

MENTAL HEALTH BILL 2013

Consideration in Detail

Resumed from 1 April.

Clause 304: Terms used —

Debate was adjourned on the following amendment moved by Dr A.D. Buti —

Page 217, after line 2 — To insert —

or

(iii) medical and epidemiological research; or

(iv) those undertaking apprehension and seizure; or

(v) associated welfare services;

Mr P. PAPALIA: I had the call when the debate was adjourned. I was halfway through quoting from the Mental Health Bill 2013; I had quoted the first subparagraph defining the term “mental health service”, which is on page 216. Paragraph (a)(ii) states —

a service provided specifically for carers of people who have or may have a mental illness;

Paragraph (b) states what the term “mental health service” does not cover.

What we were talking about, which I am particularly interested in pursuing, is the situation in which police are called by the parents, family or carers of a mentally ill individual who is having an episode that results in that individual being violent or potentially violent and the police then provide a service to transport that person. That situation may also apply for a hospital, too. I understand that police are regularly called to take people from hospital to an appropriate facility. Does that service conducted by the police count as a mental health service? The reason I ask is that I know that Western Australia Police is incapable of identifying how many individuals have been charged with an offence that attracts a mandatory jail term as a consequence of this type of scenario. I have had police ministers respond in *Hansard* to questions in this place and the other place claiming that there are databases that do not talk to each other, so they are incapable of determining whether we have people in our prison system as a direct consequence of police being called for no other reason than to escort a mentally ill person to a secure facility. I think that is a relevant and serious issue. If that is not considered a mental health service for the purpose of this legislation, the complaints process will not be appropriate. As we discussed when we last talked about this issue, it does not matter that the Corruption and Crime Commission has an oversight responsibility for police because, unless there is a closed-circuit television image or some other independent evidence that confirms specific details of an assault, or a claim of assault, an individual is completely at the mercy of police to determine whether they are charged and go to jail. It is not a matter for the courts because this government has introduced mandatory sentencing in these cases. The police deem whether it is appropriate to charge this person, and it may or may not be a real assault; it may or may not have been that individual’s responsibility. We have seen cases in Western Australia since this law was introduced that would have resulted in the mandatory imprisonment of individuals had there not been, fortuitously, CCTV cameras located in positions that could record the incident, because the police were giving false evidence. Those people would have been sent to jail under this government’s laws as a consequence. I believe responsibility lies with the government to ensure that all possible precautions are taken with a mentally ill person to ensure that we do not unnecessarily increase the number of mentally ill people in our prison system and that we do not exclude them from any complaints process. I am interested in the detail associated with police responding in those instances and whether people are able to access this complaints process when they potentially encounter the police for no other reason than someone having called them to escort the person to a facility.

Ms A.R. MITCHELL: I think I responded last night to this question regarding the police. Although I understand the member’s concern, he is going slightly out of the remit. The police have training on dealing with people with a suspected or alleged mental illness. They are very cognisant of the issues the member raised and they do all they can to ensure that the outcome is not to put someone in prison, because that is not the best outcome for anybody.

Mr P. PAPALIA: The problem with that response is that the police also have great training in how to deal with the public honestly and with integrity, yet since mandatory sentencing laws were introduced, a number of individuals would have gone to prison had they not been fortuitous enough to access closed-circuit television imagery to show that the police had not been acting in accordance with their training. That is therefore not the question. I know that the police receive training on dealing with mentally ill people. I question the extent of it and the quality of it, but that is not a criticism of the police. I think that it is a really difficult area and it requires

much more in the way of specialist services than just asking police to do it. My question is: in the event that police are called for no other purpose than to escort someone to a secure mental health facility, are the police considered to be part of the mental health service for the purpose of this bill?

Ms A.R. MITCHELL: If the complaint is about something to do with the police, it goes to the CCC and not to the Health and Disability Services Complaints Office.

Mr P. PAPALIA: I will place on the record for the final time my view of the inadequacy of that response and the suggestion that the CCC will be able to act when in all likelihood there will be no evidence contrary to or outside the police evidence and the individual concerned, which will invariably result in whatever the police determine as the outcome. They will determine whether they charge someone. They will then, because of the laws that this bill will introduce, prevent any court from considering any evidence. There will be no mitigating factor to be considered. The people will go to jail if they are charged with one of those offences that attract a mandatory sentence. I therefore think that the response is inadequate. The parliamentary secretary should consider this amendment as an opportunity to list the police response to a request to escort someone as part of the mental health service, because it happens a lot. The parliamentary secretary knows it happens a lot. I think it is almost one a day, if not more. In fact, I think it is more than that on the evidence I have received from the police minister. It is therefore happening all the time. It is a fundamental component of our response to mental illness and ultimately the sort of worrying end with regard to behaviour in the community. I therefore think it is disappointing that the parliamentary secretary's suggestion is that it is all okay because the CCC has oversight of the police. Yes, it does, but it can act only on the evidence that it has before it; and, if there is no evidence in the matter other than the evidence from the police, it will not even get to the CCC. A complaint may be made to the CCC, but it will not act on it.

Dr A.D. BUTI: Further to that, can the parliamentary secretary clarify for me how the matter will be referred to the CCC? Even if it is referred to the CCC, I imagine that it will go initially to the internal complaints division of the police. From my understanding of previous complaints that have been made, the CCC always defers initially to the internal complaints division of the police. If that is the case, the matter may not get to the CCC; and if the CCC refuses to take the matter further, what avenue does the complainant have then? If the matter goes to the CCC and the CCC states that it will not investigate it, what other avenue is there? Also, will the CCC defer initially to the internal police complaints division?

Ms A.R. MITCHELL: I respect the question raised by the members, but I can say that it is not particularly related to this bill. It will probably come up under another piece of legislation that we are not discussing at the moment.

Division

Amendment put and a division taken with the following result —

Ayes (16)

Ms L.L. Baker	Mr D.J. Kelly	Mr P. Papalia	Ms R. Saffioti
Dr A.D. Buti	Mr F.M. Logan	Mr J.R. Quigley	Mr P.B. Watson
Mr R.H. Cook	Mr M. McGowan	Ms M.M. Quirk	Mr B.S. Wyatt
Ms J.M. Freeman	Ms S.F. McGurk	Mrs M.H. Roberts	Mr D.A. Templeman (<i>Teller</i>)

Noes (30)

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

Pairs

Ms J. Farrer	Mrs L.M. Harvey
Mr P.C. Tinley	Dr K.D. Hames
Mr M.P. Murray	Mr T.R. Buswell
Mr C.J. Tallentire	Dr G.G. Jacobs
Mr W.J. Johnston	Mr B.J. Grylls

Amendment thus negated.

Clause put and passed.

Clause 305 put and passed.

New clause 305A —

Ms A.R. MITCHELL: This amendment will correct a drafting oversight. Both divisions 3 and 4 of part 19 relate to the Health and Disability Services Complaints Office and, accordingly, both divisions should be read with HADSCO's primary legislation, the Health and Disability Services (Complaints) Act 1995. I therefore move —

Page 218, after line 4 — To insert —

305A. Divisions 3 and 4 to be read with *Health and Disability Services (Complaints) Act 1995*

Divisions 3 and 4 are to be read with the *Health and Disability Services (Complaints) Act 1995*.

New clause put and passed.

Clauses 306 and 307 put and passed.

Clause 308: Division to be read with *Health and Disability Services (Complaints) Act 1995* —

Ms A.R. MITCHELL: The amendment in my name on the notice paper can be deleted because it has been replaced by new clause 305A. I think the wording I should use is to oppose this clause.

The SPEAKER: It has just been explained to me that you cannot delete it; you can vote against it.

Clause put and negatived.

Clause 309 and 310 put and passed.

Clause 311: Functions of Director —

Dr A.D. BUTI: I turn the parliamentary secretary's attention to subclause (2), which reads —

The function of the Director under subsection (1)(f) does not include the publication of personal information about a person who has or may have a mental illness, but this subsection does not affect the operation of section 342.

Clause 342 deals with reports to Parliament. We can deal with this matter under clause 342 also. Is the legislation providing that under clause 342 that personal information can be published?

Ms A.R. Mitchell: Clause 342 permits publication only with the consent of the person.

Clause put and passed.

Clause 312: Directions by Minister —

Dr A.D. BUTI: I seek clarification on the interplay between clause 312(1) and (2). It reads —

- (1) The Minister may, after consultation with the Director, issue written directions about the general policy to be followed ...
- (2) The Director may request the Minister to issue a direction under subsection (1).

Will the minister be able to issue written directions that have been advised or requested by only the director or can ministers do that at their own discretion?

Ms A.R. MITCHELL: I have been advised that ministers can do that at their own discretion, but they must discuss those things with the director first.

Dr A.D. BUTI: Thank you. Subclause (2) provides that the director may request the minister to issue a direction under subclause (1). I assume that just because the minister is requested to issue a direction, the minister does not have to issue it.

Ms A.R. Mitchell: No.

Clause put and passed.

Clauses 313 and 314 put and passed.

Clause 315: Representative of person with mental illness or carer —

Dr A.D. BUTI: Subclause (3) states in part —

The Director cannot recognise a person as the representative of a complainant unless satisfied that the prospective representative —

- (a) ... is a prescribed person as defined in section 316(1);

That is obviously the following clause. It continues —

- (b) if the prospective representative is not a relative of the complainant — has no financial interest in the outcome of the complaint.

If the prospective representative is not a relative of the complainant and has no financial interest, does that mean that if the person is a relative they can have a financial interest? I may be reading it wrongly, but on plain reading it tells me that if the prospective representative is not a relative they have no financial interest. That implies that it relates only to non-relatives. I think that could be quite dangerous because we know the history of money and families. I picked that up only this morning, parliamentary secretary. I feel that probably should be amended. It is interesting—I will hark back to my hobby horse here—that financial interest is referred to here but the treating medical practitioner is not required to disclose any financial interest they have with the patient. That seems quite strange. However, the more important issue at this stage is what I think may be a drafting error.

Ms A.R. MITCHELL: I have been informed that clause 315(3) is straight out of section 20 of the Health and Disability Services (Complaints) Act primary legislation.

Dr A.D. Buti: That doesn't make it right.

Ms A.R. MITCHELL: If I can continue. An example is that the relative could be paying for the treatment and believe they have been overcharged or something along those lines. They may not be necessarily being paid to be the person's representative, but have some other interest, which is more likely to occur in this situation.

Dr A.D. BUTI: I find that explanation completely unsatisfactory—because it may be in another act. Maybe it should not be in that other act. The financial interest that the parliamentary secretary says may be referred to is not the complete gamut of financial interest. I picked it up myself only this morning. It seems quite clear to me that that clause states that a relative can have a financial interest in the outcome of the complaint. That is open to abuse. The parliamentary secretary stated a relative cannot have a financial interest, but there is no guarantee that a relative will always act in the best interests of a complainant. I seek directions from the Speaker: if the parliamentary secretary is not going to move an amendment, can I move an amendment now? I am not sure what the situation is.

The SPEAKER: You can move an amendment.

Dr A.D. BUTI: I will listen to the parliamentary secretary first.

Ms A.R. MITCHELL: Member for Armadale, we believe that it is covered through the Health and Disability Services Complaints Office's primary legislation. There have been no examples of issues through that. We believe we are fine.

Dr A.D. BUTI: I am thinking on my feet here. In that case, I move —

Page 225, line 9 — To delete “is not a relative of the complainant”

Ms A.R. MITCHELL: I am trying to seek clarification, member. What is important here is that the relative still needs to be a prescribed person. We need to make sure that we keep that within the legislation. Subclause (3)(a) states at the end “and (b)”. If we delete “is not a relative”, the relative still needs a place in this legislation.

Dr A.D. BUTI: Is the parliamentary secretary saying to me that the prescribed person has to be a relative?

Ms A.R. Mitchell: No. There still needs to be a prescribed person in that clause and we have to cover the fact that it might be a relative.

Dr A.D. BUTI: Yes, I understand that. I am not saying that they cannot be a relative. My proposed amendment does not deny the relative; it just denies that the relative can have a financial interest. That is what I am arguing. I am not saying that they cannot be a relative; I am just saying they cannot have a financial interest.

Ms A.R. MITCHELL: I suppose that is about the member's thinking of what a financial interest is. We are thinking in the broader sense: if I was the mother of the person, I would have a financial interest in that person—not necessarily that they are paying me to do anything, or things like that, but I have a financial interest. It is a very broad concept of financial interest rather than a specific one that I think the member is focusing on.

Dr A.D. BUTI: Even more so! I am talking about the full gamut of financial interest. It is in the clause because the parliamentary secretary feels it is a problem for some prospective representatives but not others. I am saying that it is a very dangerous line to try to divide between relative and non-relative when it comes to financial interests. There is a litany of examples in succession law: it is often when relatives become involved in financial matters that there is a problem. If financial interest is a problem for the government in regard to a non-relative, there is no reason it may not be a problem in regard to a relative.

Ms A.R. MITCHELL: I repeat again that this clause relates to complaints. It concerns financial interest with respect to a complaint.

Dr A.D. Buti: It says “in the outcome of the complaint”.

Ms A.R. MITCHELL: Over the page, clause 319 gives a couple of examples. Subparagraphs (i) and (j) refer to that. I think we have covered that.

Dr A.D. BUTI: Yes, it is a complaint. It refers to the outcome of the complaint. The clause states that a non-relative cannot have a financial interest. Why is it therefore okay for a relative to have a financial interest? If the parliamentary secretary does not think it is appropriate for a non-relative to have a financial interest, why should it be okay for a relative to have a financial interest? It is either no good for relatives and non-relatives or it is good for relatives and non-relatives. To me the distinction the parliamentary secretary is making is very dangerous, which is why I have moved the amendment.

Ms A.R. MITCHELL: If I can come back a little: if the relative is to be remunerated, they can only represent the person if they are a prescribed person, which comes up in clause 316. Once again, that, in conjunction with what the member raised, has been covered.

Dr A.D. BUTI: As the parliamentary secretary will understand, clause 316 refers to payment. Not so long ago the parliamentary secretary herself said that financial interest is not narrow; it encompasses everything. Financial interest does not have to mean a person is being paid; they may actually receive some other form of financial advantage. I get back to the point: the parliamentary secretary stated that the prospective representative should not have a financial interest if they are not a relative. If a non-relative should not have a financial interest, neither should a relative.

Mr P. ABETZ: I can perhaps clarify that a little. Let us say a family with a business has a family trust. The parents have a financial-interest connection with that child and would therefore be automatically excluded, if the parliamentary secretary accepted the member for Armadale’s amendment. I believe that family ties should be paramount in dealing with these kinds of situations. Even if my son owes me X hundred thousand dollars, my interest is in my son’s wellbeing. We need to trust parents sufficiently on that. I guess the word “relative” spreads it out a little further. I think the family tie is really a very close one. Families have interconnections financially as well as emotionally and everything else. It would be undesirable to exclude a relative from that role simply because they have some financial connection. I certainly appreciate that there can be times when a grandson is eager for grandma to die so he can get an inheritance. Those sorts of things happen in families at times, but this is a different kind of context.

Dr A.D. BUTI: Thank you, member for Southern River. I understand that, but when it comes to financial interest we find the greatest tensions and the greatest source of family break-ups are due to financial interest. The government has determined that there is a problem if the prospective representative has a financial interest. It should not matter whether it is a family member or not. The member said he hoped the parent would act in the best interests of their child. We may not be talking about a parent and we may not be talking about a child—there are a number of listed participants or prescribed relatives in the bill.

If the point was that there might be a family trust, so be it. The fact that little Johnny, who is 10 years old, may be a beneficiary of the family trust does not mean that his father, who may also have a financial interest in the family trust—he may not; he may be only the trustee, but more than likely he would be a beneficiary—should not be excluded from being a prospective representative. How can a distinction be made between a relative and a non-relative in relation to a financial interest? We know, as the member will know from various readings of the scriptures, that money and financial interests often bring out the worst in people. The government, to its credit, has decided that a financial interest could be a problem for a prospective representative if they are not a relative. They could be a distant relative. Often distant relatives come out of the woodwork when there is money to be made. That should also apply to a relative. Whether or not it is in another act does not address the issue that I have raised. I cannot see why there is a problem with my amendment. Most people do not have family trusts in any case. Quite a small percentage of families have family trusts. Are we writing this law on the basis that a small percentage of people have a family trust? I do not think that is how we should draft legislation. The purpose of this bill should be based on the best interests of the complainant—that is, the mentally ill patient. The government has decided that a financial interest for a representative could be a problem. If it could be a problem for a non-relative, it could also be a problem for a relative, and sometimes even more so. That is why I have moved the amendment.

Ms A.R. MITCHELL: Member, there are a couple of things. Subclause (2) states that the director “may”. This is about the director having the discretion to determine whether the representative should be recognised. The clause goes through a number of things that the director should consider in the recognition of that person. The

family of the relative would most likely, we would like to think, as the member for Southern River said, play a significant part in that. This is about the complaint, not a financial interest disclosure.

Dr A.D. Buti: Why do you have it in there in any case if it is about the complaint?

Ms A.R. MITCHELL: It is because it is in the complaints section. That is why it is there.

Dr A.D. BUTI: I thank the parliamentary secretary for that clarification. Of course it is about the complaint; that is why it is in the complaints section! But if a financial interest is not an issue, why is it in the bill? The bill expressly prohibits a prospective representative from having a financial interest in the outcome of the complaint if they are non-relative. If that is the case, there should be no arbitrary distinction between whether they are a relative or a non-relative. The government has determined that if they are a non-relative, they cannot be a prospective representative in a complaint if they have a financial interest. If that is the case, why should it not also apply to a relative?

Ms A.R. MITCHELL: It states that they have no financial interest in the outcome of the complaint, which is different from a financial interest.

Dr A.D. Buti: No.

Ms A.R. MITCHELL: The amendment could mean that if the person were represented by their mother or father or a sibling, and if those people were paying for the medication, they could not represent that person. We are not talking about that. We want those people there. It is about having a financial interest in the outcome of the complaint.

Dr A.D. BUTI: That may be the case, parliamentary secretary, but maybe the government should have more tightly drafted that provision of the bill. A prospective representative might be a really good friend. The parliamentary secretary talked about a parent. A mentally ill person's best friend could be a prospective representative and they might have some financial interest because they may pay for the medication. If a complaint is upheld, it may allow that person to move back into the mentally ill person's apartment and help them subsidise their rent. Every time an example is given for a relative, it could also apply to a non-relative. The fact is that the government has created the situation by saying that financial interest is an issue. I go back to the point that if it is an issue for a non-relative, it is an issue for a relative. If the government is concerned about the gambit of financial interest, it should have more closely or more narrowly defined what it means by financial interest.

Ms A.R. MITCHELL: I appreciate what the member has done, but I repeat that if we accept the amendment, it will mean that the person could not be represented by their mother, father, siblings or other relative, and we do not believe that is appropriate.

Dr A.D. Buti: Why?

Ms A.R. MITCHELL: They may be paying for the medication.

Dr A.D. Buti: But they may not.

Ms A.R. MITCHELL: The member has ruled it out.

Dr A.D. BUTI: But they may not. Under this clause, a whole batch of other people who could be incredibly good representatives also may not be able to represent the person. The government should either not have the clause, although I think it should include financial interests, or more narrowly define what it means by financial interest. At the moment that is dangerous. It is okay for the parliamentary secretary to say that it may prevent a mother, father, brother et cetera, but the clause also opens it up to abuse, because it may not just be about medication; it may be other more substantial financial factors.

Division

Amendment put and a division taken, the Acting Speaker (Mr I.M. Britza) casting his vote with the noes, with the following result —

Extract from *Hansard*
[ASSEMBLY — Wednesday, 2 April 2014]
p1961b-1974a

Dr Tony Buti; Mr Paul Papalia; Ms Andrea Mitchell; Mr Peter Abetz; Acting Speaker

Ayes (16)

Ms L.L. Baker	Mr W.J. Johnston	Ms S.F. McGurk	Mr C.J. Tallentire
Dr A.D. Buti	Mr D.J. Kelly	Mr P. Papalia	Mr P.B. Watson
Mr R.H. Cook	Mr F.M. Logan	Mrs M.H. Roberts	Mr B.S. Wyatt
Ms J.M. Freeman	Mr M. McGowan	Ms R. Saffioti	Mr D.A. Templeman (<i>Teller</i>)

Noes (31)

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

Pairs

Ms J. Farrer	Mrs L.M. Harvey
Mr P.C. Tinley	Dr K.D. Hames
Mr M.P. Murray	Mr T.R. Buswell
Mr J.R. Quigley	Dr G.G. Jacobs
Ms M.M. Quirk	Mr B.J. Grylls

Amendment thus negated.

Clause put and passed.

Clause 316: Representative must not be paid —

Dr A.D. BUTI: This clause follows on from the clause we just discussed. I move —

Page 225, after line 19 — To insert —

or

- (d) a legal practitioner, who is being paid through a funding arrangement with government to provide free legal advice, who is representing the patient.

We say that a representative must not be paid. That excludes a whole gamut of people who could represent the complainant. Legal services that receive government funding to represent people with mental illness are not being paid directly by the complainant. We are not talking about a situation in which a lawyer is being paid directly by the complainant. My amendment will ensure that people who provide free legal advice to patients are able to represent the complainant. I assume that part of the reason this clause is in this bill is to ensure that complaints are not being pushed by lawyers or others who may be paid by the complainant or others to represent someone and therefore to ensure there are more complaints than may otherwise be the case. A legal practitioner may be funded to do exactly what the government is prohibiting by this clause. We are moving this amendment to reverse that—to ensure that free legal advice can be provided by a practitioner who is being paid by a funding body other than the complainant. I will argue that that seems a very reasonable and necessary amendment, but then I might be biased.

Ms A.R. MITCHELL: We are supportive of the principle behind the member's amendment but under advice from the Health and Disability Services Complaints Office, we would like to make a further change to the amendment. My amendment reads —

Page 225, after line 19 — To insert —

or

- (d) a legal practitioner, who is being paid through a funding arrangement with government to provide free legal advice, who is representing a person who has, or may have, a mental illness or a carer of a person who has, or may have, a mental illness.

We have expanded it.

Dr A.D. Buti: Would that include the patient as well?

Ms A.R. MITCHELL: It includes the patient.

Dr A.D. BUTI: That is an improvement on my amendment. It is very sensible. I seek leave to withdraw my amendment.

Amendment, by leave, withdrawn.

Ms A.R. MITCHELL: I move —

Page 225, after line 19 — To insert —

or

- (d) a legal practitioner, who is being paid through a funding arrangement with government to provide free legal advice, who is representing a person who has, or may have, a mental illness or a carer of a person who has, or may have, a mental illness.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 317 to 320 put and passed.

Clause 321: How to complain —

Dr A.D. BUTI: This clause relates to how to make a complaint. We believe that the complainant's name and identifying details should remain confidential to the director only, if the director is satisfied that repercussions could occur to the complainant if those details were distributed to other people. As we know from having debated a previous clause in the bill that referred to others making complaints about the complainant or the mentally ill person and their details not being disclosed, the details of a third person making a complaint about a mentally ill patient are not to be disclosed in some cases. All we are saying here about the complainant is that if the director is of the opinion that repercussions to the complainant could take place, those details should not be disclosed; however, we are not saying it always has to be the case. We do not see that that violates the general thrust of the complaints procedure under clause 321, and it provides a safeguard to the complainant if need be. Therefore, I move —

Page 228, after line 24 — To insert —

- (6) The Director shall not disclose the name or identifying details of the complainant to any other person or body, if the Director is satisfied that there could be repercussions for the complainant if there is such a disclosure.

Ms A.R. MITCHELL: We have received advice on the member's amendment from the director of the Health and Disability Services Complaints Office and the advice supports the intent of the amendment—there is no problem with what the member is trying to do. However, it is believed that the issue is already addressed by clause 327(11) and that that provision affords the director discretion to withhold personal information from the respondent in circumstances in which the disclosure may put the complainant's health, safety or welfare at risk, or prejudice the investigation of the complaint. Further restrictions on the disclosure are contained in two other clauses in the bill.

Dr A.D. BUTI: I thank the parliamentary secretary. I have just had another look at clause 327(11) and I agree with what the parliamentary secretary is saying—this is amazing! Therefore, I withdraw my amendment.

Amendment, by leave, withdrawn.

Clause put and passed.

Clause 322 put and passed.

Clause 323: Withdrawal of complaint —

Dr A.D. BUTI: Clause 323 deals with the withdrawal of a complaint. Of course, the complainant should always have a right to withdraw their complaint at any time. In this clause it is noted that the complainant may withdraw the complaint at any time by notifying the director, and, if satisfied that the complainant has withdrawn the complaint, the director must stop dealing with the complaint. That is fine, but of course sometimes pressure is put on people to withdraw complaints and that is why I seek to move an amendment. I move —

Page 229, line 7 — To insert after “the complaint” —

without duress

I think that is incredibly important because there is no doubt that complaints can have ramifications for a number of people who are the respondents to the complaint or to whom the complaint is directed. There will be occasions, due to the power imbalance or other circumstances, when the complainant may be put under pressure or feel that they are under pressure to withdraw the complaint. I believe that that simple amendment that the complaint should be withdrawn without duress will safeguard complaints being withdrawn when they would not

otherwise be withdrawn if no pressure had been exerted on the complainant. That is why we have moved this amendment.

Ms A.R. MITCHELL: The member is certainly right. It is important that patients and their support persons are able to pursue complaints without fear of reprisal. I refer the member to clause 344, which makes it an offence to use threats or intimidation to persuade a person to withdraw a complaint. I think we already looked at some of those concerns at clause 244, but certainly under clause 344 it is an offence to do that.

Dr A.D. BUTI: Clause 344 outlines the ramifications for the person who may be exerting the pressure—that is, a fine of \$2 500. Nothing in that clause states that if the complaint has been withdrawn, the process can commence again; nothing in that clause allows for that complaint to recommence. Clause 344 is an ex post facto sanction of conduct that the parliamentary secretary has rightly identified should not take place. My amendment to clause 323 is proactive and states that a complaint cannot be withdrawn if it is done under duress. If the parliamentary secretary can show me that clause 344 allows the complaint to restart—I want to see a provision in the bill that actually states that—I may reconsider the necessity of my amendment.

Ms A.R. MITCHELL: The complainant can make a complaint again; there is nothing that says they cannot do that. The right to make a complaint brings with it the right to decide whether or not the complaint should go ahead so that both options are available to the person making the complaint.

Dr A.D. BUTI: Would it not be more prudent to not have to engage in a recommencement of the complaint? Should the onus not be on the director to ensure that the complaint has been withdrawn by the complainant without duress? That should be done prior to making the decision that the complaint has been withdrawn. Should that not be done rather than deciding that the complaint will be terminated? Basically, under clause 323 the complainant withdraws the complaint by notifying the director, and, if satisfied that the complainant has withdrawn the complaint, the director must stop dealing with it. The plain reading of clause 323 does not require or even alert the director to ensure they have undertaken their own investigation to be satisfied that a complaint has been withdrawn without any duress. Therefore, we then have to wait for further information to allow clause 344 to come into play and then recommence the complaint. By that time there may have been quite a considerable time lag, and the urgency of the complaint being heard at the time it would have been heard had it not been withdrawn is lost. I do not understand why there would be any reluctance to include an amendment that just states that the director, in effect, has to be satisfied that the complainant has withdrawn their complaint without duress. All that is required of the director, probably at first instance, is for them to ask the complainant whether they have withdrawn the complaint of their own free will and to ascertain that there has not been any pressure exerted on them to do so. That would not be an incredibly excessive administrative burden on the director and it may actually decrease the burden vis-a-vis having to recommence the complaint at a later period after the time lag and with people's memories perhaps having faded somewhat.

Ms A.R. MITCHELL: I have been informed that HADSCO operates that way. It does not just accept that a complaint has been withdrawn and then does nothing about it; it always discusses issues around that with the person withdrawing the complaint so that it understands why the complaint has been withdrawn. I think the member will find that in practice that will occur without us having to accept his amendment.

Dr A.D. BUTI: That may be the case. However, this is a very comprehensive bill. It has over 580 clauses, and it had, as the parliamentary secretary knows, many years of gestation. Therefore, we should ensure that this bill is as correct and of high quality as is possible. That is why we should include in this bill the things that are necessary to be included. The words “without duress” should be included in order to ensure that the director is satisfied that a complaint has been withdrawn without undue pressure having been exerted.

Ms A.R. MITCHELL: The member's amendment goes into another area—namely, that after discussion between the Health and Disability Services Complaints Office and the complainant, HADSCO may still choose to investigate, which may be against the wishes of the person who made the complaint—and that is not the preferred method of operation.

Dr A.D. BUTI: That may be the case. But there is nothing in this clause that refers to another act. Clause 308 states that division 3 is to be read with the Health and Disability Services (Complaints) Act 1995. However, that does not go directly to prescribing in this bill what the director must do. This bill is quite prescriptive. Therefore, it should include a matter that is fundamental to ensuring that the complaint is genuine and has been made of the free volition of the complainant without undue pressure having been exerted. The parliamentary secretary said that this matter is dealt with under another act. My amendment is not hostile to what may be contained in another act. Therefore, if it is not hostile, why should it not be included? The parliamentary secretary may say that it will add duplication, because it is repeating what is contained in another act. Even if my amendment were to repeat the exact words that are contained in another act, it would not be of such complexity that it would make this clause unworkable. If anything, it would improve this clause by putting this provision up-front in legislation.

This Mental Health Bill is the premier legislation dealing with mental health issues in WA. Why should the principal legislation that deals with mental health issues in WA not include a provision to ensure that the director has turned his or her mind to the issue of whether duress has been exerted on the complainant?

Ms A.R. MITCHELL: Can I clarify that I did not intend what I said to be taken as meaning that it comes under another act. The way in which HADSCO operates is that it does not just accept a complaint being withdrawn; it does its own investigation to understand why and to see whether there is an issue.

Dr A.D. BUTI: That is an even greater reason why this amendment should be included in the legislation. The operations of any policy or administrative unit of the public service may change from time to time without legislation and without parliamentary scrutiny. We want to ensure that this legislation that we as parliamentarians have a responsibility to enact provides the greatest form of protection to people in the mental health area. The parliamentary secretary is saying that this is the normal practice. It may be the normal practice today, but it may not be the normal practice if another director comes on board. In any case, if it is the normal practice, then all my amendment is doing is codifying in legislative form something that is already occurring in practice. Therefore, my amendment should not be offensive or hostile to the government and should be agreed to.

Division

Amendment put and a division taken, the Acting Speaker (Mr I.M. Britza) casting his vote with the noes, with the following result —

Ayes (14)

Ms L.L. Baker
Dr A.D. Buti
Mr R.H. Cook
Ms J.M. Freeman

Mr D.J. Kelly
Mr F.M. Logan
Mr M. McGowan
Ms S.F. McGurk

Mr P. Papalia
Mrs M.H. Roberts
Ms R. Saffioti
Mr C.J. Tallentire

Mr P.B. Watson
Mr D.A. Templeman (*Teller*)

Noes (32)

Mr P. Abetz
Mr F.A. Alban
Mr C.J. Barnett
Mr I.C. Blayney
Mr I.M. Britza
Mr G.M. Castrilli
Mr V.A. Catania
Mr M.J. Cowper

Ms M.J. Davies
Mr J.H.D. Day
Ms W.M. Duncan
Ms E. Evangel
Mr J.M. Francis
Mrs G.J. Godfrey
Mr C.D. Hatton
Mr A.P. Jacob

Mr R.F. Johnson
Mr S.K. L'Estrange
Mr R.S. Love
Mr W.R. Marmion
Mr J.E. McGrath
Mr P.T. Miles
Ms A.R. Mitchell
Mr N.W. Morton

Dr M.D. Nahan
Mr D.C. Nalder
Mr J. Norberger
Mr D.T. Redman
Mr A.J. Simpson
Mr M.H. Taylor
Mr T.K. Waldron
Mr A. Krsticevic (*Teller*)

Pairs

Mr W.J. Johnston
Mr B.S. Wyatt
Mr P.C. Tinley
Ms J. Farrer
Mr M.P. Murray

Dr G.G. Jacobs
Mr T.R. Buswell
Dr K.D. Hames
Mrs L.M. Harvey
Mr B.J. Grylls

Amendment thus negated.

Clause put and passed.

Clauses 324 to 327 put and passed.

Clause 328: Rejection, deferral or referral of complaints —

Dr A.D. BUTI: Nothing in this clause requires the director who rejects, defers or refers a complaint to do that in writing to the complainant, although if it is deferred, it will be in writing, I imagine. I do not think that is necessary under the legislation.

Ms A.R. MITCHELL: I take the member back to clause 327(7), which states —

If the Director rejects the complaint, the Director must give to the complainant written details of the decision.

Clause put and passed.

Clauses 329 and 330 put and passed.

Clause 331: Conciliation of complaints —

Ms A.R. MITCHELL: I move —

Page 237, after line 16 — To insert —

- (7A) Despite the *Parliamentary Commissioner Act 1971* section 20(3), evidence referred to in subsection (7) may be disclosed to the Parliamentary Commissioner for the purposes of an investigation under that Act.

This amendment will correct a drafting oversight and will enable the director to disclose information obtained through conciliation to the Parliamentary Commissioner for Administrative Investigations for the purpose of an investigation. Equivalent clauses are already included in the bill in relation to information derived from negotiations and statements by the respondent and in the Health and Disability Services (Complaints) Act 1995.

Dr A.D. BUTI: The opposition will not oppose this amendment. While I am on my feet, I refer to subclause (6), in which it is possible for the conciliator to invite others to be in attendance at the conciliation. Is there any restriction on who can or cannot appear? For instance, in debate on clause 316, the parliamentary secretary referred to people in a paid position or a non-relative who might have a financial interest. Would they be excluded from appearing in a conciliation, despite its being the opinion of the conciliator that they may be beneficial to the outcome? I understand that they are not appearing as a representative, but they may still have the same financial interest or reward that the government has tried to exclude in clauses 315 and 316.

Ms A.R. Mitchell: I understand it is at the discretion of the conciliator.

Dr A.D. BUTI: Therefore, they can be included if the director wishes.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 332 to 344 put and passed.

Clause 345: Registers: complaints, matters directed to be investigated —

Dr A.D. BUTI: This clause refers to establishing and maintaining a register of complaints reported to the director under certain provisions of this bill. Subclause (2) states —

Each register must be established and maintained in the manner determined by the Director.

Subclause (3) states —

The form and contents of each register must be determined by the Director.

Is that register to be made public, or, if it is not to be made public, is there a provision in the bill that prevents it being made public? If so, I have not found it.

Ms A.R. MITCHELL: No; it is not meant to be made public. Clause 572 refers to confidentiality. If anything on the register was released, it would be only statistical information and would not be personal information.

Dr A.D. BUTI: I do not believe that clause 572 prevents the register being made public. It is true that clause 572(3) might prevent certain aspects of the information being made public. It reads —

Subsection (2) does not apply in relation to the recording, disclosure or use of statistical or other information that is not personal information.

Ms A.R. Mitchell: It would be statistical information.

Dr A.D. BUTI: That is true, but under clause 572(2) —

A person must not (whether directly or indirectly) record, disclose or use any information obtained by the person because of —

- (a) the person's office, position, employment ...

I do not know whether that prevents the register being made public, as subclause (3) says only that the clause does not apply to disclosures of a statistical nature. I know that under clause 572 personal information cannot be disclosed, which is fine, and that may prevent the disclosure of personal information on the register; however, does personal information include names? Does it prevent publication of other aspects of the person's identity that, if revealed, others could work out who it was, even if their name was not included?

Ms A.R. MITCHELL: As I said before, the information is not to be made public.

Dr A.D. BUTI: The parliamentary secretary may say that, but clause 572 does not completely prohibit the registry being made public under clause 345.

Ms A.R. Mitchell: I did say that some statistical information may come out of it, but the registry as such would not become public.

Dr A.D. BUTI: The parliamentary secretary may say that, but her pronouncement about statistical information says what will be published; it does not necessarily say what will not be published. I will not go on about that, but I do not believe that the confidentiality provision of this bill under clause 572 provides complete prohibition of information on the registry.

Clause put and passed.

Clause 346: Delegation by Director —

Dr A.D. BUTI: Subclause (1) states that the director may delegate to a member of the complaints office staff any power or duty of the director under another provision of this part. It then talks about how that delegation will be made, but then states that the delegation cannot then be sub-delegated—so the delegator cannot delegate. It is interesting that this clause refers to “power” or “duty”. As the parliamentary secretary would know, there is a difference between “power” and “duty”. “Power” is the authority a person has; a “duty” is something that is owed to someone else. It is quite common to delegate powers—that is, the operation of something. It is not normal to delegate duty, because with duty goes obligations. This provision means the director can delegate to a subordinate not only a particular exercise or power, but also any responsibility, and that could be dangerous. I think what the government means by “duty” is not perhaps the legal obligation or liability attached to duty; but, unfortunately, the way the legislation is written the director is given power to remove some of their obligations. That is very dangerous, as the parliamentary secretary would know, because if the discipline that goes with having certain obligations is removed, powers could be exercised in a manner in which they should not be exercised. Why has “duty” been included here? If it was meant to be included, there should be a section that states that the obligation or the liability still attaches to the director. The way the clause reads, the director can offload a lot of his obligations.

Ms A.R. MITCHELL: In terms of the duties, it would be things like establishing the register, or providing written information or notice to a respondent—to do those sorts of things. The director will always have those responsibilities to discharge the duties, and even though he may delegate a couple, the responsibility still falls with the director.

Dr A.D. BUTI: That is not actually the case. Clause 346 states that the director may delegate to a member of the complaints office staff any power or duty of the director under another provision of this part. It refers to “any”. The director may not actually always have the duty that the parliamentary secretary has just stated, because the way that this clause is drafted gives them the right to delegate that duty. It would be better if the clause read “any power of the director under another provision of this part” rather than duty.

Ms A.R. MITCHELL: I take the member back to clause 311, which talks about the functions of the director, including dealing with complaints. I then refer to clause 346, which is just about the delegations.

Dr A.D. BUTI: I do not believe that that follows. Clause 311 talks about the functions of the director.

Ms A.R. Mitchell: And that is where the director still has to always perform their functions under that clause.

Dr A.D. BUTI: Yes, but is the parliamentary secretary saying that clause 346 prevents the director from delegating to a complaints officer all the functions under clause 311(1)?

Ms A.R. Mitchell: Clause 311 gives the director overall responsibility.

Dr A.D. BUTI: That may be the case, and that is of course what they should have, but clause 346 provides that overall responsibility can be delegated, because of that word “duty”.

Ms A.R. MITCHELL: Clause 346 is limited to powers and duties, not functions.

Dr A.D. BUTI: Is the parliamentary secretary saying that under clause 346 the ability of the director to delegate to the complaints officer does not allow them to delegate or prepare and publish information, which is under clause 311(1)(f)? It is interesting if the parliamentary secretary is saying that.

Ms A.R. Mitchell: They can delegate, but the director has overall responsibility.

Dr A.D. BUTI: I am sorry. Clause 311 talks about the functions of the director. Nowhere in clause 311 does it state that those functions cannot be delegated. Clause 346 makes quite clear that the director can delegate to a member of the complaints office staff any power or duty. Is the parliamentary secretary saying that dealing with complaints made to the director is a function and not a duty?

Ms A.R. MITCHELL: I believe the member’s issue is dealt with under clause 346(5), which states that an officer or agent can perform that function.

Dr A.D. BUTI: No, it actually does not, because clause 346(5) states —

This section does not limit the ability of the Director to perform a function through an officer or agent.

Yes, it does not limit their ability to perform the function, but it does not stop that function from being delegated. Clause 346 states quite clearly that the director may delegate their power or duty. Clause 311 lists a number of powers and duties of the director. There may be a definitional category called “functions”, but it includes powers and duties. Clause 346 states that they can be delegated. Subclause (5) does not reimpose the liability back on the director; all it states is that it does not limit the ability to perform their function. Those functions are duties and powers. If they are not duties and powers, what else are they?

Mr P. PAPALIA: I rise to join the member for Armadale in demanding a response from the parliamentary secretary. She cannot just sit there; a quite legitimate question has been asked. The functions of the director are listed in clause 311, and they, by definition, will have to be part of the duties and powers of the director that can be delegated in accordance with clause 346. What is the parliamentary secretary’s response? She cannot just sit there mute; she has to actually give an answer.

The ACTING SPEAKER: That is actually not correct, member for Warnbro.

Ms A.R. Mitchell: No, that is not correct.

The ACTING SPEAKER: The parliamentary secretary is not obligated to answer any question, but the parliamentary secretary may wish to do so.

Point of Order

Mr P. PAPALIA: I feel compelled to stand and continue my comments because I have been enjoined by a number of comments regarding my last statement, as well as by you —

The ACTING SPEAKER (Mr P. Abetz): Are you raising a point of order?

Mr P. PAPALIA: Yes, in response to the interjections from you and the other side with respect to the comment I made. It was more of a rhetorical flourish, condemning the parliamentary secretary for failing in her duties as a representative of the minister by not responding to what was a quite reasonable question and a reasonable point.

The ACTING SPEAKER: I do not think you have a point of order.

Debate Resumed

Dr A.D. BUTI: I believe the parliamentary secretary is taking guidance from her advisers; while she is doing so, I will continue.

A trustee, for instance, can delegate their powers, but they cannot delegate their obligations to the beneficiaries. Clause 346 allows the director to delegate; by using the word “duty”, the director is enabled to delegate their obligations or responsibilities. There is no doubt that the list of functions under clause 311 includes powers and duties. If they are not powers and duties, what powers and duties are we referring to?

Ms A.R. MITCHELL: Member, given the functions of a director, there is a considerable amount of work to be done. Obviously, that director cannot undertake all of their functions, so they have the power to delegate some of those responsibilities to other people who can undertake the work. But the function is still with the director.

Dr A.D. BUTI: Obviously, the director should have the ability to delegate various things they have to perform. The issue is not with the delegation of the power; the issue is with the delegation of the duty. As I said before, a trustee has many, many obligations to a beneficiary. They can delegate the actual exercise of those duties, but they cannot delegate the actual duty because they have to remain responsible. They are legally responsible for the best interests of the beneficiary. In this case, the director should not be able to devolve their responsibility by saying that they can delegate the duty. There is no doubt that they should be able to delegate the power or the exercise of the various functions under clause 311—the parliamentary secretary has said that they are functions, not powers in any case, but let us say that they are powers because they are—but they should not be able to delegate the actual duty that has a legal responsibility attached to it. The problem has been created by including the “or duty” in clause 346.

Clause put and passed.

Clauses 347 to 350 put and passed.

Clause 351: Functions of mental health advocates —

Dr A.D. BUTI: This clause deals with the functions of mental health advocates, and it lists an array of them. Clause 351(1)(g) reads —

assisting identified persons to access legal services; ...

I presume that in regard to access to legal services there is no prohibition on the lawyer being paid for their services?

Ms A.R. Mitchell: No.

Dr A.D. BUTI: There is none?

Ms A.R. Mitchell: I have said no; I responded.

Clause put and passed.

Clause 352 put and passed.

Clause 353: Directions to Chief Mental Health Advocate about general matters —

Dr A.D. BUTI: Of particular concern is clause 353(2), which reads —

The CEO may, after consultation with the Chief Mental Health Advocate, issue written directions about the administrative policies and procedures to be followed by the Chief Mental Health Advocate in managing the office of the Chief Mental Health Advocate.

We are concerned about that subclause being included. I move —

Page 255, lines 3 to 7 — To delete the lines.

Ms A.R. Mitchell: We are going to accept that amendment. I just thought I would save you some time.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 354: Directions to Chief Mental Health Advocate to report on particular issues —

Debate interrupted, pursuant to standing orders.

[Continued on page 1984.]