



Guardianship Amendment Bill 2007

< H2>Guardianship Amendment Bill 2007

Extract from NSW Legislative Assembly Hansard and Papers Wednesday 30 May 2007.

Agreement in Principle

Ms KRISTINA KENEALLY (Heffron—Minister for Ageing, and Minister for Disability Services) [11.13 a.m.]: I move:

That this bill be now agreed to in principle.

The guardianship legislation is a vital component of the Government's commitment to supporting people living with a disability. Guardianship in the twenty-first century is about the empowerment and protection of disabled members of our community.

The Guardianship Act 1987 provides an important legislative framework for promoting and safeguarding the welfare and best interest of adults with a decision-making disability. Not all adults with a disability need the protection of the Guardianship Act. The Act recognises that while freedom of decision making by adults with a disability should be restricted as little as possible, some people need assistance with decision making in areas such as lifestyle, health or financial matters. The Guardianship Act was passed in 1987 with bipartisan support. It established the Guardianship Tribunal to determine when it is in the best interests of an adult with a disability to have someone else appointed as their substitute decision maker.

The legislation requires that the tribunal conduct its business with as little formality and legal technicalities as possible. The tribunal fosters maximum participation of people with a disability, their families and carers. Taking away an individual's right to make decisions and placing that responsibility with another person is one of the most sensitive areas about which the Parliament can legislate. It is vital for the successful implementation of such laws that the body charged with the responsibility to make these decisions has appropriate systems and procedures to fulfil the charter given to it by the Parliament. The purpose of this amendment bill is to enhance the tribunal's ability to respond effectively and efficiently to the needs of adults with impaired decision making, their families and carers by improving the way the tribunal conducts its business.

Over the past 20 years there has been a significant increase in the jurisdiction and workload of the tribunal. In the past financial year the tribunal managed more than 8,000 matters and the number of new applications made to the tribunal increased by 9.3 per cent as compared to the previous year. Demographic changes, such as the ageing of the population, present challenges to the community and to the Government. It is vital that the tribunal's services keep pace with the changing demands of the community. The majority of people now accessing the guardianship system in this State are people who suffer from age-related disabilities, particularly dementia. The guardianship legislation and the Guardianship Tribunal are the Government's key and very successful responses to addressing the needs of ageing people living with a disability.

The Government is very mindful that improvements in efficiency should not compromise the rights of adults with a disability. To ensure individual rights are protected, the bill includes safeguards. In recognising the important and sensitive role that the tribunal performs in the community, the Government was keen to seek

community and stakeholder views about possible improvements to the operation of the tribunal. A discussion paper detailing the proposed amendments was released in November 2006. The discussion paper called for submissions and major government and non-government stakeholders responded. There was strong support to the proposed amendments as well as suggestions for the refinement of some proposals.

In summary, the amendments deliver four key changes to the Act and to the operation of the tribunal. The amendments make the criteria for non-reviewable guardianship orders clear and more flexible. They add to the range of functions to be performed by a tribunal comprised of fewer than three members, they clarify procedural and other functions that may be performed by the registrar of the tribunal, they allow for the review of those decisions by the tribunal and they extend the maximum term of appointment for a member of the tribunal from three to five years.

I will now provide members with some detail on each of the key changes. The first relates to non-reviewable guardianship orders. At present when the tribunal makes a guardianship order, it specifies the term of the order. The legislation requires that a review be undertaken at the end of the term unless the order is made non-reviewable. At a review the tribunal determines whether the order should or should not continue. Section 16 (2) (a) of the Guardianship Act explains when a non-reviewable order can be made. I am advised that in the tribunal's experience the wording of the current provision has created some confusion. The amendment will avoid confusion by clarifying that non-reviewable orders can be made if the tribunal is satisfied that in all the circumstances it is appropriate and in the best interests of the person with a disability that the order not be reviewed at the expiry of its term. The Guardianship Tribunal conducts its hearings in an informal manner and it seeks to ensure that the experience is as comfortable as possible for the participants, particularly people with a disability. However, attending a legal hearing can cause distress and anxiety. Non-reviewable guardianship orders remove the need for people with a disability, their family and carers to attend a review hearing that might simply confirm that an order is no longer required. The amendment promotes hearing arrangements that are less intrusive and less demanding for the people concerned. The Act already contains safeguards for a person with a disability under a non-reviewable guardianship order. Those safeguards are that if a person's circumstances change and family or carers think the order should be reviewed, an application can be made to the tribunal for a review. Additionally, the tribunal itself can initiate a review if it is considered necessary. These safeguards will continue.

The second change is increasing the functions of a tribunal comprised of fewer than three members. In recognition of the complex issues under consideration in the guardianship area, the legislation requires that the matters before the tribunal be considered by a multidisciplinary panel comprised of a presiding legal member, a professional member with experience in assessing or treating people with a disability, and a community member with experience in disability issues. As I said in my opening remarks, the tribunal's role is a sensitive one. The tribunal's determinations are significant and can have far-reaching consequences for people. The Act will continue to mandate that all determinations about initial guardianship and financial management orders must be considered by a three-member tribunal. The Government recognises that these determinations require careful consideration by a panel of experts with a cross-section of skills and experience. The multi-

member, multidisciplinary panel is a safeguard which ensures proper consideration of legal, social, medical and financial issues, before the decision-making rights of the person with a disability are affected. These benefits extend to the family and carers of the person with a disability before the tribunal. The current Act allows for certain procedural matters to be heard by a tribunal constituted by fewer than three members. The amendments build on the existing provisions and allow a tribunal of fewer than three members to review guardianship and financial management orders and to give consent to some medical treatment. The president of the tribunal will have discretion to determine when it is appropriate for a tribunal of fewer than three members to be constituted.

When the tribunal conducts reviews of guardianship or financial management orders, consideration of the matters covered at the initial hearing, such as decision-making capacity, is not always required. Some reviews are more straightforward than others. In many reviews, if there is no further dispute about the decisions to be made, often the guardianship order can be allowed to lapse. In some reviews it is clear that very little has changed since the making of the original order, and for this reason it will be in the best interests of the person for the order to continue. The amendments are needed because in straightforward review matters the tribunal should be able to be constituted by one or two members without any compromise in the quality of the service the tribunal provides to its clients and stakeholders.

Similarly, simple medical decisions can be made by a one or two-member tribunal without disadvantage to the person with the disability. However, if the issues are complex or if there is a dispute, the president of the tribunal has the discretion to arrange for a three-member tribunal to conduct the hearing.

The third change concerns the role and functions of the tribunal registrar. The Guardianship Tribunal, as a legal tribunal, has a range of procedural functions. The Act establishes the position of Tribunal Registrar but provides little guidance about the role and responsibilities of the registrar, specifying only two functions which he or she may exercise. The amendments will clarify the registrar's role in performing certain procedural functions. This will enhance the tribunal's ability to manage its caseload in a responsible and efficient manner without compromising the rights of people with a decision-making disability. Improved workflow processes have clear benefits for the tribunal's clients in terms of enhancing the timeliness and quality of services provided by the tribunal.

Specifically, the amendments will give the registrar, at the discretion of the president of the tribunal, the functions of dismissing applications where the tribunal does not have jurisdiction to hear the matter or for want of prosecution; refusing requests to review guardianship or financial management orders; recognition of interstate orders; joining parties to a proceeding; granting leave for a person to be legally represented or requiring the appointment of a separate representative for a person; giving directions on proceedings prior to a hearing; adjourning proceedings; and consenting to the withdrawal of applications. These changes are consistent with the operation of other tribunals in the State and with guardianship tribunals around the country. Significantly, the amendments make it clear that the registrar's decision is not necessarily final. The tribunal can change a decision of the registrar, and if a person is dissatisfied with the registrar's decision there are options available to have that decision reviewed or changed.

The last change is increasing the maximum term of appointment for tribunal

members. The Guardianship Act currently allows for the appointment of tribunal members for a maximum term of three years. The Governor appoints members on the recommendation of the Minister for Disability Services. The amendment will increase the possible maximum term of appointment of tribunal members from three to five years. Enhancing the security of tenure of tribunal members increases the community's confidence in the tribunal's independence and impartiality. The amendment is consistent with the practice of guardianship tribunals in other States and Territories. Another significant benefit of the amendment is that it will allow the tribunal to redirect the administrative and human resources it would otherwise employ in the appointment and reappointment process towards other areas to further enhance the quality of tribunal services to people with a disability, their families and carers.

Tribunal members are appointed through an open, merit-based selection process. They are subject to an extensive induction, training and mentoring system. Professional development and performance appraisal programs support members to maintain appropriate professional standards. The tribunal's clients are some of the most vulnerable people in the State, and they deserve a guardianship system which is able to respond to their needs in a timely and efficient way. I would like to sincerely thank the people and organisations across the State who took the time to contribute to the development of these important reforms. These amendments will ensure that the Guardianship Tribunal will continue to deliver responsive and high-quality services to the people of New South Wales. I commend the bill to the House.