ACTS AMENDMENT (CONSENT TO MEDICAL TREATMENT) BILL 2006

Committee

Resumed from 14 May. The Chairman of Committees (Hon George Cash) in the chair; Hon Sue Ellery (Minister for Child Protection) in charge of the bill.

Clause 11: Parts 9A to 9D inserted —

Proposed section 110S: Operation generally —

Progress was reported after clause 11 had been amended.

The CHAIRMAN: When we were last considering this bill we were at clause 11; in particular, proposed section 110S, "Operation generally". We were dealing with a number of amendments to proposed section 110S. The next amendment that needs to be considered on the question that proposed section 110S do stand as printed is the amendment in the name of Hon Ed Dermer, 29/11.

Hon ED DERMER: I have a number of amendments that are related in their intent, and this is the first of those. I will address each of them in my introductory comments.

The CHAIRMAN: Recognising that I will put them separately.

Hon ED DERMER: I understand that, Mr Chairman. I move —

> Page 17, line 18 — To delete "exist or have" and insert instead
>
> have or knowledge has

My concern with the current wording of this bill is that when it is enacted it may lead to a situation in which a health care provider hesitates to provide reasonable and appropriate treatment to a person where that person had not anticipated the availability of such treatment when the person prepared an advance health care directive. That is a long sentence. However, I am endeavouring to explain to members that it is easy to imagine a situation whereby since a person made a written directive there has been a change in medical knowledge, advance in available treatments or some other change in the circumstances for that person and his or her health. At a later time when that person is unable to communicate his or her wishes on the health treatment he or she would like, he or she is in the hands of a doctor or other health care professional. That health care professional may at that point in time be fully aware of an appropriate and reasonable treatment but hesitates to give that treatment because of an advance health care directive that was written at an earlier time when the particular treatment was unknown or was not available. I hope I have made myself clear. That is the motivation behind the amendments I have on the notice paper.

I was pleased when I received a letter from the Australian Medical Association (WA). It has probably been sent to all members of the Legislative Council; I know that one or two members with whom I have consulted have received it. I refer to a letter from Geoffrey Dobb, who is the president of the Australian Medical Association (WA). The letter is dated 23 April 2008. I read the amendments suggested in Mr Dobb's letter and it appeared to me that they would go a significant way to overcome the problem that I explained to the chamber. Proposed section 110S(3) of the bill states —

> Subject to subsection (4), a treatment decision in an advance health directive does not operate if circumstances exist or have arisen that —
>
> (a) the maker of the directive did not anticipate at the time of making the directive; and
>
> (b) would have caused the maker to change his or her mind about the treatment decision.

The bill, as it stands, endeavours to address the issue that I raised. The amendment suggested by the Australian Medical Association (WA) would give further protection by ensuring that appropriate and reasonable advance in medical knowledge would be available to the health care provider to use in the best interests of the patient without being constrained by a health care directive that would prevent that provider using a reasonable and appropriate treatment for the benefit of the patient.

The wording of proposed section 110S(3) would read, if my amendment were passed, as follows —

> Subject to subsection (4), a treatment decision in an advance health directive does not operate if circumstances have or knowledge has arisen that —

My amendment would allow for any improvement in medical knowledge of the care that can be given to someone in need of that care. It would allow a health care provider to give appropriate and reasonable care to the patient in that circumstance.

The president of the Australian Medical Association (WA) suggested a further amendment, which is reflected in the next amendment in my name on the supplementary notice paper. Proposed section 110S(3), if my second amendment on the supplementary notice paper was passed, would read —

> Subject to subsection (4), a treatment decision in an advance health directive does not operate if circumstances have or knowledge has arisen that —
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> (a) the maker of that directive would not have reasonably anticipated at the time of making the directive; and
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> (b) a reasonable person in the patient's position, would have changed his or her mind about the treatment decision.

This amendment is a sensible suggestion by the Australian Medical Association (WA). It would go a long way to ensure that a very unfortunate situation does not arise; that is, that good health care, that was not available at the time a patient wrote a directive, could be provided to a patient. I have outlined the purpose behind my amendments.

Hon SUE ELLERY: The government does not support this amendment. I will make two points. First, I draw to the attention of the member that I believe he has left out a word from the phrase he intended to delete through this amendment, but I will argue my case as if the word left out was actually there. I think he needed to delete the word "circumstances" as well.

Hon Ed Dermer interjected.

Hon SUE ELLERY: I know the point that the member is trying to make, so I will mount my argument in any event. The government does not support this amendment because it is not necessary, for two reasons. Firstly, the proposed subsection (3) that we are currently considering reads, in part —

> Subject to subsection (4), a treatment decision in an advance health directive does not operate if circumstances exist or have arisen that —
>
> (a) the maker of the directive did not anticipate . . .

We say that the words "circumstances exist or have arisen" are enough to take into account anything, including, for example, any new information about new treatments that might be available that were not available at the time the directive was made. Probably of more use to the member, proposed subsection (4) sets out the matters that need to be taken into account in determining whether proposed subsection (3) applies to a directive made more than 10 years before the time at which the treatment decision would otherwise have been given. The explanatory memorandum sets out what the matters listed include. For example, new medications are constantly becoming available for the treatment of cancer, which may improve the quality of life and extend life expectancy. A further example is when a person merely gives a direction in an advance health directive that, should he or she become comatose, resuscitation is not to be provided. That person might then suffer from a bee sting and go into anaphylactic shock, a reversible condition for which resuscitative measures may be required for a short period. The treating health professional may consider that, in the absence of specified circumstances in the directive, the person could not have anticipated the consequences of a bee sting at the time of making the directive and would have changed his or her mind.

The amendment is redundant for two reasons, in the first instance because the broad term is already in there, in the words "a treatment decision in an advance health directive does not operate if circumstances exist or have arisen". The words "circumstances exist or have arisen" are broad enough to include, for example, advances in the treatment of conditions. Secondly, there is a further safety net in the following proposed subsection, which sets out the things that need to be taken into account in those circumstances. That includes, for example, changes in treatment. The government opposes the amendment. We say that the words already in proposed subsection (3) cover circumstance that exist or have arisen, and that is broad enough to capture all the things that the honourable member, and indeed the Australian Medical Association, seek to include.

Hon ED DERMER: First of all, I will make it very clear that the words in my amendment are exactly as I intended them to be. There was never any suggestion to remove the word "circumstances". The words presently in the bill are "circumstances exist or have arisen". I am suggesting deleting the words "exist or have" and inserting the words "have or knowledge has". The phrase would then read "if circumstances have or knowledge has arisen". The word "circumstances" will remain after my amendment is passed. What is material is the insertion of the word "knowledge". I would like to hope that circumstances include advances in medical

knowledge. The advantage of my amendment over the current wording is that it makes that very important point explicit. That is not only my judgement, but also that of the Australian Medical Association. On many occasions I do not agree with matters raised by the AMA but, given that most health care is provided by doctors and members of this association, I take its recommendations very seriously, and I suggest that others do likewise. I am very aware of proposed subsection (4) and its reference to health directives made more than 10 years before the time at which the treatment decision would otherwise be taken. I think 10 years is vastly too long a period. Changes in medical knowledge often occur in unexpected ways. Although they do not occur as quickly as we would like, from time to time they do occur very quickly. It would be a mistake for me to say much more about that, because that is the subject of a further amendment standing in my name.

Hon SUE ELLERY: I point out to the committee that the effect of the amendment is in fact to make the provisions of the subsection narrower, and I am not sure that that is the direction the committee wishes to go. Taking out the word "exist" after 'circumstances" will result in this subsection referring only to circumstances that have arisen. To refer to the examples I gave, a bee sting is not something that may be created in the future and that we do not know about now. A bee sting is a circumstance that exists now, but the writer of the advance health directive may not have considered a bee sting as something to be explicitly dealt with in the directive. Perhaps he or she was thinking about something more catastrophic or some form of illness. The effect of the amendment would be to make the application of the subsection narrower, and I do not think that is the intention of the honourable member. Putting that to one side, we say that the word "circumstances" is broad enough to canvass anything, including knowledge.

Hon ED DERMER: I will take a moment to consider the minister's last suggestion. Is the minister suggesting that the word "exist" has a substance that is not covered by the word "arisen"?

Hon Sue Ellery: Yes.

Hon ED DERMER: As the minister indicated, it is certainly not my intention to diminish the effect of circumstances. Given a moment, I could probably find a satisfactory solution to that suggestion.

Hon Sue Ellery: If it helps you, that will not change the government's position on your amendment.

Hon ED DERMER: I understand that, but it may influence others in the chamber, and that is my intention. Mr Chairman, I wonder if I could ask you to consider leaving the chair for a short time to allow that?

The CHAIRMAN: Generally, I am required to look to the minister in charge of the bill, but I can say this: if you just need a moment or two to consider your position, I very happy for you to sit down and I will then give you the call. However, to leave the chair is a matter for the minister in charge of the bill, and then it is a matter for the committee.

Hon Sue Ellery: Would it be enough to delete the word "exist" from your amendment?

The CHAIRMAN: Hon Ed Dermer should resume his seat for a moment. If he wishes to approach the minister, he may do so, to save time. If I leave the chair, it will cost us time.

Hon ED DERMER: I think the suggestion made by the minister would achieve the desired effect.

Hon Sue Ellery: Don't say I never help you.

Hon ED DERMER: I would never suggest that. It would be a matter of altering the first part of the amendment from "to delete 'exist or have'" to simply "to delete 'have'". The amendment would then delete the word "have" and continue with the words to be inserted.

The CHAIRMAN: I think the committee should be invited to test the proposition. If the committee agrees to delete the words, Hon Ed Dermer might then decide to come up with some other set of words to insert. If the committee does not agree to delete those words, we will not have to worry too much.

Hon ED DERMER: I think I now have the right form of words I want to use. I seek leave to alter my amendment so that it will read —

> Page 17, line 18 — To delete "or have" and insert instead —
>
> or knowledge has

If the amendment, as altered, is passed, the passage will read "if circumstances exist or knowledge has arisen".

Amendment, by leave, altered.

Hon BARBARA SCOTT: I will make just a small suggestion. One or another is plural, so the word we should use after "knowledge" is "have" and not "has". I think that would be more grammatically correct.

The CHAIRMAN: Let us see whether the words can first be deleted. If we do not delete the words, an amendment will not be needed to correct the grammar of the sentence.

Amendment, as altered, put and a division taken with the following result —

Ayes (8)

Hon Vincent Catania	Hon Wendy Duncan	Hon Helen Morton	Hon Barbara Scott
Hon Kate Doust	Hon Anthony Fels	Hon Batong Pham	Hon Ed Dermer *(Teller)*

Noes (20)

Hon Ken Baston	Hon Sue Ellery	Hon Barry House	Hon Ljiljanna Ravlich
Hon Matt Benson-Lidholm	Hon Donna Faragher	Hon Paul Llewellyn	Hon Sally Talbot
Hon George Cash	Hon Adele Farina	Hon Robyn McSweeney	Hon Ken Travers
Hon Kim Chance	Hon Nigel Hallett	Hon Sheila Mills	Hon Giz Watson
Hon Peter Collier	Hon Ray Halligan	Hon Norman Moore	Hon Bruce Donaldson *(Teller)*

Amendment, as altered, thus negatived.

Hon ED DERMER: I move —

Page 17, lines 19 to 22 — To delete the lines and insert instead —

(a) the maker of that directive would not have reasonably anticipated at the time of making the directive; and

(b) a reasonable person in the patient's position, would have changed his or her mind about the treatment decision.

The material difference between the words that I suggest and those in the bill before us is the reference to "reasonably anticipated" and "a reasonable person in the patient's position".

I will read out proposed section 110S(3)(a) to allow members to compare and consider the words in the bill and the words in my amendment —

the maker of the directive did not anticipate at the time of making the directive; and

I propose we replace that with —

the maker of that directive would not have reasonably anticipated at the time of making the directive; and

This amendment was included in the letter that we received from Mr Dobb of the Western Australian branch of the Australian Medical Association. If a patient is unable for any reason to give advice about the medical treatment he or she may or may not want at the time that treatment is needed, how can a health care provider be expected to know what that patient may or may not have anticipated at the time the patient health directive was made? The only evidence the health care provider will have before him is the health directive itself—assuming the patient is no longer able to communicate his or her wishes, which is the purpose for having the health directive in the first place.

I think the effect of the amendment to include "the maker of that directive would not have reasonably anticipated at the time of making the directive" will be to require the health care provider to make a judgement about what would reasonably have been anticipated by the maker of the directive. I believe a health care provider can make a "reasonable" judgement, with "reasonable" having been clearly defined and interpreted in law. However, the words in the bill require the health care provider to know what the person who made out the directive would have or have not anticipated. It is for that reason I suggest that my proposed paragraph (a) is an improvement.

Proposed section 110S(3)(b) reads —

would have caused the maker to change his or her mind about the treatment decision.

The amendment I picked up from the Australian Medical Association reads —

a reasonable person in the patient's position, would have changed his or her mind about the treatment decision.

I believe the principle is the same. How is a health care provider to understand the person's intention at the time he or she wrote the health directive? The directive may have been written many years previously, and the person can no longer communicate his or her wishes to the health care provider. The form of words suggested by the AMA allows the health care provider to make a decision about what would be reasonable and gives the provider

greater discretion to reasonably assist in a way the patient would want, notwithstanding what may be contained in a very old health directive.

Hon SUE ELLERY: This amendment seeks to achieve the same outcomes as does the next amendment on the supplementary notice paper. The government's position is that it prefers the version moved by Hon Ed Dermer and before the chamber now. We think one change is needed to the language of the amendment now before the chamber. The change does not relate to a matter of substance, but will keep the language of the bill consistent. The reason the government prefers this amendment is that it is structurally better in that it amends both paragraphs of proposed section 100S(3) rather than confining the amendment to subsection (3)(b).

If the member will agree, I seek leave to alter the amendment, which presently reads —

> a reasonable person in the patient's position, would have changed his or her mind about the treatment decision.

I now propose to insert before "a reasonable person" the words "would have caused", change "patient's" to "maker's"—which is consistent with the preceding proposed subsection—and, finally, to delete "would" and insert "to", so that the amendment then reads —

> would have caused a reasonable person in the maker's position to have changed his or her mind about the treatment decision.

Hon ED DERMER: Before making a decision I would like to read out the amended version of proposed section 110S(3)(b) to ensure that I have correctly understood the minister's amendment. My proposed paragraph (a) would stand, and the proposed paragraph (b), incorporating the minister's changes, would read —

> (b) would have caused a reasonable person in the maker's position to have changed his or her mind about the treatment decision.

Hon Sue Ellery: The proposed change is grammatical and does nothing to the substance of the member's proposed amendment.

Hon ED DERMER: I understand the proposed change is about achieving a consistency of style, which is very important in legislation. I think the variation on my amendment suggested by the minister is entirely reasonable, and I am now very pleased to seek the leave of the house to so alter my amendment.

Amendment, by leave, altered.

Amendment, as altered, put and passed.

The CHAIRMAN: It seems that Hon Barbara Scott's amendment 28/11 may now fall away, as what she was trying to achieve has been achieved.

Hon BARBARA SCOTT: Indeed it does. I am pleased that the minister has accepted that change, because it would otherwise have caused the application of "unprovable". It may get to the stage that the courts debate health directives, and "unprovable", in this instance, is not acceptable, whereas "reasonable person" or "reasonable cause" are legal terms accepted in the courts.

The CHAIRMAN: The next amendment stands in the name of the minister. Why is the minister deleting the words "an advance health directive" from the proposed subsection, and then putting them back in?

Hon SUE ELLERY: It is all about the comma.

The CHAIRMAN: I wondered whether that was a clerical matter. The minister may move —

> Page 17, lines 24 to 27 — To delete —
>
> made more than 10 years before the time at which the treatment decision would otherwise operate

Hon SUE ELLERY: That achieves exactly what I want to achieve. This amendment is consistent with recommendation 5 of the committee's report. Do I need to seek leave to change my amendment?

The CHAIRMAN: Yes.

Hon SUE ELLERY: I seek leave to remove the following from my amendment on the supplementary notice paper —"an advance health directive" and the comma after "operate". So everyone is clear, there must be a comma after the word "operate".

The CHAIRMAN: That will appear.

Hon ED DERMER: The minister assisted me earlier and I will be of some assistance now: the minister probably also needs to vary her amendment by deleting the insertion of "an advance health care directive". That

would then result in the amendment that she has suggested being different by one comma perhaps to the one I have suggested. Having suggested similar amendments, I am delighted to support the intent of the amendment.

The CHAIRMAN: We must be very clear about this. As I understand it, the minister is moving —

Page 17, lines 24 to 27 — To delete —

made more than 10 years before the time at which the treatment decision would otherwise operate

Hon SUE ELLERY: Yes. I seek leave to accordingly alter my amendment.

Amendment, by leave, altered.

Amendment, as altered, put and passed.

The CHAIRMAN: We do not now move to Hon Ed Dermer's amendment at 32/11; that is not now needed and it falls away.

Hon ED DERMER: It does. It has exactly the same words as the amendment the minister moved.

The CHAIRMAN: Yes. The minister has already taken care of that. We therefore go to the amendment in the name of the minister at amendment 2/11; the deletion of a word.

Hon SUE ELLERY: I move —

Page 17, line 29 — To delete —

of

This corrects a grammatical error. Proposed section 110S(4), at line 29, states —

(a) the maker's age at the time of the directive was made . . .

It is clearly grammatically incorrect and "of" needs to be deleted.

Amendment put and passed.

The CHAIRMAN: That was possibly a Clerk's amendment, but the committee is going through the provisions very slowly under the circumstances.

Members, an amendment stands in the name of Hon Graham Giffard at 21/11.

Hon ED DERMER: I am aware that Hon Graham Giffard is away on urgent parliamentary business, and is therefore unable to move the amendment.

The CHAIRMAN: The bottom line is that this is a potential amendment in the name of Hon Graham Giffard. Any other member can move the amendment if he or she so desire.

Hon ED DERMER: It would be entirely appropriate for the amendment to be moved; if so, even if nothing else was achieved, members would at least hear the minister's position on this amendment. In my own mind I will be listening to the minister's words before I decide whether to support the amendment, but I am happy to move it in that sense—to put it on the agenda. Therefore, I move —

Page 18, after line 9 — To insert the following —

(e) the views of any guardian of the maker, enduring guardian of the maker or the person responsible for the maker as defined in section 110ZD concerning the treatment, unless such a person has been specifically precluded from expressing such a view in the advance health directive.

Hon SUE ELLERY: The government opposes this amendment. We think we understand the intention of the honourable member, even though he is not in the chamber, and I have an alternative amendment if the committee is of the view that it wants to go down this path. This amendment has arisen as a result of recommendation 6 of the standing committee report. However, the way the amendment is written confuses the factors that must be considered when deciding whether the proposed section applies to the manner of determining the nature and significance of such factors. The amendment seeks to make this a factor that must be considered when, in fact, the views of any guardian ought to be the manner in which the treating clinician determines whether or not anything has changed that he or she needs to take into account. The views of third parties—in this case, the enduring guardian—are not factors relevant to the operation of an advance health directive, but are simply one way in which it might be determined whether, as a matter of fact, the criteria set out in proposed section 110S(3) have been met. We oppose this amendment. If members want some provision in the legislation to reflect

recommendation 6, I have an alternative amendment that we think meets the objective but does not confuse a factor with the way in which a person determines whether those factors have been satisfied.

The CHAIRMAN: Hon Ed Dermer has moved an amendment, but he may decide to seek the leave of the committee to withdraw that amendment if a satisfactory counter-amendment is suggested by the minister. It might be worthwhile for the minister to tell the chamber what she is proposing, and then Hon Ed Dermer can make a decision.

Hon SUE ELLERY: I appreciate the cooperation of members. My proposed amendment states —

> Page 18, lines 10 to 14 — To delete the lines and insert instead —
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> (5) For the purpose of determining whether or not subsection (3) applies in relation to a treatment decision that is in an advance health directive, subject to the terms of the directive, any of the following persons may be consulted —
>
> (a) if the maker has an enduring guardian — the enduring guardian;
>
> (b) if the maker has a guardian — the guardian;
>
> (c) a person who has a relationship with the maker described in section 110ZD(3)(a) to (d);
>
> (d) any other person considered appropriate in the circumstances.

This proposed amendment sets out the manner in which a person would determine whether those factors were being applied or taken into account. It does not confuse the manner with the actual factor. The intention of the amendment moved by Hon Ed Dermer and reflected in the recommendation in the report is that it was considered that the views of third parties ought to be ascertained as a way of determining whether the factors had been met.

Hon GIZ WATSON: I followed those comments with interest. Does this proposed amendment deal with the proposition that such a person might already have been specifically precluded from expressing a view in an advance health directive?

Hon Sue Ellery: Yes. It does that in the words "subject to the terms of the directive" in the introduction in proposed subsection (5).

Hon HELEN MORTON: I note that the minister's proposed amendment commences with the word "may".

Hon Sue Ellery: May what?

Hon HELEN MORTON: The minister indicated that the amendment includes the words "may be consulted". I wonder whether that leaves it open to the fact that persons may not be consulted.

Hon Sue Ellery: The amendment states "subject to the terms of the directive" because it may be that, under the terms of the directive, they do not consult.

Hon HELEN MORTON: Should it not then reflect that it is a requirement to do that subject to the terms of the directive?

Hon SUE ELLERY: It does not require a person to do that, because it may be perfectly obvious, depending on the particular circumstances, that the person has not changed his or her mind. It provides that a clinician will follow the health directive, and, if the health directive states that there is doubt about it, the clinician can speak to person X, Y or Z. That is what the clinician can do at that point. It is not prescriptive in the sense that a clinician will do this, because it will depend entirely on the circumstances that the clinician is confronted with at the time.

Hon BARBARA SCOTT: I presume that the amendment refers to people or children who have an enduring guardian. Can the rights of an enduring guardian be legally expunged and left to be queried? If it is a child —

Hon Giz Watson interjected.

Hon BARBARA SCOTT: A vulnerable person, then, who has an enduring guardian.

Hon SUE ELLERY: No, that is entirely irrelevant because this applies only to someone who is capable under the law of making an advance health directive, and a child is not.

Hon Barbara Scott: A child cannot make one, no. I understand that. I'm sorry; I made that mistake.

The CHAIRMAN: Hon Ed Dermer has moved an amendment. Does Hon Ed Dermer wish to seek the leave of the committee to withdraw the amendment to enable the minister to formally move her proposed amendment?

Hon ED DERMER: In the limited time that I have had to examine the amendment proposed by the minister, the intent of the proposed amendment seems to be consistent with the intent of the amendment originally proposed by Hon Graham Giffard that I moved in his absence.

The issue raised by Hon Helen Morton was of interest to me. I imagine—I am looking for a response from the minister—that effectively the clinician will take account of the words that were amended earlier this afternoon about a reasonable interpretation of the intent of the maker within the bounds of a possible change in circumstances. The effect of this amendment will be to allow a clinician to consult a guardian when the clinician wishes to do so if the clinician's endeavour to make a reasonable interpretation is such that his or her final judgement will be informed by a consultation with the enduring guardian.

Hon SUE ELLERY: Yes, it is, subject to the terms of the advance health directive.

The CHAIRMAN: Is Hon Ed Dermer seeking the leave of the committee to withdraw the amendment that he has moved?

Hon ED DERMER: Yes.

Amendment, by leave, withdrawn.

Hon SUE ELLERY: I move —

> Page 18, lines 10 to 14 — To delete the lines and insert instead —
>
> (5) For the purpose of determining whether or not subsection (3) applies in relation to a treatment decision that is in an advance health directive, subject to the terms of the directive, any of the following persons may be consulted —
>
> (a) if the maker has an enduring guardian — the enduring guardian;
>
> (b) if the maker has a guardian — the guardian;
>
> (c) a person who has a relationship with the maker described in section 110ZD(3)(a) to (d);
>
> (d) any other person considered appropriate in the circumstances.

Hon HELEN MORTON: I believe that the intent of the committee was that it should be a requirement rather than an option for the health practitioner to consult the next person in the cascading order of the decision-making list—that is, the next person along the list, if it is not the person at the top of the list, given that under these circumstances it will have been determined whether the person was able to anticipate at the time of making the directive that certain circumstances could have arisen subsequently. The circumstances could be broader than advances in medical technology. A directive might have been made 10 years ago, or at a time when the person was not in the situation he is in now. The person may have registered the directive but had not got around to revoking it. A situation could arise in which a health practitioner may have no knowledge about the changed circumstances surrounding that person's life. The person may have had children since making the directive; the range of changed circumstances has never been specifically confined to medical or technological advances. A raft of changed circumstances might arise about which a health practitioner could not have any knowledge. The committee's intent was for there to be a requirement for the medical practitioner to consult the person who has become the decision maker for the person who can no longer give consent. We are not talking about emergency issues; this falls outside the emergency provisions, so there is plenty of time for the health practitioner to adequately consult the person who has become the decision maker unless, as has been indicated, the person has been excluded by virtue of the health directive. The word "may" is perhaps a little loose and should be strengthened to "any of the following persons must be consulted".

Hon SUE ELLERY: I understand the point made by the honourable member. We differ on the point I raised earlier. The government is comfortable with inserting some provision that subject to the terms of the advance health directive, the clinician may consult those people. However, we will not be prescriptive about it because a range of things might have happened that might lead the clinician to take the view that it is not appropriate to consult those people. For example, it may be clear that there has been a major family rift or falling-out, or that the decision maker is no longer around or no longer exists. The point of difference between us is about prescription. The government understands the committee's question. I refer to page 38, paragraph 13.4 of the report. It states —

> The question arose during the Committee's inquiry as to why the views of interested persons should not be included in such a list of relevant considerations. The Committee could find no objection on the basis of the policy of the Bill as to why such an inclusion should not be made. The Committee therefore recommends as follows: . . .

There is not a lot to guide us from the extensive deliberations on this point. The government can go some way to addressing that by making it a discretionary matter subject to the terms of the advance health directive, but we will not agree to prescribe it.

Hon HELEN MORTON: I understand from one discussion I had during the committee inquiry that it will never be an option for a health practitioner to both make the decision and carry out the treatment, other than in an emergency. Page 21 of the bill contains a list of the relevant criteria for persons responsible. It itemises, one by one, how decisions are to be made and the circumstances under which persons responsible may make treatment decisions. Now the minister is saying that the government is not prepared to require the health practitioner, under these conditions, to go to that list of people one at a time—the first or second person on the list, etc. I do not understand why the minister is leaving the health practitioner to make a decision about whether the maker of the directive had not anticipated changed circumstances that would cause the maker of the directive to change his or her mind. The minister knows full well that in some circumstances the health practitioner will have no former knowledge or understanding of the directive maker's life, family or circumstances. I again ask the minister to try not to think about a person in the end stages of a terminal illness—I think that is what most people think about in this situation—and think instead about somebody who is completely removed from that situation. I give the example of a young mum with a psychotic illness who has made an advance health directive about what sort of things may or may not occur to her in a situation in which she is unable to make a decision for herself. She is going through a cyclical phase of a psychotic illness and is now in a situation in which she is unable to make a decision for herself. She has already put an advance health directive in place, stating who shall make decisions on her behalf should those circumstances arise. The minister now says that she will not make it a requirement for a health practitioner to go to that person and ask whether any circumstances have changed since the woman made the advance health directive five years earlier. The health practitioner will know nothing about this person; she is receiving treatment in a mental health institution. The minister will not be bothered making it a requirement for the health practitioner to consult the person who is able to provide an explanation of the circumstances relevant to the person who made the directive. That is the issue I have with this bill. Most people think of the people who make advance health directives as people who are terminally ill and who are interacting with a range of health professionals who know their family and their circumstances and who continue to have an ongoing involvement with them. This bill will impact on anyone who has a problem with consenting to medical treatment when they are unable to do so. I say again that the word "may" must be changed to "must".

Hon SUE ELLERY: I think that the honourable member has jumped ahead a few steps in her analysis of the role of the guardian, or anyone else on that cascading list, because the consent exists in the advance health directive, so that is where a person goes to. He or she does not go to the guardian first or to anybody else; he or she goes to the advance health directive. If it is determined that the advance health directive does not operate —

Hon Helen Morton: By whom?

Hon SUE ELLERY: Ultimately, if it is to be challenged, by the State Administrative Tribunal. However, if there is a question about its validity or something like that at the time it is being looked at, the person goes down the list. The first port of call is the advance health directive, not a person on the list. Of course, a guardian is a person appointed by the maker of the directive through an entirely separate process. The advance health directive does not establish someone as the maker's guardian. It might name the maker's guardian, but the process for establishing the maker's guardian is done in a completely separate process. Therefore, the member's proposition that the government is somehow abrogating the provision of the bill that says that in certain circumstances a person goes to the cascading list of people is incorrect. We are not abrogating that responsibility. The first port of call is what is in the advance health directive. If there is reason to think that the advance health directive is not valid, or if there is some other reason, that is when the person goes to the cascading list. Therefore, there is no proposition to undermine or diminish in any way that cascading list.

Hon HELEN MORTON: Therefore, this point is really about the decision making on whether the advance health directive is valid because the maker, at the time of making the directive, did not anticipate circumstances which have arisen and which would have caused that person to change his or her mind. Therefore, it is about the validity of the advance health directive. I am as comfortable as any other member is about the fact that the first port of call is the advance health directive, but we are talking about a clause in the bill that states —

> Subject to subsection (4), a treatment decision in an advance health directive does not operate if circumstances exist —

I know that I am not using the amended words, but members will understand the intent —

> or have arisen that —
>
> (a) the maker of the directive did not anticipate . . . and
>
> (b) would have caused the maker to change his or her mind . . .

The minister is saying that, yes, the person goes to the advance health directive first, but if there is a suspicion by somebody—because of what the minister has said, in my mind that "somebody" is the health practitioner—that that might be the case, the advance health directive does not operate. What if the health practitioner is not the best person to make that decision? Under those circumstances, if someone is suspicious or is questioning whether the advance health directive is valid because of new circumstances that exist, or even if a health practitioner believes that no circumstances exist, that is a problem. The committee was of the view—I believe that some members of the committee were strongly of the view—that if there were such a perception, the family members, or whomever on that list the health practitioner would go to for that discussion, would say that the maker definitely wants the advance health directive to continue. Although the medical practitioner or the health practitioner may believe that new medication or new technology might prolong the person's life, the family members are probably the people who will be able to say quite categorically that although that is the case, there is no way that the maker wants that to change the advance health directive. Equally, there is another side to that; that is, that the person to whom those associated with the maker would go, other than the health practitioner, would be able to say that five years ago the maker had no idea about the changes that would occur in his lifestyle and with his family situation etc; consequently, the suggestion is that the advance health directive should not operate under those circumstances. Therefore, I think that a stronger word than "may" should be used.

Hon SUE ELLERY: I will go back to the proposition that I put in my second reading response, which was that the policy decision behind this legislation is self-determination. The prime instrument for referral is the advance health directive. I appreciate that for some members the notion that self-determination should be the prime objective is a difficult one and one that —

Hon Helen Morton: Not from us.

Hon SUE ELLERY: Honourable member, I am trying to guide the committee through the government's decision. I listened to the honourable member in silence to hear her point of view. She was trying to express a point of view to the whole committee, not just to me, and that is what I am trying to do also. The advance health directive has primacy. Therefore, this clause is about the operation of the advance health directive. Proposed subsection (3) states that a treatment decision in an advance health directive does not operate if circumstances exist or have arisen that the maker of the directive did not anticipate at the time, or something has arisen that would have caused the maker to change his mind. That is a big call for a clinician to make; that is, that he is not going to follow the self-determined decision that is set out in the advance health directive. Proposed subsection (4) goes on to say that when a person is making that big call in proposed subsection (3) in relation to a treatment decision that is in an advance health directive made more than 10 years before the time at which the treatment decision would otherwise operate, the matters that must be taken into account are those listed in proposed subsection (4).

The difficulty we had with the recommendation of Hon Graham Giffard, which has been withdrawn and which I am seeking to replace, is that he confused the factors that must be taken into account when a clinician is making that big decision that he is not going to follow the self-determined decision of the maker with who should be spoken to about the factors. Therefore, it is the case that the factors remain prescribed. Those are the factors that must be taken into account. There is no discretion. However, we are dealing with human beings, and the clinician might decide that he needs to test his assumption about these factors with somebody. When dealing with human beings, it is difficult to be as prescriptive as one is about the factors that must be taken into account because relationships are involved, and relationships can be driven by all sorts of different motivations. Therefore, we say that it is appropriate, when a person is making that big call that he is not going to do something that is in the directive, that he take into account those prescribed factors. However, in determining whom that person speaks to about those prescribed factors, account must be taken of what is in the advance health directive. We say that the person needs to have discretion—and it ought not be prescribed—about which of the people, if any at all, on that cascading list the person consults. That is the difference between us, honourable member. We are not going to agree on this. We are not going to agree that it must be prescribed that the clinician speak to those people, because the primacy is in the advance health directive, and it might set out that the maker does not want person X to be consulted. It may also be perfectly clear to the clinician that there is a major family falling out, or something like that. We can talk about it as much as the committee would like, but the government will not change its position so that it is to be prescribed. The government believes that it is appropriate that the method by which those factors are tested is discretionary in prescribing to whom one speaks, if at all.

Hon HELEN MORTON: Mr Chairman, I am not sure whether I can move an amendment to the minister's amendment at this stage to test it?

The CHAIRMAN: No, the question before the Chair is that the lines to be deleted be deleted. If the committee agrees to delete the lines, I will put the question that the minister's words be inserted. That is the time at which Hon Helen Morton can consider her amendment.

Hon KATE DOUST: I have been listening to this debate and, unfortunately, I missed an earlier part of it. I put on the record that on this occasion I will support the minister's amendment.

One of the biggest difficulties with this legislation for me has been perhaps the lack of clarity in the drafting. I am pleased that the minister is moving to delete lines 10 to 14 on page 18 of the bill. It is not an easy clause to read and understand. The average Joe Blow on the street would find it very difficult to understand. The amendment in the name of Hon Graham Giffard sought to deal with the issue of clarity. I think the minister's amendment clearly defines the steps that would be taken. On this occasion it is positive that the minister has sought to deal with the matter to make it easier for people to understand the legislation. I take on board Hon Helen Morton's concerns, but if we are to move forward with this bill, we must accept that the minister is at least prepared to make a compromise on this occasion and members should support that.

Amendment (words to be deleted) put and passed.

The CHAIRMAN: The question now before the Chair is that the words to be inserted be inserted. Hon Helen Morton, this is your opportunity to speak if you are considering any changes.

Hon HELEN MORTON: I move —

Line 4 of new proposed subsection (5) — To delete the word "may" and substitute —

must

Hon NORMAN MOORE: I have been listening to this debate with interest. If "may" is substituted with "must", proposed subparagraph (d) would need to be deleted. The reason is that we simply cannot require that any person considered to be appropriate in the circumstances must be consulted. It leaves a huge discretion to try to decide who the appropriate persons are. If we go down this path, I suggest to Hon Helen Morton that she would need to delete subparagraph (d) or require it to be one of those groups of persons who "may" be consulted as opposed to "must" be consulted.

Amendment on the amendment put and negatived.

Amendment (words to be inserted) put and passed.

Proposed section 110S, as amended, put and passed.

The CHAIRMAN: I move now to —

Hon Barbara Scott interjected.

The CHAIRMAN: I will come to Hon Barbara Scott. The committee has agreed that proposed section 110S, as amended, be agreed to. The question is that —

Hon ED DERMER: I refer to the amendments at the top of page 3 of the supplementary notice paper.

The CHAIRMAN: The amendments at the top of that page are in the minister's name and Hon Ed Dermer's name. They have already been deleted.

Hon Sue Ellery: They fall away.

The CHAIRMAN: I did not want to cut Hon Barbara Scott off. We are dealing with either proposed section 110T or we are moving forward to page 21, line 1 of the bill, proposed section 110ZA. I will give Hon Barbara Scott the call when the committee resumes.

Committee interrupted, pursuant to temporary orders.

[Continued on page 3123.]

Sitting suspended from 4.15 to 4.30 pm