LEGISLATIVE COUNCIL

Wednesday 13 October 1993

The PRESIDENT (Hon. G.L. Bruce) took the Chair at 2.15 p.m. and read prayers.

LEGISLATIVE REVIEW COMMITTEE

The Hon. M.S. FELEPPA: I bring up the final report of the committee on the inquiry into matters pertinent to South Australians being able to obtain adequate, appropriate and affordable justice in and throughout the courts system and move:

That the report be printed.

Motion carried.

SOCIAL DEVELOPMENT COMMITTEE

The Hon. CAROLYN PICKLES: I bring up the report of the committee on AIDS—Risks, Rights and Myths and move:

That the report be printed.

Motion carried.

MULTIFUNCTION POLIS

The Hon. C.J. SUMNER (Attorney-General) I seek leave to table a ministerial statement being given by the Premier in another place on the MFP.

Leave granted.

QUESTION TIME

ELECTORAL COMMISSIONER

The Hon. K.T. GRIFFIN: I seek leave to make an explanation before asking the Attorney-General a question about the Electoral Commissioner.

Leave granted.

The Hon. K.T. GRIFFIN: I have raised publicly, but not in the Council, concerns expressed by the Electoral Commissioner about the abolition of his department and its absorption into the new Department of Justice. As I understand it, at the time I raised it the Attorney-General did say that the issue would be addressed. However, because the independence of the Electoral Commissioner in the electoral process is essential, it is important to have the matter clarified and on the record here.

As a statutory officer, the Electoral Commissioner can be dismissed only by the Governor on an address of both Houses of Parliament. To this extent he can be regarded as an officer of the Parliament. The same can also be said of the Ombudsman. However, the Electoral Commissioner does play a key role as a member of the Electoral Districts Boundaries Commission and has the responsibility for running elections and, therefore, there should be no hint of any reduction of his independence. In a minute which the Electoral Commissioner forwarded to the Attorney-General on 7 September 1993, he says:

> Following the briefing of agency chiefs on the formation and make-up of the 'super' departments, I wrote to the Acting Attorney-General expressing my concern at the reduction in the level of independence of the State Electoral Department which will result in its absorption in the new Department of Justice.

Then later he says:

> However, I do not see why expedience should, at any time, override principle.

Later in the minute he says:

> We have been very fortunate in this State in that there has been no attempt made to prejudice the independence of my office or (to my knowledge) that of any other statutory office holder. Unlike elsewhere, the integrity of our Ministers cannot be questioned. Consequently, I am not that paranoid to expect the situation to change with a reduction in the degree of independence I currently enjoy.

And later:

> In my view the Ombudsman and the DPP should have full statutory rights and that cannot be obtained if they do not have statutory control over their staff, budget, etc.
>
> Frankly, I cannot see the need for change. There will be costs involved for little if no gain. There are no economies to be derived through the amalgamation of functions. Salaries are already handled outside the agency and the personnel functions are minuscule. More time would be wasted walking from Natwest to this office once a week than the total time required to address personnel issues. Occupational health and safety matters must be locality based. The accounting function is a full-time position and dealings with Treasury must be on an agency basis.
>
> I remain to be convinced that the change is in this State's best interests. That may take some time.

As I said, I understood that the Attorney-General had indicated that the Electoral Commissioner would be protected and changes would be made to the Department of Justice. So my questions are:

1. What steps is the Attorney-General taking to protect the independence of the Electoral Commissioner and what changes will be made to the Department of Justice to achieve that?

2. Will similar consideration be given to the position of the Ombudsman?

The Hon. C.J. SUMNER: There never has been any suggestion that the independence of the Electoral Commissioner or the Ombudsman is being compromised. The fact is that in so far as that is implicit in the question asked by the honourable member, I reject it. It never was envisaged and nothing the Government has done has impacted on the independence of the Electoral Commissioner to carry out his statutory responsibilities, and the same with the Ombudsman.

The reality is, however, that staff employed in the Ombudsman's office, in the DPP and in the Electoral Commission, are all officers employed under the Government Management and Employment Act and I do not believe the situation could be any other way. The notion that you would have those bodies being completely independent as far as staffing is concerned simply would not work because there would not be the capacity to move people from one department to another. There would be lack of career opportunities and all sorts of problems.

The key to the issue is whether the person in charge, the Ombudsman or the Electoral Commissioner, has the power to direct staff and to deal with budgets, and that is something that is arranged with the Ombudsman, through arrangements with the Department of Justice and the Ombudsman's office, and likewise the same or something similar will occur with the Electoral Commissioner.

Since this matter was raised, I have indicated that there was no intention of the Government to impact on the independence of the Electoral Commissioner, that arrangements would be put in place to ensure that that did not occur. Since the matter was raised publicly by the honourable member, I have not seen what arrangements have been put in

place between the Chief Executive Officer of the Justice Department and the Electoral Commissioner, but I indicate that I said at the time that the Electoral Commissioner's independence would not be compromised and that some arrangement would be entered into.

I am happy to discuss the matter with the Chief Executive Officer and, if necessary, the Electoral Commissioner to see whether matters have been resolved to everyone's satisfaction.

COUNTRY RAILWAYS

The Hon. DIANA LAIDLAW: I seek leave to make an explanation before asking the Minister of Transport Development a question about country rail infrastructure.

Leave granted.

The Hon. DIANA LAIDLAW: The Select Committee on Country Rail Services in South Australia, which reported to the Legislative Council last week, recommended that the rail infrastructure that remains must be retained so that it may be retrieved in appropriate circumstances enabling economic use of rail lines for commercial or tourist purposes, either by private or public operators. Under the rail transfer agreement 1975 the Minister has the power to reject applications by Australian National and the Commonwealth Government to close down railway services and to pull up railway lines.

Since 1978, when AN assumed control of South Australian country rail services, 1 314.6 kilometres of line have been closed and about one third of this length has been pulled up. The Minister of course took no notice of the recommendations of the Environment, Resources and Development Committee in relation to the construction of the bridge to Hindmarsh Island. Therefore, does she intend to heed the recommendations of the Select Committee on Country Rail Services and therefore use her powers under the rail transfer agreement to ensure that, if further rail services must be closed down, at least all country rail line infrastructure is retained?

The Hon. BARBARA WIESE: I am not sure why this question is being asked now because it has already been asked in months gone by and I have already answered it, and nothing has changed. As the honourable member knows, and all members in this place know, in the earlier months of this year I spent an extraordinarily large amount of time negotiating with the Federal Government about rail issues, and spent an enormous amount of time putting a South Australian perspective to the Federal Government about various issues that were then under consideration by that Government relating to the future of Australian National in view of the formation of the National Rail Corporation and the changes which that organisation will bring to the shape of rail around Australia.

I put very strong submissions on behalf of the Government to the Federal Government that Australian National should be retained, and members will recall that at that time all sorts of stories were going about, as well as consultants' reports, which clearly implied that the question of the disbanding of Australian National was one of the issues on the national agenda. I put a very strong case to the Federal Government that Australian National should be retained; that the terms of the rail transfer agreement should be retained; that the promises that had previously been given by the Federal Government to honour the rail transfer agreement should be retained; and numerous other matters relating to the details of the by-products of the standardisation project, and so on, including such issues as the standardisation of the rail lines to silos along the path of the rail line between the South Australian border and Adelaide.

So, all those issues were raised with the Federal Government, and in almost every respect we have been successful in achieving the undertakings we sought and/or the relevant funding that was needed to ensure the continuation of rail services in some areas, and more particularly the continuation of Australian National as the rail organisation which provides services within our State.

One of the key issues that had to be dealt with by the Federal Government in determining the future of Australian National was the debt restructuring of that organisation, because if there were no debt restructuring of Australian National it would not be in a position to carry on or to take up some of the residual rail opportunities that exist in South Australia, and it would also put much greater pressure on existing rail services in country areas. Fortunately, the Federal Government responded in that regard also, because there has been considerable debt restructuring which has ensured the ability of Australian National to carry on.

Australian National has now been asked, in view of the restructuring that has taken place, to prepare a new business plan that will take it up to 1995. As part of that business plan, it will look again in much greater detail at country rail lines around the State, some of which, I understand, it felt previously would not be viable for the future, but now that these changes have occurred and a more detailed study is being undertaken, it is in a position to indicate to the State Government that many of those lines that it thought would close are not likely to close and can be viable for the future.

No decisions have been made about those things at this point, but I have been successful in gaining an undertaking from the Federal Government that Australian National will provide information to the State Government about any analysis that it conducts of particular branch lines in this State. Should it make a decision about wanting to close a particular line, we will have access to the sort of information we need to assess whether there is a good case for closure or a strong argument for the State to put to the Federal Government that that should not occur.

I remind members that, in putting such a case for the retention of a line, a continuing need or a continuing market for that line must be clearly demonstrated. In some cases, from information I already have it is clearly the case that there is a reason to keep certain lines open. In other cases, I do not have sufficient information and I am not sure about those matters at this stage. I can say that decisions are far from being made about branch lines; I am advised by Australian National that quite a lot of work is yet to be done. However, the key to this matter from a South Australian perspective is that, on this occasion, the South Australian Government will be provided with access to relevant information so that it can make an informed judgment.

That has not always been the case in the past; we have had to rely very much on arguments that have been put to us by Australian National. Should Australian National decide to close a particular line and should the State Government disagree with that decision, the procedure under the Rail Transfer Agreement is well known: the matter could go to arbitration and be decided there. At this point, there are no such propositions before me, and I am not expecting any to be presented for some time because, as I indicated, the work of assessing the branch lines around the State is still under

way in light of the new financial position of Australian National.

SCHOOL FIRE SAFETY

The Hon. R.I. LUCAS: I seek leave to make an explanation before asking the Minister representing the Minister of Education, Employment and Training a question about school fire safety.

Leave granted.

The Hon. R.I. LUCAS: I have been contacted by a number of parents and teachers who are concerned about fire safety in schools—and in particular within transportable classrooms. They have drawn my attention to an apparent absence of adequate fire regulations in schools supplied with wooden classrooms. One teacher, who is currently working at a Hills school, says that at his school, which has a number of transportable classrooms, fire safety escape hatches are being permanently blocked by book shelves, filing cabinets and other school furniture. These items would clearly create an obstacle to immediate evacuation in the case of sudden fire.

In this teacher's view, the possibility of a major tragedy occurring is not remote, given that some of these wooden classrooms are used as science laboratories or for technical studies. This teacher has spoken to the schools officer within the Metropolitan Fire Service about this issue and was informed that nothing contained within the regulations required fire safety hatches to be kept clear. In fact, if there is a door within 20 metres of the teaching area, it is not even necessary for a fire hatch to be installed. My questions to the Minister are:

1. Is it the case that schools are placing furniture and office equipment in front of fire safety hatches within transportable classrooms and, if so, does the Minister and the department approve of this practice?

2. When was the last time the department issued a directive to schools on fire safety precautions, including warnings against placing school furniture or equipment in front of escape routes?

3. Is it the case that there are no specific regulations requiring fire escape hatches within Education Department schools to be kept clear and, if so, when will the Minister remedy that situation?

The Hon. ANNE LEVY: I will refer those questions to my colleague in another place and bring back a reply.

HORTICULTURE INDUSTRY

The Hon. M.J. ELLIOTT: I seek leave to make a brief explanation before asking the Minister representing the Minister of Primary Industries a question about the effects of mutual recognition legislation on the horticulture industry.

Leave granted.

The Hon. M.J. ELLIOTT: About two weeks ago, I visited the Riverland and spent some time with the South Australian Riverland Horticultural Association. It remains concerned about the impact of the Mutual Recognition Bill passed by State Parliament on 9 September. The growers organisation is greatly concerned about the State Government's attitude towards passing the legislation without even evaluating its potential impact on local industry. During consultation with the organisation, I have been told that the Horticultural Council received a letter from the Primary Industries Minister, dated only two days prior to the passing of the Bill. In that letter, the Minister admitted that the Government did not have any information on the impact of mutual recognition legislation on the dried fruit industry. The Minister's letter states:

> One of the most elusive aspects of preparing a water-tight case for the adoption of uniform dried fruits standards is the accurate measurement of the potential effects of mutual recognition on the Australian industry. I would be grateful to learn of any such figures that might be held by the Riverland Horticultural Association Inc.

This is just another example of the appalling lack of commitment by the State Government to an industry which is already suffering due to Government policies at a time of economic downturn.

The industry can already envisage many problems due to the legislation, such as the dumping of low quality fruit interstate from overseas which could then enter South Australia as a result of the passage of the Mutual Recognition Bill. They believe that consumers will be the losers out of this, along with the industry's attempts to improve total quality management procedures to ensure that it has a viable future not just in domestic markets but for export.

The Hon. T. Crothers interjecting:

The Hon. M.J. ELLIOTT: No; you can't. My questions are:

1. Why did the Minister allow the Government to move ahead with the passing of the mutual recognition legislation without even knowing the ramifications of the Bill on South Australian dried fruit industry, as illustrated by the Minister's letter two days before the passage of the Bill through this place?

2. Will food items be exempted from the legislation on the basis that a mechanism already exists through the National Food Authority to harmonise health, safety and quality standards for food?

3. Will the Minister gather information about the potential effects of the legislation on the horticulture industry and other local industries affected by the legislation?

The Hon. BARBARA WIESE: I will refer that question to my colleague in another place and bring back a reply.

MULTICULTURAL AND ETHNIC AFFAIRS

The Hon. J.F. STEFANI: I seek leave to make a brief explanation before asking the Attorney-General, representing the Minister of Multicultural and Ethnic Affairs, a question about the appointment of the Chief Executive Officer to the office of the Multicultural and Ethnic Affairs Commission.

Leave granted.

The Hon. J.F. STEFANI: On 16 September 1993 the Department of the Premier and Cabinet announced that the current Chairman of the South Australian Multicultural and Ethnic Affairs Commission had been appointed as the Chief Executive Officer of the office of Multicultural and Ethnic Affairs Commission for a period of five years. This means that Mr Nocella has now been provided with a Public Service position for a contract period of five years. Prior to his appointment as Chairman of the South Australian Multicultural and Ethnic Affairs Commission Mr Nocella was not employed in the South Australian Public Service.

When the South Australian Ethnic Affairs Commission Act Amendment Bill was considered by the Legislative Council in 1989 I successfully moved an amendment which required that:

> An appointment may not be made to the position of Chief Executive Officer of an administrative unit of the Public Service

established to assist the commission unless the Minister has first consulted with the commission in relation to the proposed appointment.

In view of the requirements of the Act and because a number of senior public servants have suggested that existing suitable public servants were deliberately overlooked for this position, my questions are:

1. Will the Minister advise whether he consulted all members of the commission as required by the Act before he made the appointment to the Chief Executive Officer position? If not, why not?

2. What are the financial terms and conditions of the appointment of the new Chief Executive Officer?

3. Was the position advertised within the South Australian Public Service? If so, when? If not, why not?

4. Will the Minister explain the rationale in combining the two positions, which were previously separate positions?

The Hon. C.J. SUMNER: I will refer those questions to my colleague in another place and bring back a reply.

CLIMATIC CHANGES

The Hon. PETER DUNN: I seek leave to make a brief explanation before asking the Minister of Emergency Services and/or the Minister of Public Infrastructure a question on the Earth's climatic changes.

Leave granted.

Members interjecting:

The Hon. PETER DUNN: Did the earth shake for you, too?

The PRESIDENT: Order!

The Hon. PETER DUNN: Early in September 1993 Dr John Zillman (Director of the Commonwealth Bureau of Meteorology) said that the Earth's climate was beginning to change after 10 000 years of relative stability. The changes were being influenced by human activity and would be greater in the twenty-first century. He said that, together with economic factors, climate had the greatest influence on the economy. A two degrees centigrade rise in temperature would cause catastrophic consequences, such as sudden changes and instability with extremes of hot and cold over short periods of 100 years or so, influenced mostly by the greenhouse effect.

Dr Zillman suggested that the Government would have to spend large sums of money in planning water catchment, flood plain management, irrigation capacity, urban stormwater drainage systems, road, rail, bridge and port facilities, not to mention agricultural practices. My questions are: has the Government made any provision for the foreseeable future as outlined by Dr Zillman? If so, what are they?

The Hon. C.J. SUMNER: I will refer that question to my colleague in another place and bring back a reply.

COUNTRY HEALTH

The Hon. CAROLINE SCHAEFER: I seek leave to make a brief explanation before asking the Minister of Transport Development, representing the Minister of Health, Family and Community Services, a question about country health.

Leave granted.

The Hon. CAROLINE SCHAEFER: On 13 August I asked a question regarding a workshop set up by the Rural Doctors Association at Modbury Hospital. During my explanation I stated that the South Australian Health Commission did not attend or table an apology. On 5 October I received a written reply from the Minister, which in part stated:

> No written invitations were received to the workshop at Modbury Hospital, but Dr David Gill, an employee of the Health Commission, was present at the workshop. . .

I have been informed that written invitations and numerous verbal invitations were issued and that Dr David Gill attended of his own volition as a committed member of the Rural Doctors Association, not as a representative of the South Australian Health Commission.

I have also been informed that the working group subsequently set up by the South Australian Health Commission has no consumer representatives, such as country hospital board members, on it and that meetings have been poorly attended by the city-based delegates. In fact, my informant has said that country doctors are tired of the 'don't care' attitude portrayed to them by the South Australian Health Commission. My questions are:

1. Why was the answer to my original question so misleading?

2. Why is the South Australian Health Commission continuing to be so obstructive to the Rural Doctors Association, which tries to deliver adequate health services to rural people under trying circumstances?

The Hon. BARBARA WIESE: I will refer those questions to my colleague in another place and bring back a reply.

TERRACE HOTEL

The Hon. L.H. DAVIS: I seek leave to make an explanation before asking the Attorney-General, as Leader of the Government, a question about SGIC.

Leave granted.

The Hon. L.H. DAVIS: In 1988, SGIC purchased what was then called the Gateway Hotel from Ansett Airlines for $40 million. The hotel was refurbished and renamed the Terrace Hotel and opened in 1989. The Government Management Board review of SGIC, which reported in mid-1991, noted that Bouvet Pty Ltd, the subsidiary of SGIC which operates the Terrace Hotel, at that time owed SGIC $100.2 million. That obviously included the original purchase price of $40 million, the extensive refurbishment costs and interest on that amount.

The review committee noted that interest was not being paid on this loan and, in fact, that some interest had been written off in previous years. An examination of the past four annual reports of SGIC reveals that an extraordinary $60.4 million has been written off or lost on this hotel investment. If allowance is made for the interest that has not been paid on the loan, the loss from write-downs and actual trading losses could well be in excess of $70 million on an original investment of just $40 million. This investment ranks as the second worst single investment for SGIC after the infamous 333 Collins Street, which to date has suffered losses and write-downs of $358.1 million on an original investment of $465 million in July 1991.

SGIC consistently ignored advice from people with expertise in the hotel industry and refurbished the hotel in what was described as an inappropriate fashion and spent far too much money. It was only in 1992-93 that SGIC negotiated with the Intercontinental Group to take over the management of the hotel. Until that point, SGIC had the dubious honour of being the only insurance company in Australia, if

not the world, which was actually managing its own hotel investment. Will the Government advise whether the SGIC has any plans to sell the Terrace Intercontinental Hotel?

The Hon. C.J. SUMNER: I will seek a report on that matter from the Treasurer.

RESTRICTED PUBLICATIONS

The Hon. BERNICE PFITZNER: I seek leave to make a brief explanation before asking the Attorney-General a question about the classification of publications.

Leave granted.

The Hon. BERNICE PFITZNER: It has be been drawn to my attention that restricted publications category 2 are being sold freely in approximately 50 or 60 car service stations. As we know, restricted publications category 2 are required by legislation to be sold in adult bookshops or sex shops. Whilst newsagents are abiding by the law, car service stations are, as they say, making a killing and the category 2 publications are selling very rapidly in these service stations. We note that the Classification of Publications Act 1974, under 'Offences' (section 18(1)), provides:

> A person who sells, distributes or delivers, exhibits or otherwise deals with restricted publications in contravention of any condition imposed under this Act shall be guilty of an offence and liable to a penalty not exceeding $5 000 or imprisonment for three months.

Further, in section 18(4), the Act provides:

> A person who sells, displays or delivers on sale a publication that has been classified under this Act shall, if the publication or any package, container, wrapping or casing in which the publication is sold, displayed or delivered on sale does not comply with the regulations relating to the marking of such publication, package, container, wrapping or casing, be guilty of an offence and liable to a penalty not exceeding $2 000.

Further, section 18a(1) provides:

> Where an offence is committed under this Act in relation to a publication, a person who has control or management of the premises in which the offence was committed shall also be guilty of an offence and liable to the same penalty as that prescribed for the principal offence.

Finally, section 19(1) provides:

> Where a member of the Police Force has reason to believe that an offence has been committed under this Act in relation to a publication, he may enter upon any premises of the person by whom he believes the contravention to have been committed and seize any copies of the publication upon those premises.

We therefore have sufficient legislation to prosecute if necessary. There is an allegation that the sellers of the restricted publications are either ignorant of the requirements or that the publisher has deliberately categorised the magazines as category 1 restriction instead of category 2.

As we know, this means they can be sold at service stations but in a transparent wrapper. Since the Act relating to demeaning images has not yet been proclaimed, we do not even have the protection of opaque wrappers or blinder racks. Is the Attorney-General aware of these category 2 magazines being sold in service stations? If so, what is the Government doing about it? If not, will the Attorney investigate the situation and bring back a reply?

The Hon. C.J. SUMNER: I find the honourable member's question a little bit surprising. The reality is that, if the honourable member has evidence of a criminal offence being committed in some shops in Adelaide where category 2 publications are being sold illegally, then the course of action that she should take is to go to the police with her complaint if she has evidence. She has not chosen to do that and one wonders why.

The reality is that if there are allegations of illegality or breaches of the law then that is a matter for the police to investigate. If the honourable member has evidence of that and if she has had complaints about it then she should have taken them to the police, and I am surprised that she has not. Reading out the sections of the Act in the Parliament hardly advances the issue. I think that the Parliament is fully aware of the sections of the Act. The question really is whether there is any illegal behaviour and whether there is a matter that has to be determined by the courts after the police have investigated the issues and decided whether or not to prosecute.

So, I suggest that the honourable member takes the evidence she has to the police to investigate. In the meantime, I will certainly refer the question to the police to see whether they have any evidence of the practice to which the honourable member has referred.

The Hon. BERNICE PFITZNER: As a supplementary question, I have not got any specific evidence but just—

The Hon. Anne Levy interjecting:

The Hon. BERNICE PFITZNER: I am about to ask the question—therefore, I request that the Attorney-General investigate it further as I do not have any specific details about where they are or the numbers.

The PRESIDENT: I do not know whether that is a supplementary question.

The Hon. C.J. SUMNER: I have said that I will refer the matter to the police. But I find it a little surprising that there is now an admission from the honourable member that she does not have any evidence of this practice occurring.

I would have thought that perhaps she might take the trouble to check to some extent at least before raising the matter in the Parliament. Nevertheless, as I said in answer to the previous question, I will certainly refer the matter to the police and see whether they have any evidence of this behaviour. But the honourable member has to realise that the only way the police can take action is if they have complaints and if they investigate those complaints and find that there is some basis in the allegation that these category 2 publications are being sold illegally. Police cannot act without evidence of the activity.

INDUSTRIAL OFFENCES

The Hon. K.T. GRIFFIN: I seek leave to make an explanation before asking the Attorney-General a question about industrial offences.

Leave granted.

The Hon. K.T. GRIFFIN: Recently I received a copy of a submission from the Law Society which raises concerns about section 120 of the Workers Rehabilitation and Compensation Act. Regulations have been promulgated which declare that offences created by this section must be dealt with by an industrial magistrate, with an appeal only to the Industrial Court. In other words, these offences are to be dealt with outside the mainstream courts and there is no right of appeal beyond the Industrial Court.

The offences under section 120 are criminal in character rather than industrial and are different from and bear no comparison with other offences which are to be dealt with by the industrial magistrates. The offences under section 120 relate to obtaining or attempting to obtain a benefit under the Workers Rehabilitation and Compensation Act by dishonest means, in other words, obtaining by false pretences. The section also deals with dishonestly making a statement,

knowing it to be false, and aiding, abetting, counselling or procuring an offence.

In essence, as I have indicated, these offences are not, in my view, truly industrial-type offences and carry substantial penalties—$10 000 fine and one year's imprisonment, and recoupment of costs and damages—which the Law Society suggests in some cases have reached amounts of $30 000. The Law Society has made the comment:

> It is our view that the removal of these criminal offences from the criminal justice system is alarming.

The Law Society draws to attention that section 59 of the Occupational Health and Safety Act which creates an offence with similar characteristics to that of section 120 of the Workers Rehabilitation and Compensation Act is excluded from the jurisdiction of the Industrial Court.

The Law Society draws attention to a number of important reasons why section 120 offences should remain in the ordinary courts and not be treated as industrial offences. It does seek to have the matter addressed urgently. In addition, it says that there is a growing backlog in these sorts of cases before the industrial magistrate, partly because of the complexity of the cases and the seriousness of the issues which are being raised.

My question to the Attorney-General is: will he acknowledge that the offences under section 120, because of their character, are more appropriately dealt with by the ordinary courts, and will he seek to have the Government correct what is seen to be a serious anomaly?

The Hon. C.J. SUMNER: I will have the matter examined.

HIRE CARS

The Hon. DIANA LAIDLAW: I seek leave to make an explanation before asking the Minister of Transport Development a question about hire cars.

Leave granted.

The Hon. DIANA LAIDLAW: Yesterday in answer to a question that I asked on a *de facto* taxi industry the Minister at some length sang the praises of the former Minister and his efforts to provide 'for a diversity of service to the public'. This diversity of service arose from a press statement that he released on 11 April 1990, when in part the Hon. Mr Blevins removed the current arbitrary limit of 55 on the number of hire cars permitted to operate in the metropolitan area.

There were 55 hire cars as at April 1990 and, as at 30 June 1993, 260 hire cars were licensed by the Metropolitan Taxi Cab Board. However, today I have been advised that the Metropolitan Taxi Cab Board is concerned that half of this number—130—are cars on the road not for the reasons of providing a diversity of service to the public but for reasons of tax minimisation. Apparently, according to my informant, some accountants are advising an increasing number of families to get into the hire car business for tax minimisation purposes and they are advising families to convert their family car to a hire car and gain the new blue plate. These cars are rarely used to provide a diversity of service, but they do, however, provide such families with considerable tax benefits. They of course receive reduced compulsory third party insurance rates and they also gain generous depreciation right-offs for their vehicles.

Will the Minister investigate this matter with the Metropolitan Taxi Cab Board so that she is confident that so-called deregulation of hire cars is indeed providing the diversity of service that she claims, and that it is not being used and abused for tax purposes?

The Hon. BARBARA WIESE: I do not recall allegations of the kind that are being raised by the Hon. Ms Laidlaw being raised with me. But, certainly, if this is a practice as widespread as the honourable member suggests it is, then it is a matter of considerable concern to me. If it is the case that people are having large numbers of vehicles licensed in a particular way and not being used in accordance with their licences and for the purpose of avoiding tax, or enjoying tax benefits which are not legitimate, then that is a serious matter and I will certainly take that matter up with the Metropolitan Taxi Cab Board. If the Metropolitan Taxi Cab Board knows about this, then I am surprised that it has not raised the issue with me. However, I shall certainly make inquiries about that matter and assess what action can be taken, if there is indeed a problem, as the honourable member suggests.

On the general question of the contribution that has been made by the hire car industry in the metropolitan area since a larger number of hire cars has been licensed, it is true to say and fairly obvious to casual observers that hire cars have become a fairly prominent feature of the transport scene in Adelaide, and indeed they have played a very significant role in providing a diversity of service. They can be seen around the streets of Adelaide during the day and at night time they are being used for all sorts of transport to functions and other things which previously was not a service people had available.

Part of the service they are playing in that respect is to keep off the roads people who would otherwise be drinking and driving, because many people are getting a group of friends together, hiring one of these vehicles and heading off to discos, parties and other things, able to get to and from their destination at a reasonable cost and without having to worry about the risks of drinking and driving. That is just one example of the sorts of services that have been provided by these people: there are many more. It has been a very successful move to provide that diversity that I was talking about. However, I am concerned about the allegations that the honourable member has made and I will certainly have them investigated.

SSABSA

In reply to **Hon R.I. LUCAS** (18 August).

The Hon. ANNE LEVY: The Minister of Education, Employment and Training has provided the following response:

1. There has not been widespread corruption of the Senior Secondary Assessment Board of South Australia's computer system, either in the database or through virus infection. The SSABSA computer network, and the database of student enrolments and results, has not had any significant loss of data either in 1992 or 1993. Security backup systems have worked well and the SSABSA Information Systems staff monitor the status of the database.

There is always a potential for virus infection as SSABSA accepts data from many sources via diskette. Schools are the most common source. Disks brought into SSABSA are routinely scanned for viruses before they are used, and whenever a virus is found the originator of the disk is contacted immediately. Routine checking and cleaning procedures are implemented immediately. These procedures have been most effective in preventing recurring virus infection.

The SSABSA database management system has been upgraded as part of the introduction of the South Australian Certificate of Education. This necessarily means spending some time working out how best to operate new facilities and how to deal with new resources. However, the information within the database has always been protected, both from damage and from improper access. The necessary statistical reporting, as judged by the priorities and resources of the time, has been completed at each stage and activities

which have at any stage been deferred have been assessed as less urgent or less important.

Database management techniques continue to improve and SSABSA's database is now one of the largest production databases of its type in Australia. Backup precautions are constantly being enhanced, both with equipment and systems and with procedures which are routinely followed. A security copy of the main database is taken regularly. Copies of interim changes are retained. There are arrangements for security storage at another location. Checking programs which confirm the integrity of the database information are run at frequent intervals.

2. The submission to the Industrial Commission does not in any way change the facts on which the assurance about the integrity of the SSABSA network and its protection against illegal access was based. Indeed, as plans which were developed more than two years ago are progressively implemented the security of the network is increasing, despite a simultaneous increase in the number of users and in the types of work done on the network.

Running a computer game at a user workstation was not a case of illegal access to the network as it was undertaken under the direct supervision of an authorised staff member and was restricted to a single workstation during a work break.

The SSABSA network is protected by both physical security precautions and security inbuilt in the systems and the databases. It is limited to one physical location. Security also employs authorisation of personnel in a way which is relevant to the functions they have to perform. This results in staff such as the witness whose statement is quoted having greater privilege than other employees who are not required to participate in a wide range of functions. The types of access which are cited in the statement describe that special authorisation, rather than an absence of control. Staff throughout the organisation have their responsibilities explained to them and random audits are conducted. All of these precautions are not taken for granted but are actively reviewed, especially at this time each year.

As the sophistication of the network and its users increases more and more restrictive security provisions are being implemented, which ensure that confidentiality of information can be maintained without making the system too difficult to use. SSABSA has a full-time network support officer whose job includes implementing security provisions. The proper use of passwords and responsibilities of staff are among the issues he follows up. The database administrator also ensures that users only have access to those parts of the system which are necessary for their own work.

There is no evidence of instances of illegal access to the SSABSA network and no reason to anticipate illegal access in the future.

ARTS DEPARTMENT DIRECTOR

In reply to **Hon. R.I. LUCAS** (7 October).

The Hon. ANNE LEVY: Two staff transferred to the Department for the Arts and Cultural Heritage from the Education Department around the time of Dr Willmot's taking up appointment as Chief Executive Officer, Department for the Arts and Cultural Heritage. Both employees transferred at the same level of remuneration as prior to their transfer.

One employee commenced with the Department for the Arts and Cultural Heritage on 11 November 1992 as a Senior Policy Officer at the PSO 4 level to be reviewed after 12 months. That employee has since won a permanent position through normal selection processes at the ASO-7 level (which equates to PSO-4) with the Department for the Arts and Cultural Heritage and will be paid by that agency from 11 November 1993.

The other employee commenced with the Department for the Arts and Cultural Heritage on 19 October 1992 as an Executive Assistant at the seconded level 3 (Education Act) to be reviewed after 12 months with an option to extend for a maximum of 3 years. The arrangement has been for the Department for the Arts and Cultural Heritage and the Education Department to each contribute half of the salary costs for the period up until the end of August 1993. From 1 September 1993 the Department for the Arts and Cultural Heritage has assumed full salary responsibility for this employee from within its existing resources.

The above arrangements were negotiated with senior management of the Education Department and the Office of the Commissioner for Public Employment and took into consideration factors including Dr Willmot's circumstances at the time, the needs of the agencies concerned and the funding situation. Whilst the Education Department has borne some costs in the short term it will achieve a longer term saving.

Both transferred employees have made significant contributions to the activities of the Department for the Arts and Cultural Heritage.

With regard to Dr Willmot's appointment as Director-General of Education and more recently as Chief Executive Officer of the Department for the Arts and Cultural Heritage, I am advised that the Commissioner for Public Employment has carefully examined the documentation and is satisfied that the processes followed comply with Government Management and Employment Act requirements. It is indeed understood that Dr Willmot's appointment as Director General of Education and Chief Executive Officer of the Education Department ceased with effect from 15 October 1992.

CURRICULUM PROFILE

In reply to **Hon. R.I. LUCAS** (24 August).

The Hon. ANNE LEVY: The Minister of Education, Employment and Training has provided the following response:

1. A draft South Australian management plan for the implementation of nationally developed profiles has been the subject of a thorough consultation process with schools and community representatives. Profiles will be implemented in South Australia beginning in 1994 with the intention that by the end of 1996 all schools will be using all profiles. Similar steps are being taken in all States and Territories as the profiles are being implemented in some form by education systems in all States and Territories.

2. Profiles will help produce the high level of expertise required by business and industry to maintain and improve our international and national competitiveness. Prior to the July AEC meeting members were petitioned by eminent representatives of national industry groups, persons very much in tune with the requirements of business and industry, to approve national profiles because they regarded them as significant developments and an opportunity to improve the competitiveness of Australia. The AEC at this meeting made a retrograde decision that has been firmly condemned by industry and business groups including BHP.

Mr Andrew White, writing in the Financial Review on July 28, commented that Mr John Prescott, Managing director, BHP, . . . 'joins a growing chorus of industry groups which have condemned the move'. . . to effectively end cooperation on national curriculum. Mr Prescott was quoted in the same article as follows:

'The challenge is to ensure that the highest possible standards are established right across Australia. To ignore the large body of constructive input which has been made by so many people on this issue and revert to a parochial stance would be a retrograde step'.

The view that profiles will cause irreparable harm to the education of South Australia's children is not supported by well informed individuals representing interested community groups, including parent groups in this State and business and industry groups nationally.

ENGINEERING & WATER SUPPLY DEPARTMENT

In reply to **Hon. BERNICE PFITZNER** (26 August).

The Hon. ANNE LEVY: The Minister of Public Infrastructure has advised that the questions raised by the Honourable Member relate to the introduction of completely new supply and financial software into the E&WS.

This software is but one element of a comprehensive initiative to provide a modern integrated computing environment to support the new commercial, customer driven framework required for the organisation's future.

The $32 million, referred to in the preamble to the question, includes not only the supply and financial software, which amounted to $5.2 million, but also new customer services information and human resources software, major new mainframe computers and the communications infrastructure necessary to support them.

The impetus for this investment came from many sources. The old systems were fragmented, did not provide the facilities to meet future needs and were expensive to maintain. In particular, the shift toward commercialisation and greater productivity could not be supported under the old accounting and supply software packages and the strategic direction to supply comprehensive customer information could not be provided in the old revenue system.

This was further aggravated by the scheduled decommissioning of State Systems Cyber, which meant the revenue system would be unable to run.

The supply and financial software packages were implemented in July 1992 at the start of the new financial year. This timing was judged to provide the least disruptive change over process and would allow the earliest achievement of the identified benefits of the new software.

The outcome of these pressures was the generation of individual proposals to overcome these problems which were all justified on economic grounds and received Cabinet approval.

In the particular case of the $5.2m supply and financial software, the Department received Cabinet and State Supply approval in 1991.

To meet this timing, the software was installed on a leased mainframe computer and run on the old communications network. This interim arrangement was to allow more detailed assessment of options for mainframe and network solutions.

The initial running period generated a series of problems which have progressively been addressed. These fell into two basic categories, those dealing with software functionality, and those with hardware performance.

The software functionality provided some initial minor problems which were addressed. The result has been that the new software did not generate any qualifications in the 1992-93 financial statements by the Auditor-General's Department.

The hardware problems have largely stemmed from capacity problems which have generally been improved, especially with the implementation of the new communications network, and can be expected to be further improved when the new contracted mainframe computing environment goes on line in November.

The response to the problems has seen the formation of user reference groups, a help desk and a performance monitoring committee. A major outcome has been a weekly performance report which has in fact shown that the computer has had a very high level of availability over an extended period.

The important fact is that there are very few mainframe computers which do not suffer down times. Whilst it is understandable that individuals will feel frustrated when systems are unavailable, failures will occasionally happen.

ARTS AND CULTURAL HERITAGE

In reply to **Hon. DIANA LAIDLAW** (3 August).

The Hon. ANNE LEVY: The Minister of Public Sector Reform has advised that the promotion of the Arts in South Australia has two very important consequences: the enrichment of the cultural life of the State and Australia by promoting excellence as well as widespread participation in the Arts; and the opening of opportunities for economic development.

The inclusion of Arts and Cultural Heritage in the Portfolio of Business and Regional Development is based on the perceived importance of the Arts, given its link with tourism and its existing and potential economic contribution.

This portfolio is to be a loose coalition of departments and agencies that will remain as separate entities reporting to their present Ministers. There will be improved policy coordination on key strategic issues on a collaborative basis. The Chief Executives of these agencies will form a State Business Development Executive in which other related development and economic agencies will also be invited to participate. The other constituent agencies are:

Economic Development Authority;

Office of Business & Regional Development;

SA Tourism Commission;

Department of Mines & Energy and a number of smaller bodies such as the SA Centre for Manufacturing and SAGRIC International.

The Office of Business and Regional Development will play a coordinating role. The Chief Executive Officer of the Arts and Cultural Heritage Department within the Portfolio has direct access to his Minister and the Minister involves the Portfolio Coordinator mainly in coordination between two or more entities.

The Arts are generously funded in South Australia compared with other States. While the majority of Arts activities are for the benefit of South Australians, there is the view, for the Arts to grow and flourish in the future, there is a need to expand its economic potential.

The Government continues to state its commitment to the role of the Arts in enriching the cultural life of South Australia and has now designed a way to promote its economic potential by attaching the Arts to the Business and Regional Development Portfolio. This action builds the commercial capacity of the Arts Industry by placing Arts as a separate 'business' entity within the Portfolio.

The Portfolio will provide the Arts and Cultural Heritage with such expertise as: business case development, assistance in dealing with overseas countries and advice on cultural tourism strategies (in conjunction with Tourism SA).

It is now recognised that the Arts and Cultural Heritage is set on a path of being a wealth generating industry. That is, it is a vital part of a coalition well able to analyse factors influencing its business and investment and, in turn, to recommend action to enhance international competitiveness of other areas of the State's industry and commerce.

Of its own volition, the Arts will be able to:

· attract investment to the State

· negotiate expansion of its industry

· encourage and oversee economic planning and development

· identify infrastructure necessary to maintain and expand its industry

· identify skills to be developed and maintained as the basis for the expansion of its levels of sustainable employment

· take commercial vantage within the economic framework of the State

· participate as a member of joint ventures in projects and programs for the economic development of the State

· assist with regional development strategies.

MOUNT GAMBIER RAILWAY LINE

The Hon. M.J. ELLIOTT: I seek leave to make a brief explanation before asking the Minister of Transport Development a question about the Mount Gambier railway line.

Leave granted.

The Hon. M.J. ELLIOTT: Over the last few weeks I have had discussions with business people in both Adelaide and Mount Gambier in relation to the Mount Gambier railway line. There is a great deal of concern about the impact of the loss of that service to the South-East because, with the standardisation of the main Melbourne to Adelaide line, the spur line from Wolseley to Mount Gambier becomes unusable unless it is also standardised. At this stage it appears that standardisation is not going to occur. The people I have spoken with have expressed interest in running private trains along the line. The suggestion raised in discussions I have had with them is that the line itself could remain in Government hands in the same way that you have Government roads, and that they would pay a fee for service to use the rail. They believe that the line could be standardised for about $5 million.

Does the Minister have an attitude towards the maintenance of that line, whether it be Government-owned entirely or whether it has public or private trains on it? Does the Minister support the standardisation? Could we insist that the service remain by arbitration under the State railways agreements, and is that not a useful lever at least to get the line standardised even if in future the trains themselves happen to be private rather than public?

The Hon. BARBARA WIESE: The issue of the Mount Gambier line is being examined by Australian National currently and, as far as I know, no firm decisions have been made about its future, although I understand from the information I have received informally that this particular line is a very difficult problem because it will be very difficult to demonstrate that it is either viable now or can be viable in the future. The fact is that, although many people in the South-East claim that they would like that line retained, they are not putting their money where their mouth is by ensuring that freight is transported on the line: they are using road transport as a preferred option for transport. That is a serious problem and it is a contributing factor to the problem that exists for the Mount Gambier line.

However, as the honourable member indicates, numerous organisations are investigating what the options could be for that line, for keeping it open and providing a service if there is a market for it. I am aware that the organisation known as Rail 2000, for example, is researching what are called short line operations, that is, rail services which are provided on short lines such as the one we are now discussing and which can provide a freight service by organisations other than the traditional rail organisations.

In the United States, where such services have been in operation for some time, quite a lot of success has been achieved through converting some lines for this purpose. Of course, the United States is a very different place from South Australia: the population, volumes of freight and passenger numbers, etc., are much greater. Whether or not we will be successful in achieving that sort of operation in South Australia is yet to be demonstrated, but I certainly think it is an idea that is well worth a proper investigation, and officers of the Government, through the Office of Transport Policy and Planning, have been keeping in close contact with the Rail 2000 organisation and providing assistance wherever possible with the studies that they are currently undertaking.

I certainly have no ideological or operational objection to the notion that private sector operators could or should have access to rail lines for the provision of services if they believe that such services can be a viable operation and they want to take up those opportunities. In fact, I would encourage it. I think it is a very good idea if it is indeed a proposition that they wish to pursue. I am not sure what the attitude of Australian National or the National Rail Corporation is to that matter, although I am aware that, under the terms on which the National Rail Corporation has been established, rights for other parties to use the rail lines around Australia are preserved so that there is the opportunity legally for such operations by private sector organisations to be established or to operate.

I will be interested to see the outcome of the work that is currently under way by organisations such as Rail 2000 and the detailed analysis being undertaken by Australian National as to whether that particular line does have a future.

The Hon. M.J. ELLIOTT: I repeat one question the Minister missed: does the State railways agreement give us some leverage in terms of maintenance of service or, at the very least, an ability to retain the line?

The Hon. BARBARA WIESE: That is a matter that will have to be examined when all the facts are before us, but I remind the honourable member, as I indicated earlier in response to a question from the Hon. Ms Laidlaw, that a demand or market must be demonstrated. There has to be a demonstrated need as part of the criteria for mounting a case to preserve a rail line. I cannot remember the exact terminology that is included in the rail transfer agreement, but that is a key factor in determining whether the State has grounds upon which it can act with respect to rail closures. As I said, we have to await the outcome of the work that is currently under way before any such assessment is made.

SELECT COMMITTEE ON COUNTRY RAIL SERVICES IN SOUTH AUSTRALIA

The Hon. G. WEATHERILL: I move:

That the report be noted.

First, I would like to thank the members of the select committee: the Hon. Di Laidlaw, the Hon. Peter Dunn, the Hon. Ian Gilfillan and the Hon. Ron Roberts. Because the select committee was so frustrated in not being able to receive information that was required to verify some of the statements made to it by different groups, I would also like to thank, in particular, Graham Little, our Research Officer, and Trevor Blowes, our Secretary. The committee was frustrated by the lack of confirmation of information that it received. I would like to say more about that, but at this time I seek leave to conclude my remarks later.

Leave granted; debate adjourned.

SOCIAL DEVELOPMENT COMMITTEE

The Hon. CAROLYN PICKLES: I move:

That the report of the committee on AIDS-Risks, Rights and Myths be noted.

This is the first part of a two part report of the Social Development Committee on AIDS, on which it has been working for some time. We hope to table the second part of the report during the sitting of this Parliament. Obviously, there are rumours afoot that an election is in the air, but we hope to have time to have the report noted by the Parliament, because we believe it is important.

At this stage, as I will seek leave to conclude my remarks shortly, I merely want to place on record my thanks as Presiding Member to all members of the committee who worked very hard on this report.

The members are: Mr Atkinson, MP; the Hon. Legh Davis, MLC; the Hon. Ian Gilfillan; Mr Vic Heron; and Mrs Dorothy Kotz, MP. All members of the committee worked well together. It has been a difficult social issue to deal with; clearly there are quite different viewpoints about matters relating to AIDS, and I believe that we have been productive in getting together and producing this report with unanimous recommendations.

I wish to place on the record my sincere thanks to the Secretary of our committee, Ms Vicki Evans, who is an extremely efficient worker. I think all members will agree that she has a fantastically pleasant manner and she has helped to produce a very worthwhile report. I also wish to place on the record the thanks of members of the committee to Mr John Wright, our Research Officer. It is unfortunate that the staff of parliamentary committees are not known very well by anyone other than the members who work on these committees.

I think our parliamentary committees are a credit to the South Australian Parliament. I can only speak for the Social Development Committee on which I serve, but it is serviced by the Legislative Council and is a very worthwhile committee indeed. I would also like to thank Ms Noeleen Ryan, the committee's stenographer, who has had to work very hard in the past few days to enable this report to be presented to the Parliament in time.

I intend to go into much further detail later in the day on the whole report of the committee, but at this point I would like to say that one matter that concerns members of the committee is that they feel there has not always been a free flow of information between the Parliament and the committee. I know that there are moves afoot to call together all members and staff of parliamentary committees across all Parties to try to thrash out a few of the problems that exist in

the hope that they can be resolved before the next session of Parliament.

If we cannot resolve these difficulties, I believe it will be difficult for the parliamentary committees to continue to function. The committees are a valuable asset to the Parliament, and I think that, in particular, the report of this committee, which I commend to all members, will be an asset to this Parliament. I am sure that members will be surprised upon reading the report to see that such a difficult issue has been resolved so satisfactorily by all members of the committee. I think that the way in which the members of this committee—in this Chamber, Mr Gilfillan and Mr Davis, and members of the other place—have worked together is to their credit. I seek leave to conclude my remarks later.

Leave granted; debate adjourned.

AUSTRALIAN LOAN COUNCIL

The Hon. I. GILFILLAN: I move:

That the Legislative Council take note of the motion passed on 5 October 1993 by the Australian Senate requesting that the South Australian Houses of Parliament require former Premier and Treasurer, Hon. John Bannon, to give evidence to a Senate select committee, viz:

'That the Senate request the relevant Houses of Parliament to require the attendance of the following persons before the Select Committee on the Functions, Powers and Operations of the Australian Loan Council to provide public evidence.

New South Wales:	Hon. John Fahey, M.L.A.
Tasmania:	Hon. Robin Gray, M.L.A.
	Hon. Tony Rundle, M.L.A.
Victoria:	Hon. Joan Kirner, M.L.A.
	Hon. Tony Sheehan, M.L.A.
	Hon. David White, M.L.C.
South Australia:	Hon. John Bannon, M.L.A.
Commonwealth:	Hon. John Dawkins, M.P.'

This motion is aimed at improving the situation and effectiveness of the Loan Council. As far as we are concerned, it quite clearly requests that the former Premier (Hon. John Bannon) attend before the committee to give evidence. Although there has been identification of a specific area on which Mr Bannon will be asked to give information—that is, the sale and lease-back of facilities, utilities and, in particular, power stations in South Australia—it is quite clear that he will also be asked to contribute on a much wider field than just that matter.

I believe that this committee deserves the respect of being non-Party politically motivated. It was set up genuinely to look at the effectiveness of and restriction on the way in which the Loan Council is working. My political colleague Senator Coulter chairs this committee. In the *Hansard* of 5 October this year, in speaking to the motion to request these people to attend before the committee, he refers to the appearance of Mr Greiner, as follows:

. . . Already Mr Greiner, a former Premier of New South Wales, has given evidence to our committee. Mr Greiner indicated the way in which the Loan Council formerly operated and the procedures under which not only Victoria but also a number of other States clearly went outside the terms of the Loan Council.

Exactly why they had gone outside the terms of the Loan Council is not at all clear. We know that Victoria most recently did so but we certainly know that other States have done so. I, personally—and I am sure, other members of the committee—would like to know whether, for instance, it was the pressure being put on by the Commonwealth Government in relation to restrictions in grants which made it feel it was necessary to move outside those limits. We need to get some sense of the overall financial management of this country with respect to the actual grants and with respect to the borrowings of the Commonwealth and the States.

We have not yet heard from the Reserve Bank. We will shortly be hearing from the Reserve Bank. We do not know exactly what part it plays, but we do know that in the case of several of the States the Reserve Bank has given advice in relation to the borrowings of the States and to the operations of state banks—particularly in relation to the operation of the State Bank of South Australia, the demise of which is all too recent in everybody's minds.

Senator Coulter states further:

I am quite sure my committee will recommend further changes to the operation of the Loan Council. . . meet the criterion that certainly I have been pursuing through this committee; that is, to make the operation of the Loan Council transparent and to make it accountable so that not only will the various members of the Loan Council, the States and the Commonwealth, know what is going on but also the public at large will have a clear perception of what is going on.

For that to occur, it is highly desirable that the relevant members of the various State Houses of Parliament named in the motion come before this committee and give some explanation of the way in which, in their view, the Loan Council is operating and, in their view, the way in which the Loan Council could be made to operate better.

It is clear from those quotes that it is not a vendetta; it is not a witch-hunt to try to indict individuals and embarrass them. It is in that spirit that I hope the Hon. John Bannon will rethink his previous declining of this invitation. The issue does concern all of us not on a Party-political basis but on a States versus Commonwealth funding interface.

I know of nobody who has been close to the Loan Council who is satisfied with the way it is operating. It is not an open arena in which sensible decisions are discussed and reached. In many cases, it is purely a facade for other decisions and other negotiations which have taken place out of site. The question asked by Senator Coulter, namely, 'How much of the extension outside the lending limits is pressured by unacceptable [certainly in the States' view] control and restriction by the Federal Government on their financial capacity or the management of their financial affairs?' We, as a State Parliament, must know those answers. Therefore, I urge members to support this motion. If they look closely at its wording, they will realise that it is a polite request, in our case, to the Hon. John Bannon to appear before the committee.

I am personally making that overture to Mr Bannon as a colleague in this place, because it would be unfortunate and erroneous if it is seen only as a chance to put a politician in the stand to be pilloried by an aggressive committee. I chaired a committee on energy matters some years back in this place, and we were briefed on a confidential basis by the then Under Treasurer as to how those sales and lease back arrangements were put in place. They were, without any apology, purely devices to borrow money at a lower rate of interest and on very gentle, long-term repayment circumstances.

That questioning may reveal decisions and procedures which were not totally kosher as far as complying with the Loan Council expectations. I cannot comment on that. John Bannon has nothing to lose by sharing that information with the committee, because it was done in the best interests of financing the State, and other States will have been in a similar circumstance. For the future, it is essential that we do throw open this murky and closed area in which the loans and the funding, Federal to State, and the lending restrictions are established. We should get people with the first-hand experience possessed by Mr Greiner, who has already presented, and in this respect I refer to Mr Bannon and those others mentioned in my motion (namely,Mr Fahey, Mr Gray, Mr Rundle, Mrs Kirner, Mr Sheehan, Mr White and Mr

Dawkins from the Federal Parliament).

I urge that the Legislative Council support the motion, taking note of the motion passed in the Australian Senate and, by doing so, giving gentle encouragement to John Bannon to be prepared to give evidence in person to this select committee on such an important matter, which will be to the advantage in the long run of all South Australians.

The Hon. R.R. ROBERTS secured the adjournment of the debate.

HERITAGE ITEMS

Order of the Day, Private Business, No. 1: Hon M.S. Feleppa to move:

That the regulations under the City of Adelaide Development Control Act 1976 concerning Heritage Items (Variations and Register), made on 22 July 1993 and laid on the table of this Council on 3 August 1993, be disallowed.

The Hon. M.S. FELEPPA: I move:

That this Order of the Day be discharged.

Order of the Day discharged.

CRIMINAL LAW (SENTENCING) ACT

Order of the Day, Private Business, No. 2: Hon. M.S. Feleppa to move:

That the regulations under the Criminal Law (Sentencing) Act 1988 concerning court fees, made on 1 July 1993 and laid on the table of this Council on 3 August 1993, be disallowed.

The Hon. M.S. FELEPPA: I move:

That this Order of the Day be discharged.

Order of the Day discharged.

DISTRICT COURT ACT

Order of the Day, Private Business, No. 3: Hon. M.S. Feleppa to move:

That the regulations under the District Court Act 1991 concerning court and transcript fees, made on 1 July 1993 and laid on the table of this Council on 3 August 1993, be disallowed.

The Hon. M.S. FELEPPA: I move:

That this Order of the Day be discharged.

Order of the Day discharged.

MAGISTRATES COURT ACT

Order of the Day, Private Business, No. 4: Hon M.S. Feleppa to move:

That the regulations under the Magistrates Court Act 1991 concerning court and transcript fees, made on 1 July 1993 and laid on the table of this Council on 3 August 1993, be disallowed.

The Hon. M.S. FELEPPA: I move:

That this Order of the Day be discharged.

Order of the Day discharged.

SHERIFFS ACT

Order of the Day, Private Business, No. 5: Hon. M.S. Feleppa to move:

That the regulations under the Sheriffs Act 1978 concerning court fees, made on 1 July 1993 and laid on the table of this Council on 3 August 1993, be disallowed.

The Hon. M.S. FELEPPA: I move:

That this Order of the Day be discharged.

Order of the Day discharged.

TRAFFIC EXPIATION FEES

Order of the Day, Private Business, No. 6: Hon. M.S. Feleppa to move:

That the regulations under the Summary Offences Act 1953 concerning traffic expiation fees, made on 1 July 1993 and laid on the table of this Council on 3 August 1993, be disallowed.

The Hon. M.S. FELEPPA: I move:

That this Order of the Day be discharged.

Order of the Day discharged.

TRANSCRIPT FEES

Order of the Day, Private Business, No. 7: Hon. M.S. Feleppa to move:

That the regulations under the Supreme Court Act 1935 concerning court and transcript fees, made on 1 July 1993 and laid on the table of this Council on 3 August 1993, be disallowed.

The Hon. M.S. FELEPPA: I move:

That this Order of the Day be discharged.

Order of the Day discharged.

PROBATE FEES

Order of the Day, Private Business, No. 8: Hon. M.S. Feleppa to move:

That the regulations under the Supreme Court Act 1935 concerning court fees (probate), made on 1 July 1993 and laid on the table of this Council on 3 August 1993, be disallowed.

The Hon. M.S. FELEPPA: I move:

That this Order of the Day be discharged.

Order of the Day discharged.

CRIMINAL LAW (STALKING) AMENDMENT BILL

The Hon. C.J. SUMNER (Attorney-General) obtained leave and introduced a Bill for an Act to amend the Criminal Law Consolidation Act 1935. Read a first time.

The Hon. C.J. SUMNER: I move:

That this Bill be now read a second time.

In recent times there has been a recognition of the distinct anti-social behaviour known generally as 'stalking'. The essence of this behaviour is the intentional harassment, threatening and/or intimidation of a person by following them about, sending them articles, telephoning them, waiting outside a house and the like. In general terms, an awakening of concern about this kind of behaviour in this country has been caused by its prevalence in domestic violence cases. The creation of a criminal offence dealing with this behaviour is presented and argued for as an adjunct to the arsenal of legal weapons arrayed against domestic violence.

The most immediate catalyst is, no doubt, due to the murder in New South Wales of a Ms Andrea Patrick by an ex-lover who harassed her violently in violation of a protection order before killing her and committing suicide. The idea for this kind of legislation in modern times originates in the United States. Beginning with California in 1990, at last count 31 American States had brought some version of a stalking offence into law. The offences vary from State to State, not only in content but also in form and penalty. Moreover, it is clear that, while some concerns have been prompted by domestic violence, the original California

initiative was probably due to the 'stalking' of celebrities by crazed fans.

The most notorious of these (and there are quite a number) was John Hinckley who, obsessed with the actress Jodie Foster, shot Ronald Reagan in order to get her attention. Some 35% of the work of the relevant unit in Los Angeles Police Department is reported to be celebrity related. Although they differ, in general terms it may be said that the American statutes criminalise the intentional and repeated following or harassment of another person and the making of a credible threat with intent to place that person in reasonable fear of death or great bodily injury.

Some of the statutes also contain an 'aggravated stalking' offence in which the basic offence attracts a higher penalty if, for example, the use of a weapon is involved, if there is violation of a restraining order, or a previous conviction. There can be little doubt that there is a niche of anti-social, threatening behaviour which, it can be argued, is not properly or adequately covered by the current criminal law. In general terms, that gap occurs where one person causes another a degree of fear or trepidation by behaviour which is, on the surface, innocent but which, taken in context, assumes an importance beyond its immediate significance.

Where a person does not explicitly threaten another but silently follows them around or sits outside their dwelling, it may be difficult to find the appropriate criminal sanction. Such behaviour may be offensive and hence contrary to section 7 of the Summary Offences Act or, if a threat is actually made, it may be contrary to the Criminal Law Consolidation Act. But neither may be so, or may be proven. This kind of behaviour can be controlled by restraining orders, but the restraining order may be inadequate to the specific task.

If the principal object of the offence is to deal with domestic violence related situations, it makes a great deal of sense to have a basic offence aggravated by such factors as violation of a restraining order, employment of a weapon and the like. The basic offence should be punishable by three years imprisonment and the aggravated offence by five years imprisonment. Great care must be taken in formulating the offence(s). It must be carefully targeted at that niche between the minor offence of offensive behaviour, on the one hand, and the serious offences of threats, offences against the person, sexual assaults and property damage on the other.

It is worthy of note that this is not the first time that the Government has put forward initiatives in this area. This is not an isolated attempt by the Government to provide aid to the victims of domestic and community violence. Last year, for example, the Summary Procedure (Summary Protection Orders) Amendment Act was passed, which provided for the registration and enforcement of interstate orders, urgent telephone applications and mandatory orders in relation to firearms. The Government will continue to look at any measure which will aid the victims of threatened and actual violence.

It is also worth noting that the Government's proposed privacy legislation would have given civil remedies to victims in this area—but, as all know, that measure of protection fell, due to vociferous opposition from the media and others with vested interests to protect, including the Opposition in this State. It must also be recognised that the enactment of the offence will not of itself stop domestic violence. Nevertheless, this new law, when taken together with the appropriate use of protection orders, ought to assist materially in the protection of the victims of domestic violence.

If, as in the Patrick case, the accused is prepared to suicide in order to attain his or her objective, the legal prevention of violence is far more difficult. It is in the ordinary course very difficult to keep obsessed citizens in custody indefinitely. But these are extreme cases. The enactment of a quite serious offence allied to enforcement of protection orders ought to act as an incentive for courts and police to act against violence in the community. I commend the Bill to the House. I seek leave to have the explanation of the clauses inserted in *Hansard* without my reading it.

Leave granted.

Clause 1: Short title

This clause is formal.

Clause 2: Commencement

This clause is formal.

Clause 3: Insertion of section 19AA

This clause provides for the insertion of the heading *Stalking* and proposed section 19AA after section 19 of the principal Act. Proposed section 19AA provides that a person stalks another if, on at least two separate occasions, the person—

- follows the other person;
- loiters outside the place of residence of the other person or some other place frequented by the other person;
- enters property of the other person;
- keeps the other person under surveillance; or
- acts covertly in a way that could reasonably be expected to arouse the other person's apprehension or fear; and

the person intends to cause serious physical or mental harm to the other person or a third person or intends to cause serious apprehension or fear.

The penalty for a person found guilty of the offence of stalking differs according to the circumstances surrounding the commission of the offence. If the offender's conduct contravened an injunction or an order imposed by a court, or the offender was (on any occasion to which the charge relates) in possession of an offensive weapon, the penalty is imprisonment for not more than five years. In any other circumstances, the penalty is imprisonment for not more than three years.

Proposed subsection (3) provides that, subject to one exception, a person may not be charged (either in the same or in different instruments of charge) with stalking and some other offence arising out of the same set of circumstances, and involving a physical element that is common to the charge of stalking. The exception to this rule is that a person may be charged, in the alternative, with stalking and offensive behaviour contrary to section 7 of the *Summary Offences Act 1953*.

Proposed subsection (4) provides that a person who has been acquitted or convicted on a charge of stalking may not be charged with another offence arising out of the same set of circumstances and involving a physical element that is common to that charge. Proposed subsection (5) provides for the reverse of the situation provided for in the previous proposed subsection.

The Hon. K.T. GRIFFIN secured the adjournment of the debate.

CRIMINAL LAW CONSOLIDATION (CHILD SEXUAL ABUSE) AMENDMENT BILL

The Hon. C.J. SUMNER (Attorney-General) obtained leave and introduced a Bill for an Act to amend the Criminal Law Consolidation Act 1935. Read a first time.

The Hon. C.J. SUMNER: I move:

That this Bill be now read a second time.

In 1989, the High Court decided the case of *S*. The accused was charged with three counts of incest with his daughter. She gave evidence that he had engaged in a course of conduct of sexual abuse from the time she turned 9 or 10 to the time she was 17. This amounted to an allegation of sexual abuse between about 1975 and 1983. Her evidence was that sexual intercourse began when she was 14 (1979) and took place "every couple of months for a year". The

charges specified intercourse on a date unknown between 1 January 1980 and 31 December 1980; 1 January 1981 and 31 December 1981; and 8 November 1981 and 8 November 1982 (respectively). A defence request for particulars was refused and the trial judge declined to make any order. On appeal from conviction, the High Court (Brennan J dissenting) ordered a new trial.

The decision of the High Court poses great difficulty in charging defendants where the allegations involve a long period of multiple offending. In some cases, like *S,* the child—or the adult recalling events which took place when he or she was a child—cannot specify particular dates or occasions when the offence is alleged to have taken place. The result is that defendants are being acquitted even where juries clearly indicate that they accept the evidence that abuse took place at some time.

Legislation has been introduced in Queensland, Victoria, Western Australia and the Australian Capital Territory to deal with this problem. The Directors of Public Prosecutions in all jurisdictions have agreed that such legislation is necessary. The South Australian Director of Public Prosecutions has requested that legislation on the Western Australian model be introduced as a matter of urgency.

The essence of the legislation in other jurisdictions is the creation of a new offence of having a sexual relationship with a child. That offence is proved by proving that the defendant commits a sexual offence against a child on three or more separate occasions. It is provided that ". . . it is not necessary to specify the dates, or in any other way to particularise the circumstances, of the alleged acts".

The Bill follows these models. It is a necessary reform to the way in which the criminal law copes with these particularly difficult cases. I commend the Bill to the House. I seek leave to have the explanation of the clauses inserted in *Hansard* without my reading it.

Leave granted.

Clause 1: Short title
Clause 2: Commencement
Clauses 1 and 2 are formal.
Clause 3: Insertion of s. 74
Clause 3 amends the principal Act by creating an offence of persistent sexual abuse of a child.

The offence consists of a course of conduct involving the commission of a sexual offence against a child on at least three separate occasions on at least three days. A charge under this section must specify with reasonable particularity when the course of conduct began and when it ended, must state the nature of the alleged offences and must describe, in reasonable detail, the conduct in the course of which the sexual offences were committed. The charge need not state the dates on which the sexual offences were committed, the order in which the offences were committed, or differentiate the circumstances of each offence.

Persistent sexual abuse of a child is established if it is proved beyond reasonable doubt that the defendant committed at least as many offences as the number specified in the charge over the period specified in the charge. It is not necessary to establish the dates on which the offences were committed, the order in which they were committed or to differentiate the circumstances of commission.

If a defendant is found guilty of persistent sexual abuse of a child, the jury or court must state the nature of the sexual offences found to have been committed against the child and the defendant is liable to the same penalty as would be applicable on a conviction for the most serious of those offences.

A charge of persistent sexual abuse of a child subsumes all sexual offences committed by the same person against the same child during the period of the alleged sexual abuse. Hence, a person cannot be simultaneously charged with persistent sexual abuse of a child and a sexual offence alleged to have been committed against the same child during the period of the alleged persistent sexual abuse.

A person who has been tried and convicted or acquitted on a charge of persistent sexual abuse of a child may not be charged with a sexual offence against the same child alleged to have been committed during the period the defendant was alleged to have committed persistent sexual abuse of the child. For the purposes of this section a child is a person under the age of sixteen.

The Hon. K.T. GRIFFIN secured the adjournment of the debate.

CONSENT TO MEDICAL TREATMENT AND PALLIATIVE CARE BILL

In Committee.

(Continued from 12 October. Page 523.)

Clause 7—'Appointment of agent to consent to medical treatment.'

The Hon. BARBARA WIESE: I move:

Page 3, lines 27 to 29—Leave out paragraph (a) and insert—
(a) authorises the agent, subject to any conditions and directions contained in the power of attorney, to make decisions about the medical treatment of the person who granted the power if that person is incapable of making decisions on his or her own behalf; but.

Essentially, this continues the debate that we started last night about the issue of consent or refusal to consent, as opposed to having a concept where an individual is empowered to make decisions relating to medical treatment, which is a broader concept. The amendment that I am now moving provides for what I consider to be that broader concept: empowering the agent to make decisions about medical treatment in a range of areas, not simply consenting to or refusing consent for a particular medical treatment.

The Hon. K.T. GRIFFIN: The essence of what the Minister's amendment is seeking to do is consistent with the amendment we made to subclause (1) of clause 7, so to that extent it is unlikely to be controversial. However, if the Minister's amendment is successful, it then precludes me from moving mine. So what I would like to do is to move my amendment as an amendment to the Minister's amendment.

The Minister's amendment 'authorises the agent, subject to any conditions and directions contained in the power of attorney, to make decisions about the medical treatment of the person who granted the power if that person is incapable of making decisions on his or her own behalf'—and they are the relevant words. The paragraph which the Minister is seeking to replace provides, 'A medical power of attorney . . . authorises the agent, subject to the conditions (if any) stated in the power of attorney, to consent or to refuse to consent to medical treatment if the person who grants the power is incapable of making the decision on his or her own behalf.' So, those words are the same in both the paragraph in the Bill and the amendment of the Minister, but I am anxious to ensure that those words are changed. So, I move my amendment to the Minister's amendment:

Page 3, line 29—Leave out 'incapable of making the decision on his or her own behalf' and insert 'because of mental incapacity, incapable of making a decision for himself or herself.'

I am focusing upon this issue of the person being incapable of making decisions on his or her own behalf. That is very broad. I prefer to link the question of incapacity to mental incapacity.

When one makes a will the question of testamentary capacity is related to mental capacity or incapacity and also relates to the question of whether or not the person understands not only what is happening but also the tenor of what is being proposed. There is a need for precision in this whole

area of capacity in so far as it relates to the capacity of the person appointing the agent.

If one refers it to mental incapacity it follows that, if a person is not mentally capable, is perhaps comatose and is therefore mentally incapable of making a decision, but may be restored to consciousness, the subsequent amendments which I am proposing will recognise that the grantor of the medical power of attorney may, on regaining mental capacity to make decisions about his or her medical treatment, vary or revoke any decision taken by the medical agent during the period of incapacity.

That overcomes part of the problem we were debating last night—but in a different context—about when an agent is unavailable and at what point unavailability becomes availability and who makes decisions. Whilst it is not on all fours it is quite possible that, if an agent makes a decision, the question arises of what happens if the patient becomes capable of making a decision in the future. My subsequent amendments seek to address that issue.

So, in my view it is desirable to link the question of capability to mental capacity rather than merely to leave it in the broad sense of being 'incapable', which can have a range of connotations.

The Hon. BARBARA WIESE: The Hon. Mr Griffin's amendment is opposed. The terminology that is used in the Bill was specifically chosen, and it was arrived at after the select committee had heard a great deal of evidence. In the context in which it is used it means that a person lacks the capacity: it does not mean that a person is prevaricating or is unable to make up their mind. It is a plain language user-friendly way of saying that someone lacks the capacity.

Apparently there was much debate about this definition within the select committee, and there was debate about the definition of 'mental incapacity' as it appears in the recent Guardianship and Administration Act.

Various groups rightly or wrongly saw that terminology as stigmatising, albeit that in drafting terms it may have been an efficient way of dealing with the circumstances covered by that legislation. The Minister does not want to perpetuate that type of debate by using the wording proposed in the amendment. He believes that the wording in the clause as it stands is adequate and desirable and reflects the select committee's intentions. Therefore I oppose this amendment.

The Hon. BERNICE PFITZNER: I have difficulty with using the descriptive term 'mental incapacity' because it could be a physical incapacity when the patient is unable to speak, a psychological incapacity or, as the Hon. Mr Griffin said, the patient may be comatose or unconscious. However, if the decision for medical treatment has to be made at that time, how long must we wait for the unconscious patient to revive before that medical treatment can be instituted?

Surely that is why we have this medical agent: to help make decisions for medical treatment which may be required to be instituted almost immediately. So, I have difficulty with specifying what kind of incapacity, because that kind of incapacity might take a long time from which to recover, and that is why we have the medical agent there: to help make a decision on the medical treatment.

The Hon. K.T. GRIFFIN: If it is suggested that the person may be physically incapacitated so as not to be able to speak but nevertheless may be fully mentally alert, but in those circumstances an agent is able to act, I think that is an outrageous liberty, and I do not believe that ought to be in any way supported. I made the point that, if a person is comatose, quite obviously there is no mental capacity. I am trying to focus upon the fact that someone is able to understand what is being proposed and has the necessary capacity to make a decision: that the person understands the tenor and weight of the decision that is being proposed. Mere prevarication is not in my view a sign of incapacity, at least in law, and it should not be. However, it is at least open to that interpretation. The term 'incapable of' seems to be much broader or at least is open to the interpretation of being much broader than merely being unable because of a mental incapacity to make a decision.

Even if a person is quite alert but physically unable to speak, that is no reason for giving a medical agent the power to make a decision affecting the medical treatment of that person. We are really into the realms of the bizarre and the extraordinary if we are moving to the point where someone is quite lucid mentally but unable to talk and, by so doing, communicate intention but may be able to communicate intention by the grip of a hand or by something else. Then I think it is a very dangerous piece of legislation, and I want to ensure that we limit paragraph (a) to those circumstances where there really is true lack of legal capacity.

The Hon. BERNICE PFITZNER: The Hon. Mr Griffin misunderstands my use of the word 'physical'. I mean by that that the person is not only unable to speak but also is unable to indicate in all ways. As we know, in the Bill it is paramount first of all to consult the actual patient himself or herself, and it is only when one is unable to get any sign of response from that person that we go to the medical agent for help.

So, in using the term 'physical incapacity' I would envisage a person being unable to show any signs at all, when we do not know whether the patient is mentally capable or not. I was referring to the physical sign and assuming that mentally he or she might be quite normal. Over and above that we all understand that it is paramount to get the decision from the patient initially.

The Hon. K.T. GRIFFIN: We must be very cautious about moving down that track. It may be that there is a person who is somewhat distressed, who nevertheless understands what is going on but who is unable to make up his or her mind. I suggest that it is open to interpretation that that person may be incapable of making a decision on his or her own behalf because of the state of his or her mind, their attitude and distress, but that does not mean that that person lacks the necessary legal capacity to make a decision. That is why I think we must be cautious about what the scope of the power of a medical power of attorney may be and why I want to confine it rather than leave it as broad as in the Minister's amendment and in the original Bill.

The Hon. BARBARA WIESE: I have heard the arguments put by the Hon. Mr Griffin and the Hon. Dr Pfitzner and I have sought further advice to satisfy myself about this question of lack of capacity and how it is likely to be interpreted. Whilst I understand the Hon. Mr Griffin's concern that the rights of an individual should not be trampled on by the use of a provision of this sort, I think that, on balance, in a real world case in a hospital or a hospice where a person lacks the capacity, there would be a clear understanding amongst the parties of what 'lack of capacity' means. It would not be that a person cannot make up their mind or that they are withholding making a decision when they have the capacity to do so.

More particularly, the Hon. Dr Pfitzner raises the point that it would be wrong to narrow this question of capacity to mental capacity alone when there could be a very good case

for an agent to make decisions on behalf of a person who has a severe physical incapacity. For example, it may be that a person is totally paralysed and unable to communicate in any way although their mental faculties might be perfectly okay.

The Hon. K.T. Griffin interjecting:

The Hon. BARBARA WIESE: There are cases beyond mental incapacity where one could envisage that an individual might want an agent to act on their behalf, so we ought not to narrow this provision to exclude circumstances of that kind.

Paragraph (a) negatived.

The Committee divided on the Hon. K.T. Griffin's amendment to the Hon. Barbara Wiese's amendment:

AYES (7)

Burdett, J. C.	Davis, L. H.
Dunn, H. P. K.	Griffin, K .T. (teller)
Irwin, J. C.	Schaefer, C. V.
Stefani, J. F.	

NOES (13)

Crothers, T.	Elliott, M. J.
Feleppa, M. S.	Gilfillan, I.
Laidlaw, D. V.	Levy, J. A. W.
Lucas, R. I.	Pfitzner, B. S. L.
Pickles, C. A.	Roberts, R. R.
Roberts, T. G.	Weatherill, G.
Wiese, B. J. (teller)	

Majority of 6 for the Noes.

Amendment thus negatived; the Hon. Barbara Wiese's amendment carried.

The Hon. I. GILFILLAN: I move:

Page 3, lines 30 to 32—Leave out paragraph (b) and insert:

(b) does not authorise the agent to refuse the administration of drugs to relieve pain or distress, nor to refuse the provision or administration of food or water except as follows:

A medical agent may, subject to the terms and conditions of the medical power of attorney, refuse the administration, or the continued administration, of food and water by artificial means if the effect or likely effect of administering, or continuing to administer, food and water by artificial means is to prolong life in a moribund state without any real prospect of recovery.

Subclause (6) provides:

A medical power of attorney—

(a) authorises the agent, subject to the conditions (if any) stated in the power of attorney, to consent or to refuse to consent to medical treatment if the person who grants the power is incapable of making the decision on his or her own behalf; but

(b) does not authorise the agent to refuse—

(i) the natural provision or natural administration of food and water; or

(ii) the administration of drugs to relieve pain or distress.

I have moved my amendment because I consider that this puts some further restraint on the withdrawal of the artificial administration of food and water, where there could be some ambivalence as to the actual condition of the patient. I feel that we must take a position of extreme caution in passing legislation which opens up possible avenues for the termination of life without full justification for it.

So, if my amendment is successful, for the qualification involving the withdrawal of the administration of food and water by artificial means to be effected, there would need to be a diagnosis that the life of the person was in a moribund state without any real prospect of recovery. 'Real prospect of recovery' is a phrase used elsewhere in the Bill, so it is consistent, and it has adequate meaning to make it worthwhile in this context. I recommend the amendment to the Committee.

The Hon. R.I. LUCAS: I have some concerns with the Hon. Mr Gilfillan's amendment. During the Committee stage, we have looked at a number of examples, one being someone who was in a coma for a considerable period. The advice that we have had is that medical experts, in many cases, would, after a period, diagnose such a person to be in a moribund state without any real prospect of recovery. Therefore, these difficult decisions have to be taken as to whether or not, for example, a nasogastric drip and things such as that might have to be withdrawn or not withdrawn, and an example of that was given in debate in this Chamber.

I indicated that one of my colleagues advised me that there had been cases of someone being in a coma for up to two years, with that person coming out of the coma and going on to lead a happy and productive life in the community.

My understanding of the Hon. Mr Gilfillan's amendment is that, in those cases where someone has been in a coma for some period and the medical experts indicate that in their view (even though there may be differing viewpoints about that) the person is in a moribund state without any real prospect of recovery, he is making an allowance for the nasogastric drip to be removed. If that is the honourable member's intention, I ask him to clarify that, because—certainly at the moment, anyway—I would not be prepared to support his intention in relation to that example.

The Hon. I. GILFILLAN: My understanding of the text of the Bill is that it is far wider than my amendment. The intention of my amendment is to restrict rather than open up. As I read the Bill—

The Hon. R.I. Lucas: I accept that. It is a question of whether we restrict it to your amendment or to Mr Griffin's amendment.

The Hon. I. GILFILLAN: I must say that I am looking forward to hearing from the Hon. Mr Griffin. Perhaps he will speak to his amendment before we vote on this one, because I would be interested in what he has to say. I make the point that I want to have the option that, in certain circumstances, there is the right and power to withdraw the nasogastric form of artificial feeding, or whatever other form of artificial feeding that may evolve from time to time, where to all intents and purposes there is no prospect of recovery—in other words, it is just an indeterminate continuation of a vegetative state of life.

The Hon. R.I. Lucas: Do you want to cover the example that I have raised?

The Hon. I. GILFILLAN: I do not know the details of it, but I recognise the example the honourable member gave to the Committee of a person in a coma, with a medical opinion—I assume—of no prospect of recovery, and after two years there was this remarkable—

The Hon. R.I. Lucas: Not necessarily two years: it might only be two weeks.

The Hon. I. GILFILLAN: But the example which the honourable member gave and to which he asked me to refer involved a period of two years; is that not correct?

The Hon. R.I. Lucas interjecting:

The Hon. I. GILFILLAN: I am referring to the one that you asked me to consider, which is the one you gave to the Committee. The honourable member might have given others that I did not hear. If medical opinion is so indeterminate and unreliable, this would be hazardous in the extreme, and anybody acting as an attorney would be unlikely to rely on that sort of medical advice. There are sufficient instances

where there is the retention, as far as one can judge, of an insensate and vegetative state of life, with prospects of years of that to continue.

In the circumstances, it is appropriate that artificial feeding be withdrawn. It is obviously not an instruction, but, where the situation has been weighed and balanced, there is this possibility.

The Hon. BARBARA WIESE: The Hon. Mr Gilfillan's amendment is very sensible, and I support it.

The Hon. M.J. ELLIOTT: I am not convinced by the Hon. Mr Gilfillan's amendment, because a person may not be moribund but is quite clearly in the terminal phase of a terminal illness, and is being fed by quite gross artificial means and who may actually want that to be withdrawn. I am not sure whether Mr Gilfillan's amendments allow that, because he is saying that the person needs to be moribund. That is quite a significant change to the way in which the whole legislation is working.

The Hon. K.T. GRIFFIN: I move:

Page 3, line 31—Leave out subparagraph (i) and insert—
(i) the provision or administration of nutrition; or.

My amendment is to leave out subparagraph (i), which is to leave out the reference to 'the natural provision or natural administration of food and water; or', and to insert a new subparagraph (i) relating to 'the provision or administration of nutrition; or'. That is much narrower. I debated whether 'nutrition' covers food and water, and all the advice I have received indicates that it does.

If someone has very grave concerns that nutrition does not cover water I am prepared to move it in an amended form, but I think nutrition in a medical context is clearly food and water. I have grave concerns about the Bill as it is. I acknowledge that the Minister is now indicating support for the Hon. Mr Gilfillan. As it is the Bill provides:

. . . does not authorise the agent to refuse the natural provision or natural administration of food and water.

So anything that is not natural may be refused. That may be a drip, and it may be that, in the circumstances outlined by my colleague the Hon. Robert Lucas, it is quite inappropriate for the drip to be removed. In the context of the Hon. Mr Gilfillan's amendment it would still allow, even in the circumstances where a person is moribund—that is comatose—the discontinuance of the provision of food and water by artificial means.

In addressing the issue from the perspective of care of the dying, clause 13 provides that a medical practitioner who is responsible for the treatment or care of a patient in the terminal phase of a terminal illness is, in the absence of an expressed direction by the patient or the patient's representative—in a sense it is a reverse onus—under no duty to use or to continue to use extraordinary measures in treating the patient if the effect of doing so would be merely to prolong life in a moribund state without any real prospect of recovery.

I have an amendment on that—I am concerned about the use of this word 'moribund'—and I seek to put that issue beyond doubt by referring to prolonging life in a vegetative state without any reasonable prospect of recovery and building into it also certification by two other medical practitioners, so that the issue can be beyond doubt.

What the Hon. Mr Gilfillan's amendment will allow is a unilateral decision by the agent. There will be no reference to the vegetative state, no reference to the terminal phase of a terminal illness and no sense in which some medical practitioner must give the appropriate certification. I have concerns that that is likely to be open to abuse. The preference I express is that the agent does not have the power to refuse the provision or administration of nutrition, whether naturally provided or artificially provided. If food and nutrition is to be withdrawn, then that is only in the context of the care of the dying and under the very strict controls set out in clause 13, remembering that the power—

The Hon. M.J. Elliott interjecting:

The Hon. K.T. GRIFFIN: They do not apply in relation to the exercise of the medical power of attorney's responsibilities under this clause. What I am proposing is a much tighter provision and, subsequently, some amendments to clause 13 which will focus upon the vegetative state rather than the moribund state.

The Hon. I. GILFILLAN: I would like to clarify a point. I believe it is fair to say that the amendment that the Hon. Trevor Griffin has moved is more restrictive than the avenues available through the Bill.

The Hon. K.T. Griffin interjecting:

The Hon. I. GILFILLAN: I know you do. I am agreeing with you, which is nice to do. I feel ill at ease about that. I also think that, in the appointment of a medical agent, the form will encourage the patient to think long and hard about what would be their wishes under these circumstances. One can expect that there would have been some guidance given or possibly some very clear instruction given, and I think that under those circumstances my amendment—although wider than the Bill—is not irresponsibly wide and does give the opportunity for the merciful removal of artificial feeding interminably where there is, as far as we can judge, no satisfactory quality of life.

The Hon. BERNICE PFITZNER: I have difficulty with both amendments. I am not sure whether the Hon. Mr Gilfillan is referring to the care of the dying, in which he does not qualify it with a terminal phase of a terminal illness, or whether he is referring to the acute emergency of a comatose patient. I also have difficulty with the Hon. Mr Griffin's amendment, because if you take out 'natural' in front of 'provision and administration' it will mean that the medical agent is not able to refuse artificial provisions and artificial administration. This means that the comatose patient may or may not be moribund or may or may not be in a terminal phase of a terminal illness and will be nasogastrically fed and intravenously fed for as many months, weeks, years as the patient is comatose.

I thought that this was about the benefit of the quality of life and the best interest of the patient, and it should therefore be allowable that the agent have recourse to refuse artificial provision and artificial administration of food and water. I prefer the original clause.

The Hon. R.I. LUCAS: I want to tackle this issue of the quality of life and I want to refer to the example of someone who is comatose. We have had examples—I do not have to repeat them—of people who have been in a coma for a period of time, whether it be three weeks (as one member referred to in relation to a personal example) or up to two years. Having come out of the coma, in relation to quality of life they are fully functioning, happy, productive members of society.

If we are talking about quality of life issues, whilst I concede that the Hon. Dr Pfitzner has raised a quality of life question, there is equally a quality of life issue as to whether or not you are alive. It is a fundamental question of life or death that we are talking about here. We know there are examples of people who are in comas for an extended period

of time who come out of those comas and who go on to live productive lives in our community. So, we are not just talking about quality of life, we are talking about the quality of life in the wider sense of whether you are alive or dead.

In relation to this basic question of providing nutrition to someone in this condition, what we are considering here is whether or not we can continue to provide a person in a coma with the administration of nutrition for a continuing period of time.

It is just the fundamental question in relation to the question of quality of life. We have had the examples where learned medical opinion has stated in relation to some of those people who have been in comas that they are in a moribund state; there is no real prospect of recovery; and all the advice has been given to families that they should consider the options, such as removing nasogastric drips in this particular example. In some cases families have made the decision not to take that advice; it is a difficult decision. They have made that decision and, for whatever reason, that individual comes out of the coma and is a fully functioning, happy, productive member of our society.

No issue is black and white and I concede that; there are arguments on both sides. However, when we talk about quality of life we also have to address this important issue. The advice I have received in relation to the Hon. Gilfillan's argument is that the example that I have given—which is a real world example and we all know of such examples—would be covered by his definition of 'moribund state without any real prospect of recovery'. Therefore, the nasogastric drip could be removed.

The Hon. Mr Gilfillan acknowledged that at the end when I put that question to him. Whilst I acknowledge that his is an attempted restriction of what exists in the Bill, I believe that the Committee should consider the amendment that has been moved by my colleague the Hon. Mr Griffin.

The Hon. I. GILFILLAN: I would ask the Hon. Rob Lucas whether he believes that I have the right to indicate that were I to be in a comatose or moribund state without any real prospect of recovery I do not wish to have continued artificial administration of food and water. If I make that wish quite clearly in writing, in a properly accepted form, should it or should it not be honoured?

The Hon. K.T. Griffin: I don't think it should be.

The Hon. I. GILFILLAN: I am asking the question. I ask you the question, too, and you say 'No'.

The Hon. K.T. Griffin interjecting:

The Hon. I. GILFILLAN: If that is the case, then the purpose of this Bill becomes cloudy and it certainly departs from my idea of what the Bill is seeking to achieve. The purpose of this Bill is to achieve some implementation of the wishes of a person in a healthy state for procedures which may or may not be applied to them in circumstances in which they may not be *compos mentis* and may not be capable of making a decision. From time to time in the purpose of the Bill reference is made to a medical agent power of attorney so that the implementation of those wishes will be followed through by a person whom I trust, and a person whom I would have chosen because I believe that person will express my wishes.

It seems to me that the argument that the Hon. Mr Lucas is putting up is that everyone in a coma and incapable of expressing their personal wish—and even then if they were capable of expressing a personal wish—should be kept alive by artificial means indefinitely with no other option. I can respect that point of view; I can understand that it can be justified philosophically and spiritually. I just do not happen to hold it. Therefore, I think my amendment, which is not *carte blanche* and it does have qualifying factors, is safe enough in the uncertain world in which we live. Certainly there may be circumstances in which the decision to withdraw artificial feeding may have been done premature to an unexpected and extraordinary recovery down the track. No-one will be able to guarantee that that will not happen, except in the circumstances that I understand the Hon. Rob Lucas is recommending; that is, continued administration without any circumstances that justify withdrawal of artificial administration of food and water—or nutrition.

We must respect that there are different points of view; that is to be expected, in fact to be welcomed, perhaps. However, that does not pursuade me that my amendment is not the best way to proceed. Certainly, it reflects my position and my conviction, so I am happy with it as it stands.

The Hon. BERNICE PFITZNER: I, like the Hon. Mr Gilfillan, feel that the purpose of this Bill was (as in clause 12) to protect the medical practitioner. We know that very often there are times when the patient has been comatosed and a sign has been put up stating 'Do not resuscitate.' That relates partly to artificial administration of food and water. If we are to take away the ability of the agent to make that decision of removing artificial administration of food and water then I feel we are not able (as the Bill further provides in clause 12(d)) to preserve or improve the quality of life. I still adhere to that, although I do understand what the Hon. Mr Lucas is saying—that that is a difficult concept sometimes for people to understand.

However, my understanding was that this Bill was to allow the agent who has been given permission by the patient to do certain things for him or her. Taking away part of the ability to refuse artificial administration of food and water restricts the agent in performing the role that the patient himself or herself might have requested.

The Hon. M.J. ELLIOTT: I am opposed to both amendments. The inclusion of 'moribund' is in fact a significant restriction—a narrowing of the Bill. Quite clearly there is a number of conditions that could leave a person not covered by a definition of 'moribund' but incapable of making a decision and requiring an agent to act. A person could be suffering, for instance, a degenerative disease, diseases which do not ever have any remission and there is a number of those. When I refer to 'remission' I mean recovery. The condition may stall at various points and a person could be at a terminal phase for quite an extended period of time.

This legislation is about people making determinations in the first instance about what happens to them. They have two choices: they can leave a living will, which is a very clear expression of what they want; or they can get someone to act as their agent, and again they have the option of quite clearly saying what that agent can and cannot do. If you do not want an agent—someone making decisions about you—you do not appoint one. What some people are trying to do is to interfere with the rights of others about what is perhaps one of the more important things of life, that is, death.

A person should be able to make some decisions about their death. In this case we are in fact talking about people who are in the final phase of terminal illnesses being kept alive by artificial means and by their own instruction have said that they do not want that to continue. That is what this is all about. There are all sorts of layers of protection in this and now there is an attempt by various amendments to start

narrowing that. I think that is wrong, and consequently I will oppose both amendments.

The Hon. R.I. LUCAS: I will briefly respond to the aspect Mr Elliott has raised, where he says we are interfering with the rights of others. It is not a question of whether we do or we do not; it is a question of to what degree, because even the Hon. Mr Elliott and the Bill's authors are interfering with the rights of others. The Hon. Mr Elliott is saying, and so is the Bill, that it does not authorise the agent to refuse the natural provision or the natural administration of food or water. So, if the person wanted to, or instructed his or her medical agent to say, 'I do not want to have the natural provision of food or water', the Hon. Mr Elliott and the Bill's supporters are supporting the interference in that particular person's rights.

So, it is not a question of whether members are interfering with the rights of others or not; it is the extent of how far we interfere. The Hon. Mr Elliott and the Bill's supporters say, 'We should only interfere to that level: that is, the natural provision of food or water.' That is the point at which Mr. Elliott draws the line about interference. Others, like the Hon. Mr Griffin in relation to his amendment, draw the line in relation to the next step, which is in relation to the provision of food or water, whether it is natural or whether it is artificial. So, it is not a question of black or white, or whether some are interfering with the rights of others and some are not; it is a question of to what degree do you interfere with the rights of others. The interesting question is: what is the distinction between interfering to the extent of force feeding naturally as opposed to force feeding artificially? It is not this black and white question about some of us are supporting an interference with the rights of others and the rest not interfering with the rights of others; it is just a question of degree. Where do you draw the line?

The Hon. BERNICE PFITZNER: Changing this provision would further limit what we had decided about an advance directive and also schedule 1A, because in an advance directive for personal health there are provisions which say that 'I give my agent permission, if I am in an irreversible condition or a terminal phase of a terminal illness, to remove intravenous therapy, nasogastric tubes and various artificial surgical implements.' By changing this you are narrowing what we passed last night regarding a patient's advance directive given to the medical agent to remove artificial provision and administration of food and water.

The Hon. BARBARA WIESE: Earlier I indicated support for the Hon. Mr Gilfillan's amendment, but having listened to the debate and having studied more closely the amendment that he is moving, the belief that I had earlier that his amendment was really just expressing the sentiment in the Bill in a slightly different way is not a belief that I now hold. In fact, this amendment is narrowing the power of the attorney to act on behalf of the individual and I do not support a narrowing of the power of the attorney in this respect.

Furthermore, I believe that the Minister of Health, Family and Community Services, who had indicated to me that the Gilfillan amendment was acceptable to him, did not take into account as clearly as I have been able to as a result of the debate we have heard here that this would be the result. I believe that in retrospect the Minister would want to oppose this amendment, because he and other members of the select committee had a very strong view that, in drafting this part of the Bill, having taken into account all of the evidence that it received, there was a base line below which an agent should not be asked to move. The committee was very aware of the evidence that it received from experts in palliative care, that a natural part of the dying process for many people is to reject food and water as death approaches—many people do reject food and water as death approaches—and to have that forced on them by some artificial means was, therefore, not an appropriate thing to do. It causes great distress and great discomfort.

So, the select committee, having heard the evidence, believed that there was an area where a person ought to be able, either by specific instructions in the instrument of appointment of a medical agent or by their choice of an agent, to ensure that their wishes could be carried out. However, the committee did not consider that it was fair or reasonable to expect an agent to permit the refusal of the natural provision of food or water, and that was the basis of the drafting of this part of the legislation. So that was the limit that the committee believed should be set, but it felt that it was appropriate and desired by many people that an agent should be able to refuse artificial means in other circumstances.

The Hon. Mr Gilfillan's amendment moves away from that concept. I do not think that the Minister of Health, Family and Community Services would support that, and I certainly do not. So, I am now withdrawing my support for his amendment, and I also indicate that I will be opposing the Hon. Mr Griffin's amendment for the same reasons.

The Hon. I. GILFILLAN: I do not think the case that the Minister gave of someone who is approaching death not wanting to be fed is really affected by my amendment, because that person is either conscious, in which case that person makes his or her own decision and is not affected by my amendment, or—

The Hon. Barbara Wiese interjecting:

The Hon. I. GILFILLAN: Maybe there is confusion. If a patient is conscious and regarded as being competent in making a decision on his or her own behalf, I cannot imagine that there is any medical power of attorney given which would override that. If there is, then I am very, very concerned about the implications of this Bill, but I am assuming that is not the case. So, if I am approaching death and I do not want to be artificially fed—

The Hon. C.J. Sumner: What was that point again?

The Hon. I. GILFILLAN: My point is that if I, as a patient (and I am putting it in the first person), am consciously aware of approaching death and make a decision in my right mind for certain procedures that I do not want, and if that is overridden by a medical power of attorney then I am very concerned about the implications of the Bill, but I do not believe that is the case.

The Hon. Barbara Wiese: That was not what I was saying, either.

The Hon. I. GILFILLAN: If it was not, I was a little unclear about the implications of what you were saying. If a patient is conscious then this amendment has no effect.

The Hon. K.T. Griffin: Not necessarily: then the question of mental capacity becomes relevant.

The Hon. I. GILFILLAN: I am saying the person is *compos mentis* and conscious. So the person is gauged to be competent to make the decision. If that is the case then there is no overriding authority or power of attorney which says that your decisions will not be honoured and you will be artificially fed and watered even if you do not want to be.

The Hon. M.J. Elliott: But you can be incompetent without being moribund.

The Hon. I. GILFILLAN: I am not sure I understand the niceties of that argument, but if there is a person who is

competent to make the decision then my amendment, as I understand it, has no effect. It is only affecting a medical agent who is making the decision on my behalf.

So, if I am *compos mentis* in making my decision my amendment does not apply. If I am not *compos mentis* and I am approaching death, as in the example that the Minister gave, the medical power of attorney is perfectly authorised by my amendment to terminate the artificial feeding because that is exactly the condition which I believe would be covered by my amendment. There would be no argument about it. I accept entirely the difference in scope of the wording of the Bill and my amendment, which is deliberately more restrictive.

If the Minister had not picked that up earlier, it is sensible that she has done so now. I am interested that the Minister was supportive because he has not been renowned for incompetence in his understanding of Bills and amendments, and he is very diligent in his assessment of this Bill and very keen for it to go through.

I repeat that my amendment is more restrictive than the Bill. I am quite aware of that. That is what I want it to be, but I do not believe it is unreasonably restrictive and I am happy therefore to promote it.

The Hon. CAROLINE SCHAEFER: I support the Hon. Mr Griffin's amendment. We have discussed the possibility of a comatose patient being kept alive by the artificial administration of nutrients. I think the Hon. Dr Pfitzner would agree that most comatose patients need other artificial means than merely the provision of nutrients to keep them alive. For instance, most of them lose the ability to breathe and need to be kept alive with some apparatus which will assist their lungs.

We have all agreed in this place that this is not a euthanasia Bill. However, it seems to me that if the withdrawal of nutrients is the only reason for a patient to die we are dealing in fact with a euthanasia Bill and should be honest enough to admit that. This is a very important clause and I support the Hon. Mr Griffin.

The Hon. I. Gilfillan's amendment carried.

The Committee divided on the Hon. K. T. Griffin's amendment:

AYES (8)

Burdett, J. C.	Davis, L. H.
Dunn, H. P. K.	Griffin, K .T. (teller)
Irwin, J. C.	Lucas, R. I.
Schaefer, C. V.	Stefani, J. F.

NOES (13)

Crothers, T.	Elliott, M. J.
Feleppa, M. S.	Gilfillan, I.
Laidlaw, D. V.	Levy, J. A. W.
Pfitzner, B. S. L.	Pickles, C. A.
Roberts, R. R.	Roberts, T. G.
Sumner, C. J.	Weatherill, G.
Wiese, B. J. (teller)	

Majority of 5 for the Noes.

Amendment thus negatived.

The Hon. M.S. FELEPPA: I move:

Page 3, after line 32—Insert subparagraph as follows:
or
(iii) medical treatment that is part of the conventional treatment of an illness and is not significantly intrusive or burdensome.

I wish to draw members' attention to my amendment by reading it in context with subclause 6(b), which provides:

A medical power of attorney—
(b) does not authorise the agent to refuse—
(i) the natural provision or a natural administration of food and water; or
(ii) the administration of drugs to relieve pain or distress.

My amendment is in relation to a third provision, which reads:

(iii) medical treatment that is part of the conventional treatment of an illness and is not significantly intrusive and burdensome.

I move this amendment because I believe that subclause 6(b) of this Bill does not entirely exhaust the range of reasonable possibilities which could occur for the medical agent who may not be authorised to refuse.

My interpretation of the Bill as it stands is that the agent cannot refuse the natural provision or natural administration of food and water or pain relieving drugs; that it would be impossible for a medical agent to refuse conventional treatment other than pain relieving drugs. I am told by people who are concerned that some treatments are not significantly burdensome or intrusive and that a medical agent should not reasonably refuse them. If they are considered by a medical agent to be significantly intrusive or burdensome—a term which has been used quite often during the debate on this Bill—or, indeed, are contrary to the known wishes of the patient, they may be refused.

I draw the attention of members to clause 12(b). Under this clause, hospital staff will incur no civil or criminal liability for an act or omission made in good faith and without negligence. So, in order to preserve or improve the quality of life under subclause (d) they shall so act, but in the case in point the protection for so acting is not as clear as it should be. In order to clarify this confusion, at least in my mind, regarding a case in which medical and hospital staff may administer conventional treatment, my proposed subparagraph (iii) should be added.

The Hon. R.I. LUCAS: One of the things that concerns me about the legislation before us, as it has been explained to me by Mr Evans and its other proponents, involves a situation where a diabetic goes into a coma caused by lack of insulin. The conventional treatment is to prescribe insulin, and that person returns to being a 100 per cent fully functioning member of society. As has been explained to me, the Bill as it is drafted and as its supporters wish would allow a medical agent, in that case, to refuse the administration of insulin to that person.

My reading of the Hon. Mr Feleppa's amendment is that it seeks to provide for such a situation; that is, the provision of medical treatment that is part of the conventional treatment of an illness that is not significantly intrusive or burdensome. If a person goes into a coma because of not having insulin, the conventional treatment is to prescribe insulin. On any definition, in my judgment, that would not be significantly intrusive or burdensome, and that person would again become a fully functioning member of society.

So, the Hon. Mr Feleppa's amendment seeks to cover that example and many others. Mr Atkinson referred to patients with kidney disorders being treated on dialysis machines. I wonder whether that situation would also be covered by this amendment, whether that would be conventional treatment of a condition that is not significantly intrusive or burdensome, although some might argue one way or another in relation to that. I ask whether that is the Hon. Mr Feleppa's intention, and I would be interested in any advice that the Minister might have as to whether or not the two examples I have outlined would be covered by the Hon. Mr Feleppa's amendment.

The Hon. M.J. ELLIOTT: It would seem to me that the denial of insulin would be contrary to clause 12(c). I should have thought that proper professional standards of medical practice would require that insulin be administered and that in those circumstances the medical practitioner would be subject to criminal action.

The Hon. C.J. SUMNER: What I am about to say probably goes to the heart of the concerns that the Hon. Mr Griffin and others have about the Bill. Perhaps the Hon. Dr Pfitzner as a medical practitioner might like to comment but, as I understand it, the subclause that we are concerned about, as currently drafted and introduced by the Minister, allows a medical agent to refuse to consent to the artificial feeding of a person who is only temporarily incapable of feeding himself or herself and who has every prospect of recovery. In other words, it gives the medical agent the capacity to take action that would result in the death of a patient even though that patient may have the capacity to recover.

The Hon. K.T. Griffin: It is certainly not a terminal phase of a terminal illness.

The Hon. C.J. SUMNER: That is right; it does not apply to a terminal phase of a terminal illness. That is the issue that concerns me about this Bill. The Hon. Mr Feleppa is trying to hedge that in, to some extent, virtually to overcome the complete freedom of a medical agent. I understand that the select committee's argument is that a person chooses a medical agent because he knows and trusts that person and therefore believes that that person will always act in his best interests, no matter what the circumstances.

However, I suppose one could postulate a situation of a medical agent who stands to gain from the death of the patient and who then, in circumstances which would otherwise not be proper, decides to withdraw the artificial administration of food or water, even though there may be some prospect of recovery.

The Hon. R.I. Lucas: Every prospect.

The Hon. C.J. SUMNER: Yes, possibly every prospect of recovery. The argument no doubt used by the proponents of the Bill, is that, first, medical agents are unlikely to do that because it is a person trusted by the patient, and the patient, when they had full control of their faculties, considered the issue and gave the medical agent that power. So they trust them. They would not act in a prejudicial or self-interested way if they are involved in a monetary way with a patient (that would be one argument), but pass on your autonomy to that medical agent and that medical agent will always act in your best interests. I suppose one could argue about that.

The second leg to their argument, as I understand it, is that, even if that medical agent in a particular case wanted to act in a manner that was contrary to the interests of the patient, the medical practitioner would not allow them to do so. Therefore, if there was a prospect of recovery and being in a comatose state was only temporary, then the medical practitioner would not permit the medical agent to give the instructions; they would not carry out the instructions if they were given them. That is the argument that, no doubt, the proponents of the Bill would put up. However, in theory, the Bill does allow, as I understand it, the refusal of artificial feeding in circumstances where the patient is comatose, but where that is only temporary and where, in fact, there is a prospect of recovery. So, you are giving that medical agent that power.

As I said, the protection is that one assumes that a doctor acting in accordance with medical ethics would not do that. But then the question is raised, 'Well, if the doctor wouldn't do it, why are you theoretically permitting it as something that could happen under legislation?' That is the concern that exists in this area. I know in another place there were some attempts to hedge around it. The Hon. Mr Feleppa's amendment is an attempt, perhaps in a somewhat similar way to understand that which the Hon. Mr Atkinson had moved in another place, to restrict the capacity of the medical agent to some extent.

So, I am inclined, subject to further argument, to look sympathetically at what the Hon. Mr Feleppa is doing in this circumstance. I suppose the general question is, 'Why is the capacity of the medical agent to act not confined to circumstances of terminal illness and situations where there is no reasonable prospect of recovery?' I am not sure whether that debate was one we should have had earlier. But this clause does raise this issue, because it is this clause which actually gives the medical agent the power to withdraw the support to the patient, even though there is a prospect of recovery and the situation in which the patient finds himself or herself is only temporary. My worry, if that does not happen, because it will be the subject of discussion with the doctor, is why we are going so far as theoretically to permit it in legislation.

The Hon. R.I. LUCAS: I am persuaded by the contributions of the Attorney and the Hon. Mr Feleppa. I indicate my preparedness to support the Hon. Mr Feleppa's amendment. The matter that the Attorney hit on at the end, as to whether or not the powers of the medical agent ought to be confined in some way to the terminal phase of the terminal illness, is an issue and, given the number of issues that are coming back at the recommittal stage, is something that people such as the Attorney and the shadow Attorney might like to apply themselves to before the recommittal stage. But let us leave that debate for them.

The Attorney did refer to the fact that Mr Atkinson raised similar issues in another place. I note that that amendment is similar to that which Mr Feleppa is moving. In another place, Mr Atkinson said:

> One feature of the Bill which I do not think is widely understood is that it does not apply only in circumstances of terminal illness: it is a Bill that applies more generally. It applies to situations in which the patient is in no danger of death in the ordinary course of events.
>
> Under the Bill, as I read it—and I stand to be corrected by the Minister if I am wrong—the power of the medical agent is absolute. For example, in the case of a young woman who was admitted to hospital after an accident, the medical agent could refuse or veto vital kidney dialysis on behalf of that woman, refuse the supply of insulin were she a diabetic or refuse the occasional use of a ventilator.

I am not sure where all those examples are covered, but certainly I have discussed with the Hon. Martyn Evans the case of the diabetic involving the insulin-induced coma and earlier I asked the question in relation to kidney dialysis. So, for the reasons the Attorney and the Hon. Mr Feleppa have put, I think we ought to support this provision. Secondly, between now and recommittal, we ought to think seriously whether there ought not be an even more all-embracing amendment which seeks to limit the operations of the medical agent to this question of life and death.

The Hon. C.J. Sumner: Why do the proponents say it shouldn't be limited to that?

The Hon. R.I. LUCAS: I don't know, and that is why we need to hear from the proponents of the Bill, perhaps through the Minister or those in this Chamber, why the Attorney's argument—which at least on the surface makes a lot of sense—and that of a number of others ought not be tackled by this Committee at the recommittal stage. I would be interested to hear—and I am sure that other members would

be, too—the response from the Attorney to the question on this matter. We ought to support the Hon. Mr Feleppa's amendment, and we can then tackle this other issue at the recommittal stage.

The Hon. BERNICE PFITZNER: I do not believe this amendment is necessary. What we really want and what we are looking at is trust in the power of the medical agent and trust in the medical practitioner. The medical practitioner is bound in this Bill under clause 12(c) to act in accordance with proper professional standards in accordance with proper medical practice. Under schedule 1, the Bill provides:

> I*[here set out name, address and occupation of medical agent]* accept appointment as a medical agent under this medical power of attorney and undertake to exercise the powers conferred honestly, in accordance with my principal's desires so far as they are known to me, and, subject to that, in what I genuinely believe to be my principal's best interests.

Therefore, I think that this amendment would be accommodated by the legislation that is already there. What we are seeking, because we are very uncomfortable and perhaps we do not trust the agent, is to restrict the agent's right of doing certain things. The only restriction that is placed on the agent at present is the restriction of natural provision and natural administration of food and water. We sought initially to restrict that further by putting 'artificial', and here we are further restricting it into this phrase, which I find a little difficult to accommodate because, again, we have 'not significantly intrusive or burdensome' and 'conventional treatment'. What happens if the treatment has to be unconventional because of a certain situation? I have some concern with the statement in that amendment.

The Hon. CAROLYN PICKLES: I am not quite sure who makes the decision about what is 'significantly intrusive or burdensome'. The power of attorney has granted to another person the wishes of the individual who is in a terminal phase, and the person who is in the terminal phase has already indicated that they do not wish to be kept alive by significantly intrusive or burdensome methods—and conventional treatments of medical care can often be extremely intrusive and extremely burdensome, yet some members of the medical profession may not consider them to be so. I believe that the insertion of this amendment further limits the rights of the patient because it removes from the agent the right to carry out the wishes of the patient where the patient is competent to do so. I oppose the amendment.

The Hon. K.T. GRIFFIN: The questions the Hon. Ms Pickles has raised about the words 'is not significantly intrusive or burdensome' suggest that she should have actually been supporting my amendment to the definition of 'extraordinary measures', because I argued the very same thing. I argued that it is a question of definition and a question of judgment.

The Hon. Carolyn Pickles: This is further restricting the powers.

The Hon. K.T. GRIFFIN: One of your arguments in respect of the definition we are now—

The Hon. Carolyn Pickles: I am not going to change my mind on that clause no matter what you say.

The Hon. K.T. GRIFFIN: I am not going to let the honourable member get away with it, because she has used as an argument against this amendment of the Hon. Mr Feleppa the issue of who makes the decision about what is significantly intrusive or burdensome and how do you assess that?

The Hon. CAROLYN PICKLES: The agent should be making the decision.

The Hon. K.T. GRIFFIN: With respect, I do not agree. You are then giving the agent licence to kill. If you say that it is the agent who makes the decision, then you have no objective standard by which you make a judgment on whether the person is acting properly or improperly within or outside the law. That is the whole problem with the Bill: there are so many areas where there are judgments to be made—and they will be difficult judgments to make—in a variety of circumstances. The more of those subjective assessments that one imports into definitions and into other provisions of the Bill, the more difficult it will be to administer and to protect the patient initially and primarily but also to protect the medical practitioners and the medical agent.

I agree with my colleague, the Hon. Mr Lucas, that this amendment ought to be accepted. While it is a restriction on the power of the agent, in my view that is an improvement to this provision, because I hold the view that the line ought to be drawn at a point which is very restrictive upon the agent. The agent should be exercising authority or responsibility only in those circumstances where it is genuinely related to the issue of imminent death rather than the very much at large decision which is presently allowed, not just by clause 7 but by other provisions of the Bill.

In a sense, clause 7 would be unlimited but for the provisions of clause 12, in particular. Of course, the medical practitioner has no civil or criminal liability for an act or omission '. . . with the consent of the patient or of a person empowered to consent to medical treatment. . . but in accordance with an authority conferred by this Act. . . in good faith and without negligence; in accordance with proper professional standards of medical practice. . . '—that is a bit vague, I suspect—and 'in order to preserve or improve the quality of life.' That has some problems too and I will be debating that when we get to that.

The Hon. R.I. Lucas: That is only protection for the medical profession.

The Hon. K.T. GRIFFIN: That is protection for the medical profession, that is correct, but there would appear to be at least some protections in respect of the care of the dying in subclause (3) of clause 13 otherwise the authority of the attorney under a medical power of attorney is only subject to the limitations imposed by the medical practitioner and the protections conferred upon the medical practitioner by clause 12. So, but for the constraint of the medical practitioner, there are no limitations except those in paragraph (b) of subclause (6).

The Hon. Carolyn Pickles: I thought they were schedules; schedule 1.

The Hon. K.T. GRIFFIN: Schedule 1 is nothing. With respect, that is just a form of a power of attorney.

The Hon. Carolyn Pickles: You set out the conditions.

The Hon. K.T. GRIFFIN: That is the limitation by the person who is granting the power. It is not a limitation by law: it is the limitation by virtue of the operation of the power and the limitations imposed by the person who is granting the power. I am supporting the Hon. Mr Feleppa's amendment because I think that that is an improvement, but I have the concerns which the Attorney-General articulated earlier about the legal limitations on the way in which a medical attorney may exercise power.

The Hon. C.J. SUMNER: I feel pretty bad about this. After all these years in the Legislative Council, I find myself on this occasion almost in agreement with the Hon. Mr

Griffin. It is quite a shock to me, but there we are. As I understand the position, what the Hon. Mr Griffin said is correct; namely, that the power of the medical power of attorney given by clause 7(6) is at large in the sense that the only criterion is that the patient is incapable of making the decision on his or her own behalf, but that that incapacity may be only a temporary incapacity.

I preface my remarks by saying that I assume I am reading the clause correctly and reading the intention of the proponents of the Bill correctly. But if that is the case,and the Hon. Mr Griffin has read it correctly—and he is more likely to have read it correctly than I am, given that he has taken more interest in it—the only restraint on the medical agent is contained in clause 7. The medical agent can still act even if the patient has temporary incapacity.

One then relies on the medical practitioner to behave as one would expect, in accordance with proper professional standards of medical practice. So, the medical practitioners' code of ethics places a restraint on the full power that the attorney may exercise. If that is correct, my problem is: why are we putting in legislation a situation which enables a medical power of attorney to do something that medical ethics would not allow that person to do and which, if they did exercise it, was wrong. I think that is the essence of the situation, if I have interpreted it correctly. I went through the arguments before, and presumably the arguments of the select committee are that the patient, when in full possession of his or her capacities, has decided to trust an agent to make the decisions irrespective of what subsequent changes there might be in that agent's approach to life or to the patient, or whether or not the agent may at some stage seek to gain from the death of the patient.

Therefore, I have this conceptual problem of putting in legislation something that allows an agent to do something on behalf of a patient that we would not in any circumstances permit normally, and then we rely on the medical practitioners, in effect, to restrain the agent from fully exercising those powers. What I do not understand is why that is necessary to achieve the objects of the legislation. So, one could be fully supportive of the objectives of the legislation without having a clause that permitted an agent to refuse consent to medical treatment or to withdraw artificial feeding in circumstances where there is a prospect of recovery and where the patient's lack of capacity may be only temporary. I would have thought that we would be better off looking at a situation that actually lined up the medical agent's powers under the legislation with medical ethics. It is interesting that the—

The Hon. K.T. Griffin: It is the law that sets the limits and not the medical practitioners' ethics.

The Hon. C.J. SUMNER: But we do deal with a situation that I understood this legislation was designed to deal with, which is dying. In fact, the long title states that it is an Act to deal with consent to medical treatment and to regulate medical practice so far as it affects the care of the dying. What we are talking about is people who are dying, who are on the way to death—they may not be terminal at that point, but they are on the way. Therefore, the principal issue that has to be addressed, I believe, is why the powers of the medical attorney are not restricted to those circumstances of terminal illness. I am not sure that that question has been properly answered to my satisfaction. As I said, it only arises in this circumstance because this is the clause that actually gives the powers to the medical agent to do what the Bill provides. I think those powers are too broad.

The Hon. M.J. ELLIOTT: I have a feeling that this clause will not be decided before the dinner break. I float a suggestion—without moving anything at this stage—that it might be possible to address most of the issues that have been raised, including the acceptance of the Hon. Mr Feleppa's amendment, if clause 7(6)(b) begins with words such as 'unless a patient is in the terminal phase of a terminal illness'.

Members interjecting:

The Hon. M.J. ELLIOTT: No, it is quite a significant change. It is saying that only when a person is in the terminal phase of a terminal illness can there be the denial of a drip or whatever else. What if the Bill provides that the agent cannot refuse various things unless the patient is in the terminal phase of a terminal illness, and there could be an additional rider that these could be quite separate, unless explicitly requested within the granting of the power of attorney?

If a person has explicitly said that he or she wants a particular person to do something in a particular circumstance, that is still the wish of the patient that they would express if they were conscious. Where they have not made an explicit request, the patient would have to be in the terminal phase of a terminal illness to be able to deny drip feeding or conventional medical treatments.

The Hon. R.I. LUCAS: As we are nearing the dinner break, my view is that we should test the support for the Hon. Mr Feleppa's amendment. There has certainly been a long debate about it. In terms of the issue that the Attorney has raised, which the Hon. Mr Elliott I think would concede on the run is offering one suggestion which may or may not be the best suggestion, it is impossible for us before the dinner break to come to a resolution of what is a very important issue. We should leave that for the recommittal stage. The Hon. Mr Elliott has made a suggestion, the Attorney may well have another suggestion or other members may have other suggestions.

We are going to recommit and I think it is a fundamental issue. I was more attracted to the notion that I thought the Attorney was flagging of somehow limiting the whole operation of the medical powers of attorney to, in effect, what the Bill was meant to be about rather than the option that I understood the Hon. Mr Elliott was talking about in relation to clause 7(6)(b). As I understood the suggestion from the Attorney, it is that we limit the operations of the medical power to what the Bill intended. Whether that is a fair reflection of what the Attorney said I do not know. I am suggesting at this stage that we should not spend too much time on it.

I think we should resolve one way or the other whether we support the Hon. Mr Feleppa's amendment. I have indicated support for it. I suggest that we vote on that before the dinner break and then leave this very important question for people to work on so that, when we come back to the recommittal stage, someone can come back to us if they wish with a suggested option to test the majority view of the Committee.

The Hon. BERNICE PFITZNER: I would also like to float the idea that if we are going to restrict this to the terminal phase of a terminal illness, does that also include prolonging life in a moribund state if a body is riddled with cancer or has a tumour that may or may not be evident or where the patient is the victim of a horrendous vehicle accident? The other thing I would like to ask the Hon. Mr Feleppa is: what is meant by conventional treatment? Different medical officers have different kinds of treatment. What is the standard of conventional treatment?

I understand that what is written in the Bill are proper professional standards. They are written out for us, but a conventional treatment is different in the eyes of different medical officers.

The Hon. C.J. SUMNER: I do not know whether what the Hon. Mr Feleppa has moved is the best solution to the issue. I was concerned to support it, because I think it goes part of the way to overcome the problem that I was concerned about—and therefore I will support it—but I think the general issue needs some further examination. At this stage that is not on the table. As I understand it, the whole Bill will be recommitted anyhow, at some point.

[Sitting suspended from 5.58 to 7.45 p.m.]

The Committee divided on the amendment:

AYES (13)

Burdett, J. C.	Crothers, T.
Davis, L. H.	Dunn, H. P. K.
Feleppa, M. S. (teller)	Griffin, K .T.
Irwin, J. C.	Lucas, R. I.
Roberts, R. R.	Schaefer, C. V.
Stefani, J. F.	Sumner, C. J.
Weatherill, G.	

NOES (7)

Elliott, M. J.	Laidlaw, D. V.
Levy, J. A. W.	Pfitzner, B. S. L.
Pickles, C. A.	Roberts, T. G.
Wiese, B. J. (teller)	

Majority of 6 for the Ayes.

Amendment thus carried.

The Hon. K.T. GRIFFIN: I move:

Lines 33 and 34—Leave out subclause (7) and substitute:

(7) The powers conferred by a medical power of attorney must be exercised—

(a) in accordance with any lawful directions contained in the medical power of attorney; and

(b) in the best interests of the grantor of the power of attorney.

(8) The grantor of a medical power of attorney may, by any form of representation that indicates an intention to withdraw or terminate the power, revoke the power of attorney.

(9) The grantor of a medical power of attorney may, on regaining capacity to make decisions about his or her medical treatment, vary or revoke any decision taken by the medical agent during the period of incapacity.

(10) A medical power of attorney is an enduring power of attorney and the provisions of the Powers of Attorney and Agency Act 1984 applicable to enduring powers of attorney apply to a medical power of attorney except to the extent of any inconsistency with this Act.

My amendment seeks to remove the present subclause (7), which provides that the powers conferred by a medical power of attorney must be exercised in accordance with any lawful directions contained in the medical power of attorney. I certainly intend to keep that provision but to extend it so that there is a positive responsibility upon the medical power of attorney also to act in the best interests of the grantor of the power of attorney. It is necessary to express clearly that obligation; otherwise, there is nothing in clause 7 which places some constraints upon the way in which the attorney will exercise his or her responsibilities.

It seems to me that, whilst there may be some clear directions from the person granting the power as to the way in which it will be exercised, it is unlikely always to be the case, and if there is just a general appointment we need to provide expressly for that positive obligation. That is the first part of the amendment, and it may be that you, Sir, will want to take each of these new subclauses separately. However, I will outline the other aspects of them.

In proposed subclause (8) which I want to insert, I want to ensure that the revocation, withdrawal or termination of a power of attorney can be done by any form of representation; otherwise, there is no formal recognition of the means by which the power may be withdrawn, terminated or revoked.

I have moved subclause (9) in a slightly amended form. Having lost my amendment to refer specifically in an earlier part of this clause to mental incapacity, I have removed the word 'mental' so that we will be providing, if this is carried, that the grantor may, on regaining capacity to make decisions about his or her medical treatment, vary or revoke any decision taken by the medical agent during the period of incapacity. Everyone may have taken for granted the fact that a person on regaining capacity has that power, but I would suggest that the only way effectively that could be done would be to formally revoke the power, and my provision ensures that a variation or revocation of a decision is recognised as being within the competence of the grantor of the power when he or she regains the necessary capacity.

Subclause (10) is inserted out of a desire to be particularly cautious and careful. We talk in this Bill about powers of attorney being equivalent to enduring powers, and it seems to me that there would be no harm in at least recognising them as such under the Powers of Attorney and Agency Act, which then adopts the body of law which relates to interpretation, application, and so on, relating to powers of attorney and enduring powers. There are obviously some modifications to the Powers of Attorney and Agency Act by other provisions of the Bill: whether the review, for example, is by the Supreme Court or the Guardianship Board or the option is for both. However, by making reference to the medical power becoming an enduring power pursuant to the provisions of the Powers of Attorney and Agency Act we pick up all the desirable features of that Act which have not been the subject of variation by this Bill.

That is the outline of what I seek to do with these amendments and, as I have said, I have moved them recognising that subclause (9) is in a slightly amended form, and it may be that the way in which we vote upon these allows each to be dealt with separately.

The Hon. J.C. IRWIN: Proposed subclause (8) provides:

The grantor of a medical power of attorney may, by any form of representation that indicates an intention to withdraw or terminate. . .

Is that compatible with subclause (10) relating to the Powers of Attorney and Agency Act 1984? In other words, is anything spelt out in the Power of Attorney and Agency Act that indicates that what is spelt out in subclause (8) can in fact be achieved, or is subclause (8) something new?

The Hon. K.T. GRIFFIN: Subclause (8) is new. I expressed concern at the second reading stage that there appeared not to be any recognition of any means by which the power of attorney might be revoked in the first instance, but more particularly if a person was incapable of making a decision what would happen if the person subsequently became capable of making a decision, revived, recovered, went into remission or whatever? Rather than formally revoking the power I sought to leave the power of attorney in tact but to allow variation in relation to subclause (9), and in relation to subclause (8) to recognise that, if the grantor, whether it is formally by deed or by letter or even by verbal communication, indicates an intention to withdraw the power that may occur.

Of course, the withdrawal is effective only if the grantor has the necessary capacity to do that. It cannot be done on the whim of the moment and subsequently be contested. If the person does not have the necessary capacity to revoke it, even verbally, an indication of an intention to revoke will not be effective.

In relation to subclause (10), enduring powers of attorney are dealt with under section 6, but the way in which they are made is not relevant, I suggest, because a scheme set out in the Bill before us indicates the way in which a power is granted. The Powers of Attorney and Agency Act refers to the general duty of a donee of an enduring power. Under section 7, the donee of an enduring power must, during any period of legal incapacity of the donor, exercise his powers as attorney with reasonable diligence to protect the interests of the donor, and if he fails to do so he should be liable to compensate the donor for loss occasioned by the failure.

That has greater significance in relation to those enduring powers that deal with property transactions, but to some extent it has relevance to what we are doing here. It may be that in the final analysis the Powers of Attorney and Agency Act does not add much to it, but it seemed to me that it was a useful fall-back to recognise such medical powers of attorney as formally being enduring powers of attorney under the Act.

The Hon. J.C. IRWIN: I presume that the representation is made to the grantor.

The Hon. K.T. Griffin: No, it can be made to the medical practitioner or to anyone.

The Hon. J.C. IRWIN: I think that should be spelt out. What is the simplest form of indication? Is it simply a verbal indication that the power should be withdrawn or should it be in writing? It seems a bit too wide. If we are talking about the representation being able to be made to the grantor as well as to the medical practitioner, it is not clear enough. To be a legal withdrawal of that consent, should it at the very least be in writing?

The Hon. K.T. GRIFFIN: The difficulty is that if one requires it to be in writing, as the Hon. Dr Pfitzner said earlier, there may be people who are not able to write. By law, even a verbal indication of an intention to withdraw a power of attorney is sufficient. If an agent is not aware of the withdrawal, the agent incurs no liability, but normally one can indicate an intention to withdraw verbally or by acts. It can be acted upon by those who are aware of it. If it is not drawn to the attention of the agent, as I have said, the agent incurs no liability for continuing to act even though it has been revoked. We must provide some mechanism by which revocation may occur.

In the context of this Bill, one must recognise that a person who is granted a power may not have the necessary physical ability to reduce that power to writing but may be able to give an indication of an intention to withdraw the power by some verbal or other intimation. If we do not have some recognition of the right to withdraw, we could have the intolerable position of the power having been granted years ago, or recently, but a major falling out between the person who is granting the power and the person who is acting as agent or attorney may have occurred.

It would be intolerable if there were no means by which a withdrawal or revocation could be indicated even in the terminal phase of a terminal illness where a person who is granted a power should have the right, if that person has the necessity capacity, to revoke it. To require that to be done in writing, whilst it may satisfy the formal niceties, may well place an unnecessary obligation upon the person who seeks to withdraw the power of attorney which he or she is granted.

The Hon. BARBARA WIESE: I will support one of the subclauses but not the other three of those that have been proposed by the Hon. Mr Griffin. I have no argument with the first part of the honourable member's proposed subclause (7), because that is already in the Bill, but I oppose the remainder of that amendment because it is not necessary. My objection to subclause (7) concerns proposed subclause (7)(b), which I suggest needs close examination. On the face of it, one might wonder how one could object to the exercise of powers of attorney in the best interests of the grantor of the power of attorney, but that is not the point.

As the Bill stands, the medical agent, in accepting the power of attorney, undertakes to exercise those powers in accordance with the principal's desires as far as they are known to the agent and, subject to that, in what the agent generally believes to be the principal's best interests. The amendment seeks to set up a situation for objective assessment of the patient's best interests. When read in conjunction with the later amendment that seeks to impose a supervisory jurisdiction of the Supreme Court, the honourable member is setting up a situation for interminable court battles and rulings on what is in the patient's best interests. That, I would suggest, goes to the very heart of what this Bill is all about and what the committee was on about, that is, patient autonomy.

We must remember that the appointment of a medical agent is not something that an individual will do lightly. This person will be someone who has the principal's trust. One of the things that strikes me as being rather horrifying about this debate, which has now being going on for nearly two days, is that the whole thrust of the objections, the questions asked about this legislation involving the powers of attorney, and so on, all seem to be based on the premise that somehow or other people will appoint their worst enemies to look after their interests.

That is clearly not what this is about. People will appoint those whom they trust to make decisions on their behalf, who they believe will understand and act according to their wishes. It seems to me that the arguments put do not accept, first, that a person has a right to have their wishes carried out and, secondly, that they have the ability to appoint someone whom they can trust and who is likely to act according to their wishes. So, that sums up the reasons why I will oppose subclause (7).

As to the question of a revocation of power of attorney, I certainly have no problem with that. Members will note that I will move an amendment which will make clear that there is that power to revoke, although the Bill as it stands allowed for that. But my amendment clarifies the point and has been suggested by the Minister following representations that he received on the matter. The Minister certainly favours the words in the amendment as he has drafted it, rather than the wording of the amendment as proposed by the Hon. Mr Griffin.

I will support proposed new subclause (9). Perhaps it states the obvious, but there is certainly no objection to that being incorporated. As to subclause (10), the Minister believes that the constraints and safeguards written into the Bill and my amendments are sufficient and does not see the need to refer specifically to the Powers of Attorney and Agency Act.

The Hon. M.J. ELLIOTT: Mr Griffin's amendment to subclause (7) provides:

The powers conferred by a medical power of attorney must be exercised—

(a) in accordance with any lawful directions contained in the medical power of attorney; and

(b) in the best interests of the grantor of the power of attorney.

If the grantor has given quite explicit instructions as to what is to happen in a particular circumstance, what significance does that bear if the person with the power of attorney feels that the explicit instructions are not in the best interests of the grantor?

The Hon. K.T. GRIFFIN: I do not see any problem with that at all. The Minister said, 'One would think that, the way everybody is approaching the Bill, a person appoints his or her worst enemy to undertake responsibilities,' and I interjected—but it did not get on the record because she did not respond—that it may be at the time of appointment that the grantor of the power did appoint his or her best friend to make decisions. But it could well be that, either within a short period or maybe over a longer period, they became sworn enemies, but the appointment was not varied. One has to try to prepare for all exigencies, because this law is to apply to the whole community. It is to apply not only to those whose best friends remain their best friends but also to others who may have ulterior motives or who have changed in their relationship or even their attitudes.

So, it is important that we focus not only on the lawful directions but also on the best interests of the grantor. The Hon. Mr Elliott asks, 'Well, what happens if the lawful directions are clear but they are not necessarily in the best interests of the grantor?' My view is that the best interests of the grantor should still be paramount, and it does not matter whether someone gives an instruction that certain directions—

The Hon. Barbara Wiese interjecting:

The Hon. K.T. GRIFFIN: Part of the problem is that the directions may have been given five years ago, in totally different circumstances. This is the whole problem with both the power of attorney and with the anticipatory direction: they are not required to be the subject of review and circumstances change. You must have some mechanism by which what is made five or even 10 years ago can be applied in the circumstances of the present.

The Hon. Barbara Wiese: The Guardianship Board is there to cover that.

The Hon. K.T. GRIFFIN: Now we want to introduce bureaucracy. Well, we will do that, anyway.

The Hon. C.J. Sumner: You were going to introduce the court.

The Hon. K.T. GRIFFIN: Yes, I know.

The Hon. C.J. Sumner: Well, that's bureaucratic.

The Hon. K.T. GRIFFIN: Yes, of course it is. It was a flippant observation. The Guardianship Board has to have some standards to apply. What will it apply? Under my proposition, it has to make a decision at least as to what is in the best interests of the patient. As I see what the Minister is providing in respect of the Guardianship Board, the board has no criteria by which it makes its decisions. The board reviews the decision, but what is the basis? That is a defect which needs to be addressed at the time we consider that. Unless you have at least some objective criteria, it seems to me that you will then have no solid basis upon which you judge the propriety of the decisions taken.

The Hon. C.J. Sumner: Is acceptance in the schedule not adequate?

The Hon. K.T. GRIFFIN: The schedule can be amended.

The Hon. C.J. Sumner: The Act can be amended.

The Hon. K.T. GRIFFIN: As I understand it, the schedule is there only for information and can be amended by regulation, but I do not think that is adequate.

The Hon. C.J. Sumner: If you really wanted to, you could put in the Act the provisions that are in the schedule relating to the principal's best interests.

The Hon. K.T. GRIFFIN: 'To be in the principal's best interests': you could do that. At least it would then import some standard.

The Hon. C.J. SUMNER: Assuming the schedule could not be amended by regulation, would what you have in the schedule not be adequate?

The Hon. K.T. GRIFFIN: That is an alternative. I understand what the Minister is saying about arguments and about what might objectively be in the best interests of the principal. That is at least better than nothing. The problem with that is that it still imports one person's sort of genuine belief, and even if you translate that into the body of the Act it seems to me that there are still no criteria upon which the decision will be reviewed. I may be wrong and I am happy to be persuaded to the contrary, but what is in the acceptance in schedule 1 is a subjective and not an objective assessment.

In extreme cases where there are major problems in the way in which powers are exercised, some standard needs to be applied, and what I am seeking to include is a standard which I think is the appropriate standard by which the actions of the medical agent can be properly judged.

The Hon. M.J. ELLIOTT: The answer given by the Hon. Mr Griffin is the very answer that I feared. I will not be supporting the amendment. The whole purpose of this part of the Bill is that a person can make someone their medical agent and give them instructions. What you are saying is that, having made a person an attorney, they can actually ignore all the instructions, and in so doing you have really cut at the very heart of the Bill. The question is: how can my will be carried out when I am not able to do so myself? I appoint someone else to carry it out on my behalf and give them instructions as to what I want them to do.

The way the honourable member has constructed this amendment it appears that, having done that, you are saying that this other person can then go and override—

The Hon. K.T. Griffin: Euthanasia is what you are after.

The Hon. M.J. ELLIOTT: Not at all. You are talking about people. I am not talking about euthanasia at all: that is what you are talking about and the thrust of all your amendments is concerned with that. You are not looking at this in a very logical way at all.

The Hon. K.T. Griffin interjecting:

The Hon. M.J. ELLIOTT: It is my judgment, I am sorry.

Members interjecting:

The Hon. M.J. ELLIOTT: It seems to me that if you had an amendment which said that in so far as it is consistent with lawful directions the person would act in the best interests of the grantor, it would mean that where there is some ambivalence in the instructions, for example, a person has left instructions which are open to interpretation, the person with the medical power of attorney would act in the best interests of the grantor within the instructions that are left. Where there is any ambivalence they move within that. To say they can move outside of instructions makes total nonsense of the schedule. Of course, I think the whole schedule and the whole concept is opposed by the Hon. Mr Griffin in any case.

The Hon. BERNICE PFITZNER: I want to refer the Hon. Mr Griffin to his clause 7(8) and what he thought of that

compared with the amendments that will be moved by the Government on revocation of medical power of attorney in (7)(a). Does he not think that (7)(a) spells it out a little clearer and in more detail than his subclause 7(8)?

The Hon. K.T. GRIFFIN: I concede that the Minister's amendment has some merit and that it is moving in the same direction that I want to go. However, the difficulty with it is that in my view it is too limiting, because the revocation may be by giving written or oral notice to the medical agent or, if it is not reasonably practical to give notice to the agent, by giving written or oral notice of revocation to a medical practitioner responsible for the grantor's treatment. It may be, for example, that the medical agent is not around at the time. Someone may be wheeled into the hospital and may be accompanied by a medical practitioner who is not responsible for the grantor's treatment. It may be the person's accountant or some other person. The grantor may say, 'I know I have given authority to X to make decisions for me. I do not really want that any longer, so will you make sure that it is not acted upon?'

I should have thought that in those circumstances, where you have reliable, independent witnesses to that revocation, that should be sufficient, and that is what my amendment is seeking to allow. Perhaps you may not have it as stringently controlled as some may like, while nevertheless recognising that the intention to withdraw may be expressed in a variety of ways and may be established to individuals who are not necessarily the agent or the medical practitioner responsible for the grantor's treatment. That is the limiting aspect of the Minister's amendments that causes me concern.

The Hon. C.J. SUMNER: I guess my approach to what the Hon. Mr Griffin is doing is coloured by my attitude to the previous debate and the previous amendment, and the fact that the previous amendment was passed means that I am not as concerned with the Bill as it is introduced by the Government. Therefore, I am not so compelled to accept what the Hon. Mr Griffin says. I do not think we have actually resolved that previous debate, so I would like to leave my position on this somewhat open, given that the whole Bill at some point will be recommitted.

If the previous problems I put are resolved, then many other things fall into place for me, and I can then accept the basic philosophical thrust of this Bill, which is that the autonomy of the patient can be transferred to the person who is that patient's attorney. That is the philosophy of the Bill, and it was very strongly expressed in the House of Assembly and in the Bill as it was introduced. Those such as the Hon. Mr Griffin, who are opposed to that transference of autonomy, are presumably saying that it ought not to be a free transference because, at the time the attorney exercises the powers, the person who granted the powers is incompetent, in a situation of diminished capacity and, therefore, some objective element should be put into the equation.

I think that probably there is a majority of Parliament and the Council perhaps against the position of the Hon. Mr Griffin but in favour of the autonomy argument; that is, that a person should be able to transfer their autonomy about how they want to be dealt with in medical terms to someone else. Provided that my problem is fixed up on the previous clause, I can accept that.

So, I guess that the position I want to take on this a preliminary position and I would like to indicate it. On the face of it, one would say there is nothing wrong in the medical power of attorney exercising the powers in the best interests of the grantor of the power, and one would expect that to be the case. That has been objected to on the basis that it introduces an objective standard that could then be contested in court and so on and therefore undermines the concept of autonomy, which is at the basis of the Bill.

So, the formulation in the schedule, which provides that the person receiving the power undertakes to exercise the powers conferred honestly and in accordance with the principal's desires as far as they are known to the attorney and, subject to that, in what that person genuinely believes to be in the principal's best interests, seems to me to overcome most of the problems that the Hon. Mr Griffin might have. Perhaps it does not go as far as he would want it to go, but that probably solves the problems.

Certainly, as far as I am concerned, given the basic premise of the legislation, that is a reasonable statement of the position as it should be as far as the medical agent is concerned. Now, if the Committee is concerned that that can be changed by regulation then we could import those principles into the Bill in place of what the Hon. Mr Griffin wants to put in, and that is an option that the Committee could consider. If the schedule could not be changed by regulation then I would not be so worried, because I do not think the legal effect would be all that much different if it came to a dispute.

The other issue I wanted to raise on this point is that I understand that the Hon. Mr Griffin has an amendment subsequently in which he creates a criminal offence. The criminal offence that he wants to create is in terms of the wording in the acceptance of the power of attorney in the schedule not the words that he wants to put in by way of this amendment. In other words, what he is saying in his foreshadowed amendment is that in creating the criminal offence a medical agent who exercises powers conferred by a medical power of attorney must act honestly and in what the agent genuinely believes to be the best interests of the grantor of the power. That picks up the words in the schedule, but in fact is different from the wording that he seeks to put in by the amendment currently before us, where he says that the medical power of attorney must be exercised in the best interests of the grantor of the power of attorney. I think that perhaps that is an issue where there is some inconsistency in the honourable member's approach.

However, for my part, I think that if proposed clause 7b picked up the words in the schedule then that would be satisfactory, although I am happy for them to be left in the schedule provided the schedule cannot be amended by regulation. As to the other amendment moved by the Hon. Mr Griffin, I am quite happy with what he has moved on his new subclause (8) and I do not think there is all that much difference between his proposal and the Minister's. However, I am happy to support his amendment on that and it seems that subclause (9) is not in dispute. I am less inclined to make the provisions of the Powers of Attorney and Agency Act applicable in these circumstances unless I can be persuaded to the contrary.

The Hon. K.T. GRIFFIN:I will address the issue of the apparent inconsistency between the amendment to clause 8, which creates the criminal offence, and what I am proposing here as the way in which the powers must be exercised. I do not see that there is an inconsistency. I acknowledge that on the face of it there appears to be. However, I do not see any reason why one cannot provide an objective standard by which the powers must be exercised.

However, when it comes to the criminal sanction, in my view, one cannot punish an agent for acting in a way which

the agent genuinely believed was in the best interests of the grantor, even though objectively they may not have been in the best interests. I can acknowledge in respect of the criminal law, where we have a penal sanction, that to require compliance with the objective standard without having regard to the state of mind of the defendant would impose an unreasonable obligation and place the medical attorney at an unreasonable level of risk. I would argue that we can have the two expressing different standards.

The whole difficulty with the Bill is this question of whether the agent is acting as an extension of the grantor of the power or is acting as an agent in a sense independently but nevertheless in accordance with extensions. In my view the agent should not be an extension of the grantor, should not be acting as though he or she were the grantor of the power, because in those circumstances one allows a much wider latitude than if one recognises what the facts are; that is, that the agent is a separate person acting in fact as an agent endeavouring to carry out the wishes of the grantor in a changing environment.

As I said, it may be only a short time since the agent was appointed or it may be a longer period of time, but one has to recognise that circumstances change. In my view, one cannot allow a person who is appointed as an agent merely to act as though he or she were that grantor. But we do have to have some objective standards imposed by which a community would expect such a person should generally act.

It may be that in the end, if my amendment is defeated when the Bill is recommitted, that at least the provision in the acceptance should be included in the Bill as being something better than nothing. So far as the schedule is concerned, the medical power of attorney under clause 7 must be in a form prescribed by schedule 1, or in a form to similar effect. There is no guarantee that what is ultimately granted is necessarily in the precise form of the schedule, so it may be that something does have to be brought back into the Bill in any event.

The Hon. R.I. LUCAS: I was going to suggest a course of action. We seem to be bogging down just a little in this area. I can understand the debate that is going on. The course of action the Attorney suggested had, at least on the surface, some attraction. As I understand it, from the advice provided to me, currently the schedule cannot be amended by regulation, but the Minister has an amendment on file to allow it to be amended by regulation, and the reason was that the Minister said last night that the Minister, Mr Evans, was keen to tidy up the forms of the schedule, etc.

The Hon. Barbara Wiese: That was the advance directive.

The Hon. R.I. LUCAS: Yes. I recall that under the Electoral Act the various forms are amended by way of regulation, etc., rather than having to amend the Act. I wonder whether or not we ought not proceed to a vote on this particular matter at this stage, whichever way it goes, and the question that the Attorney has raised can be an issue that is tested at the recommittal stage. But at this stage we do not have an amendment along the lines that the Attorney, off the top of his head, was suggesting for us to consider. Certainly, as I said, I thought it was worthwhile considering—

The Hon. C.J. Sumner: One has been distributed in my name.

The Hon. R.I. LUCAS: That is on the issue you raised before. As I understand it, the Attorney raised the further prospect of an amendment where he picked up the words from the schedule and put them into the Act. Now, that is a relatively simple amendment, but we do not have it before us at the moment. I am wondering whether or not it would not be sensible for the Committee to proceed to some sort of a vote on this issue now, irrespective of which way it goes, and we can have a look at the Attorney's potential amendment at the recommittal stage and have another go at it then. Rather than going around and around at this stage, let us have a vote on it.

The Hon. C.J. Sumner: Hear, hear!

The Hon. R.R. ROBERTS: I started out being fairly clear on this, then I became interested in what the Hon. Mr Griffin said, and at that stage the Hon. Mr Elliott decided to enter the debate and confuse me, but now we have had the entree by the Attorney-General which has left me thoroughly confused. If we are talking about giving a power of attorney to someone else, I just make the point that when an agent is appointed he could be appointed in good faith and could have great affection for the person for whom he acts as agent, but we could have a situation where that person is in distress or has a suicidal tendency. Suicide used to be a criminal offence, although I do not know how you actually penalise someone who has committed suicide. Suicide is not generally condoned within our society, and I am a bit confused. If we say succinctly that if a person transfers their wish totally, without there being any bounds within which he must act (which we in society would call within the bounds of propriety), we then get into the area of voluntary euthanasia or suicide by proxy.

It was said in one of the earlier contributions that we are stating the obvious. So, if we take that to its conclusion, I would suggest that for the agent to act in the best interests of the guarantor is probably obvious also. I actually think that every citizen in society, whether someone wishes it or not, has to comply with the rules and the standards of the society within which they live.

At this stage I would be prepared to support the amendment as proposed by the Hon. Mr Griffin on the basis, as outlined by the Hon. Mr Lucas, that at this stage we need to make some decision, otherwise we could be here for another half an hour, because we are recommitting a lot of these decisions and, if I am persuaded by the Attorney-General's course of action, we could fix it up then.

The Hon. M.J. ELLIOTT: The debate has run this far, so, while there may be a re-vote, we may as well still try to clarify the issues while we are thinking about them rather than leaving them half discussed and trying to pick them up again later on. It appears to me that a number of protections have already been put in the legislation—I am addressing this to the Hon. Mr Roberts—in relation to clause 6(b)(i) and (ii), and now there has been a further amendment from the Hon. Mr Feleppa, paragraph (iii), which puts in a series of provisions.

The Hon. K.T. Griffin: They are not protections; they are limitations.

The Hon. M.J. ELLIOTT: They are protections, in so far as he is worried about people assisting suicide. The fact is you cannot get somebody else to plunge a knife or anything else into you. You are only allowed to do particular things. There are some bounds, there are some protections, and these are a form of protection.

The Attorney-General is also suggesting that there will be a further protection again by way of an amendment that he has already distributed. The Hon. Mr Roberts needs to realise that the proposed subclause (7)(b) effectively undermines the intent which was contained in the original subclause (7). Mr Griffin knows that. It says that a person cannot pass on what

their wishes are, because in effect (7)(b) says that their wishes can be denied.

We are not talking about people suiciding. The people who are wanting this legislation are people who foresee the day when they will be in the terminal phase of a terminal illness. This is their particular concern. There may be some need for further amendment, but this is why people are wanting to leave medical powers of attorney. At the end of the day they do not want to have tubes running in and out of them and have all sorts of fistulas and whatever else inserted into their bodies simply keeping the body alive but doing nothing more than that. That is not an unreasonable wish for people to have, but there is a real chance that those sorts of wishes can be denied. There are already some protections and the Attorney-General is offering one further.

The Hon. BARBARA WIESE: I would like to make two points that I hope will allay the fears expressed by the Hon. Ron Roberts. First, both the Bill and the first part of the amendment as proposed by the Hon. Mr Griffin require that the powers conferred by a medical power of attorney must be exercised in accordance with any lawful directions contained in the medical power of attorney, so that, in the first place, the individual who is appointing an agent can only appoint them to undertake lawful actions.

Secondly, should you have a circumstance as outlined by the honourable member where some sort of suicide pact or something exists between the grantor and the agent under my proposed amendment, giving effect to the Guardianship Board as an authority to review decisions, you will find that, for example, if the medical practitioner or someone who is involved in this process believes that a decision being taken by the agent has the effect of exposing the patient to risk of death or to exacerbate the risk of death, that is something that will not be allowed under these provisions.

The Guardianship Board would review that situation and indicate that the grantor was at risk of death as a result of this decision being taken by the agent, and it therefore would not happen. So, there are those protections in addition to those which have already been outlined by the Hon. Mr Elliott.

The Hon. CAROLINE SCHAEFER: Division 2 of Part 2 of this Bill deals with medical powers of attorney, about which we have talked *ad infinitum*. We have discussed the rights of the grantor of the powers as well as the legal implications to the medical profession. We have not discussed or taken into account the position in which the medical agent may be placed. The medical agent may well be 2 rung medical agent, No. 1 medical agent having died, been fallen out with or being overseas. It may well be someone who has discussed in only the most general terms the wishes of the grantor of those powers, which may have been passed on some 10 or 15 years previously. All of us are probably adult children, and I would not wish to be placed in the position of having almost ultimate power over someone who may or may not be in the terminal phase of a terminal illness.

The Hon. Barbara Wiese interjecting:

The Hon. CAROLINE SCHAEFER: I might have agreed 10 years ago when I was somewhat more silly than I am now, if that is possible. However, having looked at this matter from a more mature aspect, I may well not know the wishes of that person. It therefore seems to me that some direction within this Act would then be a most gratifying thing. It would be very nice to know from within this Act what are and are not my powers as a medical agent, and this is the only section in this Bill which gives any directive to the medical agent. That is something that should be considered. When we are discussing it we should also continue to consider that the medical agent is a medical agent at all times when that person is unable to express their wishes: it is not merely in the terminal phase of a terminal illness.

The Hon. BERNICE PFITZNER: I want to clarify and give an overview of this Bill as well, because to me it seems so clear. We are so worried about the conduct of these people. We were worried about the conduct of the medical practitioner, and in the Bill we have the checks and balances that the medical practitioner must perform to proper professional standards. If we are worried about the medical agent, the schedule provides that the medical agent must undertake and exercise powers conferred honestly and in accordance with the principal's desire, and in the principal's best interests.

If, as the Hon. Mr Griffin says, the schedule is not powerful enough, why do we not move the whole jolly thing into the Bill? Again we are worried that the agent, having been appointed five years ago, may not act in the best interests. Then we have the check of the Guardianship Board, which acts when the medical practitioner is unhappy with the agent or when a person with a close personal relationship to the patient or the patient's family are unhappy with him or her and complains to the Guardianship Board. That is another check and balance there. There seem to be many checks and balances, and I cannot see how we can feel that this agent might be so evil as to want to end the patient's life for evil purposes.

Members interjecting:

The Hon. T. CROTHERS: I wish I could say the same about some of you. I have listened very patiently to the debate and have not sought to enter into it. I want to take up a point that was raised by the Hon. Ms Pfitzner about checks and balances. My experience going through life has been that the more one tries to amend anything the deeper the trough one gets into. We can look around the corner, we can look for curve balls, and so on, but we are never really going to know how effective or otherwise the Bill is in whatever form it ultimately passes here until it is given some practical effect. That is a historical fact of life. Someone said that perhaps something might have happened to the first guarantor. Can I dare suggest that the first, second, third or fourth guarantor may well die before we pass this Bill.

If we really are serious—and I think that we are all serious about the Bill and about getting something on the ground that will work—and we are breaking some new ground with this Bill, and there may be other experiences in other countries or other States perhaps; I do not know—and about the fact that we might make mistakes, and it is a pretty serious matter, the only way we will pass the Bill without really amending it to such an extent that we amend it out of all proportion to what was intended by the select committee is to put a sunset clause in the Bill and have a look at what happens over three years of implementation of the Bill.

The Hon. Mr Griffin might laugh. It might mean less work for the members of his profession, I do not know. How dare I suggest that. I recall the trade union movement on one occasion moving amendment after amendment to the Workers Compensation Act, which finished up in a mess. Quite frankly, that is the way are going with this Bill.

Members interjecting:

The Hon. T. CROTHERS: I suggest that, with all the amendments being shovelled at us, in five or six months time there might be an automatic sunset clause in the Bill. However, my view is that we will amend the Bill out of all meaningful existence with respect to the way—

The Hon. L.H. Davis interjecting:

The Hon. T. CROTHERS: That is the second time you have thought this year, Mr Davis; you are becoming quite a worry. That is my view. As I said, it is the first time I have spoken to this Bill. Even when I have been absent in other buildings I have been listening very patiently to what has been said, but I think we are getting nowhere fast.

The Committee divided on subclause (7):

AYES (12)

Crothers, T.	Elliott, M. J.
Feleppa, M. S.	Laidlaw, D. V.
Levy, J. A. W.	Pfitzner, B. S. L.
Pickles, C. A.	Roberts, R. R.
Roberts, T. G.	Sumner, C. J.
Weatherill, G.	Wiese, B. J. (teller)

NOES (8)

Burdett, J. C.	Davis, L. H.
Dunn, H. P. K.	Griffin, K .T. (teller)
Irwin, J. C.	Lucas, R. I.
Schaefer, C. V.	Stefani, J. F.

Majority of 4 for the Ayes.

Subclause (7) thus carried.

The Committee divided on subclause (8):

AYES (12)

Burdett, J. C.	Crothers, T.
Davis, L. H.	Dunn, H. P. K.
Elliott, M. J.	Feleppa, M. S.
Griffin, K .T. (teller)	Irwin, J. C.
Lucas, R. I.	Schaefer, C. V.
Stefani, J. F.	Sumner, C. J.

NOES (8)

Laidlaw, D. V.	Levy, J. A. W.
Pfitzner, B. S. L.	Pickles, C. A.
Roberts, R. R.	Roberts, T. G.
Weatherill, G.	Wiese, B. J.

Majority of 4 for the Ayes.

Subclause (8) thus carried.

Subclause (9) inserted; subclause (10) negatived; clause as amended passed.

New clause 7A—'Medical power of attorney to be produced.'

The Hon. K.T. GRIFFIN: I move:

After clause 7, insert new clause as follows—

7A. (1) A medical agent is not entitled to exercise a power under a medical power of attorney unless the agent produces a copy of the medical power of attorney for inspection by the medical practitioner responsible for the treatment of the grantor of the power.

(2) A medical agent will not be regarded as available to make a decision about the medical treatment of the grantor of the medical power of attorney unless the medical practitioner responsible for the treatment of the grantor is aware of the appointment and the agent produces a copy of the medical power of attorney for inspection by the medical practitioner on request by the medical practitioner.

I am seeking in this new clause to provide for the production of a copy of the medical power of attorney for inspection by the medical practitioner responsible for the treatment of the grantor of the power and, unless it is produced, then the medical agent is not entitled to exercise the power, and in subclause (2) to provide that a medical agent is not available to make a decision unless the medical practitioner responsible for the treatment of the grantor is aware of the appointment and the agent produces a copy of the medical power of attorney for inspection on request by the medical practitioner.

There needs to be a framework within which proof of the appointment and authority of the medical agent can be established. It may well be that the medical agent is not known to the medical practitioner. One would ordinarily expect that the power of attorney would be produced to the medical practitioner, and the medical practitioner would insist on its production. But something specific is necessary to put that issue beyond doubt and to provide the framework within which the grant is recognised.

It may be that, when one talks about a register later, this will need some modification if a power of attorney is registered and the medical practitioner has been given access to the register. We are talking about something which presently is hypothetical but which may be the subject of further discussion later in the debate.

The Hon. BARBARA WIESE: I support this amendment, I must say, with some trepidation because I hope that in practice this requirement will not frustrate the wishes of a patient in difficult circumstances.

New clause inserted.

New clause 7B—'Review of medical agent's decision.'

The Hon. BARBARA WIESE: I move:

After clause 7, insert new clause as follows:

7B. (1) The Guardianship Board may, on the application of—

(a) the medical practitioner responsible for the treatment of a person (the 'patient') for whom a decision is made by a medical agent; or

(b) a person with a close personal relationship to the patient or the patient's family,

review the decision of a medical agent.

(2) The Guardianship Board may not review a decision by a medical agent to discontinue treatment if—

(a) the patient is in the terminal phase of a terminal illness; and

(b) the effect of the treatment would be merely to prolong life in a moribund state without any real prospect of recovery.

(3) The purpose of the review is to ensure as far as possible that the medical agent's decision is in accord with what the patient would have wished, if the patient had been able to express his or her wishes, and, subject to subsection (4), it will be presumed that the decision is in accord with those wishes unless the contrary is established on the review.

(4) The presumption referred to in subsection (4) does not operate if—

(a) the patient is not in the terminal phase of a terminal illness; and

(b) the effect of the medical agent's decision would be to expose the patient to risk of death or to exacerbate the risk of death.

(5) The Guardianship Board may cancel, vary or reverse the decision of the medical agent and give any consequential directions that may be necessary or desirable in the circumstances of the case.

(6) The Guardianship Board must conduct a review under this section as expeditiously as possible.B.

(7) No appeal lies from the decision of the Guardianship Board under this section.

This amendment establishes the Guardianship Board as the agency to review the medical agent's decision in certain circumstances. A medical practitioner responsible for the treatment of a patient for whom a decision is made by a medical agent or a person with a close personal relationship to the patient or the patient's family may apply to the Guardianship Board for a review of the decision of the agent to ensure that the decision is in accord with what the patient would have wished. The board, which must conduct the review expeditiously, can cancel, vary or reverse the decision and give consequential directions. The amendment thus inserts a safeguard against what one would hope would be infrequent abuses of power by the medical agent, be they capricious, malicious or whatever.

There is no appeal from a decision of the board. It should be noted that the Guardianship Board has no jurisdiction to review a decision by a medical agent to discontinue treatment if, first, the patient is in the terminal phase of a terminal illness and, secondly, the effect of the treatment would be to

prolong life in a moribund state without any real prospect of recovery.

This amendment picks up a concern which was expressed by members of the Committee and probably some people outside the parliamentary process who felt that it was inappropriate that there should not be some sort of mechanism for review of decisions of an agent. This makes that provision. The Guardianship Board is a well established, well respected organisation in which we can have faith, and it does not have the drawback that the proposal that may be put forward by the Hon. Mr Griffin could have, that is, to introduce the courts into a situation such as this to provide some mechanism for review. Therefore, those of us who wish to ensure that the wishes of a grantor should be given proper credence but nevertheless that there ought to be some protection should there be an abuse of power are concerned that the mechanism for review should not create additional problems.

I believe that by introducing the Guardianship Board we are providing the mechanism. We have an organisation that people have some faith in and can trust, and we will not have the problems that sometimes emerge in the courts whereby long delays and lengthy legal arguments will take over and possibly overcome the wishes of the person in the first place. I commend the amendment to the Committee.

The Hon. R.I. LUCAS: I indicate that either now or in the very near future an amendment to the Minister's amendment will be put forward in my name. There will be general debate about whether it is the Guardianship Board or the Supreme Court: if the decision is to go down the path of the Guardianship Board I want to raise an issue that I referred to briefly last night or earlier this afternoon in relation to the appeal provisions. As I understand it, on the advice given to me, the appeal provisions that the Minister is moving under the Guardianship Board are such that when you move into the terminal phase of a terminal illness there is no appeal to the Guardianship Board.

An honourable member interjecting:

The Hon. R.I. LUCAS: There is no appeal and therefore there is no protection against abuse. In relation to the circumstance that I raised last night and again this afternoon, if we talk about a person who is in a comatose state—we have debated this particular example on a number of occasions—clearly that person could be defined as a person in a terminal phase of a terminal illness. We have also had one member indicate that medical opinion in relation to a particular example was that that person was in a moribund state without any real prospect of recovery. Under the Minister's construction of this package of amendments on the Guardianship Board, there would be no appeal at all if someone wanted to take action as a medical agent to end that person's life.

If someone strongly disagreed and wanted to appeal—because they feared abuse for whatever reason or they might have inherited something or they wanted to be vindictive; whatever the argument—in that situation the Minister's amendment does not allow an appeal. As the Hon. Mr Elliott indicated this afternoon—I think he agrees with the proposition—there are examples that I and others have given where the terminal phase of a terminal illness, the definition that this Committee and the proposers of the Bill insisted on in the definition clause, can be an extended period. In the case that I have talked about people have been known to be comatose for up to two years and then come out of that coma and lead productive lives.

The terminal phase of a terminal illness, moribund with no real prospect of recovery, could be two years and may even be longer. For all that period, under the Minister's package of amendments there would be no appeal provision against possible abuse. All I am having put on the table at the moment is a proposition that has been drafted for me by Parliamentary Counsel, in effect—and this is the way it has been suggested—to try to bring back this particular non-appeal provision period to a much shorter period; certainly not this extended period called 'the terminal phase of a terminal illness' which might, in some cases, be a couple of years.

There needs to be something a bit shorter, and the suggestion here is that the patient's death is imminent. We all agreed last night that the argument against the change in definition was that this was too restrictive; it was a short period. It might be hours; it might be days; but it is certainly not going to be years or months. It is a much shorter period which is, in effect, the appeal free zone, and for all that other part of the terminal phase of the terminal illness period appeal provisions would still be available under the Minister's package of amendments.

I just want to put it on the file at this stage and at least explain it, because I know that the Committee has to decide between a package of amendments in relation to the Guardianship Board and a package of amendments in relation to the Supreme Court. If the decision of the Committee is to take the Guardianship Board option, I would urge the Committee to look at my further amendment to the Minister's package.

The Hon. C.J. SUMNER: I wonder whether we are in a situation where we cannot resolve this particular provision at the present stage of the debate, because proposed section 7(b)(2) says:

> The Guardianship Board may not review a decision by a medical agent to discontinue treatment if the patient is in the terminal phase of a terminal illness and the effect of the treatment would be merely to prolong life in a moribund state without any real prospect of recovery.

Again, this comes back to the debate which I raised earlier and which I have said is central to the consideration of the Bill. I have placed on file an amendment that deals with the powers of the medical agent and indicates that the medical power of attorney cannot authorise the agent to refuse medical treatment that would have the effect of preserving the life of the patient unless the effect of the treatment would be merely to prolong life in a moribund state without any real prospect of recovery.

When we recommit the clause, if it is considered that we need to restrict the scope of legislation in the way that I indicated previously, namely, that we are talking about someone who is dying, in a terminal phase of a terminal illness or in a moribund state without any real prospect of recovery, and if under this provision the Guardianship Board cannot review any of those circumstances, then this provision in its present form does not have any work to do.

The Hon. K.T. Griffin: It is redundant.

The Hon. C.J. SUMNER: It is redundant, as the Hon. Mr Griffin points out, or may be redundant; I need to think about it a bit more. It seems to me that we are in a position where we still need to get back and resolve that fundamental issue, which we have not resolved, and then the debate about whether there should be some supervisory role in the Guardianship Board or the Supreme Court can be considered. As the provision is drafted at the present time, it presupposes something that is not yet settled in the Bill. It might be that

this is an issue that needs to be revisited once we have gone back to look at the powers of the medical agent. Perhaps the only real debate that we could have at the present time is whether or not, if there is to be a supervisory role, it should be heard in the Supreme Court or the Guardianship Board.

However, if I understand the Hon. Mr Lucas's proposition correctly, he would take out the restriction on review, which is in the Minister's amendment, and if he did that there would still be the capacity to review even if we put into the legislation the restrictions on the medical power of attorney that I foreshadowed earlier. If we pass it in the form in which the Minister has proposed it and then go ahead and introduce the amendment that I foreshadowed, then I think that the clause as introduced by the Minister would not be satisfactory. As I said, it would not have any work to do.

The Hon. J.C. BURDETT: I believe that there must be some sort of appeal provision. If we look at the Bill as it stands at the moment it may very well be—and I think usually will be—that the medical agent will be someone who may benefit from the death of the patient.

It will probably be a partner or a child or someone of that nature, and that is perfectly proper. In most cases the power will be well exercised, I am sure. But there may be some cases where the medical agent may be moved to pursue their own benefit, which may be advanced by the death of the patient. There is not much in the Bill as it stands against this. There is clause 7(4) about the appointment of a medical power of attorney in the case of a professional or administrative capacity directly or indirectly responsible for or involved in the medical care or treatment of the person by whom the medical power of attorney is to be given, but that is very limited. Clause 8—penalty for fraud, undue influence—relates only to the execution of a medical power of attorney, not anything that may arise thereafter.

Therefore, I believe that there must be a right of appeal and I do not think that the Guardianship Board or the Supreme Court, as the case may be, or both will be unduly bogged down with appeals, because when one looks at it, it will be in only a fairly small number of cases that there will be anyone who will raise the matter. At this stage, there is the question of the Hon. Mr Griffin's amendment in relation to the Supreme Court and there is this one, which is also adverted to in the Hon. Mr Lucas' amendment in relation to the Guardianship Board. It may well be that the two could run in parallel because they are not the same. However, in my view, there has to be some sort of appeal and I might well be disposed to vote against the Bill at the third reading if some satisfactory form of appeal is not there.

In regard to the Minister's amendment, the difficulty I have is the one that has been addressed by the Hon. Mr Lucas; that is, that the terminal phase of a terminal illness might go on for some time and there should be some right of appeal within that period, which is addressed by the suggestion as to when death is imminent. I indicate at this stage that, as far as I am concerned, some right of appeal is essential and I will certainly be most interested to see how the debate progresses to achieve that.

The Hon. K.T. GRIFFIN: As the Hon. John Burdett has said, it is quite conceivable that both my provision and that of the Minister can be incorporated in the Bill. There will probably be some argument against that though, and we can deal with that as the debate progresses. Like the Hon. John Burdett, I believe it is essential to have a right of review. I also believe that it is important for the right to be more than a right to review. That is why I have opted for the Supreme Court as the appropriate body to exercise a supervisory responsibility. That undoubtedly will be met by an argument about costs and complexity and so on, but that need not be the case. The court is used to dealing with a whole range of urgent applications, particularly under the Aged and Infirm Persons Property Act, where these sorts of issues are addressed head on.

Of course, what this Supreme Court jurisdiction will allow is not just a review of the decision to ensure that the decision is in accord with what the patient would have wished but also the validity of the power, in a sense an advisory opinion from the court by someone who may need to have some clarification of the directions that are given in the medical power of attorney, and to deal with a range of perhaps unforeseen issues, even to the point of ordering that life support systems be switched off. So, the Supreme Court is a much more flexible jurisdiction and also has the capacity to make a wider range of enforceable orders in those circumstances where there may be some controversy about the validity of the power, the exercise of the power and the concept of the power.

The Minister's amendment limits quite severely the power of the Guardianship Board, and of course it is not subject to any form of review, so it becomes unaccountable in theory as well as in practice. However, the Guardianship Board may not review a decision by a medical agent at the very end—at the terminal phase of a terminal illness—even in circumstances of imminent death. I think there is the need to have the whole range of a period subject to review. It may be that there is some issue that arises when it is assessed that death is imminent, where under the Minister's amendment the Guardianship Board will not have jurisdiction—it will not be permitted to undertake the review.

It is all very well to say that this is designed to prevent abuse, but one period during which abuse is a possibility is not subject to review. Then, the Guardianship Board does not have the power to address issues of validity of the power or even to address that thorny question that we raised earlier in the debate about a sequential appointment of agents or attorneys and when someone is available or not available. Under my proposition, all of those things are within the jurisdiction of the Supreme Court. It is my submission to the Committee that that will not be cumbersome and costly; it can be expeditious and it is a much more appropriate forum for reviewing these important decisions than I would suggest is the Guardianship Board, as proposed by the Minister.

The Hon. M.J. ELLIOTT: I support the Minister's amendment in relation to (7)(b) in so far as I believe it is the Guardianship Board to which I want appeals to be made and not the court system. That was my view when last we debated this legislation in the previous session. In fact, at that stage I had an amendment on file with which I did not proceed at this time. I am not so fussed about the terminal phase of a terminal illness; I am not sure that that is necessary. In fact, I rather suspect that appeals could go in either direction. If we are talking about complying with the clear wishes of a patient, one may from time to time in fact have a person who is clearly acting against the wishes of a patient and there may be a person who may wish to appeal against that. It would be difficult to establish in many ways in that it is presumed that the decision is in accord with those wishes unless the contrary is established.

So it has to be a very clear violation of the grantor's wishes, whichever direction the appeal might be coming from. They could equally come from people who are

concerned about it being done one way as against the other. At this stage, if we want to move on quickly, we are probably going to vote on the broad principle with some tuning to be done later on. So, I indicate that at this stage I am supporting the Minister's amendment. I do not see any difficulties in the concept of a terminal phase of a terminal illness here being removed, because I see it as a two-edged sword, anyway.

The Hon. K.T. Griffin: Are you suggesting all divisions are reviewable? Is that the point you are making?

The Hon. M.J. ELLIOTT: I am essentially saying that clause 7B(3) and (4) largely cover my concerns. You could leave out (2), and it would still cover most of my concerns.

I had raised another matter in my amendment and it might be worth just keeping in mind because none of the amendments so far treat it, and that is the question as to what happens where an agent has been appointed but have themselves become incompetent. This could particularly happen if an ageing couple may have appointed each other as agents. One of them has had a stroke and the other one, since the filling out of the documentation, has suffered from Parkinson's disease or some form of dementia, but is still designated agent and is not really in a position to make a competent decision.

I felt that perhaps there could be potential for some form of challenge there to the Guardianship Board, although to some extent I suppose it is covered in so far as that could be picked up if they are trying to make decisions which are against the express wishes, but it is a matter which perhaps also needs some further examination, but none of the amendments before us at this stage tackle that question.

The Hon. K.T. Griffin: Mine does.

The Hon. M.J. ELLIOTT: Yes, but you do not do it with the Guardianship Board.

The Hon. CAROLINE SCHAEFER: I have an amendment to the Minister's proposed amendment. I support the Minister's proposed amendment for the Guardianship Board to be able to review the decision of a medical agent under the requirements of (a) and (b). My only amendment is to change the word 'may' to 'must'. So it would read:

> The Guardianship Board must, on application of—
> (a) the medical practitioner responsible for the treatment of a person (the 'patient') for whom a decision is made by a medical agent; or
> (b) a person with a close personal relationship to the patient or the patient's family,
> review the decision of a medical agent.

There seems to me very little point in having a right of appeal if it is then up to the Guardianship Board as to whether it may or may not conduct that review. So I am really only asking for the alteration of that one word in that clause.

The Hon. BERNICE PFITZNER: I want to make a brief comment. First, having the two review bodies together is a bit of an overkill and I think we should choose one or the other. Having listened to the debates over the last two days, I realise that there is a difference of interpretation from a legal background to a medical background and, therefore, I feel that the Guardianship Board might be more appropriate because it is more used to dealing with medical conditions, as it usually handles mentally disabled people. However, I am constantly reminded that, although the medical point is important, the legal officers have the final say. So, I would prefer the Guardianship Board as opposed to the Supreme Court.

As far as subclause (2) is concerned, which states that 'the Guardianship Board may not review', I am not quite sure what the Attorney-General was explaining. To my mind, those phrases are quite clear and they are used constantly throughout this Bill. So, if we are to redebate those phrases, it is quite a basic point to look at again, but my understanding of subclause (2) is that where a patient is in this final phase of illness or is in this moribund state, then the board does not review the decision of the medical agent. I am not quite sure what the Attorney-General was referring to, and at some later stage I would like further clarification.

The Hon. R.I. LUCAS: I wanted to seek clarification from the Attorney, too, in relation to the point that I understood him to make. I understood the point he was making was that if his amendment that he has flagged gets up in relation to clause 7, then maybe 7B(2) has nothing to do and therefore could be deleted.

The Hon. C.J. Sumner: It has nothing to do.

The Hon. R.I. LUCAS: The whole clause, not just subclause (2).

The Hon. C.J. Sumner: If you take out subclause (2), there is something for it to do.

The Hon. R.I. LUCAS: I am still not clear about the point the Attorney is making. The amendment that he has flagged for clause 7, if he is referring to his suggested subclause (6)(a), seems to be saying that a medical power of attorney or a medical agent could refuse medical treatment in the circumstance where it would be merely to prolong life in a moribund state without any real prospect of recovery. Is that a fair description?

The Hon. C.J. Sumner interjecting:

The Hon. R.I. LUCAS: The Attorney, in that amendment that he is flagging, is saying that a medical agent, in the circumstances of a person who was in a moribund state without any real prospect of recovery, could refuse medical treatment. It also does other things as well, but that is what the Attorney is arguing.

The Minister's amendment, 7B(2), talks about the Guardianship Board not being able to review a decision by a medical agent to discontinue treatment if 'the patient is in the terminal phase of a terminal illness' and 'the effect of the treatment would be merely to prolong life in a moribund state without any real prospect of recovery.' That seems to be saying that in the circumstances what the Attorney says could still apply, if his amendment operated; that is, a medical agent could discontinue treatment or withdraw treatment when it was really only just prolonging life in a moribund state without any real prospect of recovery. Then the Minister is saying, even with the Attorney's amendment, that there should be no review of that particular decision.

The Hon. C.J. Sumner interjecting:

The Hon. K.T. Griffin: The Minister's amendment to 7B limits the area of review, and you cannot review a decision at the end of the day when the person is dying.

The Hon. R.I. LUCAS: This is the distinction. I still do not understand that exactly. In relation to the example that I used earlier, where someone is in a comatose state for two years, for example, for that whole period of two years under the definitions in the Bill that patient is in the terminal phase of a terminal illness. My understanding is that, under the Minister's amendment, even with the Attorney's amendment if it were to be successful, for that whole two year period there would be no appeal.

The Hon. C.J. SUMNER: That is what the Minister's amendment says.

The Hon. R.I. LUCAS: Yes, but even if your amendment was successful I do not see how it changes that situation. I

understand your amendment, and I am not arguing against it. The Attorney's amendment provides that a medical agent can withdraw treatment for a comatose patient at any stage when he or she is moribund with no real prospect of recovery. Being moribund with no real prospect of recovery and the terminal phase of a terminal illness for someone who is comatose could extend for two years. A person could be comatose with all the medical specialists saying that he or she was moribund with no real prospect of recovery for the whole period of two years, and he or she could also be in the terminal phase of a terminal illness.

Nevertheless, it is possible for the family or a medical agent under the arrangement we are talking about to keep going with nasogastric drips and a whole range of other life support systems during that whole period of two years. With the Minister's amendment, even if the Attorney's amendment was carried, I still see two separate decisions to be taken. I do not see that the success of the Attorney's amendment will mean that we should not still debate this issue that I have raised by way of my amendment to the Minister's amendment. Even if the Attorney's and the Minister's amendments are carried, this comatose patient could be in a moribund state with no real prospect of recovery and in a terminal phase of a terminal illness for potentially two years. With the Minister's amendment, no appeal provisions are provided for a situation where, at any time during that period, the medical agent says, 'I am going to pull the plug.' Someone else in the family could say, 'No, I do not want that to be the case because I suspect abuse; the person is going to benefit from the death of the patient, and I have another specialist who has been flown in from Melbourne and who says that many a comatose patient after six months has come out of it and lived a productive life.'

I would have thought that sort of issue ought to be appealable to the Guardianship Board. It is the very essence of having an appeal right. By way of my small amendment, I seek to limit this appeal-free period in the Minister's amendment back to a very small section that says 'when death is imminent'. That is not a two-year period we are talking about: it may be hours, days or weeks, depending on how the Guardianship Board or the Supreme Court establishes precedence in relation to this particular matter.

The Hon. K.T. GRIFFIN: I go further than you and say that all of it ought to be the subject of review.

The Hon. R.I. LUCAS: I understand the Hon. Mr Griffin's argument, and there is also another argument that the Hon. Mr Elliott might have been suggesting, namely, that, if we delete subclause (2) of the Minister's amendment completely, it would mean that everything was reviewable to the Guardianship Board. That is another option.

There seems to be a head of steam directed towards the Minister's amendment in relation to an appeal to the Guardianship Board, but if we leave in subclause (2), which limits appeals in certain periods, we need to consider my amendment. I do not believe that the Attorney's amendment, even if it is successful—and I am attracted to it at least on the surface—means that we should not be considering the issue that I have raised this evening.

The Hon. BERNICE PFITZNER: Is it the Attorney-General's intention in removing subclause (2) to open it right out so that a review of the decision of the medical agent would be on all kinds of patients, including those suffering from a terminal illness, those who are in a moribund state, and so on?

The Hon. C.J. SUMNER: I was not really expressing an intention about what I wanted to do. I do not think the Minister's amendment is in an appropriate form if we come back to my proposition in clause 7, which effectively narrows the scope of the Act to the situation of a person in a moribund state without any real prospect of recovery. If we narrow the scope of the Bill to that, which is what I always thought it was about, anyhow, and we leave in the clause which says that the Guardianship Board may not review a situation or circumstances where we are dealing with the prolonging of life in a moribund state without any real prospect of recovery, all we are saying is that the Guardianship Board cannot review the principal scope of the legislation.

If it cannot review that, the Guardianship Board has nothing to do, and that is my argument. If you narrow the scope of the legislation to deal with the issue of prolonging or not prolonging life in a moribund state without any real prospect of recovery, and if that is the scope of the Bill, and the Guardianship Board under this clause cannot review that, there is no reason to have clause 7B(2) in the Bill. If you delete clause 7B(2) it gives the Guardianship Board the capacity at large to review the central issue with which we are concerned in relation to the legislation, which is the question of the non-prolongation of life where someone is in a moribund state without any real prospect of recovery. Do people understand the point or not?

Members interjecting:

The Hon. C.J. SUMNER: The Hon. Mr Griffin does. He has understood it for ages. I do not know why you do not leave it to us as you usually do.

The Hon. BERNICE PFITZNER: Maybe it is because legal minds think alike.

The Hon. C.J. Sumner: It is not that difficult. It is not actually a legal point.

The Hon. BERNICE PFITZNER: We have discussed two kinds of patients, but there are other kinds of patients that the Guardianship Board may review, such as those with an emergency medical condition when there is severe head injury, and the patient is not in a terminal phase of a terminal illness and not in a moribund state without any real prospect of recovery. There are other categories of patients, such as those people with Alzheimer's disease and other kinds of incurable conditions. You are thinking along the lines that there are only two kinds of patients, but there are other categories of patients about whom the medical agent may have to make a decision.

For example, the Hon. Mr Irwin's son was a patient who would not fall into these two categories. So, there is a wider group of patients who could fall into the categories mentioned in clause 7B(1). Clause 7B(2) deals with the other two kinds of patients in relation to whom there is a certainty or prospect of death. Those are the two categories of patients that are being removed from the review because they believe that the medical agent has been given the instruction specifically that, if the patient is in these two conditions, the medical agent has been told that artificial resuscitation is not on.

The Hon. K.T. GRIFFIN: What the Hon. Dr Pfitzner has said highlights the issue regarding clause 7. If a medical agent is only to make decisions about a person in the terminal phase of a terminal illness, that is, in the context of dying, as the Hon. Dr Pfitzner has indicated, perhaps decisions that a medical agent makes become irrelevant, because that will not be covered by the Bill unless they relate to dying. I agree with that. Whatever the scope of the Bill and whichever body undertakes the review function, it is my view that that body

ought to have the capacity to review across the range rather than be limited to a particular period.

I still prefer to have the Supreme Court because of its wider jurisdiction, which I think it needs to have. Whilst at the beginning I suggested that the two might live comfortably together, I think we are at the point of making a decision about one or the other. I sense that the Guardianship Board is somewhat in front, but I would like to think that the Supreme Court, with its inherent jurisdiction to deal with issues such as this, might be more seriously considered.

The Hon. C.J. SUMNER: I do not quite understand the point that the Hon. Dr Pfitzner made. I thought that the purpose of this Bill—and this goes back to the intervention I made earlier in the debate—was to deal with people who were incapable of making a decision for whatever reason. For example, they might have Alzheimer's disease, they might be comatose or unconscious, etc., incapable of making a decision. I thought that this legislation provided for their being in that condition and in the process of dying; in other words, that they are in an irretrievable process, which I thought was described in the legislation as a moribund state without any real prospect of recovery.

If that is the central point of the legislation, I am trying to envisage the circumstances that the Guardianship Board would have to review if the legislation were confined to that situation. That is the point that I do not understand from the Hon. Dr Pfitzner's contribution.

The Hon. BERNICE PFITZNER: There are two categories of patients. There are those patients who are covered by division 2: the dying who need palliative care and patients who are riddled with cancer and who are in the terminal phase of a terminal illness. There is another category of patients who are covered by division 4, 'Emergency medical treatment': patients who have a car accident, a head injury, Alzheimer's disease and so on. We are not quite sure whether they are in the terminal phase of a terminal illness or whether they are in a moribund state. So, there are two categories. The category in subclause (2) which relates to division 2, the care of the dying and palliative care, and the other category is in subclause (1), which relates to emergency medical treatment.

The Hon. M.J. ELLIOTT: The Attorney-General asked what the Guardianship Board would have to do. I think there is one job that it can carry out, and that is a determination as to whether or not an agent is acting according to the wishes of the person who is granting the power of attorney (the grantor). That is what proposed new clauses 7B(3) and (4) are all about. That is the one ground of appeal that I entertained when I had amendments drafted in the last session. If they are clearly acting contrary to the wishes of the grantor, who will make that determination? I thought the Guardianship Board was the appropriate body to do so.

Another role that the Guardianship Board could play is one that is not within proposed new clause 7B, but I think someone needs to make the determination as to whether or not the agent is competent to make decisions. For instance, after being made an agent, the agent may suffer some mental infirmity which no longer makes them competent. Who will make the decision? The doctor alone cannot say, 'I don't think this person is competent any longer.' The doctor may be concerned about it and may make an approach to the Guardianship Board, but how else could such a determination be made? I think there are two roles that the Guardianship Board could carry out.

The Hon. BARBARA WIESE: I would like to come back to this point about what this Bill is covering. This Bill is not just about death and dying or about replacing the Natural Death Act; it also incorporates the provisions of the consent to medical and dental treatment legislation. So, we are dealing with people in a range of circumstances. We are certainly dealing with people who may be in the terminal phase of a terminal illness. The majority of the debate on this Bill in the Council thus far has revolved around circumstances involving people in such a condition.

But this Bill goes beyond that: it also deals with the question of consent and decision-making with respect to medical treatment for people in other circumstances where they are unable to make their own decisions. So, the point raised by the Hon. Dr Pfitzner is relevant. It may be that someone who has Alzheimer's disease is no longer capable of making their own decisions about a range of medical treatments that do not necessarily have to do with the last phase of their life.

So, they have appointed an agent who can make decisions on their behalf. They may be a long way from death and nowhere near the terminal phase of their life, but they are not capable of making their own decisions about medical treatment, and they have appointed an agent to do that for them. This Bill deals with those circumstances as well. It would be wrong for us to try to restrict the scope of the Bill to relate only to death and dying, because the issues here are broader.

The Hon. R.I. LUCAS: I am not sure what the Attorney was suggesting in relation to trying to resolve this matter. If the option is that we support the Minister's amendments with the deletion of subclause (2), at least at this stage,it will in effect mean that the Guardianship Board can review any decision of a medical agent, and that covers, as the Minister said, a person who has Alzheimer's disease who is not in the terminal phase of a terminal illness but who nevertheless has a medical agent making decisions for him or her. Those decisions can be reviewed. The decisions I understand the Hon. Mr Elliott wants reviewed would be reviewed.

The Hon. M.J. Elliott interjecting:

The Hon. R.I. LUCAS: Yes; exactly. I am trying to make the point that, in the example I gave of a patient who was comatose for two years, those sorts of decisions ought to be reviewable as well. I sought to do it through one mechanism, which was to restrict the appeal-free period that the Minister has under subclause (2) to a very small region. Another way of doing that, which is being floated at the moment, is to get rid of subclause (2) completely. It just means that all decisions of medical agents are reviewable by the Guardianship Board. That has some simplistic logic to it.

It seems to be the option that the Attorney and the Hon. Mr Elliott were suggesting—I do not want to put words in anyone's mouth—and it is an option that we can consider. It would be useful if we could come to some resolution as to what decisions we intend to take at this stage. Of course, we must recommit the Bill and consider the amendment that the Attorney flagged on clause 7. If there is any flow-through effect, then we can consider it again at the recommittal stage.

The Hon. M.J. ELLIOTT: At this stage we should be striking out 7B(2). In relation to subclauses (3) and (4), any decision would be difficult to overturn unless you could really prove beyond any reasonable doubt that the grantor's wishes were not being complied with. Overturning most decisions would be difficult unless the grantor's wishes were not being clearly complied with.

The Hon. BARBARA WIESE: I agree with the Hon. Mr Lucas that it is time we made a decision on this matter, but I disagree with what he is suggesting. I want to state, first, that the Minister of Health, Family and Community Services feels very strongly about what provisions should be provided for review. He and members of the select committee started from the point that they felt there should be no right of review at all, and they had that view after they had heard evidence from all parties over a four-year period. They emerged from that select committee with a very strong view that in the past, even with the Natural Death Act, the wishes of some patients have not been respected, even though they may have signed a document under the terms of the Natural Death Act.

So, their starting position was to design a Bill which provided protection for people who wanted someone to act on their behalf when they were incapable of acting, and that person would be someone who would make the sorts of decisions that they would otherwise make for themselves if they were capable of doing it. So, they felt very strongly about preserving the rights of that individual to have someone acting for them in accordance with their wishes. That is why they started with the view that there should be no right of appeal, that someone else should not be allowed to come in and try to frustrate their wishes.

The select committee has moved to this position of accepting the arguments that have now been put by others that there may be grounds on which it is legitimate that there should be a review of decisions. Something may go wrong in some circumstances, so the decision being made by an agent is not appropriate and there should be a right of review.

Clause 7B(2) was included to protect the situation of a terminal phase of a terminal illness, and the matter relating to the effect of the treatment would merely prolong life in a moribund state is to cover that period during which most people who raise this issue and want these protections are talking about.

They are talking about the last part of their life generally when they are afraid that their wishes will not be carried out. The Minister wants to quarantine that area and say, 'When a person is close to death, we will not allow a review because it may be at the time when the most distress is being caused through treatments that they did not want (or whatever it might be), and their wishes, particularly at that time, should be respected.' I am quite sure that the Minister would strongly oppose any move to remove clause 7B(2).

The second point is essentially procedural. Until such time as the Committee considers the Attorney-General's proposed amendment, I think it would be inappropriate to remove clause 7B(2) to be consistent with it. We do not have that yet; we have not carried that amendment. Therefore, my argument is that we should preserve clause 7B as it stands at this time. If, on recommittal of various clauses, we were to change the fundamental issue to which the Attorney-General was referring and it followed that perhaps clause 7B(2) was no longer required, we should take action at that time, not before. Otherwise, we shall end up with a real dog's breakfast heading off in one direction in this clause and in a different direction in another. We should try to maintain some consistency as we go through the Bill. Therefore, I would argue very strongly that we should keep this amendment intact at this time. If there is a need to change it later, we will do that.

The Hon. K.T. GRIFFIN: There is no problem with deleting subclause (2) now. That would bring into focus the issue as to whether the Guardianship Board should have a limited or extended power of review. My view is that it ought to be an extended power of review. The more I hear about clause 7B, the more I am persuaded that the wider scope of my amendment is to be preferred. Why should decisions made by a medical agent in the last stages of a person's life not be subject to review if there is a suggestion of abuse or even misinterpretation of the directions? It may be that the medical power of attorney was granted two, three or five years ago and the instructions are not as clear as they are required to be in the circumstances in which the grantor ultimately finds himself or herself. In those circumstances, who will help to clarify the intention of the power of attorney? Somebody has to do that. The Guardianship Board is not given the power to do that. It has the power only to review a decision, and I am talking about matters which are not decisions.

I will not support the Minister's amendment. I will move and support my own amendment, because I think that it gives a wider range of remedies in a variety of circumstances, none of which can be foreseen in legislation which is meant to deal with a whole range of diverse interests, circumstances and events over what may be a long period.

I think it is desirable to have in place appropriate mechanisms to address those issues. Even though I do not support the Minister's amendment, I want to move an amendment to the Minister's amendment, and that is to delete subclause (2), because no-one has formally done that. That then gives the Committee an opportunity to consider the issue of whether the full range of life should be under review or whether some parts of it ought to be excluded. I think that will bring it into focus.

The Hon. R.I. LUCAS: I am not sure how this is going to be voted on and I will be interested to see what the procedure is, but at this stage I will support, if it comes first, the attempt by the Hon. Mr Griffin to delete subclause (2) of the Minister's amendment, but I will flag that, if that is unsuccessful and if I can then move my amendment, I will do so. If I cannot do it now I will do it when we recommit. I want to make my position clear. I will support the Minister's amendments and I will support the Hon. Mr Griffin's deletion of subclause (2) to the Minister's amendment. I will not be supporting the Hon. Mr Griffin's amendments as they relate to the Supreme Court.

However, if the Hon. Mr Griffin's amendment to delete subclause (2) is unsuccessful I give notice that at this stage, if I can, I will move my amendment to subclause (2)—which I have not yet formally moved—and if I cannot do it now I will do it when we recommit.

The Hon. Caroline Schaefer's amendment negatived; new clause 7B(1) inserted.

The Committee divided on new clause 7B(2):

AYES (10)

Crothers, T.	Feleppa, M. S.
Laidlaw, D. V.	Levy, J. A. W.
Pfitzner, B. S. L.	Pickles, C. A.
Roberts, R. R.	Roberts, T. G.
Weatherill, G.	Wiese, B. J. (teller)

NOES (10)

Burdett, J. C.	Davis, L. H.
Dunn, H. P. K.	Elliott, M. J.
Griffin, K .T. (teller)	Irwin, J. C.
Lucas, R. I.	Schaefer, C. V.
Stefani, J. F.	Sumner, C. J.

The CHAIRMAN: There being an equality of votes, I cast my vote for the 'Ayes'.

New clause 7B(2) thus inserted.

New clauses 7B (3), (4), (5), (6) and (7) inserted.

[Sitting suspended from 10.30 to 10.52 p.m.]

Clause 8—'Penalty for fraud, undue influence, etc.'

The Hon. BARBARA WIESE: I move:

Page 4, after line 4—Insert subclause as follows:

(1A) A person who purports to act as a medical agent under a medical power of attorney knowing that the power of attorney has been revoked is guilty of an offence.

Penalty: Imprisonment for 10 years.

This amendment creates an offence where a person purports to act as a medical agent, knowing that the power of attorney has been revoked, and provides for a penality of imprisonment for 10 years should a person be found guilty of such an offence.

The Hon. K.T. GRIFFIN: I move:

Page 4, after line 4—Insert subclause as follows:

(1A) A medical agent who exercises powers conferred by a medical power of attorney must act honestly and in what the agent genuinely believes to be the best interests of the grantor of the power.

Penalty: Imprisonment for 10 years.

I am happy to indicate support for the Minister's amendment and I hope she will equally support mine, because they are not in competition with each other; they deal with separate issues. My amendment seeks to provide that a medical agent must act honestly and in what the agent genuinely believes to be the best interests of the grantor of the power. It seems to me that that is an appropriate standard to set for a person who is exercising responsibilities on what might be regarded as life and death issues. I think it is appropriate that that be reinforced by the creation of an offence.

The Hon. BARBARA WIESE: I oppose the amendment. When a person accepts appointment as a medical agent, they sign an undertaking to act in what they genuinely believe to be the best interests of the grantor of the power. To seek to lay the agent's decision open to challenge in this way, such that a criminal sanction may apply, is considered to be unacceptable.

The Hon. K.T. GRIFFIN: What is an undertaking if you cannot enforce it? I do not think that the amendment creates a problem: it just means that people who are appointed as agents have to act honestly and in what the agent genuinely believes to be the best interests of the grantor of the power. The Attorney-General and I did debate the issue of the standard and I indicated then that I thought that this standard was essentially a subjective standard and was appropriate in the circumstances.

The Hon. M.J. Elliott: How do you test it?

The Hon. K.T. GRIFFIN: By the facts.

The Hon. M.J. Elliott: How do you test a genuine belief?

The Hon. K.T. GRIFFIN: You do all the time. A person has to act honestly. It may be that there are not many prosecutions, if any, but at least the standard is set. If you do not have a sanction for failure to meet the standard, it is pointless having the standard.

The Hon. BERNICE PFITZNER: I support the amendment. We have been arguing about the principal's best interests not actually being covered by the Bill and the schedule, and this is an attempt to move the best interests of the grantor of the power into the Bill. Although I did not envisage such a powerful amendment, with penalties, I still support it.

The Hon. Barbara Wiese's amendment carried.

The Committee divided on the Hon. K.T. Griffin's amendment:

AYES (10)

Burdett, J. C.	Davis, L. H.
Dunn, H. P. K.	Griffin, K .T. (teller)
Irwin, J. C.	Laidlaw, D. V.
Lucas, R. I.	Pfitzner, B. S. L.
Schaefer, C. V.	Stefani, J. F.

NOES (10)

Crothers, T.	Elliott, M. J.
Feleppa, M. S.	Levy, J. A. W.
Pickles, C. A.	Roberts, R. R.
Roberts, T. G.	Sumner, C. J.
Weatherill, G.	Wiese, B. J. (teller)

The CHAIRMAN: There are 10 Ayes and 10 Noes. I cast my vote for the Noes.

Amendment thus negatived.

The Hon. M.S. FELEPPA: I move:

Page 4, line 7—Leave out 'execute' and insert 'grant'.

The phrases 'execute a medical power of attorney' and 'execute a power of attorney' are a little ambiguous, in my view, in their meaning. This provision seems to have been included primarily to counter abuse of a medical power of attorney where interest in a relevant estate is concerned. I take it that the relevant estate would be that of the patient for whom the medical agent would act and, if by dishonesty or undue influence a third person tried to induce the medical agent to execute the medical power of attorney, that third person would be guilty of an offence, as under subclause (1).

According to subclause (2), if that person is convicted or found guilty, they forfeit an interest in the estate of the medical agent, but the medical agent may be a friend or relative whose estate is not in question in relation to that third person. Forfeiture, therefore, may not be forfeiture at all. The forfeiture should be a forfeiture in relation to the estate of the patient and not that of the medical agent.

So, it is not a question as to whether the patient has been properly induced to grant the power of attorney. Proper inducement is by the person convicted or found guilty, exercised by the one holding the power of attorney. As suggested by parliamentary counsel when we first introduced this Bill, replacing the word 'execute' with the word 'grant' will eliminate that ambiguity to which I referred.

The Hon. BARBARA WIESE: I indicate support for the amendment.

The Hon. M.J. ELLIOTT: I think I understand what the Hon. Mr Feleppa is trying to achieve, but I am not quite sure that his amendment does it. I would have thought they should forfeit interest in the estate of the grantor. What we should be saying is 'the person might otherwise have had in the estate of the grantor'. It is not a matter of a person being improperly induced to grant the power of attorney. The problem is that somebody has wrongly executed the power of attorney, but the estate is not that person's estate but the estate of the grantor, I would have thought. I think I understand what the Hon. Mr Feleppa is trying to achieve, and I support it, but I do not think his amendment actually does what he has set out to do. It is getting terribly late at night. I still feel that, if I understood the intent of what the Hon. Mr Feleppa was doing, the amendment does not achieve the end.

It seems to me that what we do not want to happen is where a person has improperly induced the agent to execute the power of attorney—

Members interjecting:

The Hon. M.J. ELLIOTT: If a person induces the agent to execute the power of attorney in an improper fashion that person should have no right to any part of the estate of the grantor. I still do not believe that this amendment achieves that end.

The Hon. K.T. Griffin: You are talking about an agent being persuaded to accept the grant.

The Hon. M.J. ELLIOTT: Let us take a hypothetical situation. There has been some paranoia amongst some people that somebody—

The Hon. K.T. Griffin: It is not paranoia: it is reasonable concern.

The Hon. M.J. ELLIOTT: Okay. There has been some concern that somebody may bump somebody else off for an improper motive. Let us take the situation where there is a parent—

The Hon. K.T. Griffin interjecting:

The Hon. M.J. ELLIOTT: Okay. Let us say there is a parent with two children, one of whom has been made the agent. The second child puts pressure on the agent to hasten the death of the parent. In that circumstance you would not only want, as you would in 8(1), the person who induced the agent to improperly execute the medical power of attorney to be guilty of an offence and face imprisonment, but also that person should not be in a position to receive any part of the estate of the grantor. This clause does not tackle that problem as it presently stands, nor does it tackle the problem if it is amended.

The Hon. K.T. GRIFFIN: Even with the amendment of the word 'execute' to the word 'grant' I would suggest that it does not address the issue. I would have thought that the word 'execute' is preferable because at least it ensures consistency with the offence created by subclause (1) which provides:

> A person who, by dishonesty or undue influence, induces another to execute a medical power of attorney is guilty of an offence.

It may be that the words 'execute' and 'grant' have the same meaning, but to avoid any debate about that I would have thought you would leave the word 'execute' in subclause (2). I remind the Committee that, if the majority had decided to pass my amendment, it would have overcome that problem because my amendment was to create an offence whereby a medical agent who exercises powers conferred by a medical power of attorney must act honestly and in what the agent genuinely believes to be the best interests of the grantor, and a person convicted or found guilty of an offence against the section would have forfeited an interest.

The Hon. M.J. Elliott: That is the agent, but you still have a third party and I thought this was about third parties who may have an interest in the estate.

The Hon. K.T. GRIFFIN: Fair enough. I think you need something more than just changing the word 'execute' to 'grant'.

The Hon. M.J. ELLIOTT: I said I believe the word 'execute' should stay there. That was the point I was making, but having left the word 'execute' in the Bill I still do not think it achieves the objective which I think that it had, because if you leave the word 'execute' there you are then referring to the estate of the agent and not to the estate—

Members interjecting:

The Hon. M.J. ELLIOTT: I believe it has.

The Hon. M.S. FELEPPA: The wording of both subclauses could mean to either execute a medical power of attorney or an act under the medical power of attorney, the act being executed by a medical agent.

Alternatively, it could mean to execute an act under the medical power of Attorney, the act being executed by a medical agent. If it means to execute an act under the medical power of attorney, the forfeiture in subclause (2) in my view would not necessarily be effective. So, if it means, as I think it does, to execute an instrument called a medical power of Attorney, then the person guilty of dishonesty who unduly influences to grant the medical power of Attorney may have an interest in the estate of the prospective patient and therefore suffer necessarily forfeiture of that interest. I am not saying that this action as it stands is not legally accurate, but as I said at the beginning it is a little ambiguous.

The Hon. K.T. GRIFFIN: I acknowledge that my clause, which was defeated, would have addressed at least part of the problem though, because it would have meant that the medical agent who exercised powers and who did not act honestly would have been caught by the provision. And, of course, creating the offence would have been an active disincentive to impose any undue influence or inducement on the person who was granting it.

It seems to me that if members want to ensure that anybody who has been a part of the inducement, whether it is to have a person execute a power of attorney or to exercise the grant in a way which is beneficial to the person who has been bringing pressure to bear, then I think you need to redraft the provision. That is what the Hon. Mr Elliott is saying. But changing the word 'execute' to 'grant', in response to the Hon. Mr Feleppa, does not, in my view, deal with that issue.

The Hon. BARBARA WIESE: As I understand this clause, the point being raised by the Hon. Mr Elliott is correct: that it may well catch a dishonest third party who induces an agent to act inappropriately, but it does not catch the dishonest agent who has acted in such a way. So, this may well be a clause that requires further amendment.

I recommend that we agree to the Hon. Mr Feleppa's amendment and look at this clause again at a different time of the day and, if we can agree on whom we are trying to catch within a clause that relates to a penalty for fraud and undue influence, we can move a new amendment when we recommit the various clauses of the Bill.

The Hon. M.J. ELLIOTT: It appears to me—and I have not heard anyone say to the contrary—that we would want to pick up both the agent and any other third party who may induce the agent to act improperly so that either can face a penalty of imprisonment and certainly have no entitlement to the estate.

The Hon. R.R. Roberts interjecting:

The Hon. M.J. ELLIOTT: Neither the agent, if they behave improperly, nor anyone who induces them to behave improperly should be entitled to any part of the estate, and they should both face imprisonment.

The Committee divided on the amendment:

AYES (9)

Crothers, T.	Feleppa, M. S. (teller)
Levy, J. A. W.	Pickles, C. A.
Roberts, R. R.	Roberts, T. G.
Sumner, C. J.	Weatherill, G.
Wiese, B. J.	

NOES (11)

Burdett, J. C.	Davis, L. H.
Dunn, H. P. K.	Elliott, M. J.
Griffin, K .T. (teller)	Irwin, J. C.

NOES (cont)

Laidlaw, D. V.	Lucas, R. I.
Pfitzner, B. S. L.	Schaefer, C. V.
Stefani, J. F.	

Majority of 2 for the Noes.

Amendment thus negatived; clause passed.

New clause 8A—'Right to make anticipatory refusal of extraordinary measures.'

The Hon. BERNICE PFITZNER: I move:

Page 4, after line 8—Insert new clause as follows:

8A. (1) A person over 16 years of age may, while of sound mind, sign a direction under this section that he or she is not to be subjected to extraordinary measures if the effect of taking or continuing the measures would be merely to prolong life, in the terminal phase of a terminal illness, without any real prospect of recovery.

(2) A direction under this section—

(a) must be in the form prescribed by Schedule 1A or in a form to similar effect; and

(b) must be witnessed by an authorised witness who completes a certificate in the form or to the effect of the certificate in Schedule 1A.

(3) If—

(a) a person by whom a direction under this section is signed becomes incapable of making decisions about his or her medical treatment; and

(b) there is no reason to suppose that the person had revoked, or intended to revoke, the direction,

effect must be given to the direction.

This matter is known as anticipatory refusal of extraordinary measures. It is an advance directive and is slightly different from that which was passed by the Minister in schedule 1A. In my previous amendment I spoke of my concern about an advance directive being made possibly five years down the track. That advance directive was known as an anticipatory grant or refusal of consent to medical treatment. I was concerned that that was too complicated and that schedule 1A would have had too complex a directive to follow.

Schedule 1A would have set out the kinds of medical treatments that the person does or does not want. I gave an example of the kinds of medical treatments that might have been used, as in the Canadian personal health care directive, which involved a chart displaying life threatening illnesses and which also indicated whether to make a palliative, limited, surgical or intensive decision. My amendment is simple and concise, and I urge the Committee to support it.

The Hon. BARBARA WIESE: I oppose this amendment. In fact, I would argue that we have already debated and resolved this issue with the passing of my amendment to clause 6A. At the time that we had that debate, reference was also made to the provisions contained in the Hon. Dr Pfitzner's amendment. A choice between those two concepts was made by members. One thing that is missing from the Hon. Dr Pfitzner's proposal is a reference to 'vegetative state' that is likely to be permanent, which is included in my amendment. In my mind, that is one of the matters that makes the Hon. Dr Pfitzner's amendment unacceptable. But, apart from that, we have already had this debate and resolved it, as I understand it.

The Hon. R.I. LUCAS: It was a long time ago, but I agree with the Minister in that I thought we did debate both clauses 8A and 6A. I think I supported the Hon. Dr Pfitzner but, as with a number of other votes, unsuccessfully on that occasion. My recollection was that in the debate on clause 6A we basically came down to the two options for these anticipatory refusals. We had the debate, and I think I supported the Hon. Dr Pfitzner; I think that was my intention. The Minister's amendment was carried; therefore, I am inclined to agree with the Minister that we have really had this debate. The view that prevailed at the time was for clause 6A rather than clause 8A.

The Hon. BARBARA WIESE: There is one other thing I should like to point out for the record. At the time the vote was taken on new clause 6A, a change was made to the age of consent. We agreed at that time that this issue would be recommitted, but recommitted only on the age of consent.

The Hon. BERNICE PFITZNER: I do not agree with the Minister, although I understand her line of thinking. I think that this anticipatory refusal is an extra option that can be used by someone who wants an anticipatory directive. The Minister says that the term 'vegetative' is not there. It is a difficult term, which is not even placed in the interpretations or the definitions. I understand the Minister's argument, but I feel that it is an extra option for someone to use.

The Hon. K.T. GRIFFIN: I am sorry that I missed the early part of the discussion on this amendment, but I understand the tenor of what the Hon. Robert Lucas was proposing. I take the view that it is possible for this to coexist with clause 6A, which was inserted. Clause 8A provides a very succinct proposition: that a person, in the circumstances which are clearly outlined, is not to be subjected to extraordinary measures. 'Extraordinary measures' are defined in the Bill. It is not a question of interpreting instructions; it is a very simple proposition. Clause 6A, which we inserted, deals with directions. The direction is to be in the form of schedule 1A, which specifies:

> The person by whom the direction is given must include here a statement of his or her wishes. The statement should clearly set out the kinds of medical treatment that the person wants, or the kinds of medical treatment that the person does not want, or both. If the consent, or refusal of consent, is to operate only in certain circumstances, or on certain conditions, the statement should define those circumstances or conditions.

Whilst I acknowledge that the Minister has proposed that the schedules may need to be revised, and there will be consultation about that, I am attracted to the simple proposition which is included in clause 8A. There is no requirement to phrase directions in such a way that they might be the subject of later interpretation by a medical practitioner or agent or even the Guardianship Board ultimately. I support the principle which is set out in the clause. There may have to be some tidying up of the wording later if it gets through, but I think there can be a comfortable coexistence.

The Hon. BARBARA WIESE: There cannot be a comfortable coexistence because they are not compatible. This amendment is more restrictive than the one that I moved. We have had this debate and it has been resolved. This is really going on too long.

The Hon. K.T. GRIFFIN: If people want to choose clause 8A, why should they not be allowed to do so instead of going through the complicated rigmarole that the Minister is proposing? It is an alternative. Why not make it available? We are talking about free choice, but the Minister says that it is restrictive and we should not let people make a choice. That is absolute nonsense.

The Hon. Barbara Wiese: We had the debate; that is my point, and how many times are we going to debate these issues?

The CHAIRMAN: Order!

The Hon. K.T. GRIFFIN: We did not have the debate on the merits of 8A as opposed to 6A.

The Hon. Barbara Wiese: We did.

The Hon. K.T. GRIFFIN: We did not.

The Hon. Barbara Wiese: Other members think we did.

The CHAIRMAN: Order!

The Hon. K.T. GRIFFIN: I have been here all the time, thank you very much.

The CHAIRMAN: Order! Members will address the Chair, not each other.

The Hon. K.T. GRIFFIN: Mr Chairman, I think the Minister is suffering from stress.

The Hon. Barbara Wiese interjecting:

The CHAIRMAN: Order!

The Hon. K.T. GRIFFIN: The Minister is getting personal with me and—

Members interjecting:

The CHAIRMAN: Members will address the Chair.

Members interjecting:

The Hon. K.T. GRIFFIN: I am putting a simple proposition: I am entitled to put it. I am entitled to support any amendment that I wish and I am entitled to put the reasons. If the Minister does not like it she can rationally and reasonably respond instead of starting to get quite stroppy about it and suggesting that it is inconsistent. She can do that but let it be in a pleasant way. The whole debate has been conducted in a more reasonable fashion than the Minister seems to be embarking on.

The Committee divided on the new clause:

AYES (7)

Davis, L. H.	Dunn, H. P. K.
Griffin, K .T.	Irwin, J. C.
Pfitzner, B. S. L. (teller)	Pickles, C. A.
Stefani, J. F.	

NOES (12)

Burdett, J. C.	Crothers, T.
Elliott, M. J.	Feleppa, M. S.
Laidlaw, D. V.	Levy, J. A. W.
Lucas, R. I.	Roberts, R. R.
Roberts, T. G.	Sumner, C. J.
Weatherill, G.	Wiese, B. J. (teller)

Majority of 5 for the Noes.

New clause thus negatived.

Clause 9—'Medical treatment of children.'

The Hon. K.T. GRIFFIN: I move:

Substitute the following new clause for clause 9—

9(1) Subject to this Act, a medical practitioner must, before administering medical treatment to a child, seek the consent of a parent or guardian of the child.

(2) The medical practitioner may then administer medical treatment to the child if—

(a) the parent or guardian consents; or

(b) the parent or guardian does not consent (or there is no parent or guardian reasonably available to make a decision) but the child consents and—

(i) the medical practitioner who is to administer the treatment is of the opinion that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interests of the child's health and well-being; and

(ii) that the opinion is supported by the written opinion of at least one other medical practitioner who personally examines the child before the treatment is commenced.

This amendment replaces clause 9. I wanted to ensure that a medical practitioner must, before administering medical treatment to a child, seek the consent of the parent or guardian of the child. There is no obligation upon the medical practitioner first to seek that consent—at least it is not expressly provided. Then I want to provide that the treatment may be administered if the parent or guardian consents, and that is in similar terms to that provision already in the Bill or, if the parent or guardian does not consent or there is no parent or guardian reasonably available to make a decision but the child consents, in certain circumstances it may still be appropriate for the medical treatment to be administered. It seems to me that that sets out a more appropriate structure within which the consent relating to children ought to be dealt with.

The Hon. BERNICE PFITZNER: I have a similar amendment on file. It has the addition of seeking the consent of the parent or guardian, although if, as the Hon. Mr Griffin says, the consent is not given, the child still makes a decision on the medical treatment. I think this is a better way, because it will enhance family cohesion and rapport within the family, although it does not need the child to consent for treatment to be administered.

The Hon. BARBARA WIESE: I support the amendment.

The Hon. CAROLINE SCHAEFER: I support the amendment, except for the last provision, which is that the opinion is supported by the written opinion of at least one other medical practitioner who personally examines the child before the treatment is commenced. I do not support that provision and hope that there will be some way that I have the opportunity to vote on that separately. I do not support it for the simple reason that I can envisage many occasions in rural areas where there is no access to a second medical opinion. I believe that is fraught with dangers for medical practitioners in small, single practice areas, where they are constantly concerned with litigation cases as it is. That is my only reason for not supporting that provision.

The Hon. K.T. GRIFFIN: I acknowledge the Hon. Mrs Schaefer's concern. The difficulty, though, is that I think where a parent or guardian does not consent then there does have to be something more than just the opinion of one medical practitioner who will actually administer the treatment that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the interests of the child's health and well-being, remembering that it is in the context of a parent or guardian not consenting, or it may be in circumstances where there is no parent or guardian reasonably available to make a decision.

It is not in the same category as emergency treatment, because that treatment is dealt with separately. So, if there is some life threatening illness or injury then the medical practitioner (under clause 10) is able to do that, because in those circumstances the patient is incapable of consenting and the medical practitioner who administers the treatment is of the opinion that the treatment is necessary to meet an imminent risk to life or health and that opinion is supported by the written opinion of another medical practitioner who has personally examined the patient. However, there is an exception to that, where it is not practicable to obtain a second opinion.

I do not think that for emergency treatment this will create a problem for people in the rural areas of South Australia, where there may not be two medical practitioners. I think, though, that it is a necessary safeguard even in those areas because of the circumstances in which the second medical opinion is required to be given. I think it is a necessary safeguard and should be supported and will not, if enacted, be the source of the concern to which the Hon. Mrs Schaefer has referred.

The Hon. BERNICE PFITZNER: I understand the Hon. Mrs Schaefer's difficulties. However, I think that for a child, especially one who is relatively young, a second opinion is very important. Division 4, in relation to emergency treatment (subclause 10(2)), provides:

> A supporting opinion is not necessary under subsection (1) if in the circumstances of the case it is not practicable to obtain such an opinion.

That refers to an emergency. However, if it is not an emergency, as in the case of ordinary medical treatment, we should allow for trying to contact another medical practitioner for another supporting opinion.

The Hon. CAROLINE SCHAEFER: It has been pointed out to me that there is some provision within Division 4 to allay my fears. However, the amendment suggests that the other medical practitioner must personally examine the patient. That is not the same as seeking a second opinion; I would have no objection to a second opinion being sought. However, I still think that the physical difficulties of shifting a child by ambulance for whatever treatment in order to make a decision under these circumstances is less than practical. I have no objection if that were the seeking of a second opinion, which could be done by phone. However, either to get a doctor there to examine physically or to transport the child is still less than practical. So I still have some objection to that part of it. If forced, I think the amendment is good enough; I will support it. But I would like the opportunity to oppose that part, for the reasons I have expressed.

The Hon. M.J. ELLIOTT: I make the point to the Hon. Mrs Schaefer that when we get to Division 4 in relation to emergency medical treatment, it relates not only to imminent risk to life but also to imminent risk to health. One is talking about something that has to be done in a hurry, whether or not it is life threatening. If it is something that does not need to be done in a hurry and you cannot get parental consent, the issue is whether a doctor when there is no particular hurry should be making a decision alone. On the other hand, when we get to Division 4, clause 10(1)(b) does need amending along the lines that the Hon. Mrs Schaefer suggests, because getting the second medical opinion in a hurry in that case is a real problem.

The Hon. K.T. Griffin: There is subclause (2).

The Hon. M.J. ELLIOTT: Yes, but nevertheless in regard to this clause we are not talking about situations where there is any rush.

Clause negatived; new clause 9(1) and (2)(a) and (b)(i) inserted.

The Hon. CAROLINE SCHAEFER: I move:

> To amend new subparagraph (2)(b)(ii) by striking out 'written' and all words after 'medical practitioner'.

Subparagraph (ii) would thus read:

> . . . that opinion is supported by the opinion of a least one other medical practitioner.

The Hon. K.T. GRIFFIN: I appreciate the difficulty but, if one looks at what opinion is to be given, it is an opinion that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interests of the child's health and well-being. The difficulty I foresee with the amendment is that it will probably be impossible to get a medical practitioner to give that opinion, even if verbally, without having examined the child and talking to the child, and even with talking on the telephone I would expect that most medical practitioners would not accept that, because they are not able to assess whether the child is acting on his or her own free will and the personal examination is necessary to determine if the treatment is in the best interests of the child's health and well-being. I suggest that there will be some practical difficulties from the medical practitioner's point of view, in any event. I do not see how we can get away from subparagraph (ii) as proposed because to do otherwise would make it virtually unworkable and, in any event, it will have the potential to compromise the quality of the advice given in determining whether a medical practitioner can administer medical treatment even if a parent or a guardian does not consent.

The Hon. R.R. ROBERTS: I find myself somewhat in concert with what Mr Griffin is saying. I know it is dangerous to leap forward, but in 'emergency medical treatment' there are some remedies that are actually safeguards against some of the things about which the Hon. Mrs Schaefer is concerned. When Mrs Schaefer got to her feet, I anticipated almost precisely what she was going to say, because I have had some experience in rural areas also. In division 4 it is stated:

> A supporting opinion is not necessary under subsection (1) if in the circumstances of the case it is not practicable to obtain such an opinion.

In effect, it gives the right. If it is an emergency situation, a life threatening situation, and there is no other medical practitioner practicably able to make the assessment, I would suggest it is picked up. If it is not life-threatening and it can be put off, you do not necessarily have to shift the child: generally, as they do in the bush, the Flying Doctor flies to the patient. So I think it is covered. The select committee has gone to some trouble to ensure that rights are fully covered so that two medical practitioners have to make the decision in what may be a life-threatening situation. I am in concert at this stage with the Hon. Mr Griffin, and I will be supporting his amendment as it stands.

The Hon. Caroline Schaefer's amendment negatived; the Hon. K.T. Griffin's amendment carried.

Progress reported; Committee to sit again.

CHILDREN'S PROTECTION BILL

Received from the House of Assembly and read a first time.

The Hon. BARBARA WIESE (Minister of Transport Development): I move:

That this Bill be now read a second time.

I seek leave to have the second reading explanation inserted in *Hansard* without my reading it.

Leave granted.

The *Children's Protection Bill 1993* is being introduced as the third and final Bill to replace the *Children's Protection and Young Offenders Act 1979*. It was a recommendation of the Select Committee on the Juvenile Justice System, November 1992, that there be separate legislation for the Youth Court, for Young Offenders and for Child Protection.

The first two Bills, the *Young Offenders Bill* and the *Youth Court Bill* were passed by the House on the 6th May, 1993. *The Children's Protection Bill* was tabled, 20th April 1993 as the final report of the Juvenile Justice Select Committee.

The Juvenile Justice Select Committee recommendation for separate child protection legislation provided an opportunity to review the provisions of the *Children's Protection and Young Offenders Act 1979* and the *Community Welfare Act 1972*. These Acts provide the current mandate for child protection and social welfare provisions in South Australia. At the time of the development of the *Children's Protection and Young Offenders Act in 1979* the identification of child abuse and neglect was a social phenomenon which was receiving little public attention or recognition. There

was substantially less knowledge and expertise in the identification of child abuse or neglect and few specialised services to address the problem.

The legislation reflected the need for State intervention to protect children and has been instrumental in raising awareness in the community regarding the problem of child abuse. The extended provisions for mandatory notification in the *Community Welfare Act* ensured that the abuse of children was drawn to the attention of the Community Welfare Department. This led to a dramatic increase in the reporting of child abuse and neglect and the subsequent need for more State intervention into family life.

During the past decade, the increased identification of sexual abuse of children has placed additional demand on investigation and assessment services. Some of the investigation processes adopted for establishing information and evidence leading to civil proceedings and criminal prosecution in child abuse matters have been perceived by some sections of the community to be legally driven and adversarial.

The professionalisation of the child protection system, whilst being committed to protecting children from harm, has resulted in a public perception that State intervention largely excludes families from participation in the decisions made about their children. In some instances families have felt alienated and disempowered by a system supposedly devised to support families and to assist them to protect their children. Some families have felt forced into compromising positions by professionals imposing upon them decisions and plans for the future of their children.

Unfortunately, the Court system has also become increasingly adversarial. Some matters before the Court have resulted in protracted trials which have delayed the resolution of the day to day care and protection needs for children. At times this has left families at odds with the very agencies established to assist them and has inhibited the ability to work co-operatively to reach favourable and acceptable arrangements.

These trends and perceptions are not unique to South Australia. Similar factors have been the reason for major reform of child protection law nationally and internationally. Both Britain and New Zealand, who now have internationally acclaimed innovative child protection legislation, were driven by similar concerns.

In addition to these factors, an extensive range of literature and research relating to child protection issues has developed over the years. The knowledge base and expertise in this area continues to be challenged and systems developed to meet community needs. The International Society for the Prevention of Child Abuse and Neglect has influenced world trends contributing significantly to local reform and practice. In 1991 Australia formed the National Child Protection Council to raise awareness of, and develop strategies for, the prevention of child abuse.

At the State level there has been a number of reviews which have addressed the South Australia child protection system. These include the Child Sexual Abuse Task Force (1986), the Bidmeade Report (1986) which reviewed the procedures for children in need of care, the Cooper Report (1988) into the Department for Community Welfare Policies and Procedures with Respect to Children of Underaged Parents and the Report of the Select Committee of the Legislative Council on Child Protection (1991) Each report highlighted different aspects of the child protection system which required attention. Many recommendations of these reports have been implemented and have contributed to improved practice. However, it is now timely to consolidate these and other changes into an integrated legislative framework.

Children's rights have received increased international recognition in recent years. Australia has formalised its commitment to children by becoming a signatory to the United Nations Convention on the Rights of the Child. This Convention was incorporated into the Federal *Human Rights and Equal Opportunities Act* in January 1993. The preamble to the Convention recognises the rights of all members of the family and recognises the family as the fundamental group in society responsible for the growth and well-being of all members, particularly children. The Convention recognises that families should be assisted to assume fully their responsibilities within the community. The Convention states that in recognising the child in the context of the family, and in taking account of the rights and duties of the child's parents, the rights of the child should be given primary consideration in all action taken by public or private institutions. The State role then is to assist families to care for their children and to exercise jurisdiction only when the family cannot provide the child with adequate care and protection.

South Australia has been prominent in lobbying for the rights of children in Australia. The Children's Interests Bureau was established in 1983 and its functions expanded to include professional advocacy for children in the welfare system in 1988. The status of the child has been raised and a focus on the individual and unique needs of children in the family unit has been promoted. Unfortunately, and perhaps inevitably, there has been a developing perception in the wider community that advocating for children's rights has negated parental rights and responsibilities.

The process of developing and drafting the *Children's Protection Bill* has drawn on the growing body of child protection knowledge, international and national directions including recent legislative reforms, the recommendations of the various reviews, and current community attitudes and values.

Since the Select Committee tabled the Bill in April, there has been widespread consultation with government departments, non-government agencies and community groups. Thirty four written responses to a request for comment have been received and twelve personal consultations have occurred. Comments and recommendations received during the consultation process were taken into consideration when finalising the Bill which is before Honourable Members.

The Bill aims to establish a child protection system based on the premise that partnership between the community, families and the State will best provide for the care and protection of children. The intent is to address the inequalities of power between families and State agencies. The court will continue to be used for conflict resolution and child protection but wherever possible the child, the family and social workers will work together to find solutions acceptable to everyone. In so doing, the Bill aims to strengthen the family unit to provide safety for the child.

The objectives of the Bill are

- to provide for the protection of children who are at risk
- to provide children with the stability of safe family care
- to recognise the family of the child as the unit primarily responsible for the protection of the child and to strengthen and support families in carrying out that responsibility

The importance of exercising the powers of the Bill in the best interests of the child are recognised and consistent with that now encouraged by Federal Law. A child who is capable of forming his or her own views will have those views sought and given due weight in accordance with the age and maturity of the child.

The focus of the Bill is on children being cared for and protected by their families. The Minister's functions support the promotion of partnerships between Government, non-government and communities in developing coordinated services to deal with child abuse and neglect. They promote education for parents and other members of the community to address the developmental, social and safety requirements of children.

An important initiative in the legislation is the inclusion of provisions to specifically address the need of Aboriginal people to be involved in decisions concerning their children, to have preventive and support services directed towards strengthening and supporting Aboriginal community life, to reducing child abuse and neglect and to maximising the well-being of Aboriginal children generally.

When intervention occurs in Aboriginal families in relation to the protection or placement of their children, Aboriginal organisations will be consulted as to the most appropriate arrangements for the child. At all times the traditional and cultural values of the child's family shall be given due regard.

In addition to the specific needs of the Aboriginal population, the cultural diversity of South Australian society is recognised by provisions in the Bill which will ensure that intervention is culturally acceptable to the family and the child's sense of racial, ethnic or cultural identity is preserved and enhanced.

New provisions included under the Minister's functions are those which promote the collation and publication of data, statistics and research and encourage tertiary institutions to address child abuse and neglect in the curriculum of relevant courses.

Consistent with working co-operatively with families to assist them with the care and protection of their children, provision has been made for voluntary custody agreements to be made between guardians of the child and the Minister. Such agreements are time limited to prevent unnecessary separation between children and their families and to facilitate resolution of family breakdown.

Following the recommendation of the Juvenile Justice Select Committee to empower the Police to remove a child from a place of danger and to return the child home, provision has been made to

facilitate this except when not in the child's interest to do so. In such circumstances, the Police must refer the matter to the Department for Family and Community Services. The Department will have the authority to provide safe care for the child until satisfactory arrangements can be made with the family for the child's care or until an application may be made to the Youth Court for an Investigation and Assessment order, but in any event will not be able to hold the child beyond the end of the next working day.

When a child is in imminent danger and at risk, necessitating removal from the child's guardian or custodian, the Police and/or an authorised Departmental officer will have the authority to remove the child. Following removal of a child, the Chief Executive Officer will provide care until the end of the next working day, by which time the child will have been safely returned to the family or an application will have been made to the Youth Court for an Investigation and Assessment order.

Departmental officers are provided with the authority to investigate the circumstances of a child whom they suspect on reasonable grounds to be at risk. Police officers (of a certain seniority) may for the purpose of an investigation, on the authority of a warrant, enter or break into premises, take photographs and require persons to answer questions and provide information relevant to the investigation. A warrant will not be required in certain situations of urgency, for example where any delay might lead to concealment or destruction of evidence.

Investigation and Assessment Orders are a major reform in the legislation. These orders will only be required in circumstances when further investigation into a matter is warranted because investigation into the circumstances of a child has been prevented from proceeding, or it is desirable that a child be protected during investigation or while a family care meeting is held. In these matters the Chief Executive Officer of the Department may apply to the Youth Court for an order to facilitate the investigation. The orders that the court may make include orders authorising that a child be taken for examination or assessment, that a child be in the custody of the Minister or that a party who resides with the child refrain from residing or having contact with the child. Other orders may be made as the Court thinks fit. These provisions remain consistent with the philosophy of the Bill which provides for intervention strategies which are the least disruptive to the child.

The commitment to family participation in decision making and planning for arrangements to care for and protect children is formalised by the introduction of the Family Care Meeting model. These meetings are the pivotal point of departmental intervention prior to Court action, and are modelled on the New Zealand Family Group Conference concept of family decision making. The New Zealand model has been adapted to best complement and incorporate the strengths of the existing South Australian child protection system. The model is premissed on what we all know, that is, that children are more likely to develop and reach their potential whilst remaining in and being protected by their family network. This will best be facilitated by the family and the child's being involved in the decisions and arrangements for the child's future care.

In recognising the strength of families, it is desirable that support for the child during the Family Care Meeting process be from within the family. A family member who will act as advocate for the child and the child's interest and wishes can ensure that current and future needs for safety are met. Provision has been made in the legislation to ensure such support is provided and in addition, where necessary, may involve the services of a professional advocate. This system will least undermine family responsibility and ensure that the focus of the child is maintained in the arrangements that are planned from this meeting.

The role of the Care and Protection Co-ordinator in Family Care Meetings is to convene and facilitate the meeting and to ensure that the decisions and arrangements agreed upon meet the care and protection concerns. All arrangements made will address the need for review of the circumstances of the child. Shared participation in and responsibility for the decision making and planning for the child's safety will address the balance of power between professionals, the child and the family. The process of establishing adequate protection for children is the responsibility of the Minister for Family and Community Services and the adoption of the Family Care Meeting model in legislation and departmental procedures will best meet this responsibility.

To ensure that co-ordinators are adequately trained and supervised with a sound knowledge of departmental legislation, procedures and resources, Co-ordinators will be employed by the Department.

In the event that arrangements for the safety of the child at risk cannot be agreed upon, and further action is necessary to protect the child, the Minister may, after having convened a Family Care Meeting, make application to the Youth Court for a care and protection order. A range of orders broader than those which currently exist have been designed to best facilitate intensive intervention to maintain the child in the family, to reunify the child with the family, or to provide for the child's long term future.

Care and Protection orders include undertakings by the guardian or the child with provision to supervise the child, orders granting custody of the child to suitable person(s) including the Minister, and short term guardianship orders. When short term orders are unable to meet the needs of the child a long term guardianship order may be made to provide alternative stable care arrangements for the child until the child reaches 18 years of age. An order placing a child under the guardianship of the Minister will be considered as a last resort. All children who are under the guardianship of the Minister will have their circumstances reviewed annually.

The need for services to children who have been under the Minister's care, to assist the transition to adulthood, has been recognised for some time. Provision is made in the Bill to assist this transition.

The responsibility of the Minister for the interstate transfer of children under guardianship is currently a provision of the *Community Welfare Act*. This provision is to be deleted from that Act and is incorporated in the Bill.

To assist the Court in its administration of mandatory notification matters, an additional provision has been made in the Bill to extend the power of prosecution from six months to two years to enable prosecution to occur in matters which may not be immediately evident.

In summary it is clear that the *Children's Protection Bill* is legislation which will be innovative in social welfare reform. It places a strong emphasis on the protection of children, the care of children at risk, the recognition of the rights of the child and balances this with the responsibility of the family and the State. It addresses the public concern for family involvement in the child protection system and increases and supports the responsibility of Aboriginal people for their communities. In so doing, it has encompassed international initiatives, recognised the strengths of the existing child protection infrastructure and provided new intervention mechanisms to ensure that South Australia continues to be at the forefront of meeting the needs of its children and families.

Explanation of Clauses

The clauses of the Bill are as follows:

PART 1

PRELIMINARY

Clause 1: Short title

Clause 1 is formal.

Clause 2: Commencement

Clause 2 provides for commencement by proclamation.

Clause 3: Objects

Clause 3 sets out the objects of the Act, which are to provide children who are at risk with a safe and stable family environment, and to accord a high priority to assisting families to care for and protect their own children.

Clause 4: Principles to be observed in dealing with children

Clause 4 sets out a number of matters that the Youth Court and the Department must give serious consideration to in making any decisions or orders in relation to a child. However, the safety of the child must always be the paramount consideration, and the powers under the Act must be exercised in the best interests of the child concerned. The child's own views as to his or her ongoing care arrangements should be sought and given serious consideration, provided that the child is capable of expressing them. All proceedings (of any kind) must be dealt with expeditiously and must be prioritised according to the degree of urgency of each case.

Clause 5: Provisions relating to dealing with Aboriginal or Torres Strait Islander children

Clause 5 sets out special provisions for Aboriginal and Torres Strait Islander children. The Minister will consult with both the Aboriginal and the Torres Strait Islander communities and declare a number of organisations to be recognised organisations for the purposes of the Act. Placement decisions or orders relating to Aboriginal or Torres Strait Islander children cannot be made unless the relevant recognised organisation has first been consulted. When any decision or order is being made under the Act, regard must be paid to the submissions made by such an organisation, but where no such submissions have been made, regard must be had to Aboriginal or

Torres Strait Islander traditions and cultural values, as generally expressed by those communities. Finally, the decision maker must pay regard to the general principle that Aboriginal and Torres Strait Islander children should remain within their communities.

Clause 6: Interpretation

Clause 6 provides some necessary definitions. The actions that constitute "abuse or neglect" of a child are set out. The definition of "family" includes a child's extended family, and in relation to an Aboriginal or Torres Strait Islander child, includes any other person deemed to be related to the child under the rules of kinship. The definition of guardian includes parents, legal guardians, legal custodians and any other persons who stand *in loco parentis* to the child. *Subclause (2)* defines what it is to be a "child at risk". A child is at risk if the child has been or is being abused or neglected, or if a person with whom the child resides has threatened to kill or injure the child. A child is also at risk if a person with whom he or she resides has killed, abused or neglected some other child and there is a reasonable likelihood that the child will suffer a similar fate. The third limb of the definition deals with the situation where a child's guardians are unable or unwilling to maintain the child, or to exercise an adequate level of supervision and control over the child or have abandoned the child. The fourth limb of the definition provides that a child is at risk if he or she has been persistently absent from school without satisfactory excuse.

PART 2
THE MINISTER'S FUNCTIONS

Clause 7: General functions of the Minister

Clause 7 provides that the Minister is to seek to further the objects of the Act and will perform some general functions in relation to the care and protection of children. First and foremost are the functions of promoting a partnership approach between all sections of the community in dealing with the problem of child abuse and neglect and in assisting the development of co-ordinated strategies for that purpose. A strong emphasis is also put on the role of providing, or assisting others to provide, educative programs aimed towards preventing or reducing the incidence of child abuse and neglect.

PART 3
CUSTODY AGREEMENTS

Clause 8: Voluntary custody agreements

Clause 8 provides that the guardians of a child and the Minister may enter into an agreement under which the Minister will have the custody of the child while the agreement exists. An agreement has effect for up to three months and can be extended, but no agreement (including any extensions) can go for longer than six months. Generally speaking, all the child's guardians will be involved in entering into such an agreement (certain exceptions are provided, such as where a guardian cannot be found). If the child is 16 or more, he or she can veto the entering into of an agreement and can terminate such an agreement. An agreement can be terminated at any time by any guardian who is a party to the agreement.

PART 4
NOTIFICATION AND INVESTIGATIONS
DIVISION 1—NOTIFICATION OF ABUSE OR NEGLECT

Clause 9: Interpretation

Clause 9 adds a further limb to the definition of "abuse or neglect" for the purposes of this Division, i.e. where there is a reasonable likelihood (as set out in clause 6(2)*(b)*) of a child being killed, injured, abused or neglected.

Clause 10: Notification of abuse or neglect

Clause 10 re-enacts the provision (currently in the *Community Welfare Act*) that requires certain people to notify the Department of suspected cases of child abuse or neglect. Chemists will no longer be required to notify. It is made clear that it is only where the suspicion is formed during the course of a person's employment or official duties that the requirement to notify will apply. *Subclause (4)* enables a prosecution for an offence against this section to take place within two years.

Clause 11: Protection from liability for voluntary or mandatory notification

Clause 11 gives an immunity from civil or criminal liability for any person who notifies the Department of a suspected case of abuse or neglect, whether that person notifies voluntarily, or because he or she is required to do so under clause 10.

Clause 12: Confidentiality of notification of abuse or neglect

Clause 12 gives notifiers of abuse or neglect protection from being identified, except where a court allows evidence leading to identification to be admitted in any proceedings, or where identity is disclosed by a person acting in the course of official duties to another person also acting in the course of official duties.

Clause 13: Chief Executive Officer not obliged to take action in certain circumstances

Clause 13 makes it clear that the Department is not obliged to act on a notification of suspected abuse or neglect if satisfied that insufficient grounds exist for the suspicion, or that the child's care and protection are properly catered for.

DIVISION 2—REMOVAL OF CHILDREN IN DANGER

Clause 14: Interpretation

Clause 14 defines "officer" for the purposes of this Division to be any member of the police force, or any Departmental employee who has been authorised by the Minister to exercise the powers under this Division.

Clause 15: Power to remove children from dangerous situations

Clause 15 empowers an officer to remove a child from a situation of danger, provided that the child is not in the company of any of its guardians. The first duty is to try and return the child to his or her home, unless the officer thinks it would not be in the best interests of the child to do so.

Clause 16: Power to remove children from guardians

Clause 16 empowers an officer to remove a child from its guardians if the officer has reasonable grounds for believing that the child is a child at risk (within the meaning of the Act) and that the child's safety is in imminent danger. A Departmental officer can only exercise this power in any particular case with the prior approval of the Chief Executive Officer.

Clause 17: Dealing with a child after removal

Clause 17 grants custody of a child removed pursuant to this Division to the Minister, but only until the end of the next working day. If the Department needs to hold a child any longer, it will only be able to do so if authorised by an investigation and assessment order from the Youth Court.

DIVISION 3—INVESTIGATIONS

Clause 18: Investigations

Clause 18 empowers the Chief Executive Officer to investigate the circumstances of a child suspected to be at risk. The Chief Executive Officer can require a person who has examined, assessed or treated the child to furnish a copy of the resulting report. An authorised police officer (i.e. of or over the rank of sergeant or in charge of a police station) may assist an investigation, and may for that purpose, break into any premises, take photographs, etc., require persons to answer relevant questions and seize any item that may afford evidence. A police officer may only exercise those powers on the authority of a warrant from a magistrate (which may be obtained in person or by telephone). However, a warrant is not required if the police officer has already been denied entry and has reasonable grounds for believing that to delay for the purposes of obtaining a warrant would prejudice the investigation. The usual immunities are given in relation to legal professional privilege and self-incrimination.

DIVISION 4—INVESTIGATION AND ASSESSMENT ORDERS

Clause 19: Application for order

Clause 19 empowers the Chief Executive Officer to apply to the Youth Court for an investigation and assessment order where it is suspected on reasonable grounds that a child is at risk.

Clause 20: Orders Court may make

The Court can order that the child be examined and assessed, that Departmental officers be empowered to question persons, that persons who have examined, assessed or treated a party to the proceedings (other than the child) can be required to furnish reports to the Chief Executive Officer, that the child be placed in the custody of the Minister, that a party cease living in the same place as the child, that a party have no contact with the child and may make ancillary orders. Orders cannot have effect for longer than four weeks, but may, if the Senior Judge of the Court so determines, be extended for one further period of up to four weeks. It is an offence carrying a penalty of division 8 imprisonment to contravene an investigation and assessment order.

Clause 21: Variation or discharge of orders

Clause 21 provides for an order under this Division to be varied or revoked on the application of the Chief Executive Officer.

Clause 22: Power of adjournment

Clause 22 permits only one adjournment of no more than seven days for an application under this Division. Certain interim orders can be made on such an adjournment, carrying the same penalty for breach.

Clause 23: Obligation to answer questions or furnish reports

Clause 23 obliges a person to answer a question or furnish a report where required to do so on the authority of an investigation and assessment order. The usual immunities are given in subclauses (2) and (3).

Clause 24: Orders not appealable

Clause 24 provides that no right of appeal lies against orders under this Division.

DIVISION 5—EXAMINATION AND ASSESSMENT OF CHILDREN

Clause 25: Examination and assessment of children

Clause 25 provides for the examination and assessment of a child where the Minister has the temporary custody of a child, either pursuant to the removal of the child under Division 2 or pursuant to an investigation and assessment order under Division 4. A doctor or dentist who is examining a child under this section may give the child treatment to alleviate any immediate injury or suffering and may do so notwithstanding that the guardians refuse or fail to consent to the treatment. However, if the child refuses nothing in this section will be taken to oblige the doctor or dentist to carry out the treatment.

PART 5
CHILDREN IN NEED OF CARE AND PROTECTION
DIVISION 1—FAMILY CARE MEETING

Clause 26: Family care meeting must be held in certain circumstances

Clause 26 obliges the Minister to hold a family care meeting before any application for a care and protection order is taken out in respect of a child.

Clause 27: Purpose of family care meetings

Clause 27 provides that the purpose of a family care meeting is to provide an opportunity for the child's family, in conjunction with a Care and Protection Co-ordinator, to make arrangements for the care and protection of the child and to review those arrangements from time to time.

Clause 28: Convening a family care meeting

Clause 28 provides that a Care and Protection Co-ordinator will convene and run a family care meeting. The Co-ordinator must consult as far as practicable with the child and the child's guardians in fixing the date, place and time for a meeting.

Clause 29: Invited participants

Clause 29 sets out who will be invited to attend a family care meeting. The persons who will be invited are the child, the child's guardians, other family members who the Co-ordinator thinks should attend, any person who has had a close association with the child and who the Co-ordinator thinks should attend and support persons nominated by the child and the guardians and who the Co-ordinator thinks would be of assistance in that role. The Co-ordinator is not obliged to invite the child or any other particular person if the Co-ordinator thinks it would not be in the best interests of the child to do so.

Clause 30: Constitution of family care meeting

Clause 30 sets out the persons who will constitute a family care meeting. These are the Co-ordinator, the invitees who wish to attend, a Departmental officer who will present the report on the child's circumstances, an Education Department or school nominee where truancy is involved, any professionals who have examined, assessed or treated the child, nominated by the Co-ordinator, a person nominated by the Co-ordinator to act as advocate for the child if the Co-ordinator thinks it desirable, and if the child is an Aboriginal or a Torres Strait Islander, a person nominated by the relevant recognised organisation.

Clause 31: Procedures

Clause 31 requires the Co-ordinator to try and ascertain the views of certain persons who will not be attending the meeting and to relay those views to the meeting. Most importantly, the Co-ordinator must allow the child's family, and the child if appropriate, to hold private discussions as to the arrangements for the child's care and protection. Decisions should be made, if possible, by consensus of the child, the guardians and the other family members. However, unless the Co-ordinator agrees that the proposed arrangements do properly secure the child's care and protection, then the family's decisions cannot stand. Decisions will be put in writing and signed by those concurring. Copies of the written record will be made available to the child, all guardians, those involved in implementing the arrangements and any other person who the Co-ordinator thinks has a proper interest in the matter.

Clause 32: Review of arrangements

Clause 32 provides for the review of arrangements. The Co-ordinator can convene a further meeting at any time and must do so if that was the decision of a previous meeting or if two or more of the child's family members who attend the previous meeting so request.

Clause 33: Certain matters not admissible

Clause 33 provides that evidence of anything said at a family care meeting is not admissible in any proceedings, but the written record of the decisions made at a meeting is admissible for the purpose of proceedings for a care and protection order.

Clause 34: Procedure where decisions not made or implemented

Clause 34 provides that the Minister will proceed to apply for a care and protection order if a family care meeting does not reach a decision, or if any decisions made are not implemented, but only if the Minister is of the opinion that the child is at risk, and needs the benefit of a care and protection order.

Clause 35: Guardians whose whereabouts are unknown

Clause 35 provides that the Division relating to family care meetings does not apply in relation to a guardian who cannot be found.

DIVISION 2—CARE AND PROTECTION ORDERS

Clause 36: Application for care and protection order

Clause 36 empowers the Minister to apply to the Youth Court for care and protection in respect of a child who is at risk and who needs the benefit of such an order. An application may also be made in respect of a child who is not at risk but who is subject to some informal care arrangements that should, in the interests of giving the child a settled and secure living arrangement, be formalised by a court order.

Clause 37: Court's power to make orders

Clause 37 sets out the orders the Court may make on such an application. An order may be made requiring the child or any guardian to enter into undertakings for not more than 12 months. A child may be required to be under supervision during such a period. Orders may be made granting custody of the child to the Minister or any other person for a period of up to 12 months. Guardianship can be granted to the Minister or to one or two other persons for a period not exceeding 12 months, or until the child turns 18. The Court may direct any party to the application to cease residing in the same premises of the child, to refrain from coming within a specified distance of the child's home, to refrain from having any contact with the child except in the presence of some other person, or to have no contact at all. Access orders and other ancillary orders may also be made. The Court is directed to take special care in making long term guardianship orders. Generally, such an order should not be made unless all other orders have failed to secure the child's care and protection. However, if a child has been subject to other orders under this section for a period of two years, serious consideration must be given to making such an order, in the interests of settling the child's long term future. *Subclause (3)* provides that a child cannot be taken from its parents on the ground that some other person living in the house has abused or neglected the child unless the Court is satisfied that the parents knew, or ought to have known, of the abuse or neglect.

Clause 38: Adjournments

Clause 38 provides for adjournments and the orders that may be made on an adjournment. The period between the lodging of an application and the commencement of the hearing must not exceed 10 weeks.

Clause 39: Variation or revocation of orders

Clause 39 provides for variation or revocation of orders on the application of any party to the proceedings.

Clause 40: Right of other interested persons to be heard

Clause 40 provides that the Court may allow interested persons to be heard in any proceedings under this Division.

Clause 41: Conference of parties

Clause 41 allows for conferences to be held between the parties to any proceedings under this Division.

Clause 42: Effect of guardianship order

Clause 42 makes it clear that a guardianship order gives exclusive guardianship rights to the appointee.

Clause 43: Non-compliance with orders

Clause 43 makes it an offence to contravene an order under this Division. The penalty is division 8 imprisonment.

PART 6
PROCEDURAL MATTERS

Clause 44: Evidence

Clause 44 provides that the Youth Court is not bound by the rules of evidence in any proceedings under this Act. Facts need only be proved on the balance of probabilities.

Clause 45: Service of applications on parties

Clause 45 sets out the persons who are parties to applications for orders under this Act. Provision is made for service of applications on parties.

Clause 46: Joinder of parties

Clause 46 allows the Court to join any person as a party to proceedings if the Court proposes to make an order binding on that person. For example, an order may be made requiring a person (who is not a guardian of the child) to cease living in the same premises as the child on the ground that that person has been abusing the child. The court will give such a person an opportunity to show cause why such an order should not be made.

Clause 47: Legal representation of child

Clause 47 requires a child to have legal representation in all proceedings under this Act, unless the Court is satisfied that the child has made an informed and independent decision not be so represented.

Whether or not a child is so represented, the Court must seek the child's view's as to his or her ongoing care and protection unless the child is not capable of doing so.

Clause 48: Orders for costs

Clause 48 empowers the Court to order costs against the Crown if the Court dismisses any application made by the Minister or the Chief Executive Officer.

PART 7
CHILDREN UNDER MINISTER'S CARE AND PROTECTION

Clause 49: Powers of Minister in relation to children under the Minister's care and protection

Clause 49 sets out the arrangements that may be made for a child who has been placed under the Minister's guardianship or of whom the Minister has the custody. The Minister must keep the child's parents informed as to the care of the child, unless of the opinion that it would not be in the child's best interests to do so. An authorised police officer may remove such a child from any place if necessary for the purpose of enforcing a Youth Court order.

Clause 50: Review of circumstances of child under long term guardianship of Minister

Clause 50 requires the Minister to review at least annually the circumstances of a child placed under his or her guardianship until 18.

PART 8
INTERSTATE TRANSFERS OF CHILDREN UNDER GUARDIANSHIP, ETC.

Clause 51: Guardianship or care of children from other States or Territories

Clause 51 enables custody or guardianship of an interstate child to be assumed by the Minister if the child has entered, or is about to enter, this State.

Clause 52: Transfer of guardianship or custody to an interstate authority

Clause 52 provides for an interstate authority to assume custody or guardianship of a child in this State who is under the guardianship or in the custody of the Minister or the Chief Executive Officer pursuant to this Act or any other Act.

PART 9
MISCELLANEOUS

Clause 53: Referrals to the Chief Executive Officer

Clause 53 enables the Youth Court, a Youth Justice Co-ordinator or a police officer to refer a child who they believe to be at risk to the Chief Executive Officer.

Clause 54: Delegation

Clause 54 gives a power of delegation to the Minister and the Chief Executive Officer.

Clause 55: Duty to maintain confidentiality

Clause 55 requires a person engaged in the administration of this Act not to divulge personal information relating to a child, its guardians or other family members or any other person alleged to have abused, neglected or threatened the child. Persons who attend family conferences are under a similar obligation (except for the child and its family). The usual exceptions to the rule of confidentiality are given (e.g., where a person is required by law to divulge information).

Clause 56: Reports of family care meetings not to be published

Clause 56 prohibits the publication of reports of family care meetings.

Clause 57: Hindering a person in execution of duty

Clause 57 makes it an offence to hinder or obstruct a person in the exercise of powers under this Act.

Clause 58: Protection from liability

Clause 58 gives the usual immunity from civil liability to persons engaged in the administration of this Act.

Clause 59: Regulations

Clause 59 is the regulation making power.

The Hon. K.T. GRIFFIN secured the adjournment of the debate.

COMMUNITY WELFARE (CHILDREN) AMENDMENT BILL

Received from the House of Assembly and read a first time.

The Hon. BARBARA WIESE (Minister of Transport Development): I move:

That this Bill be now read a second time.

I seek leave to have the second reading explanation inserted in *Hansard* without my reading it.

Leave granted.

This Bill amends the Community Welfare Act 1972.

The necessity for this Bill arises from the passing of the Young Offenders Act 1993 and the Youth Court Act 1993 earlier this year, and the Children's Protection Bill which was recently introduced.

The main purpose of the Bill is to delete the administrative provisions in the Community Welfare Act for children to be placed under the guardianship of the Minister, the provisions which set out the Minister's responsibilities in regard to the interstate transfer of children under guardianship, and the powers of the Director-General for the care and protection of children under the guardianship of the Minister. These provision are no longer required. All such provisions relating to the care and protection of children are dealt with under the Children's Protection Bill 1993.

The provisions for the establishment of regional and local child protection panels are also repealed. These panels were established in 1972 at a time when there were few notifications of child abuse and limited community and agency awareness and cooperation in dealing with child protection matters. The system contemplated by the Children's Protection Bill provides alternative mechanisms for accountability and interagency response to the problem of child abuse.

Notification of suspected child abuse, offences against children, medical examination and treatment of children and the temporary care of children in hospital are also provisions to be repealed and dealt with under the Children's Protection Bill.

Community Welfare forums are abolished. A Division has been inserted to ensure that the Minister and the Department consult with relevant organisations in providing services to the community. Members of the public and organisations will be encouraged to make comments and recommendations to the Department about services. The Minister will ensure that procedures are in place for the Department to deal with client complaints.

Principles for dealing with children, to ensure that all action is taken in the best interests of the child, are provided in the Children's Protection Bill 1993. Consequently, the principles for dealing with children under the Community Welfare Act are no longer required and are proposed for repeal.

The provisions relating to the establishment of facilities for children and for foster care have been recast to bring them into line with current language, programs, procedures and practice. The inclusion of two new sections ensures that a licensed foster care agency undertakes regular assessment of foster parents and has authority to assess a foster parent for financial or other assistance. The Chief Executive Officer may delegate powers to a licensed foster care agency.

Opportunity has been taken to delete, insert and amend clauses in the Community Welfare Act 1972 to bring it into line with the objects, definitions, provisions and terminology of the legislation recently passed and the Children's Protection Bill. The Bill also brings the Act into modern drafting language. These changes will ensure that legislation is consistent and complementary when the Acts are brought into force.

References to the Department for Community Welfare have been replaced with Department for Family and Community Services, the Director General replaced with Chief Executive Officer, 'shall' a word not used in modern drafting has been replaced by 'must', 'will'

or 'should'. Language has also been amended to make it non-gender specific.

Transitional provisions are dealt with in Schedule 1. Guardianship orders made under the Community Welfare Act will run their term but there is provision to cancel an order or appeal against a refusal to cancel. The same powers and duties apply to the Minister and the Chief Executive Officer in respect to children subject to guardianship orders as apply under the Children's Protection Bill.

Schedule 2 revises penalties under the Act.

In summary the Community Welfare (Children) Amendment Bill does not make substantive change to the Community Welfare Act 1972 but brings it up to date with legislative reform relating to children, families and community services.

Explanation of Clauses

Clause 1: Short title

This clause is formal.

Clause 2: Commencement

This clause provides for the Act to come into force by proclamation.

Clause 3: Substitution of s. 1

This clause substitutes the short title of the Act.

Clause 4: Amendment of s. 6—Interpretation

This clause deletes and inserts various definitions. It should be noted that Schedule 3 of the Bill also includes various amendments (of a statute revision nature) to the definitions.

Clause 5: Further amendment of s. 6—Interpretation

This clause adds a 'catch all' provision that picks up references to the old Director-General terminology in other Acts and statutory instruments.

Clause 6: Amendment of s. 8—Delegation

This clause substitutes references to the 'Deputy Director-General' with references to the 'Executive Director, Operations'.

Clause 7: Amendment of s. 10—Objectives of the Minister and the Department

This clause brings the objectives of the Minister and the department with regard to ethnic and racial groups into line with the terminology of the Children's Protection Bill.

Clause 8: Substitution of Division V of Part II

This clause revises the provision of the Act relating to consultation by the Minister. It is intended to abolish community welfare consumer forums under the Act and instead to require generally that the Minister and the department consult with relevant organisations. Furthermore, members of the public will be encouraged to make comments and recommendations to the department. The Minister will also be required to ensure that appropriate procedures are in place to allow complaints against the department to be considered and, if appropriate, acted upon.

Clause 9: Substitution of Division II of Part III

This clause recasts section 23 of the principal Act so that the 'Community Welfare Grants Fund' will become the fund for the Family and Community Development Program and the 'Community Welfare Residential Care and Supports Grants Fund' will become the fund for the Early Intervention and Substitute Care Program.

Clause 10: Amendment of heading

This clause is a consequential amendment.

Clause 11: Repeal of s. 25—Persons dealing with children must observe certain principles

This clause repeals the section that sets out certain principles for dealing with children under Part IV. This is no longer necessary as Part IV is now only comprised of administrative provisions.

Clause 12: Repeal of Subdivision 1 of Division II of Part IV

This clause repeals those provisions providing for placing children under the Minister's guardianship by executive decision. This will no longer be allowed.

Clause 13: Substitution of Subdivision

This clause revises subdivision 2 of division II of Part IV of the principal Act. This subdivision relates to the establishment of facilities for children, including homes for the care of children. It is proposed to recast the provision so that the Minister will establish facilities and programs for the care of children.

Clause 14: Substitution of s. 40

This clause re-states the purposes of foster care, emphasising that foster care is only for where a child cannot remain within the child's own family.

Clause 15: Substitution of s. 41

This clause re-enacts section 41 in up-to-date language and provides a Division 6 fine for a person who acts as a foster parent without first being approved as a foster parent by the department.

Clause 16: Amendment of s. 42—Application for approval as foster parents

This clause relates to the assessment of the suitability of persons to be foster parents under section 42 of the principal Act. It is proposed to refer specifically to the need for the Chief Executive Officer to be satisfied that a proposed foster parent is a fit and proper person to provide foster care.

Clause 17: Insertion of s. 43a

This clause inserts a new provision into the principal Act to require the Chief Executive Officer to undertake regular assessments of a person's role as a foster parent, and to provide on-going support and guidance to the foster parent.

Clause 18: Repeal of s. 44—Duty of Director-General in relation to foster children

This clause repeals section 44 which is now redundant in view of the review provisions under the Children's Protection Bill.

Clause 19: Amendment of s. 45—Powers of entry

This clause is consequential upon clause 32 of the Bill, which inserts a general offence of hindering departmental employees.

Clause 20: Amendment of s. 46—Cancellation of approval

This clause relates to the ability of the Chief Executive Officer to cancel the approval of a person as a foster parent under section 46. The grounds upon which the Chief Executive Officer may act will be expanded to include that the person would no longer qualify for approval as a foster parent, or that other proper cause exists for the cancellation of approval.

Clause 21: Substitution of s. 47

This clause revises section 47 of the principal Act. This provision relates to the information that a foster parent must furnish to the Chief Executive Officer. The provision will require a foster parent to advise the Chief Executive Officer if the foster parent changes address, if another person comes to reside with the foster parent, or if a person residing with the foster parent is charged with an offence (other than a trifling offence).

Clause 22: Insertion of ss. 50a and 50b

This clause inserts two new sections. New section 50a will require a licensed foster care agency to undertake regular assessments of a foster parent's role as a foster parent and to assess any requirement of a foster parent for financial or other assistance. New section 50b empowers the Chief Executive Officer to delegate his or her powers relating to foster parents to a licensed foster care agency.

Clause 23: Amendment of s. 51—Children's residential facilities

This clause re-enacts a part of section 51 in up-to-date language and provides a Division 6 fine for a person who maintains a children's residential facility without a licence. More emphasis is placed on the question of the suitability of a person to run such a facility.

Clause 24: Substitution of ss. 54 and 55

This clause recasts section 54 of the principal Act using modern terminology, but makes no substantive changes to the section other than the insertion of a division 7 fine for breach of the section.

Section 55 of the principal Act is re-enacted in revised form. This section requires that a person who has a licence to conduct a children's residential facilities must enter into a written agreement with a guardian of the child before a child under the age of 15 years takes up residence in the facility. Where a child is of or above the age of 15 years, the licensee must, where practicable, consult with the guardians of the child and be satisfied that the child has consented to be cared for in the facility. However, these requirements will not apply in relation to a child under the guardianship of the Minister or the Chief Executive Officer, or of whom the Minister has custody.

Clause 25: Repeal of s. 73—Interpretation

This clause repeals section 73 which will no longer be required in view of the proposed amendments to or repeal of the various sections comprised in this Division.

Clause 26: Substitution of ss. 74 and 75

This clause re-casts section 74 in up-to-date language. It provides for granting financial assistance to persons providing 'substitute' care for a child. Section 75 is repealed as the question of unlawful absence from training centres is now covered by the Young Offenders Act, and the powers under this section relating to children in care are now in the Children's Protection Bill.

Clause 27: Amendment of s. 76—Unlawful taking of child

This clause makes amendments consequential upon the repeal of section 73.

Clause 28: Substitution of s. 77 and 78

This clause re-casts section 77 and makes it clear that an authorised officer from the department can request a person to leave the grounds premises of a training centre or other facility where a child is being detained (pursuant to the Young Offenders Act) or a children's residential facility established by the Minister. The Chief Executive Officer may also forbid communication between a particular person

and a child detained or residing in any such premises. Section 78 is repealed as it is now redundant.

Clause 29: Substitution of s. 80

Section 80 is re-cast in simpler terms and in up-to-date language.

Clause 30: Repeal of ss. 81 to 83

This clause repeals sections 81 to 83. Sections 81 and 82 are now covered by the Children's Protection Bill. Section 83, which forbids selling prescribed substances or articles to children under 16, is now redundant in view of the Tobacco Products Control Act and the Controlled Substances Act.

Clause 31 Repeal of s. 85—Director-General may in certain circumstances consent to medical or dental treatment of child in detention or placed under his control by order of the Children's Court

This clause repeals section 85 which deals with consent to medical treatment of certain children. This matter is covered by the Children's Protection Bill and, as far as children in detention are concerned, the ordinary laws as to consent will apply.

Clause 32: Repeal of Division III of Part IV

This clause repeals the provisions that provide for the establishment of regional and local child protection panels, the notification of suspected cases of child abuse, offences of maltreating children and the medical examination and temporary custody of abused children. All these matters are now dealt with in the Children's Protection Bill, with the exception of child protection panels—this system is brought to an end.

Clause 33: Insertion of new ss. 236a and 236b

This clause inserts two new sections in the Act. One deals with the offence of hindering persons exercising powers under the Act. The other creates an offence of impersonating a departmental employee with statutory powers.

Clause 34: Amendment of s. 251—Regulations

This clause tidies up the regulation-making power. Heads of power are deleted either because they are now redundant or because the matters they refer to are handled administratively.

Clause 35: Repeal of s. 252—Offences

This clause repeals section 252, which was a general offence provision. All offences under the Act will now have penalties appearing at the foot of the relevant sections, and all offences are summary offences by virtue of their penalty levels.

Clause 36: Revision of penalties and statute revision amendments

This clause refers to the revision of penalties that is to be found in Schedule 2, and to the miscellaneous statute revision amendments in Schedule 3.

Schedule 1: Transitional Provisions

This schedule deals with several necessary transitional matters. Clause 2 keeps guardianship orders that were made by the Minister under the repealed provisions alive. These orders will be permitted to run their term. Clause 3 preserves the right to apply for cancellation of guardianship orders and rights of appeal against a refusal to cancel. Clause 4 requires the Minister to continue to review such orders annually. Clause 5 makes it clear that the Minister and the Chief Executive Officer have, in respect of children subject to such guardianship orders, the same powers and duties as they have in relationship to children put under the Minister's guardianship pursuant to the Children's Protection Bill. Clause 6 allows the 96 hour detention of a child in hospital to run its course where the detention commenced prior to this Act coming into operation.

Schedule 2 revises the penalties under the Act, converting them to divisional penalties and, where appropriate, increasing the levels to levels more in line with current penalties.

Schedule 3 makes the usual non-substantive statute revision amendments, e.g., converting the Act to gender-neutral language.

The Hon. DIANA LAIDLAW secured the adjournment of the debate.

STATUTES REPEAL AND AMENDMENT (CHILDREN'S PROTECTION AND YOUNG OFFENDERS) BILL

Received from the House of Assembly and read a first time.

The Hon. BARBARA WIESE (Minister of Transport Development):I move:

That this Bill be now read a second time.

I seek leave to have the second reading explanation inserted in *Hansard* without my reading it.

Leave granted.

This bill amends various Acts affected by the enactment of the Young Offenders Act, 1993, the Youth Court Act, 1993 and the passage of the Children's Protection Bill, 1993. It contains provisions to ensure that matters will not be disrupted by the repeal of the Children's Protection and Young Offenders Act, 1979 and the enactment of the new legislation.

The new Young Offenders Act, 1993 does not, as did the Children's Protection and Young Offenders Act, 1979, spell out young offenders' rights to bail, nor are the Youth Court's sentencing powers fully spelt out. The provisions of the Bail Act, 1985 and the Criminal Law (Sentencing) Act, 1988 now apply to young offenders. In the case of the Bail Act a minor amendment is needed to ensure that the new Youth Court is a bail authority.

More far reaching amendments are needed to modify some provisions of the Criminal Law (Sentencing) Act. For example some references to imprisonment need to be amended to read as references to detention, references to bonds need to be read as references to an order under section 26 of the Young Offenders Act, 1993, references to probation need to be read as references to the youth against whom the order is made. The Act also needs to be amended to take cognisance of the fact that orders to which it refers will now also be made by the Youth Court and that it is the Chief Executive Officer of the Department of Family and Community Services who has responsibility in relation to young offenders and not the Chief Executive Officer of the Department of Correctional Services. Warrants of commitment will not be issued by the Youth Court and the concepts of community service under the Young Offenders Act differ somewhat from that under the Criminal Law (Sentencing) Act. These differences are also catered for in the amendments.

The Bill also contains the transitional provisions necessitated by the repeal of the Children's Protection and Young Offenders Act and the creation of the new Youth Court and a totally new regime for dealing with young offenders and children in need of protection.

The regime adopted in the transitional provisions is to allow all proceedings for offences to be started or continued under the new regime, even though the alleged offence was committed before the new legislation came into operation. It may be, for example, that a young offender has an appearance before an Aid Panel outstanding at the time the new legislation comes into operation and this will need to be dealt with.

The amendments recognise that a young offender may be subject to more severe penalties under the new legislation so it is provided that, where the offence was committed before the new legislation comes into operation, a young offender cannot be subject to a more severe penalty than he or she could have received under the old legislation.

Because the enforcement of bonds of the Children's Court differs from that under the new legislation their enforcement is to continue in accordance with the old legislation. This is to ensure that young offenders already in the system are not disadvantaged by being subject to the new regime. Equally with other orders of the Children's Court. The release of young offenders in detention, for example, will continue to be governed by the old legislation.

Provision is made to allow matters that are part heard at the time of the commencement of the new legislation to continue to be heard even though the judicial officer is not a member of the new court.

Provision is also made with respect to the continuance of part heard in need of care proceedings.

Explanation of Clauses

PART 1
PRELIMINARY

Clause 1: Short title

Clause 2: Commencement

Clause 3: Interpretation

This clause includes definitions aimed at simplifying the expression of the transitional provisions.

PART 2
REPEAL OF CHILDREN'S PROTECTION AND YOUNG OFFENDERS ACT 1979

Clause 4: Repeal of Children's Protection and Young Offenders Act 1979

PART 3
AMENDMENT OF BAIL ACT 1985

Clause 5: Amendment of s. 13—Procedure on arrest

The amendments require a youth who is arrested and refused police bail to be brought before the Youth Court rather than a justice as is the case with an adult.

PART 4
AMENDMENT OF CRIMINAL LAW (SENTENCING) ACT 1988

Clause 6: Interpretation of Part

This is a machinery provision for references to the principal Act in this Part.

Clause 7: Amendment of s. 3—Interpretation

The definition of 'court' is amended so that the Act applies to the Youth Court.

The definition of 'appropriate officer' is amended so that it includes the Registrar of the Youth Court.

Definitions of 'youth' and 'Youth Court' are added.

Clause 8: Substitution of s. 21

Section 21 provides that the provisions relating to sentences of indeterminate duration do not apply to a child unless the child is sentenced as an adult. The terminology used in the section is updated to comply with that used in the Young Offenders Act 1993.

Clause 9: Substitution of heading to Part V

Clause 10: Insertion of s. 44A—Application of Part to youths

Part V relating to bonds is modified so that it applies to orders made against youths under section 26 of the Young Offenders Act 1993. This gives the Youth Court power to suspend a sentence of detention or to discharge without sentencing on condition that the youth enters into an undertaking. It imposes a limit of 3 years on the term of an undertaking. It enables the Court to require a youth to pay a sum of money in the event of breach of an undertaking and to require that obligation to be guaranteed. It also provides for variation or discharge of an undertaking.

Clause 11: Insertion of s. 59AA—Application of Division to youths

This clause modifies the provisions relating to enforcement of bonds for the purposes of their application to an order under section 26 of the Young Offenders Act 1993 requiring a youth to enter an undertaking. The terminology used in relation to adults is modified to make it applicable to youths.

Clause 12: Amendment of s. 61—Imprisonment or detention in default of payment

Clause 13: Amendment of s. 61a—Driver's licence disqualification for default

Clause 14: Amendment of s. 67—Application to work off pecuniary sums by community service

Clause 15: Amendment of s. 69—Amount in default is reduced by imprisonment or detention served

These amendments modify the provisions relating to enforcement of pecuniary sums for the purposes of their application to an order for payment of a pecuniary sum made against a youth. The provisions in the Criminal Law (Sentencing) Act are subject to sections 23(5) and (6) of the Young Offenders Act. The terminology used in relation to adults is modified to make it applicable to youths. The Youth Court is given power to make an order for detention of a youth for non-payment of a fine equivalent to a warrant of commitment against an adult. A youth is given the opportunity to apply to work off a fine by community service under the Young Offenders Act similarly to that given to an adult.

Clause 16: Amendment of s. 71—Community service orders may be enforced by imprisonment or detention

This amendment modifies the provision relating to enforcement of community service orders for the purposes of its application to an order for community service made against a youth. The terminology used in relation to adults is modified to make it applicable to youths. The Youth Court is given power to make an order for detention of a youth for breach of an order equivalent to a warrant of commitment against an adult.

Clause 17: Amendment of s. 71a—Other non-pecuniary orders may be enforced by imprisonment or detention

This amendment modifies the provision relating to enforcement of an order that requires a person to do something other than community service or payment of a pecuniary sum for the purposes of its application to such an order made against a youth. The terminology used in relation to adults is modified to make it applicable to youths. The Youth Court is given power to make an order for detention of a youth for breach of an order equivalent to a warrant of commitment against an adult.

PART 5
TRANSITIONAL PROVISIONS

Clause 18: Transitional provisions—Youth Court

The non-judicial staff of the Children's Court are transferred to the Youth Court.

Clause 19: Transitional provisions—proceedings for offences

Proceedings for an offence in the Children's Court may be continued in the Youth Court but the penalty that may be imposed must be no more severe than could properly have been imposed by the Children's Court. The Children's Protection and Young Offenders Act will continue to apply to orders and bonds in force under that Act on the commencement of the new scheme.

Clause 20: Transitional provisions—in need of care proceedings

A family care meeting need not be held prior to taking proceedings under the new Children's Protection Act if a conference was held under the Children's Protection and Young Offenders Act within the last month. The Children's Court, in completing part-heard 'in need of care' proceedings, must make only those orders that the Youth Court is empowered to make under the Children's Protection Act. Orders made under Part III remain in force and may be varied or revoked by the Youth Court. A care and control (residential) order will be taken to be an order granting custody of the child to the Minister. A child being held in temporary custody under section 19 of the Children's Protection and Young Offenders Act may continue to be so held in accordance with that section (i.e. until the next working day).

Clause 21: Interpretation of Acts and instruments

References to the Children's Court are to be interpreted as references to the Youth Court. References to an officer of the Children's Court are to be interpreted as references to the corresponding officer of the Youth Court.

The Hon. K.T. GRIFFIN secured the adjournment of the debate.

ADJOURNMENT

At 12.3 a.m. the Council adjourned until Thursday 14 October at 2.15 p.m.