

[Act 2002 No 119]



New South Wales

Guardianship and Protected Estates Legislation Amendment Bill 2002

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are as follows:

- (a) to allow appeals to be made to the Administrative Decisions Tribunal (*the ADT*) against certain decisions of the Guardianship Tribunal made under the *Guardianship Act 1987* (including the making of guardianship orders and financial management orders),
 - (b) to allow appeals to be made to the ADT against estate management orders made under the *Protected Estates Act 1983* by Magistrates and the Mental Health Review Tribunal,
 - (c) to provide for certain decisions of the Protective Commissioner under the *Protective Estates Act 1983* and the Public Guardian under the *Guardianship Act 1987* to be reviewable by the ADT,
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- (d) to confer jurisdiction on the ADT to hear and determine appeals against decisions by the Guardianship Tribunal and other persons and bodies, and to provide that the ADT is to be constituted by a 3 member Appeal Panel in relation to any such appeal,
- (e) to amend the *Protected Estates Act 1983* to separate the functions of the Protective Commissioner from the functions of the Supreme Court under that Act, and to confer additional functions on the Protective Commissioner in relation to the management of estates of protected persons,
- (f) to make a number of miscellaneous and consequential amendments to the *Guardianship Act 1987*, the *Protected Estates Act 1983*, the *Administrative Decisions Tribunal Act 1997* (**the ADT Act**) and the *Defamation Act 1974*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Guardianship Act 1987* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendments to the *Protected Estates Act 1983* set out in Schedule 2.

Clause 5 is a formal provision giving effect to the amendments to the *Administrative Decisions Tribunal Act 1997* set out in Schedule 3.

Clause 6 is a formal provision giving effect to the amendment to the *Defamation Act 1974* set out in Schedule 4.

Schedule 1 Amendment of Guardianship Act 1987

At present under the Act, any decision of the Guardianship Tribunal is subject to appeal to the Supreme Court. Without affecting this existing right of appeal, **Schedule 1 [6]** provides for appeals also to be made to the ADT against decisions by the Guardianship Tribunal. The appealable decisions relate to the appointment of enduring guardians, the making of guardianship orders and financial management orders and the giving of directions to guardians. **Schedule 1 [1] and [5]** are consequential amendments.

Schedule 1 [2] and [3] are consequential on the amendment made by **Schedule 2 [10]**.

Schedule 1 [4] makes it clear that a party to proceedings before the Guardianship Tribunal has, if the proceedings are under some other Act, a right of appeal to the Supreme Court against the Tribunal's decision.

Schedule 1 [7] provides that the Guardianship Tribunal must, when it makes any decision that is appealable to the ADT, advise the parties that the decision may be appealed against.

Schedule 1 [8] provides for decisions of the Public Guardian under the *Guardianship Act 1987* to be reviewable by the ADT.

Schedule 1 [9] provides that the Public Guardian may issue an evidentiary certificate stating that a specified person was during a specified period subject to a guardianship order.

Schedule 1 [10] and [11] provide for savings and transitional matters.

Schedule 2 Amendment of Protected Estates Act 1983

Schedule 2 [7] provides for appeals to be made to the ADT against orders by Magistrates or the Mental Health Review Tribunal (being orders providing that the estates of persons are subject to management under the *Protected Estates Act 1983*). The amendment also provides that if a Magistrate or the MHRT makes any such order, the parties must, on request, be given notice of the reasons for the decision and their right of appeal to the ADT. **Schedule 2 [1], [2], [5] and [6]** are consequential amendments.

Schedule 2 [8] provides that the decision of the Protective Commissioner whether or not to approve of a private manager authorising a protected person to deal with part of his or her estate will be reviewable by the ADT.

Schedule 2 [9] provides that decisions by the Protective Commissioner in relation to the management of estates of protected persons will be reviewable by the ADT.

Schedule 2 [10] provides that the Protective Commissioner will have the function of authorising a person who has been appointed by the Supreme Court or the Guardianship Tribunal as the manager of the estate of a protected person to have the functions that the Protective Commissioner specifies. The Protective Commissioner will also be able to give directions in relation to the functions of private managers. **Schedule 2 [15]** provides that the Supreme Court may still make orders as to the management of the estates of protected persons.

The amendment also replaces a provision of the Act that currently enables the Protective Commissioner, as an officer of the Supreme Court, to exercise the jurisdiction and powers of the Supreme Court in relation to the management of the estates of protected persons. **Schedule 2 [3], [4], [16], [18]–[21], [23] and [27]** make a number of amendments as a consequence of the Protective Commissioner being given the power to exercise these functions independently of the Supreme Court.

Schedule 2 [11] provides that decisions by the Protective Commissioner in relation to the functions of private managers will be reviewable by the ADT.

Schedule 2 [12] provides that the security that the Supreme Court or the Guardianship Tribunal may order a private manager to give to the Protective Commissioner may include security comprising the assets of the protected person.

Schedule 2 [13] provides that any security given as directed by the Supreme Court or the Guardianship Tribunal may be invested by the Protective Commissioner.

Schedule 2 [14] enables private managers to lodge estate funds with the Protective Commissioner and makes provision for the investment of those funds. The amendment also enables the Protective Commissioner to prepare financial plans in respect of the estates of protected persons.

Schedule 2 [17] enables money in the reserve fund established under section 54 of the Act to be applied for the payment of certain costs.

Schedule 2 [22] makes it an offence for a person to fail to comply with a direction of the Protective Commissioner. **Schedule 2 [26]** is a consequential amendment.

Schedule 2 [24] provides that the Protective Commissioner (and no longer the Supreme Court) may order visits and reports in relation to protected persons.

Schedule 2 [25] enables the Protective Commissioner to issue an evidentiary certificate stating that the estate of a person was during a specified period subject to financial management.

Schedule 2 [28] and [29] provide for savings and transitional matters.

Schedule 3 Amendment of Administrative Decisions Tribunal Act 1997

Schedule 3 [27] provides that the ADT will have jurisdiction under an Act to hear and determine an appeal against a decision if the Act provides that an appeal may be made to the ADT against any such decision made by the decision-maker. These appeals are referred to in the ADT Act as *external appeals* to distinguish them from

appeals against decisions of the ADT (ie *internal appeals*) and will include, for the time being, appeals under proposed section 67A of the *Guardianship Act 1987* and proposed section 21A of the *Protected Estates Act 1983*. The amendment also makes provision for the grounds on which external appeals may be made and the orders that may be made by the ADT in relation to an external appeal.

Schedule 3 [1]–[3], [23]–[26], [28] and [30] make amendments that are consequential on the creation of the new external appeals jurisdiction of the ADT.

Schedule 3 [5] provides that the ADT will be constituted by a 3 member Appeal Panel for the purposes of an external appeal. In the case of an external appeal under proposed section 67A of the *Guardianship Act 1987* or proposed section 21A of the *Protected Estates Act 1983*, the appeal will be heard by a specially constituted 3 member Appeal Panel with at least one member having experience in dealing with persons who have a disability. **Schedule 3 [4] and [6]–[12]** make amendments that are consequential on the creation of an ADT Appeal Panel to deal with external appeals.

Schedule 3 [13] specifies the parties to proceedings for an external appeal and provides that the ADT's rules may also make provision for the parties to external appeals (including the designation of a respondent). **Schedule 3 [14]–[18]** make consequential amendments.

Schedule 3 [19] makes special provision for the representation of certain parties in the case of an external appeal under proposed section 67A of the *Guardianship Act 1987* or proposed section 21A of the *Protected Estates Act 1983*.

Schedule 3 [20]–[22] apply certain procedural provisions under the Act to external appeals.

Schedule 3 [29] provides that the publication of names or identification of persons involved in proceedings is prohibited if the proceedings relate to an external appeal under proposed section 67A of the *Guardianship Act 1987* or proposed section 21A of the *Protected Estates Act 1983* or a reviewable decision by the Protective Commissioner or the Public Guardian under those Acts.

Schedule 3 [31] and [32] provide that the functions of the ADT in relation to reviewable decisions of the Protective Commissioner or the Public Guardian are allocated to the General Division of the ADT.

Schedule 3 [33] enables regulations of a savings and transitional nature to be made as a consequence of the amendments to the ADT Act made by the proposed Act.

Schedule 4 Amendment of Defamation Act 1974

Schedule 4 inserts proposed section 17P in the *Defamation Act 1974* to provide a defence of absolute privilege under that Act for a publication of a report to the Protective Commissioner under section 79 of the *Protected Estates Act 1983* (as inserted by **Schedule 2 [24]**).