ABORTION LEGISLATION REFORM BILL 2023

Committee

Resumed from 19 September. The Deputy Chair of Committees (Hon Dr Brian Walker) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 42: Section 110U replaced —

Progress was reported after the clause had been partly considered.

Hon NICK GOIRAN: When we last sat, we were considering this clause and I thought the minister was taking advice on a question.

Hon Sue Ellery: I provided the answer, honourable member.

Hon NICK GOIRAN: Okay. According to my notes, when considering clause 42, one of the things that became apparent was that for the first time this would allow an abortion to take place based on an advance health directive. I inquired about what the situation is in the other jurisdictions. Was the issue of allowing an abortion to take place on the basis of an advance health directive for a person who no longer has capacity part of the community consultation that was undertaken?

Hon SUE ELLERY: No, honourable member.

Hon NICK GOIRAN: I think it is uncontroversial to say that it is a significant issue to perform an abortion on a person who does not have capacity. I also think it is uncontroversial to say that it is significant to perform an abortion on a person because, at some point in time when they did have capacity, they wrote down as an advance health directive that they would like this to happen. There are circumstances when people change their mind. This matter has particular consequences unlike any other matter. It is intriguing that this was not thought worthy of consideration in the community consultation. Over the course of this bill, the government has relied quite extensively on the community consultation that was undertaken. It is curious to now find this late in the piece that clause 42—we are dealing with amendments to the Guardianship and Administration Act 1990—was not part of the community consultation process. What was the genesis for this amendment if it was not the community consultation?

Hon SUE ELLERY: I note the honourable member's comment that this is significant. It is important to note that the provisions around an advance health directive and whether they apply when a person no longer has capacity are not new; they were not created as a result of the consideration of this bill. They apply to any medical procedure. That is not new. On the matter of their application to abortion health care, one of the motivations for the bill that we talked about before was to modernise the regulatory regime. I noted in the last answer I gave when we met last night the other jurisdictions in Australia that have similar arrangements in place. It is not out of line with those. It is part of modernising the legislation.

Hon NICK GOIRAN: The minister is saying that other jurisdictions have done it, so it is in line with them. However, we just dealt with a clause earlier on the removal of the coroner's jurisdiction, and that is not the case in any other jurisdiction. I put to the government that it cannot have it both ways. If the justification for doing something is that this is what the other states do, that ought to be applied consistently; and, if not, there should be an express rationale for it. In this particular instance, just because the other states have done it does not necessarily mean that that is why we should do it, especially in the absence of any community consultation. Given it was not part of the community consultation process, were specific stakeholders consulted on this matter?

Hon SUE ELLERY: If I may, and with the greatest of generosity available to me, I request that the honourable member not verbal me. I gave two reasons in answer to his question about why we were going to rely on the provisions in the Guardianship and Administration Act around advance healthcare directives when a person no longer has capacity. The first reason was that that applies to any medical procedure when a person no longer has capacity. It was not just the case of—I did not say this—the driver being "just that other jurisdictions did it". There were two. The first reason was that that particular provision applies to a whole range of medical procedures, and then, by happy coincidence, it also applies in other jurisdictions to abortion care. I am not able to give the honourable member any additional information about whether any particular stakeholders were consulted about this.

Hon NICK GOIRAN: Is the minister able to indicate whether any stakeholders were specifically consulted on this matter?

Hon SUE ELLERY: Not specifically about these provisions. The Office of the Public Advocate was consulted generally about the bill, but not specifically about these provisions.

Hon NICK GOIRAN: I might just make a comment at this point rather than ask a question, then we can move on to another clause. From my perspective, it is most unsatisfactory that clause 42, which deals with a scenario in which a patient has lost capacity, is found deep at the back end of this legislation. No matter where one sits on it, it is controversial legislation. That is no small matter. It is very significant when a person loses capacity. Do we

have provisions in Western Australia that deal with those particular scenarios? Yes, absolutely. It is quite common that from time to time a substitute decision needs to be made for a person who does not have capacity. That in itself, as the minister identified, is not something new and will not be introduced by virtue of this bill. However, what will be introduced by virtue of this bill is that, for the first time, an abortion could be performed on a Western Australian without their consent at that moment in time, relying on the person's historical view at a particular moment in time, presumably drafted and agreed to in circumstances in which they were not in that condition. We will allow this to occur for the first time. Is that something that is permissible by any government? Of course. Is it permissible for a legislature to enact a regime around this? Of course. Should it not be consulted? As I said, the government placed great weight on the fact that it had done this consultation process with the community, but, if I can be less charitable, it has hidden from the community that as part of this reform it was going to introduce a scenario in which advance health directives would be relied upon. No information is presently available to the chamber about which express stakeholders were consulted on this matter.

It deeply troubles me, deputy chair, noting that this provision will also allow a change to upcoming clause 44, which, for the benefit of the chairman, as he is managing the bill, is the next clause I have questions on. It deals with the redefinition of "urgent treatment", dealing with scenarios in which Western Australians do not have capacity. I do not expect to persuade members on this clause—it is far too late for that—but this provision would have warranted proper examination and consultation by government with a list of expert stakeholders that ought to be transparently provided, and the community should have been told well before we got to clause 42 that we will be introducing for the first time advance health directives as a means to procure an abortion.

Clause put and passed.

Clause 43 put and passed.

Clause 44: Section 110ZH amended —

Hon NICK GOIRAN: Clause 44 will delete the definition of "urgent treatment" that exists in the Guardianship and Administration Act and will insert a new definition. I see that in part it makes reference to the performance of an abortion on a patient if performing the abortion is urgently needed to save the patient's life, prevent serious damage to the patient's health or to save another fetus. Is it the case at the moment that abortions can be performed in these circumstances?

Hon SUE ELLERY: Currently, in respect to the performance of an abortion, we already canvass the particular bespoke definition of informed consent that needs to be given. However, section 334 of the Health (Miscellaneous Provisions) Act provides that that does not apply if it is impracticable for her to do so. The current arrangements in section 334(3) say —

> (c) serious danger to the physical or mental health of the woman concerned will result if the abortion is not performed; or
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> (d) the pregnancy of the woman concerned is causing serious danger to her physical or mental health.

That does not apply unless given informed consent, with that particular definition of informed consent, or in the case of the two subsections that I just read out, it would be impracticable for her to do so.

Hon NICK GOIRAN: In other words, the scenario in which it is deemed necessary to perform an abortion to save the patient's life, irrespective of whether they have capacity or not, can be done under the present law and will continue to be done moving forward?

Hon Sue Ellery: Yes.

Hon NICK GOIRAN: What about the scenario in which they are preventing serious damage to the patient's health?

Hon SUE ELLERY: Yes, it will be possible going forward. The relevant section of the Guardianship and Administration Act 1990 that would be amended to give effect to that is part 9D, section 110ZH.

Committee interrupted, pursuant to standing orders.

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