

NSW Legislative Council Hansard

PROTECTED ESTATES AMENDMENT (MISSING PERSONS) BILL

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Second Reading

The Hon. JOHN HATZISTERGOS (Minister for Justice, and Minister Assisting the Premier on Citizenship) [5.56 p.m.]: I move:

That this bill be now read a second time.

I seek leave to incorporate the second reading speech in *Hansard*.

Leave granted.

This bill represents a further major step in the Government's initiatives to assist families and friends of missing people.

The Victims Rights Act 1996 was amended in 2000 to include the families of missing people as victims of crime. At the same time, the Family and Friends of Missing People Unit in Victims Services was set up, and funding was provided for a telephone support and counselling service.

Through interagency work and stakeholder participation, the Unit has identified the need for clearer and simpler laws to help relatives and friends deal with the estates of missing people.

Currently, family or friends can only manage the affairs and estates of missing people after obtaining a grant of probate from the Supreme Court. This means the missing person is presumed to be dead. Unless there is strong evidence that the person has died, probate may not be granted until they have been missing for seven years.

The presumption of death process is particularly distressing for families and friends of missing people because they usually do not want to accept, let alone prove, that the person is dead. It is also unsuitable for the majority of missing people who are found alive. The process takes too long to provide any practical, timely assistance to people wishing to look after an estate in the short or medium term.

Over 8,000 people go missing in New South Wales each year. 70 per cent are found within three days. 86 per cent are found within two weeks and 99.7 per cent are located overall. "Long term" missing people, are those who have been missing for more than a year. In New South Wales, there are more than 500 long-term missing people.

The Government, in consultation with families and friends of missing people, has developed a clear and simple legal procedure for applications to be made to allow others to manage property belonging to missing people.

The bill creates a statutory scheme, unique in Australia, for administering estates of missing people when it is not known if they are still alive.

The bill includes a new section 21C in the Protected Estates Act 1983 ('the Act') to allow applications to the Supreme Court for a declaration that a person is missing and order that the person's estate is subject to management under the Act.

An application to the court can be made by: the spouse of the person, a relative of the person, a business partner or employee of the person, the Attorney General, the Protective Commissioner; or any other person who has an interest in the estate of the person.

Section 21C also provides that the Court may be satisfied a person is missing if: it is not known whether the person is alive; all reasonable efforts have been made to locate the person; and people with whom the person would be likely to communicate have not heard from, or of, the person for at least 90 days.

The court may make a declaration and estate management order if: the person is missing; the person's usual place of residence is in New South Wales; and it is in the best interests of the person to do so. The court may then appoint any suitable person, or the Protective Commissioner, to manage and administer the estate of the missing person.

A new definition is inserted in section 4 of the Act and a "protected missing person" is a person in respect of whom such an estate management order is made.

The Protected Estates Act will then apply to the estates of protected missing people as it does to the estates of protected people who have been found to be incapable of managing their affairs.

Amendments to section 24 of the Act ensure that where the Protective Commissioner is appointed to manage the estate

of a protected missing person, the Protective Commissioner has all powers necessary to manage the estate, including the power to: receive money or rent from real or personal property, to grant leases of property, to sell or mortgage real and personal property, to settle a demand against the estate, to carry on a business the protected missing person had carried on; and to bring and defend proceedings on behalf of the protected missing person.

Division 4 of the Act applies to the management of estates by people other than the Protective Commissioner. Amendments to section 30 of the Act ensure that orders can be made when another person is appointed to manage the estate of a missing person giving them all powers necessary to manage the estate.

Under Division 4 of the Act the Protective Commissioner will provide direction, supervision and support when another person is appointed to manage the estate of a protected missing person.

Section 32 of the Act is amended to enable the Court to make such orders as appear necessary for making the property and income of a protected missing person available for: the payment of the debts, or otherwise for the benefit of the protected missing person; the maintenance and benefit of the family of the protected missing person; and other purposes for the care and management of the estate.

The Act is also amended to provide that fees can also be prescribed for functions exercised by the Protective Commissioner in relation to the estates of protected missing people (Section 8). It is proposed to amend the Protected Estates Regulation 2003 to allow the Protective Commissioner to charge the same fees for the administration of the estates of missing people as is currently charged for other protected persons.

The bill also provides for estate management orders for protected missing people to be terminated.

A new section 35A will allow an application to be made to the Supreme Court for the revocation of a declaration and order where there is evidence the protected missing person is alive. Section 38A provides for the Protective Commissioner to be able to terminate the management of the estate of a missing person when he or she is satisfied the person is alive.

The bill also provides for consultation of the relatives of a protected missing person by the Protective Commissioner. Amendments to section 50 require that before the Protective Commissioner takes any action in respect of the estate of a protected missing person he or she must determine whether the relatives of the person should be consulted.

Section 76 is amended to provide that a power of attorney is suspended while the estate of a protected missing person is subject to management under the Act.

This bill fills a significant gap in the current law. The proposed amendments to the Protected Estates Act 1983 create a clear effective mechanism for dealing with the estates of protected missing people. The scheme uses the extensive expertise that already exists in the Supreme Court and the Office of the Protective Commissioner.

The proposed role for the Protective Commissioner is compatible with the current role, duties and responsibilities of that Office. That is, looking after the estates of people who are not able to do it for themselves. Considering that a proportion of people become missing because of a disability (for example, dementia), managing the estates of missing people will complement the Protective Commissioner's existing role.

The family and friends of a person who is missing are confronted with harrowing social and personal issues. These issues are presently made more difficult by the complex legal processes involved in attempting to manage and preserve the missing person's estate.

This legislation will be the first of its kind in Australia. Similar schemes exist in only a few other countries in the world, such as Guam and Canada.

The scheme proposed in the bill provides families and friends with a simple, timely and effective method for ensuring the estate of a missing person can be managed when it is not known whether that person is alive. It is hoped that this legislation will help ease the grief and uncertainty of relatives and friends whilst preserving the property and assets of missing people.

I wish to express my sincere thanks and sympathy to the families and friends of missing people who have shared their personal stories and experiences with me during the development of this legislation. I am indebted to them for having the courage to speak out, in the face of terrible tragedy and heartache. They have experienced, first hand, the quagmire of legal problems involved in trying to deal with the estate of a missing loved one. Through their courage and insight, they have assisted in developing this legislation. They have eased the burden for all those other children, parents, spouses, friends, who may, in the future, have to deal with the unexplained disappearance of someone dear to them.

I commend this Bill to the House.

The Hon. GREG PEARCE [5.56 p.m.]: I lead for the Opposition in debate on the Protected Estates Amendment (Missing Persons) Bill and state that it does not oppose the bill. The purpose of the bill is to amend the Protected Estates Act 1983 to provide for the management of the estates of missing persons. Currently, family or friends of missing persons can manage the affairs and estates of a missing person only after obtaining a grant of probate from the Supreme Court. Unless there is strong evidence that the person has died, probate may not be granted until that person has been missing for seven years. That then makes it difficult for families and friends to manage and preserve the assets belonging to people who are missing.

The bill creates a statutory scheme for administering estates of missing people when it is not known whether or not they are still alive. The proposed amendments provide a procedure for applying to the Supreme Court for a declaration that a person is missing, which is similar to the existing procedure where a person can be declared a protected person. Next of kin, domestic partners, business partners and employees, the Attorney General, or the Protective Commissioner are among those who may apply for the declaration and seek the appointment of someone to manage the person's estate. The court will be allowed to make a declaration if it is satisfied that it is in the interests of the missing person to do so, the person has been missing for 90 days, it is not known whether the person is alive, and reasonable efforts have been made to locate that person.

The Protective Commissioner or a private manager, such as a family member, may be appointed a missing person's estate manager. The court and the Protective Commissioner will have the power to terminate an estate management order if he or she is satisfied that a missing person is alive. An estate management order will also suspend a power of attorney, although the court will have the power to restore it as it sees fit. The Attorney General, when introducing this bill, did not address the issue of increasing resources for the Office of the Protective Commissioner, which is a matter of some concern to the Opposition as the Office of the Protective Commissioner is already under significant strain because of its current responsibilities. This will place upon it an extra workload.

I note that provisions in the Act enable the recovery of the Crown's expenses for the care and management of an estate, and the Protective Commissioner's fees are extended to cover protected missing persons. According to the Attorney General's second reading speech, the legislation will be the first of its kind in Australia, with similar schemes existing in only two other countries in the world—Guam and Canada. So this is quite new legislation. The Attorney General indicated that the bill is a result of consultation with interested parties and support groups, who overwhelmingly supported the establishment of a clear and simple scheme for estate administration. As the current process is lengthy and often a hindrance to managing a missing person's estate in the short or medium term, these amendments seem to be sensible. The Opposition does not oppose them.

Reverend the Hon. Dr GORDON MOYES [5.59 p.m.]: The Christian Democratic Party supports the Protected Estates Amendment (Missing Persons) Bill. Presently, when a person becomes a missing person, family or friends can manage the affairs and estates of such persons only after obtaining a grant of probate from the Supreme Court. Unless there is strong evidence that a person has died, probate may not be granted until the person has been missing for seven years. Family and friends may find themselves in a situation where they cannot access the missing person's funds to clear the person's debts or manage the person's estate for at least seven years. In my previous work with the Wesley Mission that task became obvious when we were dealing with homeless street people. A high percentage of such people die on the street and become classified as missing persons. They all have families and frequently we trace the family, only to find a serious situation.

Because persons live on the street does not mean they are impecunious. Over the years I have met many persons with assets in excess of hundreds of thousands of dollars. But they suffer from a mental condition, which encourages them to live outside a normal room and board situation. They have a disease that is commonly known as the starlight hotel syndrome. They are frightened to live in rooms, particularly rooms with doors. I have removed them because these homeless people will not stay in a room with doors. Previously they have been confined in prison cells or psychiatric wards and they suffer from a severe mental attitude to closed spaces and doors.

I know of persons who have considerable assets but still sleep in the parks, in the Domain and in other public places, including in front of the public library near this place. They have assets and are able to afford a place to sleep, but they will not accept that because, as I said, they suffer from the mental disorder known colloquially as the starlight hotel syndrome. The process of gaining a person's assets in these situations is far too lengthy to provide any practical and timely assistance to people wishing to look after an estate in the short or medium term. According to some figures noted by the Attorney General, more than 8,000 people go missing in New South Wales each year. Of those 8,000, 70 per cent are found within three days, 86 per cent are found within two weeks and, overall, 99.7 per cent are located. On those figures alone, about 24 people every year would be the subject of this bill.

The object of the Protected Estates Amendment (Missing Persons) Bill 2004 is to amend the Protected Estates Act 1983 to enable the estates of missing persons to be subject to management under that Act. The current target of the Protected Estates Act 1983 is the management of the property and affairs of persons who are incapable of managing their own affairs by reason of mental or other condition. Thus, this bill extends the reach of the Protected Estates Act 1983 to also include missing persons. I commend the nature and purpose of the bill. A new definition is inserted in section 4 of the Protected Estates Act 1983. A protected missing person is defined as a person in respect of whom a Supreme Court order is in force so that the estate of the person is subject to management under the Protected Estates Act 1983. The most important initiative of this bill is in proposed section 21C. The first part of that section provides that the Supreme Court may declare that a person is a missing person and order that the estate of the person be subject to the management under this Act if the court is satisfied of three conditions: first, that the person is a missing person; second, that the person's usual place of residence is in this State; and, third, that it is in the best interests of the person to do so.

The second part of the section provides that the court may be satisfied that a person is a missing person only if it is satisfied that, first, it is not known whether the person is alive and that all reasonable efforts have been made to locate the person at his or her last known place of residence or, second, relatives or friends with whom the person would be likely to communicate have not heard from or seen the person for at least 90 days. The 90 days' time frame at first blush seems unreasonable. It was raised in the crossbench meeting by one of the members as unreasonable. If a person disappeared on a holiday for over 90 days, what would stop relatives or friends from saying that the person is missing to use the missing person's assets to support them? I will make a couple of points as to the safeguards preventing a person from

being declared a missing person in contentious situations.

First, the bill will not allow any person to approach the Supreme Court after 90 days requesting an order be made as to the supposed missing person's estate. The court has to be satisfied that all reasonable efforts have been made to locate the person. It must also not be known whether the person is alive. The court must also be satisfied that it is in the best interests of the person to make an order, and if any reasonable evidence suggests that the person is alive, the court cannot declare the person to be missing or order that the estate be managed. As to the reasonableness of the length of the 90-day period, the Attorney General's Department has indicated that the New South Wales Bar Association and Privacy New South Wales supported this time frame and that many public submissions strongly suggested that a longer period than this time frame would be too long. It is worth noting that the 90-day time period is consistent with the practice in Canada and Guam.

The effect of an order under the proposed new Act will allow the administration of a missing person's estate in relation to such requirements as accommodation and support for dependants. Honourable members would be amazed to know that there are homeless people on the streets of Sydney who have children, including young children. I know of families with children who live on mattresses in doorways and in the lanes of our city, particularly around the Darlinghurst area. It is not unknown for missing persons to have young children. Therefore, the management of their estates for the support of their children is an important issue. Homeless people may have rental payments. Honourable members may ask how homeless people and missing persons can have rental payments? Some homeless people rent a room in which to keep their belongings, even though they never sleep in it. I know of a person who loves watching video movies. He rents a room in a boarding house. He never eats or sleeps there, but he uses it as a secure place to keep his belongings, his valuables and, in particular, his television and video recorder. Making the rental payments would require the management of his estate.

Payments may be required on insurance policies that would expire if payments were not made. Payments may be required for mail and utilities and the management of business interests. The bill prescribes certain situations in which the management of the estate of a protected missing person is terminated. Proposed section 34 (2) prescribes that that can occur if the order is revoked, if the Protective Commissioner certifies under section 33A that the management is terminated, or on the death of the protected missing person. Proposed section 38A also certifies that the management of the estate of the protected missing person is terminated if the Protective Commissioner is satisfied that a protected missing person is alive. Most important, the bill empowers the Supreme Court to make orders if a person is no longer missing, that is, if the court is satisfied that a protected missing person is alive. The court may revoke any declaration that the person is a missing person. The court may also revoke the order that the estate of the person is subject to management under this Act and make any other orders that will give effect to the revocation of an order. The Christian Democratic Party supports the bill.

Reverend the Hon. FRED NILE [6.08 p.m.]: Following the excellent speech by Reverend the Hon. Dr Gordon Moyes, I ask a question of the Government. I highlight a recent case in which a wife was supposed to have run away and was notified as missing. It was later found that she had been murdered by her husband and buried in the backyard. If someone is claimed to be missing and before a decision is made, is there a process whereby contact is made with the police to see whether the person disappeared in suspicious circumstances?

The Hon. Dr ARTHUR CHESTERFIELD-EVANS [6.09 p.m.]: There is a lot of literature on this subject because problems arise when people are in a state of limbo—it is not known whether they are alive or dead—and their estates have to be managed over time. The 2002 case *White v Zurich Insurance* held that a person was presumed dead when he or she had been missing for seven years. In that case there was a suicide note but the body was never found and the wife wanted to sort out the matter with the insurance company. About 30,000 people are reported missing in Australia every year, which is one person every 18 minutes, and most of them are found. In fact, the police are quite active in this area and give counselling to relatives. The first week in August has been designated National Missing Persons Week to draw attention to their plight. The Protected Estates Amendment (Missing Persons) Bill is sensible legislation that allows for management of a missing person's estate while his or her fate remains undetermined.

I have a question for the Minister for Justice to which he might respond when he replies to the second reading debate. Given that a spouse, business partner, employee or relative can apply to the Supreme Court to have the estate of a missing person managed by a suitable person or the Protective Commissioner, what happens to a spouse and any jointly owned assets if, for example, the business partner of the missing person applies to the court for the sole purpose of getting money that may be owed to him? Could a jointly owned family home be sold against the wishes of the spouse of a missing person to pay the debts of a business partner? The bill does not make that clear.

The Hon. JON JENKINS [6.11 p.m.]: Many of my constituents travel extensively. Many of them spend six months on the road, travelling from place to place and living in caravans. A few years ago I took my long service leave and spent a considerable time away with my family. We were simply not contactable for as much as six or eight weeks at a time; we were in the desert somewhere with no means of communication. We were certainly not contactable for periods approaching 90 days. Will the Minister for Justice clarify the procedures that might be followed if a person is thought to be missing? What steps would be taken to try to contact a missing person? Elderly people often travel in the north of the State during the winter months and then spend six months in the south during summer. At any one time about 400,000 Australians have no fixed address as they are travelling around the country in caravans. That issue must be resolved. I stressed my concerns during the crossbench briefing, and I ask the Minister to address them tonight.

The Hon. JOHN HATZISTERGOS (Minister for Justice, and Minister Assisting the Premier on Citizenship) [6.13 p.m.], in reply: I thank all members who spoke in support of the Protected Estates Amendment (Missing Persons) Bill. A number of issues were raised during the second reading debate. The Hon. Greg Pearce named some jurisdictions that have similar legislation to that which we are considering. It is correct that no other Australian jurisdiction has legislation relating to

administering the estates of missing persons. Nevertheless, a number of jurisdictions beyond those that were mentioned by the Hon. Greg Pearce have such legislation. They include Wyoming in the United States of America, three Canadian jurisdictions—British Columbia, Ontario and Saskatchewan—and Guam. So there is an established level of expertise in dealing with these issues.

The Hon. Greg Pearce referred also to the contribution by Mr Andrew Tink in the other place and his concern about what resources might be given to the Protective Commissioner. The Hon. Bob Debus, the Attorney General, covered the resources issue in his speech in reply to the second reading debate, and I refer the honourable member to those comments. It is always important to read the entire debate.

The Hon. Greg Pearce: That doesn't mean we don't continue to have concerns.

The Hon. JOHN HATZISTERGOS: I think those concerns were addressed appropriately. When planning his contribution it is important that the honourable member does not simply plunder his colleague's speech but reads the entire debate in the other place to find out what resources will be available.

The Hon. Greg Pearce: No.

The Hon. JOHN HATZISTERGOS: It is addressed in the Attorney General's response.

The Hon. Greg Pearce: No, it's not.

The Hon. JOHN HATZISTERGOS: I will read it. The Hon. Greg Pearce obviously has not read the speech or he would not have made those comments. The Attorney General said:

Several honourable members spoke of the extra resources that might be needed by the Protective Commissioner. In that respect, I am able to point out that it is proposed to amend the Protected Estates Regulation to allow the Protective Commissioner to charge the same fees for the administration of estates of missing people as it presently charges in relation to protected persons. Two fees are payable for the estates of protected persons: a management fee, which is calculated as a percentage of the total value of the estate, with the present fee being 2.1 per cent of the estate for the first year of management, with 1 per cent of that capped at \$2,200, and with the management fee reducing to 1.1 per cent of the value of the estate for every year that follows; and there may be an investment fee, which is, at present, 0.5 per cent of the total amount invested in the Office of the Protective Commissioner's investment funds. Those fees are calculated daily and are deducted at the end of each month. The practical effect of the structure of the fees is that the amount of fees payable varies according to the size of the estate, and that of course is appropriate.

The new fee structure, which commenced on 1 October 2003, significantly reduced the fees that were payable in any particular instance. That was, in turn, possible because of the injection of public funds. In 2003 and again in 2004 about \$9 million was provided to the Office of the Protective Commissioner. That, coupled with the capacity of the fee structure to be adjusted to the size of an estate, ensures that financial resources for the Office of the Protective Commissioner are always sufficient to enable the commissioner to take care of the responsibilities of the office and that that will be so into the future. It is to be borne in mind that it is not expected that a large number of cases will be assigned to the Office of the Protective Commissioner at any particular time. Many of the cases that will be subject to this legislation will end up under the administration of a family member, a business partner or whoever the court has determined to be an appropriate person.

That addresses the resources issue. Public resources are being provided and the Protective Commissioner will be able to levy charges. Of course the Protective Commissioner will not be the only person in charge of missing persons' estates. Reverend the Hon. Fred Nile asked about the role of the police. The majority of missing persons are reported to the police, which is how they are included in the missing persons statistics. The court would use reports to the police to satisfy itself that all reasonable attempts have been made to locate a missing person. The court must be satisfied that a person is missing.

Reverend the Hon. Fred Nile: Not in suspicious circumstances.

The Hon. JOHN HATZISTERGOS: It is for the police to decide whether the circumstances are suspicious. To make one of the orders contemplated under this legislation the court must be satisfied that a person is missing. When a person goes missing it is almost a prerequisite that there be some contact with the police to advise them of that fact. In answer to the Hon. Dr Arthur Chesterfield-Evans's question, the Supreme Court must be satisfied that the person appointed to manage the estate would be appropriate, that is, it is in the best interests of the missing person. This does not have to be the person who applied to the court; it could be someone else. The Hon. Jon Jenkins asked what might happen to missing persons. More than 8,000 people go missing in New South Wales each year. Some 70 per cent are found within three days, 86 per cent are found within two weeks and 95 per cent are found within a month. Some 99.7 per cent of all missing persons will be located. This means that the estate management scheme should be designed primarily to protect the estates of people who will be located sometime in the future.

Given these figures, and based on the submissions received during the Attorney General's public consultation process, the proposed 90 days is a sufficient period in which to make reasonable inquiries about a person's location. It provides a reasonable amount of time for a person to return, to contact family members or friends or to obtain information from others as to the person's stated intentions regarding his or her absence.

If information comes to light that the person has told someone that he or she intends to be uncontactable for a period—for

example on a camping holiday—the order would not be made unless there were evidence that the person had failed to return. It is a departure from the current process, whereby the family of a missing person must provide strong evidence that a missing person is dead rather than missing. In some instances, seven years may pass before the grant of probate can be obtained from the Supreme Court. During such time, the unadministered estate of a missing person can fall into disarray and disrepair, and its value can be dissipated. That causes further frustration to the family and friends, who may already be suffering grief and uncertainty. Most significantly, this is not in the interests of the missing person.

Administration of a missing person's estate may be needed in relation to accommodation and support for dependents, to make mortgage or rental payments, rental or maintenance of real estate, insurance policies, mail and utilities, business interests, depreciating assets—for example, motor vehicles—or filing of tax returns. The 90-day limit is consistent with international precedent. It is used in British Columbia, Canada, Wyoming and Guam. During consultation, the New South Wales Bar Association and Privacy New South Wales supported the 90-day time frame. Many other public submissions strongly suggested that a longer period—even one or two years—would be too long.

Mention was made of safeguards for a person who simply disappears on a holiday for more than 90 days being declared a missing person. The bill is squarely directed at those cases in which it is simply impossible to establish what has happened to a missing person—he or she has vanished and is making no attempt to contact family or friends or to use assets. It is not against the law for a person simply to take off while still looking after part of his or her estate, that is, to operate a bank account, make arrangements to pay utilities, have mail redirected or kept at a post office but not to remain in contact with family or friends. Obviously these factors would go against making an order.

To protect against frivolous or misleading applications, a number of safeguards have been built into the application process. A declaration that a person is missing and an estate management order can be made only by the Supreme Court. Before making a missing person declaration, the court must be satisfied that it is not known whether the person is alive, all reasonable efforts have been made to locate that person and people with whom the person would be likely to communicate have not heard from him or her for 90 days. Before making an order for estate management the court must be satisfied that it is in the best interests of the person to do so. If there is reasonable evidence to suggest that a person is alive, the court cannot declare the person to be missing or order that the estate be managed.

In relation to evidence that the court may use, the vast majority of submissions received as part of the consultation process focus on situations in which it is not known whether a person is missing, alive or dead. It is possible that a person who is looking after part of the estate may be regarded as missing because he or she does not keep in contact. However, as I have indicated, it is not against the law. If there is reasonable evidence to suggest that a person is alive, the scheme proposed by this bill will not apply. The bill is directed at those cases I have identified in which persons have vanished and have made no attempt to contact family or friends or to use their assets. I thank honourable members for their contributions and I commend the bill to the House.

Motion agreed to.

Bill read a second time and passed through remaining stages.

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