

MENTAL HEALTH BILL 2013

Business of the House — Consideration in Detail — Standing Orders Suspension — Motion

MR J.H.D. DAY (Kalamunda — Leader of the House) [7.47 pm] — without notice: I move —

That so much of standing orders be suspended as is necessary to allow debate to be resumed forthwith on the Mental Health Bill 2013.

I provide a very brief explanation. When I moved to adjourn the debate on that bill before the dinner break, I neglected to provide for it to be brought back on for debate tonight. That was the intention but it was not realised and I apologise. I appreciate the cooperation of members who are in here at the moment because we do need an absolute majority.

The ACTING SPEAKER (Ms L.L. Baker): As this is a motion without notice to suspend standing orders it needs an absolute majority to succeed. If I hear a dissenting voice I will be required to divide the Assembly. I have counted the Assembly and satisfied myself that an absolute majority is present. I declare the motion carried.

Question put and passed with an absolute majority.

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 422: Parties to proceeding —

Debate was adjourned after clause 421 had been agreed to.

Clause put and passed.

Clause 423 put and passed

Clause 424: Application for review —

Dr A.D. BUTI: Once again I refer to the issue of representation by a lawyer. It is quite easy: I will not continue to bring this up if the parliamentary secretary gives me the answer that the lawyer can represent the patient only if they have the approval of the tribunal. I do not agree there should be that fetter, but that is the fetter and the parliamentary secretary should admit it. That is the situation from any plain reading of subclause (2), which contains an exhaustive list. The lawyer is not listed in paragraphs (a), (b) or (c), although they may be a person under paragraph (d). It is alright for the member for Eyre to say that of course the patient's lawyer will have sufficient interest, and there may be occasions that they might, but there will be occasions that they might not, and they will have to get the approval of the tribunal. The member for Eyre said that the lawyer will always have sufficient interest. If that is the case, they should be able to represent the patient without first having to get the approval of the tribunal. Under any reading of the current clause, and other clauses, the lawyer has to get the approval the tribunal because it has to be "in the opinion of the tribunal" that they have sufficient interest in the matter. They probably do have sufficient interest, but they do not have the same status as any of the people listed in paragraphs (a), (b) or (c) and it seems absurd that they do not have an unfettered right to represent the patient and that can only be done in the opinion of the tribunal. It would be easy-peasy if the parliamentary secretary accepted that is the plain reading of this clause, and then I will not keep bringing this up in each clause.

Ms A.R. MITCHELL: The member did not hear what I said just before he started his speech and he will be pleased to know, and I will say again, that the lawyer does not have to get the approval of the Mental Health Tribunal because they would have the authority to act on behalf of the patient.

Dr A.D. BUTI: The parliamentary secretary has given me that explanation a number of times, but it is not consistent with a proper reading of the clause. This clause, and other clauses, contains an exhaustive list of people who can make applications, or whatever a clause refers to, and the lawyer is not included in that list. The parliamentary secretary says that the patient can give authority for the lawyer to act for them, but that is not provided in this clause. The parliamentary secretary wants me to be satisfied that an authority or agreement between the patient and their lawyer will override the exhaustive list in subclause (2). I do not believe that is the case.

Clause put and passed.

Clauses 425 and 426 put and passed.

Clause 427: Application for decision —

Dr A.D. BUTI: In division 10, "Jurisdiction in relation to nominated person", clause 427 reads —

Application for decision

- (1) A person specified in subsection (2) may apply to the Tribunal for a decision under this Division about a nomination.
- (2) An application may be made under subsection (1) by any of these people —
 - (a) the person who made the nomination;
 - (b) the nominated person;
 - (c) a carer, close family member or other personal support person of the person who made the nomination;
 - (d) a mental health advocate;
 - (e) any other person who, in the opinion of the Tribunal, has a sufficient interest in the matter.

How can the parliamentary secretary equate that exhaustive list with her argument that if the person has an agreement with a lawyer, then the lawyer can act on their behalf? The lawyer is not in that list of people who can make the application. It is no good saying they can represent the patient because there is an agreement between the lawyer and the patient. I do not understand how that can be case.

Ms A.R. MITCHELL: Any of the persons listed in clause 427(2)(a), (b) and (c), and even paragraph (d), could have a lawyer acting on their behalf, if they had signed the authority to act.

Dr A.D. BUTI: Where in the legislation does it say that is the case? As I said to the parliamentary secretary, there are many jurisdictions in which lawyers cannot appear, and this subclause contains an exhaustive list of people who can make an application. The lawyer can definitely appear on behalf of the patient if they can get the approval of the tribunal. I do not understand why the parliamentary secretary cannot admit that is the plain reading of the clause.

Ms M.M. QUIRK: I may be able to put it another way. Who else might be contemplated as falling within the purview of clause 424(2)(d)?

The ACTING SPEAKER: It is clause 427.

Point of Order

Dr A.D. BUTI: The member for Girrawheen put a question to the parliamentary secretary and she would like an answer.

The ACTING SPEAKER (Ms L.L. Baker): The member asked a question about clause 424, I think.

Consideration in Detail Resumed

Ms M.M. QUIRK: I am referring to clause 427(2)(e). I referred to clause 424 in error, Madam Acting Speaker.

The ACTING SPEAKER: Can the member for Girrawheen stand again and explain the question to the parliamentary secretary?

Ms M.M. QUIRK: Parliamentary secretary, I ask in relation to clause 427(2) what other persons might be contemplated as falling within the provisions of paragraph (e)?

Ms A.R. MITCHELL: It could be a friend, which is why it is general rather than specific.

Ms M.M. QUIRK: Would not a friend fall within paragraph (c) as being “other personal support person”?

Ms A.R. MITCHELL: Possibly, but not definitely; and that is why there is scope within those criteria.

Ms M.M. QUIRK: If the tribunal has to exercise its view on whether someone has sufficient interest in the matter, and the courts have to interpret this, the parliamentary secretary needs to give them some guidance as to whom she anticipates might fall within this subclause.

Ms A.R. MITCHELL: Each case will probably be different, and there is not one list that will fit all cases and the Mental Health Tribunal will decide whether the person or the relationship is appropriate.

Ms M.M. QUIRK: Frankly, from those answers, is it not the case that subclause (2)(e) is possibly redundant? The parliamentary secretary cannot seem to give us any example of people, other than lawyers, who might fall within that category.

Ms A.R. MITCHELL: A significant number of people could fall under subclause (2)(e). It might be the person’s employer or it could be an ex-schoolteacher. We do not know the circumstances. It would be a case-by-

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Dave Kelly

case situation, so I think it is better having it in there to allow that situation to proceed than not to have it in there.

Ms M.M. QUIRK: All the categories of people the parliamentary secretary has just given come under “personal support person” in subclause (2)(c). Going back to subclause (2)(e), if a lawyer seems to be the only person we contemplate might come within that paragraph, why does it not just say “lawyer”?

Clause put and passed.

Clauses 428 to 430 put and passed.

Clause 431: Application for review —

Dr A.D. BUTI: Surprisingly, I return to the famous issue about a lawyer and whether they would come under this provision. Once again the bill sets out a list of people who can make an application. A lawyer, surprisingly, is not one of those people listed. I would have thought they would be high on the agenda of people who would want to make an application for a review. We keep hearing from the parliamentary secretary that they can automatically act for the person if they have an authority to act. It is just not right to say that, as the legislation is obviously contrary to that viewpoint and they can act. Indeed, the member for Eyre, and I think supported by the member for Southern River, believes it would be automatic for them to have the ability to act under subclause (2)(d). That may be the case, but I am asking the parliamentary secretary to concede that and she will not. That is the point. The member for Eyre may be right in that they may have a sufficient interest in the matter. However, the parliamentary secretary continues to refuse to approach this consideration in detail stage in a commonsense way that would be of benefit to all of us. The parliamentary secretary keeps going back to the person having an authority, and that if there is a piece of paper signed between them and the lawyer, the lawyer can act. That is plainly contrary to the provisions under subclause (2). They can act properly nearly all the time—nearly but maybe not absolutely—under subclause (2)(d), but they need the approval of the tribunal. That is okay, but at least just be honest about it. Can the parliamentary secretary please give us an explanation rather than just sit there and say that she is not going to provide an answer?

Ms A.R. MITCHELL: I recall the member for member for Armadale saying not so long ago that he would not bring that matter up again. My answer is still the same.

Dr A.D. BUTI: I did not say that. I said I would continue to bring it up until the parliamentary secretary gave a proper explanation. She has refused to give a proper explanation. She erroneously referred to clause 451, then went on to refer to “prescribed requirement” under clause 419. That also proved to be erroneous. I admitted to an erroneous interpretation of a clause but she will not admit to the erroneous interpretation of any clause. It is absurd for the parliamentary secretary to continue with this facile argument that she keeps making about this authority to act. If that is the case, she should have in this bill the words, “If the lawyer has the authority to act, they may act.” She does not have that in the bill and she provided an exhaustive list of people who can act. I never said that I would not bring up the matter again. I said I would continue to bring it up until the parliamentary secretary provides a proper answer.

Clause put and passed.

Clause 432 put and passed.

Clause 433: What Tribunal may do on completing review —

Dr A.D. BUTI: This clause states —

On completing the review, the Tribunal may make any orders, and give any directions, the Tribunal considers appropriate.

Members may recall that in the amendment I proposed to clause 405, I sought to shorten the time for the tribunal to make orders or give directions. The parliamentary secretary refused to accept that amendment. Why should the tribunal under this clause be able to make orders? This clause refers to a different area and the parliamentary secretary will therefore have a proper explanation for this, but why is the tribunal able to “make any orders, and give any directions”? Is the tribunal also able to make recommendations?

Ms A.R. MITCHELL: Division 11 deals with a range of different scenarios and with patients’ rights. It therefore makes it difficult to prescribe specific orders that can be made. It is appropriate that the tribunal can give orders and directions under this clause.

Dr A.D. BUTI: Is the tribunal able to make recommendations? It does not appear so from the clause.

Ms A.R. MITCHELL: No.

Clause put and passed.

Mr John Day; Dr Tony Buti; Ms Andrea Mitchell; Ms Margaret Quirk; Acting Speaker; Deputy Speaker; Mr
Dave Kelly

Clauses 434 and 435 put and passed.

Clause 436: Conduct of proceedings —

Dr A.D. BUTI: In referring to a proceeding, subclause (1) states that it should be conducted with as little formality and technicality as possible. Does that mean that the rules of evidence are excluded, or does it mean that it is up to the tribunal to apply the normal rules of evidence? I have a series of questions on this clause but I will ask that one first.

Ms A.R. MITCHELL: I refer the member to clause 456. The subclauses there give specific information about evidence generally.

Dr A.D. BUTI: I thank the parliamentary secretary. Subclause (2) states that the tribunal is bound by the rules of natural justice. What is the parliamentary secretary's interpretation of "natural justice"?

Ms A.R. MITCHELL: In response, I refer to the explanatory memorandum, which states —

... it is implied in the Act that there must not be any conflict between the MHT members hearing a proceeding, and any other interest. For example, a neurosurgeon hearing an application for neurosurgery to be performed on a patient must not be the neurosurgeon proposed to perform the neurosurgery.

Ms M.M. QUIRK: There are two components to natural justice: there is the perception of bias, which is what the parliamentary secretary just told us about; and there is also the opportunity to be heard and answer allegations. The parliamentary secretary has not mentioned that. I wonder where that fits in.

Ms A.R. MITCHELL: My next response, as I thought there would be a second question, is that people will always have an opportunity to hear and respond to evidence, and the tribunal relies on that.

Dr A.D. BUTI: The parliamentary secretary mentioned that it is bound by the rules of natural justice. I am just trying to flick through other parts of the bill. If the tribunal acts contrary to the rules of natural justice, does that result in a de novo hearing; and, if so, is that by the same tribunal or a differently constituted tribunal?

Ms A.R. MITCHELL: In that situation, one can apply to the State Administrative Tribunal.

Clause put and passed.

Clause 437 put and passed.

Clause 438: Deciding questions in proceedings —

Dr A.D. BUTI: Clause 438 states —

- (1) In this section —
question of law includes a question of mixed law and fact.
- (2) A question in a proceeding (other than a question of law) must be resolved according to the opinion of the majority of the members constituting the Tribunal ...
- (3) A question of law in a proceeding before the Tribunal must be resolved according to the opinion of the presiding member.

That member has to be a lawyer, according to clause 437. When it says that "question of law" includes a question of mixed law and fact, what is the difference between mixed law and fact, and when do we have a mixed law and fact scenario? Can the parliamentary secretary give an example please?

Ms A.R. MITCHELL: It is my understanding that it relates to how the law should be interpreted in light of a particular factual scenario.

Clause put and passed.

Clauses 439 to 442 put and passed.

Clause 443: Notice of applications —

Ruling by Deputy Speaker — Test Vote

The DEPUTY SPEAKER: Two members have indicated a wish to move amendments to clause 443. The member for Armadale wishes to delete lines 3 to 12 on page 304, with a view to substituting other words, while the parliamentary secretary wishes to delete certain words in line 6, with a view to substituting other words. If the house does not agree to the member for Armadale's amendment to delete lines 3 to 12, it would effectively prevent the parliamentary secretary from moving her amendment to delete certain words in the same clause

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because, by not agreeing to delete the lines, the house is effectively saying that those lines stand as printed and therefore cannot be further amended or deleted. Hence a test vote is required. So as to preserve the rights of both members as far as possible, it is my intention to put only that part of the member for Armadale's amendment up to the point where the minister's amendment starts; that is, I will put the question that lines 3 to 5 be deleted. If that amendment is not agreed to by the house, I will immediately put the parliamentary secretary's proposed deletion of the words in line 6 and substitution of other words.

Debate Resumed

Dr A.D. BUTI: I move —

Page 304, lines 3 to 12 — To delete the lines and substitute —

- (a) the child's representative under section 448(1); and
- (b) if the child's parent or guardian is not a party — the child's parent or guardian; and

Clause 443 deals with notice of applications. I have a concern about the issue of children. I hope that my amendment will ensure that a notice of application hearing relating to children must go to the parent or guardian of the child concerned, regardless of the legal capacity of the child. That is what I seek to do. I think it is quite necessary and important that the child's parent or guardian is always party to these issues that can have major consequences for the children.

Ms A.R. MITCHELL: Can I seek clarification on what you said before about moving part of the member for Armadale's amendment, rather than both, and the implication of that?

The DEPUTY SPEAKER: The member for Armadale has indicated his whole amendment, but because it overlaps with an alternative amendment, in my role as Chair of the proceedings, I will put the part of his amendment that does not conflict with yours, and on the outcome of that we will decide how to proceed. We have the amendment put by the member for Armadale, but in view of the overlap with the notice of the amendment from the parliamentary secretary, the question that we will put is that lines 3 to 5 be deleted. That is the first part of the member for Armadale's amendment, so it is a test vote to see the appetite of the house to pursue the member for Armadale's amendment. The question is —

That lines 3 to 5 be deleted.

Division

Amendment put and a division taken, the Deputy Speaker (Ms W.M. Duncan) casting her vote with the noes, with the following result —

Ayes (14)

Dr A.D. Buti	Mr M.P. Murray	Ms R. Saffioti	Mr B.S. Wyatt
Ms J. Farrer	Mr P. Papalia	Mr C.J. Tallentire	Mr D.A. Templeman (<i>Teller</i>)
Mr F.M. Logan	Ms M.M. Quirk	Mr P.C. Tinley	
Mr M. McGowan	Mrs M.H. Roberts	Mr P.B. Watson	

Noes (31)

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

Pairs

Ms S.F. McGurk	Mr C.J. Barnett
Mr D.J. Kelly	Mr T.R. Buswell
Ms J.M. Freeman	Mr J.E. McGrath
Ms L.L. Baker	Mr A.P. Jacob
Mr J.R. Quigley	Dr K.D. Hames

Amendment thus negated.

Ms A.R. MITCHELL: The amendment is necessitated by the forthcoming amendment to clause 447, which will impact on the cross-references contained in clause 443. I move —

Page 304, line 6 — To delete “section 447(1)(b); or” and substitute —

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Dave Kelly

section 447(1)(b) or (c); or

Amendment put and passed.

Ms A.R. MITCHELL: I move —

Page 304, line 11 — To delete “section 447(1)(b)” and substitute —
section 447(1)(b) or (c)

Amendment put and passed.

Dr A.D. BUTI: I move —

Page 304, lines 14 to 19 — To delete the lines and substitute —

- (d) any carer, close family member or other personal support person of the child —
- (i) who is not a party; and
- (ii) whose name and contact details are provided to the Tribunal;

I have discussed the reasons why, so I do not think I need to say anything more.

Ruling by Deputy Speaker — Test Vote

The DEPUTY SPEAKER: We again have a situation of an amendment from the parliamentary secretary overlapping with the member for Armadale’s amendment. Therefore, we will now put the question on that portion of the member for Armadale’s amendment that does not conflict with the parliamentary secretary’s amendment. The question is —

That lines 14 to 16 be deleted.

Division

Amendment put and a division taken, the Deputy Speaker (Ms W.M. Duncan) casting her vote with the noes, with the following result —

Ayes (15)

Dr A.D. Buti	Mr F.M. Logan	Mrs M.H. Roberts	Mr P.B. Watson
Ms J. Farrer	Mr M.P. Murray	Ms R. Saffioti	Mr B.S. Wyatt
Ms J.M. Freeman	Mr P. Papalia	Mr C.J. Tallentire	Mr D.A. Templeman (<i>Teller</i>)
Mr D.J. Kelly	Ms M.M. Quirk	Mr P.C. Tinley	

Noes (31)

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

Pairs

Ms S.F. McGurk	Mr C.J. Barnett
Ms L.L. Baker	Mr T.R. Buswell
Mr R.H. Cook	Mr J.E. McGrath
Mr J.R. Quigley	Mr A.P. Jacob
Mr M. McGowan	Dr K.D. Hames
Mr W.J. Johnston	Dr M.D. Nahan

Amendment thus negated.

Ms A.R. MITCHELL: I move —

Page 304, line 17 — To delete “section 447(1)(b)” and substitute —
section 447(1)(b) or (c)

Amendment put and passed.

Clause, as amended, put and passed.

Clause 444: Notice of hearings —

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The DEPUTY SPEAKER: We have the same situation here, member for Armadale.

Dr A.D. BUTI: Yes, we do have the same situation. I presume the parliamentary secretary wants me to move the first part of my amendment.

The DEPUTY SPEAKER: Yes, please.

Dr A.D. BUTI: This clause deals with notice of hearings; I move —

Page 305, lines 15 to 24 — To delete the lines and substitute —

- (a) the child's representative under section 448(1); and
- (b) if the child's parent or guardian is not a party — the child's parent or guardian; and

Once again, this is important to ensure that there is proper representation in regards to children.

Ruling by Deputy Speaker — Test Vote

The DEPUTY SPEAKER: For the benefit of members who were not here earlier, I will just outline how we will deal with this. Two members have indicated a wish to move amendments to clause 444 of the Mental Health Bill. The member for Armadale wishes to delete lines 15 to 24 on page 305 with a view to substituting other words, while the Parliamentary Secretary to the Minister for Mental Health wishes to delete certain words in line 18 with a view to substituting other words. If the house does not agree to the member for Armadale's amendment to delete lines 15 to 24, it would effectively prevent the parliamentary secretary from moving her amendments to delete certain words in line 18 of the same clause, because by not agreeing to delete the lines the house is effectively saying that those lines stand as printed and therefore cannot be further amended or deleted. Hence, a test vote is required. So as to preserve the rights of both members as far as possible, it is my intention to put only that part of the member for Armadale's amendment up to the point at which the minister's amendment starts. I will put the question that lines 15 to 17 be deleted. If that amendment is not agreed to by the house, I will immediately put the parliamentary secretary's proposed deletion of certain words in line 18 and substitution of other words. The question is —

That lines 15 to 17 be deleted.

Division

Amendment put and a division taken, the Deputy Speaker (Ms W.M. Duncan) casting her vote with the noes, with the following result —

Ayes (15)

Dr A.D. Buti	Mr F.M. Logan	Mrs M.H. Roberts	Mr P.C. Tinley
Ms J. Farrer	Mr M.P. Murray	Ms R. Saffioti	Mr P.B. Watson
Ms J.M. Freeman	Mr P. Papalia	Mr C.J. Tallentire	Mr B.S. Wyatt
Mr D.J. Kelly	Ms M.M. Quirk	Mr D.A. Templeman	

Noes (31)

Mr P. Abetz	Mr J.H.D. Day	Dr G.G. Jacobs	Mr N.W. Morton
Mr F.A. Alban	Ms W.M. Duncan	Mr R.F. Johnson	Mr D.C. Nalder
Mr I.C. Blayney	Ms E. Evangel	Mr A. Krsticevic	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 W.R. Marmion	Mr M.H. Taylor
Mr M.J. Cowper	Mrs L.M. Harvey	Mr P.T. Miles	Mr T.K. Waldron
Ms M.J. Davies	Mr C.D. Hatton	Ms A.R. Mitchell	

Pairs

Ms S.F. McGurk	Mr C.J. Barnett
Ms L.L. Baker	Mr T.R. Buswell
Mr R.H. Cook	Mr J.E. McGrath
Mr J.R. Quigley	Mr A.P. Jacob
Mr M. McGowan	Dr K.D. Hames
Mr W.J. Johnston	Dr M.D. Nahan

Amendment thus negated.

THE DEPUTY SPEAKER: Parliamentary secretary, I believe you have an amendment.

Ms A.R. MITCHELL: I have. I seek leave to move the amendments for page 305, line 18, and page 305, line 23. Can I do them together or do I have to do them one at a time?

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Dave Kelly

The DEPUTY SPEAKER: No, parliamentary secretary, because there is also another amendment that will require a test vote. The parliamentary secretary can move her amendment up to line 23; there are two there.

Ms A.R. MITCHELL — by leave: I move —

Page 305, line 18 — To delete “section 447(1)(b); or” and substitute —
section 447(1)(b) or (c); or

Page 305, line 23 — To delete “section 447(1)(b)” and substitute —
section 447(1)(b) or (c)

Amendments put and passed.

Dr A.D. BUTI: I move —

Page 305, lines 26 to 31 — To delete the lines and substitute —

- (d) any carer, close family member or other personal support person of the child —
- (i) who is not a party; and
 - (ii) whose name and contact details are provided to the Tribunal;

Ruling by Deputy Speaker — Test Vote

The DEPUTY SPEAKER: Two members have indicated a wish to move amendments to clause 444 of the Mental Health Bill 2013; the member for Armadale wishes to delete lines 26 to 31 on page 305, with a view to substituting other words, and the Parliamentary Secretary to the Minister for Mental Health wishes to delete certain words on line 29 with a view to substituting other words. If the house does not agree to the member for Armadale’s amendment to delete lines 26 to 31, it would effectively prevent the parliamentary secretary from moving her amendment to delete certain words on line 29, because by not agreeing to delete the lines, the house is effectively saying that those lines stand as printed and therefore cannot be further amended or deleted. Hence, a test vote is required. To preserve the rights of both members as far as possible, it is my intention to put only that part of the member for Armadale’s amendment up to the point where the minister’s amendment starts—that is, I will put the question that lines 26 to 28 be deleted. If that amendment is not agreed to by the house, I will immediately put the parliamentary secretary’s proposed deletion of certain words on line 29 and the substitution of other words. The question is —

That lines 26 to 28 be deleted.

Division

Amendment put and a division taken, the Deputy Speaker (Ms W.M. Duncan) casting her vote with the noes, with the following result —

Ayes (15)

Dr A.D. Buti
Ms J. Farrer
Ms J.M. Freeman
Mr D.J. Kelly

Mr F.M. Logan
Mr M.P. Murray
Mr P. Papalia
Ms M.M. Quirk

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

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

Noes (31)

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

Mr J.H.D. Day
Ms W.M. Duncan
Ms E. Evangel
Mr J.M. Francis
Mrs G.J. Godfrey
Mr B.J. Grylls
Mrs L.M. Harvey
Mr C.D. Hatton

Dr G.G. Jacobs
Mr R.F. Johnson
Mr S.K. L’Estrange
Mr R.S. Love
Mr W.R. Marmion
Mr P.T. Miles
Ms A.R. Mitchell
Mr N.W. Morton

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

Pairs

Ms S.F. McGurk
Ms L.L. Baker
Mr R.H. Cook
Mr W.J. Johnston
Mr J.R. Quigley
Mr M. McGowan

Mr C.J. Barnett
Mr T.R. Buswell
Mr J.E. McGrath
Dr M.D. Nahan
Mr A.P. Jacob
Dr K.D. Hames

Amendment thus negatived.

Ms A.R. MITCHELL: I move —

Page 305, line 29 — To delete “section 447(1)(b)” and substitute —
section 447(1)(b) or (c)

Amendment put and passed.

Clause, as amended, put and passed.

Clause 445 put and passed.

Clause 446: Party is an adult —

Dr A.D. BUTI: I move —

Page 306, lines 25 and 26 — To delete the lines and substitute —

- (a) may appear in person; or
- (aa) may be represented by —
 - (i) a legal practitioner; or
 - (ii) any other person;

or

This provision relates to appearance and representation. The repetitive question I have asked about legal practitioners in other clauses of the bill is also important here. It appears that the bill will potentially water down the role of a legal practitioner. The drafters of the bill did not consider that there is a difference between “legal advice” and “legal representation”. I have moved the amendment because it is important that we expressly provide representation by a legal practitioner. The way the bill has been written means that representation can be by a number of parties. The bill does not refer to the issue of a lawyer. It is referred to in clause 447, but in clause 446 we are dealing with an adult, and it is important that the express view of a legal practitioner or express provisions for representation by a legal practitioner be included.

Ms A.R. MITCHELL: We have given full consideration to the member for Armadale’s amendment, as we always do, but we will not support it because there is nothing in clause 446 that prevents a person from being legally represented. Therefore, such an amendment is unnecessary.

Amendment put and negatived.

Dr A.D. BUTI: I move —

Page 307, after line 2 — To insert —

- (2A) The Tribunal may specify in an order made under subsection (2) that the party must be represented in the proceeding by a legal practitioner.

A current reading of the bill reads that a tribunal “may make an order”. I am not sure that I should have moved that amendment.

Amendment, by leave, withdrawn.

Clause put and passed.

New clause 446A —

Dr A.D. BUTI: I move -

Page 307, after line 9 — To insert —

446A. Party is a child

- (1) In a proceeding, a party who is a child must be represented by a legal practitioner.
- (2) Even though a party who is a child is represented in the proceeding, the child is entitled to express in person his or her views about any matter arising in the course of the proceeding that may affect the child, whether or not the child has sufficient maturity and understanding to make reasonable decisions about matters relating to himself or herself.

It would be a worrying situation if we did not ensure that a child is represented by a legal practitioner. One may argue that a child should not have to be represented by a legal practitioner, but it is dangerous to leave such

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discretion to a child. The amendment provides that a child is still allowed to express his or her views. The lawyer is under an obligation to represent the child's best interests and not to act contrary to their instructions. Having a lawyer present is a guarantee that they will be represented appropriately, because it would be rare that a child would know all their rights in the procedures before them, but it does not prevent the child expressing their point of view. The lawyer will always be under an obligation not to act contrary to the instructions of the child. Mandating that the child must be represented by a legal practitioner does not in any way reduce the ability of the child to express their personal viewpoint. It would be very dangerous to have a situation in which a child is not represented by a legal practitioner.

Ms A.R. MITCHELL: The government obviously agrees with the member's concern that we must protect the interests of the child at all costs throughout this. Having said that, the government believes that the bill already makes appropriate provision for the representation of children who are parties to proceedings; in fact, clause 448 requires that all children without capacity be represented. However, the government opposes this amendment because it would empower the tribunal to require a child who is a party to be represented if it would not be in the child's best interests to appear in person. The bill also empowers the tribunal to make arrangements for representation of a party if the party wants the tribunal to do so. Legal representation should not be the only option available for children who are parties to proceedings; all parties, including children, should have a choice. For example, the child may wish to be represented by a parent, guardian or a mental health advocate who has been providing them with advice and support.

Dr A.D. BUTI: The parliamentary secretary thinks it is okay that a child does not need to be represented by a lawyer, and this bill seems to dilute representation by lawyers. It has widened the scope of representation to include other parties, such as a mental health advocate, who is a very important player in this. However, a mental health advocate will not necessarily have the skills, experience or knowledge about a child's rights, particularly legal rights that need to be protected. My amendment does not in any way allow the legal practitioner to act contrary to the instructions or the wishes of the child. My amendment proposes that the child would be represented by a legal practitioner. I am sure that most children would want the legal practitioner to have some input into the proceedings, but if they wished the lawyer could be mute in the proceedings, but at least they would be present if required. We are dealing with children in the mental health system, so they will be vulnerable. It is the case here, if they do not have a lawyer, they do not know what they do not know. The child does not necessarily know that they do not know that they do not know their rights and therefore the lawyer should be there.

Several government members interjected.

Dr A.D. BUTI: If the member does not know what I do not know, then I know that he does not know! The point is that the lawyer is present and can be called on if they need to explain something to the child. The lawyer is there to represent the child and they cannot act contrary to the child's instructions. It is a dangerous situation, when the government is watering down the ability of the lawyer to be included in these proceedings.

Ms A.R. MITCHELL: At times, the child may not want the lawyer to be there. That is not disrespectful to lawyers, but the child and/or a member of the family may choose not to have a lawyer involved. We need to respect their preference and wishes as well.

Dr A.D. BUTI: That is not a consistent approach, because in clause 446, "Party is an adult", the parliamentary secretary advised that, in subclause (2), the tribunal may order that a party must be represented in the proceedings if it is the tribunal's opinion it is in the best interests of the party for the person to be represented. Therefore, the government does not always respect the wishes of a party to the proceedings. Clause 447 does no more than say that a child may be represented. The government is saying that the child has sufficient maturity and understanding to make reasonable decisions about matters in regard to themselves. They may, but if they are in the mental health system, they are probably quite vulnerable. The minister's point was that it is okay with an adult for the tribunal to overrule their wishes, and she does not even talk about their capacity or otherwise. The parliamentary secretary splits her arguments, with clause 448 referring to a child with no capacity, clause 447 to a child with capacity, and clause 446 to an adult. The bill allows the tribunal to overrule the wishes of an adult. However, one of the parliamentary secretary's reasons for refusing to accept my amendment is that child's wishes should not be overruled. Why should the tribunal overrule the wishes of an adult, who may have capacity, and appoint a lawyer—the parliamentary secretary is not excluding that—and not do the same thing for a child, who I would think would be in a more vulnerable position than an adult?

Ms A.R. MITCHELL: I have foreshadowed an amendment to clause 447 to insert an additional safeguard for children appearing before the tribunal by empowering the tribunal to order that a child be represented even if the child has decision-making capacity.

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Dr A.D. BUTI: Yes, but the parliamentary secretary's amendment proposes that that representation can be provided by anyone, and she does not stipulate who they are. For some reason, the parliamentary secretary is constantly hesitating to specify legal practitioners. I will let the parliamentary secretary move her amendment.

New clause put and negatived.

Clause 447: Party is a child with capacity to consent —

Ms A.R. MITCHELL: I move —

Page 307, after line 23 — To insert —

- (c) must be represented by another person if the Tribunal makes an order under subsection (1A) in respect of the party.
- (1A) The Tribunal may make an order that the party must be represented in the proceeding if, in the Tribunal's opinion, it is not in the best interests of the party for the party to appear in person in the proceeding.

Ms A.R. MITCHELL: I spoke to the amendment when I responded to the member for Armadale's amendment to insert new clause 446A.

Dr A.D. BUTI: The parliamentary secretary has moved to include that the child must be represented by another person if the tribunal makes an order under subclause (1A) and may make an order that the party must be represented in the proceedings if it is in the child's best interests. What sort of representation does the parliamentary secretary envisage? Who would qualify to provide this representation? Are they listed under subclause (1)(b)?

Ms A.R. MITCHELL: Yes, they are listed in subclause (1)(b).

Amendment put and passed.

Clause, as amended, put and passed.

Clause 448 put and passed.

Clause 449: Tribunal may make arrangements for representation —

Dr A.D. BUTI: At the moment this clause states —

The Tribunal may make arrangements for a party to be represented at a hearing if the party wants the Tribunal to make such an arrangement on the party's behalf.

I move —

Page 308, lines 16 to 18 — To delete all the words appearing after "The Tribunal" and substitute —

:

- (a) must make arrangements for the party to be represented at a hearing if the party is the person concerned in the proceeding; and
- (b) may make such an arrangement for any other party.

There are two parts to this amendment. The tribunal must make arrangements for the party to be represented at a hearing if the party is the person concerned, and it may make arrangements for any other party. It is once again very important that people be represented. This does not prevent people's personal views from being represented. If people are to ensure that their rights are properly guaranteed and protected, it is incredibly important that the legislation before us does whatever is necessary in those arrangements to ensure that those rights and freedoms are protected. That is why we believe it is necessary for part of the clause to contain a mandatory provision.

Ms A.R. MITCHELL: I certainly recognise that people who fall within the scope of this bill often need assistance with the exercise of their rights. I have said to the member before that this clause of the bill empowers the tribunal to require a person to be represented if it is in the patient's best interests. If a person wants the tribunal to arrange for representation, the tribunal can do so. However, we are not in favour of the member's amendment, as we believe it is covered.

Dr A.D. BUTI: It is not always easy for tribunals to decide what is necessarily in a person's best interests. This tribunal is a decision-making body and the bill also asks it to make decisions on whether a party to proceedings—not even legal proceedings—should have representation. Why do we necessarily give the tribunal

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that power? Of course tribunals often may not want someone to be represented; it may be easier for a tribunal to proceed without representation. Hopefully that would not be the case, but there is no guarantee that it would not be the case. Leaving the decision to the tribunal may not always be the appropriate method to use because the tribunal must also make decisions about the parties. However, the bill also asks the tribunal to make decisions on whether or not someone should be represented.

Ms A.R. MITCHELL: The Mental Health Tribunal certainly will be acting in the best interests of patients. Clause 7 in division 3 refers to the best interests of a person. The Mental Health Tribunal will therefore always be acting in the best interests of the person, and will be doing so not in an adversarial way but more in a way to protect the person. Once again, I think the member's amendment is covered throughout the bill.

Mr D.J. KELLY: I share some of the concerns of the member for Armadale. Although under the statute the tribunal will be required to act in the best interests of the person before it, it is a very strange arrangement. At the same time the tribunal, which has at its disposal quite wide-ranging powers and punitive orders, is supposed to safeguard the person's interests. Involuntary detention, if you like, is a very serious matter. I therefore share the concerns of the member for Armadale that to have a person come before the tribunal without representation is fraught with all sorts of dangers. The amendment that the member proposes, which will simply ensure that people are represented, seems to me to be incredibly wise. The history of mental health care is littered with people who have gone through the processes and at a later date, after great damage to the person, the processes have been found to be unfair. Just ensuring that the person is represented seems to be a really precautionary approach to take, and the amendment of the member for Armadale seems to me to be eminently sensible.

Ms A.R. MITCHELL: I confirm to the member that the tribunal cannot make an involuntary treatment order for a patient. I think the member referred to that as one of the things it could do but it cannot.

Dr A.D. Buti: But it can do a lot of things.

Ms A.R. MITCHELL: I want to clarify that matter. Once again, there may be occasions when a patient does not want legal representation, and we need to respect that right.

Dr A.D. Buti: This amendment is not about legal representation; it is about representation.

Ms A.R. MITCHELL: At the same time, as I said earlier, there is an opportunity for a person who wants the tribunal to arrange representation to have that occur, and this bill empowers the tribunal to require that person to be represented if it is in the patient's best interests. There are therefore such opportunities.

Dr A.D. BUTI: As I said, it is not just about legal representation; it is about representation generally. When the tribunal is making decisions that can affect the rights and freedoms of a party, it can also determine whether or not someone should be represented even if that person has not actually asked to be represented. This bill is about dealing with vulnerable people in the mental health system. Representation—not necessarily legal representation—will not allow the representative to act in a manner that is detrimental to a party or to act in a manner that is contrary to the wishes of the party because the tribunal will not allow it to happen. However, the party needs that safeguard of having someone with them to represent them. As I said, although I believe legal representation is incredibly important, my proposed amendment to clause 449 does not stipulate that it has to be legal representation.

Division

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

Extract from Hansard
[ASSEMBLY — Tuesday, 8 April 2014]
p2266b-2286a

Mr John Day; Dr Tony Buti; Ms Andrea Mitchell; Ms Margaret Quirk; Acting Speaker; Deputy Speaker; Mr Dave Kelly

Ayes (14)

Dr A.D. Buti
Ms J. Farrer
Ms J.M. Freeman
Mr D.J. Kelly

Mr F.M. Logan
Mr M.P. Murray
Mr P. Papalia
Mrs M.H. Roberts

Ms R. Saffioti
Mr C.J. Tallentire
Mr P.C. Tinley
Mr P.B. Watson

Mr B.S. Wyatt
Mr D.A. Templeman (*Teller*)

Noes (31)

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

Mr J.H.D. Day
Ms W.M. Duncan
Ms E. Evangel
Mr J.M. Francis
Mrs G.J. Godfrey
Mr B.J. Grylls
Mrs L.M. Harvey
Mr C.D. Hatton

Dr G.G. Jacobs
Mr R.F. Johnson
Mr S.K. L'Estrange
Mr R.S. Love
Mr W.R. Marmion
Mr P.T. Miles
Ms A.R. Mitchell
Mr N.W. Morton

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

Pairs

Ms S.F. McGurk
Ms L.L. Baker
Mr R.H. Cook
Mr J.R. Quigley
Mr M. McGowan
Mr W.J. Johnston

Mr C.J. Barnett
Mr T.R. Buswell
Mr J.E. McGrath
Mr A.P. Jacob
Dr K.D. Hames
Dr M.D. Nahan

Amendment thus negatived.

Clause put and passed.

Clause 450 put and passed.

New clause 450A —

Dr A.D. BUTI: I move —

Page 308, after line 25 — To insert —

450A. Access to Tribunal's records

For the purpose of conducting a proceeding, a party appearing in person or a party's representative under section 446, 447 or 448 is entitled to inspect, and to take a copy of the whole or any part of, the Tribunal's records relating to the proceedings —

- (a) at any time the office of the Tribunal is open for business; and
(b) at any other time by arrangement with the registrar.

As the parliamentary secretary mentioned, the whole idea is to ensure that the party's interests are properly represented. The tribunal is also there to ensure that the party receives the best possible representation and that their interests are preserved and guaranteed. If that is to have force and be more than just a platitude, it is sometimes necessary for the party or their representative to have access to the record of proceedings. This amendment has been moved to ensure that it is properly acknowledged that the party or the representative has all the relevant information to make appropriate decisions if any further action may be desired.

Ms A.R. MITCHELL: We do not support this new clause. My rationale for that comes from the president of the current Mental Health Review Board, which will become the Mental Health Tribunal. He said that the tribunal's documents that relate to a proceeding will be the documents that relate to procedural matters to do with the listing of the proceeding for hearing. He also referred to the copies of an application for hearing and the notice informing specified persons as to when and where a hearing will be held. The documents and records relevant to a tribunal decision are the medical records obtainable from the mental health service. The tribunal will not have copies of the files kept by the mental health services; they are not the tribunal's records.

New clause put and negatived.

Clauses 451 and 452 put and passed.

Clause 453: Closed hearings —

Dr A.D. BUTI: Clause 453 states —

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- (1) A hearing is not open to the public unless the Tribunal orders that the hearing or a part of the hearing is open to the public.
- (2) The Tribunal may, on the application of any person or on its own initiative, make an order —
 - (a) permitting a specified person to be present at a hearing or part of a hearing; or
 - (b) excluding a specified person (including a witness) ...
- (3) Despite section 466, the Tribunal must provide reasons for making an order ...

I move —

Page 310, after line 25 — To insert —

- (3A) If the Tribunal makes an order under subsection (2)(b) excluding the person concerned in the proceeding or the person concerned's representative under section 446, 447 or 448 from a hearing or a part of a hearing, the Tribunal must make arrangements for the person concerned to be represented at the hearing or part of the hearing.

If we are to exclude a specified person from a hearing—it may be a witness—we must ensure that the person concerned is represented at the hearing or part of the hearing. We talked about natural justice. Natural justice ensures that there is a fair hearing. One would also probably add that it is important that people's ability to be represented is preserved, even though that is not part of natural justice.

Ms A.R. MITCHELL: It is certainly accepted that the exclusion of a patient or their representative could adversely impact on the patient's ability to engage in the hearing process. However, as I think we have said before, the concern about the member's amendment is that the patient may legitimately prefer for the hearing to proceed despite the absence of a representative. For example, arranging for a representative could significantly delay the resumption of the hearing. We believe the bill already empowers the tribunal to make the necessary arrangements to ensure that the person is represented.

Division

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

Ayes (13)

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

Noes (29)

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

Pairs

Ms S.F. McGurk	Mr C.J. Barnett
Ms J. Farrer	Mr T.R. Buswell
Mr R.H. Cook	Mr J.E. McGrath
Mr W.J. Johnston	Dr M.D. Nahan
Mr J.R. Quigley	Mr A.P. Jacob
Mr M. McGowan	Dr K.D. Hames
Ms M.M. Quirk	Mr J.M. Francis
Ms R. Saffioti	Mr R.F. Johnson

Amendment thus negatived.

Clause put and passed.

New clause 453A —

Dr A.D. BUTI: I move —

Page 310, after line 29 — To insert —

453A. Conduct of hearing in absence of party

The Tribunal may conduct a hearing in the absence of a party if satisfied that —

- (a) the party has been given notice of the hearing; and
- (b) it is in the best interests of the person concerned in the proceeding for the hearing not to be adjourned.

We believe this is a commonsense amendment and that it will assist in the proper functioning of the tribunal proceedings.

Ms A.R. MITCHELL: Member, the government supports the amendment.

New clause put and passed.

Clauses 454 to 462 put and passed.

Clause 463: Contempt of Tribunal —

Dr A.D. BUTI: We will be opposing this clause.

Ms A.R. MITCHELL: We agree and accept that the clause needs to be deleted.

Dr A.D. BUTI: In a rare moment of bipartisanship, I believe that is appropriate, and, as I said, we will be opposing this clause.

Clause put and negatived.

Clauses 464 to 468 put and passed.

New clause 468A —

Dr A.D. BUTI: I move —

Page 320, after line 12 — To insert —

468A. Publication of Tribunal's decisions

- (1) The Tribunal may publish all or any of its decisions in any form (including electronic form) that the Tribunal considers appropriate.
- (2) A decision may be published under subsection (1) with or without the reasons for it.
- (3) All personal information must be removed from a decision before it is published under subsection (1).

This deals with the issue of decisions in proceedings. My amendment does not mandate that decisions have to be published; it simply provides a legislative framework to allow the position to be published and provides parameters for the way in which the decision can be published. It is sometimes quite important that decisions are published because they provide some sort of guidance for future decisions even though they are done on an individual basis. Other parties and interested people often need or wish to read the reasons for the decisions.

Ms A.R. MITCHELL: The bill does not prohibit the publication of reasons for decisions that are made, providing the identifying information is removed. Therefore, we believe that the opposition's new clause 468A does not need to be in the bill.

New clause put and negatived.

Clause 469 put and passed.

Clause 470: Content —

Dr A.D. BUTI: I move —

Page 321, after line 10 — To insert —

- (iii) the period within which a proceeding must be brought before the Tribunal; and

- (iv) the period within which a document received under this Act by the Tribunal must be dealt with; and
- (v) the period within which a document must be given under this Act by the Tribunal;

We believe it is important to ensure that we lay out the requirements that the tribunal must meet. All my amendment seeks to do is to ensure that some further guidelines or requirements are provided for in the practices and procedures of the tribunal.

Ms A.R. MITCHELL: Clause 470 does not limit what can be in the rules. Again, we do not believe that it is necessary to accommodate the member for Armadale's amendment.

Amendment put and negatived.

Clause put and passed.

Clauses 471 and 472 put and passed.

New clause 472A —

Dr A.D. BUTI: I will move a number of amendments. These amendments are borne from some concerns that I received in correspondence, which I believe the Minister for Mental Health also received, from Merranie Strauss, who is a lawyer and has acted on a number of tribunals. She was quite concerned about the functions and qualifications of the president of the tribunal and was particularly concerned that the president will not need to be a lawyer. The bill appears to not require the president to be a lawyer with specified experience and standing. She provided quite a detailed exposé of the reasons that the president should be a lawyer. Therefore, I move —

Page 322, after line 7 — To insert —

472A. Qualifications of President

The President must be either:

- (a) a judge or former judge of the Supreme, District or Family Court of Western Australia, or
- (b) an Australian lawyer as defined by the *Legal Profession Act 2008* and have at least 8 years legal experience.

Although it is implied under clause 472 that the president will be a lawyer, there is no explicit guarantee that that is the case. It is important to have a lawyer as a president. We have such arrangements in other tribunals. For instance, under the Corruption and Crime Commission Act, the commissioner has to be a judge. The assessors and Chief Assessor of Criminal Injuries Compensation of the Criminal Injuries Compensation Board need to be judges. This is consistent with all other states and territories' mental health boards and tribunals, from my understanding. I am sure that all, if not nearly all, presidents of mental health boards and tribunals in other jurisdictions are lawyers. We are dealing with quite important issues. If the parliamentary secretary recalls, earlier we talked about when questions of law and fact in certain proceedings will have to be determined by the lawyer on the tribunal. The president often has to deal with complex legal issues and that is why the president should be a lawyer. In many other cases the president is a lawyer and I believe that it would be appropriate for the government to agree to this amendment.

Ms A.R. MITCHELL: The person who is selected for this role will go through a competitive selection process, as we would expect. Eminently suitably qualified people with a great deal of experience may be very fitting for the role and may not be lawyers. It is important that we give those people an opportunity. As the member for Armadale knows—he just made the statement—there is a lawyer on the Mental Health Tribunal as a presiding member. There will always be a lawyer on the Mental Health Tribunal, but it may not necessarily be the president.

Dr A.D. BUTI: It is interesting that for many other tribunals in Western Australia the president or the chief assessor is a lawyer and that the presidents of mental health boards in many other states are lawyers. Is the parliamentary secretary able to inform me of the jurisdictions in which the president of the mental health board or tribunal is not a lawyer? This amendment does not prevent other people from sitting on the tribunal, but the president has certain duties that are incredibly important and it would seem to be silly for the president to have to defer to a lawyer questions of law, which can be a mixed fact-and-law scenario, because the president is not a lawyer. Under this bill, questions of law have to be decided by the lawyer on the tribunal. That lawyer may make a decision on something that the president does not have the expertise to properly understand. Many eminent people could sit on the tribunal, and they are not prevented from doing so; this amendment specifically concerns

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the president. It is quite standard procedure for presidents in quasi-legal bodies—it is a quasi-legal body because it deals with rights and freedoms of people—to be lawyers.

Ms A.R. MITCHELL: As I said, the process to select the candidate for the role of the president will take all amount of consideration, I am sure. However, we believe we should keep the selection process open. It may be that a senior legal person does come through, but we do need to keep the options open.

Dr A.D. BUTI: In her letter to the mental health minister, Ms Strauss laid down her reasons why the president should be a lawyer with the experience and qualifications necessary to be accepted as a district or Supreme Court judge; that is, they have eight years' experience as an Australian lawyer. I think it is important that I read this letter. I will not read every single part of it, but I think it is important to read parts of it. It states —

Inevitably, an Act that repeals outdated or insufficiently comprehensive legislation gives rise to many legal interpretation issues, irrespective of how well it is drafted.

In anticipation of a new Mental Health Act commencing this year I have studied the Bill's scheme and extensive, detailed provisions. I anticipate there will be a myriad of legal and procedural issues as the new Act is implemented.

The Bill is long and intricate. Under Part 21 the Tribunal will have extreme powers in relation to involuntary patients, potential involuntary patients, specialist doctors and other health care professionals, including powers to:

- make decisions about a patient's mental health and need for treatment, which decisions can carry considerable risk to the health and safety of the patient, the patient's carers, their family members and others in the community;
- order that a person continue in detention against their will for compulsory medical treatment, for a period which is not determined at the time of the Tribunal's order;
- make other decisions affecting a patient's liberty, such as by maintaining a community treatment order and reviewing any limitation of a patient's right to lawful communication;
- review and make orders about whether a psychiatrist's or other health professional's order to seclude or physically or mechanically restrain a patient was lawful and appropriate;
- judge the validity of involuntary treatment orders made by highly trained and committed medical specialists who have extensive experience in their field, particularly psychiatrists but also neurosurgeons;
- on its own initiative, suspend the operation of an involuntary treatment order pending a full Tribunal review;
- on its own initiative, restrain a person from taking action under an involuntary treatment order pending a full Tribunal review;
- order that a psychiatrist treat a patient under a community treatment order, rather than under an inpatient treatment order;
- decide whether a psychiatrist can give a patient electroconvulsive therapy, and if so, the number and duration of treatments;
- decide whether a neurosurgeon can perform psychosurgery on a patient, (the Tribunal cannot approve the proposed psychosurgery unless it has "clinical merit" and the neurosurgeon is "suitably qualified and experienced");
- judge the actions or omissions of a psychiatrist who makes or does not make a transfer order requiring an involuntary patient to be transferred from one hospital to another for examination or treatment;
- revoke a patient's nomination of their nominated person; and
- decide whether any other decisions affecting a patient's rights has been lawful and appropriate, such as a decision to transfer or transport against their will;
- open hearings or parts of hearings to the public;
- issue a summons requiring a person to attend and give oral evidence or produce a document;
- in a hearing, direct a person to answer a relevant question;
- in a hearing, require a person to give evidence on oath or by affidavit;

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- refer a person to the appropriate authority for prosecution for contempt or any other offence provided for in the Bill.

That is incredibly comprehensive. Many of those things I have just read out require people with legal expertise. Many of the provisions there are rights that can be taken away from people with a mental illness. Would we say that the president of the Prisoners Review Board should not be a lawyer? The president of the Prisoners Review Board is, of course, a lawyer. I believe the president of the Mentally Impaired Accused Review Board is a lawyer. The president of the State Administrative Tribunal is a lawyer. Why, when those bodies have lawyers, is it not believed that the president of the Mental Health Tribunal should be a lawyer? The bill gives the tribunal incredible powers to affect the rights and freedoms of a patient. It is not more onerous on the state to have a lawyer as the president because there has to be a lawyer on the tribunal. The president has a particular status and they should be a lawyer, and that is what our new clause seeks to do.

Ms A.R. MITCHELL: As I have said before, it may well be that a very qualified lawyer is chosen through the selection process to become the president. We also believe that throughout the bill we have other avenues to ensure that the Mental Health Tribunal can obtain assistance from persons with the relevant knowledge and experience—that is, clause 439—in the areas they may want. Also, clause 492(2) allows the Mental Health Tribunal to seek determinations on questions of law from the State Administrative Tribunal. Therefore, there are a number of avenues by which the Mental Health Tribunal can seek professional legal advice.

Dr A.D. BUTI: If the Mental Health Tribunal president is not a senior experienced lawyer, or even a judge, arguably, it will not have the same status and recognition that it would have if the president is a lawyer. Remember, parliamentary secretary, that this tribunal has to make decisions that require legal interpretation of the legislation we have been debating for some time and also the lawful implementation of the new bill, and that requires having a lawyer in the senior position to properly direct how the tribunal should be operating. If the president is not a legal member, there is a serious chance that there will be inconsistencies in the approach of the various members and the president will need to be a lawyer so he or she can properly direct how that tribunal should proceed. I do not wish to be disrespectful to other professions, but the legally qualified president will be able to lead the tribunal in its interpretation and application of SAT and Supreme Court decisions in regards to reviews and appeals. Often matters will go to SAT and the Supreme Court and the president will need to direct how the tribunal will then interpret those decisions. It is all right to say that there will be a vigorous selection process and that people will be selected on merit, but the point is that in regards to the president that merit should be based on whether they have sufficient legal standing and experience.

Division

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

Ayes (13)

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

Noes (29)

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

Pairs

Ms S.F. McGurk
Ms J. Farrer
Ms R. Saffioti
Mr J.R. Quigley
Mr M. McGowan
Mr W.J. Johnston
Ms J.M. Freeman
Ms M.M. Quirk

Mr C.J. Barnett
Mr T.R. Buswell
Mr J.E. McGrath
Mr A.P. Jacob
Dr K.D. Hames
Dr M.D. Nahan
Mr R.F. Johnson
Mr F.A. Alban

New clause thus negatived.

New clause 472B —

Dr A.D. BUTI: I move —

Page 322, after line 7 — To insert —

472B. General function of President

The President is responsible for the administration of the Tribunal and is to be assisted by the Registrar appointed under section 480 and Tribunal staff appointed under section 483.

This is a new clause, but it will not be section 472B, will it?

The ACTING SPEAKER (Mr N.W. Morton): That is fine; that can be corrected.

Dr A.D. BUTI: It is quite obvious that the president is a member of the tribunal, and I imagine that the general functions of the tribunal will be consistent with the State Administrative Tribunal Act, which of course gives the president general administrative and improvement functions. My amendment states that the president is responsible for the administration of the tribunal and should be assisted. It is very important that the president have responsibility for the administration of the tribunal and be provided with assistance when needed. From my reading of the Mental Health Bill 2013, nothing in it states the functions of the tribunal or who has responsibility for ensuring that the functions of the tribunal are properly proceeded with. The president should specify which members are to constitute the tribunal in each case. That is done in particular cases under clause 381. This amendment ensures that it is legislatively provided for that the president is the person responsible for the administration of the tribunal. Under the current reading of clause 472, the president of the Mental Health Tribunal is appointed by the Governor; it does not state what its functions are. Clause 472 refers to the functions of the registrar but not the functions of the president. It refers also to the delegation that the president can make, but that is not the same thing. That is why I have moved the amendment.

Ms A.R. MITCHELL: The provisions of the bill relating to the relationship between the president and the registrar are modelled on the equivalent clauses of the current act. Those provisions have not been problematic, and further clarification is considered unnecessary. The bill makes it clear that the president has the power to direct the registrar in the performance of the registrar's functions either generally or to a particular matter.

Dr A.D. Buti: We are not talking about the registrar; we are talking about the president.

Ms A.R. MITCHELL: The member was talking about the relationship between the president and the —

Dr A.D. Buti: With the assistance of the registrar.

Ms A.R. MITCHELL: The member wanted clarification and I am giving him that clarification, which the member will find in clause 482.

New clause put and negatived.

Clauses 473 to 477 put and passed.

New clause 477A —

Dr A.D. BUTI: I move —

Page 324, after line 6 — To insert —

477A. Code of conduct

(1) The President of the Tribunal must make and maintain a written code of conduct applying to each member.

- (2) To the extent that the President of the Tribunal considers appropriate, the President must consult with these people about what the code of conduct should contain —
- (a) members;
 - (b) the registrar and the registry staff referred to in section 483;
 - (c) the Public Sector Commissioner;
 - (d) other persons the President considers appropriate.
- (3) A member must comply with the code of conduct.

It must be reiterated that the Mental Health Tribunal has immense powers to affect the wellbeing, freedom, rights and type of treatment people with a mental illness receive. That is why it is incredibly important for the tribunal to have a code of conduct. The parliamentary secretary has talked about other tribunals. I also referred to other tribunals, of which the president is a lawyer. It seems that when I refer to other tribunals to explain the need for the president to be a lawyer, the parliamentary secretary thinks that is an invalid comparison, but it is all right for her to refer to other tribunals if it supports her argument. We are dealing with the Mental Health Tribunal and it is important that it has a code of conduct. The Mental Health Tribunal should not be compared with another tribunal as an analogy. That is the reason I moved this amendment. I find it hard to understand why the government would oppose providing legislative imprimatur for the president of the Mental Health Tribunal to put in place a written code of conduct, according to the provisions contained in this amendment.

Ms A.R. MITCHELL: It is important that the tribunal is seen to be independent of government. The Governor has the overarching power to remove a member of the tribunal. I am probably bringing in a number of the provisions contained in the amendment moved by the member for Armadale, as they all fit within the concept of independence from government. The Governor has the overarching power to remove a member of the tribunal on grounds of neglect of duty and all those other things, and complaints about members of the tribunal can be made to the Ombudsman. Clause 470 allows the president to make rules that may include matters relating to the conduct of members, together with relevant practice and procedures, but that is not listed in this bill. It is an operational matter that the president may well consider, but the bill does not need to include a code of conduct.

Dr A.D. BUTI: Is the parliamentary secretary saying that a prescribed code of conduct is not important?

Ms A.R. Mitchell: No, I did not say that.

Dr A.D. BUTI: What is the parliamentary secretary saying?

Ms A.R. MITCHELL: I said that the president has the ability and the right to make rules that may include matters relating to the conduct of members, together with relevant practice and procedures, in his role as president of the tribunal.

Dr A.D. BUTI: The parliamentary secretary has referred to clause 470(2)(c)(ii), which concerns the conduct of the proceedings; it does not refer to a code of conduct. There is a difference between the conduct of proceedings and a code of conduct.

Ms A.R. MITCHELL: I was not referring to a specific part of clause 470 but to the clause as a whole and that the president in his role may make rules that include those matters I have mentioned.

Dr A.D. BUTI: It would be prudent of any government seeking to bring in a major piece of legislation that it expressly provides a provision that ensures that the president “will” and not “may” ensure a code of conduct applies to each member.

Division

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

Ayes (13)

Extract from Hansard
[ASSEMBLY — Tuesday, 8 April 2014]
p2266b-2286a

Mr John Day; Dr Tony Buti; Ms Andrea Mitchell; Ms Margaret Quirk; Acting Speaker; Deputy Speaker; Mr Dave Kelly

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

Noes (29)

Mr P. Abetz	Ms W.M. Duncan	Mr S.K. L'Estrange	Mr D.T. Redman
Mr I.C. Blayney	Ms E. Evangel	Mr R.S. Love	Mr A.J. Simpson
Mr I.M. Britza	Mr J.M. Francis	Mr W.R. Marmion	Mr M.H. Taylor
Mr G.M. Castrilli	Mrs G.J. Godfrey	Mr P.T. Miles	Mr T.K. Waldron
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Ms M.J. Davies	Mr C.D. Hatton	Mr D.C. Nalder	
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Pairs

Ms S.F. McGurk	Mr C.J. Barnett
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Ms R. Saffioti	Mr J.E. McGrath
Mr J.R. Quigley	Mr A.P. Jacob
Mr M. McGowan	Dr K.D. Hames
Mr W.J. Johnston	Dr M.D. Nahan
Ms J.M. Freeman	Mr R.F. Johnson
Ms M.M. Quirk	Mr F.A. Alban

New clause thus negated.

New Clause 477B —

Dr A.D. BUTI: I move —

Page 324, after line 6 — To insert —

477B. Suspending member from office

- (1) The Minister may suspend a person from the office of member if the Minister believes —
- (a) that there may be a reason under section 477 to remove the person from the office of member; or
- (b) that the person is the subject of a matter before the Tribunal otherwise than as a member.
- (2) A person suspended from office under subsection (1) remains entitled to the emoluments of the office while suspended.

The parliamentary secretary mentioned the minister having certain powers. I believe this amendment is necessary to ensure that this tribunal at all times acts in the way that it should act and that it is regarded in the highest possible opinion. This proposed new clause seeks to ensure that the minister will have the power that may be necessary from time to time to suspend a member from office.

Ms A.R. MITCHELL: It is important that the tribunal be independent and be seen to be independent of government; the minister therefore would not have these powers. There is an overarching power of the Governor to remove a member of the tribunal on the grounds of neglect of duty, incapacity, incompetence or misconduct. The separation of powers from the minister to the Governor is there on purpose.

Dr A.D. BUTI: The parliamentary secretary talks about the separation of powers. There is no constitutional requirement in this bill for a separation of powers. There is no requirement that the president of the tribunal be a lawyer. It is not a judicial body as such; it is a quasi-judicial body. However, I am not sure why the minister would not be allowed under this clause to remove someone who should be removed. In other tribunals the minister has the power to remove someone from office—unless the parliamentary secretary is saying that the members of this office have the rights and privileges of judges. Presumably if they have the rights and privileges of judges, they will receive the beautiful superannuation benefits that judges receive—and I think that four or five members of this house will receive even though they voted against it many years ago. That is a sore point, so I will not go on about it. The members of this tribunal are not judges, I assume, so why has the separation of

Mr John Day; Dr Tony Buti; Ms Andrea Mitchell; Ms Margaret Quirk; Acting Speaker; Deputy Speaker; Mr
Dave Kelly

powers been brought up in this proposed new clause? Surely the government would want the ability and the power to suspend certain people.

Ms A.R. MITCHELL: I will say again that it is very important that the tribunal be independent of government and be seen to be independent of government.

Dr A.D. BUTI: This proposed new clause would not interfere at all with the functions of the tribunal. It would not interfere with the decision-making body. It just states that the minister has the right to suspend a person from office if required. I am not sure how the tribunal would still not be independent in its operations.

New clause put and negated.

Dr A.D. BUTI: On the basis that the government did not agree to my previous amendment, I wish to remove the amendment to insert new clause 477C standing in my name on the notice paper.

The ACTING SPEAKER (Mr N.W. Morton): It will not be dealt with if the member does not move it.

Dr A.D. BUTI: Okay; fine. I will not be moving proposed new clause 477C.

The ACTING SPEAKER: Are there further clauses in that case? I just need some clarity as to which clause the member wishes to speak to.

Dr A.D. BUTI: I move to proposed new clause 477D standing in my name on the notice paper. I also will not be moving that one now.

The ACTING SPEAKER: The member is also not moving new clause 477D. I note on page 20 of the notice paper there is also a new clause 477E. Will the member be moving that one?

Dr A.D. BUTI: I will not be moving that one either.

Clauses 478 and 479 put and passed.

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