Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, and Minister for Industrial Relations) [10.02 p.m.]: I move:

That this bill be now read a second time.

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

Leave granted.

The NSW Trustee and Guardian Bill 2009 facilitates a merger between the Office of the Protective Commissioner and the Public Trustee, enabling service improvements and operational efficiencies that will benefit the people of New South Wales. It is proposed that this legislation commence on 1 July 2009. A merger implementation team, comprising the Director General of the Attorney General's Department, Mr Laurie Glanfield, the Protective Commissioner, Ms Imelda Dodds, and the Public Trustee, Mr Peter Whitehead, has been working this year on the merger, and has held a number of meetings with stakeholder groups in the disability sector. The bill does not involve substantive amendment to the roles and responsibilities currently exercised by the Protective Commissioner or the Public Trustee. Rather it integrates the two, repeals the existing legislation and replaces it with one Act, focusing on the roles of the merged entities—personal trustee and financial management services.

I turn first to the roles of the existing organisations. The Protective Commissioner is an independent public official appointed under the Protected Estates Act 1983 to protect and administer the financial affairs of people who are unable to make their own financial decisions, called protected persons, and missing persons, who are identified as protected missing persons. The Protective Commissioner also provides direction to private managers who have been appointed to administer the financial affairs of other protected persons. The Protective Commissioner has approximately 12,000 clients, directly managing just over 9,000 clients, overseeing approximately 2,500 privately managed clients, and acting as banker for 700 other clients on behalf of the Department of Ageing, Disability and Home Care. The Protective Commissioner does not choose clients but is appointed by a court or tribunal financial management order, and has a staff of approximately 250.

Clients of the Office of the Protective Commissioner require a higher level of service in respect of financial decision making than most members of the general population because of their disability or mental illness. The Public Trustee is appointed by the Governor for a period of up to five years under the Public Trustee Act 1913. The Public Trustee's role is to act as an independent and impartial trustee, executor, attorney and agent for the people of New South Wales, no matter what value business they bring. The Public Trustee has five core businesses: will-making, estate administration, executor services, trust management, and power of attorney management. The Public Trustee also attends to the management of seized or confiscated assets under the Criminal Assets Recovery Act 1990 and the Confiscation of Proceeds of Crime Act 1989.

The Public Trustee has a staff of approximately 300. It manages approximately 7,100 ongoing trusts, 5,800 deceased estates and 660 powers of attorney and holds 400,000 wills for current clients who have appointed the Public Trustee as their executor. The value of individual trusts and deceased estates administered by the Public Trustee varies greatly. The Public Trustee has a statutory obligation not to decline an estate on the grounds of its small value, and is funded for community service obligations to cover small deceased estates, trusts and making wills for clients disclosing assets less than $50,000. Both the Office of the Protective Commissioner and the Public Trustee provide important legal, personal trustee, and financial and asset management services to the people of New South Wales. The merger provides the opportunity to improve operational efficiency, while enabling the quality of services to clients not only to be maintained, but also to continue to improve.

This bill will create a strong new organisation that will build on the existing strengths of both offices, harmonising its common functions and delivering improved front-line services. In particular, over time the existing branch structure of the Public Trustee will enable clients of the Protective Commissioner to access services beyond metropolitan Sydney in places such as Gosford, Newcastle, Armidale, Broken Hill, Lismore, Port Macquarie, Wollongong and Bathurst. In all other Australian jurisdictions the Public Trustee can be appointed to manage the estate of a person who is incapable of managing his or her estate. The reason for the dichotomy between the two in New South Wales is historical and flows from its original relationship with the Supreme Court. Prior to the enactment of the Protected Estates Act, the Protective Division of the Supreme Court exercised the functions of the Protective Commissioner.

An erudite paper written by a former New South Wales Supreme Court Judge, Philip Powell, AM, QC, published under the title "The Origins and Development of the Protective Jurisdiction of the Supreme Court of New South Wales" traces, among other things, the history of the Lunacy Act 1878, New South Wales, and how it provided the machinery to constitute a Lunacy jurisdiction in the Supreme Court and allow for the appointment of a Master in Lunacy. The paper traces the revision of the 1878 Act in 1898, which defined the meaning of lunacy law in New South Wales for some eight decades. The paper also looks at the supposedly "brave new world" ushered in by the Mental Health Act 1958, New South Wales—legislation which in the end proved to be a case of the emperor's new clothes. It also covers the profound changes engendered by the Hon. Laurie Brereton in 1983 through a number of bills, including the Protected Estates bill, which the then health Minister described as:

one of the most significant social reforms to be considered by this Parliament signifying a major advance in the way our society regards and deals with victims of mental illness.

Former Justice Powell played a significant role in the reform process undertaken by the then Government that changed not only the laws of mental health in New South Wales but also contributed to a new perception of those suffering from a mental illness, which unfortunately had an awful social stigma attached to it. I turn now to the provisions of the bill. The bill provides that the NSW Trustee and Guardian will be a statutory corporation, with its functions exercised by a chief executive officer, and will be listed in schedule 2, Statutory Bodies, of the Public Finance and Audit Act 1983 and so be subject to the audit and payment of tax equivalent provisions of that Act.

The Chief Executive Officer of the NSW Trustee and Guardian, who will be appointed by the Governor, will hold office for the period specified in the appointment up to a maximum of five years and will be eligible for reappointment. The chief executive officer will be subject to part 3.1, but not chapter 2, of the Public Sector Employment and Management Act 2002, and will only be able to be removed from office by the Governor for misbehaviour, incapacity or incompetence, notwithstanding section 77 of the Public Sector Employment and Management Act. The Minister will be able to appoint an acting chief executive officer in cases of absence or illness of the chief executive officer.

The NSW Trustee and Guardian will not itself employ staff. Rather, staff will be employed under the Public Sector Employment and Management Act, enabling the NSW Trustee and Guardian to exercise its functions. While the bill does not refer to any deputy or deputies, it includes a power of delegation for the chief executive officer. The bill provides for the continuation of the existing Public Trustee and Protective Commissioner's common funds, as opposed to setting up a single common fund immediately, as this gives the NSW Trustee and Guardian the greatest flexibility in transitioning to a merged organisation. Setting up a single common fund now would create possible losses resulting from being forced to realise investments and would trigger capital gains tax for clients. The legislation provides for money to be transferred between investment funds and the existing common and trust funds, as required.

Both the Public Trustee and the Protective Commissioner have other statutory roles. For example, the Dormant Funds Act 1942 provides that the person holding the office of Public Trustee shall be the Commissioner for Dormant Funds. The ANZAC Memorial (Building) Act 1923 provides that the Public Trustee is one of the trustees under that Act. The bill provides that the NSW Trustee and Guardian will hold these statutory roles, other than the Public Guardian, which I will now discuss. The Public Guardian is a statutory position established by the Guardianship Act 1987. The Guardianship Tribunal or Supreme Court can appoint the Public Guardian to make decisions on behalf of a person with impaired decision-making abilities where there is no other person able or suitable to take on this role. The Public Guardian is appointed where there is a need for a specific lifestyle or medical decisions to be made. The Office of the Public Guardian is currently guardian for approximately 1,900 people. Section 77 (2) of the Guardianship Act provides for the Protective Commissioner to be the Public Guardian.

The Office of the Public Guardian and the Office of the Protective Commissioner are separate, but the holder of the position of Protective Commissioner is also the holder of the position of Public Guardian. The bill provides that the position of Public Guardian will continue, but it does not provide that the Public Guardian will be the NSW Trustee and Guardian. The Public Guardian will report to the chief executive officer of the New South Wales Trustee and Guardian, with the Office of the Public Guardian remaining functionally separate to, but co-located with, the NSW Trustee and Guardian. Similarly to what is proposed for the NSW Trustee and Guardian, there will be no reference to a Deputy Public Guardian, but rather there will continue to be a power of delegation. An acting Public Guardian will be able to be appointed by the Attorney General, as required. This engenders a clear delineation between the roles of guardian and financial manager, ensuring no one statutory officer has the power to make decisions in all areas of a person's life and is consistent with other Australian jurisdictions.

Earlier this year the New South Wales Government announced that it would be implementing the fee recommendations of the Independent Pricing and Regulatory Tribunal report entitled "Review of the Fees of the Office of the Protective Commissioner". Some of the recommended fee relief for protected persons was implemented on 1 April 2009, and the remainder will commence with the commencement of this legislation and the realisation of the merger. The Independent Pricing and Regulatory Tribunal also recommended that the Government provide additional funding for the Office of the Protective Commissioner. In response, the Government has previously announced that until 30 June 2011 the additional funds identified by the Independent Pricing and Regulatory Tribunal will be met from the merger between the Office of the Protective Commissioner and the Public Trustee.

The merged body will have sufficient funds because, one, it will retain the dividend and tax-equivalent payments the Public Trustee would have otherwise made under the Public Finance and Audit Act; and, two, it is proposed that it will have access to surplus funds held in the interest suspense account of the Public Trustee. At present, section 36C of the Public Trustee Act allows surplus funds to be used for the working of the Act after allowing for the payment of interest to clients and the placement of adequate funds in the Estate Guarantee and Reserve Account under section 36B of the Public Trustee Act. The bill provides that surplus funds similarly be used for the working of the new Act, placing adequate funds in necessary reserve accounts. The Independent Pricing and Regulatory Tribunal recommended a limited mid-term review in 2010 to reassess fees for privately managed clients. It is proposed that this mid-term review also report on sources of funding for the New South Wales Trustee and Guardian and examine the fee structure of the merged organisation.

While the bill essentially provides for re-enacting the existing Public Trustee and Protected Estates Acts, a number of amendments are also being introduced to improve the regime for managing the estates of people who do not have legal capacity to manage their own financial affairs and require a financial manager to make substitute decisions for them. I will now outline these amendments. New South Wales has retained two different legislative regimes for the making of financial management orders. The Supreme Court and the Mental Health Review Tribunal make orders under the Protected Estates Act whereas the Guardianship Tribunal makes its orders under the Guardianship Act. The Protected Estates Act has evolved in line with mental health laws, including the Mental Health Act 2007, and seeks to protect a person's estate at a critical point in the onset or treatment of mental illness, or other disability, while in hospital.

The Guardianship Act deals with substitute decision-making orders more generally, including for a person with an intellectual disability, a person of advanced age, a person with an acquired brain injury, or a mentally ill person who is not in hospital. The powers in the Protected Estates Act and the Guardianship Act are not identical in every regard. Consistency is desirable to bring the same level of flexibility to the making of orders in each jurisdiction, to prevent forum shopping and to ensure that the least restrictive approach is encouraged in each court and tribunal. Ideally, the making of an order, or not, should not depend on the forum in which the application is brought. The following four amendments are designed to bring greater consistency between the two regimes.

The first amendment is contained in clause 39 of the bill. It will replicate the set of general principles contained in section 4 of the Guardianship Act insofar as they apply to financial management. Currently the Protected Estates Act, unlike the Guardianship Act, does not contain a set of general principles to guide the making of orders or the performance of functions under the Act. This is anomalous because people with disabilities who require others to make decisions for them about health and lifestyle matters, including medical and dental treatment, may also need a substitute decision-maker to manage at least some of their financial affairs.

Clause 39 of the bill will create a duty on everyone exercising functions under the new Act to: give paramount consideration to the welfare and best interests of protected persons or patients, restrict their freedom of decision and action as little as possible, encourage them to live, as far as possible, a normal life in the community, seek and take into account their views as far as possible, recognise the importance of preserving their family relationships and cultural and linguistic environments, encourage, as far as possible, self-reliance in their financial affairs, and protect them against neglect, abuse and exploitation. The benefits of this approach will include greater consistency in decision-making across these related areas of law, giving legislative recognition to the models of "best practice" which already exist in the provision of services to people with disabilities, including within the Office of the Protective Commissioner, and giving greater protection to the human rights of people with disabilities to live with dignity and as much autonomy as possible.

The second amendment is to reverse the presumption of incapacity that currently operates in sections 16 to 19 of the Protected Estates Act. Currently various provisions of the Protected Estates Act presume incapacity. For example, section 16 requires that where a magistrate directs the detention of a person in a mental health facility as an involuntary patient under the Mental Health Act the estate of the person must be subject to management, unless the magistrate is satisfied that the patient is capable of managing their affairs. However, it cannot be assumed that a person who is detained in a mental health facility as an involuntary patient has automatically lost capacity to manage some or all of their financial affairs. For example, a mentally ill person may lose capacity to make decisions about large sums of money invested in a range of trust funds, but be able to continue to use money from a savings account to pay for groceries or to pay bills.

Clauses 44 to 46 of the bill incorporate amendments to what are currently sections 16 to 19 of the Protected Estates Act to reverse the current presumption of incapacity. This means that the Mental Health Review Tribunal, when considering a person's capability of managing their own affairs, is to make a financial management order only if it is satisfied that the person is incapable of managing the whole or part of their financial affairs. The major benefit of this approach will be to reduce the number of unnecessary orders when it is clear that an involuntary patient can still manage their finances, or is likely to be capable with immediate treatment. Clause 46 of the bill provides an appropriate avenue for a subsequent application to the Mental Health Review Tribunal for an order, should evidence emerge that the patient might be unable to continue to manage some or all of their financial matters.

The third amendment is to amend section 25E of the Guardianship Act to remove the requirement for the Guardianship Tribunal to consult with the Protective Commissioner before excluding part of an estate from a financial management order. This requirement was included to provide assistance to the Guardianship Tribunal when it was first established. However, the tribunal now has 20 years of expertise in determining the appropriate scope of financial management orders; moreover, this amendment removes an unnecessary delay in a process intended to be as least restrictive as possible.

The fourth amendment is to limit the length of an interim order made by a magistrate or the Mental Health Review Tribunal to no longer than six months, similar to section 25H of the Guardianship Act; and to allow an order that is an interim order to be reviewed by the Mental Health Review Tribunal within a specific time, similar to section 25N of the Guardianship Act. Currently, section 20 of the Protected Estates Act provides for interim orders pending further consideration of a person's capacity to manage their affairs. However, there is no statutory limit on the length of interim orders. In practice, the Mental Health Review Tribunal may make an extended interim order even if it is unlikely the person will be in hospital when the interim order expires. In addition there is no mechanism to review an order that is in place to determine whether it is still needed.

The bill provides, in clauses 47 and 48, that the period of an interim order be limited to six months and that an order may be reviewed within a specified time, in the same way that the Guardianship Tribunal can order and conduct reviews. These proposals support the "least restrictive alternative" model by providing mechanisms to ensure that an order is only in place for the length of time that the protected person is incapable of managing their affairs or some other person becomes available to do so on their behalf.

A number of other amendments have been incorporated into the bill. I turn now to these. Historically, the Protective Commissioner was an officer of the Supreme Court who performed judicial as well as administrative functions relating to financial management orders. In 2002, however, the Protected Estates Act was amended to separate the functions of judicial decision-making from financial management. The aim of the changes was to ensure the Protective Commissioner acts exclusively as the financial manager or as the supervisor of private financial managers. There are a number of proposed changes outlined in the paragraphs which follow which are consequential on the separation of judicial power from the business of financial management and oversight. The Supreme Court has been consulted and agrees with these proposals.

Section 9 of the Protected Estates Act gives the Protective Commissioner the power to issue subpoenas and require a person to attend to give evidence. Section 10 of the Protected Estates Act provides that, where a person is required to attend before the Protective Commissioner, he or she may be cross-examined or re-examined orally. As these powers are judicial in nature, the bill provides that sections 9 and 10 of the Protected Estates Act be replaced with a provision that allows the Protective Commissioner to require a person, by notice in writing, to supply relevant information and documents within 14 days. Sections 6 and 11 of the Protected Estates Act relate to inquiries that the Supreme Court may direct the Protective Commissioner to conduct, and advertising for the purposes of such an inquiry. Section 13 (3) (b) of the Protected Estates Act allows the court to direct that the Protective Commissioner examine and report on the person whose capability to manage their affairs is in question.

As the Protective Commissioner is no longer an officer of the court, the bill does not replicate these sections. Currently, under section 38 of the Protected Estates Act the Protective Commissioner is required to determine whether an order should continue in certain circumstances, including where a person is no longer under guardianship or no longer an involuntary patient in a New South Wales hospital. The bill provides that while the New South Wales Trustee and Guardian will continue to terminate orders in non-contentious matters, the New South Wales Trustee and Guardian will be given the capacity to refer the issue of termination to the Supreme Court, the Guardianship Tribunal or the Mental Health Review Tribunal—whichever made the original order—where there is a dispute about the possible termination. This would only arise in situations where there is uncertain or contested evidence about a person's capacity to manage all or part of their finances.

The bill also provides a power for the New South Wales Trustee and Guardian or a private manager to buy gifts of a small monetary value for family members for personal or cultural reasons. This proposal accords with the role of financial manager as substitute decision-maker, "standing in the shoes" of the protected person. The powers will be analogous to those available to an attorney under schedule 3 of the Powers of Attorney Act 2003, which include a prescribed form of authority for the giving of gifts. The gift must be to a relative or close friend of the protected person; be of a seasonable nature or because of a special event, for example, a birth or a marriage; or a donation of the nature that the protected person made when he or she had the capacity or might reasonably have been expected to make; and the gift's value must not be more than what is reasonable having regard to all the circumstances and the size of the protected person's estate. Legislation authorising financial managers to make suitable gifts already exists in Queensland, Victoria, Tasmania and Western Australia.

The bill also allows a manager of an estate to serve notice on a holder of a protected person's will to deliver a copy within 14 days, unless the holder applies to the Supreme Court for a contrary direction. The primary role of a financial manager is to maintain an estate in the best interests of a protected person. To perform this role the past attitudes and decision-making preferences of the person when they had legal capacity are relevant. In this context, a will may assist a financial manager in deciding whether or not to sell a particular piece of property or dispose of other assets. In practice, the Protective Commissioner and private managers already refer to available wills to assist them in their substitute decision-making.

The amendments outlined above capture some of the concerns that various stakeholders have raised about the management of estates of people incapable of managing their affairs. It is acknowledged that these amendments have focussed almost exclusively on amalgamating the two offices and that further reform may be required. In order to address any further concerns and ensure that they are canvassed through a comprehensive consultation process—particularly with the disability sector—it is proposed that the Legislative Council Standing Committee on Social Issues inquire into these additional matters as part of a general reference and report on whether the New South Wales legislation requires amendment to make better provision for the management of estates of people incapable of managing their affairs, and the guardianship of people who have disabilities, and report back by 1 February 2010. This will also provide a means by which any further concerns regarding the proposed merger can be adequately addressed. I commend the bill to the House.