

SECOND READING SPEECH – HON. DR. VANESSA GOODWIN MLC

Guardianship and Administration Amendment Bill 2015

Mr President, the *Guardianship and Administration Amendment Bill 2015* makes important amendments to the *Guardianship and Administration Act 1995* to help further protect and assist people who may have an incapacity that affects their ability to make decisions.

Unfortunately, studies show that people with cognitive disabilities are vulnerable to certain crimes against the person such as assaults and sexual assaults. The investigation of these sorts of crimes relies on being able to gather physical evidence, such as forensic samples, to ensure access to justice by assisting in investigating and prosecuting an offence.

However, taking of a forensic sample requires informed consent from the victim, and some people with cognitive disabilities are unable to provide informed consent to the procedure.

At present, there is no clear-cut and accessible procedure for obtaining substitute consent for the taking of a forensic sample from victims who may have decision making incapacity. If a person cannot consent to a procedure and does not have an appointed guardian then an emergency guardianship order may be required.

This can take up crucial time and samples can deteriorate or the sample may not be taken at all.

Sometimes, delay or the issues around consent can affect the chain of evidence meaning that the taking of the sample may be open to claims in court that it was unlawfully obtained and should therefore be excluded as evidence.

Delays in the collection of forensic evidence may lead to deterioration of the sample and potentially hamper the investigation of a crime.

These factors can themselves create obstacles in the investigation and successful prosecution of crimes.

Mr President, this Bill provides a mechanism that both protects the person with decision making incapacity and ensures the timely taking of samples.

The ability to quickly obtain consent for sampling procedures will mean that obtaining samples from the victim can be done at the same time the victim is receiving medical attention for injuries sustained. It should be noted that in the case of some crimes there will be a treating doctor, but the authority for a doctor to treat a patient is completely discrete from an authority to obtain forensic samples. Also, while a 'person responsible' (that is the relative of the person with a decision making incapacity as defined in the *Guardianship and Administration Act*), may have capacity to consent to medical treatment, they do not have capacity to consent to the taking of a forensic sample.

Being able to take the forensic sample at the same time the person is being treated will mean that forensic procedures are as discrete as possible as the victim will not need to be re-examined at a later point for the sole purpose of obtaining forensic samples. As well as making the process efficient, it will reduce the stress and trauma to the victim.

Medical practitioners and police are already well experienced in obtaining samples from victims and will do so under this legislative power with the same respect for the dignity of the victim as in any other case.

The evidence extracted as part of the forensic procedure will, in most cases, form an integral part of the investigation and prosecution of many crimes against the person. This evidence is of particular importance where the victim's incapacity prevents them from being able to give oral evidence in court.

This Bill amends the *Guardianship and Administration Act* to allow a 'person responsible' to give consent to a forensic procedure where the intended subject of the procedure is incapable of doing so.

The *Guardianship and Administration Act* sets out who is a person responsible. The term is defined to mean a spouse, a close friend or family member and a carer.

As noted before, under the *Guardianship and Administration Act* (the Act) a 'person responsible' may make certain medical decisions for a person with a decision making incapacity, but this does not presently extend to consenting to the taking of a forensic sample.

This Bill will provide that where a police officer or registered medical practitioner suspects that a person with a decision making incapacity is the victim of a crime and that, because of that crime, a forensic sample should be taken, then they may ask a 'person responsible' to consent to the taking of the sample.

In the following circumstances -

- if a person responsible is unavailable or inaccessible such that consent cannot be sought within a reasonable time; or
- the person responsible refuses to consent;
- or there is no person responsible;
- or it is not in the best interests of the victim for the person responsible to consent;

the Public Guardian will now be able to consent without the need for an emergency order

An example of where it may not be in the best interests of the victim for the person responsible to consent is where it is believed that the person responsible is also the offender, or may wish to protect the offender, and to seek their consent to a forensic procedure would alert them to investigation.

Statistics show that it is often the people with care or responsibility for vulnerable people who are the perpetrators of crimes against these people. A snapshot of cases of violence against represented persons in Victoria, undertaken by the Victorian Public

Advocate in 2010, showed that in 86 case studies, there were 64 cases in which the perpetrator was classified as relatives and partners.

This Bill also includes the specific power for the Guardianship and Administration Board to consent to a forensic treatment so that the broadest range of options are available to ensure appropriate consent. It is envisaged that this power will only be used in circumstances where a procedure is not required urgently.

This Bill provides protections to persons with decision making incapacities who are victims of crime as well as ensuring their rights to access justice are met.

Mr President, I commend this Bill to the Council.