

ACTS AMENDMENT (CONSENT TO MEDICAL TREATMENT) BILL 2006

Committee

Resumed from 15 November 2007. The Chairman of Committees (Hon George Cash) in the chair; Hon Sue Ellery (Minister for Child Protection) in charge of the bill.

Clause 11: Parts 9A to 9D inserted —

Proposed section 110Q: Formal requirements —

Debate was adjourned after the following amendment had been moved by Hon Helen Morton —

Page 15, after line 30 —To insert —

- (e) it includes a form of words which provides an opportunity for the maker to identify from whom the advice has been sought.

Hon HELEN MORTON: I seek leave to withdraw my amendment.

Amendment, by leave, withdrawn.

The CHAIRMAN: We are dealing with clause 11, in particular proposed section 110Q. Members will be aware that a new proposed subsection (1)(b) has already been agreed to. We now move to proposed amendment 25/11 in the name of Hon Helen Morton.

Hon HELEN MORTON: I move —

Page 15, before line 12 — To insert —

- (c) it includes a form of words which provide the maker, where the maker has received advice under paragraph (b), with an opportunity to disclose the source of that advice; and

So that there is no misunderstanding, the amendment that I sought leave to withdraw was at page 15, after line 30. This amendment is at page 15, after line 12. The advice that I was given was that if I withdrew my previous amendment, it would keep proposed section 110Q alive, and I would then be able to move this amendment to page 15, before line 12, which was my intention.

Although it is not an absolute requirement that an advance health directive be made, this amendment will give any person who does make such a directive the opportunity to disclose to his or her health practitioner the source of any legal or medical advice that the person has obtained in the course of making that directive. I will give an example. A person may be travelling around the state, be in Bruce Rock and suffer a stroke, and be sent to the local hospital. However, that person does not have a general practitioner in Bruce Rock who knows him and his family. The medical practitioners at Bruce Rock may be required to make decisions about this particular person's advance health directive. If that person's advance health directive showed that he had received advice when making that directive—as is provided for in that part of the bill that states that the medical practitioner must be comfortable that the person understood the implications of the advance health directive at the time that directive was made—it would help those practitioners understand that the person had been rightfully informed about the decision that was being made.

All this amendment will do is provide the opportunity for people who make an advance health directive to demonstrate, if they so wish, whether they have received advice, and who that advice was from. The amendment does not require that such a form of words must be included. The directive will still be valid with or without that information. However, it is a mechanism that will assist health practitioners who are not familiar with the family or the individual. It will assist in the process.

Hon SUE ELLERY: The government opposes this amendment. I ask members to think carefully about whether the chamber should agree to the insertion of these words. I have an alternate proposition to put to members, which I think will meet the objectives sought, but will also ensure that we do not do two things. The first is that we do not make the process so complicated that people choose not to pursue an advance health directive when that is actually what they do want to do. I am not talking about people who are not even vaguely interested in this legislation. I am talking about people who want to pursue an advance health directive but who find that the process is so cumbersome and so difficult, and that there are so many obstacles in the way because of the additional requirements this amendment seeks to put in place, that they do not get to exercise that choice.

The second reason I would ask members to think seriously about whether they should support the amendment moved by Hon Helen Morton is that it will cause confusion between the formal requirements for a valid advance health directive and what should appear on the form prescribed by the regulations. The effect of the amendment moved by Hon Barbara Scott and passed by the house last time, and the amendment that is before the house now,

is that if an advance health directive does not include the forms of words proposed in the amendment that was carried last time, and also the form of words that is proposed now by Hon Helen Morton, the advance health directive will be invalid.

It is the case that recommendation 2 in the report recommends that a clause be included to encourage the maker of an advance health directive to seek medical and/or legal advice. It also recommends that the maker indicate whether he or she has received that advice. As a result of that recommendation, that particular amendment was moved by Hon Barbara Scott. Just to remind the house of what that amendment was, we added a new paragraph (b) —

the maker is encouraged to seek legal or medical advice . . .

The amendment before us, moved by Hon Helen Morton, refers to the inclusion of a form of words to provide the maker of the directive with an opportunity to disclose the source of the legal or medical advice referred to. It is proposed that those words be inserted in proposed section 110(a)(1), which sets out the formal requirements for a valid advance health directive.

I think that this amendment is well intentioned, but its effect means that it is misconceived, because it will create confusion between the formal requirements of a valid advance health directive and what should appear on the form prescribed by the regulations. If this amendment remains in this form, the effect will be that all advance health directives will be potentially invalid. I have an alternative proposition to put to the chamber. It would require members to defeat the amendment before us. That alternative proposition includes an amendment that deals with what should appear on the form prescribed by the regulations. It would be effective in encouraging the maker to obtain medical and legal advice. However, in the event that the maker chose not to obtain advice, it would not invalidate the advance health directive. The proposed amendment would give the maker the option of obtaining advice or not; and, if the advice had been obtained, the maker would be given the further option of identifying who had given that advice. However, failure to do either one of those two things would not make the advance health directive invalid.

The CHAIRMAN: If the minister has a copy of the wording of the amendment, it might be helpful for her to read it out.

Hon SUE ELLERY: Yes. There are two parts to the proposition that I am asking the chamber to consider as an alternative. First, I ask members to support the following amendment —

Page 16, after line 8 – To insert –

110QA. Maker may indicate in directive whether advice obtained

The form prescribed by the regulations for section 110Q(1)(a) must include provision for the maker, if the maker wishes –

- (a) to indicate whether the maker obtained legal or medical advice about the making of the directive; and
- (b) if so, to identify from whom the maker obtained the advice.

The second part states –

Page 15, after line 30 – To insert –

- (1A) Despite subsection (1)(b) and (c), the validity of an advance health directive is not affected by a failure to comply with subsection (1)(b) or (c).

I understand that I have just read that out and members do not have the proposed amendments in front of them, but I ask members to seriously consider how they exercise their vote on this question, because it will determine the future of the bill. I say this as a matter of fact; I do not want to be accused of making threats. If the making of an advance health directive is either so cumbersome and there are such obstacles in the way of people who genuinely want to pursue an advance health directive, as opposed to those who want no part of it, that in our judgement it would have the effect of discouraging those who want to exercise that choice from going down that path, or if there is confusion about whether or not someone, for example, crossed out with a pen the form of words that have been sought to be inserted through the amendment of Hon Barbara Scott, which we have already carried, and through this amendment of Hon Helen Morton and it makes the advance health directive invalid, this legislation will go no further because it will not achieve the policy intent of the government. That is why I ask members to be clear about how they vote on this amendment. The amendments that I have proposed will achieve the result that is sought, which is to give people the option to identify on the form, as opposed to the advance health directive—there could be some confusion about those two documents—whether or not they sought advice and from whom they sought that advice. We need to be very clear about this. If we make it so cumbersome that it would have the effect of making people think it is too hard and they will not do all the other things, or we put

in place a set of words that can easily be struck out by somebody and it makes the advance health directive invalid, this legislation will not proceed. I will sign the amendments that I have read out and circulate them. I ask members to very carefully consider how they will vote because they will be determining the future of the legislation.

Hon HELEN MORTON: Will the minister confirm that when she refers to proposed subsection (1)(c) in the alternative amendment that she will move, she is referring to my proposed amendment and not proposed paragraph (c) that is already in proposed section 110Q(1)(c) of the bill?

Hon SUE ELLERY: I can confirm that. Proposed paragraph (c) in my amendment refers to proposed section 110Q(1)(c) in Hon Helen Morton's amendment.

The CHAIRMAN: It is absolutely critical to circulate the proposed amendments, as indicated by the minister, so that members know what we are contemplating. Until that is done, I do not intend to do anything more with the amendment that has been moved by Hon Helen Morton because she has been invited to withdraw it. We will circulate the amendment advanced by the minister and Hon Helen Morton will then be in a position to decide whether she is prepared to withdraw her amendment. It will take a couple of minutes but we must wait for it.

The minister referred to proposed subsection 110Q(1A) earlier. Did she mean proposed section 110Q(1)(e)? Perhaps I misheard the minister. Maybe it will be shown on the amendments.

Hon SUE ELLERY: It will. It is a new clause. It will be new clause 110Q(1A). All will be revealed.

The CHAIRMAN: We cannot proceed until we have the amendment in front of us. We are dealing with the amendment moved by Hon Helen Morton; that is, to insert the words that are contained on supplementary notice paper 149, issue No. 9.

Hon HELEN MORTON: I am very satisfied with the minister's amendment. The only additional comment I have to make is that this has come about through a very tortuous process. This recommendation was made during the committee stage. Had the minister picked up on that recommendation at the time, we would have saved weeks of effort. During the recent parliamentary break, a significant deputation saw me, and as a result a form of words similar to this amendment was put together. I appreciate the work the deputation did to encourage the minister to put these words together.

Amendment, by leave, withdrawn.

Hon SUE ELLERY: I move —

Page 15, after line 30 — To insert —

(1A) Despite subsection (1)(b) and (c), the validity of an advance health directive is not affected by a failure to comply with subsection (1)(b) or (c).

Hon KATE DOUST: I have a question. I do not have the words in front of me from the last time we dealt with this bill and the amendment moved by Hon Barbara Scott that I think required somebody to get medical advice. Can the minister take me through this amendment? Does it negate the amendment moved by Hon Barbara Scott? Can the minister take me through how that interacts?

Hon SUE ELLERY: The difficulty with the amendment moved by Hon Barbara Scott, and the one that has just been withdrawn, is that there was confusion between the words prescribed on the form and an advance health directive, and whether the failure to have those words of itself made the advance health directive invalid. For example, a potential problem was that the words on the form, in the case of the amendment moved by Hon Barbara Scott, encourage the maker to seek legal or medical advice. Say that the person filling in the form scratched out those words. The potential problem was that that could result in the advance health directive being deemed invalid.

Amendment put and passed.

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

New proposed section 110QA —

Hon SUE ELLERY: I move —

Page 16, after line 8 — to insert —

110QA. Maker may indicate in directive whether advice obtained

The form prescribed by the regulations for section 110Q(1)(a) must include provision for the maker, if the maker wishes —

- (a) to indicate whether the maker obtained legal or medical advice about the making of the directive; and
- (b) if so, to identify from whom the maker obtained the advice.

New proposed section put and passed.

Hon KATE DOUST: I am sorry, Mr Chairman. That proposed section was not listed on issue 9 of the supplementary notice paper. It is difficult for members to follow what is taking place. Perhaps when amendments are on separate pages, they can be distributed to all members who are participating in the debate, not just a few.

The CHAIRMAN: I hear what the parliamentary secretary says. The minister, as the parliamentary secretary saw, provided me with a copy of the amendment a few minutes ago and I held up the committee while they were distributed. I hear what the parliamentary secretary says and I am sure that the minister does also.

Proposed sections 110R and 110RA put and passed.

We now move to proposed section 110S.

Point of Order

Hon SUE ELLERY: There is an amendment on the supplementary notice paper in my name at page 16, lines 21 to 24 of the bill.

The CHAIRMAN: We have dealt with it. I agree that it exists and I have been advised that we have dealt with it. If we have not dealt with it, we will certainly come back to it. Let us assume for the time being that we have dealt with it so that we can move on to Hon Barbara Scott's amendment. In the meantime, I will seek some confirmation of that.

Committee Resumed

Proposed section 110S: Operation generally —

Hon BARBARA SCOTT: I move —

Page 17, line 15 — To insert after the word “circumstances” —
clearly

My amendment is self-explanatory. The subsection would then read —

Subject to subsection (3), a treatment decision in an advance health directive operates only in the circumstances clearly specified in the directive.

Hon SUE ELLERY: Again I ask members to carefully consider how they vote on this amendment. The effect of the amendment is that it qualifies the operation of an advance health directive. It does not do that particularly well. It begs the question that a treatment decision in an advance health directive, if we proceed with the amendment, does not operate if circumstances clearly exist or have arisen. It does not define clearly to whom. It would have an affect on the operation of the advance health directive. The government opposes the amendment. The health professional proposing to take treatment action might understand perfectly what the maker of the advance health directive meant. For example, the health professional has perhaps treated the maker of the advance health directive for some time and is familiar with how he or she describes his or her condition or circumstances. It does not necessarily mean it will be clear to anyone else who reads the advance health directive. Although I am sure the motivation is pure, it has the effect of qualifying the operation of the advance health directive because somebody might seek to test who it was meant to be clear to and exactly what is meant by “clear”. I ask members to oppose the amendment.

Hon BARBARA SCOTT: I ask the minister to go back over her explanation. In her first paragraph she said that it negated the agreement.

Hon Sue Ellery: No, I said that it qualifies the operation.

Hon BARBARA SCOTT: It qualifies it for the doctor interpreting it?

Hon Sue Ellery: Good question; I don't know for whom.

Hon BARBARA SCOTT: Is the minister's objection that the doctor does not need to have a clear understanding of the circumstances, and that the circumstances need to be clearly specified for the receiver and the doctor? I wonder whether the minister could explain her legal argument in further detail.

Hon SUE ELLERY: I was not mounting a legal argument. The addition of that word clearly qualifies the word that precedes it, which is “circumstances”. It would make the operation subject to the circumstances clearly, and

then it goes on. One would read it as it is. I do not want to use the word “clear”, but the difficulty is that it is not clear who one intends it should be clear to. The nature of adding that word qualifies the operation of the advance health directive. Proposed section 110S(2) states —

Subject to subsection (2), a treatment decision in an advance health directive operates only in the circumstances specified in the directive.

Adding the word “clearly” after the word “circumstances” will qualify the circumstances in which the treatment decision in that advance health directive operates. It begs the question: clear to whom? How will that be determined if somebody raises a question about it? I ask members to oppose the amendment moved by Hon Barbara Scott because it goes to whether an advance health directive can operate. Some people in this chamber do not want an advance health directive to operate at all. I understand and respect that, but for those people who choose to have an advance health directive, this may potentially mean that the treatment decisions set out in an advance health directive cannot be delivered because it is not clear to whom the circumstances should be clear. Adding that word does not take it any further; it just adds questions about to whom it should be clear. It also throws into question whether treatment decisions set out in an advance health directive will be carried out.

Hon ROBYN McSWEENEY: I support Hon Barbara Scott because it should be clear to a janitor. What is set out should be clear to anybody. The word used is “treatment”, and presumably treatment is covered in the bill. I have seen it. It should be clearly spelt out, and I believe that can be achieved by putting “clear” in front of it. The government should just let this one go through to the keeper and insert the word, because it does not take away anything that the government is trying to do. It is not like the first amendment, which would invalidate it. This does not invalidate anything.

Hon Sue Ellery: It could potentially stop the operation of that particular treatment. My opposition to it is in the same vein as my opposition earlier.

The CHAIRMAN: The time being 5.55 pm, I am required to leave the chair and I will invite the minister to report progress in a moment. I want to deal with amendment 1/11; that is, page 16, lines 21 to 24, to which the minister moved an amendment. I want to confirm that when we were dealing with this matter on 15 November 2007 the minister moved to delete certain lines and insert —

110RA. Registration of advance health directive

An advance health directive may be registered in the register referred to in section 110ZAA.

I confirm that was done. With four clerks assisting me, how can I go wrong?

Having dealt with that, the committee is still dealing with amendment 26/11 moved by Hon Barbara Scott.

Progress reported and leave granted to sit again, on motion by Hon Sue Ellery (Minister for Child Protection).

House adjourned at 5.57 pm
