




Speech By
Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

Record of Proceedings, 15 February 2018

GUARDIANSHIP AND ADMINISTRATION AND OTHER LEGISLATION AMENDMENT BILL

Introduction

 **Hon. YM D'ATH** (Redcliffe—ALP) (Attorney-General and Minister for Justice) (3.00 pm): I present a bill for an act to amend the Government Owned Corporations Act 1993, the Guardianship and Administration Act 2000, the Integrity Act 2009, the Powers of Attorney Act 1998, the Public Guardian Act 2014 and the Public Interest Disclosure Act 2010 for particular purposes. I table the bill and the explanatory notes. I nominate the Legal Affairs and Community Safety Committee to consider the bill.

Tabled paper: Guardianship and Administration and Other Legislation Amendment Bill 2018 [\[175\]](#).

Tabled paper: Guardianship and Administration and Other Legislation Amendment Bill 2018, explanatory notes [\[176\]](#).

I am pleased to introduce the Guardianship and Administration and Other Legislation Amendment Bill 2018. As this bill is substantially the same as the bill introduced to the parliament in September 2017, this speech is largely the same as the explanatory speech for the bill when it was introduced last year. Minor changes have been made to the bill since it was introduced during the last parliament. These changes address minor drafting issues in the revised healthcare principles in the Powers of Attorney Act 1998—in clause 56 of the bill—to make them consistent with the revised principles in the Guardianship and Administration Act 2000. Amendments have also been made to clauses 68 and 76 of the bill to address a recommendation made by the Queensland Law Society in its public briefing to the Legal Affairs and Community Safety Committee on the bill last year. These amendments will ensure a consistent approach to the authorisation of conflict transactions for administrators and attorneys so that it is clear that QCAT can authorise a conflict transaction by an attorney both prospectively and retrospectively.

This bill will amend Queensland's guardianship legislation—that is, the Guardianship and Administration Act 2000, the Powers of Attorney Act 1998 and the Public Guardian Act 2014. Guardianship legislation will have relevance for most of us at some point in our lives. Many of us have an older parent or relative who can no longer make their own decisions because they have a cognitive impairment such as dementia. Sometimes an adult's capacity to make decisions may be impaired due to an acquired brain injury, intellectual disability or mental illness. Queensland's guardianship legislation establishes a scheme for substitute decision-making for adults with impaired decision-making capacity. The legislation provides for the Queensland Civil and Administrative Tribunal to appoint a guardian or an administrator to make personal and financial decisions on behalf of an adult with impaired capacity.

Under Queensland's guardianship legislation, a person is also able to plan for a time when they do not have decision-making capacity by executing an enduring power of attorney to authorise another person—an attorney—to make personal and/or financial decisions or an advance health directive to provide directions about their future health care. Under the Public Guardian Act 2014, the Public Guardian also plays an important role in protecting the rights and interests of adults with impaired capacity including by investigating allegations of neglect, exploitation or abuse, acting as a guardian,

and providing the community visitor program. Overall, Queensland's guardianship legislation is working well. These amendments will make the law clearer and more user friendly, strengthen the safeguards for adults with impaired capacity and better align the law with contemporary practice and human rights.

The amendments in the bill progress and support a number of actions in Queensland: an age-friendly community action plan, launched by the Hon. Coralee O'Rourke MP, the then minister for disability services, minister for seniors and minister assisting the Premier on North Queensland, at the International Federation on Ageing 13th Global Conference on Ageing in Brisbane on 22 June 2016. In particular, it strengthens safeguards and remedies for adults who have appointed attorneys under enduring documents to reduce risks to older persons of financial abuse and exploitation.

The amendments also implement a number of recommendations from the Queensland Law Reform Commission's report, *A review of Queensland's guardianship laws*, tabled in parliament in 2010. The bill implements those QLRC recommendations that strengthen the focus on contemporary practice and human rights for adults with impaired capacity, enhances safeguards for adults with impaired capacity and improves the efficiency and clarity of Queensland's guardianship system. The government has had strong support from a broad range of stakeholders from legal, medical and disability advocacy organisations on the amendments to guardianship legislation in this bill. I thank these organisations for their feedback, which has helped to ensure that the amendments achieve their purpose.

One of the significant amendments included in this bill is the introduction of a statutory exception to ademption. Ademption occurs where the gift of a specific item of property in a will fails because, prior to the testator's death, the property is sold or otherwise disposed of. A common example is where a person leaves their house as a specific testamentary gift in their will but then sells the house to fund their own aged care and the person does not update their will to reflect the changed circumstances. Upon the person's death, the gift is adeemed because it no longer forms part of the testator's estate. Any remaining proceeds from the sale fall into the residue of the estate and go to the residuary beneficiaries, potentially leaving the intended beneficiary of the specific gift of the house with no interest under the will. As such, the rule of ademption may significantly distort the testator's intention and/or result in unjust outcomes. This is especially the case if the testator is an adult with impaired capacity who will not have the capacity to change their will to deal with the situation and it is an attorney or administrator who deals with the adult's property.

The bill will amend the Guardianship and Administration Act 2000 and the Powers of Attorney Act 1998 to create a statutory exception to ademption so that, when an attorney under an enduring power of attorney or an administrator deals with the testator's property that is a gift under a will, the beneficiary is entitled to the same interest in any surplus money or other property arising from the sale or other dealing with the property. This will give effect to the testator's intentions before he or she lost capacity.

The bill will also create a limited missing person's jurisdiction for QCAT. When a person goes missing it may be some time before the adult is presumed to be dead at law or a coroner makes a finding that the person has died. The bill will provide that, when a person is missing and there is a pressing need to preserve the adult's assets and property, QCAT will be specifically empowered to appoint an administrator to exercise financial decision-making powers on behalf of the adult. The bill will also make it clear that QCAT can order an attorney, or a former attorney, an administrator, or a former administrator, to compensate a principal or an adult for loss caused by the attorney or administrator for a failure to comply with their duties under the guardianship legislation. Previously, it was not clear if QCAT could exercise this jurisdiction in relation to former attorneys and administrators—for example, after the appointment had ended the enduring power of attorney had been revoked or the adult had died. This amendment will enhance the availability of financial compensation to older persons who are subject to financial elder abuse, which is an action in the Queensland: an age-friendly community action plan.

Some of the other reforms that will enhance safeguards for adults with impaired capacity include requiring QCAT, when carrying out its functions or powers under the Guardianship and Administration Act 2000, to the greatest extent practicable to seek and take into account the views, wishes and preferences expressed or demonstrated by the adult and any members of the adult's support network; strengthening the eligibility requirements for an attorney under an enduring power of attorney so that the eligible attorney must have capacity for a matter and must not have been a paid carer for the principal, being the adult, in the previous three years; clarifying the capacity needed for an adult to execute an advance health directive or an enduring power of attorney; strengthening the prohibition on attorneys and administrators entering into conflict transactions—transactions where their interests are in conflict with the adult for whom they are making financial decisions; providing that both a court and

QCAT can order an attorney, or a former attorney, an administrator, or former administrator, a guardian, or former guardian, to account for any profits the attorney, administrator or guardian has accrued as a result of the attorney's or administrator's failure to comply with his or her duties; and broadening the protection available to whistleblowers who disclose confidential information when making a disclosure about conduct they believe could involve abuse, neglect or exploitation of an adult with impaired capacity.

To ensure that Queensland's guardianship legislation is more consistent with contemporary practice and human rights the bill also redrafts the general principles and the healthcare principle to be more consistent with the United Nations Convention on the Rights of Persons with Disabilities; relocates the new general principles and healthcare principles to the beginning of both the Guardianship and Administration Act 2000 and the Powers of Attorney Act 1998 from their current location in the schedules of both acts to highlight the new principled approach and encourage the exercise of functions and powers under the acts in a way that is more consistent with human rights and contemporary practice; and provides that the minister is to prepare guidelines to assist persons required to make assessments about an adult's capacity.

Finally, to improve the efficiency and clarity of Queensland's guardianship legislation, the bill also clarifies how the presumption of capacity is to be applied in certain circumstances; simplifies the certification process required for proving copies of enduring documents—advance health directives and enduring powers of attorney; and clarifies that an advance health directive, or an enduring power of attorney, made under the Powers of Attorney Act 1998 by an adult residing interstate is effective in Queensland.

The bill also includes other non-guardianship related amendments that implement recommendations from two parliamentary committee reports. The bill includes amendments to the Integrity Act 2009 to implement recommendations 1 and 2 of the Finance and Administration Committee report No. 19, *Inquiry into the report on the strategic review of the functions of the Integrity Commissioner*. These amendments streamline the process for senior executives and senior officers obtaining advice from the Integrity Commissioner by removing the requirement for managerial consent and allow former designated persons—that is, former members of the Legislative Assembly, statutory officer holders, chief executives, senior executives or officers and staff members employed in the office of a minister or assistant minister—to seek access to the advice services of the Integrity Commissioner for a period of two years after leaving office.

The bill also implements recommendation 13 of the Parliamentary Crime and Corruption Committee report No. 97, *Review of the Crime and Corruption Commission*, by making amendments to the Government Owned Corporations Act 1993 and the Public Interest Disclosure Act 2010. These amendments will resolve conflicting statutory obligations in state and Commonwealth legislation to ensure an officer or employee of a government owned corporation who discloses information in accordance with the requirements of the Crime and Corruption Act 2000 is afforded whistleblower protection.

An effective guardianship system is vital for upholding the rights and interests of adults with impaired capacity. This bill makes important and practical changes that will make meaningful improvements to the lives of some of our most vulnerable Queenslanders. I commend the bill to the House.

First Reading

Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice) (3.11 pm): I move—

That the bill be now read a first time.

Question put—That the bill be now read a first time.

Motion agreed to.

Bill read a first time.

Referral to Legal Affairs and Community Safety Committee

Mr DEPUTY SPEAKER (Mr Whiting): In accordance with standing order 131, the bill is now referred to the Legal Affairs and Community Safety Committee.

Portfolio Committee, Reporting Date

Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice) (3.11 pm), by leave, without notice: I move—

That under the provisions of standing order 136 the Legal Affairs and Community Safety Committee report to the House on the Guardianship and Administration and Other Legislation Amendment Bill by 9 April 2018.

Question put—That the motion be agreed to.

Motion agreed to.