THE JOINT SELECT COMMITTEE ON COMMUNITY DEVELOPMENT MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART, ON TUESDAY 1 SEPTEMBER 2009.

DYING WITH DIGNITY BILL 2009

Ms RUTH HENDERSON AND **Ms KATHERINE WOODWARD,** PARLIAMENTARY COUNSEL, WERE CALLED AND EXAMINED.

CHAIR (Mr Finch) - Thanks very much, Ruth and Katherine, for joining us from Parliamentary Counsel to resume discussion on the Dying with Dignity Bill. We will continue from where we left off yesterday.

Ms HENDERSON - On page 11 we did not have any major concerns apart from the general comments we had at the beginning about overly long sentences being quite difficult to read, and the language.

Ms FORREST - Are there any issues with the subjectivity of this? How do you determine what is acceptable to the patient, what is a reasonable thing? How does someone determine what is alleviating the sufferer's pain and suffering? Is that a reasonable thing to have in there and can that be easily assessed?

Mr WOODWARD - It is subjective to the sufferer so it needs to then be assessed by the sufferer. It is up to them to decide whether or not it has its levels that are acceptable.

Ms O'CONNOR - Then is the medical professional's determination of that level of acceptability implied?

Ms WOODWARD - From my reading it mainly relies on the sufferer being satisfied, not the medical practitioner.

Ms FORREST - If the sufferer went to the only palliative care specialist in the region, which may well be the case in Tasmania in a number of areas, and they were very anti-voluntary euthanasia, then they might not determine that the sufferer's comments or their assessment of the situation were reasonable because they felt that this or that had not been tried. So does that make it difficult, or is it that once a sufferer has said that is it, then that is it?

Ms HENDERSON - The way I read it is that it is purely based on the sufferer's mental state, not on the medical practitioner making a judgment about the sufferer. So it is purely a decision of the sufferer. Is my pain being relieved or is it not? I do not see where there is medical judgment coming in there.

Ms O'CONNOR - But isn't it about the act of medically judging whether or not to assist the sufferer, so that acceptability is a factor in the assessment?

Ms WOODWARD - I think the point is that if a medical practitioner is not satisfied with the level or is not satisfied with what the sufferer is saying, then they would not assist

someone under this act anyway. That would be my interpretation of using 'must not' because it implies that the consequence is. If they were not satisfied with that then they would not actually assist the sufferer under the act.

Ms HENDERSON - Yes, but ultimately the test is the subjective test.

Ms WOODWARD - That is right. The test is the sufferer but if the medical practitioner is not satisfied with that then their option is to not assist under the act.

Ms O'CONNOR - That is an option or a compulsion, isn't it, under the act?

Ms WOODWARD - That is right. They cannot assist under the act if they are not satisfied about it.

Ms FORREST - Even if they are satisfied the medical professional may continue to assist the sufferer. So that gives the medical practitioner the out if they do not want to. The whole issue of whether it is actually workable in a broader sense is called into question there in that regard. If you had medical practitioners who were very anti -

Ms HENDERSON - The way it is drafted is that the medical profession 'may' assist someone. You cannot force a medical practitioner to do it.

Ms O'CONNOR - That is an important component of the bill.

Ms HENDERSON - Yes, that is right.

Ms FORREST - The sufferer indicates in writing to the medical practitioner the sufferer's wish to proceed. It does not allow for any other form of communication. What if someone is illiterate, cannot use their hands and cannot write? Again, is that making it too onerous for people? You can assess only if the sufferer indicates in writing to the medical practitioner the sufferer's wish to proceed with the request.

Ms O'CONNOR - There must be all sorts of examples in contract law and in the drafting up of documents where you may be dealing with a person who is physically unable to write something down.

Ms FORREST - They have an enduring guardian or power of attorney, but this is not that.

Ms O'CONNOR - But aren't those provisions already embedded in other laws?

Ms WOODWARD - There is a reference to writing in the Acts Interpretation Act and that says that writing is construed as including references to any mode of representing or reproducing words, figures, symbols in a visible form. For example, someone who may not be able to physically write could verbally express their wishes and have voice recognition software write out something or someone else could write it down for them, and that would be enough to constitute writing. That would be my interpretation under the Acts Interpretation Act.

Mr GAFFNEY - I go back to your comment earlier that they were really long sentences. When I looked at this section I thought that is huge. That is just one sentence. I looked

through it to see whether putting in a few more commas and pauses would suffice, but would you try to decrease that? You start at the top and get to the bottom but you have got to retain all the steps. It seems to be to be very unwieldy.

Ms O'CONNOR - You have to read it quite a few times actually to absorb it.

Ms HENDERSON - If I were drafting it I would definitely be either putting it into two sentences or breaking it down into paragraphs (a), (b) and (c). In the general introduction I was talking about the difficulty in reading it. There might not necessarily be a legal issue, but you do have to read it four or five times.

Ms WOODWARD - It is not written in plain English so that someone reading it for the first time can understand it straightaway.

CHAIR - Or structured well?

Ms WOODWARD - That is right.

Ms FORREST - Clause 12(1) has been raised by some of our witnesses. Concerns have been raised that in aged-care facilities, where people are dying at times, or in palliative care centres, there are a lot of people in the environment. There could be the cleaner, the lady who delivers the meals from the kitchen, the workman who comes into the room to do some minor repairs in the room, or whatever. If a patient or person said to that person they had rescinded their request, do they have obligations under this act to then report, and to whom do they report it?

Ms HENDERSON - That is not covered.

Ms FORREST - It should be because it says here they can do it in any manner. That means a person may have been lying there, had some awakening or got a phone call from their daughter whom they had not heard from for 20 years and, as a result, have changed their mind about doing it.

Ms O'CONNOR - Are you suggesting that they have this moment of lucidity and change of mind and then, if they lapse back into an unconscious state, they cannot articulate what they are after?

Ms FORREST - Not necessarily, no. But they might have said it to this one person and think they have told somebody that they do not want to do this anymore. What is the responsibility of that person? If they rescind in any manner at any time then that is game over as far as that goes. There could be circumstances that would arise and someone would think, 'I have gone through the process, I have signed everything, but I really do not want to do it'. There are two options. One is that they then lose competence. They have signed a certificate but something happens. The call from their daughter caused them to have a stroke because they were so excited about their daughter coming to reconcile. They have lost competence and do not really want to be dead now their daughter is on the way or whatever. That is one type of thing. Then what happens to the person that they told?

Ms WOODWARD - From a drafting point of view, that is not covered. It just says that they can do it at any time and in any manner and there is no obligation as it is currently drafted as to what happens with that.

Ms FORREST - Do you think that should be in there?

Ms WOODWARD - That is something that we cannot answer. That is a policy decision.

Ms O'CONNOR - Don't you think that would be covered? Remember Dr Otlowski suggested there be the final act of confirmation. There is no way a GP who has been requested to and accepted the request for assistance could euthanase an unconscious person.

Ms FORREST - Yes they can. They have signed all the paperwork. There is nothing to stop them at this point. They have not rescinded. They have told the cleaner that they do not want to go ahead, but the cleaner has not told anybody else and thinks, 'What do I do with this information?', or it was just a casual cleaner who was only in for the day and is gone again and may not be aware of the act at all. Then the person has the stroke; they have lost competence and so they will be euthanased. They might still have chosen that path but the last thing they said was that they did not want to do it. The safeguards are so encompassing here, but there are also these areas that have been identified. I did not make this one up. It was raised by someone about an aged-care facility.

Ms O'CONNOR - But isn't competency an issue when the ultimate act comes?

Ms FORREST - No; it is only if you do not rescind it at any time.

Ms HENDERSON - They can rescind in any manner, at any time, but it does not state to whom. Then in (2), if they rescind then the medical practitioner must destroy the certificate. If it is not to the medical practitioner then they are not going to know. The medical practitioner will not be able fulfil their obligations because they will not be aware of the rescission.

Ms FORREST - The last test in this is whether a sufferer at any time, in any manner, rescinded the request for assistance.

CHAIR - In circumstances where somebody might have made a request to be euthanased, should new protocols be put in place in that facility to ensure the cleaner is not the one who is told?

Ms FORREST - You cannot do that.

CHAIR - I am just curious. In that hypothetical situation of a cleaner being presented with the information, I think the facility would need to ensure that their cleaners have an understanding of the obligation to report that.

Ms FORREST - In an aged-care facility the cleaners and the kitchen staff and everyone engage with a person there. Aside from the nursing staff and the carers that are involved, that is their social life a lot of the time, so you are saying you cannot talk to them when you go in there in case they do something.

CHAIR - No, I am not suggesting that. I am saying that if they do reveal the information that the cleaner is obligated to report, that they understand they are part of the process.

Ms O'CONNOR - I understand that, but again, there needs to be, at that final point where the substance is administered, an affirmation of the intent.

Ms FORREST - If you do that then you knock out everybody who loses capacity.

Ms O'CONNOR - But if someone is losing capacity then there is no argument for them to be euthanased.

Ms FORREST - But if you have gone along the whole path and your cancer is getting worse, your pain is getting worse, you are on a whole new range of medications now, they have introduced new opioids or midazolam that are going to alter your perception and your rational thought because that is part of the palliative care that is keeping you going until that point, then if you ask that question at that point the answer would have to be no. If you have reached that point that Margaret Otlowski suggested, that you have that approval and confirmation, mentally competent confirmation at that time, then you will not get it in a lot of these cases.

Mr GAFFNEY - I wonder how they handled it in the Northern Territory.

Ms FORREST - Well, they didn't because they were not based on intolerable pain. None of those deaths related to intolerable pain.

Mr GAFFNEY - But the rescinding part?

Ms FORREST - It was not part of their bill, I don't think.

Mr GAFFNEY - I can see how that would happen, and it is a weakness. It is a flaw.

Ms O'CONNOR - It is a flaw in that someone's wishes may not be carried out or that they will be unconscious?

Mr GAFFNEY - If you are the cook and I say to you I do not want to die now, I have changed my mind, then I pass out, but you do not tell anybody because you do not understand what I am talking because you are Mexican, then this person is euthanased. Or you do not act quickly on it and that puts a lot of pressure on the person. 'Did they really say that? I am not quite sure what they said.' It is that sort of uncertainty, so it is a grey area of the bill.

CHAIR - Are we debating something here that is not of an issue for our guests?

Mr GAFFNEY - They were thinking that but they were too nice to say it. We will just put a star there.

CHAIR - Is there something that you are seeking?

Ms FORREST - It is a matter of policy, I accept that, but how about a subclause such that any notification received by anybody should be reported, ideally to the medical practitioner. Then it becomes the medical practitioner's job to destroy the certificate.

Ms WOODWARD - That is one way you could do it. There are other ways that could clear this up. For example, you could deal with that level of detail in the regulations but you would then need to, rather than saying 'at any time, in any manner', talk about 'in a prescribed manner' or something like that and then setting out things within the regulations. It is an area that is not covered at the moment.

Ms FORREST - If you put down a prescribed manner, the regulations would be massive to try to account for every opportunity.

Ms WOODWARD - That would depend on the policy behind it. There are ways of drafting things so that they are all-encompassing. You might just exclude certain manners rather than listing all the manners by which it can be done. There are ways that it could be dealt with if necessary. As we say, that is a question of policy.

Ms HENDERSON - If I were drafting this bill and the instructing officer showed that to me, I would point out the problems and then wait for them to respond.

Ms WOODWARD - We cannot say it is the right way or the wrong way to do it.

Ms O'CONNOR - Is there scope within this framework for inserting a clause that says the medical practitioner must be satisfied at the time of administering the substance that the sufferer still wishes to end their life.

Ms HENDERSON - You could include a clause. I guess it does get around the rescission problem. Yes, you could put a clause along those lines in there towards the end. There is still the problem of 12(1); they can rescind to anyone but then you are putting the onus on the medical practitioner here to destroy a certificate, when it is something outside of their knowledge if they rescind to the cleaner. Clause 12 would still be problematic because you are telling a medical practitioner they must do something when they might have no knowledge that something occurs. That is the biggest difficulty: the obligation is on the medical practitioner to know something outside his scope.

Ms FORREST - There is no direct link between those two, necessarily. That is the problem.

Ms HENDERSON - That is right.

Ms FORREST - This is almost making the assumption that the rescission was made to the doctor.

Ms HENDERSON - That is right.

Ms WOODWARD - Or to someone who is in contact with the doctor and would think to notify them of it, like a family member or something like that.

Ms FORREST - Again it comes back to the problem of a family member who may really want that person to be euthanased and not passing on that information.

In the event of this happening should a person then decide not to go down that path, do we then have to go back to the start at that point? The certificate has been torn up. Maybe the palliative care has been working or they just found out their daughter is pregnant and they want to try to hang around for the birth. If down the track the pain and suffering become unbearable and they again no longer want to continue, do they go back to start?

Ms HENDERSON - It is not covered. It is completely unclear as to what happens. It is clear that you would need a new certificate of request.

Ms O'CONNOR - You would have to go back to start, and rightly so.

Mr GAFFNEY - What if in 12(2) the word was 'should', not 'must'.

Ms O'CONNOR - No, that is high risk.

Ms WOODWARD - Perhaps what I would do is remove 'If a sufferer rescinds a request' and put it at the end of a sentence - 'If the medical practitioner is aware that the sufferer has rescinded the request'. Something along those lines would alleviate the pressure on the medical practitioner, so long as they destroy it as soon as they are aware of a rescission. If they are not aware of the rescission they cannot be held liable under this.

Ms FORREST - But they must do it as soon as they are made aware.

Mr WOODWARD - Yes, but if they are not aware then they are not responsible for doing something against their obligations in the act.

Ms FORREST - The Coroner has decided this is a bit iffy. In a court the doctor says 'No, no-one told me' and then the nurse says, 'I rang you on that afternoon and told you at handover that Mrs Smith has just said she does not want to proceed'. The doctor says, 'I have no recollection of that event'. The doctor usually wins in those battles.

Ms O'CONNOR - Ruth was saying before that if she was drafting this bill there are certain things that she would have written in. I just want to put on the record that I am sure that the person who put this bill forward, along with other members of opposition parties in Tasmania, would dearly love to have access to Parliamentary Counsel because we are the only Australian State that does not give members outside the Government access to Parliamentary Counsel. We might not be having the detail of this discussion if Parliamentary Counsel was open to all parties. It is annoying and it diminishes the quality of the legislative output.

Ms HENDERSON - When I say that I would have drafted a few sentences differently, given the instructions you would probably get 10 different versions of the bill. Everyone has their own style of drafting things. That is just how I would do it.

Mr GAFFNEY - The maximum penalty is 200 penalty units or imprisonment for four years. Are penalty units $100?

Ms WOODWARD - Penalty units at the moment are $120.

Mr GAFFNEY - To me, this is a funny one. It is like either/or. I have the money so I will pay the unit or I go to prison.

Ms FORREST - No, that is not for you to decide.

Ms WOODWARD - Our current drafting would say at the end of something like this, '200 penalty units or imprisonment for four years or both'.

Ms HENDERSON - Section 37 of the Act Interpretations Act covers it.

Ms WOODWARD - So it is up to the judge to do one or the other or both.

Ms HENDERSON - In section 37?

Mr GAFFNEY - The reason I ask is that on page 7 they just had penalty units. They did not have 'or imprisonment'.

Ms WOODWARD - There is no imprisonment in that case.

Mr GAFFNEY - You have one worth 100 penalty units or imprisonment for two years, and one for 100 penalty units and no imprisonment, but to me they are for the same severity of offence.

Ms WOODWARD - We would raise that with the instructing officer.

Mr GAFFNEY - I thought there should have been some consistency throughout the act.

Ms WOODWARD - That is a question of policy for when imprisonment is attached.

Ms FORREST - That could be changed depending on how bad they thought the offence was and what sort of penalty there should be.

Mr GAFFNEY - On page 6 a medical practitioner can get a maximum penalty of 100 penalty units.

Ms O'CONNOR - No, that is aimed at any other person who is offering some incentive to compel or persuade the medical practitioner to do the deed.

Ms FORREST - If, say, I offered my GP a bit of money to knock off my mother -

Mr GAFFNEY - And you do not think that is worth imprisonment?

Ms FORREST - I am not saying it doesn't. That is not my decision. That is for the drafter of the bill.

Mr GAFFNEY - That is what I am saying.

Ms FORREST - That is something you should talk to Mr McKim about or try to amend it in the Parliament if you think it is not strong enough.

Mr GAFFNEY - On page 13 it is 100 penalty units or imprisonment for two years for medical records not being kept properly. To me the first one was probably worse.

Ms O'CONNOR - Policy issues.

Mr GAFFNEY - You would need some consistency.

Ms WOODWARD - It would be something that we would raise with an instructing officer, but it would be up to the instructing officer, when they came back to us, as to how it would be dealt with.

Ms FORREST - In clause 13, would this penalty or this clause actually apply to people who did not live in Tasmania? For someone coming over from the mainland and participating in this part of the bill, if they did the wrong thing would there be any penalty or it is only for Tasmanians?

Ms O'CONNOR - They would if they did it in Tasmania.

Ms WOODWARD - It would be like any other crime that is committed in Tasmania. If they were found out they would be brought to and prosecuted in Tasmania, regardless of where they live.

Ms HENDERSON - At the top of page 13, the first part of that clause suddenly brings in a requirement that the sufferer's medical practitioner have a residential qualification - presumably living in Tasmania - but there is no requirement in the actual definition of medical practitioner that they be residential in Tasmania.

Ms WOODWARD - Nor anywhere within the act, so that reference to a residential requirement is unclear as to what they are referring to.

Ms O'CONNOR - Does it mean their certificate of practice in Tasmania? Does that apply with GPs?

Ms WOODWARD - At the moment all they were asking them to do is to certify their independence and the residential and the period-of-practice qualifications. At the moment it is ambiguous about what the residential is actually doing.

Ms HENDERSON - In the definition of medical practitioner it is clear what the period-of-practice qualification is - five years - but no residential qualifications are necessary.

Ms WOODWARD - And that is not referred to anywhere else in the bill.

Ms HENDERSON - It does not work with the actual definition of medical practitioner.

Ms FORREST - So all that is required is that the medical practitioner establishes their independence and also informs where they live, so they could live anywhere in the world.

Ms O'CONNOR - It could just be an address detail requirement.

Ms HENDERSON - That is right, but residential requirement is not clear. Is it where they are living? Is it maybe where they are performing the act? Just using residential is unclear within itself.

Ms FORREST - If it is intended, for example, that you want a residential contact for this doctor so we can track them down if something goes astray or wrong, or the medical records are not complete and perhaps the Coroner needs them for further investigation, then that would be the purpose.

Ms WOODWARD - That is unclear.

Ms HENDERSON - Are the qualifications qualifying the period of practice or the residential? It is very unclear exactly what it is getting at there.

Mr WOODWARD - The last sentence in that clause is 'and such other information, if any, as is prescribed'. That is what we call in drafting an 'out text' and it is normally quite clear which part of the clause it applies to. At the moment, though, it is unclear whether this other information is just covering the note by the sufferer's medical practitioner referred to in subclause (5) or whether it is any other information under the whole clause.

This is an example where the numbering is not as we would do it within our drafting office, but that is something that can be picked up for the second-print bill. However, the out text is not something that we could work out.

Ms HENDERSON - If we were drafting regulations under the act I would not know what that 'prescribed' actually applied to, whether it was applicable to the whole of clause 14 or just (5) - information to be included in that medical practitioner's note. It would make it quite problematical to prescribe anything under that. Our main concern with clauses 15 and 16 was the notion of a death certificate.

Ms WOODWARD - It's not defined. We did a search of all the Tasmanian legislation at the moment, apart from some of the archaic rules and regulations. There is actually only one other reference to a death certificate; that is in the Births, Deaths and Marriages Registration Act, but it doesn't actually define it there either. So we're actually unclear as to what is being referred to with the death certificate. It is one of those general terms that you would think has a meaning, but when you look through the legislation it's not actually something that is referred to.

CHAIR - What's the term in Tasmania, then?

Ms WOODWARD - It depends on what you are referring to. There's a reference in the Burial and Cremation Act to 'certificate of life extinct'. It is a very obscure name.

Ms HENDERSON - Again, if we were given instructions we would go back to the policy officer and ask exactly what do you mean, what are you talking about there, because I'm not entirely sure.

Ms FORREST - There is more than one document that's completed at the time of the patient's death in a hospital.

Ms WOODWARD - There is a document completed at the time of a patient's death, but then there are various other things, as you say, that are registered.

Ms FORREST - There are two at least that go to the funeral director. When relatives go to get the death certificate for the purposes of accessing superannuation, if they don't get the right certificate then the superannuation won't be paid out. It needs to be very clear what they are talking about here.

CHAIR - Generally you refer to death certificates, though, don't you?

Ms FORREST - You do, but it doesn't mean we understand what they are here.

Ms O'CONNOR - What is the document that is delivered to the Coroner in the case of any unnatural death?

Mr GAFFNEY - Did you look at the Coroners Act?

Ms WOODWARD - No, but I looked in the Burial and Cremation Act, which is the one that deals with the documentation on a person's death. I know that at least one copy of the certificate issued under that act is given to the Coroner. But, as I say, we can't answer what is meant here by death certificate. That's what our problem is because it would be then up to a court to determine what they consider a death certificate to be.

Ms FORREST - Would any death in these circumstances automatically become a coroner's case because it's not considered natural?

Ms WOODWARD - I can't comment on that one; I don't know.

Ms HENDERSON - Subclause 15(2) says that a death as a result of assistance given under this act is not taken to be unexpected, unnatural or violent for the purposes of a coronial inquiry, but then it is required to be reported to the Coroner under 16. Having not looked at the Coroners Act, I can't tell you whether or not it would be a reportable death.

Ms O'CONNOR - Our understanding is that it would be.

Ms FORREST - Yes. In 15(2) basically those deaths cannot become the subject of a coroner's inquest, but then in 16 it is reported to the Coroner, so isn't that a contradiction?

Ms WOODWARD - Subclause 15(2) refers to a coronial inquiry, not necessarily reporting to the Coroner, which is a different step. By putting in the 'unexpected, unnatural or violent, or of having occurred under an anaesthetic', it's saying it wouldn't necessarily need to be reported.

Ms FORREST - Well, it wouldn't be for the purpose of a coronial inquiry -

Ms WOODWARD - That's right, but then it's putting in its own obligation to report it to the Coroner.

Ms FORREST - Yes, but under subclause 15(2) you can't undertake a coronial inquiry where the Coroner thinks there may have been some skulduggery. Effectively you're

saying 'No, you can't'. Isn't it putting a barrier in the way if the Coroner is going to be saying, 'Yes, I've got a report but I can't actually instigate a coronial inquiry here because it says here that his death is not to be taken in this way for the purposes of a coronial inquiry'.

Ms WOODWARD - I would have to have a better understanding of the Coroners Act before I could answer that one.

Ms HENDERSON - We have not looked at the Coroners Act so I cannot really comment on its relationship with the Coroners Act.

Mr GAFFNEY - I read that differently. 'Only' means that it could be unexpected, unnatural, violent, so that means he could launch a coronial inquiry.

Ms HENDERSON - The words 'for that reason only' is the key to the provision. It is not meant to be a blanketing.

Ms WOODWARD - That is right.

Ms HENDERSON - You cannot look into anything at all.

CHAIR - So are you suggesting that could be done better? For what is trying to be achieved here, do you think that covers what is there or is it a little bit confusing?

Ms WOODWARD - We cannot answer whether or not it could be done better.

CHAIR - Is it clear enough?

Ms HENDERSON - It is hard if you can't talk to the person who has drafted it or know the policy intent behind it. It is a bit hard without having anyone to ask, 'What exactly are you trying to get at and I will tell you whether you exactly have it'.

Ms WOODWARD - Because this may be exactly what is intended under the policy. We cannot answer whether or not it could be done differently or better.

Ms FORREST - So it all comes back to what that whole clause is trying to achieve.

Ms HENDERSON - Yes, that is right.

Ms FORREST - I guess it comes down to the point of whether it enables the Coroner to have a good hard look at a case, bearing in mind that the person is already dead at this point - as coroner's cases generally are. Do they have the capacity to go back and fully investigate any death that happens under these circumstances in a way that can identify if doctors are doing the wrong thing or things were not done in a way that is consistent with the act.

Ms WOODWARD - I think you are right with 'for that reason only'. Yes, if there is another reason why they think the death should be investigated in a coronial inquiry, they could because there might be another reason. They cannot investigate if it was only assistance given under the act, but if there was another reason.

Ms HENDERSON - If there were suspicious circumstances.

Ms WOODWARD - Exactly, or if there was a question as to the death for another reason rather than just that they have been given assistance under this act. That then could be the subject of a coronial inquiry.

Ms FORREST - I guess it comes back all those hoops and everything.

Ms WOODWARD - Subclause 16(2) I felt was better served being under 'Coroner may report on operation of Act ' - clause 17 - rather than under 'Medical records to be sent to Coroner', but that is not a fatal issue there.

Ms FORREST - There is no definition of medical treatment in clause 18.

Ms WOODWARD - That would depend on the legislative enactment that you are looking at. If that refers to medical treatment then this would be considered medical treatment.

Ms HENDERSON - Basically, if another act refers to medical treatment then it is saying that this constitutes medical treatment for the purposes of other legislation.

Ms WOODWARD - So it would depend on that legislation rather than this act.

Ms HENDERSON - Again we would go to the policy officer and ask what you are trying to achieve and what legislation you have in mind. Without saying what legislation it is trying cover it is a bid hard to work out.

Ms FORREST - If we go back to 'assist' in the interpretation it talks about the role generally of the medical practitioner. The person who is exempted from the criminal code is the doctor. This talks about assistance given by a medical practitioner or a health care provider. A health care provider is the hospital, the nursing home, the organisation and potentially it could also be the nurse who is there. Does this mean there is protection for those people? It is linking them with assistance in clause 18 when the definition of assistance refers to the doctor who has the immunity or the indemnity under this.

Ms O'CONNOR - But a health provider as an entity can't provide assistance.

Ms FORREST - But nurses can.

Ms O'CONNOR - Isn't it implicit in that we are talking about staff who work for health care providers?

Ms WOODWARD - It is in the definition of 'health care provider'.

Ms FORREST - 'Any nurse or other person whose duties include ...'. This is the nurse I am talking about now; the nurse is not afforded any protection under this bill.

Ms WOODWARD - It is providing them with protection under any other act that may talk about medical treatment. They must not provide it unless it is for medical treatment. So

it is affording them protection from another act in which they might be liable, even if it is not necessarily providing the protection under this.

Ms O'CONNOR - That is presumably the Criminal Code.

Ms FORREST - The Nursing Act has certain things in it too about what you can do.

Ms WOODWARD - Exactly, but it would depend on the wording of those acts as to whether or not this would cover it.

Ms FORREST - So how do we ascertain that the protection is there without going back to the Nursing Act or the Poisons Act, because the Poisons Act is another one which would come into play here.

Ms WOODWARD - You would need to go back and look at that act and look at the policy you are intending to cover here.

Ms HENDERSON - Again, we would go back to a policy officer and ask, 'What are you trying to achieve with this; what do you have in mind in the drafting; and what acts do you have in mind?' You could have a guess, but we don't know the policy or intention behind this and you really need to find that out.

Ms FORREST - The policy intention behind this particular clause?

Ms O'CONNOR - That has been an issue a couple of times as we have gone through, so it may be worth getting the person to come and explain some of the policy queries that have been raised.

Mr GAFFNEY - Isn't that covered by the instructions from medical practitioners? It says 'on the instructions', so if the medical practitioner is telling the health care provider or the nurse to do that, doesn't that cover the nurse?

Ms FORREST - No.

Mr GAFFNEY - Why not? If it covers that here in the health care provider then it covers the nurse there as part of the health care provider.

Ms FORREST - That is including her or him in this. It is not saying that the nurse can be a person who fits into this by a health care provider. It can be the nurse, so a nurse does not have to do what a doctor says. If the nurse does what a doctor says and it is wrong, then she is still liable.

Mr GAFFNEY - Not according to this 'on the instructions of the medical practitioner'.

Ms FORREST - I will give you an example. I have done it myself. The doctor wrote a drug order on a drug chart and I looked at it before I went to give it to the patient. It was the wrong dose. It should have been 50 milligrams but it said 150 - too much. I went to the doctor and I said 'Are you sure you have that order right?'. 'Yes.' 'Are you really sure you want me to give 150 milligrams?'. 'Yes.' 'Do you want to give it intravenously?'.

'Oh, maybe not. Thank you.' If I had given it, I know the drug would not kill the patient but that was not the right order.

Mr GAFFNEY - But you can't be held liable for that?

Ms FORREST - Yes, I can be. If I have given it and have not questioned it when I know that it is wrong, and a reasonable nurse would know that it is wrong, then I can be.

Ms O'CONNOR - That is why it is 'on the instructions of a medical practitioner'.

Ms FORREST - That drug chart was an instruction. It is a legal document. It is a legal instruction to give that drug at that time to that patient. Maybe we need to know what the policy intent is here.

Ms WOODWARD - In subclause 22(4) there is a requirement to transfer the relevant medical records but there is no time frame in there.

Ms HENDERSON - It is something that we ordinarily put in a bill. If you ask someone to do something, like hand over documents or records, you ordinarily give them a time frame - as soon as possible or within three days or whatever - that you consider appropriate in the circumstances.

Ms O'CONNOR - That may well be covered under the Coroners Act, though.

Ms WOODWARD - This is if they are refusing to provide the treatments. This is not providing it to the Coroner. This is if a health care provider refuses to provide assistance and they transfer the patient to a different provider.

Ms FORREST - That should be accompanying the patient.

Mr GAFFNEY - It would be as soon as practicable. You could not give a time because you might to find another institution willing to take on the patient.

Ms FORREST - But even so, the information should go with the patient. If you had electronic records it would not be a problem.

Ms WOODWARD - That is a question of policy but it was something raised when we were looking at the drafting.

Ms HENDERSON - As it is they can say, 'We will do it when we want to do it'.

Ms FORREST - Is 'as soon as practicable' a reasonable thing?

Ms WOODWARD - In drafting terms that means as soon as is reasonably possible. It means that you do not have to drop everything to do it, but you have to do it in due course. You cannot delay it or hold it up.

Ms O'CONNOR - That would fit well in here?

Ms WOODWARD - It is one way you could do it, yes.

Ms FORREST - Clause 16 has the medical records being sent to the Coroner as soon as practicable after the death of the sufferer.

Ms WOODWARD - That is right. It does not mean that as soon as they have died you have got to go straightaway and pass the medical records to the Coroner.

Ms FORREST - What happens in Zurich is that as soon as the patient is dead they have to ring the police and notify the police of a suicide. They take the medication themselves.

Mr GAFFNEY - If the provider is 'unable or unwilling' and you live in, say, Strahan and there is no other provider, then it takes time. So it is as soon as practicable.

Ms WOODWARD - That is right. You do not want them to be necessarily dropping everything but it is a time frame that we thought could be included.

Ms FORREST - With clause 23, 'The Governor may make regulations, not inconsistent with this Act, prescribing all matters:', is that a usual way of writing such a clause?

Ms WOODWARD - That is not our current drafting precedent for regulation making powers. It used to be. It is very similar to what used to be the requirement. At the moment we generally draft slightly more extensive regulation-making powers that set out certain things that you may specifically want to draft regulations on. Unless it says it is prescribed there are sometimes questions as to whether or not regulations can be crafted under the act.

Ms HENDERSON - The Acts Interpretation Act does have some regulation-making power that covers all acts, but that is restricted. That is not the style that we would use. We would start with saying, 'The Governor may make regulations for the purposes of this Act', and then we would go on to say what they included.

Ms WOODWARD - It is not our standard wording but it still enables regulations to be drafted under the act.

Ms HENDERSON - We had a look through section 47 of the Acts Interpretation Act, which fills in the blanks of what is missing but which we would ordinarily include.

Ms WOODWARD - The main concern we had was the lack of an administration of that clause, which we would always put in any bill. If you are going to have a piece of legislation the department needs to be responsible for it.

Ms HENDERSON - That assigns the minister responsible for administering the legislation and the department responsible for assisting the minister in that.

Ms WOODWARD - It is an administration of act clause. It is not fatal, we discovered, due to the Administrative Arrangements Act. That would look after a minister for this, but especially considering this is a private member's bill and there is not a department already associated with the drafting, nor a minister associated with the bill, it is our standard policy to include it. We discussed it with the chief and he was quite insistent that a clause needed to be in there.

Ms FORREST - It is interesting because we have had some suggestions that it does not fit under Health.

Ms O'CONNOR - Under Justice, wasn't it?

Ms WOODWARD - At the moment, if one is not included in there then it would be assigned to the minister responsible for the Administrative Arrangements Act until a new administrative arrangement order is made.

Ms FORREST - Is that the Treasurer?

Ms WOODWARD - I don't know.

Ms HENDERSON - A difficulty is added to the fact that its commencement is on royal assent, so you have a bill coming into operation very quickly that does not have a department responsible.

Ms WOODWARD - You may have a medical practitioner wanting to ask questions but there is nothing in the act that actually points them to the department responsible for it.

Ms HENDERSON - So whoever is going to be made responsible for it is not going to have time to get on top of the policy and answer any queries that medical practitioners have.

Ms WOODWARD - Generally we try to prescribe forms if possible, which allows them to be amended more easily than including them in the act, but that is just a general drafting thing. There is no reason why a form could not be included at that level.

Ms FORREST - Regarding signatures, we have the patient's medical practitioner and the second medical practitioner. With the requirement to have a psychiatric consultation, should not that psychiatrist also be signing off on the same form?

Ms WOODWARD - That is a policy question that we cannot answer.

Ms FORREST - Otherwise how do you really know they have done it?

Mrs BUTLER - Is it important for the witness to understand that there is a right to rescind as well?

Ms WOODWARD - It is the last line of the request for assistance, but there is nothing in there requiring the witnesses to understand that.

Ms O'CONNOR - But no-one can be compelled to be a witness so how does the right to rescind come into play there?

Ms WOODWARD - It does not, unless the policy intent is for them to become aware of that right to rescind. That is where most of the form requirements are a matter of policy, not necessarily a matter of drafting.

CHAIR - Thank you both very much.

THE WITNESSES WITHDREW.