SECOND READING SPEECH

POWERS OF ATTORNEY AMENDMENT BILL 2013

Over the last 10 years there has been an increasing awareness of the gradual aging of the Australian population. As a corollary of this it has become increasingly apparent that there must be appropriate mechanisms in place to care for and protect persons with age-related loss of mental capacity.

Tragically many older Tasmanians currently experience some form of abuse by people whom they trust with their care and wellbeing. The Tasmanian Government, through the Department of Health and Human Services is implementing the Protecting Older Tasmanians from Abuse: Elder Abuse Prevention Strategy. Additionally an Elder Abuse Helpline was established in August 2012 to assist older people with suspected elder abuse, as well as to capture much needed data on the nature and extent of the elder abuse problem in Tasmania.

I can report that my colleague, Minister O'Connor, has advised me that the Elder Abuse Helpline has received 229 reports of elder abuse in its first year of operation. 58 % of cases identified financial or material abuse as a concern. This statistic demonstrates the vulnerability of older Tasmanians to financial abuse and their need for increased protection.

The most prevalent form of elder abuse disclosed in applications before the Guardianship Board is financial abuse. Detection of financial abuse can be very difficult, especially where the abuser has an enduring power of attorney or other authority such as a Centrelink nomination, or bank authorities.

Tasmania currently has two Acts which allow a person to appoint a substitute decision maker to make decisions on his or her behalf after he or she has lost that capacity.

Part 4 of the Powers of Attorney Act 2000 provides for the making of an enduring power of attorney (EPA). A person appointed as an attorney under an EPA (a substitute decision maker) may make financial and property decisions for the person making the appointment (the donor) once that person loses capacity. This Bill makes amendments to the Powers of Attorney Act in relation to enduring powers of attorney.

Part 5 of the *Guardianship and Administration Act 1995* provides for the appointment of an "enduring guardian" to make lifestyle decisions on the appointer's behalf. Amendments to the *Guardianship and Administration Act* are the subject of a separate Bill also before Parliament at the moment.

A comparison of the enduring substitute decision making provisions of the above Tasmanian Acts with equivalent interstate Acts, in particular the Australian Capital Territory and Queensland, which have the most up-to-date legislation, has been undertaken. This comparison has revealed several ways that the Tasmanian Acts could be clarified and strengthened. This Bill does that.

In the future there is likely to be increasing use of substitute decision makers as more people seek to make their own arrangements for possible age-related loss of mental capacity.

It is important to ensure that the law makes it clear what the rights and responsibilities of a substitute decision maker are and provides for adequate safeguards against abuse of enduring substitute decision making. This Bill will increase these safeguards.

Such abuse, while sometimes malicious, is often unintentional and arises because the person appointed as substitute decision maker is unclear as to what that role entails. For example, a child who will ultimately inherit part or all of the estate from the parent who appointed them as a substitute decision maker may see no harm in accelerating this process by using the estate for his or her own benefit while the elderly person is still alive, on the grounds that the elderly person is "not using" the estate.

If a person appointed attorney under an EPA were to access the current *Powers of Attorney* Act for guidance on his or her rights and responsibilities there is very little assistance and what is there is difficult to understand. There is an assumption that the power of attorney document itself would be sufficient guidance but that is not necessarily the case.

The Act is largely concerned with the registration requirements for a power of attorney and deals with the creation and revocation of a power of attorney generally.

It is clear from the second reading speech at the time the Act was passed that the focus was on a general power of attorney, where the donor has full capacity but uses an agent to purchase land, act in a commercial capacity etc., on his or her behalf. With electronic banking and online financial services, this agency function is probably used less than historically, but enduring powers are increasingly used and some financial advisers and nursing homes now consider them mandatory.

It is interesting to note that if a person does not appoint an attorney under an enduring power of attorney and loses capacity the Guardianship and Administration Board (the Board) may appoint an administrator under the Guardianship and Administration Act to deal with that person's financial and property affairs. The rights and responsibilities of an administrator are spelt out in far more detail in the

Guardianship Act than the rights and responsibilities of an attorney under an enduring power of attorney in the Powers of Attorney Act.

The amendments made in this Bill further protect the donor of an enduring power of attorney by clarifying the role and responsibilities of the attorney and enhancing the oversight function of the Guardianship and Administration Board.

Many of the provisions inserted, for example the list of general principles and permitted and non-permitted actions, simply state the existing common law and will serve a valuable function in ensuring an attorney better understands the responsibilities of the role he or she is assuming.

As I have mentioned, anecdotal evidence suggests that many instances of abuse of an enduring power of attorney are unintentional and result from a failure to understand fundamental principles. Other new provisions, such as a prohibition on conflict transactions, protect the attorney as well as the donor and also provide a valuable educative function.

The new provisions will not prevent a person from entering into a short form enduring power of attorney if they so wish. In fact, the amended Act will assist a person who does not attend a lawyer understand the rights and responsibilities associated with an enduring power of attorney.

Some key features of the Bill include:

- Amendments to witnessing requirements so that a close relative cannot witness the document.

- Where power of attorney documents are witnessed by people who may benefit from the document, such as family members, donors may be susceptible to undue influence or the perception of undue influence.

- Tasmania is the State with the least restrictions on who may witness an enduring power of attorney. Other jurisdictions require that either one witness be a person who can witness a declaration (such as a Commissioner for Declarations), or not be a relative of the donor or donee. Some jurisdictions require both.

- To help ensure that ineligible witnesses do not witness these documents the standard form contained in Schedule 1 has been amended to include a declaration that the witness is not an ineligible witness.

- To address concerns expressed by the Recorder of Titles (whose role it is to register enduring powers of attorney) a provision to indemnify the Recorder in relation to a false declarations is included in the Bill.

- A clear statement of principles under which an attorney appointed under an enduring power of attorney must operate. This statement serves at least two purposes – it provides fundamental guidance to the substitute decision maker and gives statutory recognition of the need to treat a mentally incapacitated person respectfully as an individual.

- An outline of activities that an attorney may and may not lawfully do. Currently section 31(2) states in relation to an enduring power of attorney that where an instrument convers general authority, "it operates to confer subject to any conditions specified, authority to do on behalf of the donor any act which the donor can lawfully do by an attorney".

- Section 20 states that "a power of attorney operates to confer power on the attorney to execute any assurance or instrument or do anything which the donor may execute or do if the performance of which may be

delegated by the donor", subject to any conditions or limitations imposed by the power of attorney.

- The Act provides no other indication of what an attorney under an enduring power of attorney may or may not do. An attorney may be able to refer to the document of appointment to clarify his or her powers. If the documents has been drawn up professionally it may contain a comprehensive list of powers, but if it has been drawn up without legal assistance it may not provide sufficient or any detail.

- It does appear that the broadness of the statements currently contained within the Act may have caused some confusion about the types of matters that may be dealt with in an enduring power of attorney. As such, it is imperative that the Act be amended to make it quite clear what types of matters are or are not dealt with by an attorney.

- A power for the attorney to gain access to documents and information that the donor would otherwise be entitled to, including the donor's will. This power will be useful in situations where a third party refuses to cooperate with the attorney or recognise their authority.

- Conflict transactions are only allowed if expressly permitted in the enduring power of attorney. A conflict transaction is a transaction that results, or may result, in conflict between the duty of the attorney to the donor and either the interests of the attorney or a relative, business associate or close friend of the attorney or another duty of the attorney.

- Transactions that would result in a benefit to the attorney are not permitted unless this is expressly authorised by the document. This provision means that, at the time of making the enduring power of attorney, a donor will need

to specifically turn his or her mind to the question of whether the attorney should be able to exercise the power conferred by the enduring power of attorney for the attorney's benefit, and if so, in what way.

- This provision will guard against any acts of "accelerated inheritance" or other abuses of power. Attorneys will still be able to recover out of pocket expenses incurred in the execution of their duties so long as accurate records are maintained.

- An attorney under an enduring power of attorney must now keep an accurate record of all dealings and transactions made under the power. It has been the experience of the Guardianship Board that there is often little or no record keeping of transactions. It will considerably assist the Board in overseeing the operation of enduring power of attorney to have such records available.

- A provision to protect interests in the donor's property. An example of where this provision may be needed is where the attorney is required to sell the donor's home to fund the donor's entry in to a nursing home. The donor may by will have bequeathed the home to a specific beneficiary, but the common law principle of ademption means that if the specific thing which is being gifted has ceased to exist at the date of the testator's death then the beneficiary will take nothing. If the donor still had capacity he or she would be able to alter their will at the time of sale to reflect the new situation.

- It could also be the case that where there are several assets which may be sold, the attorney will choose an asset that has been left to another beneficiary and retains the asset that has been left to them. This would clearly lead to an unjust outcome were normal ademption rules to apply.

- Under the new provisions the relevant beneficiary will take the same interest in any surplus money or other property arising from a dealing with the property by the attorney under the enduring power of attorney as the that beneficiary would have had if the dealing had not been made. Application may be made to the Supreme Court to make orders to give fair effect to this provision.

- The matter of ademption where an enduring power of attorney is in place has recently been considered by the Victorian Law Reform Commission and these amendments reflect that research.

There are a number of other more minor amendments in the Bill, I have provided a brief overview of key aspects only.

Legislation in place in other jurisdictions has formed the basis of these minor amendments.

In preparing this Bill extensive consultation has occurred with a variety of stakeholders including interested members of the legal profession and the Guardianship Board.

I commend the Bill to the House.