Speech by

Paul Hoolihan

MEMBER FOR KEPPEL

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SUCCESSION AMENDMENT BILL

Mr HOOLIHAN (Keppel—ALP) (5.23 pm): I commend the Attorney-General on the introduction of the Succession Amendment Bill 2005. I would like to deal with some of the background to testamentary capacity, with which wills deal. Many members have indicated that they would like to speak to this bill. However, a number of lawyers in the House would really identify with some of the difficulties that have always been experienced in the execution of wills.

As we have heard in part, testamentary documentation and the laws in relation to testamentary dispositions—or wills—originated in England and came in through New South Wales. A number of pieces of legislation have dealt with testamentary capacity. The original act, which was amended by the original succession bill, had about 32 pieces of legislation attached to it.

One thing that Queenslanders really need to take from this legislation, which makes a will more readily understood and more effective, is the knowledge that, statistically, there are estimated to be no more than 40 per cent of Queenslanders who have a valid will. That is a terrifying number when we consider some of the problems that can arise, particularly today with not only married couples with children but also blended families with stepchildren, step-stepchildren and all varieties of relationships.

Mr Lawlor: They're a nightmare.

Mr HOOLIHAN: I take that interjection from the member for Southport. For practising lawyers who are required to make a will, there are formal requirements for actually making the will and for its execution. The execution requirements for a will were so draconian that to depart even slightly from them could result in the will being ineffective. I recall that some years ago a major firm in Queensland had a word-processing package which had an attestation clause, which is required at the footer of each will. They had left out a line which read who, in the presence of each other, had signed the will. That related to witnesses. They had to re-execute several thousand wills because nobody had bothered to read through the document and look at the wording.

The uniform succession laws project has produced a document and legislation that will be of great assistance to Queenslanders. No longer will there be a substantial compliance requirement for execution. Instead, there will be a testamentary intention test. The current test is that a person must sign a will in the presence of two witnesses who are present at the same time and who, at the request of the testator and in each other's presence, sign the will. If a person is momentarily distracted, even by taking a call on a mobile phone, there may not be an acceptance that that person has understood the will and, consequently, they may not be a valid witness.

This change that is included for a testamentary intention test in actual fact fixes that to some degree. It shows that the testator needed to have the intention, and they can make or acknowledge their will in the presence of two or more witnesses. Those witnesses must sign, but they do not have to sign in the presence of each other. The testator can go to the witnesses and indicate that it is their signature and their will, and those witnesses can then sign. They do not even need to know that it is a will and they do not need to sign at the foot of the will. They were real problems in relation to a valid will. A four-page will required the signature of the testator and both witnesses at the foot of every page. This has now been

varied so that the signatures need not be at the foot of the will. In actual fact, the testator or a person directed by the testator can sign or acknowledge the will as their document. They have to sign it with the intention of executing it. And there goes the attestation clause. I would say that practising lawyers out there will be jumping for joy that they do not have to spend so much time reading every single word to make sure that wills meet the formalities.

One of the other things that the amendment does, and it is particularly relevant to superannuation, is that an appointment by a will in exercise of power of appointment is not valid unless it is executed under this section. Under superannuation law a separate direction can be made which can be signed as for a will, and that power is binding on the trustee of the superannuation fund. The amendments now allow that power to be done in the will, and it does not have to be signed in the same way as a will. If the will sets it out, then the appointment would be valid even though the section does not deal with that particular application.

Another problem that occurred with wills, and with witnessing particularly, was that any witness to a will could not take anything under a will as a beneficiary. A witness was completely excluded, and the spouse of a witness was also questionably excluded. As a result of the amendments that have now been introduced, it need not necessarily be void. If at least two witnesses who are not interested witnesses sign the will, then the third person who signs as a witness is not held out from taking any benefit under the will. The beneficiaries can also give consent to disposition which was not available under the current law because once they had witnessed it they were automatically excluded. The testator also must know that a witness will receive a disposition and make that will freely and voluntarily.

One of the things that has always concerned me as a practising lawyer is that there is no central registry for wills and the operation of wills. If a person died, unless you have a copy of the will with the date that it was made and who holds the will there is no central repository. One of the provisions of the new act relates to the registrar holding wills that are signed by order of the court or signed by minors pursuant to an order of the court. I would like to recommend to the Attorney-General—and I have spoken to the Attorney-General about this—that some consideration under the Succession Act be given to a central repository. This may need to be done in conjunction with the Queensland Law Society. I am quite certain that it would support this proposal. All lawyers when executing a will, or having a will executed, would notify a central registry as to the name of the person, their address, the date that the will was executed and the name of the firm that holds the will. That way, when you come to apply for probate and you have to go searching for a will, you can go to the central registry and find out whether or not there is a will and who holds it. That already exists in relation to the Public Trustee. Those practising lawyers who sit in this House will be aware that the Public Trustee has a very extensive database of wills that have been executed with the office. That is available to anyone who wants that information. As a matter of fact, it is required to be disclosed in any application for probate that a check has been made with the Public Trustee as to the existence of wills.

Certain of the other aspects of the legislation allow for a court to rectify the terms of a will to give effect to the instructions of a testator. Very often because of the wording that is used—and some people will make a will according to their own ideas about the English language—when it comes to trying to decipher what is in a will it just does not make sense. There is provision in the amended act to rectify, and there has to be an application made within six months of the death or the court may extend that time.

There is also provision for protection of the personal representative. If the personal representative has started to distribute information under the will or detail under the will and someone brings an application to rectify, then the personal representative is protected in relation to what has been distributed.

One of the other good things in relation to the changes is the outline as to distribution and shares, how the actual disposition of land and separate property is set out and how it is to be interpreted by the personal representative. Before I came to this House, I practised in the area of succession law for some 25 years. On reading the Succession Amendment Bill, I was very pleased to see that some sanity had come into the operation of the succession law. I commend the bill to the House.