

**MENTAL HEALTH BILL 2013**

*Consideration in Detail*

Resumed from 9 April.

**Clause 480: Registrar —**

Debate was adjourned after clauses 478 and 479 had been agreed to.

**Dr A.D. BUTI:** I move —

Page 326, lines 3 and 4 — To delete all the words after “There is to be” and substitute —

a Registrar of the Mental Health Tribunal appointed by the President under the *Public Sector Management Act 1994* Part 3.

It is not clear in the current clause whether the president appoints the registrar, who is there to assist in the functioning of the tribunal, in particular, to ensure that many of the proceedings or the structures of the president flow in a smooth manner. The president should appoint the registrar, which happens in a lot of other judicial and quasi-judicial bodies like the Mental Health Tribunal. I will talk a little more about that in another clause, but I have moved this amendment so that the president appoints the registrar.

**Ms A.R. MITCHELL:** I thank the member for the explanation of his amendment. Under the Mental Health Act 1996, the registrar is appointed by the department. The registrar is appointed to assist the minister in the administration of the act. There has not been any problem with this arrangement—hence, the rationale to continue in the same vein. The position in this bill is the same as that contained in the State Administrative Tribunal Act, which is that the executive officer of the State Administrative Tribunal is appointed by the chief executive officer of the department. The government believes the arrangement to appoint the registrar should continue in the same vein.

**Dr A.D. BUTI:** I am interested to hear the parliamentary secretary say there does not appear to be any problems in the performance of certain functions, because I will shortly refer to some comments I have received about those problems. I will leave that for another clause. The opposition stands by the fact that as the registrar is there to assist the president, the president should select the registrar.

*Division*

Amendment put and a division taken, the Acting Speaker (Mr N.W. Morton) casting his vote with the noes, with the following result —

Ayes (15)

Ms L.L. Baker	Mr D.J. Kelly	Mr M.P. Murray	Mr P.B. Watson
Dr A.D. Buti	Mr F.M. Logan	Mr P. Papalia	Mr B.S. Wyatt
Mr R.H. Cook	Mr M. McGowan	Ms M.M. Quirk	Mr D.A. Templeman ( <i>Teller</i> )
Ms J. Farrer	Ms S.F. McGurk	Mr C.J. Tallentire	

Noes (28)

Mr P. Abetz	Ms W.M. Duncan	Mr C.D. Hatton	Dr M.D. Nahan
Mr I.C. Blayney	Ms E. Evangel	Mr A.P. Jacob	Mr D.C. Nalder
Mr I.M. Britza	Mr J.M. Francis	Mr S.K. L'Estrange	Mr J. Norberger
Mr G.M. Castrilli	Mrs G.J. Godfrey	Mr W.R. Marmion	Mr D.T. Redman
Mr V.A. Catania	Mr B.J. Grylls	Mr P.T. Miles	Mr M.H. Taylor
Ms M.J. Davies	Dr K.D. Hames	Ms A.R. Mitchell	Mr T.K. Waldron
Mr J.H.D. Day	Mrs L.M. Harvey	Mr N.W. Morton	Mr A. Krsticevic ( <i>Teller</i> )

Pairs

Ms J.M. Freeman	Mr C.J. Barnett
Mr W.J. Johnston	Mr T.R. Buswell
Ms R. Saffioti	Mr A.J. Simpson
Mrs M.H. Roberts	Mr R.S. Love
Mr P.C. Tinley	Mr J.E. McGrath
Mr J.R. Quigley	Mr M.J. Cowper

**Amendment thus negatived.**

**Clause put and passed.**

**Clause 481: Functions of registrar —**

**Dr A.D. BUTI:** I move —

Page 326, line 6 — To delete the line and substitute —

Without limiting the general function of the Registrar to assist the President, the functions of the Registrar are to:

**The ACTING SPEAKER (Mr N.W. Morton):** The amendment moved is different from the one on the notice paper.

**Dr A.D. BUTI:** Sorry; it is slightly different.

**The ACTING SPEAKER:** I understand the member is putting a lot of amendments through.

**Dr A.D. BUTI:** Yes, I got lost there. I did not move the amendment that is currently on the notice paper.

**The ACTING SPEAKER:** We need a copy of the amendment moved.

**Dr A.D. BUTI:** I have moved this version due to the fact that my previous proposal was lost. I am trying to make it clearer, in legislative form, that the registrar has a general function to assist the president but is not limited to that, and they are also to engage in the functions that are stipulated in the rest of the clause. I think that is an appropriate amendment to move not only because it takes care of the various functions that have been highlighted by the government in the current clause, but also it makes it clear that the registrar is there to assist the president. I do not think it upsets the purpose of the clause put forward by the government.

**Ms A.R. MITCHELL:** There is no need to have a function to assist the president because in clause 482 the president can give the registrar directions. There is a relationship between the president and the registrar anyway, so there is no need to have a specific function for the registrar to assist the president.

**Dr A.D. BUTI:** My amendment stipulates the general function of the registrar is to assist the president. I am not saying “specific”. The president can direct the registrar, but this tries to enlarge the assistance provided by the registrar to the president based on directions by the president. The registrar should assist the president whether or not they are receiving directions from the president. My amendment refers to the “general function” of the registrar. Clause 481 as it stands refers to specific functions of the registrar. I am not saying they should not be there, but I am saying there needs to be a legislative pronouncement that the registrar has a general function to assist the president.

**Ms A.R. MITCHELL:** The proposed amendment refers to a general function that is not referred to or created in the bill. There is certainly an understanding that the registrar would assist the president. The member is referring to a general function but these are specific functions.

**Dr A.D. BUTI:** If I recall correctly, a minute ago the parliamentary secretary opposed the amendment because it dealt with “specific” functions. Now the parliamentary secretary says she opposes it because it deals with “general” functions. Is the parliamentary secretary opposing it because it deals with “functions” full stop? My amendment does not philosophically change that clause. It makes it clear, in a legislative format, that the registrar has a general function to assist the president. The parliamentary secretary has then prescribed a number of specific functions. I imagine that not all the functions referred to include everything that the registrar should do to assist the president. The parliamentary secretary states that a later clause refers to the president being able to give directions to the registrar, which is fine, but would it not be a better system, if the president does not always have to give directions to the registrar to do X, Y or Z, that it is not included in the specific functions in clause 481? My amendment seeks to cover the specific functions included in clause 481 but provides an umbrella function purpose, which is to assist the president.

**Ms A.R. MITCHELL:** I say again that we believe the amendment is unnecessary because the functions and relationship to the president are already defined. The amendment alludes to a general function that has not been stated anywhere else in the bill.

**Dr A.D. BUTI:** The whole idea of a general function is to ensure that the registrar understands, through legislative format, what they are there for. They are there to provide assistance to the president and because it is not in another part of the bill is irrelevant to this specific issue, which is the direct relationship between the registrar and the president. The parliamentary secretary’s answers have been contradictory or inconsistent. The parliamentary secretary first said that it was too specific and then she said it was too general. It is unclear why the parliamentary secretary would oppose this amendment.

*Division*

Amendment put and a division taken, the Acting Speaker (Mr N.W. Morton) casting his vote with the noes, with the following result —

**Extract from Hansard**  
[ASSEMBLY — Thursday, 10 April 2014]  
p2526b-2532a  
Dr Tony Buti; Ms Andrea Mitchell; Acting Speaker

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Ayes (14)

Ms L.L. Baker	Mr D.J. Kelly	Mr P. Papalia	Mr B.S. Wyatt
Dr A.D. Buti	Mr F.M. Logan	Mr C.J. Tallentire	Mr D.A. Templeman ( <i>Teller</i> )
Mr R.H. Cook	Ms S.F. McGurk	Mr P.C. Tinley	
Ms J. Farrer	Mr M.P. Murray	Mr P.B. Watson	

Noes (28)

Mr P. Abetz	Ms W.M. Duncan	Mr C.D. Hatton	Dr M.D. Nahan
Mr I.C. Blayney	Ms E. Evangel	Mr A.P. Jacob	Mr D.C. Nalder
Mr I.M. Britza	Mr J.M. Francis	Mr S.K. L'Estrange	Mr J. Norberger
Mr G.M. Castrilli	Mrs G.J. Godfrey	Mr W.R. Marmion	Mr D.T. Redman
Mr V.A. Catania	Mr B.J. Grylls	Mr P.T. Miles	Mr M.H. Taylor
Ms M.J. Davies	Dr K.D. Hames	Ms A.R. Mitchell	Mr T.K. Waldron
Mr J.H.D. Day	Mrs L.M. Harvey	Mr N.W. Morton	Mr A. Krsticevic ( <i>Teller</i> )

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Pairs

Mr M. McGowan	Mr T.R. Buswell
Ms J.M. Freeman	Mr C.J. Barnett
Mrs M.H. Roberts	Mr A.J. Simpson
Mr W.J. Johnston	Mr R.S. Love
Mr J.R. Quigley	Mr J.E. McGrath
Ms M.M. Quirk	Mr M.J. Cowper
Ms R. Saffioti	Mr R.F. Johnson

**Amendment thus negated.**

**Dr A.D. BUTI** — by leave: I move —

Page 326, line 12 — To delete the line and substitute —  
or under rules made under section 469; and

Page 326, line 14 — To delete “as soon as practicable; and” and substitute —  
within the period specified under rules made under section 469; and

Page 326, line 17 — To delete “as soon as practicable; and” and substitute —  
within the period specified under rules made under section 469; and

Page 326, line 20 — To delete the line and substitute —

Act, including within the period specified under rules made under section 469; and

The reason I put forward these amendments is that there should be a time requirement on the functions of the registrar, and not just that these things be done as soon as practicable. Each of these amendments seeks to delete the term “as soon as practicable” and to substitute a specific period, which may be set under the rules pursuant to clause 469. Time is of the essence when dealing with mental health matters; therefore, there should be a time stipulation on the registrar. The rules will be made under clause 469; they will not be imposed by a third body. This provision has been included in the bill by the government. Time is of the essence. If rules are made under clause 469, the registrar should abide by them.

**Ms A.R. MITCHELL:** We do not support these proposed amendments concerning the rules that are made under clause 469. We believe they are unnecessary on the same basis that the proposed amendment to clause 470 was not supported.

**Dr A.D. BUTI:** I do not actually follow that logic that well, but that is the parliamentary secretary’s ruling. Clauses 469 and 470 deal with rules that can be made. I do not know whether the proposed amendment to clause 470 would have prevented a time stipulation from being put on the registrar. The term “as soon as practicable” is very elastic. When dealing with the treatment of people with mental illness, time is of the essence. That is why a time limit should be stipulated in the legislation. The bill provides that rules with regard to time requirements can be made under division 13.

*Division*

Amendments put and a division taken, the Acting Speaker (Mr N.W. Morton) casting his vote with the noes, with the following result —

**Extract from *Hansard***  
[ASSEMBLY — Thursday, 10 April 2014]  
p2526b-2532a  
Dr Tony Buti; Ms Andrea Mitchell; Acting Speaker

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Ayes (13)

Ms L.L. Baker	Mr D.J. Kelly	Mr P. Papalia	Mr D.A. Templeman ( <i>Teller</i> )
Dr A.D. Buti	Mr F.M. Logan	Ms R. Saffioti	
Mr R.H. Cook	Ms S.F. McGurk	Mr P.C. Tinley	
Ms J.M. Freeman	Mr M.P. Murray	Mr B.S. Wyatt	

Noes (30)

Mr P. Abetz	Ms E. Evangel	Dr G.G. Jacobs	Mr D.C. Nalder
Mr I.C. Blayney	Mr J.M. Francis	Mr R.F. Johnson	Mr J. Norberger
Mr I.M. Britza	Mrs G.J. Godfrey	Mr S.K. L'Estrange	Mr D.T. Redman
Mr G.M. Castrilli	Mr B.J. Grylls	Mr W.R. Marmion	Mr M.H. Taylor
Mr V.A. Catania	Dr K.D. Hames	Mr P.T. Miles	Mr T.K. Waldron
Ms M.J. Davies	Mrs L.M. Harvey	Ms A.R. Mitchell	Mr A. Krsticevic ( <i>Teller</i> )
Mr J.H.D. Day	Mr C.D. Hatton	Mr N.W. Morton	
Ms W.M. Duncan	Mr A.P. Jacob	Dr M.D. Nahan	

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Pairs

Ms J. Farrer	Mr T.R. Buswell
Mr M. McGowan	Mr C.J. Barnett
Mrs M.H. Roberts	Mr A.J. Simpson
Mr W.J. Johnston	Mr R.S. Love
Mr J.R. Quigley	Mr J.E. McGrath
Ms M.M. Quirk	Mr M.J. Cowper
Mr C.J. Tallentire	Mr F.A. Alban

**Amendments thus negated.**

**Clause put and passed.**

**Clause 482 put and passed.**

**Clause 483: Registry staff —**

**Dr A.D. BUTI:** I move -

Page 327, line 4 — To delete the line and substitute —

to assist the President and Registrar in performing their functions under

I am concerned about the government's position on some of the amendments moved by the opposition. I was concerned the other night when the government would not agree to the very sensible amendment to ensure that the president be a person of substantial legal standing of up to eight years as a practitioner or be a judge or a retired judge. It is important to understand that the registrar is there to support the president; and, the president should be a person of legal standing. I lost that argument, but it is important for the government and the parliamentary secretary to understand the importance of the registrar supporting the president and that the president should be a lawyer. That argument has been lost. I refer again to correspondence that the Minister for Mental Health received from Ms Strauss, to which I referred briefly the other day. Ms Strauss has comprehensive and wide experience having served on quasi-judicial tribunals. She has sent comprehensive correspondence to the minister and provided information about the functions of the president and the registrar. It is quite important that I go through that correspondence in some detail.

Ms Strauss refers to various tribunals, such as the Prisoners Review Board. I refer to an attachment to her letter to the Minister for Mental Health, which is dated February 2014. Under the heading "Under the Prisoners Review Board", the letter reads —

The Sentence Administration Act 2003 establishes the Prisoners Review Board. Section 106 provides the "functions of the Board are set out in this Act" and that the Board "may do all things necessary or convenient to be done for or in connection with, or as incidental to, the performance of its functions".

She states that the board must consider a prisoner's suitability for parole before the person is eligible, as all members would understand. Her letter continues —

The Board must address the "release considerations" and decide whether to order that the prisoner be released on parole. It also has power to make early release orders. "Release considerations" include factors such as the nature and degree of risk for individuals and the community if an early release or parole order is made, issues affecting victims and the prisoner's behaviour and participation in available programmes while in prison.

That is not unlike matters that are germane to the issues of mentally ill patients. The correspondence continues —

The Board can include requirements in the parole or early release order, such as that the parolee must live at a particular address, wear a monitoring device, participate in a rehabilitation programme or do community corrections service or charitable work.

The Board can amend, suspend or cancel parole orders or early release orders.

The Chairperson of the Board must be a judge or retired judge of the Supreme or the District Court (s103(2)).

The Registrar and staff are “members” of the Board, even though they are appointed by the CEO of the relevant Department to carry out the Board’s work.

Even though, as is the case with this legislation, they are appointed by the chief executive officer—and not by the president, which is what I suggested and argued for—they are there to carry out the board’s work. The correspondence refers to the registrar and the staff being members of the board. We are looking at registry staff. This is important, because a reading of the clause refers to staff being appointed under the Public Sector Management Act to assist the registrar. However, they are not there to assist the president. A clear reading of the clause does not have registry staff assisting the president.

**Mr C.J. TALLENTIRE:** I would like to hear more from the member.

**Dr A.D. BUTI:** As the attachment from Ms Strauss to the Minister for Mental Health points out, under the Prisoners Review Board, the registrar and staff are members of the board who are there to assist the chairperson. Ms Strauss also refers to the Mentally Impaired Accused Review Board, and writes —

Under the *Criminal Law (Mentally Impaired Accused) Act 1996* a judicial officer, if satisfied that an accused person is unfit to plead or be tried because of mental illness, can order that the accused be kept in custody.

The Board must review each mentally impaired accused person’s case within 5 days after the custody order was made and decide whether the person is to be detained in hospital, prison or another place of detention.

The Board: Can grant and revoke leave of absence from the place of detention; must review the person’s case within the statutory time frames; must consider the stated criteria; and must report to the Minister.

On reviewing a person’s custody order the Board must consider the six factors in subsections 33(a) to (f) of the *Criminal Law (Mentally Impaired Accused) Act 1996*. Five of these factors are similar to factors the Mental Health Review Board must consider on a review of involuntary status, including risks to the person’s and the community’s health and safety, any treatment or training that might address the person’s mental health, the person’s ability to care for themselves if not detained and what would be the appropriate least restrictive option.

They are functions similar to those of the Mental Health Review Board and the new tribunal. Ms Strauss then refers to how the chairperson of the board and the chairperson of the Prisoners Review Board must be a judge or retired judge. Unfortunately, I lost that argument the other night.

Ms Strauss talks about the need for the registrar and staff to assist the president or the chairperson. Clause 483 does not make that clear. Rather, it refers to the staff assisting the registrar, not necessarily the president. The parliamentary secretary may say that if the staff are assisting the registrar, obviously they will also be assisting the president. However, we should make it clear in legislative form that the staff are there to assist the president and the registrar, and not just have a statement that they are there to assist the registrar.

Ms Strauss refers to the New South Wales Mental Health Tribunal and the importance of the legal status of the president, and to the functions and responsibilities of the registrar in providing assistance to the president. She refers also to the Northern Territory Mental Health Tribunal, the Queensland Mental Health Review Tribunal, the South Australian Guardianship Board, the Tasmanian Mental Health Tribunal and the Victorian Mental Health Review Board, and also to the National Native Title Tribunal and the Corruption and Crime Commission of Western Australia.

What is stated in this attachment goes against what the government is providing for in this bill with regard to the legal status of certain positions. We have seen in this bill time and again that the government seems to want to reduce the status or influence of people with legal training. I find that very interesting, because what we are dealing with here are the rights, freedoms and liberties of people with a mental illness being restricted or impinged upon.

Ms Strauss states the following at page 9 of the attachment to her letter to Hon Helen Morton —

About 6 months after the *Native Title Act 1993* ... commenced I was appointed the Deputy Registrar of the National Native Title Tribunal ... This was the first legislation to recognise native title in Australia, so there were an enormous number of legal issues to address and procedures to develop and implement.

**Mr C.J. TALLENTIRE:** I would like to hear more from the member for Armadale.

**Dr A.D. BUTI:** Thank you. She continues —

The NNTT needed to develop relationships with numerous stakeholders, including Aboriginal people; Aboriginal land councils; state, territory and local governments; state and Commonwealth agencies; people working on land or in waters (such as farmers, pastoralists, miners, fishers, and tourism operators) and the wider community, to explain the purpose, meaning and effects of the NTA.

I joined the CCC just after the *Corruption and Crime Commission Act 2003* ... commenced. I advised extensively on the meaning and effect of CCC Act provisions and the powers, duties and functions of public officers under State statutes.

The CCC Act introduced sweeping, revolutionary changes to the oversight of public officers' conduct and the investigation of misconduct and criminal conduct. Of equal importance were the CCC's other statutory functions of helping public sector bodies prevent misconduct; and educating public officers and the wider community about what constitutes misconduct and how to prevent it.

Once the CCC Act commenced, new issues about the meaning, effect and implementation of its provisions arose daily. Naturally, it was vital that the CCC's actions were lawful and that its advice to public officers, agency heads and the general community was legally sound.

Under the NTA the President must be a judge or former judge of the Federal Court, or a person with at least five years experience as a legal practitioner of the High Court, Federal Court or Supreme Court of a State or Territory.

Under the CCC Act the Commissioner must be a former judge, or a person qualified to be appointed as a judge of the Supreme Court of WA or any other State or Territory, or of the Federal or High Courts of Australia.

The legal standing and gravitas of the positions of Commissioner and President were essential to lead these new, powerful organisations through countless legal complexities and to engage and communicate with their clients, stakeholders and staff.

In her letter to Hon Helen Morton of February 2014—I have read out part of her attachment to this letter—she states —

3. The new Act should make it clear that the Tribunal Registrar and other staff are to assist the President to administer the Tribunal, and that they are accountable to the President.

Clause 481 subclauses (a) to (g) set out the Registrar's functions. Under clause 482 the President can direct the Registrar about the Registrar's clause 481 functions.

Clause 483 of the Bill provides that staff are to be appointed to assist the Registrar. Staff should be appointed to assist the President in the administration of the Tribunal. Otherwise, it may seem that staff are accountable to the Registrar, not the President.

That is the point we are trying to make with this amendment. She continues —

The Registrar should have the general function of assisting the President to administer the Act, including but not limited to any specific functions, such as those listed in clause 461. If the Registrar's function is to assist the President, reporting lines and accountabilities would be clear, enabling the President to develop and steer the Tribunal as its legal and administrative head.

The President must also have standing to engage staff he or she considers necessary for the efficient and effective operation of the Tribunal.

I am aware that the Mental Health Review Board has recently faced problems arising from uncertainty about the roles and responsibilities of Board staff, to whom they are accountable and their standing *vis a vis* the Mental Health Commission. This uncertainty undermines the independence that an Australian quasi-judicial body must have, and be seen to have. The new legislation and the administrative arrangements between the Tribunal and the Commission must demonstrate that the Tribunal has judicial independence. The legislation and the administrative arrangements must also make it clear that the Registrar and other staff are staff of the Tribunal, not the Mental Health Commission and are accountable to the President.

**Mr C.J. TALLENTIRE:** I would like to hear more from the member for Armadale.

**Dr A.D. BUTI:** Thank you.

That is why we have moved the amendments with regard to the legal status of the president, which the parliamentary secretary refused to support the other night, and that is why today we are seeking to ensure that there is a clear line of accountability and direction between the president and the registrar, and the staff of the registry. That is why these amendments, which are clear-cut and sensible, should be supported.

It is worth reading the conclusion of Ms Strauss's letter to Hon Helen Morton —

I have extensive experience working in quasi-judicial boards and tribunals, interpreting and advising on legislation, and developing and implementing procedures. It is inevitable that the Tribunal will face many legal and procedural issues from day one. The President and other Members must navigate these in an orderly way, with a degree of consistency.

The Tribunal is a legal entity with instructions (in the statute) about what administrative decisions it must make, the processes to be applied and the factors to be taken into account. As a quasi-judicial body, an experienced lawyer should head it up, as is the case in other Western Australian quasi-judicial bodies.

Mental health boards and tribunals in the eastern states have a judge at the helm, or a lawyer with legal experience that makes him or her eligible to be appointed as a judge of the District Court or the Supreme Court—an “Australian lawyer” who has at least 8 years' legal experience.

There should be additional clauses stating the President's general function and powers to run the Tribunal and engage staff, such as:

*“The President is responsible for the administration of the Tribunal, with the assistance of the members and the registrar and other staff of the Tribunal”.*

*“The President is responsible for the appointment of a Registrar and such other staff as he or she decides is required for the Tribunal to function effectively and efficiently”.*

In Board hearings one of the first things the Presiding Member explains to the patient and his or her support people is that the three members present make up an independent body that must, under the law, consider the patient's case independently of the treating doctors, the hospital or clinic, and the government department that looks after mental health business in the State.

Debate interrupted, pursuant to standing orders.

[Continued on page 2544.]