Speech by

# Peter Lawlor

## MEMBER FOR SOUTHPORT

Hansard Tuesday, 14 February 2006

## SUCCESSION AMENDMENT BILL

**Mr LAWLOR** (Southport—ALP) (5.16 pm): In 1991 the Standing Committee of Attorneys-General initiated the Uniform Succession Laws Project. In 1992 the Queensland Law Reform Commission was asked to coordinate the project. In 1995 the National Committee for Uniform Succession Laws, chaired by the Queensland Law Reform Commission, was established to examine areas of succession law. That included wills, family provision, intestacy and estate administration.

In December 1997 the national committee presented a consolidated report on the law of wills, including draft legislation to the Standing Committee of Attorneys-General. In 1997 the Queensland Law Reform Commission also presented a report to the Attorney-General which focused on the impact of the national committee's recommendations on Queensland's Succession Act 1981.

This bill will give the courts much more discretion than they have had in the past. Succession law will not be so prescriptive and as a result, some would suggest, even unfair in certain circumstances because a fairly rigid set of rules had to be applied. As I said, as a result of this bill the court in these situations will have much more discretion.

The bill implements the first-stage recommendations of the uniform succession laws project regarding the law of wills with several modifications recommended by the Queensland Law Reform Commission. Key changes effected by the bill include the introduction of court authorised wills for minors and people who lack testamentary capacity, replacing the substantial compliance requirement for the execution of wills with a testamentary intention test, removing the requirement that a will must be signed at the foot or the end of the document, introducing provisions to allow the admission of limited evidence to aid in the interpretation of wills, new rules about the effect of marriage on wills, new rules about beneficiaries who witness wills, amending the provisions dealing with gifts to interpreters of wills, and new provisions about who is entitled to see a will on the death of the testator. That is a fairly important provision, because in my years of practice it was the bane of my life. People came along to get copies of wills. The only way they could get them was if they applied for probate. If those people applied for probate, that would then become a public document and they could get a copy of it.

If they did not apply for probate—that is often the case with small estates—it was up to the executor of the estate as to whether copies of the will would be supplied to people who may have thought they should be beneficiaries or who were just curious about exactly what was involved in the will. They may have been children and so on. Sometimes there were problems within families where the executor—whoever it might be—would not supply copies of the will to people who thought they were entitled to a benefit from the will.

The most significant and innovative aspect of the bill is the new concept of a statutory will for people who lack the capacity to make a valid will. A person who lacks testamentary capacity to make a will may never have had the capacity or may have lost the capacity due to injury, illness or disease. That would include things such as Alzheimer's disease or, unfortunately due to the volume of road accidents that we see today, a brain injury acquired as a result of an accident.

Currently, when a person dies their property is distributed in accordance with intestacy rules. In the case of a person who has lost capacity, the person may have previously made a valid will which is no

longer appropriate due to a change in circumstances, for instance the subsequent birth of a child who is not mentioned in the will. In these circumstances, the child would have to bring a family provision application for a share of their parent's estate. That is a rather expensive process. The statutory will provisions offer a solution in situations where a person's known intentions would otherwise be given effect but for unforeseen circumstances or events, for instance accident or illness, as I have already mentioned. Under this bill, there is the ability to obtain limited evidence to aid in the interpretation of exactly what should happen with the estate.

The bill establishes a two-stage process whereby an applicant must first seek leave of the court to apply for an order. The requirement for leave is intended to perform a screening function to allow only adequately founded applications to proceed. A leave application must be accompanied by comprehensive material, including evidence of the person's lack of testamentary capacity—that would probably include things such as medical certificates, medical records and so on—the likelihood of the person acquiring or regaining capacity, the size and nature of the person's estate and the person's testamentary wishes.

Once leave has been granted, the next stage is for the court to consider the actual application. Before it makes an order, the court must be satisfied that the person is in fact incapable of making a will and that the proposed will reflects what he or she would have done had they had capacity. The court must also be satisfied that the appropriate steps have been taken to allow for representation of all persons with an interest in the application. That would involve serving all of those people with a notice of the application to be heard in court so that they could respond to that notification.

The bill creates a right for certain categories of people—for instance, possible beneficiaries or other potential claimants against the estate—to see and take copies of the will of the deceased person. That will take a lot of aggravation out of the current situation. It is intended to ensure that persons with a proper interest can see the contents of a will whether or not the will is admitted to probate, at which stage it becomes a public document.

As mentioned by previous speakers, there has been consultation with the Queensland Law Society, the Bar Association of Queensland and the Public Trustee. They are generally accepting of the bill and are keen to see these reforms introduced. I commend the bill to the House.