

Mr Jim McGinty; Dr Kim Hames; Dr Janet Woollard; Dr Graham Jacobs; Ms Jaye Radisich; Ms Katie Hodson-Thomas; Deputy Speaker; Dr Judy Edwards; Mr Martin Whitely; Acting Speaker; Mr Bob Kucera; Dr Elizabeth Constable

ACTS AMENDMENT (ADVANCE HEALTH CARE PLANNING) BILL 2006

Consideration in Detail

Resumed from 31 August.

Clause 11: Parts 9A to 9D inserted -

Debate was adjourned after the clause had been amended.

Mr J.A. McGINTY: I move -

Page 14, lines 25 to 27 - To delete the lines and substitute -

- (c) the signature referred to in paragraph (b) is witnessed by 2 persons -
 - (i) both of whom are authorised by law to take declarations; or
 - (ii) of whom -
 - (I) one is authorised by law to take declarations; and
 - (II) the other has the qualifications specified in subsection (2);
- and

The amendment relates to the witnessing of an advance health directive. The government has sought to carry forward the same witnessing requirements that apply to an enduring power of attorney and an enduring power of guardianship, which was agreed to when this matter was last considered in the chamber. One issue that was raised in the early stages of debate on the legislation was the need to introduce a greater degree of formality. The proposed standard witnessing procedure is that an advance health directive will be required to be witnessed by two people, one of whom must be authorised by law to take declarations; that is, a person who is authorised to take declarations under the Oaths, Affidavits and Statutory Declarations Act. Generally speaking, that is a professional person, if I can loosely refer to them as such. A raft of professional people would fit into that description, including public servants, doctors, schoolteachers, chemists and the like. One of the witnesses must be a person who is authorised by law to take declarations and the other must be an adult person. That will in part pick up on the issues raised during the second reading debate, when a greater degree of formality was requested by a number of members. I did not want to make the witnessing requirements so onerous as to deter people from making advance health directives. The amendment is an accommodation of the wishes of many members of the chamber and it seeks to achieve those two objectives: a greater degree of formality, but not to be so onerous as to deter. That is the background to the amendment and I urge members to support it.

Dr K.D. HAMES: I commented on this issue when we last debated the bill, but it was so long ago that I will repeat them because we will discuss them again to some degree when we debate the amendments proposed by the member for Swan Hills. My view is that the original legislation was inadequate. It simply would have allowed two people over the age of 18 to witness an advance health directive. I thought that was totally inadequate. It would have allowed two young people, sitting around having a beer, to think that they could make a health directive, witness each other's document and it would then be a legal document. At that stage I supported the concept that a medical practitioner should be one of the signatories to a health directive. In further discussions with the minister on the matter, he indicated that he was not prepared to support such a change because he felt that it would be an impediment to people who wanted to prepare a health directive, and that he would strongly oppose such a proposal. I then discussed an alternative with the minister and we came to an agreement. I have stated a few times what I thought the agreement was. The minister has told me privately that he is happy with the arrangement. However, I would like the minister to stand and put on the record his view of the arrangement we have come to. My view of the arrangement is that, first, we would do what the minister is seeking to do through his amendment; that is, require that one of the witnesses must be someone who is authorised under the act to take declarations. That means that it will take more thought and effort than just two people sitting around having a beer and thinking they can make a health directive. A person will have to physically go somewhere and find someone who is authorised to be a witness.

Secondly, I understood that the minister would prepare a package that would be available, possibly through the offices of members of Parliament and perhaps also through the surgeries of general practitioners. The documentation would contain a strong recommendation that people who wish to make a health directive should seek the views of a medical practitioner. It would also contain examples of similar declarations, such as those presented by the member for Maylands, which I think was from the United States, and by the member of Nedlands, which I think was from either Canada or the United States. The document presented by the member

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for Nedlands included examples of the types of medical conditions that people might have. There could be an option to tick a box, and certainly to give direction about the conditions that people might want to include in a health directive. That was a reasonable compromise that would have provided a strong recommendation that people see a doctor, but that would still give them clear advice on what the document should look like. I particularly liked the document that was presented by the member for Maylands. If I had to make a health directive, I think I would use that one.

As a former general practitioner, I know what it is like. Sometimes doctors in a practice have to sign two documents for the guardianship of an elderly patient. A patient might want a doctor's help to make a health directive when the doctor's waiting room is full and appointments have been scheduled for every 10 or 15 minutes and he is flat out. There are many different health care problems that could arise and it would take ages for a doctor to detail for a patient all the scenarios that could possibly occur. It would be extremely difficult for a GP to provide that advice and witness the health directive. Patients could go to a GP and seek advice about a health directive on a number of occasions, but they would not need to see the GP to witness the directive.

Mr J.A. McGINTY: For the sake of the record, I confirm the accuracy of that which the member for Dawesville has outlined; that is, the outcome of the discussion between the member and me. I give a commitment that the government, on the passage of this legislation, will undertake to implement each of those components. The first component, as the member has rightly said, is to strengthen the witnessing requirements. As is sought to be done by the amendment, one of the witnesses will be required to be a person who is authorised by law to take declarations. Secondly, perhaps in the regulations, but certainly administratively, we will undertake to make a package of information available.

I think the package would be appropriately available in all public hospitals, doctors' surgeries, offices of members of Parliament and perhaps even significantly wider than that, including community health centres, Silver Chain nursing services and organisations of that nature. This information would be available in a packaged form. The package would strongly recommend that people seek medical advice before filling out an advance health planning document. We would make available to people a pro forma or a document which could form the basis of an advance health care plan for an individual to sign. Following the passage of the legislation, we would draw up the content of that following fairly widespread discussion with interested stakeholders. I am thinking of Palliative Care Australia and other organisations of that nature which can provide advice. I will certainly take the two examples that have been given by the member for Maylands and the member for Nedlands during the course of this debate to form the basis of that consultation.

Ms S.E. Walker: I would like to correct the member for Dawesville. The University of Toronto Joint Centre for Bioethics package advised people to see a doctor and a lawyer, which would be more expensive, because of the consequences that would flow. I can give the minister's advisers a copy of the report. The minister wanted to make the process easier. This was only a recommendation, because of the legal consequences that might flow. I do not know, because we have not seen the detail, what legal consequences would flow from this legislation.

Mr J.A. McGINTY: I have a completely open mind and would welcome input into what should constitute part of this package. If there are legal issues, the package might well contain a recommendation to seek legal advice or even contain some advice from the government on the legal ramifications of an advance health directive. The legal impact of an advance health directive can be fairly concisely stated, subject to this legislation going through, in what both the common law and the statutory form would be. I have a very open mind and I want to do this well. I want to make sure that we get all the input from everyone who has an interest to make sure that it is made very easy for people to be able to go through and tick a box, if need be, so that we can really empower people to make their own decisions in a very simple form.

Ms S.E. Walker: It would put their mind at rest.

Mr J.A. McGINTY: Yes. If it can be done in a way that poses all the questions, so that people can tick a box to say that they mean this and not that, and if that is informed by medical opinion, I believe that is the best way to proceed. I certainly give an undertaking to do that. The additional matter that I think we also discussed was the importance of a significant public education campaign around this whole issue, which I guess relates back to the package question. I certainly give the undertaking that, on the passage of this bill, I will ensure that each of those matters is done in consequence of this legislation.

Dr J.M. WOOLLARD: I believe this is a good amendment because the Minister for Health is saying that a person will be able to take declarations. The first part refers to a person being authorised to take declarations. The amendment also refers to having qualifications specified in subclause (2). The minister has referred to the package and the directions that would be issued following the publication of the regulations. I am wondering why the minister is focusing on a medical practitioner rather than an appropriately qualified or a qualified health

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professional. I ask that the minister give consideration to the terminology “a qualified health professional” because of the need for professional expertise in the area and funding arrangements.

Mr J.A. McGinty: I agree with that point. Many people, particularly the elderly, might well feel very comfortable with getting advice from a Silver Chain nurse who has attended to them for years. It may well be that that is the best source of advice for a person, because the nurse is used to dealing with end-of-life decision making and is aware of the nursing and medical consequences and what is likely to happen. By way of extension to what I said in response to the member for Dawesville, I would happily embrace a medical practitioner or other qualified health professional. I think I agree with that.

Dr G.G. JACOBS: Some of the misgivings expressed in the debate on this bill have related to the advance health directive formal processes being informed. The house expressed some concern about assistance in the form of some advice and medical input when making an advance health directive. The minister has given some reassurance that he would strongly recommend a pro forma package and public education program, but I am not reassured that there will be an informed decision and an informed health directive. The minister may not agree with me, but rather than just a pro forma package and a recommendation in the regulations, I would like to see a provision in the legislation to assist people so that they make an informed advance health directive. Perhaps the minister could foreshadow how he feels about the notice of the amendment from the member for Swan Hills that one of those witnesses, whether a true witness or someone who countersigns, must be a medical practitioner or someone with some medical knowledge who can assist in that process. That might reassure many people that, as well as it can be achieved, it will be an informed advance health directive.

Dr K.D. HAMES: Will the minister clarify the exchange between him and the member for Alfred Cove? The member talked about the legislation referring to a medical practitioner and said that the legislation should include a health professional. The minister agreed with her. Where is that in the legislation?

Mr J.A. McGINTY: This is what I indicated would be the strong advice contained in the package. It might be something that is contained in the regulations or it might be done administratively. It is what we agreed upon.

Dr K.D. Hames: I thought the member was saying that it was in the legislation.

Mr J.A. McGINTY: No, it was really an elaboration of the point the member for Dawesville raised about strong encouragement for people who make an informed decision. The member for Alfred Cove was making the point that the information might well come from not only a medical practitioner, but also a nurse who is very experienced in that area. I would regard it as an informed decision if somebody sought advice from that quarter perhaps rather than a medical practitioner, depending on the choices available. There is nothing in the legislation.

Dr K.D. Hames: It depends on how you interpret that word, does it not? It could be an expert on Chinese medicine.

Mr J.A. McGINTY: That is why it will no doubt require some refinement, because some people might be happy to go to a practitioner of traditional Chinese medicine for advice.

Dr K.D. Hames: I would be happy if it were a nurse from Silver Chain or somebody like that.

Mr J.A. McGINTY: I do not take it beyond that, so we are still in agreement on that issue.

If I may, I will also reply to the member for Roe. Very interestingly, while we were debating this matter a week ago, the Australian Medical Association nationally came out with a policy position on advance health care planning. It is interesting to note that the text of that, which I will make available to any members who do not have it, was obviously very much informed by the debate that had been taking place in this Parliament. The AMA came up with a very strong position of support for legislation of this nature. Its policy paper dealt with a raft of issues, including the importance of a doctor providing advice. It did not say that it should be mandatory but that - this is very much the point that has been raised by the member for Roe and the member for Dawesville - it is about informed decision making. The AMA very clearly spoke about the need to uphold patients' rights to make decisions about their health care in advance. It was very supportive of recognising the importance of this legislation. I met with members of the AMA last week. They indicated their strong support for this legislation and asked whether there was anything they could do to facilitate its passage. They were very supportive.

Dr K.D. Hames: They do support the amendment by the member for Swan Hills.

Mr J.A. McGINTY: That is not what they said to me.

Dr K.D. Hames: It is what an individual from -

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Mr J.A. McGINTY: That might well be. If the member for Dawesville looks at their document, they certainly speak about the need for people to obtain medical advice, but they have never suggested it should be mandatory.

Dr K.D. Hames: We argued for half an hour with the particular person, who did not share my point of view.

Mr J.A. McGINTY: I will table the press release dated 24 August 2006 and the position statement of the AMA for the benefit of members.

[See paper 1823.]

Mr J.A. McGINTY: If they meant to say that advice from a medical practitioner should be a prerequisite, they would have said so, and they did not say so.

Dr K.D. Hames: Perhaps I convinced them.

Mr J.A. McGINTY: The member could well have. Anyway, I table those papers for the information of members and particularly to show their general support for the thrust of this legislation. A number of the issues that have been raised during the course of this debate are covered in the AMA position statement. Members can gain some comfort from that position statement.

Ms J.A. RADISICH: I oppose the amendment because further down the notice paper I have an amendment to the same clause. We have talked a lot about patients' rights. The fundamental principle of the legislation is to provide for choice for patients. By providing choice for patients we should also enshrine necessary protections for patients when making these very difficult and complicated decisions. The minister's amendment, in requiring appropriately authorised people to sign the advance health directive, is certainly a step forward from the original proposition. It satisfies my original concern about having an independent person sign an advance health directive in that it prevents people being coerced or otherwise into signing it. However, as I stated in my speech to the second reading, people need some kind of information when making these decisions and that information should be provided by a medical practitioner. I had a definition of that as an amendment to be inserted into the bill. That has been deferred pending the outcome of this discussion.

Going to a doctor to get a signature and to have a discussion is not an excessively onerous burden on a person who wishes to have an advance health directive come into force. It certainly is a burden but not an excessive burden. There is a difference between the two. In some cases it might be more of a burden for a person to obtain a signature from a JP or another person in the schedule who is authorised to take declarations than it would be under my proposal to have a signature from a doctor and another person with legal capacity. That should be taken into account.

I support the provision of marketing material, which should be prepared as a matter of course. It should provide an easy form for people to choose elements to their advance health directive that have been tested to some degree, so that they can be easily understood and implemented by a medical professional should the time arise that they would need to be implemented.

I have just thought of an example of the role a doctor could play in countersigning a document of this nature. It is a little akin to the role that members of Parliament are expected to play when putting forward nominees for appointment as justices of the peace. Off the top of my head, the tick-a-box form at the back of the JP application actually says, "Tick here if you have the support of your local MP." As all members know, we have strangers from the electorate who approach us and say, "I want to be a JP; I want you to sign my form and submit my application." In most cases a member will never have met the individual concerned and must ascertain the truth about him or her having no criminal convictions, or being a member of the local Rotary club, or working for this or that employer. These are rudimentary questions that we ask as MPs, as independent people, about applicants for a JP appointment. We have no way of independently verifying this. It is another check and balance in the system - adding to the burden on a JP applicant of taking active steps to put himself or herself forward to be considered for this type of position. I envisage and advocate that the medical practitioner's role in implementing advance health directives would not be dissimilar to that which MPs play for JP applicants. I ask members to give consideration to my proposal, which is foreshadowed, and therefore, to defeat, with great respect, the minister's amendment.

Ms K. HODSON-THOMAS: I seek some clarification. As I understand it, if the minister's amendment is successful, the member for Swan Hills can still move her amendment, because her amendment modifies proposed section 110Q (1).

The DEPUTY SPEAKER: Yes, that is the case.

Dr G.G. JACOBS: I support the member for Swan Hills and I will make a few comments concerning the formal requirements of making an advance health directive. It is important to recognise that we are not just

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talking about a bit of property here, or any other material possession. We are talking about life and death matters. It is very important that the advance health directive be understandable, that its intent be clear and, as well as can be, that it be unambiguous, otherwise we will get an advance health directive that does not do what we are trying to do. The whole reason for presenting this bill to Parliament, and the minister's whole intent in bringing this bill to Parliament, is to make this advance health directive concept work. To make it work, the advance health directive has to make sense, in a medical way, to the people to whom it is directed; that is, the medical attendant of the person, down the track, to whom this advance health directive refers. Therefore, the advance health directive must be understandable, its intent must be clear and, as near as practicable, its wording must be unambiguous in order to do what we are trying to do by this bill. The whole intent of what we are debating here is to acknowledge that people need, not influence, not even guidance, but advice on how to make the advance health directive work best. Most particularly, the intent of the person must be clear. I am still not reassured that regulations, pro forma packages, and education programs will be enough to make this work. This has nothing to do with the fact that I am a medical practitioner, and I am not keeping it within the profession. It is actually an input to the composition of the advance health directive that makes it valid and sensitive, and gives a clear intent. Otherwise we will see advance health directives that do not mean anything and are quite way out and wacko. They will be useless instruments. I have said in this house before that if the advance health directive is too generic and does not define the issues sufficiently, it is useless. If it is too prescriptive, it can also be of limited use in imparting the intent of a person. I am looking for more reassurance in this amendment, which is not there, that a provision will be written into the legislation requiring assistance from a medical practitioner. I will even go as far as conceding to the suggestion of the member for Alfred Cove that assistance be given by an appropriate health professional. However, there must be some advice and guidance to make this instrument do what we want.

Ms J.A. RADISICH: Thanks to the member for Carine, I have interpreted the potential implication if we pass the minister's amendment and then pass mine. I think the result would be that one of the witnesses would be a person authorised to take declarations and the other could still be a medical practitioner. If I am right, that is something the house should be aware of. That would require me to delete the last eight words of my amendment. It would refer to only one witness being a medical practitioner, and delete reference to the other witness, which would be taken care of in the clause that the minister is amending.

Dr J.M. EDWARDS: I support the amendment before the house. As I said 10 days ago, inserting the words proposed by the minister will improve the bill. This discussion is very interesting but from where I stand it seems to be more about making sure that, when people make their directives, they have properly consulted, are fully informed, and are realistic about the fact that they are putting together a document that delivers something sensible while delivering their wishes. While I totally agree that people should talk to their doctors and seek a lot of advice, I am not sure that I agree with some of the other amendments that are being proposed down the track. From the people that I have spoken to, it seems that when they write their directives in the future, it may be better for them to talk to, say, an intensive care unit nurse, to be reassured that people who are unconscious in intensive care units are still treated with great respect. I think it is valuable that people talk to their doctors, but it is not possible to move an amendment that will automatically ensure that doctors give the best possible advice. Some members believe that if we literally force people to talk to their medical practitioners about their living wills, we will end up with a really good document and everything will be hunky-dory. In the majority of cases that will be so, but it will not necessarily follow. I envisage that, when this legislation is passed, one of the things I will do as a local member - I suspect a lot of other members will do the same - is to facilitate seminars in the community involving a range of different people, including doctors and nurses, who will talk about treatment at the end of life, palliative care, decision making and where families fit in. I envisage that there will be many forums and discussions, and information will be provided to allow people to really think about this issue and how to put down on paper what they want to achieve. I doubt whether, if people are required to take advice from their doctors, that it can be done in one 10 or 15-minute consultation. I hope the person would raise it in the course of a consultation, and then talk to the doctor again at a later stage. I would prefer to see a package of information, with examples, that encourages people to talk to a broad range of health care professionals and others, but does not mandate that a certain type of health professional must sign off on a directive. This bill is about making more formal practices that already occur in the community, and really empowering people. Above all, it is about getting people to think in the clear, cold light of day about how they want to be treated in circumstances in which they cannot make those decisions. We must create situations in which families will be better informed, and a person's wishes are much more clearly known than is often the case at the moment.

Mr J.A. MCGINTY: In the light of the suggestion by the member for Swan Hills that she intends to oppose this amendment because of her own amendment further down the notice paper, I will make six points, which I will not debate at any great length, in relation to the amendment I have moved and the position advocated by the

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member for Swan Hills. The first point is that the purpose of witnessing the maker's signature is to verify that the maker did in fact sign the instrument. That is why people witness documents. They do not, as witnesses, have any input to the content of the directive, which may be highly personal and sensitive to the person making it. The purpose at law of having someone witness a document is simply to show that that is the person who signed, and nothing more than that. It has nothing at all to do with content. I suspect that the member for Swan Hills has chosen the wrong vehicle to get medical input to the process, and that is a very important issue.

Secondly, the requirement for a person to consult a medical practitioner before making a directive implies that the advance health directive will be of no legal force if medical input has not been received. That would result in a very burdensome approach. It would make the advance health directive less accessible and flexible, and would be inconsistent with the ability of a person to make a treatment decision about all health care matters. The fundamental principles that underpin this legislation are those of freedom of choice, respect for the individual and the right to self-determination. Putting that sort of condition in the bill infringes upon those principles. Thirdly, it is quite conceivable that a medical practitioner may not want to give hypothetical advice to a patient. It also raises questions of liability, which we all know medical practitioners are particularly anxious about. Fourthly, what would be the consequences of a requirement for compulsory consultation, if a directive became invalid because a doctor had not witnessed it? It would continue in existence as a common-law directive, in writing. In any event, it will still have full legal force. Members have to wonder at the benefit of the arrangement to have a doctor sign it.

Mr M.P. Whitely: Can you make that point again?

Mr J.A. McGINTY: Yes, I will, because this is important. If I were to fill out an advance health directive and not comply with the formal requirements and not have a doctor witness it, as the member for Swan Hills would have us do, it still has full force as a common law advance health directive and a doctor has to comply with it. Even though it may not be a statutory advance health directive because it lacks the requirement, if the member for Swan Hills' amendment is correct, it would still be legally enforceable.

Mr T.G. Stephens: Therefore, we don't need this legislation.

Mr J.A. McGINTY: Yes, we do, but that is another issue. In this particular case that would be the effect of it, but it will still be a legally enforceable common law expression of the wishes of the patient. If the doctor were to treat the patient contrary to his or her expressed wishes, it would leave the doctor open to punishment, both civil and criminal.

The fifth point is that there will be explanatory notes - this comes back to the undertaking that I gave the member for Dawesville - on the advance health directive form that will emphasise that a person must express his or her wishes with specificity and must be aware of the nature of the treatment and the consequences of not receiving it. Discussion with health professionals will be strongly recommended. In addition, an education process will be aimed at community and health professionals. I draw members' attention to clause 110R(2) in the bill that provides that a treatment decision in a directive is invalid if, at the time the directive is made, its maker does not understand the nature of the treatment decision or the consequences of making it.

The sixth point is to refer members to the Australian Medical Association policy document that I circulated. This goes to the point raised by the member for Maylands. Paragraph 3.4 reads -

The AMA endorses ACP as a process of reflection, discussion, and communication of health care preferences that respects the patient's right to take an active role in their health care, in an environment of shared decision-making between the patient and doctor. ACP can be part of a health care discussion with patients of all ages within the primary care environment or hospital setting.

Ms K. HODSON-THOMAS: I would like to provide the minister with the opportunity to finish his remarks.

Mr J.A. McGINTY: I thank the member for Carine. Paragraph 3.5 reads -

The AMA endorses the key role of the doctor in providing guidance, advice and in discussing treatment issues related to incapacitating conditions and/or future health care options with patients, as part of the therapeutic relationship. This process may involve family members, religious advisors, friends and other people the patient feels should be involved in the process.

That is the AMA perspective. It represents doctors in this state and puts the role of the doctor at its highest. It quite properly articulates what we would expect to be the relationship between the patient and the doctor in respect of the evolution of a health care plan or an advance health directive over time. There is nothing in those two paragraphs of the AMA policy statement with which I would disagree. It certainly stops short of calling for it to be a mandatory requirement.

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Mr M.P. WHITELEY: I am confused about the interplay of the member for Swan Hills' proposed amendment and the minister's amendment. I certainly support the minister's amendment; however, I am considering supporting the member for Swan Hills' amendment. I want absolute clarity that they are consistent. If the Minister for Health's amendment is passed, does it give the member for Swan Hills' amendment the capacity to pass?

Mr J.A. McGinty: Yes, it does.

Mr M.P. WHITELEY: The member for Maylands talked about the role of registered nurses in being able to witness these documents. Would it change the minister's attitude if the member for Swan Hills' amendment was amended to include "must be a medical practitioner or a registered nurse"? It would expand the list of people who could witness the documents and remove some of the burdens of the process.

Mr J.A. McGinty: It would change my view marginally, but I would still oppose it for the reasons I outlined in the six points I made by way of commentary on the member for Swan Hills' proposal. We can debate that in more detail.

Amendment put and passed.

Ms K. HODSON-THOMAS: There is an amendment in my name on the notice paper that reads -

Page 15, line 3 - To insert after "other" -

; and

(e) it is registered with the State Administrative Tribunal

I have had some discussion with the member for Swan Hills, who also has an amendment on the notice paper that relates again to an advance health directive being included in a register. The sentiment expressed in both her amendment and mine is that advance health directives should be registered in some way. The minister may like to comment on whether the State Administrative Tribunal is the right vehicle for that to happen or the Executive Director, Public Health is a better place for it to be held. I am more inclined to support the member for Swan Hills' amendment, but I would like some comment from the minister.

It is interesting to note that in the press release that the minister provided to members, the AMA referred to wanting to have clear and nationally consistent guidelines developed on the preparation, notification and storage of advance care planning, including the use of consistent pro forma documents and the potential for a national registry. It is important and it was stressed by many members in the second reading debate that the advance health directives should be placed on a register.

Ms J.A. RADISICH: I thank the member for Carine for her proposed amendment. I would like to hear the view of other members on registering these documents. It is my view that the only way to give real effect to these documents and, therefore, the choices to patients who decide to implement them, is by having a compulsory registration process. Otherwise, these documents could sit in family safes, in top drawers of kitchen benches or other places and will not be put to use. The minister has stated that it is his clear intention that the advance health directive is a tool that is accessible and easily implemented. Having a compulsory registration system for these directives is the only way that medical practitioners and family members can know of the existence of these documents and be able to put them into practice when the need arises. I will give members an example of what I mean. Only the other day I was cleaning out my kitchen and I found a will that I had written and had witnessed before I went into surgery. In the back of my mind I knew I had a will. It was in the bottom drawer in my kitchen. It would have been difficult for people to find if I had fallen off the perch, not for them to know my assets but how my debts would be paid. It was really funny. I was reading the will and the only assets that I had at the time I made the will was a flute that I last played in about year 11, a few photos, saucepans and a bed. I had given these away through my will to family and friends. The point I am trying to make is that the advance health directives must be easily accessed for them to be of any use to the patient and his or her medical practitioner.

I understand there may be privacy issues with the content of the advance health directive being put on a register because it may then be accessible to a person who is not the immediate medical practitioner of that patient. The fact is that the advance health directive exists and it could be easily registered.

The reason my amendment is worded the way that it is, and I realise that we are speaking to the amendment of the member for Carine just now -

The ACTING SPEAKER: The house is debating clause 11, as amended. The member for Carine has not moved her amendment yet.

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Ms J.A. RADISICH: I will go on until you stop me, Mr Acting Speaker.

Dr K.D. Hames interjected.

Ms J.A. RADISICH: I am giving the minister a little more time. I am sure he has pondered these matters in great detail and would be pleased to hear from all of his colleagues in the house.

It is my firm view that advance health directives should be compulsorily registered so that they can be given proper effect for the benefit of all patients who choose to make them; otherwise, this entire exercise of trying to implement living wills through this legislation will be far less than fruitful.

The wording of my amendment is meant to provide an option for the Executive Director of Public Health to liaise with the federal government, which is the responsible jurisdiction for the organ donor register, so that people can register advance health directives with that organ donor registry. I am not opposed to the suggestion by the member for Carine that this instrument could be registered with the SAT. However, it would be a nice corollary to register advance health directives with the organ donor registry because people would probably sign up for organ donation at the same time.

Mr J.A. McGINTY: My comments will be deeply relevant to both of the amendments foreshadowed on the notice paper by the members for Carine and Swan Hills. The current provisions relating to the making of an enduring power of attorney or a will do not require registration. There is no requirement for an advance health directive to be registered; it is consistent with that approach. An enduring power of guardianship is also not required to be registered. Therefore, registration of an advance health directive would be anomalous with those documents that give others the power to make decisions when people lose the mental capacity to make decisions for themselves. There are a number of problems associated with the compulsory scheme, the most important of which is that the amendments that have been foreshadowed would mean that any advance health directive would not be valid unless it was registered. Somebody might find a document which assures someone's future health care that would not be valid because it would not comply with the formal requirements.

Ms K. Hodson-Thomas: What about under common law?

Mr J.A. McGINTY: I will come back to common law because that is the next point that I was going to make. We are trying to set up a statutory scheme that will enable people to make advance health directives with ease. I think the amendments will impose a very onerous condition on people to require that they register, not the fact that they have an advance health directive, but the directive itself, which could be highly personal, with a body such as either the State Administrative Tribunal or the Executive Director of Public Health.

There are a number of other issues. One issue is that elderly people may not have access to a computer. A doctor in a remote area may find it more difficult than a doctor in an urban area to access the register. Accessing the register may also involve privacy issues. I have put completely to one side the resources that may be required to maintain the register. However, my overwhelming opposition to this is that the number of people who will take advantage of this legislation and fill out an advance health directive will be reduced under these proposed amendments.

Ms J.A. Radisich: Why?

Mr J.A. McGINTY: Because of the burden that it will impose on people to actually register an advance health directive. We do not require it for any of the other comparable documents to which I have referred, such as the enduring power of guardianship, the enduring power of attorney and wills. The more that we place conditions and burdens upon the existence of an advance health directive, the less people will take them up. That is an inevitable consequence.

Ms J.A. Radisich: Do you not think that when people take the step of drawing up one of these documents, which involves thinking about it and having it witnessed, it would be par for the course to register the document so that it can be implemented, and that they would see it as a bonus to be assured that it would implemented?

Mr J.A. McGINTY: I doubt it; that is not human nature. It will be up to people to make sure that their wishes are known sufficiently in an advance health directive so that in time of emergency it will be drawn to someone's attention. How an individual will respond to that will be very different and a matter of choice. I am somewhat persuaded to the view that there should be a capacity on a voluntary basis for registration of the fact that a person has a living will so that doctors in intensive care, emergency departments or elsewhere can look at that registration as a guide to whether the person has a living will. Something might be able to be done about that administratively. However, to suggest that a living will would be invalid if it has not been registered with a government body is unduly oppressive.

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The other point is that, at common law - bear in mind that we are trying to transport into this legislation the principles of common law - a living will is valid and enforceable against a doctor even though there is no requirement for registration.

Dr J.M. WOOLLARD: The Minister for Health has assured the house that an advance health directive will not be used to allow euthanasia in Western Australia. Therefore, I do not agree with registration of the advance health directive for the reasons that the Minister for Health has given to the house. Many people have wills at home that they are not required to register. I think that the Department of Treasury and Finance and other government departments would love the idea of living wills being registered because they would get a \$30 or \$40 fee under stamp legislation for the registration! If registration of an advance health directive were required, people might not go any further than just preparing the document. I think the purpose of the legislation is that advance health directives will be used by people who are receiving palliative care or by people who have gone into emergency departments in hospitals. They can then go home and get the piece of paper that has been signed by two people. We have already said in this legislation that two people will be signatories to the advance health directive. That will make it harder for some people. Although it will make it harder for them, I am pleased about it because I do not like the age at which this bill will affect some people. I am pleased that 18-year-olds will have to have two signatories. I will not support that this matter go to the State Administrative Tribunal.

I believe that the member for Swan Hills will move an amendment to provide that one of the signatories must be a medical practitioner. I cannot agree with that. I agree that it must be signed by an appropriately qualified health professional. It could be an excellent role for nurse practitioners. People will need to be educated about the provisions of this bill when it is enacted. Nurses would be ideally suited to work in the different health care settings and explain to people what the bill does and how people can assist others in the community to make their own health directive. The Minister for Health said there might be some problems in rural areas. I was surprised to hear the member for Roe's comments in support of a signatory having to be a medical practitioner. The Rural Doctors Association of Australia is very unhappy that in some areas, the people who have been asked to look after a community have no knowledge of the community. In those situations in particular it would be far more appropriate to have the involvement of a nurse or a health professional who works in that community to help people write an advance health directive and also to be signatories to it. It is inappropriate to insist that a health directive must be registered. Many members have said they support the concept of living wills, which is what this bill is all about. The mandatory registration of an advance health directive would be a hurdle to people completing a health directive.

Mr M.P. WHITELEY: My concerns are somewhat different from those that have been expressed by other members, and my views are different also from those of the Minister for Health. A register is a way of guaranteeing that a person's wishes are respected. If a person must rely on a family member to acknowledge that an advance health directive exists, it might not be brought to the attention of a practitioner. The family members might have a different view from the person who wrote the directive. The potential exists for disagreement among the family members based on religious convictions or on their desperation to keep a loved one alive. Therefore, a family member might not bring to the attention of a practitioner the fact that a patient has written an advance health directive. At an even more practical level, a register is a mechanism for making practitioners aware in a crisis situation that an advance health directive is in place. It is inappropriate to compare not having a register for wills or for a power of attorney and not creating a register for advance health directives. Wills are not made in a crisis situation. The fact is that the person in question is dead and all the time needed to discover its existence can be taken.

Mr J.A. McGinty: That is very compassionate of you!

Mr M.P. WHITELEY: A person who had written an advance health directive would want the practitioner to know of its existence. It would be inappropriate to rely on an informal mechanism that might be adequate for the discovery of a will. A register is needed. We must create some type of database that medical practitioners can look at in a crisis situation to identify the patient's wishes. It is because I support the intent of trying to have a person's wishes respected that a register should be set up. Otherwise, how will doctors in an emergency department know that it even exists? It will be a fruitless exercise whereby people will write an advance health directive but will not have their wishes respected. I support a form of registration for those purposes. Unless it is made compulsory, it will not apply universally. People will think that they have done it but they will not have gone through the final step of thinking about how the process would play out. I suggest that that has not happened here. We have not thought about how certain scenarios would play out and how a person's wishes will be communicated to a medical practitioner in an emergency situation. I believe that a form of compulsory registration is needed.

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Mr J.A. McGINTY: In direct response to the member for Bassendean, I will throw another element into the debate. On the very point the member has raised, the Australian Medical Association's policy document on advance health directives and end-of-life decision making states at paragraph 3.9 -

It is the responsibility of the patient or advocate to make the contents of an AD known. Patients should be encouraged to give a copy of their documents to their doctor, the attorney -

Not me -

to a trusted family member or friend, and to their solicitor. It is important for staff in all health care settings to be aware that the patient has made an advance care document, and where it can be obtained. The patient may therefore wish to carry notification on their person, stating that they have made a document or directive, and where it can be found.

I throw that into the debate because the AMA has obviously turned its mind to the issue we are now debating. It favours an obligation being placed on the patient to make sure that people are aware of their wishes and the fact that the person has such a document.

Mr M.P. Whitely: That removes a degree of liability from their profession. It is a mechanism for protecting their practitioners.

Mr J.A. McGINTY: I doubt that that is the case. The AMA has consciously moved away from the notion of registration in what it has advocated.

Ms K. Hodson-Thomas: They have not in their media statement. It talks about the potential for a national registry.

Mr J.A. McGINTY: Sure. I have alluded to that also because I am aware that Palliative Care WA and others have suggested that a computer database should be made available in emergency departments so that doctors can ascertain whether a patient has an advance health directive. However, that should not be a precondition that could render the advance health directive void. That would be the effect of these amendments, and that is the problem I have with them.

Mr J.E. McGRATH: I support the Minister for Health, not just because he gave such a compelling speech to cabinet in South Australia on the weekend either before or after he saw the Dockers play!

Mr J.A. McGinty: The cabinet was more inspirational than the Dockers!

Mr J.E. McGRATH: I will support the legislation. This is about personal choice. The government is not initiating this legislation; people are asking for it so that they can have a say both privately and personally in their own decision making when the end of their time comes. The requirement that people must register an advance health directive would put too much of an onus on them. That is not the spirit of what we are doing. It is similar to a will. Generally, people who make a will do not discuss it with many people apart from their loved ones. It is generally known where the will is kept and there is no requirement to have it registered on an official register. These advance health directives will be very similar. I spoke to my GP about advance health directives the other day, and he said that I have to support them because it is about a person's choice. A person's choice is personal. It is not about a person's name being on a directory or a register. I agree with the statement by the Australian Medical Association. People who are passionate about making a health directive would ensure that those who are close to them were aware of their advance health directive, whether that be their GP, lawyer or close family members. I hear what some members are saying about emergency situations. Basically, I think that most directives will not be used in emergency situations; they will be used for people who have an ongoing illness and know that one day they will have to make a decision. However, some emergency situations will arise. If that is the case, I am sure that many people would ensure that their doctor had a copy of the directive or that their details were placed on a register, if one were established that was not mandatory. My worry with establishing a register is that there is already so much bureaucracy in society, and health directives could be the one thing that people would not need to register.

An advance health directive is a personal decision, and that is the thrust of what the community is saying to us. People want to have some say in a health directive; it a personal decision. Many people could make that decision without consulting a professional person. That is why we should not force people to officially register their health directive with a government agency or the State Administrative Tribunal. It would be a tremendous workload on the agency. Something could go wrong and the directive could get lost or be misplaced, or two directives could get confused and it could result in litigation. Members of the community want to control their own destiny. They want to be able to ensure that whoever has possession of the health directive will say that, in

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these circumstances, this is what they want done. We should not force people to place their health directives on a register. I support the minister's view on the foreshadowed amendment.

Dr J.M. EDWARDS: I oppose the member for Carine's foreshadowed amendment and also the proposed amendment to lodge the directive with the Executive Director of Public Health for a number of reasons, some of which have already been outlined. First, the legislation should not make the process of making a health directive too bureaucratic, and a provision that required that it be registered would make it bureaucratic.

With regard to the member for Bassendean's comments about the emergency department and doctors, as the member for South Perth said, I do not think that emergencies will be a commonplace event; emergencies will be in the minority. I have awful visions of the doctors in an emergency department saying, "Oh, God, let's contact the Executive Director of Public Health or SAT and see exactly what is in the advance health directive." In these days of litigation, I suspect that if one of my parents had a health directive and was in that situation, the tendency of the doctors would be to go to the document on the government register to make sure that what I was saying was in the directive, rather than believe that I was conveying the wishes of my parent. That leads me to the second point, which is that the people who make a directive will have a big responsibility, but they will need to exercise that responsibility and make sure that their loved ones, next of kin or the relevant people they want around them at the time that the directive needed to be put in place are aware of the content of the directive and where to find it. It is much better that it be the responsibility of the person who will be the patient and his or her family and loved ones, rather than the responsibility of a public servant who might be called out in the middle of the night to clarify that the directive is on a register.

My final point is about privacy. I belong to my local library. I live in a very small local government area. I think there are 15 000 people on the roll. When I go to the library, I am asked which Judy Edwards I am because there are two Judy Edwards in that tiny local government area who have chosen to belong to the library. It amazed me the first time it happened, but now I just tell them my address. A health directive is a private matter. I do not think that a directive needs to be on a register, but a person's next of kin, spouse, parents, partner and children need to clearly know that one exists.

Mr M.P. Whitely: How does it then not become the wishes of the partner, the spouse and the children and stay as the patient's wishes?

Dr J.M. EDWARDS: It is up to the person to communicate when he or she has a good quality of mind that, in the event of this happening, this is the person's directive and he or she wants them to convey it to the treating doctors.

Mr M.P. Whitely: However, a child could say, "Mum is dying. I want to do anything to keep Mum alive. I love Mum. I don't care what she said. That was before." Therefore, the child might not make the clinicians aware of the existence of the directive. How do you get that protection?

Dr J.M. EDWARDS: I do not know that a register would provide that protection. Certainly in an emergency situation, that would work against people, rather than for them. A child can currently go against the wishes of his or her parents, but with all the education and information that will be provided on the legislation, people will understand that if they do not carry out the very clearly stated wishes of another person, they would be putting themselves at risk at common law.

Dr K.D. HAMES: I do not support the foreshadowed amendments and I support the six points that the minister has put forward. However, I think the minister should take a much more active interest in, and make a much stronger commitment to, addressing the concerns that have been raised, particularly by the members who have foreshadowed the amendments and the member for Bassendean. As the member for Bassendean has said, people could keep the health directive of their parents in their pocket, because they do not want it to be enacted, and not tell anybody that it exists. People also might not have close family members. I have close family members to whom I could give a health directive, but many people do not. I am sure that the minister has constituents who have families in the eastern states, and they would have no-one they could give a health directive to. A person could give a directive to his or her GP, who would put it in the person's file in his drawer, but he would not want to go into his surgery at midnight on a Saturday night to get it just because he got a phone call from another doctor asking whether that person had a health directive. The minister should be much more active and give a much stronger commitment to finding a way to make that opportunity available if people want it. The minister said that he was not opposed to people being able to register a health directive if they wanted to do so. I would like to be able to register my directive, even though I will give it to my family. However, I might be taken ill at midnight one night while I am driving back to Mandurah and it might take time for my family to get to the hospital. They might be upset, but I would have a health directive that indicates that I do not want to be resuscitated in certain circumstances. They would wonder where I had left it and whether it was in the bottom

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drawer in the kitchen. I have a will, but I do not know where it is. It might be my responsibility, but if I were dying and I had made a health directive, I would want the doctor to know about it, but would he know where it was? I would like to be able to register the directive.

On the issue of privacy, an advance health directive would not indicate that I had cancer or this or that condition. An advance health directive would indicate that in a certain circumstance, I would not want to be resuscitated. Why would people want to keep that secret? That is not necessarily a private matter. However, I would like the minister to look at the technology that is available. For example, I would like to be able to lodge my health directive by e-mail, so that a doctor in an emergency department could quickly scroll through the list, find my name and access my advance health directive. Obviously, Joe Bloggs would not be able to access the information, not that it would worry me if he could. It is not necessarily easy but the technology is now available. I believe that something like that could be done.

Mr J.A. McGinty: I give a commitment, on the passage of the legislation, to look at a way of having a voluntary register so that people can indicate that they have a living will, perhaps then with the attachment process that you are suggesting as a way in which that can be ascertained, for those people who want to do it. If it is voluntary, I think that is fine because that will facilitate the process, but if it is compulsory it will work against the process.

Dr K.D. HAMES: I think so. As with the member for Bassendean's concerns, if somebody's son or daughter does not want to make it clear that they have a living will, they can register it to be sure.

Mr J.A. McGinty: Yes.

Mr R.C. KUCERA: It seems to me that we are trying to have the penny and the bun. We are trying to give people choice on the one hand by producing a living will, but taking the choice away on the other hand. As I said the other day, I think that goes against the essence of the legislation. We are essentially talking about the wishes and the views of the person who is making the will, but the argument being advanced is on behalf of those who are left behind. I believe the proposal would be over-bureaucratising and complicating a desire by people making a will to have their wishes known. If the family or the executors choose not to make it known, it will happen anyway or, as in the case of Terri Schiavo in America, the family will fight tooth and nail to stop the person's wishes being carried out.

Mr M.P. Whitely: This is about protection. You are missing the point.

Mr R.C. KUCERA: I am not sure that I am missing the point. I do not support these two amendments. All the arguments being advanced at the moment are on behalf of those left behind. If the person who is the subject of a living will has got to the stage when the living will is to be executed, he has lost the capacity to argue anyway. Therefore, what happens to him is immaterial as far as he is concerned because he has gone past the point at which he can put up an argument. The argument that remains is on behalf of relatives and family who will be left behind. If they chose not to exercise the provisions of a living will, it seems to me that they would do that anyway or they would try to fight it legally.

Mr M.P. Whitely: If it is registered -

Mr R.C. KUCERA: No amount of registration will make any difference. I have made wills over the years; in fact, I have recently made a will.

Mr J.A. McGinty: Did you leave anything to me?

Mr R.C. KUCERA: As a matter of fact I did, but I will not tell the minister what it is. I think it is my Eagles ticket. The living will expresses the wishes of the person concerned and not the wishes of those left behind or somebody outside for whatever reason, whether religious or medical, who wants to intervene; it is about the will of the person. Registration will not matter. If I have enough concern to make a will, as the member for South Perth said, I am sure that I will make some arrangement that will bring it to the attention of a medical practitioner or a person who is treating me. I do not see that registration would make one iota of difference in this case. Those provisions will have already been made. It may facilitate the will, but as the member for Maylands has said, it will also get in the way of a medical practitioner. I think we are missing the point here about why we are doing this. We are doing this for the person who wants to make the choice and to protect the person who will have to treat him, which is the second issue. If we complicate that issue, we will be taking away the reason for putting this legislation in place. I do not support these amendments.

Dr E. CONSTABLE: I support the amendments. I have listened quite closely to the toing-and-froing of the different points of view. I have been surprised by the number of members who have drawn the analogy of regular wills that bequeath property, because that is not what this issue is about. It is about the medical care of

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the dying. To draw that analogy I believe is a very poor argument. Talking about the medical care of the dying is about the person writing the advance health directive, but it is also about the medical professionals who must put it into place, which is very different. This is about the wishes of dying people and having those wishes carried out. I believe very strongly that we should put safeguards in the legislation for the person making the advance health directive and for the person who must carry it out, who is somebody in the medical profession. To say that it is just about people writing their wishes is incorrect; it is more than that.

There has also been the assumption in the arguments toing-and-froing that people will talk to their family members when they write one of these directives. What a strange assumption to make. I would venture to say that many people will not do that. They may not have family members whom they trust or they may have family members who have a different point of view and think that they should not write one of these directives. It is similar to many arguments that people in families have. I believe that people will do this quietly by themselves and not tell their family members for a whole host of reasons. I do not think we can generalise and say that they will all talk to their family members, because they will not. Again, we need safeguards in place. Registration provides one sort of safeguard. I think that others will be discussed when we debate other amendments. I think that registration provides a safeguard for the person writing an advance health directive and for those who have to carry it out, who are members of the medical profession.

Mr M.P. WHITELEY: I want to pick up on a point that the member for Yokine made. If I made an advance health directive, I would want to have my wishes respected. How could I guarantee to have my wishes respected? It would be by having my living will registered, so that family members, who might be motivated by the best of intention, could not interfere with my wishes. The only mechanism whereby one could have that is some formal register that would be available to doctors when they need to deal with it. It is a matter of the protection of the rights of the individual making the advance health directive, which I believe is facilitated by a register. It would be protecting the person's wishes, rather than having family members with their own agendas, however well motivated and well intentioned, trying to impose their will rather than the will of the person who has made the advance health directive.

Another point that needs to be emphasised is a point made by the member for Churchlands. This is not merely the protection of the rights of the person making an advance health directive; it is also the protection of the rights of the medical practitioners who will be taking the action. By having a more formalised process and a central databank -

Mr R.C. Kucera: If a medical practitioner were not aware of it, would he not simply act as if it were not there anyway? Where is the rub?

Mr M.P. WHITELEY: We then get into questions of whether they took reasonable steps to find out and when they did find out. All those questions of law come into play. A register provides more of an opportunity for a clear-cut process.

I was partly reassured by the interchange between the member for Dawesville and the minister on my third point, which is that having a register would guarantee infrastructure, because there would have to be some provision of infrastructure to register matters and maintain accurate records. There would also have to be infrastructure to provide an adequate database for the medical practitioners. Having a register would be about protecting the wishes of the person making the advance health directive. It would also provide a mechanism for the protection of medical practitioners. It would also be a requirement for the provision of adequate infrastructure. I do not think that leaving it to some sort of informal process, which is not legislative or regulated, guarantees the provision of that infrastructure. I appreciate that I will not convince the minister, so I would be interested to hear the minister elaborate a little on the exchange he had earlier with the member for Dawesville on how he sees a voluntary registration mechanism being set up. I suspect that the minister will win the day, and that is where we are headed, but I would like to hear some comments on that.

Dr G.G. JACOBS: Some concern has been expressed about formalising a process, because wills generally are about the dispersion of property and possessions.

Sitting suspended from 6.00 to 7.00 pm

Debate adjourned until a later stage of the sitting, on motion by **Mr J.C. Kobelke (Leader of the House)**.

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