VOLUNTARY ASSISTED DYING BILL 2019

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 151: Board to record and retain statistical information —

Debate was interrupted after clause 150 had been agreed to.

Dr D.J. HONEY: Last night we heard questions around the coroner perhaps being involved in the collection of information for the recording and retaining of statistical information. The minister said that extensive data would be collected. When I look at the list of information here, it seems to be quite a short, restricted list of information that is to be retained. I wonder whether this is indeed the list. I see that the minister can give written direction, but obviously the minister will not have given written direction at this stage. A number of issues about this have been raised throughout this debate. One of those issues, for example, was the concern about doctor shopping. There is no restriction whatsoever in the act on the number of doctors that someone can approach to find someone to participate in this process—sorry, I thought the minister was distracted with another conversation.

Mr R.H. Cook: Sorry, I am going to take a quick break.

Dr D.J. HONEY: I am sure the minister's advisers can answer the question.

Mr R.H. Cook: They are more than capable, member for Cottesloe.

Dr D.J. HONEY: As a reprise, Premier—I will not go through it in detail—the concern is about what appears to be a very restricted list of information that is to be recorded per se. As I said, one of the issues that members have spoken about is doctor shopping when either a patient or a coordinating practitioner gets repeated rejections and the person goes back to different doctors until they find someone who will go ahead with the process. Surely that would be an important piece of information for the Voluntary Assisted Dying Board to retain so that when it is reported back to the minister and Parliament, that information is available. That was a specific and legitimate concern raised by members in this place. We were told it is not going to happen very often and will be an infrequent occurrence. That would be an important piece of information to obtain to determine how well this bill is functioning. Is this indeed the list? Clause 151(1)(a) and (b) seem to contain a very restricted amount of information. Is that the information that they report on? I recognise that the minister can give direction, but in the first instance it is a very small list.

Mr M. McGOWAN: For the member's information, the information as required under clause 151(a) and (b) is not the maximum, but the minimum required. As part of its reporting and advisory function, the board is able to advise the CEO of Health when the board is of a view that there is a pattern of doctor shopping amongst people deemed ineligible for access to voluntary assisted dying. In this way, the Department of Health may be able to look at how other areas of care support may be better developed. It may be that these patients require linkage to another part of the health system for care and support. The types of statistical information required to be provided in the Voluntary Assisted Dying Board's annual report and stored and maintained by the board will include but not be limited to the number of people accessing and attempting to access voluntary assisted dying; whether the voluntary assisted dying substance was self-administered or practitioner administered; the age, gender and postcode of the participant; and whether the person died prior to the voluntary assisted dying process being finalised.

Dr D.J. HONEY: I thank the Premier for that. Why was that not included in that clause? I appreciate that there is added additional information. Just to short-circuit discussions as I do not want to drag this out: How does this compare with the equivalent section in the Victorian legislation? Does the Victorian bill contain a more extensive list or, in fact, is it a similar list to this?

Mr M. McGOWAN: My advice is that the Victorian legislation has a similar base requirement, but the way it is structured here allows for the required information to be provided to expand, so it is a minimum. If we prescribed everything, in order to add more, we would have to come back and legislate.

Dr D.J. HONEY: I am concerned about improper behaviour. I restate, I think and I am certain, that most people think that it will be a rare rather than common occurrence. But if, for example, the coroner was required to be involved in a matter, would that be part of a report? As legislators who are responsible for this legislation, how would we be aware of that information?

Mr M. McGOWAN: The answer to the member's question is contained under section 154(2)(b). It will be all that information and potentially more. We will get to that clause shortly, but it states that the report must include —

> any information that the Board considers relevant to the performance of its functions …

Clause put and passed.

Clauses 152 and 153 put and passed.

Clause 154: Annual report —

Mrs A.K. HAYDEN: In relation to clause 154, titled "Annual report", a lot of the questions we have asked today and over the debate have been about reporting—where we find the information, whether the minister has oversight, and whether they report to the minister. Everything was referred back to the annual report. I understand that the annual report will hopefully answer all the questions that we have asked earlier on the minister having oversight of what the board is doing. Clause 151(2) states, as the Premier indicated, that anything to do with the board recording and retaining statistical information will be in the annual report. Clause 151(2) states that the minister may give a written direction to the board requiring it to look into a certain matter. If an issue comes up in the annual report, is the minister able to go back and ask the board a question on something within the report under clause 151(2)? In other words, although it has happened and has been reported on, does the minister have the ability to direct the board to look into something that has been raised and reported in the annual report?

Mr M. McGowan: Yes.

Mrs A.K. HAYDEN: The answer was "yes", for *Hansard*, because normally we sit down and stand up.

Mr M. McGowan: Not always!

Mrs A.K. HAYDEN: Again, clause 154, "Annual report", refers to a few other issues where details of any disclosure under certain sections are reported for everyone to read. Will those annual reports be tabled in Parliament or just made public online?

Mr M. McGOWAN: Clause 154(4) requires the report to be laid before both houses of Parliament.

Mrs A.K. HAYDEN: We talked about the board being able to create a committee and not needing to report back to the minister on that committee. Will the annual report contain details such as who the committee members are and what jobs and powers have been bestowed upon them by the board? Will the committee work also be tabled in the annual report, along with details such as who is on the committee, what they are being paid, what directives they have been given, and what powers the board has given them to act on its behalf?

Mr M. McGOWAN: The answer is yes.

Mr Z.R.F. KIRKUP: In answer to our questions in consideration in detail, the Minister for Health has spoken a number of times about information that will be contained in the annual report but is not specified in the bill. We raised a concern about medical practitioners who might have a higher than average involvement in being a coordinating or a consulting practitioner. I think the minister noted that that would be an issue as well, and that he would not want to see a particular entity set up for any particular purpose like that. Clause 154(3) excludes the medical practitioner's details. I am keen to understand how it would be identified to the public, for example, if there were an issue like that with a certain entity that was to be established. If we cannot include the details of a medical practitioner or their facility, how would the public or Parliament be informed about any issues that the minister himself considered a potential problem?

Mr M. McGOWAN: It would be unusual and irregular to publish the details of the practitioner. If we did, for those people who are not comfortable with these laws, I would have thought that they would not want that.

Clause put and passed.

Clause 155 put and passed.

Clause 156: Communication between patient and practitioner —

Ms M.M. QUIRK: There has been an issue around situations in which the medical practitioner uses audiovisual communication, and whether that may fall foul of sections 474.29A and 474.29B of the commonwealth Criminal Code Act 1995. We heard last week that the Attorney General has written to the federal Attorney-General. Has the Attorney General had a response to that on the constitutionality or otherwise of discussing assisted dying over the federal communication system?

Mr M. McGOWAN: The advice I have is that this matter has been dealt with on a number of occasions in a number of clauses. The second reading of the Telecommunications Act through the commonwealth Parliament indicated that that act was intended to deal with cyberbullying with the potential outcome of suicide by a victim, which is not the circumstances with which we are dealing. The advice from the Department of Health is that there is no inconsistency, but it is liaising with the commonwealth.

Ms M.M. QUIRK: I had tabled a letter from the state Attorney General, John Quigley, to the federal Attorney-General, Christian Porter, dated late August. Have we had a response to that yet?

Mr M. McGOWAN: The advice is that we do not have a response.

Ms M.M. QUIRK: Finally, in this letter, the Attorney General said that he had taken legal advice at the highest level and it is his view that communications about voluntary assisted dying via a carriage service do not contravene the commonwealth Criminal Code. Who provided that advice?

Mr M. McGOWAN: The advice was received from the Solicitor-General of Western Australia and the State Solicitor and, in any event, clauses 156, 156(4), 157, and 157(4) ensure that there is no inconsistency with commonwealth law.

Dr D.J. HONEY: During this debate there has been a bit of variation in some answers. This area has been covered before, but I want to get a clear answer on two points, please. The first point is that whilst we call it audiovisual communication, a pure telephone call without vision can comprise an appropriate communication.

Mr M. McGOWAN: I think it may have been answered before, but it is audiovisual.

Dr D.J. HONEY: The reason that I ask—I am not trying to be tricky; I just want to get clarity for the record—is that we have had three different ministers at the table giving answers and one response indicated that a telephone conversation by itself would comprise appropriate communication. I am quite happy for the Premier to confirm that it is in fact audio and visual and not simply a telephone call. It is just that a different opinion had been given in answer to a different question.

Mr M. McGOWAN: The advice I have is that there has been no inconsistency between any of the ministers, and that it is visual and audio at the same time.

Dr D.J. HONEY: Thank you, Premier. I would like to again confirm that a first request with a medical practitioner and request to access voluntary assisted dying via, for example, a FaceTime communication, would comprise a formal first request of a medical practitioner by that person.

Mr M. McGOWAN: As long as it complies with the requirements for a request contained within clause 17.

Clause put and passed.

Clause 157: Information about voluntary assisted dying —

Mrs A.K. HAYDEN: Clause 157 states —

> (1) In this section —
>
> ***authorised official*** means —
>
> (a) the CEO; or
>
> (b) a public service officer employed in the Department; or
>
> (c) a person designated as an authorised official under subsection (2).
>
> (2) The CEO may, in writing, designate persons, or persons … as authorised officials …

Can the Premier explained the purpose of the authorised official? If I understand it correctly, the purpose is to have an authorised official out there giving information on access to VAD. Why do we need that when we have medical practitioners who are already giving that information on first request? On the first day of the debate, we debated that medical practitioners are to give that information and not refuse that information. They can give a pamphlet or redirect the patient. Therefore, why do we need an authorised official?

Mr M. McGOWAN: This is to ensure that there is proper community and practitioner education as people would expect with such a significant piece of legislation.

Mrs A.K. HAYDEN: Premier, if it is to create awareness, where will the authorised official work out of? What is the actual plan and role for this person? What place within the department will it be? Will it be at a surgery?

Mr M. McGOWAN: That is a ministry matter that will be decided by the director general of the Department of Health, and no doubt it will be somewhere within the Department of Health.

Mrs A.K. HAYDEN: Will it be limited? Can there be an unlimited number of authorised officials, or will it be just one to enable the communication that goes out?

Mr M. McGOWAN: There will be no limitation on the number of people.

Clause put and passed.

Clauses 158 to 159 put and passed.

Clause 160: Interpreters —

Ms M.M. QUIRK: This clause deals with interpreters. In clause 160(2) an interpreter for a patient must be accredited by a body approved by the CEO. Are we able to contemplate what the body is?

Mr M. McGOWAN: It would be a body such as National Accreditation Authority for Translators and Interpreters.

Ms M.M. QUIRK: Premier, I understand that that is the only body, so I am wondering why we do not put that in the legislation rather than a body approved by the CEO?

Mr M. McGOWAN: It should not be limited because new bodies might be created or things of that nature. As long as it is nationally accredited, that is the requirement.

Ms M.M. QUIRK: I do not know that it says that anywhere, but I will look at the explanatory memorandum. I have had a bit to do with an interpreter who used to work at Sir Charles Gairdner Hospital. This certainly happened under the previous government and, I think, is continuing; that is, contract agency personnel are being brought in to interpret on health issues who do not have a good understanding of the nuances and issues around health conversations, so there have been some misunderstandings. The explanatory memorandum does not state "nationally accredited" either.

Mr M. McGOWAN: Clause 160(2) states —

> An interpreter for a patient —
>
> (a) must be accredited by a body approved by the CEO; …

Ms M.M. QUIRK: We can read that as the National Accreditation Authority for Translators and Interpreters because there is no other body.

Mr M. McGOWAN: Not at this point in time. It might change its name, or other bodies might come into existence.

Ms M.M. QUIRK: I refer to NAATI-accredited interpreters. There are a number of languages for which there are no NAATI-accredited interpreters in Western Australia, so the only availability is through a telephone interpreter service. As we discussed in other sections, the only way for that interpretation to take place would be over the telephone. Were the issues surrounding the use of a carriage service considered in the context of this clause?

Mr M. McGOWAN: The requirement will be for an accredited body, but if a telephone service is required to be used for assistance, particularly in remote or regional areas, the department will follow the Western Australian health system language services policy and detailed practical guidelines, which apply the state government's "Western Australian Language Services Policy 2014" to the unique conditions and complexities of the Western Australian health system.

Ms M.M. QUIRK: I think this will be my final question on this. The question was slightly different from that. Cases in which an accredited interpreter is not available in Western Australia will necessitate the use of a telephone interpreter service to access an accredited interpreter in another state. Have the issues surrounding the constitutionality of the various clauses in which communication by telephone or audiovisual means was permitted been addressed in the context of this clause?

Mr M. McGOWAN: The interpreter will not be providing advice. They will just be interpreting. They will not be inciting or coercing or anything of that nature. The advice is that it does not infringe upon any laws.

Ms M.M. QUIRK: That is a great answer, Premier. I am asking whether that issue was considered in the context of this clause. It has obviously just been considered now.

Mr M. McGOWAN: Yes, it was.

Clause put and passed.

Clause 161: Regulations —

Mrs L.M. HARVEY: Clause 161, "Regulations", creates a regulation-making power within the legislation. Can the Premier detail what regulations he thinks may be required to complement this legislation?

Mr M. McGOWAN: The bill does not require any regulations to be made. The bill has been drafted as a comprehensive piece of legislation to operate quite prescriptively and to stand alone. This general regulation-making clause is a futureproofing mechanism. However, it is not anticipated that any regulations will be made under the provision. The bill is very comprehensive. It is far more detailed than the Victorian legislation. CEO approval is required for certain aspects within the purview of the Department of Health.

Mrs L.M. HARVEY: Mention has been made of a number of forms that will be required. Are they likely to be gazetted by way of regulation or will those forms just be available on a website?

Mr M. McGOWAN: The forms will be approved by the CEO. There is no reason that they would be published on a website and no reason they would not. The forms will be created and issued by the CEO, not by regulation.

Mrs L.M. HARVEY: Just to be clear: the forms for people wanting to access voluntary assisted dying will not be tabled in the Parliament.

Mr M. McGOWAN: No.

Mr P.A. KATSAMBANIS: I am picking up on the Premier's answer that the bill was drafted in a way that does not require any regulations to be made prior to its coming into effect. As the Leader of the Opposition pointed out, the bill provides significant discretion to the CEO to do many things, including to approve certain types of forms, which directly bypasses the need for any regulations. As a legislator, I think the power to make regulations is an important check and balance in our system. It particularly enables Parliament to scrutinise regulations made by the executive. The drafting of this bill to specifically exclude and bypass regulations in favour of a CEO's directive is clearly a deliberate choice by the government. I believe it is another reason this legislation is not as good as it could be, because it deliberately bypasses parliamentary scrutiny for things that in the ordinary course of events are either included as schedules to acts or are done by regulation in lots of other legislation that relates to far more innocuous matters than legislating for the taking of a person's life. The Premier can take this as a comment. I know that is the clear intent of the government. I think it is one more indication to the public of Western Australia that this piece of legislation is clearly intended to bypass the scrutiny of Parliament and therefore bypass the scrutiny of Western Australians. It is one more alarm bell that causes concerns about this legislation.

Mr M. McGOWAN: The bill is actually far more comprehensive and far more prescriptive than the Victorian legislation. It is a far more substantial piece of legislation. The bill actually sets out what is required in the forms in far more detail. Obviously, legislation is a more accountable way of doing things than subsidiary legislation, such as regulations, because it goes through Parliament in this manner with full and comprehensive debate, as opposed to what happens with regulations, which are passed every day without that system of accountability.

Clause put and passed.

Clause 162: Review of Act —

Mrs L.M. HARVEY: This clause relates to the review of the legislation. It is worded in a somewhat confusing manner. The way I read it is that the effectiveness of the legislation will need to be reviewed as soon as practicable after it has been in operation for two years and a report is to be prepared. After that first review on the second anniversary, there then needs to be a review after not more than five years. But subclause (2) reads —

> The Minister must cause the report to be laid before each House of Parliament as soon as practicable after it is prepared, but not later than 12 months after the 2nd anniversary or the expiry of the period of 5 years, as the case may be.

I interpret that to mean that when we hit the two-year anniversary, a report will be compiled and the minister will be compelled to table that report. However, according to subclause (2), the minister will not need to table it until a period of five years has elapsed.

Mr M. McGOWAN: No. The wording essentially means that the report must be tabled within 12 months of the second anniversary, and then for the five-yearly reports, the report must be tabled within 12 months of each fifth anniversary after the second anniversary.

Ms M.M. QUIRK: Was any consideration given to a review being conducted by a parliamentary committee rather than it being left somewhat ambiguous as to who will conduct the review? The clause states that the minister will "cause the report to be laid".

Mr M. McGOWAN: It is quite standard for a review clause such as this to enable a review to be undertaken in this manner and then a report tabled, but there is nothing to stop a parliamentary committee from conducting an inquiry or review if it so desires.

Mrs A.K. HAYDEN: With regard to the review after two years, what will happen if, prior to the review, there is a wrongful death under this legislation? For example, it might be identified that there was coercion, an error was made in the diagnosis of the illness or an error was made in the decision-making. What happens if it comes out later that this did occur and there was a wrongful death? I understand that the intent of this bill is to assist people, but members have raised concerns in this place about unintended consequences for vulnerable people. Let us hope it does not happen, but what will happen if a person does pass wrongfully because it is later proven that they had falsely passed the criteria? Is there room for the minister to review the legislation immediately and table a report on that wrongful death or to advise Parliament on recommendations to either repeal or amend that flawed provision?

Mr M. McGOWAN: There is nothing to stop a minister from undertaking any such inquiry should they so wish. There is nothing to stop a parliamentary committee of its own accord or by motion of the house from undertaking any such inquiry. The review mechanism applies not to individual cases but to the operations of the act. We have already dealt with penalty provisions, which allow for a police inquiry if there is any unlawfulness or anything of that nature.

Mrs A.K. HAYDEN: I thank the Premier for that. Again, if there is a wrongful death in Victoria under a section of its legislation that is reflected in our legislation, will the minister advise Parliament that there is a possible flaw and look at addressing that immediately?

Mr M. McGOWAN: There is nothing to stop a minister, a parliamentary committee or the police from undertaking inquiries into any irregularities. If something happened in Victoria, I assume it would be published and that the Parliament, the press and/or anyone else who wanted to make known any such irregularities in Victoria would no doubt make it public.

Clause put and passed.

Clause 163: Act amended —

Mrs L.M. HARVEY: Part 11 of the bill deals with consequential amendments to other acts. I want to go back to clause 95, which actually modifies the operation of sections 75, 77, 78 and 79 of the State Administrative Tribunal Act 2004. I note that there is not a consequential amendment under this part to the State Administrative Tribunal Act, but that there are consequential amendments to every other act that will be amended by this legislation. I seek the Premier's advice on why there is not a consequential amendment for the State Administrative Tribunal Act.

Mr M. McGOWAN: Any amendments to the SAT act are already in the substance of the bill.

Mrs L.M. HARVEY: Could the Premier explain that in a little more detail? Every act that will be amended by this bill has a consequential amendment in part 11, except the SAT act. I want to know why that act is different.

Mr M. McGOWAN: The State Administrative Tribunal Act contemplates within its wording that any enabling act, which the Voluntary Assisted Dying Bill will be, can amend it in the actual act and not by a consequential amendment. There are provisions within the 162 or thereabouts clauses that we have dealt with that amend the SAT act, such as clause 91.

Mrs L.M. HARVEY: I am not sure that the Premier has adequately explained it. I think the Premier may be referring to the SAT act perhaps having an overarching section that says that if other enabling legislation refers to the SAT act, that enabling legislation has priority over the SAT act. Is that where we are up to with it? As such, we do not necessarily have to amend the SAT act because there is an overarching section of the SAT act that says that enabling legislation will take precedence.

Mr M. McGOWAN: The answer is yes, and the State Administrative Tribunal said that the way that we have done it in the content, the first 162 clauses of the Voluntary Assisted Dying Bill, is the correct way to do it.

Clause put and passed.

Clauses 164 and 165 put and passed.

Clause 166: Section 3A inserted —

Dr D.J. HONEY: We have discussed this in some reasonable detail before, and I want to make clear that I suspect the answer we will get has been given before. Not making this a reportable death that is subject to investigation by the coroner is, I think, a deficiency in the legislation. I heard the reasons that have been given, but I do not think those reasons hold water. We report deaths of people who are murdered, who are in motor vehicle accidents, from accidental drug overdoses and the like, and those things are potentially embarrassing to people. Having said that, I have never heard anyone quote a death certificate to me in a situation in which it is not a matter of choice for that individual. Those causes of death are reported on the death certificates. In this case, there should be a record on the death certificate, recognising that there is no shame in it. This has been previously answered at length.

Mr M. McGowan: Thank you.

Clause put and passed.

Clauses 167 to 184 put and passed.

Title put and passed.

Leave granted to proceed forthwith to third reading.

Third Reading

MR R.H. COOK (Kwinana — Minister for Health) [3.33 pm]: I move —

That the bill be now read a third time.

MR D.A. TEMPLEMAN (Mandurah — Leader of the House) [3.33 pm]: I want to make some comment and compliment members on the carriage of the Voluntary Assisted Dying Bill 2019 during the last period to take us to the end of the consideration in detail stage. It is important to acknowledge the significance of this bill, in terms of legislation, and that the second reading and consideration in detail stages were conducted in a very respectful

manner. I know that at times there were a few little periods of response, or passions and emotions highlighted, but generally I think it was a very respectful debate.

It is interesting to note the statistics on the analysis of this bill, and the time spent on this bill up to the end of consideration in detail is as follows. The second reading was debated for 20 hours and 52 minutes, and all members who were able to make a second reading contribution indeed did so. Again, the second reading debate and contributions by all members, irrespective of their views and where they had landed with their support or otherwise of the bill, were conducted appropriately. Until 1.00 pm today, we have spent some 45 hours and 13 minutes in the consideration in detail stage. If I add the time since question time, that would now be just over 46 hours. The consideration in detail process is the time during the debate of a bill that allows members to interrogate and analyse the bill in greater detail and I want to commend all members who partook in the consideration in detail period of the bill's passage. It is also appropriate to acknowledge the staff of Parliament, of course, particularly as we had a long sitting period not last week but the week before, which saw, I think for the second time in my parliamentary career, a sitting that went into the early hours of the next morning. For some, that was quite a novelty and for others, it was not, but I just want to acknowledge parliamentary staff for their efforts and the work they did to ensure that the house continued to operate appropriately during a long session of sitting for this Parliament. I also acknowledge—I am sure the Minister for Health will do this in his contribution to the third reading to conclude the bill next week—the staff who appeared as advisers to the minister, and the Attorney General and the Premier, who at various periods of consideration in detail supported the minister at the table. Those staff did an outstanding job representing the department and supporting the ministers who were at the table at the time.

I also want to thank the member for Dawesville for his cooperation. Although we have not been able to predict to the minute or even the hour when we would conclude various stages of the bill's passage, there has been some good cooperation with getting the bill to the conclusion of the consideration in detail stage and now to the third reading. As has been indicated to the manager of opposition business, the intention of the government is to ensure that the third reading of this bill is concluded as early as possible next week—we would expect before question time on Wednesday; that would be the aim—and we will have a discussion about that. Certainly, the bill needs to be sent to the upper house as soon as is practicable, because it will be a government priority bill once it lands in the other place.

I conclude my third reading contribution by again acknowledging the support of various people to ensure that the house has been able to operate appropriately. I think many of us will not see a bill of this significance for some time.

The conduct of all members during the debate on this bill has been commendable. I personally look forward to the passage of this bill from the Legislative Assembly early next week so that we can progress to other bills that are on the notice paper and that will be put on the notice paper in the fullness of time. I will conclude my remarks and I understand we will probably adjourn debate on this bill now so that further third reading contributions can be taken on Tuesday.

Debate adjourned, on motion by **Mr D.R. Michael**.