



Guardianship And Protected Estates Legislation Amendment Bill

Second Reading

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GUARDIANSHIP AND PROTECTED ESTATES LEGISLATION AMENDMENT BILL

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Second Reading

Debate resumed from 21 November.

The Hon. IAN MACDONALD (Parliamentary Secretary) [6.02 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have my second reading speech incorporated in *Hansard*.

Leave not granted.

This bill provides a simple, cheap and quick process for appeal to the Administrative Decisions Tribunal [ADT] from decisions of the Guardianship Tribunal, the Mental Health Tribunal and magistrates against guardianship and financial management orders. It also allows the ADT to review the decisions of the Public Guardian and the Protective Commissioner. The bill implements the recommendations of the Public Bodies Review Committee report, "Personal Effects: The Roles of the Public Guardian and the Protective Commissioner in Managing Clients Affairs". The committee recommended that the Protective Commissioner function independently from the Supreme Court and that an external right of appeal to the ADT should be available for clients. The bill makes amendments to four Acts—the Guardianship Act, the Protected Estates Act, the Administrative Decisions Tribunal Act and the Defamation Act.

Under the current Act, any decision of the Guardianship Tribunal is subject to appeal to the Supreme Court. This right of appeal continues under the provisions of this bill. The amendments in schedule 1 supplement this right of appeal by allowing parties to appeal to the Administrative Decisions Tribunal against certain decisions made by the Guardianship Tribunal. Appeals to the ADT are cheaper, quicker and easier for parties. The procedures are simple, and parties usually do not need legal representation. The ADT acts with as little formality as the circumstances of the case permit. It is not bound by rules of evidence and has a duty to act as quickly as is practicable. The provisions of this bill allow access to a fair, transparent, independent tribunal for people who may not be capable or willing to mount a Supreme Court case.

The simple appeal process from the Guardianship Tribunal to the ADT is available to people who are affected by decisions relating to the appointment of enduring guardians, the making of guardianship orders, the making of financial management orders, and giving directions to guardians. The bill makes it clear that parties must be provided with reasons for the decision by the Guardianship Tribunal and be advised of their right to appeal. In addition to the appeal rights, the bill provides a process for review of decisions made by the Public Guardian. The bill gives the ADT jurisdiction to review these decisions on the application of the person to whom the decision relates, their spouse or carer or any other person whose interests have been adversely affected by the decision.

Historically, the Protective Commissioner was an officer of the Supreme Court who performed judicial as well as administrative functions relating to financial management orders. This is not

consistent with modern best practice. The bill separates the functions of judicial decision making from financial management. Under the new scheme the Supreme Court and the Guardianship Tribunal will continue to have power to make financial management orders, and the Protective Commissioner will act exclusively as the financial manager or the supervisor of private financial managers. The bill promotes transparency and independence in the decision-making process.

It allows the Ombudsman to review the administrative decisions of the Protective Commissioner. This provides clients and their families with a cheap and simple avenue for resolving complaints and is consistent with the recommendations of the Public Bodies Review Committee. Alternatively, clients can ask the ADT to review the decisions of the Protective Commissioner relating to the approval of a private manager to authorise a protected person to deal with part of the estate, and general management of the estate of protected persons. The bill also allows the Protective Commissioner to supervise the functions of private estate managers who have been appointed by the Supreme Court or Guardianship Tribunal.

The Hon. John Jobling: If the honourable member wishes to incorporate the remainder of his speech, I am sure the House would be happy to accede to that request.

The Hon. IAN MACDONALD: I seek leave to incorporate the remainder of my second reading speech in *Hansard*.

Leave granted.

It creates an offence for failing to comply with a direction of the Commissioner. The provisions were necessary because the Protective Commissioner needs statutory power to perform the duties previously undertaken as an officer of the Supreme Court and coercive powers to ensure compliance

The decisions of the Protective Commissioner in relation to the functions of private managers will be reviewable by the ADT unless the decision was as a result of a direction by the Supreme Court.

The Bill allows private estate managers to lodge estate funds with the Protective Commissioner and allows the Commissioner to invest the funds. These provisions give private estate managers greater choice in where they lodge their investments and will allow the Protective Commissioner to compete with private sector trust companies for estates which are managed privately.

The Bill provides a right of appeal against orders by magistrates or the Mental Health Review Tribunal making estates subject to management under the *Protected Estates Act 1983*. Any person to whom an estate management order relates, or who was party to the proceedings may appeal to the ADT against the order.

To further safeguard the interests of protected persons, the Bill requires the decision maker, either the Mental Health Review Tribunal or the magistrate, to provide formal written reasons for the decision at the request of any party to the proceedings. The decision maker must also inform the party of their appeal rights.

Amendments to the *Administrative Decisions Tribunal Act 1997*

The Administrative Decisions Tribunal (ADT) is now well established as a multi-disciplinary body which has jurisdiction over a diverse range of decision making. Since its inception the ADT has demonstrated the capacity to adapt its procedures to accommodate new areas of jurisdiction in a client-oriented and accessible manner. It is imperative that clients subject to decisions made by the Protective Commissioner, the Public Guardian, the Guardianship Tribunal, the Mental Health Review Tribunal and magistrates be given access to this specialist forum for dispute resolution.

The Bill gives the ADT the jurisdiction to review many of the administrative decisions made in relation to protected persons and the jurisdiction to hear and determine appeals from tribunals.

The Bill provides for a specialist panel to determine the appeals from external judicial decisions.

The Appeal Panel consists of a presidential judicial member of the ADT, one other judicial member and a non-judicial member who has experience in dealing with people with a disability. This structure provides a combination of extensive legal expertise and specialist knowledge and empathy with specific client needs to ensure that the rights of people with a disability are vigilantly protected.

The Bill provides for the review of administrative decisions by the Public Guardian and the Protective Commissioner in the General Division of the Tribunal.

Further, to ensure that people with disabilities are able to comprehensively put their case to the Appeal Panel, the Bill allows the ADT to appoint a representative to any person who is a protected person within the meaning of the *Guardianship Act 2002* or the *Protected Estates Act 1983* or in respect of whom a guardianship order has been made or refused.

Amendments to the *Defamation Act 1974*

Under section 79 of the *Protected Estates Act 1983*, the Protective Commissioner may direct a person to provide a written report on a protected person. The report may contain sensitive information about the protected person such as comments about their:

- state of mind,
- bodily health,
- general condition, and
- care and treatment.

The amendment provides that the person preparing and publishing the report has a defence in any action for defamation arising from the contents of the report. This ensures that the report can provide a full and frank assessment of the person and the circumstances without the author risking a law suit for defamation.

The Bill confirms the ADT as the principal forum for reviewing the decisions of public authorities and establishes the ADT as an accessible appeal forum for people aggrieved by the decisions of tribunals. It implements the key findings of the Public Bodies Review Committee and provides a simple and accessible means of review and appeal by people with disabilities and their relatives and carers.

This Bill demonstrates the continuing commitment of this Government to the delivery of access to justice, and fair and transparent administrative and judicial decision making. It ensures that parties are provided with a cheap and quick appeal process. More importantly, it ensures they are given information and assistance to enable them to understand their rights, and a specialist, informal appeal forum in which to exercise them.

I commend this Bill to the House.

The Hon. PATRICIA FORSYTHE [6.06 p.m.]: For many families in this community this is one of the most important pieces of legislation that could be passed in this House. In the gallery today are some people who have waited a very long time to see this legislation passed. I am talking about the years they have waited to see changes in the system involving guardianship and the Protective Commissioner. For many reasons the Opposition will be giving strong support to the legislation, which arises out of the work of the Public Bodies Review Committee in 2001. It looked at the work of the Protective Commissioner and the Guardianship Tribunal. This bill goes much further than the work of the committee at that time but we have to acknowledge that it was a bipartisan committee that took significant evidence, and the Government could not have ignored that weight of evidence.

Having been shadow Minister for Community Services and Disability Services I am very conscious of how the work of the Guardianship Tribunal and the Protective Commissioner has impacted on many families in this State. It is a sad fact that in matters before the Guardianship Tribunal, the Protective Commissioner or the Mental Health Review Tribunal, families are often pitched against each other. Often what is seen as being in the best interest of one member of the

family is not seen that way by others, and that has been the cause of significant dispute. Until this time resolution of those disputes has been through the Supreme Court. There has long been a view that that is costly to families, cumbersome, time-consuming and very legalistic, when many issues require a more fundamental mediation approach.

As the Parliamentary Secretary said, the bill provides a simple, cheap and quick process for appeal to the Administrative Decisions Tribunal [ADT] from decisions of the Guardianship Tribunal, the Mental Health Review Tribunal and magistrates against guardianship and financial management orders. It allows the ADT to review decisions of the Public Guardian and the Protective Commissioner. The bill implements the recommendations of the Public Bodies Review Committee report entitled "Personal Effects: The Roles of the Public Guardian and the Protective Commissioner in Managing Clients' Affairs". The Opposition is pleased to support the bill.

However, I note that during the debate in the other House the honourable member for Hawkesbury made a number of points. It is important that one of those be noted in this debate. The honourable member said that this bill will not resolve all of the problems and all of the issues; that some are so complex that there will still remain a need for opportunity of further appeal to the Supreme Court. However, this bill is an important step along the way to improving the operation of the Guardianship Tribunal and the Mental Health Tribunal and facilitating the work of the Protective Commissioner.

There is no doubt that our community is ageing and that the incidence of dementia is increasing. Therefore the call on those bodies will become even greater. I want to thank Patty Costa, who in my time as shadow Minister displayed a great interest in and knowledge of work done by carers of protected persons. Others mentioned in the other place included particularly Judie Stephens, who obviously worked very hard to get this reference to the Public Bodies Review Committee. Those people deserve acknowledgement for the work they put into these measures. I am sure they will welcome the passing of this legislation as a way forward in the interests of families in this State who are impacted by various tribunals.

The Opposition will not delay the House further. We give this bill full support. In the other place honourable members who have strong involvement with families impacted by various decisions put a number of cases on the record. I have many similar cases that I became aware of as shadow Minister for Community Services, Disability Services, and Ageing that I would not know where to start to highlight the sorts of cases that could have been more easily resolved had there been an opportunity to appeal to the Administrative Decisions Tribunal. The Opposition welcomes the bill and commends it to the House.

Ms LEE RHIANNON [6.12 p.m.]: The Greens are pleased to support the bill, which we believe is long overdue. The bill will provide for an appeal mechanism to the Administrative Decisions Tribunal from decisions of the Guardianship Tribunal, the Mental Health Tribunal and magistrates against guardianship and financial management orders. The bill also provides for the Protective Commissioner to function separately from the Supreme Court. These are all measures which the Greens very much welcome.

All honourable members would be aware of the tremendous difficulties some people have experienced with the Guardianship Tribunal, in the highly emotionally charged area of guardianship orders. I imagine that every member of this place would at some time have been contacted by a constituent who has been aggrieved by some aspect of this process. It is a basic element of a fair legal process that parties to the process should have a right of appeal. Therefore we are pleased that this measure has been put in place. Hopefully, these measures will allow more of these often difficult cases to be resolved to the satisfaction of all parties. That is an aim that we should strive for. This bill goes a long way to achieving that aim.

Reverend the Hon. FRED NILE [6.13 p.m.]: The Christian Democratic Party is very pleased to support the Guardianship and Protected Estates Legislation Amendment Bill. Over a number of years we have received many complaints from people who believe they have been treated unjustly by the respective bodies, the Public Guardian and the Protective Commissioner. A number of

allegations have been made about misuse of some assets of individuals whose estates were under the control of those bodies. In particular, the bill will allow appeals to the Administrative Decisions Tribunal against certain decisions of the Guardianship Tribunal, such as decisions relating to guardianship orders and financial management orders.

It also allows appeals to the Guardianship Tribunal against orders of magistrates or the Mental Health Review Tribunal making estates subject to management under the Protected Estate Act. That is another positive move. All decisions made by the Public Guardian and the Protective Commissioner will be reviewable by the Administrative Decisions Tribunal. A most important part of the legislation is that it separates the role of the Protective Commissioner from the functions of the Supreme Court and gives additional functions to the Protective Commissioner regarding the management of estates. These are all steps in the right direction. We are pleased that the Public Bodies Review Committee conducted a review of the Protective Commissioner and the Public Guardian as well as the Council on the Cost and Quality of Government to ensure that their work is not wasted. That is because it often happens that a report is produced and we see no result from it.

Therefore we are very pleased that this report of the Public Bodies Review Committee of October 2001 at last has borne fruit. That it has taken 12 months to do so has frustrated many people involved with the review. I mention in particular those who gave evidence to the committee, especially Reverend George Capsis and Patty Costa-Hope, who did a marvellous job, at considerable emotional cost to themselves, to bring the concerns of many people out into the open and have them considered by the review committee. That has resulted in the legislation before the House. This legislation will provide the option of a cheap, quick, transparent and simple review and appeal process in the Administrative Decisions Tribunal where an appeal is lodged against decisions of the Protective Commissioner, the Public Guardian, the Mental and Health Tribunal and magistrates relating to guardianship and financial management orders.

I would like to raise a number of matters so that the Parliamentary Secretary can seek the advice of advisers. Does this legislation ensure that officers of the Guardianship Tribunal, the Office of the Protective Commissioner and the Office of the Public Guardian are removed as officers of the Supreme Court? We understand that the Administrative Decisions Tribunal is now a very important part of the system, but there remains some concern as to whether there is any restriction on public servants who worked previously with the Office of the Protective Commissioner, the Office of the Public Guardian and the Guardianship Tribunal being now members of the Administrative Decisions Tribunal. The reason I raise this question is that I have been advised by Reverend George Capsis that Frieda Hillson was the Senior Public Guardian until a few months ago and now works for the Administrative Decisions Tribunal.

The whole point of the bill was to provide honesty and transparency regarding the decisions of the bodies to which I have referred. If some of those who worked for those bodies are now working for the appeal tribunal, that could indicate some conflict of interest because some of the complaints could involve actions that they had taken while working for those bodies. There must be some check by the Government to ensure that that does not happen. Also, does the bill allow for an appeal to the Ombudsman regarding misbehaviour of guardianship staff? That does not appear to be clearly provided for in this legislation. Perhaps that is a matter that the Government could consider. Because legislation is not usually retrospective, when will this legislation take effect from the point of view of people who have made complaints? In other words, does the bill provide any new appeal opportunities for persons who are already caught up in the current system? If not, why not? After all, it was agitation by these people that led to the current proposals for reform.

As this legislation is very important, will the Government also advise the House of its plans to advise thousands of New South Wales citizens who will be affected by this legislation of their rights? This legislation should be accompanied by an education program. I do not believe that the task of informing people of their rights should be left to individuals whom I mentioned previously, namely, Patricia Costa-Hope and the Reverend George Capsis, who have been very much involved in those matters. Because a large number of people are affected, an education program will be a necessity and perhaps even individual letters should be sent to people who have had dealings with the officers to whom I have referred, informing them of their rights of appeal through the Administrative Decisions

Tribunal [ADT]. If no-one tells these people of their rights, how can those rights be exercised? It should also be remembered that many of the people affected, because of age or disabilities, have already been disadvantaged and therefore need assistance; otherwise, they would not be under the care of a public official.

Before the Hon. Elaine Nile resigned as a member of this House, she asked questions on 25 October 2001 about two staff members of the Office of the Protective Commissioner who had been convicted of fraud and whether all the moneys involved were recovered and reimbursed to the clients' accounts. I also ask the Minister whether such moneys were recovered from those staff members, or from consolidated revenue, or from the estates of the Office of the Protective Commissioner's clients? How much money was involved? I request that the Government, through its advisers, examine these practical matters and provide further advice to the House and members of the community, especially those who are represented by the Christian Democratic Party in this place. We are pleased that the bill has been introduced into the Parliament and look forward to its speedy passage and implementation.

The Hon. Dr BRIAN PEZZUTTI [6.21 p.m.]: Put simply, the bill does not go far enough, as honourable members will realise when they read the report of the Select Committee on Mental Health. Concerns have been raised by relatives and friends of a large number of people who are mentally ill. When people are well, they do not want their relatives involved, but virtually at the instant they become mentally ill they want their relatives to become involved so that people close to them will become part of the decision-making process for their care. Under current circumstances the relatives cannot be involved. Some type of guardianship provision that takes over when people become ill is required. This legislation will need to be reviewed after presentation of the report by the Select Committee on Mental Health. The Administrative Decisions Tribunal does not offer an easy, simple or transparent process. Under this Government the tribunal has become lumbering and elephantine.

It takes forever before people have the opportunity to appear before the tribunal, and there are huge delays involved in determining whether a case needs to be handled by a judicial officer. The tribunal has only one judicial officer and cases grind to a halt. If people want instant action and wish to avoid the Supreme Court they may as well forget going anywhere near the Administrative Decisions Tribunal because even a simple determination involves a delay of two or three months. The Government should allocate more resources to the tribunal if it is to have any chance of providing what honourable members have described during this debate as a simple, transparent and quick-and-easy process. At the moment it is not doing so because it is starved of funds and has not nearly enough officers to do the jobs that need to be done. The tribunal presents a gross disincentive for people who are looking for a simple process. I advise many people who are seeking a determination to go straight to the Supreme Court where their case will be heard much more quickly and probably with much greater effect.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS [6.23 p.m.]: I have received many representations on this issue, particularly regarding the Office of the Protective Commissioner and protests against the decisions made by that office. Obviously a conflict of interest exists between those who are having their money managed for the long term and family members who may wish to have the money managed differently in the short term. Accusations are levelled at family members, suggesting that they are trying to get at the money against the interest of the person who owns the estate. I have heard of many accusations about money being totally mismanaged or not being managed in the interests of the person who is supposedly being looked after by the Protective Commissioner.

The issues must be brought out into the open and discussed. I congratulate the Government on bringing the Administrative Decisions Tribunal into the process and concluding the role of the Public Guardian. This is a good solution for a problem that has been drawn to my attention. Because the computers in Parliament House are down I do not have all the details of cases that have been brought to my attention, but I believe that this is good legislation which will address problems that currently exist. When the light of public scrutiny is trained on the examples of officers who are brought before the courts, I hope that will result in beneficial feedback and improvement in the way

that the office and procedures are managed. I hope that this legislation will provide better outcomes for people who need these types of offices to look after their welfare in the long term.

The Hon. Dr PETER WONG [6.25 p.m.]: This bill is intended to streamline and simplify appeals to the Administrative Decisions Tribunal against decisions of the Guardianship Tribunal, the Mental Health Tribunal and magistrates in regard to guardianship and financial management orders. It will also allow the ADT to review the decisions of the Public Guardian and the Protective Commissioner. The Public Bodies Review Committee produced a report entitled "Personal Effects: The Roles of the Public Guardian and the Protective Commissioner in Managing Clients' Affairs", which recommended that the Protective Commissioner should function independently from the Supreme Court and that an external right of appeal to the ADT should be available for clients.

This bill amends four Acts: the Guardianship Act 1987, the Protective Estates Act 1983, the Administrative Decisions Tribunal Act 1997, and the Defamation Act 1974. The bill promotes transparency and independence in the decision-making process. It allows the Ombudsman to review the administrative decisions of the Protective Commissioner. This provision will allow many people to resolve their complaints or grievances at a local level because it is an inexpensive option, supported by the Ombudsman, which many people should avail themselves of in the first instance. Furthermore, the ADT can be requested to review the decisions of the Protective Commissioner relating to the use of a private manager to authorise a protected person to deal with part of the estate and the management of estates of protected persons generally.

The bill also allows the Protective Commissioner to supervise the functions of private estate managers who have been appointed by the Supreme Court or the Guardianship Tribunal. It creates an offence for failing to comply with a direction of the commissioner. The provisions are necessary because the Protective Commissioner needs a statutory power to perform the duties that were previously undertaken by an officer of the Supreme Court, and to provide coercive powers to ensure compliance. The decisions of the Protective Commissioner regarding the functions of private managers will be able to be reviewed by the ADT unless the decision was made as a result of a direction given by the Supreme Court. These provisions give private estate managers greater choice as to where they lodge their investments and will allow the Protective Commissioner to compete with private sector trust companies for estates that are managed privately. It will also ensure that better protections exist for the estate owners and that the process is more open and transparent.

As the honourable member for Lane Cove pointed out in the other place, the Protective Commissioner does not have a great history because the systems that were meant to provide safeguards for individuals who experienced difficulties in managing their affairs was overly legalistic. This was because any review of the decision by the commissioner required the matter to be heard in the Supreme Court. What people really encountered in a theoretically just judicial system was the reverse—a system whose structure and process was a prime example of what is termed systems abuse. No doubt the expense of many matters contested by individuals who are under protection and the expense incurred by their relatives who contested decisions have eroded the care that the Public Guardian or Protective Commissioner was able to provide. It is to be hoped that that standard of care will be improved with the passing of this bill. I, for one, will be watching, as I understand a large number of homeless people are under the care of the commissioner.

The assets under the commissioner's power are considerable. I take this opportunity to note from the report of the Public Bodies Review Committee that as at June 2001 the common fund held \$1.532 billion as cash and real estate, and that the value of jewellery, furniture and personal effects has not been valued. I note that the Government has gone some way towards addressing some of the major recommendations of the committee's report, and I believe that this bill will result in improved services to those under the care of the Protective Commissioner and the Public Guardian. That said, I believe that continued improvement in this most important area, as in all areas where the State and its officers look after individuals directly, must undergo a continuing process of improvement and reform. The bill is a good start in that direction and the Unity party supports it.

Reverend the Hon. Dr GORDON MOYES [6.31 p.m.]: I will not delay the House by going over ground that has been covered by other members. The Christian Democratic Party supports the bill

but I have a question for the Parliamentary Secretary. Would the Government consider, under the educational program, a government-funded helpline? Those of us who have been involved in the helping professions over a number of years know that clients have a lot of questions and trying to help them work through their issues takes a lot of time. Will the Government consider a funded helpline?

The Hon. IAN MACDONALD (Parliamentary Secretary) [6.31 p.m.], in reply: I thank honourable members for their comments on the bill. In reply to the first point made by Reverend the Hon. Fred Nile, it is true that the bill removes the Protective Commissioner from the Supreme Court. In reply to his second point, the Government and the President of the Administrative Decisions Tribunal [ADT] will take all steps necessary to avoid conflicts of interest. Because the Office of Protective Custody will be no longer attached to the Supreme Court it will automatically be subject to reviews by the Ombudsman. Aggrieved people can apply to the Guardianship Tribunal to vary existing orders, which will then be subject to appeal under the Act. On the question of education, the ADT will work with individuals to ensure that they are fully advised of their rights, and will assist them to make applications. The Government is not in a position to comment today on the specific case raised. The matter would be best dealt with by Reverend the Hon. Fred Nile asking a question on notice about it.

In relation to the comments of the Hon. Dr Brian Pezzutti, delays in the ADT are minimal. The honourable member was referring to one specific case in the Retail Leases Division. The Government will ensure that the General Division of the ADT is adequately resourced to deal with these cases quickly and effectively. In reply to the question of Reverend the Hon. Dr Gordon Moyes, the Government will undertake immediate consideration of a government-funded helpline. I thank honourable members for their contributions and commend the bill to the House.

Motion agreed to.

Bill read a second time and passed through remaining stages

[The Deputy-President (The Hon. Dr. Brian Pezzutti) left the chair at 6.34 p.m. The House resumed at 8.15 p.m.]

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