## MENTAL HEALTH BILL 2013

*Consideration in Detail*

Resumed from 2 April.

**Clause 399: Application for declaration —**

Debate was adjourned after clause 398 had been agreed to.

**Dr A.D. BUTI**: Clause 399 is about an application for a declaration and who can make such an application. A number of parties are referred to, including "involuntary patient" at paragraph (a). We are looking at involuntary treatment orders, but I believe that we also need to ensure that appropriate legal representation can be provided regarding people who make an application for declaration. Therefore, I move —

Page 285, line 24 — to delete the line and substitute —

(a) the patient (whether a voluntary patient or an involuntary patient);

(ba) a legal practitioner representing the patient;

In the first part of the proposed amendment, the opposition does not want to delineate between a voluntary and an involuntary patient because, unless the parliamentary secretary advises me otherwise after consulting with her expert advisers, is it not the case that it would be possible for a voluntary patient to at some stage be subject to an involuntary treatment order?

**Ms A.R. Mitchell**: That is not the case, member.

**Dr A.D. BUTI**: Can a voluntary patient never be subjected to an involuntary treatment order?

**Ms A.R. Mitchell**: If you are on an involuntary treatment order, you are an involuntary patient.

**Dr A.D. BUTI**: At all times?

**Ms A.R. Mitchell**: Yes.

**Dr A.D. BUTI**: Does that not mean that while a determination is being made for an involuntary treatment order, a voluntary patient could be a voluntary patient at that particular time? I will tell the parliamentary secretary why that could happen. Clause 397 is headed "Declaration about validity of treatment order". A voluntary patient could have an involuntary treatment order imposed on them, and that voluntary patient could seek a declaration for that order. A person becomes an involuntary patient only when the order has been given. What about the process leading up to the order? That is why the opposition believes that voluntary patients should be included in the list of people who can make an application.

I also note that paragraph (e) states —

any other person who, in the Tribunal's opinion, has a sufficient interest in the matter.

The parliamentary secretary might say that can include a legal practitioner. A legal practitioner is a very important party—usually an incredibly important person to most proceedings and applications regarding a person's rights—and the parliamentary secretary hardly ever expressly confers that recognition. That is why the opposition seeks through this amendment to insert expressly "a legal practitioner representing the patient". It is absurd that a legal practitioner who is representing a patient does not have express standing. They may have standing under paragraph (e), which states, "any other person who, in the Tribunal's opinion, has sufficient interest in the matter", but it should not be up to the tribunal; it should be up to whether the patient wants a legal practitioner to represent them. That is why the opposition has moved to insert those two paragraphs in the clause.

**Ms A.R. MITCHELL**: The definition of "treatment order" is an involuntary treatment order, or a variation of the community treatment order, but there is no voluntary treatment. A voluntary patient is not involved in that at all. That is the definition of "treatment order" and "involuntary patient", as stated in the definitions in clause 386. The government understands what the opposition is trying to do by including a legal practitioner representing the patient—it has some merit—but it is unnecessary because the legal practitioner may already make an application on a patient's instructions. It is already there; there is no need for that other part.

**Dr A.D. BUTI**: That is absolutely pathetic and stupid! Various parties have been nominated: the involuntary patient is fair enough; a psychiatrist is understandable; and a carer, close family friend or other personal support person of the involuntary patient and mental health advocate are all legitimate. Why should the bill not expressly provide that a legal practitioner be able to make the application? Why is the bill hostile toward expressly providing for a legal practitioner? The parliamentary secretary keeps saying it is unnecessary and that they can

make an application somewhere else, but that is not the issue. The issue is whether there is merit in clause 399 for an application for a declaration about the validity of a treatment order to be made by a legal practitioner. Clause 10 is about the rights and freedoms of the patient. As far as I am aware, lawyers have been pretty important in determining, protecting and guaranteeing the rights, liberties and freedoms of people in Australia. It is generally understood that lawyers have a particular understanding of and experience in the law to protect the rights and freedoms of people. Here we are dealing with a particularly vulnerable section of the community and again the government is refusing to expressly provide for a legal practitioner.

**Ms A.R. MITCHELL**: I say again that the legal practitioner applies on behalf of the involuntary patient. It is already there. It is covered and the amendment is not necessary. It is an authority to act on the patient's instructions, so it is already there; accordingly, we do not believe we need the amendment.

**Dr A.D. BUTI**: Where?

**Ms A.R. MITCHELL**: The legal practitioner applies on behalf of the involuntary patient.

**Dr A.D. Buti**: Where?

**Ms A.R. MITCHELL**: In clause 399(a).

**Dr A.D. Buti**: The "involuntary patient"?

**Ms A.R. MITCHELL**: The clause states that the legal practitioner applies on behalf of the involuntary patient.

**Dr A.D. Buti**: Where in that clause does it tell me that?

**Ms A.R. MITCHELL**: It is not spelt out in the clause, but it is under their authority to act.

**Dr A.D. Buti**: Where?

**Ms A.R. MITCHELL**: It is not in that clause; it is under their authority to act.

**Dr A.D. Buti**: Which clause is that?

**Ms A.R. MITCHELL**: They are the patient's instructions.

**Dr A.D. Buti**: Which clause?

**Ms A.R. MITCHELL**: It is not a clause; they sign an authority to act.

**Dr A.D. BUTI**: This is absolutely absurd. The parliamentary secretary is saying that the patient gives the lawyer a general authority to act, but there is no capacity provided in the bill for them to act. Is the parliamentary secretary saying that a private agreement between a lawyer and a patient will override anything in this bill? If we take her rationale to the nth degree, any agreement between a lawyer and the patient overrides what is in this bill. The parliamentary secretary cannot pinpoint anywhere in this bill this authority to act is mentioned, particularly in regard to this clause, and she will not expressly provide a provision. Why provide a provision for the Mental Health Advocate and not a lawyer? There is authority to act. This is absurd; I have never heard of such an absurd rationale.

*Division*

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

Ayes (17)

| | | | |
|---|---|---|---|
| Ms L.L. Baker | Mr F.M. Logan | Mr J.R. Quigley | Mr B.S. Wyatt |
| Dr A.D. Buti | Mr M. McGowan | Ms M.M. Quirk | Mr D.A. Templeman *(Teller)* |
| Mr R.H. Cook | Ms S.F. McGurk | Mrs M.H. Roberts | |
| Ms J. Farrer | Mr M.P. Murray | Ms R. Saffioti | |
| Ms J.M. Freeman | Mr P. Papalia | Mr P.B. Watson | |

Noes (32)

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

Pairs

| | |
|---|---|
| Mr D.J. Kelly | Mr C.J. Barnett |
| Mr W.J. Johnston | Mr T.R. Buswell |
| Mr P.C. Tinley | Mr J.E. McGrath |
| Mr C.J. Tallentire | Mr R.F. Johnson |

**Amendment thus negatived.**

**Clause put and passed.**

**Clause 400: Failure to comply with this Act —**

**Dr A.D. BUTI**: Clause 400 deals with failure to comply with this act and paragraph (b) states —

> because of that failure, whether alone or in combination with one or more other such failures, the rights or interests of the involuntary patient have been substantially prejudiced.

I seek clarification on what is meant by "substantially prejudiced".

**Ms A.R. MITCHELL**: I will give an example of a person who has not had an assessment and who is detained inappropriately or improperly as a result of that.

**Dr A.D. BUTI**: An example does not actually provide me with a definition or description of what "substantially prejudiced" means. "Substantially prejudiced" is in the bill, so the parliamentary secretary should be able to tell me what it means rather than just give me an illustration of it.

**Ms A.R. MITCHELL**: It will be at the discretion of the tribunal and obviously on a case-by-case basis. There is not a definition that will be the guideline for that.

**Dr A.D. BUTI**: It may be determined by the tribunal, but the tribunal has to comply with the legislation. Clause 400 is expressly labelled "Failure to comply with this Act". A situation in which the rights and interests of an involuntary patient are substantially prejudiced has been categorically expressly provided for in this clause. Yes, the tribunal can have discretion to decide whether a situation is substantially prejudiced, but it needs a yardstick to know what "substantially prejudiced" means. Those words are in the bill, so can the parliamentary secretary please inform the chamber what is meant by "substantially prejudiced"?

**Ms A.R. MITCHELL**: The words "substantially prejudiced" means that the Mental Health Tribunal would look at things such as the impacts on the person's liberty and the right to make decisions. Basically, once again, we are talking about the patient's rights, which would be determined by the Mental Health Tribunal.

**Dr A.D. BUTI**: But what does "substantially prejudiced" mean? I know and understand the concept of the rights and interests of an involuntary patient having been substantially prejudiced, but I want to know what the parliamentary secretary means by "substantially prejudiced"?

**Ms A.R. MITCHELL**: The bill uses concepts such as "reasonable suspicion" and so on that require the use of discretion throughout because each matter is done on a case-by-case basis; it is not necessarily black and white. I believe that it would be done on a case-by-case basis and would be fair to the patient.

**Dr A.D. BUTI**: I will once again ask the question. The parliamentary secretary has included in the bill the term "substantially prejudiced". It may be the case that she wants that term—whether or not the rights of an involuntary patient have been "substantially prejudiced"—to be determined by the Mental Health Tribunal. But what is actually meant by "substantially prejudiced"? The parliamentary secretary talked about the notion of being reasonable. There is a definition for "reasonable"; it could be objective or subjective. The parliamentary secretary cannot put a term in the bill and not then provide the meaning of that term. The term "substantially prejudiced" is quite important to that paragraph. Yes, it is "substantially prejudiced" in regard to an involuntary patient's rights and interests. I once again ask the parliamentary secretary what is meant by "substantially

prejudiced". It can be determined at the discretion of the Mental Health Tribunal, but the tribunal needs to know what Parliament has determined is "substantially prejudiced"; otherwise, it is acting in a vacuum.

**Clause put and passed.**

**Clause 401: Application of this Division —**

**Dr A.D. BUTI**: Clause 401 deals with the application of the division to a long-term voluntary patient. A "long-term voluntary patient" is defined under clause 401, which states that a long-term voluntary patient —

(a) is a voluntary inpatient at an authorised hospital; and

(b) has been a voluntary inpatient at the authorised hospital for —

(i) if the inpatient is an adult — a continuous period of ... 6 months;

(ii) if the inpatient is a child — a continuous period of ... 3 months.

I have two questions. Firstly, can there be a break of that continuous period without one having to start again? For example, if the person was not an inpatient for one day, would that make a difference? Is there somewhere in the act that defines or explains that? Secondly, what happens when a person has been an inpatient for five months and 29 days? What happens when the period is one day short of that definition? I want to know whether a breakage can occur in that continuous period.

**Ms A.R. MITCHELL**: I have been advised that the definition of a "continuous" voluntary inpatient means unbroken. If the person is not there for the full six months, he or she does not need the review anyway. Given they will have been discharged, it is not necessary.

**Dr A.D. BUTI**: But is that not a little unreasonable? If the person were there for five months and seven days and was discharged for one or two days and then readmitted after two days, incurring a break in the chain, would the time start all over again? Is that not unreasonable?

**Ms A.R. MITCHELL**: This part is really referring to long-term voluntary patients who have found themselves in an authorised hospital for an extended time without an assessment. The idea is to provide some safeguards for them by making sure that they get an assessment, rather than a patient who does not quite make the six months. If the person were becoming a long-term voluntary patient, I would imagine that an assessment would occur. The provision serves as a safeguard for the patient. I am sure that everything will be done to ensure that. We must put a time limit in the bill to make sure a guide is available for people to know what to do.

**Clause put and passed.**

**Clause 402: Application for review —**

**Dr A.D. BUTI**: Subclause (2) includes people who may make the application. Again, I notice that the bill does not include a lawyer. Clause 402(2)(d) states —

any other person who, in the opinion of the Tribunal, has a sufficient interest in the matter.

Could that include a lawyer? If it does include a lawyer, can he or she be paid? Clause 316, which is a different clause and was dealt with last week when we moved an amendment, is about complaints when a lawyer was not able to be paid. Could a lawyer in this situation be paid? If the parliamentary secretary's answer is yes, why does the provision in regard to non-payment under complaints not also apply under this clause?

**Ms A.R. MITCHELL**: The voluntary patient can have a lawyer act on their behalf, and the lawyer can be paid. What the member referred to before was about complaints to the Health and Disability Services Complaints Office, which is covered by a different clause, but a voluntary patient can ask a lawyer to act on their behalf, if they wish.

**Dr A.D. BUTI**: That does not quite answer my question because under clause 402(2)(d) people can only act, if in the opinion of the tribunal, he or she has a sufficient interest in the matter. The tribunal may decide that a lawyer cannot act for the patient, given that the parliamentary secretary has not provided for it. I should have brought a book about the interpretation of legislation. When there is a list of people who can act and it does not include one party, we cannot then say that party can act because they have an authority to act in the form of a signed agreement with the patient.

Clause 402(2) provides an exhaustive list. If it is not an exhaustive list, please tell me. Under that list are the long-term voluntary inpatient a carer, a close family member et cetera, and a mental health advocate and any other person who in the opinion of the tribunal has a sufficient interest in the matter. They would have to get the approval of the tribunal. I assume that is an exhaustive list. The parliamentary secretary has not stated that it is

not exhaustive. If that is the case, a lawyer can represent the inpatient only if they get the approval of the tribunal.

**Ms A.R. Mitchell**: No.

**Dr A.D. BUTI**: That is the case under that clause. Please do not insult my intelligence by talking about an authority to act. We are talking about a piece of legislation. Where in that clause does it tell me that a legal practitioner can act for a patient without first having the approval of the tribunal?

**Dr A.D. Buti**: That is absolutely absurd behaviour, parliamentary secretary. You interject and then you do not provide me with an answer.

**Mrs M.H. ROBERTS**: I wonder why we are not getting an answer from the parliamentary secretary to the question asked rather eloquently by the member for Armadale.

**The ACTING SPEAKER** (**Mr P. Abetz**): The parliamentary secretary is not under any obligation to answer any question. She made several attempts to answer the question. It is up to the member for Armadale whether he accepts that answer but the parliamentary secretary is not obligated to continually engage on the same question.

**Mrs M.H. ROBERTS**: I absolutely agree with your commentary, Mr Acting Speaker. It is just that I would have thought the parliamentary secretary might have provided an answer to it, and I am quite stunned that she has not.

**The ACTING SPEAKER**: It is not a point of order then.

**Mrs M.H. ROBERTS**: I will raise a point of order, but I did not actually raise a point of order; I rose to speak.

**The ACTING SPEAKER**: It is a little late when the question has been put.

**Mrs M.H. ROBERTS**: I rose to speak, Mr Acting Speaker, and you called me. I did not say "point of order" at any moment. This is just a later interpretation you have put on things.

**The ACTING SPEAKER**: That is correct; I assumed it was a point of order because you rose at that late stage.

[Quorum formed.]

**Clause put and passed.**

**Clause 403: Parties to proceeding —**

**Dr A.D. BUTI**: We will probably have a long night because I think this is referred to in every single clause.

**The ACTING SPEAKER**: Members, please take your conversations outside; it is getting a little bit noisy around here.

**Dr A.D. BUTI**: I think it was quite rude of the parliamentary secretary to interject on me when I was speaking and then not provide me with an answer. That is what the parliamentary secretary did and I hope she can provide me with an answer to my questions about clause 403. Once again, there is a list of people who are parties to a proceeding in relation to the application. I ask the parliamentary secretary again: where in this clause can the lawyer act at the request of the patient without first having approval from the tribunal?

**Ms A.R. MITCHELL**: The representative the member is talking about is not a distinct party. They are there to represent a party; the parties are listed. As I said before, a long-term voluntary patient has access to legal advice. They are not a distinct party as such.

**Dr A.D. BUTI**: What does the parliamentary secretary mean "they are not a distinct party"; what is she saying? I do not quite understand. We are talking about proceedings, not about performing medical treatment regarding a review of the admission of a long-term voluntary inpatient which, under the government's definition, means six months or more for an adult or three months or more for a child. It provides incredibly significant interference with the rights and liberties of a patient, yet the government will not include a specific clause to provide that they can be represented by a lawyer. Under this clause and the earlier clause, a lawyer cannot represent an inpatient unless they have the approval of the tribunal. The parliamentary secretary told me that clause 402 provides that the lawyer has a right to represent the patient. If that is the case under clause 402, why do they not have that right under clause 403? The parliamentary secretary's answer was that they are not a distinct party. Can the parliamentary secretary tell me why her explanation of the provisions of clause 403 is different from that regarding clause 402? The answer, which she did not provide in any case, did not satisfy me that the lawyer can represent a patient without the approval of the tribunal.

**Ms A.R. MITCHELL**: I will say again, the patient is the party, not their representative. That is why the patient is there. The right to representation is set out in clauses 446 to 448 which we have not reached yet.

**Dr A.D. BUTI**: The general view of parties to proceedings includes their representative. Otherwise, why is paragraph (d) included? Who are these other persons who in the opinion of the tribunal have sufficient interest in the matter? The parliamentary secretary just told me that the patient is the party and presumably so is the treating psychiatrist. Who are the other people?

**Ms A.R. MITCHELL**: It could be a carer, a friend or just someone else who is generally interested but they come under a separate category. As I said before, the patient is the party. The legal representation will be acting for the party. They are covered there.

**Dr A.D. BUTI**: The parliamentary secretary mentioned that legal representation is dealt with in the bill later. Just then she mentioned a carer. Why is a carer listed? I presume a carer is to provide support and some sort of representation. Why would a carer but not a lawyer come under paragraph (d)? I think in her answer to the previous clause the parliamentary secretary implied that any other person who in the opinion of the tribunal has sufficient interest in the matter could be one of those people. Is she now telling me that under clause 403(2)(d) a lawyer could not be a representative, but a carer could? Why is a lawyer not included, but a carer is?

While I am on my feet, which clauses did the parliamentary secretary refer to with regard to legal representation?

**Ms A.R. Mitchell**: I referred to clauses 446 and 448.

**Dr A.D. BUTI**: But that refers to the procedures to be followed if a person is to be represented. Is the parliamentary secretary saying that a lawyer is excluded from being a party, but a carer can be a party? Why can a carer be a party to proceedings, but a lawyer cannot be? The parliamentary secretary's explanation makes sense to an extent, in that she says that the patient is the party under paragraph (d). If that is the case, I can understand that. I understand that the long-term voluntary patient and the treating psychiatrist can be parties, and one may say that a lawyer is not a party representing. Why have paragraph (d)? The parliamentary secretary's explanation makes sense, but loses force because of the presence of paragraph (d). If the party is the patient and the party is the treating psychiatrist, that should be it in regard to the parties under the parliamentary secretary's rationale, which has some merit. Therefore, why have paragraph (d), which the parliamentary secretary says could be a carer, but not a lawyer? Carers are referred to in other parts of the bill as well.

**Ms A.R. MITCHELL**: I think we answered that.

**Clause put and passed.**

**Clause 404 put and passed.**

**Clause 405: What Tribunal may do on completing review —**

**Dr A.D. BUTI**: The clause states —

> On completing a review under this Division in respect of a long-term voluntary inpatient, the Tribunal may make any of these recommendations —

The clause has a list of recommendations. My amendment seeks to give the tribunal greater power than to just make recommendations. In other parts of the bill, dealt with on previous days, the decision-making bodies were given greater powers than those of making recommendations. I move —

> Page 288, lines 15 to 17 — To delete the lines and substitute —
>
> > On completing a review under this Division in respect of a long-term voluntary inpatient, the Tribunal may make any orders, and give any directions, the Tribunal considers appropriate. The Tribunal may also make an order, direction or recommendation in relation to any of the following —

On a previous clause, the parliamentary secretary explained to me the difference between order declarations and recommendations, which is that a recommendation does not have the same force as orders or directions. If there is to be a review to look at important matters, the tribunal undertaking the review should be able to ensure that things are corrected or made better. The parliamentary secretary made the point last week that recommendations do not have the same legal force as that of directions or orders. Why not give the tribunal the power to make orders and directions? Why have a review if the tribunal cannot make orders? Most review tribunals have the power to make orders and directions; otherwise, in many respects, they would be toothless tigers.

**Ms A.R. MITCHELL**: The tribunal's role in relation to long-term involuntary patients is to ensure that the hospital has a plan in place for patients' support, recovery and eventual discharge. The idea of the process is to get patients to the point at which they are able to leave hospital very comfortably. The member's amendment to expand this role to include the power to issue binding directions would undermine the whole concept of the voluntary nature of the patient's admission. At the same time, the continued admission of a voluntary patient is ultimately a matter for the patient, his or her support persons and the clinical team. There is a process for

voluntary patients, and they are obviously treated, not differently, but in the manner they should be treated as voluntary patients. That is why we do not support the member's amendment.

**Dr A.D. BUTI**: The flip side of the parliamentary secretary's explanation is that the treating body may not be performing the function that it should be performing. It is okay for the parliamentary secretary to say that she does not want it to interfere with the voluntary decision-making process of the voluntary patient, but the fact is that recommendations will have no binding effect on the treating body that may be acting in a manner that is not in the best interest of a long-term voluntary inpatient.

**Ms A.R. MITCHELL**: I say again that these are voluntary patients and they, or their carers or someone who is there for them, have the ability to make those decisions if they are not happy with something. Safeguards are in place and, as we have said about voluntary patients, they can go through the systems already in place.

**Amendment put and negatived.**

**Clause put and passed.**

**Clauses 406 to 408 put and passed.**

**Clause 409: Things Tribunal must be satisfied of —**

**Ms A.R. MITCHELL**: I move —

> Page 290, line 12 to page 291, line 3 — To delete the lines.

The rationale for this amendment is that the proposed amendment to clause 409 follows the removal of unreasonable refusal in the criteria for an involuntary treatment order, which was done early on in the review of this bill. The amendment to that criteria means that an involuntary patient will never have capacity to make a treatment decision, which we determined was not the case. Therefore, clause 409 should not distinguish between an involuntary patient with and without capacity. The amendment also has the effect of ensuring that the tribunal is required to consider the things set out in clause 411, which include the views of a parent or guardian of a child. Of course, that will come up a little later.

**Dr A.D. BUTI**: The parliamentary secretary has moved a very significant amendment. This amendment deals with electroconvulsive therapy approvals. The parliamentary secretary mentioned that it is no longer necessary to remove the provision on unreasonable refusal, but as we know from the debate on previous clauses—I think it was clause 18—an amendment was inserted that stated that the benefits have to be weighed up for whether it is appropriate for treatment to take place. Let us just look at what we have here. Clause 409 reads, in part —

> **409. Things Tribunal must be satisfied of**
>
> (1) The Tribunal cannot approve electroconvulsive therapy —

We debated this for hours, remember —

> being performed on a patient unless satisfied that the mental health service at which it is proposed to perform the electroconvulsive therapy is approved under section 540 for that purpose.

If we then go to page 357 of the bill clause 540 is headed, "Chief Psychiatrist to approve mental health services". That is understandable. Clause 409(2) reads —

> The Tribunal cannot approve electroconvulsive therapy being performed on a patient to whom section 195 applies unless satisfied that informed consent to it being performed on the patient is given as required by section 195(2)(a).

Clause 195(2) provides for informed consent, but as I keep referring to in respect of the issue of informed consent, there is no informed consent here because not all information has to be declared to the patient, and it is therefore not genuine informed consent. This amendment commences on line 12, so therefore subclauses (3), (4) and (5) are deleted, if I am reading the amendment correctly, and that is quite significant. Under subclause (3), as it currently stands —

> The Tribunal cannot approve electroconvulsive therapy being performed on a patient to whom section 196(2) or 198(2) applies unless satisfied of the matter in subsection (4) or the matters in subsection (5).

Under subclause (4) —

> The Tribunal must be satisfied that the patient gives informed consent to the electroconvulsive therapy being performed on himself or herself.

That is being removed. It is all very well to say that unreasonable refusal is no longer in the bill, but that does not take away the need for the tribunal to be satisfied on these other matters. Subclause (5) continues —

Alternatively, the Tribunal must be satisfied that —

(a) the patient —

(i) does not have the capacity to give informed consent to the electroconvulsive therapy being performed on himself or herself; or

(ii) has the capacity referred to in subparagraph (i) but has refused to give informed consent to the electroconvulsive therapy being performed on himself or herself; or

(iii) has the capacity referred to in subparagraph (i) but has neither given nor refused to give informed consent to the electroconvulsive therapy being performed on himself or herself;

but

(b) performing the electroconvulsive therapy is the most appropriate treatment for the health and wellbeing of the patient.

Why would we want to get rid of that? They are incredibly important provisions that were deemed fit to be included in the part of the bill covering ECT which is, as we know, controversial. To say that the conditions of one provision should be changed to remove all those safeguards is, I think, overreaching. Those safeguards should still be included.

**Ms A.R. MITCHELL**: The amendment to the criteria means that an involuntary patient will never have the capacity to make a treatment order. Clause 409 should not distinguish between involuntary patients with and without capacity, and if that is not deleted, it will.

**Dr A.D. BUTI**: Sorry, I did not quite hear that. Is the parliamentary secretary saying that that will happen because the unreasonable refusal provisions are being deleted?

**Ms A.R. Mitchell**: Yes.

**Dr A.D. BUTI**: But the parliamentary secretary moved an amendment to clause 18 about having to weigh up the benefits of whether treatment should be given. Is the parliamentary secretary saying that there should be no difference between voluntary and involuntary patients?

**Ms A.R. Mitchell**: No.

**Dr A.D. BUTI**: What is she saying, then?

**Ms A.R. MITCHELL**: Involuntary patients with and without capacity.

**Dr A.D. BUTI**: Right, but not all the subclauses that are being removed deal with capacity. How does subclause (4) deal with capacity? It deals with informed consent. One can have capacity and still not give informed consent. That is the point; the consent might be under duress, and if it is under duress, it is not informed, or at least given under free will. We are not talking about just capacity here. Capacity is mentioned under subclause (5), but not (4) or (3), so I am not sure why such a sweeping deletion has been made.

**Ms A.R. MITCHELL**: The member is bringing in a number of things that I think are again most easily summarised by saying that clause 409, as it stands, does not reflect the removal of unreasonable refusal, which is what we did earlier, and therefore it should not now distinguish between involuntary patients with and without capacity.

**Amendment put and passed.**

**Clause, as amended, put and passed.**

**Clause 410 put and passed.**

**Clause 411: Other things to which Tribunal must have regard if no informed consent —**

**Ms A.R. MITCHELL** — by leave: I move —

Page 291, line 12 — To delete "patient referred to in section 409(5)(a)," and substitute —

patient,

Page 291, lines 20 to 24 — To delete the lines and substitute —

(c) if the patient is an adult — the views of the person who is authorised by law to give informed consent to the electroconvulsive therapy being performed on the patient were that consent required;

To very quickly summarise, these proposed amendments to clause 411 correspond with the amendment to clause 409, to provide that we should not distinguish between involuntary patients with and without capacity.

**Dr A.D. BUTI**: I am not really challenging these amendments, because they really have to be moved if clause 409 has been amended. The current clause 411(1)(c) reads —

> if the patient is an adult but does not have the capacity to give informed consent to the electroconvulsive therapy being performed on himself or herself — the views of the person who is authorised by law to give that consent on the patient's behalf were that consent required;

Who would have that authority? Would it be guardians, or anyone else?

**Ms A.R. MITCHELL**: It could be the guardian or the next of kin.

**Dr A.D. BUTI**: Can the parliamentary secretary provide me with guidance under a clause—I am sure it is there somewhere—that tells us they would have the authority by law to give that consent?

**Ms A.R. MITCHELL**: It would come under the Guardianship and Administration Act.

**Dr A.D. BUTI**: The parliamentary secretary may be correct; I know she would be in regard to guardians. Does the Guardianship and Administration Act deal with next of kin? I did not know that was the case. I did not know my next of kin would have such authority unless I gave them that authority. I am not sure anything under the Guardianship and Administration Act gives the next of kin that authority.

**Ms A.R. MITCHELL**: My understanding is that the Guardianship and Administration Act sets out a hierarchy of decision-makers if a person lacks capacity.

**Dr A.D. BUTI**: Who are they? They are guardians, are they not? Are the people who have the authority determined to be guardians?

**Ms A.R. MITCHELL**: There is a treatment hierarchy. I have only got "Consent to Treatment Policy for the Western Australian Health System 2011" in which —

**Dr A.D. Buti**: Is this under the Guardianship and Administration Act?

**Ms A.R. MITCHELL**: It is based on the Guardianship and Administration Act.

**Dr A.D. Buti**: So it is not actually the guardianship act?

**Ms A.R. MITCHELL**: It is section 110ZJ of the Guardianship and Administration Act. It goes through enduring guardian; guardian; spouse or de facto; child; parent—there is actually quite a list.

**Dr A.D. BUTI**: I assume that tells us that these are the people who could be guardians and it may give a hierarchy of preference, but a next of kin does not have that authority unless guardianship imprimatur is given to them under the act. The parliamentary secretary's answer was "guardian or next of kin". I do not think it would be guardian or next of kin; I think the next of kin would have to be a guardian. Can the parliamentary secretary please clarify that?

**Ms A.R. MITCHELL**: Can I clarify and say again—perhaps I should not have used the word "kin"—it is the treatment hierarchy that is recognised and established. The clause we are talking about refers to the views of the person may be considered; it is not a decision-making process.

**Dr A.D. BUTI**: The clause refers to "the views of the person who is authorised by law to give that consent". The guardian comes under the Guardianship and Administration Act—anyone else?

**Ms L.L. BAKER**: What does the parliamentary secretary mean by "guardian"?

**Ms A.R. MITCHELL**: I have referred to the treatment hierarchy under the Guardianship and Administration Act, and it is clear there.

**Dr A.D. BUTI**: I do not think the parliamentary secretary actually answered my previous question. I have been given a few different answers to this and I am getting a bit confused. I asked the parliamentary secretary which people are authorised by law to give consent and she answered "guardian or next of kin". We were able to clarify that it would have to be the guardian, and then the parliamentary secretary said there is a hierarchy. I asked: which other persons, other than the guardian, are authorised by law? She refused to give me an answer to that. If it is only the guardian, that is fine; just tell me it is the guardian. It appears that there is more than the guardian. If it is the guardian, clearly state the case—that only the guardian authorises it. Maybe it is someone else. Could I please have clarification? This is quite important, parliamentary secretary, because we are dealing with electroconvulsive therapy. The subclause states, "If the patient … does not have the capacity to give informed consent to the electroconvulsive therapy." Does the parliamentary secretary remember that treatment we spent

hours on being performed on themselves but she said that "the views of the person who is authorised by law to give that consent" is to come into play here. It is very important that we know who these people are. We have finally come to the understanding that it is the guardian under the Guardianship and Administration Act, but is there anyone else?

**Ms A.R. MITCHELL**: Under the Guardianship and Administration Act; I also refer the member to the definitions on page 5 which outlines what is meant by "guardian". We also have "guardian or the person responsible for the patient". In order of priority I believe it is: adult spouse living with patient; nearest relative who maintains close personal relationship, adult or de facto; child; parent; sibling; unpaid primary carer; or any other adult who maintains a close personal relationship with the person. A close personal relationship means frequent contact and genuine interest in the patient's welfare.

**Dr A.D. Buti**: What is the parliamentary secretary reading from?

**Ms A.R. MITCHELL**: It is a summary of the Guardianship and Administration Act.

**Dr A.D. BUTI**: I am not asking who can be guardian. The parliamentary secretary is correct in saying that the guardian can give authority. Many different people can be guardians. A person can be a guardian if he or she is not a family relative. The question is: under this clause, if the person is not a guardian, is he or she authorised by law to give consent on the patient's behalf; and, if so, which parties and under what law? The parliamentary secretary referred to the Guardianship and Administration Act. If a person comes under the Guardianship and Administration Act, I assume they are guardians. Can anyone else, besides the guardian, give authority in regards to an adult, because that is what we are dealing with here?

**Ms A.R. MITCHELL**: I am repeating stuff that I know the member already knows: an enduring guardian is chosen by the patient. A guardian is appointed by the State Administrative Tribunal or a person responsible for the patient. That was the list I read out —

**Dr A.D. Buti**: But are they guardians?

**Ms A.R. MITCHELL**: No. They are a person responsible for the patient.

**Dr A.D. BUTI**: Responsible for the patient as determined by whom?

**Ms A.R. MITCHELL**: That is the hierarchy of treatment as listed in the Guardianship and Administration Act.

**Dr A.D. BUTI**: So we are back to the Guardianship and Administration Act. The parliamentary secretary has not been able to provide me with any other legislation that lists other people who may be guardians. It is like saying a teacher has authority to do X, Y or Z. A person can be a teacher whether they are male, female, of different ages et cetera—they are all the people who can be guardians. What I want to know, and I still have not received clarification on, is under this clause, in addition to the guardian, who has authority under law to give consent on the patient's behalf in regards to ECT?

**Mrs M.H. ROBERTS**: The parliamentary secretary has moved an amendment that uses the words "the views of the person who is authorised by law". I presume that those words were deliberately chosen, because it could have been simpler just to put "the views of the guardian to give informed consent". Why were the words "the person who is authorised by law" chosen, not the words "the guardian"?

**Ms A.R. MITCHELL**: Member for Armadale and member for Midland, in the third group down, the person responsible for the patient is not technically a guardian, but is listed in the treatment hierarchy under the Guardianship and Administration Act.

**Mrs M.H. ROBERTS**: The parliamentary secretary said something like "the third point down". I am not sure what she means by that.

**Ms A.R. Mitchell**: It is what I said before.

**Mrs M.H. ROBERTS**: It was something about the third point down—the third point down from where?

**Ms A.R. MITCHELL**: There is the enduring guardian, the guardian or a person responsible for the patient.

**Mrs M.H. ROBERTS**: Is the parliamentary secretary saying that that is why we have to have the words "who is authorised by law to give informed consent", not just "the guardian"?

**Amendments put and passed.**

**Clause, as amended, put and passed.**

**Clauses 412 to 415 put and passed.**

**Clause 416: Things Tribunal must be satisfied of —**

**Dr A.D. BUTI**: Clause 416 outlines the things that the tribunal must be satisfied of with regard to psychosurgery, including that the patient gives informed consent. Once again, that is misleading; it is not informed consent if they are not privy to financial issues, and I will keep repeating that. Paragraph (d) states —

> the neurosurgeon who it is proposed will perform the psychosurgery is suitably qualified and experienced;

The meaning of "suitably qualified" will be easy, but what is meant by "experienced"? It is not a tricky question; I just want to know what is meant by "experienced". How many years of experience will be required et cetera?

**Ms A.R. MITCHELL**: Obviously, it has not occurred in Western Australia, so it will be very carefully monitored. If someone were to be considered to undertake deep-brain stimulation, they would have experience elsewhere and would be capable of doing the work. We would not be silly enough to not do that.

**Dr A.D. BUTI**: If it has not been performed in WA, it is unlikely that a person in WA will have experience. However, is the parliamentary secretary saying that "experienced" means that anyone in WA who is to perform this psychosurgery will have performed such treatment in another jurisdiction; otherwise, how would they be experienced?

**Ms A.R. MITCHELL**: Perhaps another word that we could use is "credentialed". My understanding is that within the hospital fraternity, the word "credentialed" is well used. It is not in this legislation. I remind the member that this sort of treatment is used quite regularly now in the treatment of Parkinson's disease, so there are people in Western Australia who are currently using a similar form of medical treatment and are on the way to having those credentials and may not need many more.

**Dr A.D. BUTI**: Is the parliamentary secretary saying that we should have used the word "credentialed" rather than "experienced"? At this stage in WA—I am asking for an opinion, so I do not expect the parliamentary secretary to answer—is there anyone who could perform this treatment?

**Ms A.R. Mitchell**: No, member; we are happy with the wording.

**Clause put and passed.**

**Clause 417: Things to which Tribunal must have regard —**

**Dr A.D. BUTI**: Under clause 417, the tribunal must have regard to the views of any carer, the consequences for the treatment, the nature and degree of the risk, whether psychosurgery will promote and maintain the health and wellbeing of the patient and any other things that the tribunal considers relevant. I wonder how this clause interacts with clause 416 and the consent of the patient, which I do not believe is informed consent. I assume that the patient's consent overrides any of the considerations in clause 417. If the patient consents to psychosurgery and all the other factors in clause 417 are satisfied, but the views of the carer or the views about the risk and other matters point to the fact that psychosurgery should not take place or the person who is to perform the surgery is uncertain about whether it would be beneficial and believes that it would be fifty–fifty, what would take priority in the end? Does the patient's consent take priority over any of these other factors?

**Ms A.R. MITCHELL**: Informed consent needs to take into consideration all those areas. We cannot have one without the other or just say yes. It requires all those things to be totally understood and agreed to before that consent is given.

**Dr A.D. BUTI**: Clause 417 does not refer to the matters that the patient needs to take into consideration; it refers to the matters that the tribunal must have regard to. If the patient consents to the psychosurgery but these other factors that the tribunal must have regard to point to the fact that psychosurgery would not be the best form of treatment, what would happen?

**Ms A.R. MITCHELL**: The Mental Health Tribunal always has discretion, even when the matters required to be considered indicate that psychosurgery should be provided.

**Dr A.D. BUTI**: I understand that the Mental Health Tribunal has discretion, but my question is: will the consent of the patient be the dominant factor in deciding whether psychosurgery will take place?

**Ms A.R. MITCHELL**: No; the tribunal needs to be satisfied with all the things listed in clause 416.

**Dr A.D. BUTI**: The Mental Health Tribunal must be satisfied on all the factors in clause 416. However, clause 417 does not state that the tribunal has to be satisfied at all; it just has to take the factors into consideration. There is a difference between "satisfied" and "have regard to". I understand that the tribunal must be satisfied that all the conditions in clause 416 are met; however, that is not a requirement under clause 417. If all the factors under clause 416 are ticked off, does that override the matters that the tribunal must have regard to?

**Ms A.R. MITCHELL**: Clause 417 is relevant to clause 416(b), which is that overriding part right through.

**Clause put and passed.**

**Clauses 418 to 420 put and passed.**

**Clause 421: Application for service of compliance notice —**

**Dr A.D. BUTI**: This clause is similar to a clause that we dealt with not so long ago. Clause 421 provides for any of a number of people to apply for the service of a compliance notice. Once again, lawyers are not expressly provided for. Why is that the case? I have three more questions. Firstly, can a lawyer be another person who, in the Mental Health Tribunal's opinion, has sufficient interest in the matter? We are not looking at the parties to a proceeding; that is the next clause. Secondly, if the lawyer can be a person who has sufficient interest in the matter, can the lawyer be paid for their service? Thirdly, why is there not an express provision for a lawyer to make the application?

**Ms A.R. MITCHELL**: I guess this response will come up each time the member raises this issue. The lawyer can apply on behalf of the patient and the lawyer can be paid.

**Dr A.D. BUTI**: Where does the bill provide that a lawyer can apply on behalf of the patient? The clause provides for a mental health advocate to make an application, so why is it any different for a lawyer? This is legislation that gives legislative permission for certain parties to make an application to the Mental Health Tribunal. Lawyers are not included; therefore, I would assume that the only way a lawyer can represent the patient is through clause 421(d), which would be at the tribunal's discretion. Also, can the parliamentary secretary answer the question about whether the lawyer can be paid?

**Ms A.R. MITCHELL**: I think in the last bit of my answer I responded to the question of whether a lawyer can be paid; I said that, yes, they can. As I said earlier when talking about this, there is an authority to act for a lawyer that can be signed by the patient and therefore a lawyer is covered.

**Dr A.D. BUTI**: If we go back to clause 316, "Representative must not be paid", we see that it deals with the lawyer not being able to be paid for the complaints process. Going by the parliamentary secretary's explanation, if a client signed an authority agreement with a lawyer that the lawyer shall be paid, that would override the prohibition against payment under clause 316. We know that that is rubbish because legislation overrides any agreement. Clause 421 lists who can make an application. I assume that that is an exhaustive list, but lawyers are not expressly included. Therefore, the issue about the authority to act is, I think, misleading because, using that logic, clause 316 could be overridden by an agreement between the patient and their lawyer. Why is there a need to include mental health advocates? Surely there could be an agreement between a mental health advocate and the patient for the mental health advocate to act for them. Why do we include mental health advocates but not include lawyers?

**Ms A.R. MITCHELL**: Clause 316 does not apply to this area; it applies to complaints to the Health and Disability Services Complaints Office. Clause 451 is specifically about the Mental Health Tribunal. It is a different situation in that the lawyer can get paid. As I said before —

**Dr A.D. Buti**: But where does it say that?

**Ms A.R. MITCHELL**: Clause 451. It does not state, "The lawyer can be paid", but it is a completely different situation from that covered by clause 316. I have said before that the patient will have signed the authority to act for the lawyer to apply to work on their behalf and therefore the lawyer can be paid.

**Dr A.D. BUTI**: Clause 421 is about an application for the tribunal to issue a service provider with a compliance notice. That is what this clause deals with and the parliamentary secretary told me a minute ago that a legal practitioner could be paid. Clause 451, to which the parliamentary secretary just referred, provides that the representative must not be paid. Where are we at? I am very, very confused. The parliamentary secretary just told me that the lawyer does not have to be listed—prescribed—under clause 421 because they are dealt with under clause 451. The parliamentary secretary also told me that the lawyer can be paid. However, clause 451 is headed "Representative must not be paid", so where do we stand?

**Ms A.R. MITCHELL**: I know that we are trying to deal with this quite quickly, but if the member reads through clause 451, which I referred the member to earlier, he will see that it lists the prescribed persons.

**Dr A.D. Buti**: Which includes a mental health advocate, but you've also included them under clause 421. So, why? Where's the rationale?

**Ms A.R. MITCHELL**: It is because the mental health advocate may not have signed an authority to act and they would be operating quite differently from a legal representative.

**Dr A.D. BUTI**: I feel that the explanation the parliamentary secretary has given me is very unsatisfactory. Let us go through the explanation that she has given me. The parliamentary secretary has told me, first, that the lawyer does not need to be listed in clause 421 because they can have an authority to act, but that is just ridiculous. Second, she told me that, in any case, lawyers are provided for under clause 451. Thirdly, the parliamentary secretary said that lawyers can be paid. However, a mental health advocate is listed under clause 421 and they are also included under clause 451; therefore, that explanation does not hold water. Under clause 451, the legal practitioner, or the mental health advocate for that matter, cannot be paid. Shall we start again so that the parliamentary secretary can explain why "lawyer" is not listed as one of the parties who can make an application for service of a compliance notice? Shall we also start again in regard to payment, because so far the parliamentary secretary's explanations are incredibly inconsistent and contrary to the bill?

**Ms A.R. MITCHELL**: A lawyer will always operate under the instructions of the patient, but a mental health advocate may not operate under the instructions of a patient—they might be there in a different capacity—and so they are different. As the member for Armadale said, the lawyer has the authority to act, signed by the patient; a mental health advocate is not in the same category.

**Dr A.D. BUTI**: Does the parliamentary secretary agree that her previous explanation that it related to clause 451 was not correct? I also still do not understand how this authority to act, which is in effect a common law agreement—or maybe not even a common law agreement; it may be a professional agreement—could override a section that would appear to be exhaustive. Clause 421 would appear to be exhaustive; otherwise, it would be hard to make sense of it. Once again, why can a lawyer not act for a patient unless they have the approval of the tribunal? Nothing the parliamentary secretary has told me satisfies me that under clause 421 a lawyer has the legislative authority to act unless they have the approval of the tribunal or the tribunal is of the opinion that they have sufficient interest in the matter. It is obvious that a signed authority may give them sufficient interest in the matter, but it is still at the discretion of the tribunal. If that is the case, why does a lawyer have to pass through that hoop when others do not?

Can the parliamentary secretary clarify whether a lawyer can be paid? If they can be paid, which the parliamentary secretary said they can be, it completely contradicts what she said about this being a matter to be dealt with under clause 451.

**Ms A.R. MITCHELL**: Clause 451 sets out that a legal practitioner can be paid because they are listed as a prescribed person. A person who is not a prescribed person cannot be paid, but a representative can be paid if they are a legal practitioner. I think we have covered that and I have covered the other part that talks about the authority to act and the difference between a mental health advocate not having the authority to act.

**Dr A.D. BUTI**: Why is a mental health advocate included under clauses 421 and 451 when the parliamentary secretary's rationale for not including a lawyer under clause 421 is that they are included under clause 451?

**Ms A.R. MITCHELL**: I think clause 451 is about only the issue of the payment—nothing else. That is what clause 451 provides.

**Dr A.D. BUTI**: The parliamentary secretary said that a lawyer was not included in clause 421 because they are included under clause 451.

**Ms A.R. Mitchell**: I didn't say that.

**Dr A.D. BUTI**: Yes, the parliamentary secretary did. We can go back to the *Hansard*. The parliamentary secretary said that the reason lawyers are not included in clause 421 is that they are covered under clause 451. That is what the parliamentary secretary said. She cannot undo that.

**Ms A.R. MITCHELL**: I said, "Under the authority to act."

**Dr A.D. BUTI**: Is the parliamentary secretary saying that an authority to act—an agreement between a patient and lawyer—overrides legislation?

**Ms A.R. MITCHELL**: It is not inconsistent with the bill because they can act under clause 421(a).

**Dr A.D. BUTI**: Clause 421(a) states "the patient or other person to whom the prescribed requirement relates". What is the prescribed requirement?

**Ms A.R. MITCHELL**: That section is prescribed under clause 419 and the definition of "prescribed requirement".

**Dr A.D. BUTI**: Clause 421(a) states "the patient or other person to whom the prescribed requirement relates". In my quick reading of that clause, the prescribed requirements relate to any of the things; it does not refer to who can act. I do not think it does. I stand to be corrected on that.

**Ms A.R. Mitchell**: That is correct.

**Dr A.D. BUTI**: How does clause 421(a) provide for a lawyer to act?

**Ms A.R. Mitchell**: Because they are acting on behalf of the patient.

**Dr A.D. BUTI**: Obviously they are acting for the patient, but there is nothing that gives them legislative authority to act. I stand to be corrected on clause 451—yes, a lawyer can be paid. I read the rest of the section. Would the parliamentary secretary agree that clause 421 provides an exhaustive list of people who can act?

**Ms A.R. MITCHELL**: It is exhaustive in that clause 421(d) encompasses a range of people, but it is not an exhaustive list.

**Dr A.D. BUTI**: I understand that. It is exhaustive when the parliamentary secretary refers to paragraph (d). Therefore, I go back to paragraph (d), which provides that the lawyer can act only at the discretion of the tribunal, which I have been labouring on for some considerable time but which the parliamentary secretary would not concede is the case. The only way the lawyer can act —

**Ms A.R. Mitchell**: No.

**Dr A.D. BUTI**: This is absurd! I was able to admit that I made a mistake with clause 451. Why can the parliamentary secretary not admit that there is nothing in this clause that provides that a lawyer can act unless they have the approval of the tribunal? The parliamentary secretary talks about paragraph (a), the patients and references to prescribed requirements under clause 419, but I cannot see how that has any relevance to whether a lawyer can act or how it has any relevance to the agreement. How does clause 491 have any relevance to an agreement being signed between a patient and lawyer? The parliamentary secretary then referred to clause 451, which includes "mental health advocate", but they are included in clause 421. Why can we just not be clear and admit that this may be an oversight or that it was deliberate? It is fine. I do not agree with it, but the parliamentary secretary can say that the government's intention was not to allow lawyers to act unless they have the approval of the tribunal.

**Ms A.R. MITCHELL**: I will say again: if the lawyer is the person acting on behalf of the patient, the tribunal cannot say the person is not able to do that. The other people listed in clause 421 would not be acting on behalf of the patient, but the lawyer would be.

**Dr A.D. Buti**: Will the mental health advocate not be acting on behalf of the patient?

**Ms A.R. MITCHELL**: They may or may not be; there is no guarantee of that. I believe we have covered it.

**Dr A.D. BUTI**: That is rubbish. There are certain jurisdictions in which lawyers are not allowed to act. By the parliamentary secretary's logic, if the lawyer has an agreement with the patient or a client to act, they will also be able to act in those tribunals. That, of course, is not the case. An agreement between a lawyer and a client cannot overrule the legislative prohibition against a lawyer acting. The legislation does not provide for a lawyer to act for a patient unless they have the approval of the tribunal. The only way they can come into play is under clause 421(d). If that is the case why is there an extra hurdle to allow a lawyer to act? Other clauses include a lawyer; for instance—we will deal with this later—under clause 447 "Party is a child with capacity to consent" and clause 448 "Party is a child with no capacity to consent" legal practitioner is mentioned, but it is not mentioned in this clause. Why is it not mentioned here; is it an oversight or a deliberate viewpoint that a lawyer should be able to act—this is only the application for service of client notice—if they have the tribunal's opinion?

**Mr P. ABETZ**: I am not a lawyer but I have noticed the member for Armadale has raised this issue on a number of different clauses. It appears to me that surely not any lawyer can turn up and say they are acting on behalf of a person. There must be some documentation to verify that, obviously. If in my role as a pastor, at various times when someone found something too difficult to deal with personally, whether it be Centrelink, a lawyer or whatever the issue, wrote a letter authorising me to act on their behalf on a matter, any organisation—the Tax Office, or anything—has always allowed me to act on the person's behalf. Surely, if a voluntary or involuntary patient writes a letter saying that they authorise this person to act on their behalf that would cover the situation. I am not a lawyer so I may be wrong.

**Dr A.D. Buti**: Yes, you are.

**Mr P. ABETZ**: It is my understanding that that is what the parliamentary secretary has been saying all along and that would be the case, unless the legislation specifically excludes a lawyer from acting on behalf of the person.

**Dr A.D. BUTI**: Thank you for that contribution; I always look forward to the contributions from the member for Southern River. He is wrong because there are a number of jurisdictions in which lawyers cannot act. The member is saying that, because the clause does not expressly ban lawyers, they can act. No, because this is an

exhaustive list. The parliamentary secretary tries to fudge it by saying that it is exhaustive but the clause contains paragraph (d). Exactly, but paragraph (d) provides a lawyer can act only with the tribunal's approval. It is an exhaustive list and that means if a category of person is not on that list, they are banned; otherwise, the bill would not contain an exhaustive list. There are many tribunals, such as in the sporting field, and there used to be a tribunal for workers' compensation 20 years ago—I am not sure whether it is the case now—when in certain cases lawyers were not able to represent clients. In the small divisions of the Magistrates Court at one stage lawyers were not able to represent someone.

**Mr P. Abetz**: My question is: because lawyers are not excluded under this clause —

**Dr A.D. BUTI**: They are.

**Mr P. Abetz**: I do not believe they are.

**Dr A.D. BUTI**: Can the member tell me what an exhaustive list is?

**The ACTING SPEAKER (Ms J.M. Freeman)**: Members!

**Mr P. Abetz**: An exhaustive list means that the people on the list are the only people who can represent someone.

**Dr A.D. BUTI**: That is exactly right.

**Mr P. Abetz**: The list is there, but if the patient has the right to represent themselves and delegates that to someone else that is legally valid, unless the person to whom the patient delegates is not permitted.

**Dr A.D. BUTI**: No.

**The ACTING SPEAKER**: I think the question has to go to the parliamentary secretary, unless you are the government spokesperson for the bill, member for Southern River. Member for Armadale, put your questions to the parliamentary secretary.

**Dr A.D. BUTI**: An exhaustive list makes clear who has the right to do X, Y or Z. In this regard clause 421 provides for "Application for service of compliance notice". Anyone not on that exhaustive list cannot make an application, otherwise it would not be an exhaustive list. If in that scenario the bill provides that a lawyer is not excluded, they can act for the patient. That would mean the provision is not exclusive and other people besides the legal practitioner could make an application. It could even be a pastor, because they are not excluded here.

**Mr P. Abetz**: That's right.

**Dr A.D. BUTI**: They are not allowed to. The member should read the clause, which he does not even have in front of him.

**Mr P. Abetz**: I do; that is what I have been looking at.

**Dr A.D. BUTI**: Read it. The member should find out what "exhaustive list" means in legislative interpretation.

**The ACTING SPEAKER**: Member for —

**Dr G.G. JACOBS**: Eyre.

**The ACTING SPEAKER**: I know that, member for Eyre, sorry.

**Dr G.G. JACOBS**: It surprises me, Mr Acting Speaker; we have only spent about 30 hours of deliberation in a committee that I chair and of which you are a member.

**THE ACTING SPEAKER**: Sorry, member for Eyre.

**Dr G.G. JACOBS**: Is it true that the member for Armadale has been labouring over this issue for some time and for some reason believes that there is an exclusion of a legal practitioner in this process? There are many clauses in which it has been replicated throughout the bill. Like the member for Southern River, I am not a lawyer either, but I would have thought that paragraph (d), "any other person who, in the Tribunal's opinion, has a sufficient interest in the matter."

**Dr A.D. Buti**: I agree with you.

**The ACTING SPEAKER**: Member for Armadale!

**Dr G.G. JACOBS**: If I am a patient and have a legal representative and I give consent to that legal practitioner to represent me, surely that person, as the representing legal practitioner, has sufficient interest in the matter to be part of this process, exhaustive list or no exhaustive list.

**Dr A.D. BUTI**: The member for Eyre has just agreed with me. That is what I have been saying. I want the parliamentary secretary to admit that the lawyer can represent the patient only if they pass through this additional hoop, which the others do not have to do. Why does the lawyer have to pass through that hoop but the mental health advocate, the carer or close family member do not? Why do they not have to pass through the hoop? The parliamentary secretary will not admit to that. Thank you member for Eyre, you make my case beautifully.

**Ms M.M. QUIRK**: It is just too good a temptation to stand up when people are casting around for yet another lawyer, although people say two lawyers, three opinions. The member for Armadale is quite rightly saying in relation to clause 421(d) that a lawyer has to convince the tribunal that they have sufficient interest in the matter.

**Dr G.G. Jacobs**: As a representative they automatically would be.

**Dr A.D. Buti**: No.

**Ms M.M. QUIRK**: No, not at all.

**The ACTING SPEAKER**: Members! The member for Girrawheen has the floor.

**Ms M.M. QUIRK**: That is a threshold that a lawyer must meet, whereas the others, by virtue of their status—carer, mental health advocate or someone prescribed—does not have to meet that additional threshold that is "the tribunal is of the opinion they have sufficient interest." There is a major distinction between the two groups of people. The member for Armadale might have been labouring the point, but I think quite rightly.

**Clause put and passed.**

*Sitting suspended from 6.00 to 7.00 pm*

Debate adjourned, on motion by **Mr J.H.D. Day (Leader of the House)**.