COVID-19 RESPONSE AND ECONOMIC RECOVERY OMNIBUS BILL 2020

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Dr Steve Thomas) in the chair; Hon Stephen Dawson (Minister for Environment) in charge of the bill.

Clause 11: Validation of reductions, waivers and refunds —

Committee was interrupted after the clause had been partly considered.

Hon TJORN SIBMA: When we left off, we were talking about the range of enactments listed on page 7 of the bill. The minister advised that these relate largely to the Department of Mines, Industry Regulation and Safety. I think we left off by saying that DMIRS acted on this by providing relief for fees and charges under these acts but, obviously, did not have the head of power to do so. Nevertheless, I want to ascertain why DMIRS specifically gets this treatment as compared with other agencies that fall within the auspices of acts identified under clause 8. Did DMIRS move ahead of a cabinet decision to provide fee relief? I am trying to understand that.

Hon STEPHEN DAWSON: No. The fee waiver happened post the decision. Obviously, the government made the decision on 31 March. There was an expectation from the community that agencies would get on with waiving fees or providing relief to individuals who were living through the COVID-19 pandemic.

Hon TJORN SIBMA: Ahead of clause 11(4), subclauses (2) and (3), as they appear on page 7 of the bill, contain the word "purportedly". Can I understand what specific purported reductions, waivers or refunds occurred? I do not understand the application of the concept here. Either a waiver has been granted or it has not; an action has been committed or it has not. Can I understand why that word is used repeatedly in subclause (2) and (3)?

Hon STEPHEN DAWSON: The relief occurred in practice; however, there was no specific head of power to do it, so it is a "purported" waiver.

Hon TJORN SIBMA: I do not want to verbal the minister, but I think that this word is adopting different meanings depending upon where it appears in the bill. Effectively, the minister is saying that, in all practicality, fees have been reduced or they have been waived or they have been refunded. This is not to be terminologically cute, but let us be specific when we can. What the minister is seeking to validate are actual reductions or actual waivers or actual refunds, and things that were actually done and not things that were conceptually done. What the minister seems to be saying is "purportedly" now infers a series of actions undertaken, perhaps without the requisite statutory authorisation. That is how I read the entire bill, so from one perspective I see the word "purportedly" as being superfluous.

Hon Stephen Dawson: By way of interjection, your reading is correct.

Hon TJORN SIBMA: Thank you. I do not want to be obtuse, but one could in all essence seek to remove the word that I take particular offence to and not in any way undermine the operation of this clause.

The DEPUTY CHAIR: I am not sure that "terminologically" is a real word, but in the meantime I am going to give the call to the minister.

Hon STEPHEN DAWSON: I almost forgot what I was going to say. The answer is no. It cannot be considered legally effective if the head power did not exist, so it is a purported act. Our strong advice is that the word "purportedly" needs to be included.

Hon TJORN SIBMA: I think we should all be thankful that I have not sought to invoke terms such as "programmatic specificity" or any other sort of new inventiveness.

The DEPUTY CHAIR: I think I would call that out of order, honourable member!

Hon TJORN SIBMA: As indeed you should, Mr Deputy Chair.

My final question on this clause is: will the reporting or transparency of such decisions be covered by way of clause 104 in part 7, which was the focus of some discussion under clause 8?

Hon STEPHEN DAWSON: In relation to the issues affected by clause 11, we have previously indicated the 25 000 or so licence fees that have been waived under the Department of Mines, Industry Regulation and Safety, the approximately 300 fees waived under the jetties and vessels acts, and an unknown number of parking fees. I have disclosed that information previously in the chamber. The intention is not to list all of those examples on a website in the future; the disclosure has already been made.

Hon TJORN SIBMA: Is the minister in a position to give the dollar value of those waivers under those particular acts or has that been disclosed previously; and, if so, can the minister point me to that?

Hon STEPHEN DAWSON: The Department of Mines, Industry Regulation and Safety's share, or total allocation, is $17 579 291. Bear in mind that we will see how much is given out in the end. The Department of Transport's share is $3 million for the vessel accommodation fee waiver under the Jetties Act and the Shipping and Pilotage Act. The Public Transport Authority's share for fees that have been waived over four months and ongoing is estimated at approximately $3.58 million.

Hon TJORN SIBMA: Presumably that comes off the $100.4 million, so effectively the government has roughly 17 per cent from the Department of Mines, Industry Regulation and Safety, three per cent from the Department of Transport and 3.58 per cent from the Public Transport Authority for a total of somewhere just under a quarter of the entire package. How will performance under that relief be reported? Will that be reported in the forthcoming budget papers or the annual reports?

Hon STEPHEN DAWSON: Yes, it will. It is only that amount because other acts already have a head power that allows the waiver, or the reduction, to take place.

Hon TJORN SIBMA: I thank the minister for that. I am satisfied by the answers the minister has provided on this clause and I see no need to move the amendment standing in my name.

Clause put and passed.

Clause 12 put and passed.

Clause 13: Meetings under relevant enactments may occur by instantaneous communication —

Hon NICK GOIRAN: Minister, which enactments are intended to be prescribed under clause 13(4)(i)?

Hon STEPHEN DAWSON: I am told, honourable member, that currently none are identified as needing to be prescribed.

Hon NICK GOIRAN: Was that there when they wrote the provision?

Hon STEPHEN DAWSON: My advisers tell me it is not recommended.

Hon NICK GOIRAN: The government runs into problems here with the answers it gave me on clause 6. Remember, on clause 6, the government went out of its way to explain to me that I did not need to fear anything about clause 6 because it needs to be read in the context of the rest of the bill. According to the government, that means only 75 statutes will be impacted. Now we find this slippery little provision here that will allow the government to prescribe other laws that will have an impact on clause 6. I remain concerned, minister. It may well be the case that the advisers say it is not desirable, but unless it is absolutely necessary to have this provision in the bill, it would save everybody a lot of heartache if we could delete it.

Hon STEPHEN DAWSON: I am advised that to prescribe an act we would need to do it through regulation, honourable member, and that would be disallowable, so there would be oversight of the chamber. This provision is just in case an enactment was not included. If the provision is included, the safeguard is the fact that a regulation would need to be made, it would be disallowable and it would have the scrutiny of this chamber.

Hon SIMON O'BRIEN: With all due respect to my colleagues in the chamber, if the acts listed at clause 13(4)(a) to (h)—they are substantial acts, too—need to be listed in the principal legislation, any further acts proposed to be added to the list also need to be listed in the principal act. That indicates that further amendments may be required in, as I am given to understand, the highly unlikely chances that anything has been left off this list and an amending bill is required. If there is no further compelling argument beyond references to disallowance and so on that can be offered, I move forthwith —

Page 9, lines 9 to 10 — To delete —

and

(i) a prescribed enactment.

The DEPUTY CHAIR: I ask the honourable member to put pen to paper and write the amendment and attach a signature to it. I will just give members a minute whilst we wait for the proposed amendment to be presented.

Hon STEPHEN DAWSON: I do not have the honourable member's amendment before me, but I ask him to clarify his comments again. It is my understanding that he suggested that to include another enactment under this bill, an act amendment "would" need to be made —

Hon Simon O'Brien: Should be—should be.

Hon STEPHEN DAWSON: Is it an act amendment that "would" need to be made or "should" need to be made? The member said "would" but is it a "should"? Can the member please clarify that?

Hon SIMON O'BRIEN: I think I can assist the minister. The current clause 13(4) lists the relevant enactments, which are a series of principal acts. Clause 13(4) concludes with —

(i) a prescribed enactment.

To be considered a relevant enactment, the Parliament is now being asked to legislate in this bill that it be included in this list, but also to throw in an option for a future government to simply prescribe that other principal acts be added. My contention is that an addition of another principal act to this list should be added only via an amending bill to come through the normal processes of this chamber. I am saying that that is what should happen, so I have moved the deletion of paragraph (i) accordingly. I hope that clarifies the matter.

The DEPUTY CHAIR: Hon Simon O'Brien has moved, on page 9, lines 9 and 10, to delete the word "and", which is after the semicolon on line 9, paragraph (h), and then delete line 10 —

Point of Order

Hon STEPHEN DAWSON: We are still waiting on a copy of the amendment. While the Chair is reading it out —

The DEPUTY CHAIR (Hon Dr Steve Thomas): I am reading it out!

Hon STEPHEN DAWSON: — it is very hard to consider without it in front of me.

The DEPUTY CHAIR: Okay. I am sorry we missed the minister out.

Committee Resumed

The DEPUTY CHAIR: Members, we are dealing with the amendment from Hon Simon O'Brien. It is effectively deleting clause 13(4)(i).

Hon STEPHEN DAWSON: The government is not supportive of Hon Simon O'Brien's amendment. Division 2 relates to meetings that need to take place using telephone, audiovisual communication or any other means of instantaneous communication. Under COVID-19 response measures, the likelihood is that these forms of communication will need to take place.

Hon Simon O'Brien: Have they already been occurring?

Hon STEPHEN DAWSON: These forms of communication have been occurring, but to be clear, my advisers tell me that these are the enactments in which the extra powers were needed for the meetings to take place validly.

Hon Simon O'Brien: They have been taking place quite validly for all of these?

Hon STEPHEN DAWSON: In previous comments I have indicated that they have the frequency of those meetings et cetera; however, this bill has been consulted across government and we do not believe we have missed a meeting or an act that has taken place since 16 March.

Hon Simon O'Brien: Good—no problem, then.

Hon STEPHEN DAWSON: But, obviously, this clause is for the future, and so we want to make sure that in the future, should meetings need to take place in an act that is not in the bill, it is captured by this clause and we will not need to come back to Parliament. Therefore, we do not support the amendment.

Hon SIMON O'BRIEN: I thank the minister for assisting my argument by his remarks. This has already been happening; we are going to validate its happening. There has been extensive consultation across government. These are the areas—very many and diverse they are—that have been identified and we, as Her Majesty's loyal opposition, acquiesce to this provision coming in. Regarding some remote, hypothetical requirement of the future, we anticipate giving similar support if an amending bill is brought forward to deal with that matter. For now, it does not mean that we give a blank cheque via this proposed provision for who knows how many other enactments to be captured. In effect, that allows the government to amend the bill without reference to the Parliament in future, and that is not on.

In times gone by we have discovered that these processes have been going on and it is all fine insofar as it has been involved with these particular enactments and no others have been identified. Therefore, we are addressing all the things that have been happening in the last six or seven months, which is fine, but that is what the government seeks from this chamber and that is what it is getting, but the government members should not be asking for an open chequebook to carry on and do their own thing in the future.

I think that is probably enough debate on this, Mr Deputy Chair.

Division

Amendment put and a division taken, the Deputy Chair (Hon Dr Steve Thomas) casting his vote with the ayes, with the following result —

Ayes (20)

Hon Martin Aldridge	Hon Peter Collier	Hon Rick Mazza	Hon Aaron Stonehouse
Hon Jacqui Boydell	Hon Colin de Grussa	Hon Simon O'Brien	Hon Dr Steve Thomas
Hon Robin Chapple	Hon Diane Evers	Hon Robin Scott	Hon Colin Tincknell
Hon Jim Chown	Hon Nick Goiran	Hon Tjorn Sibma	Hon Alison Xamon
Hon Tim Clifford	Hon Colin Holt	Hon Charles Smith	Hon Ken Baston *(Teller)*

Noes (11)

Hon Alanna Clohesy	Hon Adele Farina	Hon Martin Pritchard	Hon Darren West
Hon Stephen Dawson	Hon Laurie Graham	Hon Samantha Rowe	Hon Pierre Yang *(Teller)*
Hon Sue Ellery	Hon Alannah MacTiernan	Hon Dr Sally Talbot	

Pairs

Hon Donna Faragher	Hon Matthew Swinbourn
Hon Michael Mischin	Hon Kyle McGinn

Amendment thus passed.

Clause, as amended, put and passed.

Clause 14: Decisions without meetings —

Hon TJORN SIBMA: I am deeply concerned by clause 14. First and foremost, I seek some clarification about the number of occasions—and the specifics—on which decisions were undertaken without meetings and on how many occasions, as it is described in the bill, resolutions in writing were signed or otherwise assented to. Does the minister have a record of those meetings?

Hon STEPHEN DAWSON: Honourable member, this is not a validation of past activity; this is forward looking. I notice that the member has an amendment on the supplementary notice paper to clause 14 to oppose the clause. My advice is that that would be supported.

Clause put and negatived.

Clause 15: Public meetings —

Hon ALISON XAMON: The Greens want to ensure that this provision does not remove any right that the public may have to participate in a meeting, not just observe it. I have received —

Hon STEPHEN DAWSON: I cannot hear Hon Alison Xamon.

The DEPUTY CHAIR: Honourable members, keep it down to a dull roar. I am sure that Hon Alison Xamon shall project well and put her operatic voice on.

Hon ALISON XAMON: I have no intention of shouting. As I was saying, the Greens want to ensure that this provision does not remove any right that the public has to participate in a meeting and not just observe it. I received that assurance at the briefing so I want to confirm for the record that the provision will not change anyone's rights and that it will simply provide an equivalent process.

Hon STEPHEN DAWSON: I think I answered this in my second reading reply; however, I am very happy to say that we are not diminishing the right of anyone from the public to observe development assessment panel meetings. The requirement under the Planning and Development (Development Assessment Panels) Regulations 2015 that meetings be open to the public has not been removed. The provision provides a way for the public to observe DAP meetings in a COVID-safe manner. This is an equivalent way of making meetings available to the public to that provided in pre-COVID times. The standing orders for meeting participation still apply.

Hon NICK GOIRAN: Which enactments are intended to be prescribed by clause 15(2)(b)?

Hon STEPHEN DAWSON: No others at this stage.

Hon NICK GOIRAN: Is that the same for clause 16(2)(b) and clause 17(2)(b)?

The DEPUTY CHAIR: I will allow a little leeway.

Hon STEPHEN DAWSON: Yes.

Hon NICK GOIRAN: I note that all these matters are under subdivision 1 in part 2. The minister will be aware that the chamber has just agreed to delete line 10 on page 9, a similar provision with respect to clause 13(4), so in order for subdivision 1 to remain consistent, we need to delete line 23 at page 9. I move —

Page 9, line 23 — To delete the line.

Hon STEPHEN DAWSON: I will give this another go. I indicate that the government does not support this amendment. This is a temporary provision; it expires at the end of next year. The argument that an amendment to this bill should be moved rather than this be disallowable is unreasonable and an inefficient use of the time of the Legislative Council. As I previously indicated, for any enactment to be covered by this bill, it would need to be in the regulations and that would be a disallowable instrument. That does provide oversight to this house. To suggest that there will be no oversight in the future is wrong. As I said, it is temporary; it will fall away at the end of next year.

Hon TJORN SIBMA: I will speak on behalf of my colleague, although he can obviously speak very well for himself. This is an issue. The government's defence is that this provision is disallowable. However, I think it would serve all members of this chamber well to focus their minds on the incontrovertible fact that the capacity to disallow anything after the Parliament rises either in the last week of November or the first week of December this year will be absolutely nil, until at least sometime after the March election. From the perspective of the precautionary principle alone, there is sufficient justification to strike out these references as they appear throughout the rest of the bill. I understand that the minister has again quite strongly put the government's case, but I think there is every likelihood the government will fail again. After that point, the minister might take the opportunity over the adjournment to consider whether the government should accept reality and potentially just agree to the removal of these offending words, because they do appear in a number of clauses after this point.

Division

Amendment put and a division taken, the Deputy Chair (Hon Dr Steve Thomas) casting his vote with the ayes, with the following result —

Ayes (16)

Hon Martin Aldridge	Hon Colin de Grussa	Hon Simon O'Brien	Hon Aaron Stonehouse
Hon Jacqui Boydell	Hon Nick Goiran	Hon Robin Scott	Hon Dr Steve Thomas
Hon Jim Chown	Hon Colin Holt	Hon Tjorn Sibma	Hon Colin Tincknell
Hon Peter Collier	Hon Rick Mazza	Hon Charles Smith	Hon Ken Baston *(Teller)*

Noes (15)

Hon Robin Chapple	Hon Sue Ellery	Hon Alannah MacTiernan	Hon Darren West
Hon Tim Clifford	Hon Diane Evers	Hon Martin Pritchard	Hon Alison Xamon
Hon Alanna Clohesy	Hon Adele Farina	Hon Samantha Rowe	Hon Pierre Yang *(Teller)*
Hon Stephen Dawson	Hon Laurie Graham	Hon Dr Sally Talbot	

Pairs

Hon Donna Faragher	Hon Kyle McGinn
Hon Michael Mischin	Hon Matthew Swinbourn

Amendment thus passed.

Clause, as amended, put and passed.

Clause 16: Locations of meetings —

Hon NICK GOIRAN: I move —

Page 10, line 13 — To delete the line.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 17: Venues for meetings —

Hon NICK GOIRAN: I move —

Page 10, line 22 — To delete the line.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 18 put and passed.

Clause 19: Validation of meetings and decisions —

Hon TJORN SIBMA: The relevant acts are identified at clause 19(3). I believe that the minister listed the meeting dates earlier.

Sitting suspended from 6.00 to 7.30 pm

Hon TJORN SIBMA: For the benefit of everyone in this chamber, particularly government members, I recognise that we have one hour and 29 minutes left on the shot clock, so I am going to target my remarks accordingly. Previous to our adjournment, I asked the minister a question about proposed clause 19(3). The minister indicated, very helpfully, the number of occasions on which meetings were conducted under the acts listed in proposed paragraphs (a) through (f). I was about to seek an understanding of whether there is an understanding of the decisions that have been made. Meetings were held under those acts, and I think the minister has outlined those and provided the dates. Is it possible for the minister to also provide the specific decisions that were made at those meetings under those acts?

Hon STEPHEN DAWSON: Referring to the Planning and Development Act, the number of development assessment panels has been released previously. All the other meetings are not public meetings, so that information is not ordinarily made available, with the exception of the Environmental Protection Authority, which announces its decisions. Otherwise, that information is not readily available.

Hon TJORN SIBMA: We have dealt with this bill in good faith, as we have every other COVID-19-related bill that the government has brought before this chamber. We have passed every single one of them and improved them where we saw fit. But we are, effectively, being asked here to validate meetings and decisions made at those meetings that we do not have any insight into. At the moment, we have absolutely no idea what decisions were made. Would the disclosure of the particulars of those meetings and, even in an abbreviated form, the specific decisions that were made at those meetings in any way imperil governance in this state?

Hon STEPHEN DAWSON: To be clear, we are not validating the decisions themselves; we are validating the process by which the decisions were made. I am learning on my feet, but for some of these—for example, decisions around the Aboriginal Heritage Act—elements of the decisions would be commercial-in-confidence. I could not imagine that decisions made by the Keep Australia Beautiful Council under the Litter Act would be controversial in any way. At the very least, that information is able to be FOI-ed. Information about meetings held under the Environmental Protection Act and elements of the Aboriginal Heritage Act cannot be provided, but to be helpful and ensure the passage of the bill, I am happy to take on a task to see whether there is a way of seeking out the minutes of the meetings that took place during this period and to see what can be made available, if appropriate.

Hon TJORN SIBMA: I thank the minister for his candid response. He is a genuine person, but I take issue with the fact that we are being provided with a freedom-of-information avenue because I know exactly how that operates, to be perfectly frank. I do not understand how governance in this state would be imperilled if, even in an abbreviated form, the government were to disclose the meetings and the slimmest outline of the decision made at those meetings that we are being asked as a chamber to validate. Frankly, I find this —

Hon Stephen Dawson: We're validating the means by which the decision was made; we're not validating the decision. However, I am very happy to, as a task, go away and see what I can provide the member about those meetings that have taken place and, if there's a sliver of information about those meetings, I'm happy to undertake to provide it.

Hon TJORN SIBMA: I thank the minister very much, but with the time limitations that attend to this bill, he is unlikely to come back to me with an answer despite every good-faith endeavour to do that.

Hon Stephen Dawson: It won't be in the next hour.

Hon TJORN SIBMA: In which case, frankly, we would have moved on to another clause.

Hon Stephen Dawson: I'm hopeful!

The DEPUTY CHAIR: Members!

Hon TJORN SIBMA: Everybody hopes that!

Frankly, that underscores a more serious principle. This chamber has been asked time and again, with increasing frequency, to, effectively, trust things that we can never see or have insight into. I can understand that there is a pragmatic motivation, but that comes at some risk to us in terms of us discharging our responsibilities with any sense of propriety or reasonableness. For that purpose, I advise the chamber that behind the Chair, the minister and I had a conversation in which I discussed that I would not move the amendments that stand in my name at 5/19 and 6/19. I think we have canvassed the issue of "purported" up hill and down dale. It is probably not to my satisfaction, but I realise that I am not going to be satisfied with that. I take this opportunity to formally move —

Page 11, after line 24 — To insert —

(4) The Minister responsible for the relevant enactment is required within 14 days of the Bill receiving Royal Assent to cause a copy of all meetings held and decisions made during the validation period to be published in the *Gazette*.

Hon STEPHEN DAWSON: I indicate that the government does not support this amendment. I appreciate the good way in which Hon Tjorn Sibma is operating in this debate. As I have indicated, we would need to go away and check each of these acts about how decisions are made by each of these organisations and whether things are commercial-in-confidence or otherwise. It could well be quite an onerous task to do this within 14 days of these meetings. The minutes of a meeting are approved at the following meeting. Something could be tabled in Parliament but the next meeting may decide that that is not the case, so we cannot support this amendment.

Amendment put and negatived.

Clause put and passed.

Clause 20: Public availability of documents —

Hon NICK GOIRAN: Which enactments will be prescribed under clause 20(2)(h)?

Hon STEPHEN DAWSON: I indicate that we are in fact open to an amendment should the member move one in relation to the enactment. I am further advised that my issue is with clause 25 when I would have to do something different.

Hon NICK GOIRAN: In which case, I move —

Page 12, line 25 — To delete the line.

Hon ALISON XAMON: On my reading of this provision, I understand that its purpose is that it will ensure that in the event of a complete lockdown, people who are entitled to receive and publicly inspect documents are able to do that. I want to express some concern that I would hate to need to go into total lockdown when COVID-19 inevitably has a second wave in this state and find that people are denied information that they otherwise would be able to get. I ask the minister to confirm whether this amendment, if passed and other acts are discovered that require the public to inspect documents, would have the effect of denying people access to documents that they are otherwise entitled to get.

Hon STEPHEN DAWSON: Essentially, if another act came to our attention that needed to be included, we would have to bring an amending bill to Parliament.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 21 put and passed.

Clause 22: Validation of things done —

Hon NICK GOIRAN: This is one of the clauses that the minister indicated during the consideration of clause 3 that the government wanted approved because it will allow for the validation of previous actions. This one is particularly curious because the other clauses that we dealt with earlier were specific, unlike this one; for example, if we go back to clause 11, the government wanted approval for matters that I think have been broadly described as fees—the fees validation clause. If we look at clause 19, we can see that is to do with matters pertaining to meetings. In due course, when we get to clause 44, we will be looking at assessments and examinations. But clause 22 is particularly curious because it is titled "Validation of things done". We would probably struggle to get something less specific than the title of this clause, "Validation of things done". Clause 22 states —

> A failure to comply with a public availability requirement described in section 20(1) during the period commencing on 16 March 2020 and ending immediately before the day on which this section comes into operation does not affect the validity of anything required or permitted to be done or arising in relation to or as a consequence of the public availability requirement.

That provision is extremely broad. In the minister's earlier explanation at clause 3, he indicated that the intention was to capture certain documents. I think he mentioned libraries and the like. What the minister described at clause 3 was far more specific than what we find at clause 22. My question is: why is it necessary for clause 22 to be as immensely broad as it is?

Hon STEPHEN DAWSON: The net has been cast wide to capture things that should have happened under acts, but we do not necessarily know what they all are. One example is a metropolitan region scheme amendment and the requirement for a decision to be made publicly available in a number of forums and formats. We are aware that in one case a library may well have been closed. Although the information was publicly available at different places, the library was closed for a period of time, so this provision allows for issues like that. The public still has access

to the documents and the acts listed in clause 22 contain requirements that the documents be available, often in multiple ways, which includes physical copies being made available in public venues. Some of the things include a library being closed. Despite that, the documents were made available through equivalent mechanisms such as online, and obviously not all the venues were closed. The public still had access to the documents that were required to be exhibited. This provision is in case anything comes up and we find, using the library example again, that a library is closed, in which case this would validate the information being made available in other formats.

Hon NICK GOIRAN: The library example the minister gave is one of the things done that the government seeks validation for under clause 22. Is there a convenient list that could be tabled that sets out the validations of things done that the government would like captured by clause 22?

Hon STEPHEN DAWSON: No, there is not a list. This section is about the public availability of documents. There are, for example, 139 local governments across the state, and they could well be captured by this issue.

Hon Simon O'Brien interjected.

Hon STEPHEN DAWSON: The footnotes allow me, did the member say?

Hon Simon O'Brien: The heading. Sorry, I meant marginal notes.

The DEPUTY CHAIR (Hon Robin Chapple): Members!

Hon STEPHEN DAWSON: The title is one thing, but obviously this needs to be looked at in the context of clause 22, which relates to public availability of documents.

Hon NICK GOIRAN: I appreciate that we have an hour and 10 minutes to get through this bill, which has 106 clauses, and we are currently on clause 22, so I will make this comment and then sit down. I find this entirely unsatisfactory. The chamber is about to agree to a clause that will provide this government, the McGowan government, with the luxury of validating things it has done under its governance and regime since 16 March 2020—things that it knows do not comply with the law. These are not specific things; there is not a list that the government can provide to the chamber or table before us. The government comes into this chamber, many weeks after the bill became known to members, and now, after it has been asked to provide a list of the things it has done that it would like to have retrospectively validated, it says, "Sorry, we can't provide that", and gives a vague example of a library. That is what we are agreeing to, members: validation of things done. We are about to say, "Here you go, McGowan government; anything you've done since 16 March 2020, it's okay. The Legislative Council says it's okay. We don't mind that you've breached the law. We don't mind that you haven't done certain things." No doubt the minister and the government will say, "No, hang on; it's only in respect of public availability of documents, which is the title of division 3." That is true. It means that any time since 16 March 2020 the McGowan government has not made documents available in a public fashion, it is okay according to the Legislative Council, if we pass clause 22 without amendment. Remember, this is the government that said it would provide a gold standard of transparency. Prior to the last election, Mr McGowan said that his government would provide a gold standard of transparency, yet here we are, blowing a hole in that promise at his request. We are acceding to his request to validate things he has done since 16 March, which were to make sure that certain documents were no longer publicly available. I find that totally unacceptable.

Hon STEPHEN DAWSON: Just to be clear, the information is publicly available on a website. If the member reads clause 20(1), it provides that it otherwise has to be available on a website. We are validating here that the information was not available at a library because the library was closed because of COVID-19. It is not that it was not available in toto; it was available. It simply was not available publicly, in some instances.

Clause put and passed.

Clauses 23 to 29 put and passed.

Clause 30: Decision-maker may set new expiry day for authorisations during operative period —

Hon ALISON XAMON: I move —

> Page 19, line 6 — To delete "section 3; and" and substitute —
>
> section 3(a) or (b); and

I understand from the minister's earlier reply that there is agreement from government to support this amendment. Can I just confirm that that is the case?

Hon STEPHEN DAWSON: That is correct.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 31: Decision-maker may modify or remove conditions of authorisations during operative period —

Hon ALISON XAMON: I move —

Page 23, line 4 — To delete "section 3." and substitute —

section 3(a) or (b).

Amendment put and passed.

Clause, as amended, put and passed.

Clause 32 put and passed.

Clause 33: Exemption from local planning scheme taken to be exemption from region planning scheme —

Hon NICK GOIRAN: The minister mentioned during consideration of clause 3 that clause 33 validates certain planning decisions. My question is: can a list of these planning decisions that the minister seeks retrospective validation for be tabled?

Hon STEPHEN DAWSON: Honourable member, there is not a list. This clause seeks to validate certain actions that might have been undertaken by local government authorities, developers and others. I can provide a copy of the clause 78 notice of exemption from planning requirements from the state of emergency amended notice, which lists the schedule, the schemes, the direct conditions and to whom the discretion was issued. I think that might be helpful. I am trying to be helpful. The government does not hold a list. The member can have a copy of this if he wants. No.

Hon NICK GOIRAN: I make this point. As I understand it, clause 33 provides an exemption from a local planning scheme. When that has occurred, it is taken to be an exemption from a region planning scheme. If the government is asking us to do that, it should be in a position to tell us on what occasions during the pandemic it was sufficiently concerned to justify this clause. This is an irregular occurrence in the planning provisions in Western Australia. It is not normally the case that someone would be exempt in this fashion, yet that is exactly what is proposed in this provision. If the government wants us to approve this provision, it should provide us with a list. The minister has said the government does not have a list. Therefore, we will go nowhere fast. Again, the clock is counting down, and that is totally unacceptable. We are at clause 33 of an important bill that the government says is urgent. I again, for the record, distance myself from this type of provision. It is not acceptable. I do not have a problem in principle with the government asking for validation for actions that have been taken. I am simply asking the government to specify what those actions were. If the government cannot tell us when and where these exemptions took place, I am not happy to put my name next to it.

Clause put and passed.

Clauses 34 to 43 put and passed.

Clause 44: Validation of assessments and examinations —

Hon STEPHEN DAWSON: Mr Deputy Chair, I ask that I may change my advisers.

The DEPUTY CHAIR: Not a problem.

Hon NICK GOIRAN: Clause 44 seeks to validate certain assessments and examinations that occurred under the Mental Health Act 2014. Does the government have a list of the assessments and examinations that it would like to have validated retrospectively?

Hon STEPHEN DAWSON: I am advised that the directions took effect on 7 April 2020 and that practitioners and psychiatrists were required to comply with the directions despite the provisions of the Mental Health Act. The Mental Health Commission has made inquiries but has not been able to confirm the number of people who have been assessed or examined via audiovisual communication in accordance with the directions. However, I am informed by the Mental Health Commission that the use of audiovisual communications in accordance with these amendments will be tracked. The method to analyse how these provisions are being used will be developed. What is being considered is a sample-based audit. In addition, the Chief Psychiatrist has committed to develop guidelines for the safe implementation of the use of audiovisual communications as set out in the directions. These guidelines will be developed in collaboration with consumers, carers, health service providers and clinicians and are expected to be rolled out within weeks of the act's enactment.

Hon NICK GOIRAN: Can the government guarantee that the passing of clause 44 is not validating the involuntary detention of a person on mental health grounds?

Hon STEPHEN DAWSON: I cannot give that guarantee.

Hon NICK GOIRAN: I will say what I have said before: I totally distance myself from a clause in the bill that has potentially allowed a Western Australian to be involuntarily detained under the Mental Health Act for up to 144 hours. The government is now asking us to validate that retrospectively, because one of their people has done so outside the provisions of the law. The government cannot tell us whether a person has been detained involuntarily. That is not acceptable. We are not talking about some trivial matter about whether a person has passed a circular resolution, emails have been passed around on some governance board, or something like that. We are talking about the potential that a person has been detained involuntarily under the Mental Health Act. Imagine if it was our family member who had been unlawfully involuntarily detained under the Metal Health Act. We are now being asked, as members of the Legislative Council of the Parliament of Western Australia, to validate that. Why? It is because we have this stinking clock going down. That is the only reason the government is asking us to pass this clause. If this was being done in any other circumstances, people would lose their mind. If the members on the other side of the chamber were on this side of the chamber, we would not hear the end of it. They would be out in the media. They would be losing their mind, and they would have the absolute right to do so because one of our ministers would be sitting here now and saying to them, "Sorry, we actually don't know the answer to your question. We don't know whether a Western Australian has been involuntarily detained under the Mental Health Act. We can't tell you that; nevertheless, honourable members, we'd like you to pass the amendment anyway." That is what is happening at the moment.

Hon ALISON XAMON: I rise to make a few comments about this, understanding that at the moment, the Mental Health Act enables people to be involuntarily detained having been assessed through electronic means. That was one of the key provisions that we had within the Mental Health Act, particularly for people who were otherwise not able to access any sort of treatment at all, recognising that people are detained under the Mental Health Act for their own safety. That is why we have this. I would be very surprised if a number of people were not subject to provisions under the Mental Health Act as a result of being electronically assessed through the COVID period. I would be stunned if that was not the case. In both the briefing and the second reading debate, I raised concerns about wanting to ensure that the people who were being subject to those provisions were being recorded. I asked whether consideration would be given for the "Mental Health Infection Control Directions" to require that that data was kept. I said that a reasonable way for that to occur would be for that to be reissued, because it is important that we are keeping that information. Ultimately, the Mental Health Tribunal will determine whether people have been detained appropriately, and, as I said, being assessed through electronic means is not out of the ordinary; we now have that within our state. But I would like to ask the minister again whether there is any chance that the directions themselves are able to be reissued to ensure that that data is able to be kept. The question being asked now, which is perfectly reasonable and something that I would certainly want to know if I were the Mental Health Tribunal president, is: how many people have been subject to these new provisions as a result of the different process because of COVID?

Hon STEPHEN DAWSON: The "Mental Health Infection Control Directions" were made under the Public Health Act 2016 and are issued by an emergency officer who has been authorised as such by the Chief Health Officer. An emergency officer is authorised to issue directions because they consider it necessary to do so to prevent, control or abate the serious public health risk presented by COVID-19. The content of the directions deals directly with the need to prevent, control or abate the serious public health risk of COVID-19. The requirement to record the use of audiovisual communications can be done through a policy commitment with the implementation of such a policy requiring cross-agency coordination and liaison. I am informed by the Mental Health Commission that this planning has commenced. As I previously noted, the Mental Health Commission has confirmed that use will be tracked and a sample audit done to analyse this use. In addition, the Chief Psychiatrist is in the process of developing guidelines for the safe implementation of the use of audiovisual communication in the circumstances contemplated in the directions and these amendments.

Clause put and passed.

Clauses 45 to 83 put and passed.

Clause 84: Act amended —

Hon SIMON O'BRIEN: Clause 84 is a simple clause that advises that the two-clause division that it is contained in amends the Constitution Acts Amendment Act 1899. Clause 85 then goes on to do just that. A single clause does that and it proposes to do it by inserting new section 45A into the Constitution Acts Amendment Act 1899. I want members to pay close attention to this matter because it is rather serious. It has some ramifications for the progress of this bill, so I am sure the Leader of the House will be listening closely as well in case there are any considerations that she wants to make for time allocation to deal with matters that might arise that were not anticipated, because I imagine it would be a pity from the government's point of view if, having got this far with this bill, it was not able to proceed any further. In addressing clause 84, I must of course simultaneously address clause 85, because that is the clause that gives it some effect.

Clauses 84 and 85, in my view and I think it might be the view of others, should not be agreed to. That is an argument in itself. It first came to my attention when I attended a Zoom meeting on this bill or its predecessor, with the infamous then part 7, back whenever it was. The thing that firstly struck me about this was the explanation for the amendments proposed via clauses 84 and 85, which was that they were to deal with something dismissed as some sort of anachronism that the Queen might like but nobody else has much time for, or sentiments to that effect. As a senior officer of this Parliament, it concerned me that there would be a cavalier disregard for the dignity of the legislature, the offices of the Governor and the offices of the Executive Council expressed in those sort of terms. I resolved very early on to plead the case that clauses 84 and 85 be rejected. In effect, they purport to enable that —

> (2) A meeting of the Executive Council may be held —
>
> (a) in person; or
>
> (b) using remote communication; or
>
> (c) by a mix of those 2 ways of meeting.
>
> (3) A person (including the Governor or any member who is presiding) who participates in a meeting of the Executive Council using remote communication is taken to be present at the meeting.

There are a number of very good reasons why this tradition, which has stood for centuries, of an Executive Council meeting being conducted in person should continue to be the norm. I could argue that long and hard. I do not have the time to do it now, but that is not the only critical element that we have to consider when we are looking at these clauses. I mentioned earlier what drew my attention in particular to these clauses, and I thought if that sort of attitude is being displayed to the traditional requirements of an Executive Council meeting, perhaps that has flowed through to the construction of the bill. In examining the provisions, I have found, with some concern—I think members on the government benches might now be concerned—that that is in fact the case. There is a great deal more that is wrong with this clause than the attitude that appears to drive it. What is wrong with it is that it is out of keeping with some other important statutes that we rely on in Western Australia. That in turn brings into question whether this bill, in its entirety, may proceed. I am going to take only a few minutes, because that is all I have, to explain why that is the case. The key point that we have to focus on is in proposed section 45A(4), which states —

> This section applies despite anything in any Letters Patent relating to the office of Governor.

Why is it necessary for the outcome of enabling remote communication for Executive Council for us to have this provision in the bill? It is not just the same as some of the other things that we have been considering in this bill—that is, we are now saying that it is all right when members of, say, the port authority board had to meet by phone because they could not get together in the same room because of COVID. That is one thing. If we are saying that certain videoconferencing facilities can be used for the accused to appear in court or for juries to view the accused, that can be accommodated and, indeed, already exists to some extent in our jurisdiction. But what is it that makes this different? Why am I drawing us up on this? It is because proposed subsection (4) states —

> This section applies despite anything in any Letters Patent relating to the office of Governor.

That is the proposed subsection that tells us why we need a legislative change if Executive Council meetings are to be conducted by remote communication methods, because at the moment they may not. With some of the other meetings that are being held around the place, retrospective legislation has gone through to say that if there is any impediment to that happening, we hereby give retrospective approval, having regard to the extraordinary circumstances, and say that the meetings meet the requirements that might otherwise have existed. But that does not apply to Executive Council. That is why we have this clause and that is why we have proposed subsection (4). The thing that prevents it is what is contained in the letters patent relating to the office of Governor.

There are a couple of matters that we need to look at, minister. The first is the question of being present at a meeting. There is judicial ruling on the question of whether a presence must inevitably be a physical presence. Given the constraints of time, I remind the chamber that we have seen in judicial rulings that it is not necessarily the case that presence automatically requires a physical or in-person presence in all circumstances. It has been ruled that the onus of that requirement applies if there is something else in the statute that requires presence. For example, if a statute explicitly says that everyone has to be physically present, that is beyond dispute. The Letters Patent Relating to the Office of Governor of the State of Western Australia 1986 contains these words at clause VIII —

> The Governor shall preside at meetings of the Executive Council but if the Governor is unable to preside the member appointed by the Governor to preside, or in the absence of such member, the senior member in order of appointment actually present, shall preside.

"Actually present"—the existence of these words is not contested. Indeed, if we look at the explanatory memorandum, we find that this is the explanation given for the existence of proposed subsection (4). The explanatory memorandum

provided quotes clause VIII, which I have just read out. Why does it do that? It is pointing out that it is necessary for there to be a change to the letters patent for the remote communication aspect to be enabled. It cannot happen without it, because the letters patent requires people to be actually present. Why is this a problem?

The DEPUTY CHAIR: Hon Simon O'Brien.

Hon SIMON O'BRIEN: The bill before us seeks to enable remote communications to be used to have Executive Council meetings. I have indicated that I am opposed to that and I have a range of good reasons why. That is not the issue that I want to deal with primarily right now. I point out that the fact that clause 85 exists to enable that to happen means that it cannot happen without this provision, and proposed subsection (4) tells us why. It is because the letters patent says that it cannot be done, so something has to give to enable it, and the letters patent has to be changed and therefore we have proposed subsection (4), which says —

> This section applies despite anything in any Letters Patent relating to the office of Governor.

I do not know that we can do that. What we need to turn our attention to is not the proposed repository for proposed section 45A, which is the Constitution Acts Amendment Act. No; we have to have recourse to the Constitution Act. Section 73 of the Constitution Act applies to a number of things, including, to refresh members' memories, a bill that expressly or impliedly provides for the abolition of or alteration in the office of Governor; or expressly or impliedly provides for the abolition of the Legislative Council or of the Legislative Assembly; or provides that the Legislative Council or the Legislative Assembly shall be composed of members other than members chosen directly by the people; or provides for a reduction in the numbers of the members of the Legislative Council or of the Legislative Assembly; or expressly or impliedly in any way affects any of the following sections of this act—namely, sections 2, 3, 4, 50, 51 and 73. Section 50 of the Constitution Act, under the heading "Office of Governor", contains a number of provisions, including reference to "any other person exercising, by virtue of an appointment by the Governor in accordance with letters patent, any powers and authorities of the Governor". It is in the Constitution Act 1889 that we find that particular provision, and of course that is something that is not that easy to undo. When we go back to section 73 of the Constitution Act 1889, we find not only that the provisions of section 73 apply to those several things that I have mentioned, including the letters patent, but also how they are to be changed. So far, by virtue of this COVID-19 Response and Economic Recovery Omnibus Bill and its explanatory memorandum, we have a declaration in black and white saying that we want to do this, and to do that we have to change the law. We cannot just say it is okay—it is not a guideline; we have to change the statute law. To do that we have to say that anything in any letters patent relating to the office of Governor does not apply. It is possible to do this. Section 73 of the Constitution Act 1889 tells us how. It tells us, in the way that constitution acts are written, that any of the bills that I have previously listed about doing away with the Legislative Council or the office of Governor, or reducing the number of members, including bills that affect any of the following sections of the Constitution Act, including section 50, which I recently referred to —

> shall not be presented for assent by or in the name of the Queen unless —
>
> (f) the second and third readings of the Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly, respectively …

That is the first hurdle. We need an absolute majority for the second reading and I do not believe that was recorded. There are ways we can undo that. I say to the Leader of the House that this is why I suggested earlier on that she might want to think about whether we need a little more time to deal with this bill. I will tell her how we might unscramble the egg that is scrambled in front of her.

There is a second requirement, which states —

> (g) the Bill has also prior to such presentation been approved by the electors in accordance with this section,
>
> and a Bill assented to consequent upon its presentation in contravention of this subsection shall be of no effect as an Act.

If I wanted to be flippant about this, perhaps with the same sort of flippancy I heard during my briefing on Zoom—I will not delve into that—I might ask the minister at the table whether he is proposing that a referendum on this matter be conducted on the second Saturday in March, because that is one of the things that is required. We have to put this to the electors. There is another complication. The Clerk of this Parliament—the Clerk of the Parliaments is the Clerk of the Legislative Council—is forbidden by law to present for the Governor's assent any bill that has not been passed in accordance with the Constitution. I will be blowed if any device is available to us that will undo that or will enable us to go back and say, "Well, hang on, it's all right if he did it; it's now going to be okay." That will not happen.

I will address these remarks through you, Mr Deputy Chair, to the minister at the table. It strikes me that we can deal with this in a couple of ways—a hard way and an easier way. The ridiculous way, of course, is to ask the Legislative Council to rescind the second reading vote, probably with notice, absolute majorities and all the rest of it, and then go through a second reading vote again and all sorts of other things. I do not think the Legislative Council has any appetite for that and nor, I think, does the government. We could proceed bullishly and say, "To hell with it; what we're doing is all right; someone has told me that this is the way to do it." I am telling them on behalf of the Parliament that this is not the way to do it. I do not want to see our Clerk exposed to charges that he has broken the law by laying before the Governor for royal assent a bill that has not been passed in accordance with law. That is the first thing. I could allow this government to blunder on through the Assembly again with its force of numbers and say, "To hell with it", but I do not want to see this Parliament thereby brought into disrepute for behaving in that sort of—to use the phrase I used earlier—cavalier manner.

The other thing the minister could do, which would be a lot easier, is this: when we put the question in a moment that clauses 84 and 85 do stand as printed, I suggest that the chamber disagree to adopt those clauses. That will make that problem go away. It will also mean that I do not have to lecture the chamber at some length about all the other reasons the business of an Executive Council, of which I have been a member, should be conducted in person. I hope that assists the government to make sure its bill does not fall over in a complete catastrophic mess. I therefore seek the chamber's decision on clauses 84 and 85.

Hon STEPHEN DAWSON: There is some confusion at the table, so to clarify: is the member calling into question the second reading of the bill before us and somehow suggesting there was not an absolute majority present at that stage and therefore calling into question the whole bill, or is he calling into question clauses 84 and 85 before us and the way changes are sought to be made through these clauses?

Hon SIMON O'BRIEN: I am not debating at this time whether the second reading vote was legitimate or not. I think the record shows that it was not recorded that it was passed with the requisite absolute majority. It might well have been passed with the requisite absolute majority simply by there not being an opposing voice. However, I do not think such things are recorded in the minutes of the Council. I do not know whether it was noted that an absolute majority was present. I do not know whether it was noted that there was no voice to the contrary. Given the COVID situation, it is by no means certain there would have been an absolute majority present. Yes; there probably is a question over the validity of the second reading vote in the Legislative Council, and, I am pretty darn sure, will be in another place as well—not only the second but also the third reading. They are matters for people to concern themselves over at another time, not during our consideration in the Committee of the Whole House on this bill. I hope that the minister appreciates that I have brought it to his attention before we get too much further down the track.

In relation to the second part of the minister's question, proposed section 45A(1), which he declares, by his own bill and by his own explanatory memorandum, is necessary—that is, we cannot change this without doing something about the letters patent—the explanatory memorandum reminds us what the letters patent say. I have recourse now and some other advice to the effect of what sections 50 and 73 of the Constitution Act 1889 tell us. I confirmed in my earlier remarks that, in effect, I agree that we cannot change the arrangements for Executive Council regarding remote communication unless the letters patent say something different. I am also saying that the government cannot disregard the content of the letters patent by simply passing a clause in a bill saying it does, unless it complies with the other requirements of section 73. The requirements of section 73 are that it must have an absolute majority for the second and third readings in both houses and the vote of the people. I do not see any provisions here for a referendum to be held. Maybe that is something the government has up its sleeve because it always knew about this and that will be a future COVID bill that it will bring on tomorrow, but I doubt it. I suggest that unless we make some changes, this is fatally flawed. But I have told the government that there are a couple of ways it can get out of this right now. It can plough on ahead and do a really messy foul-up of this job and risk running foul, exposing our Clerk to a criminal offence—I do not know whether he would agree to do it—or we could simply delete clauses 84 and 85, which, as I have said, there are good reasons for objecting to, even if there were not this constitutional hurdle. Thanks for the opportunity to clarify that.

Hon STEPHEN DAWSON: I indicate that the Solicitor-General was consulted to ensure that the amendment before us was appropriately constructed. I am advised that we are not changing the powers of the Governor, but we are amending the way in which the function is exercised. The honourable member is correct in his advice about the letters patent relating to the office of Governor—that clause VIII provides that the Governor is to preside at Executive Council and has been read to require all members to be present in person due to the words "actually present". This means that Exco meetings cannot currently occur through audiovisual means, even if a member is ill or social distancing measures are in place. The honourable member raised some concerns. I will, Mr Deputy Chair, ask you to leave the chair until the ringing of the bells and to seek advice and a ruling from the Clerk on this matter.

Hon Simon O'Brien: Point of order!

Hon STEPHEN DAWSON: Further, while I am on my feet, I will ask that the clock be stopped at this time to enable that advice to be sought and a ruling to be given.

Point of Order

Hon NICK GOIRAN: It is out of order for the minister to ask for a ruling from the Clerk. The only person who can provide a ruling is either yourself, Mr Deputy Chair, in Committee of the Whole House or, alternatively, the President.

Ruling by Deputy Chair

The DEPUTY CHAIR (Hon Martin Aldridge): Members, I am in a position to deliver a ruling on this matter now, so I am not required to leave the chair. I will be able to deliver a ruling in order to facilitate further debate forthwith.

The point of order relates to whether the COVID-19 Response and Economic Recovery Omnibus Bill 2020 is a bill to which section 73 of the Constitution Act 1889 applies, requiring a referendum to have been held in addition to absolute majorities at the second and third readings of the bill in both houses.

Clause 85 of the bill proposes the amendment of the Constitution Acts Amendment Act 1899 so as to enable Executive Council meetings to be conducted by remote communication, and purports to amend any letters patent relating to the office of Governor to the extent that there is any conflict. The question is therefore whether such an amendment to the practice of the Executive Council either "expressly or impliedly provides for the abolition of or alteration in the office of Governor" under section 73(2)(a) of the Constitution Act 1889; or "expressly or impliedly in any way affects" section 50, "Office of Governor", or section 51 of the Constitution Act 1889 under section 73(2)(e) of the Constitution Act 1889.

The proposed amendment does not expressly abolish or alter the office of Governor. Whether a change to the letters patent in relation to the practices of the Executive Council to permit a virtual presence of members is an "implied alteration" or "expressly or impliedly in any way affects" the office of the Governor is a more difficult question and is a matter of law that is more properly for the courts to determine rather than the Parliament. This is consistent with the traditional narrow interpretation of section 73 by presiding officers of the Legislative Council. I therefore rule that this is not a bill to which section 73 of the Constitution Act 1889 applies.

Committee Resumed

Hon SIMON O'BRIEN: Mr Deputy Chair, I thank you for that ruling. There is a requirement that if a member wishes to disagree with a ruling of the Chair, they do so forthwith. I will not be exercising that prerogative. I thank you for your considered ruling. As you point out, the matter might perhaps be resolved or head down some other avenues in due course. I refer to the question before the Chair that clause 84 be agreed to. I again restate that quite apart from any potential conflict with the Constitution, it seems to me an extraordinary thing that we should be entertaining a provision that proposes to do away with the process of Executive Council meeting in person in perpetuity, and not because there is a problem because of COVID. I do not believe that any Executive Council meetings have been postponed because they could not be held due to COVID. Would the minister be able to comment on whether any Executive Council meetings have been interrupted over the last seven months by COVID? I do not know. Perhaps he can by way of response in a moment. Members, I say with a great deal of feeling that having been a member of Exco, having sat down with a number of Governors and having got into an understanding of how an Executive Council is made to operate, it is not something to be done over a Zoom camera! A whole range of dynamics and security considerations come into play when some wise person somewhere who thinks they know better seeks to treat the legislature with contempt. With that, it is very much my earnest entreaty to the chamber that it reject clauses 84 and 85.

Hon STEPHEN DAWSON: Proposed section 45A(2) states —

> A meeting of the Executive Council may be held —
>
> (a) in person; or
>
> (b) using remote communication; or
>
> (c) by a mix of those 2 ways of meeting.

It does not necessarily replace one with the other. It adds a new way of meeting. I refer to the member's question about whether any meetings were affected by COVID. My advice is that the answer is no, thankfully. The answer to the member's question is no. This provision is to ensure that were COVID to take hold in Western Australia again and were the Governor or, indeed, the Lieutenant-Governor and a minister or multiple ministers affected by COVID-19, this would be another means of meeting. I indicate, too, that the Governor is supportive of remote meetings, but only if they are necessary. The preference is for meetings to take place face to face. However, as we have seen in Victoria and other places around the world, COVID-19 has brought great change and, indeed, great

illness, death and sickness to some places. This really is about futureproofing. Should the need arise for a meeting to take place by audiovisual means, this will allow that to happen.

In relation to the protection of confidentiality and Executive Council files and the other matters discussed, schedule VI, division 2, of the Constitutions Act Amendment Act sets out the oath of office for members of the Executive Council. Members have to swear or affirm, and one element of that is —

> … I will not, directly or indirectly, reveal any matters that come before the Council and that I am required by the Council to keep secret.

The oath of office applies whether the Executive Council meets in person or by audiovisual means. That remains. We take an oath of office. We are required, should we be in a room by ourselves, to have only members of Exco and the Governor present and to not have others in the room as well. We support clauses 84 and 85 and we hope that the chamber will also support them.

Hon AARON STONEHOUSE: I am a little concerned. I listened with great interest to the argument around manner and form presented by Hon Simon O'Brien and I think that he made a very good point, but I noticed something else. If there is an implication that clause 85 will amend the letters patent, a manner-and-form argument can be mounted about the Constitution Acts Amendment Act, but there is something in the letters patent themselves that seem to restrict the ability of us to amend them. I wonder whether my learned friend Hon Simon O'Brien has a view on this. Clause XXII of the Letters Patent Relating to the Office of Governor of the State of Western Australia 1986, "Reservation of power to revoke, alter or amend", states —

> The Power to revoke, alter or amend these Our Letters Patent is reserved.

It is reserved by Her Majesty Queen Elizabeth II. It seems to me that there is a whole other layer of manner and form that perhaps the honourable member did not articulate in his arguments earlier. It is not just that an absolute majority of the Legislative Council is needed to make amendments to certain acts prescribed in the Constitution. In fact, it seems that it may be beyond the power of the Legislative Council to amend the letters patent at all, regardless of whether we have an absolute majority.

Hon Simon O'Brien: They're not trying to amend it; they're trying to take that as implied and that it doesn't matter.

Hon AARON STONEHOUSE: That is a good point. Maybe there is an argument to be made about the distinction between what would be an amendment and what would be simply ignoring the letters patent. I would think that ignoring parts of the letters patent would be, to some extent, a repeal of the letters patent, or at least a repeal of parts of the letters patent. I am rather concerned that aside from the lack of an absolute majority, and taking into account the ruling the Deputy Chair made earlier, that a reading of clause XXII of the letters patent seems to imply that we do not have the power to amend, repeal or even merely ignore the letters patent or parts of the letters patent.

Hon TJORN SIBMA: Bearing in mind the time available to us, I think that we are about to crash into the rocky shoals of our good intentions in facilitating the passage of this bill. I do not believe that the government has made a compelling case to justify the passage of clauses 84 and 85 as they appear. We have heard great argument about why they are perilous. I do not believe that the inclusion of these clauses in any way facilitates government decision-making or executive decision-making.

Hon RICK MAZZA: I have listened to this debate intently. It has been quite fascinating. The Executive Council is the supreme decision-making body of government. It is not a standing committee of Parliament that can operate through Zoom when members are not present; it is the supreme decision-making body within government, which includes the Governor, and I think it is very important that its meetings be face-to-face meetings. I am all for modern technology. Do not get me wrong, Zoom has its place, as do other forms of audiovisual technology. But I think that in the case of the supreme decision-making body within government—the most powerful body in our state—the meetings should take place face to face. The Governor's office is just down the road. It is not hard to get to. As someone said, people can go down there at midnight to get decisions made, so I will be opposing this clause.

Hon NICK GOIRAN: I was called away on urgent parliamentary business, so I apologise if this already has been addressed. Earlier, the minister mentioned that the government sought advice from the Solicitor-General. Given the gravity of this matter, is the government in a position to provide that advice?

Hon STEPHEN DAWSON: I indicated that the Solicitor-General was consulted to ensure that the amendment was appropriately constructed. I am not at liberty to provide any advice.

Hon NICK GOIRAN: I simply indicate that since the government is unwilling to provide that advice, I have no confidence that this provision is going to be lawful and so I intend to oppose the clause, as has been suggested by Hon Tjorn Sibma.

Division

Clause put and a division taken, the Deputy Chair (Hon Martin Aldridge) casting his vote with the ayes, with the following result —

Ayes (17)

Hon Martin Aldridge	Hon Colin de Grussa	Hon Colin Holt	Hon Alison Xamon
Hon Robin Chapple	Hon Sue Ellery	Hon Alannah MacTiernan	Hon Pierre Yang *(Teller)*
Hon Tim Clifford	Hon Diane Evers	Hon Samantha Rowe	
Hon Alanna Clohesy	Hon Adele Farina	Hon Dr Sally Talbot	
Hon Stephen Dawson	Hon Laurie Graham	Hon Darren West	

Noes (12)

Hon Jim Chown	Hon Nick Goiran	Hon Robin Scott	Hon Aaron Stonehouse
Hon Peter Collier	Hon Rick Mazza	Hon Tjorn Sibma	Hon Colin Tincknell
Hon Donna Faragher	Hon Simon O'Brien	Hon Charles Smith	Hon Ken Baston *(Teller)*

Pairs

Hon Kyle McGinn	Hon Jacqui Boydell
Hon Matthew Swinbourn	Hon Dr Steve Thomas
Hon Martin Pritchard	Hon Michael Mischin

Clause thus passed.

Clause 85: Section 45A inserted —

Hon SIMON O'BRIEN: Just a couple of quick questions about clause 85 before we all unanimously vote against it, minister. There are not many people in this chamber who have been part of Executive Council; the minister has, and I have. He knows what goes on there. It involves a couple of ministers, typically; His or Her Excellency the Governor; and someone of the type of a cabinet secretary or a Department of the Premier and Cabinet permanent secretary, acting in a secretarial role. If a Governor is isolated in some room somewhere, participating by remote communication in an Executive Council meeting, or if the minister who is meant to pass the Governor a regulation or other instrument for his signature is not present, how do we know it has been properly signed by the right person and that it is, in fact, the correct document?

Hon STEPHEN DAWSON: The matter of form is still to be worked out. My advisers —

Hon Simon O'Brien: Sorry, what was that?

Hon STEPHEN DAWSON: How we will pass on the document is still to be worked out. My advisers tell me that we would potentially be looking at some sort of encrypted email that would move from one person to another; or, if the circumstances allowed for the documents to be collected from the Governor and passed to the next person, that would be looked at.

Hon Simon O'Brien: An encrypted email?

Hon STEPHEN DAWSON: That is my advice.

Hon TJORN SIBMA: With regard to that, how would anyone be satisfied that the Governor was acting of their own free volition?

Hon STEPHEN DAWSON: I am not sure whether the honourable member is suggesting that there could be somebody in the room holding a gun to the Governor's head, but can I say that coercion could already have taken place in the situation we were in before this legislation. It could already happen now.

Hon TJORN SIBMA: I am certainly not indulging in any flights of fancy, minister. This is a measure that has never been used; it has not been used at all during the COVID-19 pandemic. The minister is suggesting that it might be required. It is an absolute change from the practice in this jurisdiction since its inception. I want to ensure that any royal assent given to any bill is provided willingly by the Governor, yet the minister cannot provide me with any reassurance that that very basic safeguard will be satisfied by the measures the government is proposing to introduce via clause 85.

Hon STEPHEN DAWSON: I indicate that New South Wales and Queensland already have such a form of Exco meeting in place, so it is our intention to learn from both New South Wales and Queensland, and probably mirror the actions or activities that they undertake.

Division

Clause put and a division taken, the Deputy Chair (Hon Martin Aldridge) casting his vote with the ayes, with the following result —

Ayes (17)

Hon Martin Aldridge	Hon Colin de Grussa	Hon Colin Holt	Hon Alison Xamon
Hon Robin Chapple	Hon Sue Ellery	Hon Alannah MacTiernan	Hon Pierre Yang *(Teller)*
Hon Tim Clifford	Hon Diane Evers	Hon Samantha Rowe	
Hon Alanna Clohesy	Hon Adele Farina	Hon Dr Sally Talbot	
Hon Stephen Dawson	Hon Laurie Graham	Hon Darren West	

Noes (12)

Hon Jim Chown	Hon Nick Goiran	Hon Robin Scott	Hon Aaron Stonehouse
Hon Peter Collier	Hon Rick Mazza	Hon Tjorn Sibma	Hon Colin Tincknell
Hon Donna Faragher	Hon Simon O'Brien	Hon Charles Smith	Hon Ken Baston *(Teller)*

Pairs

Hon Kyle McGinn	Hon Michael Mischin
Hon Matthew Swinbourn	Hon Jacqui Boydell

Clause thus passed.

The DEPUTY CHAIR: Members, the temporary order relating to COVID-19-related business has now kicked in and the time for Committee of the Whole has expired. I am now required to put each question before the Chair, including seeking the intent of the mover of amendments proposed on the supplementary notice paper when we approach clauses 104 and 106, which I will do when we reach that point.

Clauses 86 to 103 put and passed.

Clause 104: Provisions about orders made under Act —

The DEPUTY CHAIR: Can Hon Tjorn Sibma now indicate whether he intends to move his amendments?

Hon TJORN SIBMA: I do. I move —

Page 51, lines 8 to 10 — To delete the lines.

Division

Amendment put and a division taken, the Deputy Chair (Hon Martin Aldridge) casting his vote with the noes, with the following result —

Ayes (11)

Hon Jim Chown	Hon Nick Goiran	Hon Robin Scott	Hon Colin Tincknell
Hon Peter Collier	Hon Rick Mazza	Hon Tjorn Sibma	Hon Ken Baston *(Teller)*
Hon Donna Faragher	Hon Simon O'Brien	Hon Aaron Stonehouse	

Noes (18)

Hon Martin Aldridge	Hon Colin de Grussa	Hon Colin Holt	Hon Darren West
Hon Robin Chapple	Hon Sue Ellery	Hon Alannah MacTiernan	Hon Alison Xamon
Hon Tim Clifford	Hon Diane Evers	Hon Samantha Rowe	Hon Pierre Yang *(Teller)*
Hon Alanna Clohesy	Hon Adele Farina	Hon Charles Smith	
Hon Stephen Dawson	Hon Laurie Graham	Hon Dr Sally Talbot	

Pairs

Hon Jacqui Boydell	Hon Kyle McGinn
Hon Michael Mischin	Hon Martin Pritchard

Amendment thus negatived.

Hon TJORN SIBMA: I move —

Page 51, line 17 — To delete "made." and substitute —

made; or

(c) the *Gazette*.

Division

Amendment put and a division taken, the Deputy Chair (Hon Martin Aldridge) casting his vote with the noes, with the following result —

Ayes (11)

Hon Jim Chown	Hon Nick Goiran	Hon Robin Scott	Hon Colin Tincknell
Hon Peter Collier	Hon Rick Mazza	Hon Tjorn Sibma	Hon Ken Baston *(Teller)*
Hon Donna Faragher	Hon Simon O'Brien	Hon Aaron Stonehouse	

Noes (18)

Hon Martin Aldridge	Hon Colin de Grussa	Hon Colin Holt	Hon Darren West
Hon Robin Chapple	Hon Sue Ellery	Hon Alannah MacTiernan	Hon Alison Xamon
Hon Tim Clifford	Hon Diane Evers	Hon Samantha Rowe	Hon Pierre Yang *(Teller)*
Hon Alanna Clohesy	Hon Adele Farina	Hon Charles Smith	
Hon Stephen Dawson	Hon Laurie Graham	Hon Dr Sally Talbot	

Pairs

Hon Jacqui Boydell	Hon Kyle McGinn
Hon Michael Mischin	Hon Martin Pritchard

Amendment thus negatived.

Clause put and passed.

Clause 105 put and passed.

Clause 106: Regulations —

Hon TJORN SIBMA: I move —

Page 52, lines 10 to 14 — To delete the lines.

Division

Amendment put and a division taken, the Deputy Chair (Hon Martin Aldridge) casting his vote with the noes, with the following result —

Ayes (12)

Hon Jim Chown	Hon Nick Goiran	Hon Robin Scott	Hon Aaron Stonehouse
Hon Peter Collier	Hon Rick Mazza	Hon Tjorn Sibma	Hon Colin Tincknell
Hon Donna Faragher	Hon Simon O'Brien	Hon Charles Smith	Hon Ken Baston *(Teller)*

Noes (17)

Hon Martin Aldridge	Hon Colin de Grussa	Hon Colin Holt	Hon Alison Xamon
Hon Robin Chapple	Hon Sue Ellery	Hon Alannah MacTiernan	Hon Pierre Yang *(Teller)*
Hon Tim Clifford	Hon Diane Evers	Hon Samantha Rowe	
Hon Alanna Clohesy	Hon Adele Farina	Hon Dr Sally Talbot	
Hon Stephen Dawson	Hon Laurie Graham	Hon Darren West	

Pairs

Hon Jacqui Boydell	Hon Matthew Swinbourn
Hon Michael Mischin	Hon Martin Pritchard

Amendment thus negatived.

Clause put and passed.

Title —

Hon TJORN SIBMA: I move —

Page 1, line 13 — To delete "**immediately before,**".

Amendment put and passed.

Title, as amended, put and passed.

Report

Bill reported, with amendments, and the report adopted.

Third Reading

HON STEPHEN DAWSON (Mining and Pastoral — Minister for Environment) [9.25 pm]: I move —

That the bill be now read a third time.

HON TJORN SIBMA (North Metropolitan) [9.26 pm]: This has been a unique debate in many respects. First and foremost, I should articulate that the Liberal Party was always of the view that pragmatic measures undertaken by agencies throughout the COVID crisis should be supported and legitimised in an orderly way. We have taken the position to support the intent of the COVID-19 Response and Economic Recovery Omnibus Bill 2020 and much of its content. Nevertheless, certain aspects of this bill have been particularly troubling: its original inception and consultation; the amended form in which it was eventually presented to this chamber for our contemplation in consideration and amendment when appropriate; and, frankly, the precedent that we are establishing for legislation from this point hence.

I will reflect on a number of things. I began my address by stating that the Liberal Party supported this bill and took the view that this was consistent with the position that we had adopted on all COVID-19 legislation introduced by the government from March onwards. We have been operating in unusual terrain, but we have sought at all times to support the government so long as it could demonstrate to us that it was acting in the interests of public health, public order and economic restoration and regrowth. Members will recall that at the outset of this bill, an original part 7 demonstrated an intention or a predilection from some in government to maximise the political benefit of being in government throughout a crisis. What was originally presented to us for consideration and subsequently demonstrated to have been amended by a subsequent cabinet meeting was frankly an absolute disgrace. There was the potential for us to have contemplated a bill that would have extended executive power in a way that had never before been contemplated in this jurisdiction. I am glad that the government saw the wisdom of removing that part of the bill as it was in its original form—the original part 7. However, as we have encountered throughout the consideration of the bill in detail, certain vestiges of that original intent have been replete throughout the bill. The approach has been to mitigate every potentiality to cover the government for any claims of liability or what have you from its immediate response to crisis.

The one thing that perturbs me now, and will probably perturb me for some time, is the differing accounts that I was provided about a meeting that did not occur on 15 March or perhaps in the immediate period leading up to the effect of the declaration of the state of emergency. I was given three separate answers. First of all, I was provided with the view that that meeting never happened and was a typo. Then I was provided with advice that that meeting did occur but no information could be provided about its particulars. Today I was told and reassured again countless times that that meeting never took place. I do not know whether that meeting took place. I do not know, and no-one in this chamber will ever be any the wiser about, which agency conducted a meeting, or thought that it conducted a meeting, in the period prior to the effect of this bill. Nevertheless, the government has reassured us that that did not occur.

In any event, it has conceded to an amendment to the long title of its own bill. I am new in this place, but I have not seen the government agree to an amendment to the long title of a bill in the last three years. I think these things are rather unusual and it speaks to the expedient and, I think, cavalier attitude that has driven the drafting of this bill. On numerous occasions, we have had struck from the bill references to basically add to the statute book prescribed enactments—unnamed and unjustified. I think this chamber has done its duty in limiting overreach undertaken, or proposed to be undertaken, by this government.

There is not much time left available to me and I know there are other speakers, but I just want to end on this score: I was very unsuccessful at the tail end of the debate on this bill at moving amendments, particularly to clauses 104 and 106. I want to reflect on clause 106, particularly subclause (3). We, as a chamber, have allowed regulations to be made that will have effect despite any other written law. We have done this far too frequently over the last few months, and we have debased ourselves by permitting it yet again. I think it is shameful and unnecessary. We all will live with the consequences of this kind of expediency—expediency, I might add, that is possibly, arguably, unsupported by the health crisis, or potentially the lack of health crisis, in Western Australia at the moment.

There was a lengthy discussion about clauses 84 and 85, which sought to amend the Constitution Acts Amendment Act. We were advised that these questions are best determined through another avenue—through the courts. I hope that we do not end up in a situation in which we discover that clauses 84 and 85 of this bill are invalid in any way, because the government could not justify their inclusion. It has never needed to invoke them and it could not invoke or speculate upon a set of circumstances in which they might be necessary. Nevertheless, we have potentially imperilled the legal standing of bills passed by Parliament.

HON AARON STONEHOUSE (South Metropolitan) [9.34 pm]: I will be very quick to try to allow time for other members to speak on the third reading of the COVID-19 Response and Economic Recovery Omnibus Bill 2020.

I appreciated the measured, balanced and very thoughtful comments of the previous speaker. However, I cannot support this bill. It is not just because the government is trying to retrospectively legitimise otherwise potentially illegal acts that agencies might have carried out during this COVID emergency, some of which might have been completely appropriate, or because we have now given the government the ability to write regulations that it would otherwise not have the power to make lawfully; it is because the government is trying to do something that I think is very likely unconstitutional. I am referring to clauses 84 and 85 of the bill. A very good and thoughtful argument was put to us about the manner-and-form requirements for amending the Constitution Acts Amendment Act 1899. I actually broadly agree with the points that were raised and I think they warrant further examination.

Unfortunately, the government is unwilling to provide us with the advice it sought from the Solicitor-General on these clauses, so we have absolutely no idea what risks these clauses might pose to judicial review if this bill is passed as it is. My reading of the letters patent might be wrong, and I would certainly like more time to analyse and consider them, but my reading of them is that they cannot be amended by the Parliament; they can be amended only by the sovereign, Her Majesty Queen Elizabeth II. This bill is an assault on the foundations of our constitutional democracy on every front—retrospectivity and the inappropriate delegation of legislation-making powers to the executive. In fact, the now excised part 7 of this bill would have been the whopper of all Henry VIII clauses; it would have given the government the power to write any law it liked, with almost no limitation. This legislation not only inappropriately delegates legislation-making power, but also potentially attacks our constitutional monarchy by trying to amend letters patent that are not ours to amend. It seems wholly inappropriate. Therefore, I cannot support the bill at the third reading.

HON NICK GOIRAN (South Metropolitan) [9.37 pm]: I note that I have less than four minutes in which to make a third reading contribution to the COVID-19 Response and Economic Recovery Omnibus Bill 2020. In those few minutes, I want to raise two concerns for the attention of members. First of all, despite the fact that more than five hours was devoted in Committee of the Whole House to consider the clauses of the bill, the government was unable to provide to the chamber a list of the actions that it wants validated. One of the key reasons that this bill is passing through the house at the moment is that the government has said that it took certain actions during the pandemic that it would like validated. As I have previously said, it is fine for the government to ask for that, but it then has the responsibility to tell the house what those actions were. On what dates during the pandemic did person X do action Y, which the government now wants the Legislative Council to validate retrospectively? The government has a duty to do that but it has not done that. In fact, despite questioning, the government has said that it does not know—it cannot provide a list to the house. It should concern any member that we are about to pass, at the third reading, a bill that validates certain actions when the government cannot tell us what those actions were.

The second point of concern is that clause 106(3) is a Henry VIII clause that members did not have the opportunity to debate because the guillotine was applied. Clause 106(3)(b) provides that the regulations can apply with specified modifications. In other words, the regulations can modify the law of Western Australia because of this particular provision, clause 106(3). Ordinarily if we had had the opportunity to debate that, I am confident the majority of members in this house would have opposed that clause because that has consistently been the practice of this house. However, we were unable to do so because not one member was able to articulate an argument because the guillotine was applied. It was wrong; it should not have happened. It is what happens with this guillotine approach. It has happened on more than one occasion during this COVID period and as a result, regulations can now be made despite any other written law, and they can make modifications to the existing law. Members should be duly concerned about that. I cannot blame the honourable member who just spoke for not supporting the bill.

Division

Question put and a division taken with the following result —

Ayes (25)

Hon Martin Aldridge	Hon Stephen Dawson	Hon Colin Holt	Hon Dr Sally Talbot
Hon Ken Baston	Hon Colin de Grussa	Hon Alannah MacTiernan	Hon Darren West
Hon Robin Chapple	Hon Sue Ellery	Hon Rick Mazza	Hon Alison Xamon
Hon Jim Chown	Hon Diane Evers	Hon Samantha Rowe	Hon Pierre Yang (*Teller)*
Hon Tim Clifford	Hon Donna Faragher	Hon Robin Scott	
Hon Alanna Clohesy	Hon Adele Farina	Hon Tjorn Sibma	
Hon Peter Collier	Hon Laurie Graham	Hon Charles Smith	

Noes (2)

Hon Simon O'Brien	Hon Aaron Stonehouse (*Teller)*

Question thus passed.

Bill read a third time and returned to the Assembly with amendments.