Speech By

Michael Berkman

MEMBER FOR MAIWAR

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GUARDIAN AND ADMINISTRATION AND OTHER LEGISLATION AMENDMENT BILL

Mr BERKMAN (Maiwar—Grn) (3.58 pm): I rise to speak on the Guardianship and Administration and Other Legislation Amendment Bill 2018. While I support the bill and especially moves towards a human rights based approach for those with impaired capacity, I will use my short time today to address some areas where the bill could be improved and to highlight the voices of people who have contacted me about their experiences with the guardianship and administration system. I urge the government to bring forward further amendments to guardianship and administration law in Queensland to better protect people who have fallen at the mercy of our sometimes inhumane system.

It is vital that the government fully implements the UN Convention on the Rights of Persons with Disabilities—or the CRPD as it is called. Nationally and internationally, there is a movement towards supported decision-making and away from substituted decision-making. The principle is that the views and wishes of the person subject to financial management or guardianship must be respected and upheld rather than having someone stand in their shoes and make decisions on their behalf without their input.

I want to take this opportunity to share a story—one of several that my office heard from people who have fallen into Queensland's bureaucratic guardianship and administration system. The names in this story have been changed. Bob was a young Indigenous man—he is now in his 30s—who was in a car accident as a young child. When he turned 18 he was awarded a $450,000 payout for injuries to his arm and leg. Bob had developed mental illness as a teenager and is not very communicative with strangers.

This story has been well reported, so I will borrow from the *Sydney Morning Herald* coverage of it. Bob was deemed to be legally capable of making his own decisions except for the financial administration of his payout. His mother and aunt were appointed to help him with his financial affairs and, using that money, they helped him buy a flat to live in and a 12-hectare block of land as an investment.

After years of back and forward, including a 10-year period in which the Public Trustee and Public Guardian fought his family for control of his assets, Bob languished. He was a troubled young man, sleeping rough in the city and spending time in jail. The Public Trustee installed tenants in his flat and sold his land. It then sold the flat, invested the proceeds and lost most of it in the GFC. Bob was mostly homeless for nine years and the Public Guardian prevented him from seeing his mother and, in effect, maintaining connections with his Indigenous community.

Since 2009, Bob has been living with his mother and stepfather, Jack, again and things have improved. The family had to fight for Bob to have full access to his disability pension. The Public Trustee wanted to give him only $150 a week. In 2016, the tribunal granted Jack responsibility as both Bob's guardian and financial administrator, but there is only about $60,000 of the original money left. Today, that flat would be worth about $1 million and the land even more. This story is just one of many, but it shows clearly why it is vital that the voices of those at the mercy of our systems are listened to.

As the department noted in evidence to the committee, the amendments in the bill do not fully implement the CRPD principle of supported decision-making and that the amendments 'do not represent a fundamental change'. We need a broad shift in Queensland towards supported decision-making and that will require a very substantial revision of the way our system works.

Right now, the Public Trustee and the Public Guardian operate on the basis of substituted decision-making. As one person said in an email to my office, 'Instead of patching up the contradiction, the whole system needs to be exposed and reformed in line with the CRPD.' I am urging the government to revisit this area and move decisively towards supported decision-making. This bill is a missed opportunity to do that, although, as other speakers have pointed out, it makes some very welcome improvements.

I will now outline a couple of the various specific concerns about the bill that were raised by submitters. Clause 7, which amends the general principles under the Guardianship and Administration Act, does not adequately recognise the fact that capacity fluctuates across time and, arguably, reverses the normal presumption of capacity. It does that via the proposed principle in new section 11(3), which states—

> If a declaration by the tribunal or the court that an adult has impaired capacity for a matter is in force, a person or other entity that performs a function or exercises a power under this Act is entitled to rely on the declaration to presume that the adult does not have capacity for the matter.

The Advocacy and Support Centre, Mr John Tracey and QAI all raised concerns about this reversal. QAI said in its submission—

> This makes the initial presumption one of incapacity, rather than capacity, when a guardianship order or declaration has been made. QAI is concerned that this ... blanket reversal of the presumption of capacity is not consistent with the appropriately nuanced understanding that capacity is time, domain and decision-specific, and could subject a person to an order that is not required, particularly in circumstances where they have limited support networks to assist them to advocate for themselves.

These concerns are well grounded in recommendation 15.1 of the QLRC's 2010 report on the Queensland administration and guardianship system, which recommended explicit recognition of those with fluctuating capacity in QCAT's orders, including provision for orders that limit the appointment of a guardian or administrator to periods in which capacity is actually impaired. I support these concerns and I call on the government to build on the small steps forward in this bill by recognising the fact that capacity fluctuates over time.

Submitters also raised concerns about the issue of consultation by QCAT in making orders and inadequate requirements to notify people subject to proposed orders about their hearings. In particular, interim orders that QCAT often makes in a very quick time frame were a special cause for concern. QAI said in its submission on this point—

> We know of cases where interim orders have been made without speaking to either of these parties, or even notifying the adult or their family, who may not even be aware of the proceedings until after the order has been made. This is particularly concerning given the common practice of routinely affirming interim orders.

The Greens support this call from QAI and Aged and Disability Advocacy Australia for stricter requirements for notice ahead of interim orders by QCAT. If the tribunal is going to make a ruling about important matters that could potentially tip a person into years of strife with the Public Trustee or other state agencies, they must be given a chance to express their views and wishes.

The inquiry heard from individual submitters who, just like those in the story that I have quoted, had serious issues with the Public Trustee and from organisations that called for more prudent controls on when the Public Trustee is appointed. The Public Advocate called on the government to implement recommendations 14-13 and 14-15 of the QLRC report, which recommended that the Public Trustee be appointed as a 'last resort'. The Public Advocate stated—

> ... if there is no other person who is appropriate and available for appointment as administrator, as is currently the case with the Public Guardian.

The Public Guardian said in her submission—

> The Public Guardian is considered to be the 'last resort' appointment for guardianship, and I can identify no clear basis for departing from this principle in terms of the appointment of administrators to manage the financial affairs of people with impaired capacity. If there is a person in the life of an adult who is the subject of an application for administration, who is appropriate and available to carry out the duties of administrator, there is no reasonable basis to apply a different test from that required to be applied when considering an application for guardianship. Further, given that the Public Trustee charges what can amount to significant fees throughout the period of administration of a person's financial affairs, it is clearly to the financial benefit of people who are placed under administration to have a private appointment if there is a person appropriate and available to be an administrator.

I call on the government to pick up on this very good advice and make sure that the Public Trustee is appointed only as a last resort. If there are concerns about the difficulties of acting as an administrator, the solution is to better support those in that position, not more overreach from an institution that has damaged many people in our state already.

In conclusion, I acknowledge the lived reality of people in Queensland living with impaired capacity and the dedication of their families, support networks and advocates. I acknowledge the steps forward in this bill. I ask the government to change course and move towards supported decision-making and implement our obligations under the Convention on the Rights of Persons with Disabilities.