Speech By

Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

Record of Proceedings, 28 February 2019

GUARDIAN AND ADMINISTRATION AND OTHER LEGISLATION AMENDMENT BILL

Second Reading

Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice) (5.44 pm): I move—

That the bill be now read a second time.

Issues of guardianship will affect most of us in some form or another during our lives. I am sure many members in the House today have a relative or friend who may struggle to make their own decisions because they have a cognitive impairment, such as dementia, an acquired brain injury, an intellectual disability or a mental illness. That is where the Guardianship and Administration and Other Legislation Bill 2018 comes in.

The bill was introduced into the parliament on 15 February 2018 and referred to the Legal Affairs and Community Safety Committee for consideration. Queensland's guardianship legislation establishes a scheme for substitute decision-making for adults with impaired capacity and provides for the Queensland Civil and Administrative Tribunal to appoint a guardian or administrator to make a personal and financial decision on behalf of an adult with impaired capacity

As I mentioned in my first reading speech, this bill is largely the same as a bill introduced in September 2017 during the previous parliament, with only minor changes made to address drafting issues and a recommendation made by the Queensland Law Society during the then committee's consideration of the 2017 bill. I thank the committee for its consideration of the bill, as well as the committee of the previous parliament for its consideration of the 2017 bill. The committee tabled its report on the bill on 23 March 2018 and recommended the bill be passed. I am pleased that the committee recognised that this bill delivers sensible and practical changes to strengthen safeguards and uphold the rights of adults with impaired decision-making capacity, while also improving the general clarity and efficiency of Queensland's guardianship system.

Queensland's guardianship system is established under the Guardianship and Administration Act 2000, the Powers of Attorney Act 1998 and the Public Guardian Act 2014. These frameworks ensure that, if a person can no longer make decisions about financial or personal arrangements or health care, an appropriate decision-maker is appointed or available to make decisions on that person's behalf.

Stakeholder support overall for the bill was positive, including for many of the amendments that enhance safeguards for adults with impaired capacity in the guardianship system, such as: strengthening eligibility requirements for the appointment of attorneys to safeguard against abuse; clarifying the capacity needed for a person to make an enduring power of attorney or advance health directive; strengthening the prohibitions on attorneys and administrators engaging in conflict transactions—transactions where their interests conflict with those of the adult on behalf of whom they are making financial decisions—improving the availability of financial remedies available against an

attorney, guardian or administrator who fails to comply with their obligations; and enhancing the powers of the Public Guardian by providing a discretionary power to continue investigating a complaint that an adult was subject to abuse, neglect or exploitation even after the death of the adult.

The amendments to the general principles and healthcare principle include: relocate the principles to the beginning of the Guardianship and Administration Act and Powers of Attorney Act; and aim to ensure greater consistency with the United Nations Convention on the Rights of Persons with Disabilities. The relocation of the principles will give them greater prominence and will highlight the new principled approach to decision-making which requires powers and functions to be exercised in a manner that is more consistent with human rights and contemporary practice.

The general principles and the healthcare principle have also been redrafted to closely reflect the language of the Convention on the Rights of Persons with Disabilities to require decision-makers to seek and take account of the views, wishes and preferences of an adult and their support network in exercising their functions. Contemporary language such as 'safeguards' is used rather than 'proper care and protection'. Further, it is the adult's 'rights, interests and opportunities' that are promoted and safeguarded, rather than their 'best interests.'

Capacity is an important threshold concept under guardianship law. The amendments in the bill with respect to the definition and presumption of capacity do not aim to change the current law but rather to clarify it. First, with respect to the application of the presumption of capacity, consistent with the Queensland Law Reform Commission recommendation and case law, clauses 7 and 75 clarify the existing presumption of capacity by: requiring QCAT or the Supreme Court to presume an adult has capacity for a matter, unless the presumption is rebutted; and providing certainty to substitute decision-makers by not requiring a guardian or administrator to apply the presumption after QCAT, or the court, has declared that an adult does not have capacity for a matter or QCAT has appointed the guardian or administrator to make decisions for the matter. This does not remove the requirement for QCAT to apply the presumption each time it is required to make a decision about an adult's capacity or reviews the appointment of a guardian or administrator, but it does provide certainty for substitute decision-makers and third parties who rely on the validity of a QCAT declaration that a person does not have capacity for a particular matter.

With respect to the definition of capacity, it should be noted that there are two tests of capacity in the current guardianship legislation. There is the general test of capacity which applies to financial and personal decisions and which is set out in schedule 4 to the Guardianship and Administration Act and schedule 3 to the Powers of Attorney Act. No substantive change has been made to that test.

Next, with respect to the capacity required to make an enduring document, consistent with the recommendations of the QLRC, the bill in clauses 62 and 63 amends the Powers of Attorney Act in two ways: firstly, to clarify the capacity required to make an enduring document—for example, to make it clear that not only must the principal understand the nature and effect of an enduring document, but must also be able to make the document freely and voluntarily; and, secondly, to clarify that this specific test applies to the capacity to make an enduring document rather than the general test of capacity.

In recognition of the importance of the concept of capacity, the bill requires the preparation of guidelines to assist in the assessments of capacity. These guidelines will be progressed alongside other reforms being carried out by the Department of Justice and Attorney-General, including the review of advance health directive and enduring powers of attorney forms and the preparation of explanatory guides to assist Queenslanders to engage in advance planning. Advance planning is so important in the context of an ageing population and the need for all of us to plan for decision-making for our future in a way that documents and preserves our own wishes and preferences for our future care and support needs. The bill also strengthens the eligibility requirements for the appointment of attorneys under enduring powers of attorney and advance health directives or a statutory health attorney to provide stronger and consistent safeguards to protect against abuse.

In line with recommendations of the QLRC, the bill in clause 57 amends the Powers of Attorney Act to provide that an attorney under an enduring power of attorney must have capacity for the matter and must not be a person who, within the previous three years, has acted as a paid carer for the principal. To provide consistency the bill provides that, as for attorneys under an enduring power of attorney, an attorney under an advance health directive cannot be a service provider for the adult in a residential service where the adult is resident. Similarly, the bill in clause 67 provides that with respect to statutory health attorneys, a person who is a close friend or relation of the adult cannot be a statutory health attorney if that person is a health provider for the adult or a service provider for a residential service where the adult lives.

Collectively, these amendments aim to address growing awareness and concerns of the risk of financial or other abuse to an adult, particularly where a former paid carer or service provider of the adult seeks to be appointed as the adult's attorney. Although this may be seen as too restrictive by

some, or not restrictive enough, the bill aims to strike a balance between strengthening safeguards and not having overly onerous eligibility requirements to the point where an adult may have no-one in their life who is eligible to perform the role of an attorney.

With respect to who can be a statutory health attorney, the bill also makes an important clarification to provide that a 'relation' includes a person who is regarded as a relative under Aboriginal tradition or Torres Strait Islander custom. The bill has made some modest but significant steps forward in embracing contemporary approaches and human rights. It does not, however, radically change the nature of the guardianship system in Queensland by, for example, introducing a legislative framework for supported, as opposed to substituted, decision-making. Many stakeholders recognised the positive steps the bill takes towards this approach. Aged and Disability Advocacy Australia submitted that—

> If passed through parliament, it is believed that these amendments will provide adults with impaired capacity with more choice and less restrictive options whilst safeguarding their rights. The proposed amendments will also bring Queensland ... closer to achieving our obligations under the UN Conventions on the Rights of Persons with Disabilities.

I would also like to draw attention to two other significant policy changes which the bill will introduce. Firstly, the bill introduces a statutory exception to the rule of ademption. Ademption occurs where a gift of a particular item of property in a will fails because, for example, the property is sold or otherwise disposed of prior to the will maker's death. The bill will provide that, where an attorney or administrator sells or disposes of property which is the subject matter of a specific gift in a deceased's will, the beneficiary will have the same interest in the proceeds arising from the sale or disposition of the property as the beneficiary would have had if it had not been sold or otherwise dealt with. In this way, the will maker's original intention before they lost capacity is preserved.

Secondly, the bill enables QCAT to appoint an administrator for a missing person where QCAT is satisfied that the person is a missing person and that without an appointment the person's financial interests will be significantly adversely affected. This amendment fills a significant gap in Queensland.

There are other non-guardianship related amendments included in the bill that implement recommendations from two parliamentary committee reports. The amendments to the Integrity Act 2009 will 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 remove the requirement for senior executives and senior officers to obtain managerial consent before seeking advice from the Integrity Commissioner; and allow former designated persons, that is, former members of the Legislative Assembly, statutory officer holders, chief executives, senior executives or senior officers and staff members employed in the office of a minister or assistant minister, to access the advice services of the Integrity Commissioner for a period of two years after leaving office.

I thank the committee for their support for these amendments consistent with the Palaszczuk government's commitment to increase transparency and integrity. I also acknowledge the Crime and Corruption Commission's submission on the bill, which recognised that the amendments to the Integrity Act 2009 'have potential to minimise corruption risks that could arise through interactions between current and former public sector employees and office holders'.

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 Crime and Corruption Act 2000 is afforded whistleblower protection. Overall, the Crime and Corruption Commission recognised that the amendments to the Integrity Act 2009, the Government Owned Corporations Act 1993 and the Public Interest Disclosure Act 2010 'will promote integrity across the public sector'.

In conclusion, the amendments in this bill will not only improve the general clarity and efficiency of Queensland's guardianship system, but enhance and safeguard the rights of Queenslanders with impaired capacity. I once again thank the committee, the secretariat and also all stakeholders who made submissions to the committee. I also acknowledge the departmental officers from the Department of Justice and Attorney-General who have worked tirelessly not just on this bill but every piece of legislation from my portfolio that has come before this parliament. I commend the bill to the House.