




Speech By
Peter Russo
MEMBER FOR TOOHEY

Record of Proceedings, 26 March 2019

GUARDIAN AND ADMINISTRATION AND OTHER LEGISLATION AMENDMENT BILL

 **Mr RUSSO** (Toohey—ALP) (12.03 pm): I rise in the House today to support the passing of this legislation. The committee's task was to consider the policy outcomes to be achieved by this legislation as well as the application of the fundamental legislative principles—that is, to consider whether the bill had sufficient regard to the rights and liberties of individuals and to the institution of parliament. The committee recommended that the Guardianship and Administration and Other Legislation Bill 2018 be passed.

Having been a lawyer for 20-odd years and having had dealings with both sides of the arguments—the relatives hoping to have more say on who the trust has been set up for, the relatives who feel that the person holding the power of attorney may or may not have done or may or may not be doing what is in the best interest of the relatives, the person who is the beneficiary wanting to have more say in how they have access to the funds in the trust—I have heard the horror stories and I have seen the outcome where perhaps the best interest of the beneficiary was not being served and the effect that has on all parties while that has to be unwound.

On 15 February 2018, the Guardianship and Administration and Other Legislation Bill was introduced into the Queensland parliament and referred to our committee. The committee was required to report to the Legislative Assembly by 9 April. The bill is substantially the same as the Guardianship and Administration and Other Legislation Amendment Bill 2017, which was introduced into the Legislative Assembly on 5 September 2017 and referred to the Legal Affairs and Community Safety Committee of the previous parliament. The previous committee conducted an inquiry into the 2017 bill but did not report to the Legislative Assembly because the parliament was dissolved four days prior to its reporting date.

Given the similarity between this bill and the 2017 bill, and because the previous committee conducted its full inquiry into the 2017 bill so recently—September-October 2017—the committee resolved to base its inquiry into the bill on the evidence gathered by the previous committee and not to seek further evidence by way of submissions or hearings. The committee did seek a written briefing from the Department of Justice and Attorney-General on the minor changes between this bill and the 2017 bill. There is no doubt that an effective guardianship system is vital for upholding the rights of interests of adults with impaired capacity. The bill makes important and practical changes that will make meaningful improvements to the lives of some of our most vulnerable Queenslanders.

As outlined in the Attorney-General's introductory speech, 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, Minister for Disability Services and Minister for Seniors. The bill strengthens safeguards and remedies for adults who have appointed attorneys under enduring documents to reduce the risk 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 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 Guardianship and Administration Act 2000, the Powers of Attorney Act 1998 and the Public Guardian Act 2014 form the legislative basis for the guardianship system in Queensland. The Guardianship and Administration Act 2000 provides for the Queensland Civil and Administrative Tribunal, QCAT, to formally appoint guardians and administrators to manage the personal and financial matters respectively of adults with impaired capacity; provides a scheme for substituted consent for healthcare matters and special healthcare matters; and establishes the Public Advocate, who has a systemic advocacy function for adults with impaired capacity. The Powers of Attorney Act provides a scheme where an adult may authorise other persons—attorneys—to make personal and/or financial decisions on their behalf or give directions about their future health care and provides legislative authority for an advance health directive and a statutory health attorney.

The Public Guardian Act establishes the role and functions of the Public Guardian for adults with impaired capacity and children, including its power to act as a person's substitute decision-maker if appointed by QCAT, or as an attorney for a personal matter under an enduring power of attorney or health matter under an advance health directive or as a person's statutory health attorney of last resort. The system provides a scheme 'for individuals to be appointed to make personal, health and financial decisions on behalf of adults who do not have capacity to make decisions about certain matters themselves' and where adults can plan ahead and appoint individuals of their choice to make personal, health and financial decisions and give directions about their future health care.

The explanatory notes advise that the objectives of the bill are to amend the Queensland guardianship legislation to provide a focus on contemporary practice and human rights for adults with impaired capacity; to enhance safeguards for adults with impaired capacity in the guardianship system; to improve the efficiency of Queensland's guardianship system or improve the clarity of Queensland's guardianship legislation; to amend the Integrity Act 2009 to implement recommendations 1 and 2 of the Finance and Administration Committee report No. 19, *Inquiry into the report of the strategic review of functions of the Integrity Commissioner*; and to amend the Government Owned Corporations Act and the Public Interest Disclosure Act to implement recommendation 13 of the Parliamentary Crime and Corruption Committee report No. 97, *Review of the Crime and Corruption Commission*.

The bill also progresses a number of actions arising from the Queensland government's response to the report of the *Inquiry into the adequacy of existing financial protections for Queensland's seniors* undertaken in 2015 by the Communities, Disability Services and Domestic and Family Violence Prevention Committee. Many of those recommendations have been incorporated into the Queensland age-friendly community action plan and implementation schedule. Actions in the Queensland age-friendly community action plan and implementation schedule implemented, or implemented in part, by the bill include providing the Public Guardian with a discretion to continue to investigate a complaint that an adult was subject to abuse, neglect or exploitation even after the death of the adult; and enhancing the safeguards for older people who appoint attorneys under enduring powers of attorney and improving financial remedies for adults with impaired capacity when attorneys fail to comply with their duties.

The bill also provides a legislative exception to ademption in certain circumstances. 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 aged care and 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. The rule of ademption may significantly distort the testator's intention or result in unjust outcomes. This is essentially 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. In these cases the assumption underlying the ademption rule that a person can always change their will to reflect the new circumstances does not apply.

Another reform in the bill has to do with missing persons—that is, enabling appointment of an administrator. Generally a person is not presumed to be dead until they have been missing and there has been no evidence of them being alive for seven years. Prior to seven years the presumption is that a person is alive. Rebutting the presumption that a missing person is alive can be an onerous task. I commend the bill to the House.