Administrator-General shall make, as soon as possible after obtaining letters of administration or a grant of probate to an estate, a true and accurate inventory of all the personal and real property of the deceased person and return the inventory to the Clerk of the Court.

¹² Clause 9

¹³ Clause 12

¹⁴ Clause 13

30. The Bill provides¹⁵ that the rights, duties, powers, and liabilities of the Administrator-General, in applying for and obtaining letters of administration or grant of probate, and in acting as administrator or executor, shall be the same in all respects as under similar circumstances the rights, duties, powers, and liabilities of private persons applying for and obtaining letters of administration or grants of probate, or acting as administrators or executors would have been if the legislation had not been passed.

31. The Bill also seeks to protect the property comprised in estates which may have to be administered by the Administrator-General. Thus clause 17 provides that whenever it appears to the court -

- (a) that there is a good reason to believe that the Administrator-General is, or is likely to become, entitled to the administration of any estate; and
- (b) that the property of the estate is likely to be damaged or diminished for want of a proper person to take charge of it, before letters of administration or grant of probate can be taken out; or
- (c) there is uncertainty who will apply for and obtain letters of administration or grant of probate,

the court may authorise the Administrator-General to take possession of the property for such time, in such manner, and subject to such conditions, if any, as the court may direct.

32. The Administrator-General will hold and deal with the property under clause 17 as may be directed by the court until letters of administration or probate have been granted. The Administrator-General will not be entitled to any commission in respect of property under this clause unless he ultimately obtains the administration of it, but he shall be entitled to be repaid out of the property all costs and expenses to which he may be put in respect thereof, and for applying to the court if the court thinks fit.

33. Where it is the duty of the Administrator-General to apply for letters of administration or grant of probate in relation to any estate he may exercise any of the following powers prior to the grant of letters of administration or grant of probate made in relation to such estate-

- (a) collecting the relevant assets, obtaining advances from the assets and otherwise dealing with the relevant assets; and
- (b) making payments out of the relevant assets-
 - (i) to meet the costs and expenses connected with obtaining the grant of letters of administration; or
 - (ii) for the advancement or benefit of any beneficiary.

34. “Relevant assets” mean money or securities for money, including money in bank accounts, insurance policies, moneys owing to an estate or rental income (“the relevant assets”) in the estate of any deceased person.

¹⁵ Clause 16

35. In order to assist the Administrator-General to identify estates which he may be required to administer the Registrar-General¹⁶ will be required to ascertain to the best of his ability, and report to the Administrator-General, the names of all persons who have died in the Islands under such circumstances as would entitle the Administrator-General to the administration of their estates.

Trusts

36. One of the earliest roles of a public trustee or Administrator-General was to act as a trustee where a private trustee could not be found. In the UK, for example, there were two major concerns prior to the establishment of the office of Public Trustee in 1906- the incidence of fraud among trustees was unacceptably high and the other was the increasing difficulty in obtaining the services of reputable persons to act as trustees.¹⁷ While the Cayman Islands do not face such problems, the office will be able to provide trust services in certain circumstances for those who cannot otherwise afford the local trustees or who simply cannot find a person to whom they are willing to give such an undertaking.

37. The Bill provides that the Administrator-General may be appointed to be trustee under any instrument creating an inter vivos trust or to perform any trust or duty belonging to a class which he is authorised by Rules of Court to accept.¹⁸ The Administrator-General, when acting as trustee, would have all the same powers, duties and liabilities, would be entitled to the same rights and immunities and would be subject to the control and orders of the court as a private trustee acting in the same capacity. The Administrator-General may decline,¹⁹ either absolutely or on prescribed conditions, to accept any trust but he shall not decline any trust on the ground only of the small value of the trust property.

38. Under the legislation the Administrator-General would be prohibited from accepting any trust under a deed of arrangement for the benefit of creditors.

Trustee in bankruptcy

39. For the purposes of the Bankruptcy Law (1997 Revision) the Clerk of the Court is the Trustee in Bankruptcy and he is empowered by that Law to administer the estates of debtors in bankruptcy subject to that Law, and any law relating to bankruptcy. Clause 23 of the Bill would transfer this function to the Administrator-General. The Trustee in Bankruptcy can act either as receiver or as a trustee in relation to property of a bankrupt.

40. In accordance with the Bankruptcy Law the Trustee in Bankruptcy can, with the approval of the court, appoint an agent in respect of any estate vested in or administered by him under the Bankruptcy Law, or in respect of any part of the business thereof. The Trustee in Bankruptcy is entitled to a commission of five per cent on all dividends of any

¹⁶ Clause 20

¹⁷ "The public trustee in England, 1906-1986: The failure of an experiment"- Patrick Polden, the Journal of Legal History,10

¹⁸ Clause 21

¹⁹ Clause 22

estate or trust paid by him in the administration of a bankrupt's estate under an absolute order for bankruptcy under the Bankruptcy Law, and a commission of five per cent on all dividends of any estate or trust paid by him (or sanctioned by the court) in the administration of a debtor's estate under a deed of arrangement under this Law.

41. Such remuneration is for the time and responsibility of the Trustee in the general administration of the estate or trust, and the estate or trust shall not be subject to any other charge in respect thereof, but any expenses in respect of any other matters, including travelling expenses relating to any estate or trust, may be charged against the estate or trust in such manner and to such extent as may be prescribed or specially sanctioned or allowed by the Court.²⁰

GUARDIANSHIP, ETC. OF PERSON UNDER DISABILITY

42. In Cayman under Order 80 of the Grand Court Rules the Solicitor General has a role in the guardianship of persons under mental and physical disability as well legal disabilities such as children. The Bill seeks to transfer that role to the Administrator-General as well as to give other powers in this area.

43. As indicated in the discussion paper there is a separate office of Public Guardian in the UK but in some territories the functions are combined in one office such as the office of Public Guardian and Trustee in British Columbia.

44. Clause 24 of the Bill, which is based on rule 3 of Order 80²¹, provides that if it appears to the court that there is no fit and proper person who is willing and able to act as next friend or guardian ad litem for a person under a disability the court shall appoint the Administrator-General who shall carry out his duties in accordance with Rules of Court. The Administrator-General would also be empowered,²² upon the direction of the court and in accordance with Rules of Court, to apply for the appointment of a guardian of a person under a disability.

45. The Administrator-General could also be called upon to act as legal representative of a person under a disability. Clause 26 provides that where in any proceedings the court considers that the interests of a person under a disability are not adequately represented the court may direct the Administrator-General to act as the legal representative for the person either generally or in the proceedings or for any particular purpose connected with the proceedings, so, however, that it shall not be necessary to appoint the Administrator-General to be guardian ad litem for the person.

46. The office would also be given the duty of acting as the guardian of a child's estate. The Bill specifies²³ that the court, may in the certain circumstances in and where it

²⁰ Section 13(5)

²¹ Order 80, r.3 currently provides for the appointment of the Solicitor General in such circumstances

²² Clause 25

²³ Clause 27

appears to the court that there is no fit and proper person who is willing and able to do so, appoint the Administrator-General to be guardian of the estate of a child provided that²⁴-

- (a) the appointment shall subsist only until the child reaches the age of eighteen; and
- (b) the consent of the child's parents has been signified to the court, or, in the opinion of the court, cannot be obtained or may be dispensed with.

47. The circumstances in which the Administrator-General may be appointed the guardian of a child's estate would include the following-

- (a) where money is paid into court on behalf of the child in accordance with directions given under Rules of Court;
- (b) where a court or tribunal outside the Islands notifies the court that it has ordered or intends to order that money be paid to the child;
- (c) where the child is absolutely entitled to proceeds of a pension fund;
- (d) where the child is absolutely entitled to a trust fund; or
- (e) where such an appointment seems desirable to the Court.

48. It is also proposed that the Administrator- General would be given the functions as guardian or receiver under section 13 of the Mental Health Law (1997 Revision) and under section 14 of the Grand Court Law (2008 Revision) unless it is proved to the satisfaction of the court that it would be more beneficial that some other person should be appointed guardian or receiver. As guardian or receiver under this section, the duties of the Administrator-General would include -

- (a) taking possession of a property;
- (b) managing, selling, acquiring, charging or dealing with property;
- (c) incurring capital expenditure in respect of a property;
- (d) entering into any settlement;
- (e) providing for the management of a business;
- (f) dissolving a partnership;
- (g) completing a contract;
- (h) conducting legal proceedings; and
- (i) acting as trustee.

RECEIVER AND OFFICIAL LIQUIDATOR

49. In addition to acting as receiver under the Grand Court Law and the Mental Health Law it is also proposed that the functions of the official receiver for the court and official liquidator would be added. Thus, clause 30 proposes that the court shall appoint the Administrator-General to be a receiver in any legal proceedings in the court, unless it is proved to the satisfaction of the court that it would be more beneficial that some other person should be appointed receiver. As the official receiver the Administrator-General

²⁴ Currently under Order 80

would have such duties as are determined by the court or prescribed by Rules of Court and such duties may include those set out in paragraph 48 above.

50. In accordance with clause 31 of the Bill, the court may appoint the Administrator-General to be an official liquidator in any proceedings where a company is being wound up by order of the court and upon such appointment it is proposed that the office shall have the same duties and powers as an official liquidator appointed under the Companies Law (2011 Revision). Section 110 of that Law provides that it is the function of an official liquidator to collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it and to report to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up. The official liquidator, among other things, may with the sanction of the court, exercise any of the following powers specified in Part I of Schedule 3 of the Companies Law-

- (a) power to bring or defend any action or other legal proceeding in the name and on behalf of the company;
- (b) power to carry on the business of the company so far as may be necessary for its beneficial winding up;
- (c) power to dispose of any property of the company to a person who is or was related to the company;
- (d) power to pay any class of creditors in full;
- (e) power to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or for which the company may be rendered liable;
- (f) power to compromise on such terms as may be agreed all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting, or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company;
- (g) power to deal with all questions in any way relating to or affecting the assets or the winding up of the company, to take any security for the discharge of any such call, debt, liability or claim and to give a complete discharge in respect of it;
- (h) power to sell any of the company's property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels;
- (i) power to raise or borrow money and grant securities therefor over the property of the company;
- (j) power to engage staff (whether or not as employees of the company) to assist him in the performance of his functions; and
- (k) power to engage attorneys and other professionally qualified persons to assist him in the performance of his functions.

51. As official liquidator the Administrator-General would be able, without the sanction of the court to exercise any of the following powers in accordance with Part II of Schedule 3 of the Companies Law-

- (a) the power to take possession of, collect and get in the property of the company and for that purpose to take all such proceedings as he considers necessary;
- (b) the power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company seal;
- (c) the power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent and rateably with the other separate creditors;
- (d) the power to draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with the respect of the company's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;
- (e) the power to promote a scheme of arrangement pursuant to section 86 of the Companies Law;
- (f) the power to convene meetings of creditors and contributories;
- (g) the power to do all other things incidental to the exercise of his powers.

LEGAL REPRESENTATIVE OF DECEASED IN LEGAL PROCEEDINGS

52. A further function which will be allocated to the Administrator-General would be to act as legal representative of an estate in proceedings where the court considers that the interests of the estate are not being adequately represented. This would permit the Administrator-General, for example, to act on behalf of a deceased person who was the victim of a fatal accident and whose estate is bringing an action in relation to such matter under the Torts (Reform) Law (1996 Revision).

53. An example of the role of the Administrator-General in such a capacity is seen in Jamaica where that office is empowered to file actions on behalf of estates for wrongful death under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act. The Administrator-General may be called to act under those pieces of legislation in the following circumstances-

- where there are minor beneficiaries;
- when the whereabouts of adult beneficiaries are unknown;
- where the adult beneficiaries are not in agreement as to who should apply to the Crown;
- when the beneficiaries request that the Administrator-General act on their behalf.

54. When the Administrator-General obtains letter of administration for the estate he then files action under the legislation through counsel for the office. Action must be filed within three years of the death of the deceased or such longer period as the court determines. On making an award the court appoints the Administrator-General as trustee in relation to the infant beneficiaries and he is given permission to use capital as well as income for their education and other personal advancement until they reach the age of eighteen. Awards are paid directly to adult beneficiaries and the trust is administered as a regular estate by the Administrator-General.²⁵

POWER TO INVESTIGATE AND AUDIT TRUSTEES, GUARDIANS, ETC.

55. The Bill proposes giving to the office of the Administrator-General the vital function of investigating and auditing trustees, guardians and attorneys under power of attorneys. Clause 33 provides that the Administrator-General may upon application of any person with a relevant interest and payment of the prescribed application fee, if any, by that person, investigate and audit the affairs, dealings and accounts of-

- (a) a trust under which a beneficiary is or may be a person under a disability;
- (b) an attorney under a power of attorney if the Administrator-General has reason to believe that the person who granted the power of attorney is incapable of managing his financial affairs, business or assets; or
- (c) a guardian,

if the Administrator-General has reason to believe that the interest in the trust, or the assets of the person under a disability, may be at risk, or that the trustee, attorney or guardian has failed to comply with his duties.

56. It is further provided that in addition to the duties set out above the Administrator-General may investigate any personal care and health care decisions made by a guardian if he has reason to believe the guardian has failed to comply with his duties. Fees may be charged for the provision of such investigative services.

57. In the review conducted by the Commission between 2007 and 2009 as to whether legislation providing for enduring powers of attorney should be introduced in the Cayman Islands, one of the factors against such introduction was the lack of a supervisory body to have oversight of the exercise of such powers of attorneys. As noted before the Legal Portfolio and the Chief Justice had recommended the establishment of an office of Public Guardian similar to that in the UK.

58. In the UK the Public Guardian, among other things, helps protect people who lack capacity by setting up and managing a register of Lasting Powers of Attorney (LPA), setting up and managing a register of Enduring Powers of Attorney (EPA) and providing reports to the Court of Protection, as requested, and dealing with cases where there are concerns raised about the way in which Attorneys or Deputies are carrying out their duties.

²⁵ www.docstoc.com- "Fatal Accident Procedure"

59. Clause 34 of the draft Bill specifies the types of powers which the Administrator-General would have in exercising this function of auditing and investigation. The Bill provides that in conducting an investigation or audit under the legislation the Administrator-General may do one or more of the following-

- (a) require a trustee, attorney or guardian to produce any accounts, securities or other records the Administrator-General considers necessary for the investigation or audit; and
- (b) require a person, institution or other body having records relating to the financial affairs, business or assets of the person under a disability to produce any accounts, securities or other records, the Administrator-General considers necessary for the investigation or audit;
- (c) require the guardian to produce any records relating to the personal care and health care decisions; and
- (d) require a person, institution or other body having records relating to the personal care or health care decisions to produce any personal care or health care records;
- (e) inspect and copy any records produced; or
- (f) require the trustee, attorney or guardian to provide any report, information or explanation the Administrator-General considers necessary for the investigation or audit.

60. If a person, institution or other body refuses or fails to produce the accounts, securities or other records or to provide the reports, information or explanations required under that subsection, the Administrator-General may apply to the court for an order. If the person, institution or other body does not comply with the order the court may, on the application of the Administrator-General, make an order authorising the Administrator-General to-

- (a) enter any premises where the accounts, securities or other records sought by the Administrator-General are believed to be located; and
- (b) inspect or copy anything the Administrator-General considers relevant to the investigation or audit.

61. If as a result of an audit or investigation the Administrator-General has reason to believe that the financial affairs, business or assets of a person under a disability are in need of immediate protection, it is proposed that the Administrator-General may do one or more of the following-

- (a) instruct any institution where the person under a disability has an account that no funds are to be withdrawn from or paid out of that account until further notice;
- (b) direct any source of income for the person under a disability to send the income to the Administrator-General or to a person named by the Administrator-General-

- (i) to be held in trust for the person under a disability; or
- (ii) to be used to protect or maintain the health or safety of the person under a disability;
- (c) halt any disposition of real or personal property belonging to the person under a disability; or
- (d) take any other step that is necessary to protect the financial affairs, business or assets of the person under a disability and that is reasonable in the circumstances.

SAFEGUARDS

62. In the discussion paper the Commission had noted that regulatory safeguards are essential to ensure the accountability and transparency of the office of Administrator-General as this had been a matter of much concern in relation to other such offices, including for example, the office of the Public Trustee in the UK.

63. In the UK in 1986 the duties of the Public Trustee had been widened to include the administration of the properties and affairs of mental patients. However, in 1999, the Public Trustee's Office, was criticised by both the National Audit Office and the Public Accounts Committee for failing to ensure that a large proportion of receivers submitted annual accounts and failing to ensure, through its visits programme, that patients' funds were being used for their benefit. The Public Trust Office was also criticised for serious weaknesses in financial and management information across its activities. As a result of such concerns in 2001 most of the duties relating to the administration and guardianship of mental patients were transferred to the Public Guardianship Office. The Office of the Public Guardian replaced the Public Guardianship Office in 2007.²⁶

64. In order to avoid such problems, the Bill seeks in clauses 36 to 39 to ensure that sufficient safeguards are in place. Clause 36 provides that the Administrator-General must keep full, complete and accurate books of account of all transactions with respect to all estates and trusts vested in or administered by him and shall keep all such books as may be necessary for that purpose. The books of account shall be kept at the office of the Administrator-General. It is further provided that the court may make Rules of Court prescribing-

- (a) the manner in which the accounts, books, and documents of the Administrator-General shall be kept;
- (b) how the office shall be regulated; and
- (c) the times, and the manner, and any conditions applicable to how and by whom searches in the books of the Administrator-General may be made, and how copies or extracts from the same may be obtained.

65. Clause 37 provides that all sums of money received by the Administrator-General in that capacity shall forthwith or within such time as may be prescribed be paid by him into a Class A bank or a specified financial institution to the credit of an account to be entitled "Administrator-General's Account" or be invested by him in securities approved

²⁶ See para 40 of discussion paper

by the Government. The Administrator-General would not be permitted to expend the money of one trust or estate for the purposes of another trust or estate.

66. The provisions of the Public Management and Finance Law (2010 Revision) that apply to the financial administration, audit and financial reporting of statutory authorities would apply to and in respect of the Administrator-General and the operations of his office. The Administrator-General would also be required within three months from the beginning of each year, to prepare and submit to the Minister responsible for social services a report containing a summary of the operations of the office for the preceding year in such form and containing such information the Minister may direct. The Minister will have to lay a copy of the report before the Legislative Assembly if it is in session and, if it is not then in session, within thirty days after the beginning of the next session.

LEGAL PROCEEDINGS, FUNDING OF OFFICE, ETC.

67. Part 5 of the legislation deals with a variety of matters relating to the Administrator-General and legal proceedings. Matters dealt with include how the Administrator-General is to sue and be sued; how process is to be served on the Administrator-General; execution against the Administrator-General and how the liability of the office will be discharged.

68. When a judgment, decree or order has been recovered against the Administrator-General and there are any circumstances which render it doubtful whether he ought to pay the amount thereof, or out of what funds he ought to pay the amount, clause 45 of the Bill provides that he may apply to the court for an order authorising him to pay, or to refuse to pay, or directing out of what funds he should pay the amount of such judgment, decree, or order. Further, the Administrator-General may at any time apply to the court for the opinion, advice, or direction of the court respecting his rights or duties with regard to-

- (a) applying for, or obtaining administration of any estate, or trust, or probate of any will;
- (b) assuming the management of any estate or trust;
- (c) any estate or trust vested in or administered by him under this Law; or
- (d) any matters arising out of the management or conduct of any estate or trust.

69. As part of the accountability safeguards the legislation provides that where any person interested in any estate, trust, judgment, decree, order, or other matter under this legislation-

- (a) has reason to believe that the Administrator-General, has acted improperly in carrying out his duties and functions under this Law in respect of such matter or has failed to act; or

- (b) has reasonable ground to think that the Administrator-General is about to improperly act, or to omit to act, with respect to any such duty or function,

he may apply to the court for an order, requiring the Administrator-General to do, or refrain from doing, the act in respect of which the person complains and the court may thereupon make any order as it thinks fit.

70. The funding of the office of the Administrator-General is dealt with in a number of ways under the legislation. For example, the office would be compensated as Trustee in Bankruptcy, for administering estates and for services relating to the investigation and auditing of guardians and trustees.

71. Underfunding and understaffing has been one of the main problems faced in the administration of such offices. As noted in paragraph 47 of the discussion paper, in New Zealand, the Public Trustee Office from early days of its existence faced the problems which come with a wide variety of functions and insufficient staff. The original duties set out in the 1872 Act²⁷ included the management of far flung estates in the colony; guardianship of estates of mental patients; guardianship of minors; taking over the estates of absent heirs until their rights had been established; administering the estate of convicts and managing vacant allotments of native land. The Office quickly became overwhelmed as estates were held over until they lost value and losses by native owners resulted in a Royal Commission of Investigation. It also became very unprofitable in the late 1990's as the office pursued business activities such as conveyancing and unit trust investments which incurred much financial loss.

72. It is more likely than not that the office of the Administrator-General, at first, will have to be funded at least in part by the Government. Clause 54 provides for charges for the administration of an estate. The Administrator-General would be entitled to a commission of six per centum-

- (a) on all payments made by him in respect of debts, liabilities, cost of management, and other similar charges;
- (b) on all payments in respect of dividends, interests, rents, or other produce, or receipts of any estate or trust; and
- (c) on all property, real and personal, conveyed, assigned, or distributed by him, including the final transfer of the corpus of any trust fund, or of any part thereof.

73. The commission under clause 54 shall be the remuneration for the time and responsibility of the Administrator-General in the general administration of the estate or trust. Any expenses in respect of any other matters, including travelling expenses relating to any estate or trust, may be charged against the estate or trust, in the same way, and to the same extent, that such expenses might be charged under similar circumstances by any administrator, executor, trustee, or guardian, other than the Administrator-General. In

²⁷ Genealogy New Zealand, History of the Public Trust 1872-1895

addition to those charges specified, the Administrator-General may, in connection with any other duty or service provided by him under this or any other Law charge such fees as may be prescribed by the Governor in Cabinet.

74. The Governor in Cabinet would be empowered to make regulations prescribing fees or a scale of fees payable to the Administrator-General and such regulations may-

- (a) prescribe at what time any fee shall be paid;
- (b) prescribe the source of funds, including the estate of a person, from which fees may be taken;
- (c) prescribe the manner in which fees are to be calculated, including, alone or in combination, any of the following-
 - (i) as a percentage of the income or capital of the estate;
 - (ii) based on a flat rate;
 - (iii) as an hourly charge;
 - (iv) based on the actual costs incurred; and
- (d) allow the Administrator-General to excuse a person from paying a fee or to refund a fee in cases of hardship, unfairness or for any other similar reason.

CONCLUSION

75. The principal aspects of the draft legislation have been outlined above and the final Bill is attached as an Appendix to this paper. The Commission is of the view that this legislation, which has the potential to provide valuable social assistance to the Cayman Islands society, could have been more informed if other stakeholders participated in the consultation process by offering comments on the proposals.

76. In promoting the first Public Trustee Act in the UK Sir Howard Vincent²⁸ subtitled his proposals as a “bill for the protection of orphans and widows”²⁹ as part of his campaign in introducing the legislation. The draft Administrator-General Bill, 2012 would not only protect widows, widowers and orphans, it would provide readily accessible services for the physically and legally disabled in the society. The Commission has sought to propose, by the draft legislation, a range of services necessary for our needs but which would not prove overwhelming to the office and which would ensure that the problems highlighted in the discussion paper and this report will not occur.

²⁸ Colonel Sir Charles Edward Howard Vincent KCMG CB DL (31 May 1849 – 7 April 1908), known as Howard Vincent or C. E. Howard Vincent, was a British soldier, barrister, police official and Conservative Party politician who sat in the House of Commons from 1885 to 1908, Wikipedia

²⁹ The Public Trustee in England, 1906-1986, Journal of Legal History

77. The Commission submits for the consideration of the Attorney General and Cabinet this final report and the draft Administrator-General Bill.

Chairman
8 August, 2012

APPENDIX - ADMINISTRATOR-GENERAL BILL, 2012