ACTS AMENDMENT (ADVANCE HEALTH CARE PLANNING) BILL 2006

Consideration in Detail

Resumed from 12 September.

Clause 11: Parts 9A to 9D inserted -

Debate was adjourned after the clause had been amended.

Mr T. BUSWELL: This clause is of some interest to members of the opposition and no doubt in due course they will join me in adding weight to the argument I will raise in support of the clause. Like many clauses in this bill, it requires thorough, proper and detailed consideration by all members. Has it not been interesting, minister, as this debate unfolded to watch the ebb and flow across the chamber as members' consciences were tugged to one side or the other? I must say that when I am absent and a division is called, I find myself on entering the chamber observing the minister and where he sits. Inevitably I will go to the other side and take comfort that I am on the right side.

Hopefully we are moving towards a position whereby others will be able to make a more substantive contribution to progressing the debate in a positive and meaningful way. Until that moment arrives, I do not wish to rush to get there, because I feel that to rush would be to ignore something that was important. With those few remarks I add my support to the position that I am sure will be shortly espoused in great detail and with much thought by the member for Carine.

Ms K. HODSON-THOMAS: As I understand it, this is an amendment the minister is making to page 16, after line 14. Can the minister give us some clarification on the intent of this amendment? Perhaps it relates to concerns members had during the second reading debate.

Mr J.A. McGINTY: I move -

> Page 16, after line 14 - To insert -
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> (4) In determining whether or not subsection (3) applies in relation to a treatment decision that is in an advance health directive made more than 10 years before the time at which the treatment decision would otherwise operate, the matters that must be taken into account include the following -
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> (a) the maker's age at the time of the directive was made and at the time the treatment decision would otherwise operate;
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> (b) the period that has elapsed between those times;
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> (c) whether the maker reviewed the treatment decision at any time during that period and, if so, the period that has elapsed between the time of the last such review and the time at which the treatment decision would otherwise operate;
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> (d) the nature of the condition for which the maker needs treatment, the nature of that treatment and the consequences of providing and not providing that treatment.
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> (5) Subsection (4) does not prevent a matter referred to subsection (4)(a) to (d) being taken into account in determining whether or not subsection (3) applies in relation to any other treatment decision if it is relevant to do so.

This amendment came out of the second reading debate when a number of members made the point that an advance health directive would not be as solid after a number of years. Something made when a person is young may not accurately reflect that person's views when he or she is old. That reflects the values of people at different stages of their lives. In addition, the advances in medical technology and medical knowledge are such that what was thought to be an incurable disease 10 years ago might well be curable today. This amendment is designed to pick up on the sentiments expressed by a number of members that in determining whether an advance health directive is valid, the age of the health directive and a range of factors ought to be relevant to that decision. It was decided that an advance health directive should be taken as valid for the first 10 years of its life. After that - this is putting it in layman's language - it can effectively be read down according to the factors that are referred to in my amendment. The factors that are to be taken into account are: firstly, the age of the person at the time the directive was made and the time at which the treatment decision would come into effect; secondly, the period of time that has elapsed between those times; thirdly, whether the maker of the advance

health directive reviewed the treatment decision at any time during that time; and, finally, the nature of the condition for which the maker needs treatment, the nature of that treatment and the consequence of providing or not providing that treatment.

This amendment attempts to ensure that an advance health directive is given effect only when it properly reflects the intention of the person. Obviously, the passage of time, changes in medical technology and the age of the person are all factors that can be taken into account. The amendment is designed to pick up on a lot of sentiments expressed by a great number of members. The period of 10 years is reasonable. It would be unreasonable to place a more frequent review requirement on most people. Obviously, if circumstances arise during the course of those 10 years that were not foreseen, that will be read down accordingly, but this amendment is really designed to pick up a number of concerns expressed by members. It arose out of the considerations and discussions between the member for Dawesville, the member for Maylands and me and is the best accommodation of the various views put forward.

Ms K. HODSON-THOMAS: The member for Nedlands has an amendment to the minister's amendment on the notice paper, which deletes the words "10 years" and substitutes "5 years". In her absence, perhaps someone on our side should progress that amendment. I seek some guidance from you, Mr Acting Speaker.

The ACTING SPEAKER (Mr P.B. Watson): We do not know whether the member for Nedlands still wants to move the amendment. If the member for Carine moves the amendment, it will be in her name.

Ms K. HODSON-THOMAS: I move -

> To delete from the amendment moved by the Minister for Electoral Affairs "10 years" in line 2 and substitute -
>
> 5 years

I have moved that amendment given that the member for Nedlands is not present. She felt that the period of 10 years was far too long and that it should be five years. She was aware that I thought an advance health directive should be valid for only five years in an amendment that I had moved previously and felt that I would be supportive of her amendment to the minister's amendment. The minister has clarified what his amendment will do.

Dr G.G. JACOBS: The member for Nedlands has spoken to me about the time frame of 10 years versus five years. Five years is a long time in medicine, given the developments of technology. If five years is a long time, 10 years is an eternity. In order for an advance health directive to be relevant in a time frame, there is some argument for reviewing that directive every five years. The advances in technology over a five-year period are enormous. If I go back five years from this date, that almost pre-dates the advent of the management of coronary artery disease and ischemic heart disease, the biggest killers in our community. If we go back five years, we pre-date the advent of stenting and angioplasty in the management of ischemic heart disease and angina, which could put a completely different perspective on one's advance health directive.

A time frame of 10 years is probably somewhat lengthy with the advancement and the pace of medical technology. I agree with the amendment of the member for Nedlands, as moved by the member for Carine. I congratulate the minister on recognising the need to update and review advance health directives. It should not be too onerous or difficult for people to review an advance health directive, bearing in mind the pace of technology and advancement in medicine. The member for Yokine keeps harping on about whether I have a provider number. I have a provider number because if any member from either side of the house may actually need me one day, they might appreciate that I keep up with technology. If I left it for five years and the member had a heart attack, I might have to let him go. However, having kept up with technology and with understanding new technology, I may be able to give the member some hope with the new breakthroughs in stenting and angioplasty. We need to keep abreast of new technology as we need to keep abreast with advance health directives.

Dr J.M. EDWARDS: I do not support this amendment. I support the original amendment moved by the Minister for Health. I feel the more that we move amendments and make changes, the more we will get away from the intent of the legislation, which is to empower people and get them to think about making decisions for themselves and not have decisions made for them. I find myself disagreeing almost totally with the member for Roe. My problem with changing the time limit from 10 years to five years is that five years can go by awfully quickly, and people will find that the five-year limit is pretty constant when they will have to do the review. Ten years is a much more sensible time frame. I do not think a whole lot of people will rush to do these advance health directives; I think only a minority will do them. I further believe that the people who complete them will really think about them. That is the nature of the sorts of people who will want this type of control.

I can tell a story that is the opposite of the experience of the member for Roe. I have not had a provider number for 16 years. When I entered this place I decided that I either did one thing or the other. I handed back my provider number. However, recently I received a call from a relative in the country -

Dr K.D. Hames: I have about three.

Dr J.M. EDWARDS: The member is greedy. I received a call about some symptoms my relative was experiencing. Even though I had not practised medicine for 16 years, I had a very strong idea of what was the problem. I immediately sent my relative back to a second GP, who again did not put a stethoscope on the chest of my relative. My jumping up and down convinced my mother that she needed to take my father back to the specialist. That was a trip to Perth that they did not really need to make. The specialist did the four things that I had told my mother needed to be done. That is a good reflection on medical training in Western Australia. However, my point is that mostly we will not be dealing with conditions that can be salvaged by advances in technology, because although advances in technology are fantastic - WA in particular has a really good record and they do save lives - at the end of the day that is still pretty much at the margin. At the end of the day, people who make these health directives will have chronic conditions. They will not be about death in a crisis, but they will be about death that is being managed. Therefore, I believe there are very good reasons for supporting the amendment moved by the Minister for Health. However, it should not be watered down as the members for Nedlands and Carine are doing.

Dr K.D. HAMES: I worry about the standard of medical treatment in Western Australia when I listen to that story by the member for Maylands. I have three similar tales of my own with relatives' treatment. I am sorry, Mr Acting Speaker, that is a different issue.

I strongly support the amendment and I should because I had a hand in what is written here. Many of the members with whom I discussed the issue were of the view that there should be a time limit; that it should not be open-ended. How can the advance health directive made by a young person still apply when that person is 60 or 70 years of age? Technology changes, but people's attitudes to their illnesses change also. An 18-year-old may think that having a paralysed arm is the end of the world. However, a 60-year-old may think it is not so bad because that person can still go fishing! I related that tale of going fishing with someone who had a paralysed arm in one of my previous speeches. Therefore, it is reasonable to put in place a time limit. The amendment is worded like this because the feeling of all who discussed this was that a time limit should not mean the end. A person could complete an advance health directive for a condition that he believes will mean the end, but the next day could find it is nothing. We still want it to be managed by the doctor, which is why it is worded as it is. If a 10-year limit is placed on the advance health directive, it is a certainty that whatever is written in the directive will be done. After 10 years, it will be not so much a guide, but something less binding on the doctor so that the doctor can take into account other things. It would not be hard to review it after 10 years. One would only have to get a new form and get the same two people to sign it. It would be able to be renewed quite easily. If it were not renewed -

The ACTING SPEAKER (Mr P.B. Watson): At the moment we are debating the words to be deleted from the amendment; that is, to change the time limit of 10 years.

Dr K.D. HAMES: My apologies. I was not in the chamber when that amendment was moved. I guess my argument still stands. I am not so concerned with a five-year limit. However, having to review the directive every five years would be much more onerous than having to review it every 10 years. Someone who completes an advance health directive when he is 18 years old will find that it will be pretty much the same when he is 23. However, when that person is 33, things might be different. When that person is 43, and it has not been reviewed for 20 years, the doctor will have a different attitude. He will not have to take the same absolute view on the advance health directive as he would if it were current. I support putting in place a time limit. My preference, from discussions with the minister and others, is for 10 years, which is a reasonable period. I think I originally talked about five years, but I was persuaded, and I have become convinced, that 10 years is more reasonable. Having to do one every 10 years will not be a large burden on people. There will not be huge changes in technology in that time. However, people will be able to change the directive if they so choose. The time limit will provide the doctor with certainty that the directive is still current.

Mr J.B. D'ORAZIO: I support the view of the member for Roe, not because of the changes in technology, but because I have always worried about things that are prescriptive. Time can change the meaning of outcomes. Five years is of no consequence in one's early years, but when one reaches the age of 60, 70 or 80, 10 years is a helluva long time. Enormous physical changes may occur in a person's life between the ages of 60, 70 and 80. Therefore, I believe the 10-year period is excessive. Perhaps it should be split so that it is 10 years up to the age of 50, and five years after the age of 50, so that we do not create a problem for people who are older than 50.

The argument is not about changes in technology. The argument is about changes in people's expectations. I talked during the second reading debate about how a person in his 30s or 40s may find a certain level of pain acceptable, but when that person is 70 or 80 and cannot walk and is in a wheelchair, the situation may be very different, because the person will have different expectations. However, as I said at the time, many people in that situation would still say that they would rather be alive than dead. We need to be conscious of the fact that there are different phases in people's lives. A 10-year period is better than nothing. However, a shorter period will provide a greater opportunity for review. The time period should reflect the stage in a person's life when most of these decisions will be made. Most of these decisions will be made when people are in their later years, and the physical changes in their bodies are occurring more rapidly. That is why I support a five-year period. I believe it will provide a better outcome from this legislation.

Mr B.S. WYATT: I want to comment on what has just been said by my colleague the member for Ballajura. A lady has been calling my office about this bill. She is not a constituent of mine but lives in South Perth. She is in her early 70s, I guess. She has a real interest in getting this legislation through the Parliament, and she is across the issues very clearly. She has discussed with my electorate officer the 10-year time frame. Her firm view is that the older she gets, the more she knows what she wants. She likes the idea of keeping the time frame at 10 years as opposed to five years, because when she writes her living will she does not expect to change it. I want to put that on the record, because this lady has been very strong in her views in respect of the time frame. I support the amendment moved by the Minister for Health. I do not support the amendment moved on behalf of the member for Nedlands to reduce the time frame from 10 years to five years, on the basis of the feedback that I have received from this lady, who has been contacting my office on a regular basis on this legislation.

Mr M.P. WHITELY: I will not be supporting the reduction from 10 years to five years, for the simple reason that a living will is optional. A 10-year time frame is a long enough period to not be too burdensome. If a person is motivated enough to make an advance health directive in the first place, the person will be aware that his circumstances may change and will take active steps to alter his living will if the need arises. A person has the option of updating his living will as regularly as he likes - even on a monthly basis if that is his choice - if his circumstances change. Therefore, I will be supporting the minister's amendment.

Mr J.A. McGINTY: I thank particularly the last two speakers on this matter, and also, of course, the member for Maylands and the member for Dawesville, for their contributions. We should not forget that every citizen has the inherent right to self-determination and to choose freely how he or she wishes medical treatment to be administered. This Parliament should respect that right. This legislation is based on three principles: self-determination, freedom of choice and respect for the individual. This legislation was originally framed in a very simple way to allow people to fill out a form saying how they wish medical treatment to be applied when they are no longer capable of making those decisions. That will generally - although not exclusively - be elderly people at the end of their lives. It is an eminently reasonable proposition that the wishes of the person should be respected by doctors and medical staff, and also by this Parliament. A number of members have asked: will people be able to give full effect to their wishes if their advance health directive was written a long time ago? I think there is sufficient focus in this place on wanting to give full effect to the wishes of a person who has filled out an advance health directive. As the member for Dawesville has put it, during its first 10 years in operation - 10 years being a reasonable period - an advance health directive will be given full effect. After 10 years, an advance health directive may cease to have effect if the person's circumstances have changed significantly. If the person is now a different age -

Mr M.W. Trenorden: He might be 10 years older!

Mr J.A. McGINTY: The person might be 50 years older! That is the point. The medical technology might have changed dramatically. Built into this amendment is an attempt to encourage people to review their health care plan, knowing full well that it will be enforceable. All people will need to do is put a new signature and a new date on it, and it will run again for the next 10 years. However, if the advance health directive is more than 10 years old, it will not raise a presumption that it is invalid, but additional tests will need to be applied to make sure it is truly giving effect to the wishes of the individual. That is the reason I am happy to support this amendment. Five years is too tight a time frame, particularly for people who are elderly, such as in the example given by the member for Victoria Park. People who are elderly usually know what lies ahead for them, and they want to spell out the circumstances that they would like to come to pass. An advance health care plan will still be valid after 10 years, unless it fails the tests that are spelt out in the amendment. I ask members not to impose too great a burden and not to seek to make an advance health plan no longer operational if, for instance, five years have passed, or other conditions arise. We want to ensure that people will get the medical treatment that they have said they want. That is the principle that underpins this amendment. Ten years is an accommodation. It is a departure from what I would like. I would like a situation in which a person can fill out a form and say

how he wants to be treated, because that is very simple. However, I appreciate that some members have concerns about this matter. Therefore, we have had some discussions, and we have come up with this amendment. If we now water down this amendment even further and make it even more restrictive, it will fly in the face of what we are seeking to achieve by this legislation; that is, to respect a person's decision about how he or she wants to be treated when it comes to, principally, end-of-life medical decision making.

Amendment on the amendment put and negatived.

Dr E. CONSTABLE: The minister's amendment follows on from proposed section 110S(3). It will be difficult for anyone to know what this means because it is too general. It might cause some problems in some circumstances, particularly for members of the legal profession. Proposed subsection (3) states -

> A treatment decision in an advance health directive is taken to have been revoked if circumstances exist or have arisen that -
>
> (a) the maker of the directive did not anticipate at the time of making the directive . . .

Who is going to decide that? It continues -

> (b) would have caused the maker to change his or her mind about the treatment decision.

Who will know that?

Mr J.A. McGinty: The treating doctor.

Dr E. CONSTABLE: How will the doctor know? The doctor might not have met the patient before. Is the Minister for Health not asking a lot of the medical profession and of individual doctors in deciding this? Proposed subsection (4) of the minister's amendment makes the same wishy-washy statements and demands that a doctor make a judgment. Let us say that a doctor makes a judgment and the patient survives because of the doctor's treatment. If a dispute occurred 10 years later, the patient who was treated could say that he did not want to be treated because of the health directive he had written, but that the doctor had treated him anyway. Where would that leave the patient and the doctor? Where would that leave the patient's relatives if they argued the toss and said that the treatment the doctor provided was not stated in the directive? A relative of the patient who did not want to be treated could object to the treatment of the patient. This amendment is far too vague. I cannot understand where it is going. The minister is asking an awful lot of the medical profession to make up its mind on this matter at this time.

Dr K.D. HAMES: I would like to respond to those comments. It is asking a lot of a doctor who is looking after a patient. Suppose that 80 per cent of people do not make an advance health directive. Doctors would manage those patients in the normal course of events, as doctors have done for hundreds of years. They make decisions based on the circumstances presented by the patient. A doctor must weigh up a patient's medical problems and the chance of the treatment being successful. A doctor decides those matters on a daily basis when treating a patient, certainly in an emergency department and more specifically in an intensive care unit. An advance health directive allows a patient to have much more influence over the type of treatment that might be carried out. A patient who is suffering from cancer and pneumonia could clearly indicate in the advance health directive that he does not want to be put on a drip and be provided with antibiotics. If the patient was conscious, he could legally tell the doctor that he did not want that treatment. The advance health directive would allow a patient who is unconscious to inform the doctor that he does not want the treatment. That would apply 100 per cent for 10 years. If the patient presented 10 years and one month after the directive had been written, the doctor would be pretty certain that the wishes of the patient were still valid. However, if a person wrote a directive when he was 20 and had not bothered to update it, and presented to a doctor 40 years later at the age of 60, the doctor could quite rightly read the directive and determine that the directive expressed the feelings and gave a general indication of the direction that the patient would like the doctor to take. However, the doctor would not be bound by that because 40 years had passed. The doctor could apply his judgment regarding the patient's age and the current medical treatments that were available. The doctor would not be so bound by the patient's directive. The patient, who had not updated his directive, knowing that it expired after 10 years, would have to accept the doctor's decision, which is the current situation. The 40-year-old directive may be of some help to the doctor who is giving the treatment. The closer the directive to the 10-year mark, the better it will be for the doctor to determine the conviction of the document. Nevertheless, the doctor will do what he thinks is right. That is what doctors do now. Doctors will not be loaded with an increased burden. The directive would make it easier for a doctor to decide to not give a patient antibiotics in a particular case. If a patient wrote a directive 20 years ago asking to not be resuscitated at all costs because he would rather go quietly and easily, the doctor would feel more comfortable making a decision that he believed was right. However, he could not be prosecuted for

making a decision to go the other way because 10 years had elapsed. The doctor would not be in any difficulty at all. The doctor would make the best decision on behalf of the patient. The advance health directive would not have total power once that 10-year period had passed. That is why we shall encourage people to renew it every 10 years. If they do not, it remains a strong indication to the doctor of what the patient would have liked to happen.

Mr M.W. TRENORDEN: A circumstance might arise whereby a patient's advance health directive is more than 10 years old and the doctor is aware of a cure that was discovered only six months ago. The patient might be completely unaware of the treatment or only vaguely aware of it. These days we regularly hear of cures, or promises that cures will soon be developed, for conditions that were not treatable yesterday. Legally, where would that place the medical practitioner? I imagine that under proposed subsection 110S(3), the directive is understood to have been revoked if circumstances exist or have arisen that the maker of the directive did not anticipate at the time the directive was made.

Mr J.A. McGinty: That is the key provision.

Mr M.W. TRENORDEN: If the doctor thinks that a person can be cured, what does the doctor do?

Mr J.A. McGINTY: The member for Avon has correctly referred to the provision that speaks about an advance health directive not having effect if the circumstances have changed or circumstances exist that were not envisaged at the time the directive was made and which would have led the patient to change his mind if he knew the treatment was available. That could include a patient ending up in intensive care, in circumstances that were not envisaged, and a cure or a likely cure being available. It could include also a change in medical technology over the passage of time so that what was once incurable was curable. In those circumstances, regardless of the length of time involved, the treating doctor would be quite entitled to reach a conclusion - and would be legally protected if he did reach the conclusion in good faith - that the advance health directive was not intended to cover that situation. Therefore, the treating doctor would do what he could in those circumstances. That is not too difficult a proposition for someone to consider. As long as the doctor acts in good faith, he will be fully protected legally.

Dr K.D. Hames: While you are on your feet, I noticed your advisers speaking to you frequently during my speech. I wonder if they thought anything I said was incorrect.

Mr J.A. McGINTY: No. In fact they were commenting on the wisdom of the member for Dawesville.

Mrs J. HUGHES: The amendment to subclause (3) applies to an advance health directive that has existed for 10 years or more. If an advance health directive has existed for eight years, will subclause (3) still apply? I am concerned about an advance health directive that has been in existence for less than 10 years. I know of people whose health five years ago was much worse than it is now because of advances in health care. Had they made an advance health directive five years ago and something were to happen to them, would they still be able to revoke it?

Mr J.A. McGINTY: If I may put the member's mind at rest, subclause (3) essentially deals with changed circumstances that were not envisaged. The provision would come into effect the next day. For example, if I were to fill out an advance health directive that was intended to deal with when I became old and silly - members should not say anything - and had an accident that was not envisaged, which was treatable, the doctor would the next day be immediately entitled to invoke subclause (3). If the amendment that I have moved is carried, when an advance health directive is more than 10 years old the doctor would be entitled to take into account a range of other circumstances to come to the view that circumstances had changed. To put it in layman's language, after 10 years the full effects of the advance health directive will be somewhat watered down, whereas - this is not legally the case - there is a presumption before then that exactly what was written was intended for the first 10 years. After 10 years the doctor can come to the conclusion, based on the factors that are listed in the amendment, that the advance health directive is not to be followed because of those factors. The member for Dawesville used the phrase "watering down", which I think is the appropriate way to look at it in practical but not legal terms.

Mrs J. Hughes: I guess the determination of subclause (3) depends on this amendment.

Mr J.A. McGINTY: Yes, I think so.

Mrs J. Hughes: It only relates to anything after 10 years.

Mr J.A. McGINTY: Yes, but anything under 10 years, if there are changed circumstances -

Mrs J. Hughes: Is picked up somewhere else in the legislation.

Mr J.A. McGINTY: No, it is picked up in subclause (3), which we are seeking to amend by inserting this amendment as well. The existing bill deals with changed circumstances. This amendment then deals with changed circumstances after 10 years. Does that make sense?

Mrs J. Hughes: Yes, it is the determination of subclause (3). I will get my head around this, but until then I will take your word for it.

Dr K.D. Hames: The minister did not say that subclause (3) applies only after 10 years, did he?

Mr J.A. McGINTY: No, subclause (3) applies on the day that a person signs the advance health directive, if there are changed circumstances, but after 10 years an additional test can be applied, which relates to the length of time, the age of the person, the nature of medical treatment and things of that nature.

Dr E. CONSTABLE: I do not have the same rosy view of this as that of the minister and the member for Dawesville, because I can see that there could be circumstances in which a case might end up in the courts. I want the minister to give some examples of circumstances that he can see in which a doctor's actions could be challenged after the doctor had made up his mind and treated the person. Who could challenge the doctor's actions and what are some of the circumstances in which a doctor could be challenged after he had treated someone in such a way that it did not really fit with the advance health directive as the person had written it? It might be challenged by a relative or the person himself.

Mr J.A. McGINTY: I think the practical answer to the question is to be found on pages 24 and 25 of the bill, which relate to the legal protection that is offered to health professionals for the way in which they deal with a treatment decision. Part of that protection for health professionals is that, provided they act in good faith, there can be no successful challenge to the decision they make.

Dr E. Constable: As it relates to this clause, 10 and half years after someone had signed an advance health directive, a doctor could make some judgments that were in line with that advance health directive. However, for reasons that we have in front of us, it is quite plausible that the doctor could reach a different decision and not be liable to any sort of prosecution.

Mr J.A. McGINTY: If doctors were to be prosecuted, they would have a perfect defence; they would be protected. There would be no prosecution because of the defence that is available to them with the all-embracing scope of proposed section 110ZK, which essentially says that if a doctor looks at the advance health directive and the circumstances and in good faith comes to a particular conclusion, that is a complete defence.

Dr E. Constable: He could face circumstances in which he was challenged and had to defend his decision.

Mr J.A. McGINTY: I guess that is true of anything, but the nature of the defence that would be available to the doctor is to say that he did it in good faith and that his professional judgment pointed to a particular outcome.

Dr E. Constable: He could still end up in a court with lawyers taking over.

Mr J.A. McGINTY: As they can now.

Dr E. Constable: Yes, but he could.

Mr J.A. McGINTY: Yes, but the nature of the defence is considerably strengthened.

Dr E. Constable: That is partly what I am asking.

Mr J.A. McGINTY: I thought it was, because the member has raised this point a number of times with this bill. It goes very much to the defence that is provided. At the moment, I think it is true to say that a lot of greyness surrounds what charges could be laid under the Criminal Code or under common law.

Dr E. Constable: The reason I raise it is that I go back to Ian Taylor's bill. As I understood that bill, its central purpose was to provide protection for the medical profession, not only doctors but also nurses and others who deal with people at the final stages of their lives. I get the general impression that this bill is not designed to protect the medical profession.

Mr J.A. McGINTY: I think that impression is completely false.

Dr E. Constable: I need to be reassured that that is the case.

Mr J.A. McGINTY: I do not remember in detail the defences that were provided under Ian Taylor's bill back in the mid-1990s.

Dr E. Constable: It was the main thrust of the bill.

Mr J.A. McGINTY: This bill offers medical and health practitioners far more comprehensive protection than is currently available. It is to be found in proposed section 110ZK. Provided the health professional acts in good faith and looks at the relevant considerations, that health professional is protected in both criminal and civil law.

Dr E. Constable: Is there a definition of "good faith"?

Mr J.A. McGINTY: It is a well-understood legal concept.

Dr E. Constable: It was a serious question. You have legal training. Define it for me in the next one minute and 10 seconds.

Mr J.A. McGINTY: I thank the member for the invitation, but it is a well-understood issue; that is, people are not motivated by any other considerations, apply their mind to the issues in front of them in the way in which they should, apply their judgment and come to a decision. That is what is involved.

Dr E. Constable: That was 19 seconds - brilliant!

Dr G.G. JACOBS: The amendment refers to proposed subsection (3). As a medical practitioner, I consider this proposed section to be a minefield. I have problems with proposed section 110S(3), which reads -

> A treatment decision in an advance health directive is taken to have been revoked if circumstances exist or have arisen that -
>
> (a) the maker of the directive did not anticipate at the time of making the directive; and

That is indicative of the stage we have reached in trying to prescribe this. As a medical practitioner, how will I be able to tell that the maker of the directive did not anticipate something at the time of making the directive? It is an absolute minefield.

Mr J.A. McGinty: Surely you are capable of exercising professional judgment. It is not that hard.

Dr G.G. JACOBS: An advance health directive might refer to a vegetative stroke of the thrombotic variety; in other words, a blockage of the major artery in the brain. With the advent of technology, a procedure has been developed called thrombolysis, which dissolves clots. As the medical practitioner, I could say that the maker of the directive did not initially anticipate that I could administer thrombolysis, clear the clot and significantly reduce the effects of the stroke. Therefore, I could administer thrombolysis treatment, which would not be against the directive. As devil's advocate, I believe that the words "the maker of the directive did not anticipate at the time of making the directive" create a very complicated issue. As a treating practitioner, I could say about every case that I will not take any notice of the directive because the person did not anticipate at the time of making the directive all these other issues. As a result, one could call into question whether this bill will be an effective instrument. As a practitioner, I could say that the person did not anticipate that I could give him thrombolysis and reduce the effects of the stroke. He would not then have a major vegetative stroke; he would have a small stroke with a bit of expressive dysphasia. On that basis I could continue giving him treatment.

If the minister really thinks about how complicated this issue is, he will realise that it is too difficult to prescribe. The provision is not an effective instrument. Recognition of the difficulty is highlighted by that proposed subsection, which suggests that in every case I could say as a practitioner that the person did not anticipate; therefore, that leaves me an out, and I can continue to prescribe the treatments. That illustrates what a minefield the clause is. I do not believe it will work.

Dr K.D. HAMES: Far be it from me to argue with my colleague, but I would like to put an alternative concept. The member for Roe focused on proposed section 110S(3) but his comments in some ways relate to the whole issue of advance health directives, although he is using this clause to highlight that point. I will talk more about the whole issue rather than this proposed subsection, although, obviously, there is a connection. I could make an advance health directive to the effect that if I have a stroke and end up in a vegetative state, I do not want to be resuscitated. However, Dr Jacobs in the emergency department might say that the thrombolysis that is available today is very effective and there is a good chance I might end up with a mild hemiplegia, so it would be quite reasonable for him to administer that. The doctor would not face any consequences for doing that. The doctor might give me thrombolysis and I might end up with a dense hemiparises and expressive dysphasia - all the things I did not want - and then get pneumonia. The doctor could say, "If he had a severe stroke and did not want to live and now he has pneumonia, it is reasonable that I do not treat his pneumonia and that I let him die because that is what he said in his advance health directive." I would want that. If the doctor thinks he can save me and does save me, good on him. The out exists for him to make that decision in the advance health directive, even if it is less than 10 years old. Beyond 10 years he will have more scope, given that it might be 40 years since I made the directive. I might have done it when I was 20 and now I am 60. Even so, it provides the option of making that decision without impairment based on the doctor doing the right thing. If the doctor were wrong

and I ended up with a severe hemiparises and he had not let me die, I would be pretty unhappy because I might much rather have died than taken the risk of ending up like that, even though I might otherwise have survived and had something I could comfortably live with. At the end of the day, in the same way that I can say no to treatment for cancer now if I were to have it, and that is my right; it is also my right to say no, I do not want to take a risk.

Mr G.M. CASTRILLI: I am not a doctor, or a lawyer. If two doctors in this place cannot agree on the interpretation of proposed subsection 110S(3), we can imagine what two lawyers will do in court. The State Administrative Tribunal will take 10 years to settle a dispute. That is why this will not work. My two learned colleagues are both medical practitioners.

Dr K.D. Hames: It already works in many other places around the world.

Dr G.G. JACOBS: I refer again to the use of thrombolysis on the stroke patient. Whether I take notice of a directive that says, "If I have a stroke and end up in a vegetative state, I do not want any active treatment" is the issue all the way through this bill; that is, the minister is trying to prescribe something that I believe cannot provide a sensible directive for treating practitioners. As the treating practitioner, I might rule that the directive will stand, irrespective of the thrombolysis being available. I will not know the prognosis or the ultimate severity of the condition. As I have said in this place before, and I will be the first to admit it, prognostication is not an exact science.

What happens if I take the directive about the vegetative stroke and say, "That is what it says. I know there might be thrombolysis and I might be able to limit the sequelae complications of this disease by 90 per cent, but the directive says to let go, so I am clear to let him go." Does that constitute letting a patient go prematurely? Does it constitute premature death when I knew thrombolysis was perhaps available that the patient did not anticipate? I might take another view and say, "Hang on, the patient did not understand at the time of making the directive and did not anticipate that treating practitioners had thrombolysis to dissolve the stroke." We can do a CT scan and make sure that the stroke is not haemorrhagic, because if we give thrombolysis with a haemorrhagic stroke, we will really make the condition worse. However, if it is a blockage of an artery caused by a clot and we think we can dissolve that clot - we can diagnose that on a CT scan - we will give thrombolysis to dissolve the clot. However, the patient has said, "If I have a major stroke and I am in a vegetative state, let me go." Irrespective of the legal complications, should I have pulled out that card? Should I have used that? I am in a situation in which the directive has been written down, the patient is in a vegetative state after a stroke, and the patient wants me to let him or her go. That is the patient's directive. I am in the clear legally but my conscience may not be clear. However, does that action constitute allowing a patient to die prematurely? That is the dilemma. This bill tries to help the person by allowing him to revoke the directive, but in doing so I believe it has confused the issue. I say that as a treating medical practitioner. That is the dilemma with this bill and I do not believe there is any prescription that will overcome the problem.

Amendment put and passed.

Mr M.P. WHITELY: I have circulated an amendment. I move -

> Page 17, after line 5 - To insert -
>
> **110UA. Non-disclosure of unregistered advance health directive**
>
> (1) In this section -
>
> **"unregistered advance health directive"** means an advance health directive that is not registered in accordance with Section 110RA.
>
> (2) Subject to subsection (3), any person who does not disclose the existence of an unregistered advance health directive cannot be charged with any criminal offence resulting from that failure to disclose.
>
> (3) Subsection (2) does not apply to any health professional within the meaning of the *Civil Liability Act 2002* section 5PA, who is involved in providing treatment or other professional services to the patient.

I have moved this amendment because of concern about a scenario that was outlined by the Minister for Health on Tuesday last week. I will read from *Hansard*, because it outlines the scenario quite clearly. It states -

> A son brings his elderly mother to an emergency department after she has suffered a stroke. The mother is not competent to give directions about her treatment. However, she has made an advance health directive that states that she does not want to be given CPR or life-sustaining treatment in the event of a stroke. The son is aware of the advance health directive but does not advise the treating

> medical officer of the existence of the AHD or its contents. The question is has the son committed an offence. I believe the answer is yes.

The minister then went on to quote a section of the Criminal Code, but when he was asked by the member for Nedlands what the offence was in this case, the minister replied, "Criminal assault." The minister then went on to say that the son could be charged with assault and, "I think he should be charged if he behaves in such a dishonest way."

I agree with so much that the Minister for Health has put into this legislation, but I do not agree that in these circumstances a son should be charged with criminal assault. In these circumstances, the son would be charged with assault for not disclosing a document that he was not comfortable with or did not agree with. The most common situation in which this would arise is exactly that outlined by the Minister for Health, when a son fails to disclose the existence of an advance health directive in order to prolong the life of a beloved parent. This would be an act of omission, not an act of commission. It is designed to extend the life of a loved one. As a result of that, he is liable to prosecution for criminal assault. I think this is unnecessarily burdensome on the son - I am referring to the scenario painted by the Minister for Health, who referred to a son - who may not have been informed of the contents of the directive but may have been told by the mother that one existed. After looking at the directive, the son may have found that the mother did not want any active intervention. The son may have been distressed at the time and may have chosen not to disclose the existence of the advance health directive because he wanted to prolong the life of his mother.

As I stated earlier today, my preference was to have a compulsory register of advance health directives because I thought it protected three parties involved in this situation. It protected the patient's wishes and it gave a mechanism for informing treating doctors of the existence of an advance health directive. Otherwise the process is very hit and miss and slapdash, and places an obligation on family members, friends or relatives who are aware of its existence to inform the treating doctors. It is a very haphazard approach. Unfortunately, the compulsory register was not agreed to. Instead we have a voluntary register. I think if someone is to prepare an advance health directive, he not only has to protect his own rights but also has a responsibility to protect others who might be affected in this sort of situation. If there were a compulsory register, friends and family would also be protected. They would not be placed in this situation if they took steps to prolong the life of a loved one.

Mr J.A. McGINTY: I hope to persuade the member for Bassendean that his amendment is not necessary. When we initially had this discussion, I was somewhat taken aback that someone through fraudulent means could frustrate the wishes of the elderly dying relative and the intentions of this legislation. That is the level to which I reacted when the member put that proposition when we last debated this issue. This amendment may well have arisen through lack of a complete description of the current law that I gave last time. Again, I will work through it step by step. The example that I gave was of a son who puts his elderly mother into the emergency department following a stroke. She is not competent to give directions concerning her treatment but she has a valid advance health directive, which contains a direction not to give CPR or life-sustaining treatment in the event of a stroke. That was the hypothetical situation we spoke about. The son decides that he does not agree with his mother's advance health directive and so does not advise the treating medical staff of its existence. The treating doctor would need to get consent from somebody to apply medical treatment to her. Under the current law, that treatment would need to be authorised by the next of kin or the person responsible, who would be the son. Implicit in the answer that I gave the member last time is that the son did more than simply stand there with his hands in his pockets and say nothing. He would then be asked by the treating doctor to give consent to the medical treatment. That is a different factual situation from what the member's amendment is targeting, although it is caught by his amendment. Section 7 of the Criminal Code states -

> Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence

In other words, if the son procured a doctor to perform an operation on his mother, which would be an assault because it was done without consent, the son is guilty of a criminal offence. Mere silence is not sufficient. I may have given the member the impression when we were last speaking that mere silence was sufficient to constitute a criminal offence. In the answer that I gave, I took the next step in the son's silence for the doctor to say, "There is no health directive. You're the person responsible, the next of kin. Do you consent to the treatment?" Given that they were his wishes and desires, he would have consented to the treatment against the express wishes of his mother as contained in the advance health directive. The further advice elaborating on that hypothetical scenario is that assuming the son was then asked to consent to the medical treatment takes it out of the realm of being the hypothetical of someone just standing there and saying nothing. It takes it that step further to where the son behaves fraudulently, certainly dishonestly, in hiding the fact that his mother has an advance

health directive and then gives an instruction to the doctor contrary to the advance health directive. That situation could then leave the son liable to criminal prosecution. Short of him then consenting to the medical treatment, which would have been automatic in the hypothetical we are talking about, it would be hard to take his mere silence as being an act procuring the commission of a criminal offence by the doctor. That is a more complete description of the current law as I am advised than I gave to the house when we were last discussing this matter.

Mr M.P. WHITELY: What would happen if the son was completely silent?

Mr J.A. McGinty: Mere silence.

Mr M.P. WHITELY: The minister said last Tuesday that mere silence would lead to a charge of criminal assault. If the son was completely silent and said nothing, just brought his mum in and did not express an opinion as to the medical treatment, what would happen then?

Mr J.A. McGINTY: I apologise for having been brief in my explanation last time, because I took it that he would naturally be asked. I will give a minor variation on someone being asked to consent to the medical treatment. Consent must be forthcoming from somebody. If there is nobody from whom consent can be obtained before the medical treatment, the treating medical practitioner has emergency powers to provide medical care in an emergency situation. I will change the hypothetical situation a little. The son brings his mother to the emergency department. He knows that she has clearly expressed wishes through an advance health directive not to be resuscitated. He is silent about the existence of a health directive and leaves the hospital. The doctors have nobody to get consent from, so they then proceed to resuscitate her using the emergency powers. That mere silence in those circumstances, without that bit more, which was the giving of consent, would not be sufficient to found a criminal charge.

Mr M.P. Whitely: What if he's there with a sister, for instance, and the sister's unaware of the situation? What if the sister gives the authority and the son remains silent again?

Mr J.A. McGINTY: Mere silence again.

Mr M.P. Whitely: What you're saying is that a sin of omission rather than commission in this case would not lead to a charge of criminal assault.

Mr J.A. McGINTY: Yes, because I presume from the discussion that we had last time that he would have then given consent because he was standing there with his mother. The doctor can invoke the emergency power to administer medical treatment only in the absence of someone being able to give consent. If the mother is unconscious and there are no relatives around, the doctor can intervene and provide the emergency treatment. To take the other example, if there was positive and dishonest action to defeat the expressed wishes in an unregistered advance health directive to achieve the exact opposite, we would have no sympathy with that.

Mr M.P. Whitely: I actually think that we should extend it to omission as well. I am pleased to hear that it does not act in the sins of omission, but we do have a difference on this.

Mr J.A. McGINTY: Let us assume that we are at the stage, which I think is caught by the member's proposed amendment, at which the son actually behaves dishonestly by telling the doctor something false in order to induce the doctor to do something, which the doctor would not have done had the doctor known of the existence of the health directive and its contents. I find it hard to understand that the member would mount an argument to say that that sort of dishonesty to achieve the exact opposite intent that the law provided for should not in some way be punished.

Mr M.P. Whitely: Your argument sounds reasonable, but we're actually talking about a son refusing to disclose information about his parent's wishes in order to keep his parent alive. I just can't imagine if we got to a situation in which we were faced with prosecuting under those circumstances that there would be any enthusiasm from anybody to have the son prosecuted.

Mr J.A. McGINTY: To that point, I agree with the member.

Mr M.P. Whitely: Then it's a bad law.

Mr J.A. McGINTY: If it is purely him remaining silent. Once he takes the positive step to deceive - to cause an assault to take place and to cause his mother's wishes to be frustrated if she had a legal expectation that they would be honoured - rather than the simple step of omission, that is when he oversteps the mark completely. In those circumstances he should face some sanction for his actions. The simple case of omission to inform would not be enough to constitute an inducement. It still needs to be an act to procure, and mere silence in itself would not be enough to procure.

Mr M.P. Whitely: I understand that. You are correcting the information from last week; I understand that. So sins of omission will not lead to criminal prosecution. However, we still have a point of difference.

Mr J.A. McGINTY: Yes.

Mr R.C. KUCERA: I oppose the amendment, although I have some sympathy for the member for Bassendean. I will come at this issue from a slightly different angle and take up the point raised by the Minister for Health. When it comes to end of life, there is nothing better for bringing out the very worst in people than families, wills etc. No criminal prosecution arising from any act that is done by the son whom we are talking about is taking us down a path that is very different from what this legislation is about. I was involved in many prosecutions over many years that involved keeping a person alive because of a time clause in a will, for instance. This amendment would preclude prosecution of any person when there was clear dishonesty. If it involves merely an omission, as the member for Bassendean has said, the Minister for Health has made it quite clear that that could be dealt with very simply under the legislation. However, to introduce an amendment that precludes prosecution is fraught with danger. There was a news item tonight on *The 7.30 Report* about a person with dementia being placed in an aged care home while the son sold off the entire holdings of the father to preclude the sister and other members of the family from getting any benefit from that estate. No doubt the police will deal with that. My difficulty here is that, if this amendment is agreed to, any act of dishonesty would be precluded from the legislation. Even though I have sympathy for the point raised by the member for Bassendean, his amendment is fraught with danger.

Dr K.D. HAMES: The member for Bassendean had me worried. In the first third of the minister's response I thought he would change his mind. I am pleased that he did not. I promised the minister that I would keep an open mind on this matter. However, I am sorry, because the minister has not convinced me. I think it may be the difference between the lawyer and the doctor, and the minister's view is that the law is right and must be followed absolutely. To me this involves a sin of love. I do not think the average person in the street would accept a son being prosecuted for agreeing to his mother being treated even if she did not want to. She may have written an advance health directive that gave direction. However, he may keep that in his pocket and tell nobody about it because he loves his mum and wants to keep her alive. That is what the advance health directive is for and it is why I support her ability to register it. If she thinks for one second that her son may not follow her direction because he loves her and does not want her to go, she should register it. I will register mine just in case.

Mr M. McGowan: Maybe your kids do not love you enough!

Dr K.D. HAMES: Maybe not. That is why I had six, remember. I had six in the hope that one of them will love me enough to try to keep me alive. If I gave my advance health directive to my daughter and she did not want me to die and so did not tell the doctor about it, and the doctor said that he wanted to save me and she said, "Save him", I would not want her charged, even if I did not want her to do that. To make sure that she cannot do that, I will register it. That is the value of having registration. I do not agree with sins of love being prosecuted through a criminal court in the same way as an assault. I support the amendment and I think all other members should do the same.

Mr G.M. CASTRILLI: I also have sympathy for the amendment of the member for Bassendean and I also agree with the member for Dawesville. An act of love is now being called a criminal assault. That is the strangest thing I have heard in my life. For some people these issues are not black and white. Some people will find it extremely difficult to have to make a decision when their dads or their mums are lying in hospital. I would do whatever I possibly could to save them, even against their will, if I thought there was the slightest chance of saving them. A person who delivers his or her mum to hospital and then leaves without saying anything is doing the same thing. I am not a lawyer. I am using commonsense. Whether or not the person stays in the hospital, it is still an omission. How can we prosecute someone and call it a criminal assault if that person commits an act of love? We would save all of the heartache if the directive had to be registered.

Mrs J. HUGHES: I also support the amendment by the member for Bassendean. As a mother, I would never want my children prosecuted for wanting me to remain with them, even if there was an advance health directive in the bottom drawer. It is strange that we are talking about prosecution of a loved one. It would be very easy when making a directive to say that it should be followed through with. However, when it happens and the child is 24 or 25 years old, it will be much harder to follow through with. It could involve a stroke or one of the conditions referred to by the member for Roe and there could be a drug that could just possibly change the result. Proposed section 105S(3) could then be invoked and we could say that it was something that was not foreseen. We will have that in place if the health directive is brought forward; however, if it is not brought forward, that proposed section will not come into play. Therefore, I have some real concerns about someone not being able to

invoke proposed subsection (3) because he or she has omitted to bring the health directive forward out of love for the ill person. I am very concerned that criminal charges could be laid against a young person or even a distraught mother in those circumstances and I will support the amendment.

Mr J.A. McGINTY: Let me attempt to persuade members who are anti-euthanasia that this is in fact a euthanasia provision. If a parent had made an advance health directive that he or she wished to be artificially hydrated and nurtured, but the son wanted to get his hands on the inheritance and refused that treatment for the parent which resulted in premature death, he would be covered by this proposed amendment. The amendment very clearly states that anyone who does not disclose the existence of an unregistered advance health directive cannot be charged with any criminal offence resulting from that failure to disclose.

Ms K. Hodson-Thomas: You are talking about a person who says that the patient should not be hydrated. What if the person says that in the knowledge that there is no advance health directive? This is referring to someone who presents in an emergency department, or wherever, and knows that there is an advance health directive but fails to disclose it. The member for Dawesville said that it is a sin of love. If I understand what the minister is saying, if the son knows that his mother has made advance health directive that says that she wishes to be hydrated, and the son does not insist on hydration, the son is most likely causing an assault. The minister is suggesting that this amendment will allow such a person to slip through and not be charged.

Mr J.A. McGINTY: Yes. That is the problem. To put it simply, it cuts both ways. It cuts in the way of someone who wants to save his mother. It also cuts in the way of someone who wants to end the life of his mother. If the mother has clearly expressed her wishes, and the son dishonestly cuts across those wishes, it can be positive or negative. It can delay the death, or it can bring on an early death. That is the problem. At an emotional level, there is some attraction in the argument that an act of love should not be a criminal offence. An act of love is currently a criminal offence. If a man's spouse has a terminal disease and is living a very painful life, and he murders her, that is a criminal offence. There was a case only last year, if my memory serves me correctly, of a mercy killing. That was an act of love in the eyes of the person who did it. Nonetheless he was charged with murder, and so he should have been.

Dr K.D. Hames: But surely that is an active act. This is an act of not allowing the doctors to do what they would normally do in their treatment of a patient. It is not forcing the doctors to do anything that they would not otherwise do for the patient.

Mr J.A. McGINTY: I simply make the point that it cuts both ways. We are not talking about mere silence. We are talking about a person who has behaved dishonestly by taking the positive step of frustrating the will of a person who has executed a legal document and made it clear how he or she wishes to be treated. We are talking about a person who has done the opposite of what the person who has made the living will wants to have done. As I have said, let us not get too caught up in the notion of an act of love, because a mercy killing, or euthanasia, is exactly that. Let us not go too far down that path.

Mr G.M. Castrilli: If the health directive was registered, and there was no grey area, because the doctor could just read it and know what the wishes of the patient were, how would that affect what the minister is talking about?

Mr J.A. McGINTY: If it was registered, the doctors would have access to it. I think this is the reason that the member for Bassendean's amendment relates only to an unregistered advance health directive. If the advance health directive was registered, we could presume that the doctors would have access to it.

Mr G.M. Castrilli: That would prevent all these problems.

Mr J.A. McGINTY: It should do. However, registration is voluntary. I would like to make some further points, but I will come back to them in a moment.

Mr M.P. WHITELY: I hear what the minister is saying. In my original draft, on advice from the Clerks, proposed subsection (2) read that the person could not be charged with any criminal offence "for any failure to follow the directions contained in the advance health directive, where those directions were for the discontinuance or non-application of any life-sustaining measure". That would effectively make it cut only one way. I have no objection to putting those words back into the amendment. The member for Dawesville has indicated that he thinks that is unnecessary, so I will not do that now. However, I would like to hear from the member for Dawesville why he thinks that is unnecessary. I am certainly happy to make sure that we have a mechanism that will make it cut only one way.

Dr K.D. HAMES: I think the minister is drawing an extremely long bow in saying that he believes -

Mr J.B. D'Orazio: Exactly.

Dr K.D. HAMES: I thank the member for Ballajura. The majority of people will not make an advance health directive. Hopefully a lot of people will, but the reality is that most people will not. That means that doctors will treat them as they normally treat people. If people make an advance health directive, it will be for a particular reason. They may be worried that they will reach a stage in their lives where they are in a vegetative state, and they do not want their life to continue in that way. Ninety-nine per cent of people will make an advance health directive that says that they do not want medical treatment in certain circumstances. However, some people will not be like that. They will want every life-sustaining treatment that can be given to them. If the son keeps the directive in his pocket and does not tell the doctors about it, because he is keen to have his mother die soon, the doctors will still do everything they can to save that patient in the absence of an advance health directive. The only time that may not be the case is if the person is dying of some terminal illness and says, "Even though I am dying of a terminal illness, I still want you to do everything possible, no matter what." Perhaps in that case the doctors will not continue with treatment. However, that is not euthanasia. That is not actively taking the life of the patient. The only things the doctors can stop are a drip or a nasal gastric tube that is artificially providing food and water to the patient. The ordinary feeding of a patient, even if the patient is not competent to be fed, would continue regardless. The person is already dying. Therefore, it is not euthanasia. By withholding the document, the son or daughter is allowing the person to die, when otherwise the doctor could save the patient, against the patient's wishes. If a person has an advance health directive, so be it. The doctor would abide by the person's wishes. However, if the son withholds the directive, that is not euthanasia. That is not actively taking a person's life - which is what euthanasia is. Therefore, the minister is drawing a very long bow. Allowing a parent to die rather than saving the parent is not euthanasia to me.

Mr J.A. McGINTY: I will state a couple of reasons that I oppose the amendment moved by the member for Bassendean. The first and most important reason is that it promotes dishonesty. I am not aware of any laws of this Parliament that say that a person can behave in a blatantly dishonest way, and we will turn a blind eye to it. That is a very important principle that we need to come to grips with. The member for Bassendean is saying that we should put to one side the mere silence of not disclosing the existence of an advance health directive. We are talking about the hypothetical example of a person who has taken positive and dishonest steps to frustrate this legislation and the wishes of the mother. I urge this house to think long and hard about carrying an amendment that would say dishonesty is okay. That is what the amendment says. It has been dressed up as an act of love, and various other words that have been imposed upon it. However, when we strip it of everything, it comes down to saying that we think that to behave in a dishonest way - I would say in a fraudulent way - is okay.

Mr M.P. Whitely: That is taking a practical approach to it.

Mr J.A. McGINTY: It is dangerous for this Parliament to be inserting an amendment that says dishonesty is okay. What type of love does someone have for another person if they say, "Bugger your views, intentions and wishes"?

Dr K.D. Hames: They are saying that they want their loved one to live.

Mr J.A. McGINTY: I would not have thought so. If they loved someone, they would go out of their way to honour the person's wishes and intentions.

Dr K.D. Hames: What if your son did not want you to die? You should have registered. That is your choice.

Ms K. Hodson-Thomas: It is about people's emotions at a time when they do not want their parent or child to die.

Mr J.A. McGINTY: I understand that.

Ms K. Hodson-Thomas: Sometimes people cannot be as pragmatic as you are standing here before us.

Mr J.A. McGINTY: My second point touches on that issue. The Director of Public Prosecutions is given prosecution guidelines that require the DPP to look at all the circumstances. In a routine case, he would not prosecute. An extraordinary case would be required for the DPP to prosecute. The DPP would prosecute if the person who made out the advance health directive was really annoyed at the person who refused to implement it and gave instructions contrary to the patient's express wishes. The patient might go to the police and lodge a complaint. It is only when that level of dishonesty is involved that the DPP would prosecute.

Mr M.P. Whitely: Could a third party who was witness to the directive lodge a complaint?

Mr J.A. McGINTY: There would need to be evidence, ultimately. Even if the evidence were presented, the DPP would decide whether the prosecution was in the public's interest.

Mr M.P. Whitely: What if a mother came out of a coma and asked why she was alive despite having given explicit instructions about her treatment? Her son Johnny might have known about it but he might tell his mum that he loves her and did not want her to die. The mother might not want to prosecute her son, but the directive could have been written in front of witnesses.

Mr J.A. McGINTY: So long as there is sufficient evidence, the DPP would judge whether it was in the public interest for that prosecution to proceed. I suspect that it would take more for the DPP to come to that conclusion than the mere hypothetical example that the member has given. I have answered the question of whether a criminal charge could apply. Whether the DPP would prosecute the case is another matter. I gave an example earlier of a case last year involving a mercy killing. The jury acquitted the person who had been charged for the very reasons we have been discussing. It was seen as an act of love. The man murdered his wife and was found not guilty because that is the way jurors handle these matters more often than not. A case of that nature would be influential upon the DPP. The three principles upon which this legislation is founded are self-determination, freedom of choice and respect for the individual. This amendment cuts across all those principles.

Mr M.W. TRENORDEN: I would have liked to have been there when the Minister for Health trekked down the road to Damascus. I have not seen the minister like this before. Last week he accepted some amendments and tonight he has again accepted some amendments. Either he went a long way down the road to Damascus or something from the minister's boat fell on his head on the weekend. Either way, it is good to see because it provides for a better debate.

I will support the minister. However, I will also put forward a few points that the member for Bassendean has been raising. I cannot totally agree with the definition. Legally I agree with it regarding an individual. However, the reality is that individuals are immersed in a family, and that cannot be forgotten. A few members and I have been involved in a family crisis situation. When families get together in a crisis - one week everything was going well and the next week it was a disaster because mum, dad, a child or whoever had been hit by a crisis - the reality is that not everyone thinks straight. I support the minister, but I am putting some of the arguments of the member for Bassendean. I have been with a family in crisis on at least two occasions. Given a different set of circumstances, those people would have made different decisions. I was pleased to hear the minister say a few moments ago that maybe - he cannot guarantee it - the Director of Public Prosecutions would not prosecute a person who breaches a health directive. In my situation, I had to make a decision about whether my mother would have an operation on her brain. The majority of the family said she should have the operation and the minority said that she should not. It was a lineball call for everyone. Even if she had made an advance health directive, the majority of the family might have said that they did not care about the law or about anything else but my mother. That is the type of thing that happens in meetings involving a family in crisis. I can guarantee it because it happened in my own family.

Dr K.D. Hames: What happened?

Mr M.W. TRENORDEN: She had the operation and lived a year longer than she should have in absolute misery. Those circumstances will happen. I want the minister to make it very clear that we are talking about people who are not in a position to make absolutely clear and sensible decisions. People get emotional and it is full-on. I hope that the minister does not want to turn those types of people into criminals.

Mr J.A. McGinty: No.

Mr M.W. TRENORDEN: Families who make a decision in half an hour or an hour will not be concerned about the law because they are dealing with a mother or a father.

Mr J.A. McGinty: It is so opposed to public policy that people would be prosecuted for decisions made in the heat of the moment because of family issues. In my view, it would be against public policy to prosecute them in those circumstances, notwithstanding that they have done the wrong thing. However, if they are doing it to get easier access to a family inheritance or they have an ulterior motive, which would be covered by this amendment, that is where it goes wrong.

Mr M.W. TRENORDEN: That is the problem with this place. Each time we pass legislation, no matter how good our intention is, we affect people. That is a fact of life. I will vote for the bill.

Dr K.D. Hames: Why?

Mr M.W. TRENORDEN: I believe that very few people will take this option. When people ask me about it - very few will - I will advise them definitely to not do it. A range of constituents in my electorate want to have this option.

Several members interjected.

Mr M.W. TRENORDEN: I do not want to debate each member in the chamber. I will support the bill because a small number of people want to take this option. However, I think people would be lunatics to actually do it.

Dr J.M. EDWARDS: I apologise that I missed the beginning of the debate when the member for Bassendean moved the amendment. I welcome to the public gallery members of the John Forrest Senior High School Parents and Citizens Association.

Could proposed subsection 110UA(2) refer to a person who had been appointed an enduring guardian? If it does, I would have grave concerns.

Mr J.A. McGinty: It could be an enduring guardian.

Dr J.M. EDWARDS: That is a big problem.

Mr M.P. WHITELY: If the minister or any member's vote will be influenced by the fact that the amendment is not specific enough regarding the action being motivated by sustaining a life rather than ending a person's life, I am happy to move an amendment on the amendment to deal with it. If any member has a problem with that, he or she should signal it now and we will alter the amendment.

Dr K.D. Hames: I have the same concerns as the member for Bassendean. I do not want any of my family being prosecuted for not saying that I have an advance health directive; but if I have an enduring guardian, it is the enduring guardian's responsibility and job.

Mr M.P. WHITELY: I ask a question about the role of enduring guardians that might clarify the position. How active are enduring guardians in the process of setting up an advance health directive? Can enduring guardians be nominated without their knowledge, or do they need to sign the directive to acknowledge that they have this authority?

Mr J.A. McGinty: They have to accept it in writing.

Mr M.P. WHITELY: In that case I would be happy to move an amendment on my amendment that would exclude enduring guardians from the provision because they would have been conscious of the process. I do not know if that will change anyone's attitude, but I am happy to move a further amendment along those lines.

Dr K.D. HAMES: I hope that the member for Bassendean will, because I hope to convince the member for Maylands that the concept of the amendment that the member for Bassendean has moved is the right one. The member for Maylands has quite rightly pointed out that she would be concerned if the proposed subsection covered an enduring power of attorney, and I share that concern. I do not intend to speak on this matter again, but it is a pity that everyone who will vote on this is not here. What tends to happen is that people walk into the chamber, without any knowledge of what has been said, and they move to whatever side they like. Sometimes that is an advantage - for me included - and at other times it is a disadvantage.

Mr M.W. Trenorden: Now would probably be a good time to adjourn the house because of that argument.

Mr J.A. McGinty: It is a bit like a dog's breakfast at the moment.

Dr K.D. HAMES: It is getting a bit like that. The member spoke of supporting the legislation. I agree with him and have been supporting it all along; in fact, I have supported every clause so far. However, I am hoping to convince him and others. I ask him to think of his child. All members must think about the impact it would have if they made an advance health directive and gave it to one of their children, who kept it in a pocket, and they then died and that child was charged under the Criminal Code for assault for giving permission for the parent to have a procedure to save their life. They must think about whether they would do that and whether they would be happy with such an outcome. Although it may not be the outcome, it is the potential outcome that the member for Bassendean wants to prevent. He wants to stop a child or parent being charged with assault because they did not want to disclose an advance health directive that stated to not let a person live.

Mr J.B. D'ORAZIO: Maybe it is my ethnic upbringing, but I have a great problem with the ability to charge somebody with such a criminal offence. I think back to when my mother was alive and what my brother did to try to save her. To try to save her, he took her to just about every person in Western Australia who dealt with green tea, herbs, willow bark from Timbuktu and the like. He would have done that whether there was a living will, an advance health directive or whatever one wants to call it. I think that I would have done it too. I would hate to think that he or I would be charged for acting out of our absolute love for our mother and father by trying to keep them alive because they were dear to us. I would hate to think that we would have insult added to injury by not only losing them but also having to face a criminal charge for something that we did that we thought was our responsibility. That would be rich. Even having legislation that would allow for that possibility is a problem. I understand the Minister for Health's point of view about non-disclosure being used on the other side

of the equation. However, when it is used on the other side of the equation, the cooperation of the doctor is needed because if the doctor is not told of a written directive, the doctor must still make a decision about treating the patient. This is not about euthanasia, as was said by those who oppose this amendment. It is important that we protect those immediate family members who do things at a moment of great stress for the right reasons. The Minister for Health told me that those people would not be charged, but after the past six months I am not sure about anything that bureaucrats do. I have really strong sympathies with this amendment, especially coming from my background. I think that many ethnic people in the community would be of the same view. As I said when we had this discussion at our branch meetings, ethnic people are absolutely adamant in their opposition to anything like this legislation being in place. The Minister for Health is telling me that a person has discretion when making a directive, but the onus is still on that person's immediate family to make the decision when the time comes. If I were in that situation again, I am certain I would do everything to save my mother. In our case, we did not tell our mother that she had cancer; we did not want her to know because we thought that she would have dropped her bundle and given up. We did not want her to give up. Those are the sorts of things that family members do. I think my brother is one of the greatest people in the world. What he did for my mother in her last hours was unbelievable. He did far more than I would probably have ever done. I would hate to see him being charged because, under the minister's scenario, our mother had made an advance health directive. I would find passing such a stupid law unforgivable and, more importantly, so would the whole community.

Mr J.A. McGINTY: I think we have probably reached a stage in this debate at which we could benefit from some reflection on the best way to tackle this issue.

Debate adjourned, on motion by **Mr J.A. McGinty (Minister for Health)**.