

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

MENTAL CAPACITY (AMENDMENT) BILL [*LORDS*]

Second Sitting

Tuesday 15 January 2019

(Afternoon)

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SCHEDULE 1, as amended, under consideration when the Committee adjourned till Thursday 17 January at half-past Eleven o'clock.
Written evidence reported to the House.

No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor’s Room, House of Commons,

not later than

Saturday 19 January 2019

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The Committee consisted of the following Members:*Chairs:* MARK PRITCHARD, † IAN AUSTIN

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| † Afolami, Bim (<i>Hitchin and Harpenden</i>) (Con) | † Morton, Wendy (<i>Aldridge-Brownhills</i>) (Con) |
| † Chalk, Alex (<i>Cheltenham</i>) (Con) | † Norris, Alex (<i>Nottingham North</i>) (Lab/Co-op) |
| † Cunningham, Alex (<i>Stockton North</i>) (Lab) | † O'Brien, Neil (<i>Harborough</i>) (Con) |
| † Debbonaire, Thangam (<i>Bristol West</i>) (Lab) | † Sherriff, Paula (<i>Dewsbury</i>) (Lab) |
| † Dhesi, Mr Tanmanjeet Singh (<i>Slough</i>) (Lab) | † Syms, Sir Robert (<i>Poole</i>) (Con) |
| † Dinenage, Caroline (<i>Minister for Care</i>) | † Whately, Helen (<i>Faversham and Mid Kent</i>) (Con) |
| † Keeley, Barbara (<i>Worsley and Eccles South</i>) (Lab) | Williams, Dr Paul (<i>Stockton South</i>) (Lab) |
| † McCabe, Steve (<i>Birmingham, Selly Oak</i>) (Lab) | Adam Mellows-Facer, <i>Committee Clerk</i> |
| Moore, Damien (<i>Southport</i>) (Con) | |
| † Morris, James (<i>Halesowen and Rowley Regis</i>) (Con) | † attended the Committee |

Public Bill Committee

Tuesday 15 January 2019

(Afternoon)

[IAN AUSTIN *in the Chair*]

Mental Capacity (Amendment) Bill [Lords]

Schedule 1

SCHEDULE TO BE INSERTED AS SCHEDULE AA1 TO THE
MENTAL CAPACITY ACT 2005

Amendment proposed (this day): 19, in schedule 1,
page 8, line 17, at end insert—

“(aa) if the arrangements are for the cared-for person to be accommodated in an independent hospital for the purpose of assessment or treatment for mental disorder, and that care is commissioned by a clinical commissioning group or Local Health Board, it is the clinical commissioning group or Local Health Board, that is the responsible body;”.—(*Barbara Keeley*.)

This amendment would mean that, where a person is accommodated in an independent hospital for the assessment or treatment of a mental disorder, and their care is commissioned by a CCG or Local Health Board, then the responsible body will be the CCG or Local Health Board.

2 pm

Question again proposed, That the amendment be made.

The Chair: Welcome back, everyone. I am sorry about the heat. Can we make sure our phones are turned off? The selection list for the sitting is available in the room. We have grouped amendments on similar issues together for debate, regardless of where they appear in the Bill. As I said this morning, decisions on amendments do not take place in the order in which they are debated, but in the order in which they appear on the amendment paper, which lists amendments according to which part of the Bill they affect.

The Minister for Care (Caroline Dinenage): It is a great pleasure to respond on the amendment, after our short break, in this delightfully warm and cosy room. I will start by addressing some of the issues raised by hon. Members.

The Opposition spokeswoman, the hon. Member for Worsley and Eccles South, spoke powerfully about concerns to do with independent hospitals and, more particularly, about the case of Bethany. We are absolutely clear that it is completely unacceptable to be subject to prolonged seclusion in the way that the hon. Lady mentioned. We have commissioned an independent review under the NHS serious incident review framework. That does not necessarily have to do with the Bill, but I felt it important to set that out for clarity. In addition, the Secretary of State commissioned a section 48 Care Quality Commission review of restrictive practices, including seclusion and long-term segregation, to understand the extent to which these things happen. NHS England is working very urgently to support Bethany into a community placement. Her father and Mencap have issued a pre-action protocol to challenge the current arrangements.

More broadly, with regard to the Transforming Care agenda, detentions of people with learning disabilities and/or autism in mental health hospitals are completely inappropriate and must end. We will achieve a 35% reduction in that at the earliest opportunity.

Barbara Keeley (Worsley and Eccles South) (Lab): Can the Minister say why the NHS long-term plan appears to go backwards on that? It is going from 25 people with a learning disability or autism in an in-patient unit per million adults to 30. That does not sound like progress; that sounds like removing a priority.

Caroline Dinenage: I understand why the hon. Lady says that, but looking at it in context, we committed to reducing the numbers by between 35% and 50% by the spring. There is no dilution of that commitment, but we have recognised that ensuring that community alternatives are robust is absolutely fundamental, because as she is well aware, we have seen people taken out of hospital settings and put into the community, but ending up back in hospital because community facilities were not sufficiently robust. That is why, as part of the NHS long-term plan, both autism and learning disability are highlighted as one of the four clinical priorities.

The plan commits to building in full the right support, to continuing that support, and to reducing in-patient numbers by 50% no later than 2023-24. The key is an enduring commitment—not knee-jerk reactions to an awful circumstance such as that mentioned by the hon. Lady—to address the issue for vulnerable people in the long-term. We are clear that in assessment and treatment units, the sorts of restraints we are talking about should be very much a last resort. We are committed to supporting those with learning disabilities and autism to live well in the community, and to putting an end to inappropriate detentions.

The amendment seeks to make clinical commissioning groups in England and local health boards in Wales the responsible bodies for arrangements in cases where they commission the care of people accommodated in independent hospitals. I am sure the whole Committee agrees—I know the hon. Lady does—that it is vital to provide protection to vulnerable people in independent hospitals. We have all seen how the misuse of authority in such settings can lead to the kind of tragic and unacceptable consequences that she highlighted.

The Bill demonstrates the Government’s commitment to ensuring that vulnerable people receive protection. The Government have further strengthened those protections with amendment 9, which requires an approved mental capacity professional to conduct the pre-authorisation review if the cared-for person receives care or treatment mainly in an independent hospital. By requiring authorisations in independent hospitals to be considered by an AMCP, regardless of whether there is any objection, we add a further level of security. The AMCP will meet with the person concerned, complete a consultation and review assessments to decide whether the authorisation conditions are met.

I further reassure Members that the AMCP will act independently of the responsible body. I know that the hon. Lady has concerns about that. The AMCP will be approved by a local authority, act as an independent decision maker and be accountable to their professional body. Those acting as AMCPs will be experienced

professionals who have successfully completed approved post-qualification specialist training, which will require them to demonstrate the capability to ensure and promote the person's best interests and protect their rights.

Barbara Keeley: The point I was making very strongly, and which I ask the Minister to consider again, is that it is easy to see a situation in which the relationship between an independent hospital and a preferred list of AMCPs could get very cosy, with the AMCPs working only in those hospitals and the work starting to become a large part of their livelihoods. The Minister cannot reassure me that that would not happen. The responsible body is entirely responsible for the whole process of selecting the AMCP and making the arrangements, and it can just plump for the same people time and again, and develop a cosy relationship. That is a real fear.

Caroline Dinenge: The hon. Lady has legitimate concerns. Making the responsible body the independent hospital was a recommendation in the Law Commission report. Amendment 19 changes the responsible body in cases where a CCG or a local health board is responsible for commissioning the care of people for the assessment or treatment of a mental disorder.

Steve McCabe (Birmingham, Selly Oak) (Lab): I was reflecting on the comment made by my hon. Friend the Member for Worsley and Eccles South about the risk of the relationship being too close, cosy or convenient. Has the Minister considered giving the CQC a wider brief to investigate what happens between the various parties over a range of authorisation decisions in any given period? If a relationship that could be regarded as unhealthy was developing, that would presumably be an easy way of highlighting that.

Caroline Dinenge: I thank the hon. Gentleman for his suggestion; we will definitely take it into consideration. I fully understand where the concerns about independent hospitals acting as a responsible body come from. We must be careful not to stigmatise all independent hospitals. Every time we have such debates, we hear horror stories, but then I always get emails from parents who feel that their children's lives have been saved by such hospitals. We must make preparations to care for those who are most vulnerable and at risk.

Alex Cunningham (Stockton North) (Lab): Following up on what my hon. Friend the Member for Birmingham, Selly Oak, said, does the Minister agree that if she took up the idea of the CQC having such a role, we would need something in the Bill to ensure that if it identified a cosy or questionable relationship, someone could do something about that? In CQC reports now, homes are identified as totally inadequate, but no one can do anything about it, because the CQC will take a decision only at the very, very last minute, by which time it is matter of closure.

Caroline Dinenge: The hon. Gentleman makes a good point; we have to look at that interaction. The AMCP will be a professional social worker, will be accountable to a professional body, and will have the high level of skills and training to enable them to carry out their job with great professional integrity. However, the reasonable concerns that have been raised by hon. Members need to be taken into consideration, and I

find the suggestion that they make in this amendment very interesting; I have a good deal of sympathy for it, and am certainly willing to reflect further on the amendment. The problem is that its exact wording does not work. We need to ensure that any changes work for the whole system. We also know that there are examples of NHS England commissioning the care from an independent hospital; it is not just CCGs. With that in mind, I commit to considering this amendment further. I hope that answer enables hon. Members to withdraw it.

Barbara Keeley: Our concern is that the Bill enshrines a fundamental conflict of interest by allowing independent hospitals to be the responsible body for deprivation of liberty in their own hospitals. That is what is wrong: they have that power in their own hospitals. They are not independent of the people who are in those hospitals, and the important thing is that, as I have described, these are organisations with a vested interest in putting people in their hospitals. There was not much debate about this issue in the House of Lords, because the Lords concentrated on the role of care home managers, but the point was made that the vested interests of independent hospitals are different from those of NHS hospitals.

NHS hospitals are not perfect. We have had awful issues in them; Connor Sparrowhawk's death happened in an NHS hospital, as did other deaths. As the Minister will know, when somebody is admitted to an NHS hospital, the pressure on the system is to get them discharged. That is not the case here. The Minister knows from the case of Bethany, which I cited, and from other cases that the vested interest of independent hospitals is to keep people there. Maybe we should be looking at fee levels separately, because that is part of that vested interest, but there is a vested interest, and I would not be content to allow the situation that this Bill permits. Independent hospitals have a very substantial vested interest; the Minister heard the figures that I gave. Those are serious amounts of money, and a serious waste—it is not even a good use of money in the NHS.

Independent hospitals often receive hundreds of millions of pounds in public funding every year. They are not all bad, I am sure, but programmes such as the BBC's "File on 4" and journalists such as Ian Birrell have repeatedly revealed cases in which they are bad and things are going wrong, the most recent being the Priory group and the death of young Amy. That hospital was making £720 million out of the NHS every year. These hospitals receive public funding, and they are not up to the job that they are doing. I ask the Minister for Care to accept that these independent hospitals are, in too many cases—we do not know what proportion—deeply flawed. The company I just mentioned had been criticised by the coroner 20 times since 2012—Southern Health had a lot to answer for—so we are not talking about one or two deaths.

As I mentioned, 40 people died in assessment and treatment units between 2015 and 2018. There are numerous cases involving the bodies that the Bill designates as responsible for organising this whole process, and that is what is wrong. The Government amendment, which will involve AMCPs in these cases, is not sufficient. It is clear to me that the power of deprivation of liberty should never lie in the hands of the organisations I have talked about, which are making such profits and have such vested interests.

[Barbara Keeley]

The Minister is clear that she wants to address the appalling abuse that is sometimes meted out in independent hospitals, and I believe she is sincere about that. However, without this amendment, there is a danger that the Bill will enable more of that type of case, because it is clear to all parties that more cases will be dealt with under this new process than under the Mental Health Act 1983—and the Act has more safeguards.

In my view, the wrong signal is being sent at this time of heightened concerns about these hospitals. If the Minister is concerned about this issue, she should be prepared to accept the amendment. We will press it to a Division; it is important that we do so. If there is anything we can do to improve the amendment before Report, we will do it, but we are going to press it to a vote today.

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 8.

Division No. 1]

AYES

Cunningham, Alex	McCabe, Steve
Debonnaire, Thangam	Norris, Alex
Dhesi, Mr Tanmanjeet Singh	Sherriff, Paula
Keeley, Barbara	

NOES

Afolami, Bim	Morton, Wendy
Chalk, Alex	O'Brien, Neil
Dinenage, Caroline	Syms, Sir Robert
Morris, James	Whately, Helen

Question accordingly negatived.

2.15 pm

Caroline Dinenage: I beg to move amendment 3, in schedule 1, page 8, line 19, leave out from “mainly” to “that” in line 21 and insert

“through—

(i) the provision of NHS continuing healthcare under arrangements made by a clinical commissioning group, or

(ii) in Wales, the provision of an equivalent to NHS continuing healthcare under arrangements made by a Local Health Board,”.

“NHS continuing healthcare” is defined, for England, by paragraph 8 of new Schedule AA1. This amendment provides that in the case of arrangements carried out through the equivalent of NHS continuing healthcare, in Wales, the responsible body is the Local Health Board making the arrangements.

This is just a technical amendment that will help to ensure that the new liberty protection safeguard system, which I am sure we all agree is a really important part of this process, works well in Wales. There is no statutory definition of “NHS continuing healthcare” that applies to Wales. The amendment clarifies that, while in England the CCG will be the responsible body when care arrangements are mainly done through continuing healthcare, in Wales, local health boards will act as responsible bodies, if the arrangements are mainly carried out through the provision of an equivalent to NHS continuing healthcare, as defined in English legislation.

In the new system, the responsible body will have the important role of arranging pre-authorisation review, in which a person independent of delivering the day-to-day

care or treatment will review the arrangements before authorising them. This is a vital safeguard in a system that will ensure that arrangements receive proper scrutiny.

I put on the record my thanks to colleagues in the Welsh Government who have worked with us to ensure that the drafting of this amendment will allow the system to work in Wales as the Law Commission recommended and as the Government intend. I ask the Committee to support the amendment.

Barbara Keeley: We welcome this amendment, which gives clarity on arrangements in Wales, so that there is uniformity with England through the equivalent to continuing healthcare arrangements.

Amendment 3 agreed to.

Steve McCabe: I beg to move amendment 47, in schedule 1, page 11, line 17, at end insert—

“(d) the arrangements are in the cared for person’s best interest,

(e) less restrictive options have been considered,

(f) appropriate weight has been given to the cared for person’s feelings and wishes as best as these can be determined.”

This amendment is designed to pursue the issue of a person being deprived of their liberty as a last resort and only if it is in their best interest and a reasonable effort made to determine their wishes and feelings.

In suggesting these additions to the clause, I will return to the matters I raised this morning, because it seems to me that it is crucial that we in this Committee are as confident as any Committee ever can be that the arrangements will prove to be for the benefit of and in the best interests of the vulnerable person, and not for the convenience of the agency or the authorising body. It seems to me that, as the pressures grow on various professionals, the temptation is to interpret legislation for the convenience of the agency, as opposed to the interests of the individual. Consequently, it would be helpful and send an absolutely clear signal about the Government’s intentions if the Minister were to include in the clause a statement that the authorisation must be in the person’s best interests. That would make it crystal clear that there could not be any room for doubt or any other agenda or issue to intrude.

I recognise that paragraph 12(c) of new schedule AA1 to the Mental Capacity Act 2005 says that the arrangements must be “proportionate”, and I guess that the Minister will tell me that my fears will, therefore, not be realised, but I was thinking about that during the break and wondered whether “proportionate” could be interpreted as “suitable” rather than “necessarily in the best interests of the person”. It is quite possible in a hospital or a local authority setting to make proportionate arrangements that are suitable.

I am sure every member of the Committee deals with housing cases in local authorities every day of the week, where the local authority says that it has been proportionate in its decision about allocating a property, particularly given the constraints on the properties it has. It will certainly be a proportionate decision, but whether it is necessarily in the best interests of the person is open to debate. I simply say to the Minister that I am not wholly convinced that the two terms are exactly the same. Likewise, I do not know that, in a situation where “proportionate” meant “suitable”, it would necessarily indicate that all other less restrictive options have been

properly considered, examined and then excluded. I am thinking of an elderly person who suffers a degree of confusion, or a brain-injury victim. If there is a lack of home care or day care in the area in which they reside, there may be a temptation to go for another option regarded as proportionate based on those considerations, rather than on what is in the best interests of the person, and to rule out more coercive options.

In such a situation, it might be perfectly possible for that elderly person or brain-injury victim to be properly and well cared for with the support of a dear relative, if that relative had access to realistic respite care to give them a break from time to time, and if the cared-for person had their care supported by reasonable access to home care and day care services. If that were the case, it would be wrong to restrict that person's liberty not because less restrictive options had been considered and ruled out, but because the available care options in the area were inadequate and nothing had been done to try to address that.

That would be a classic example of a decision being made to suit the immediate economic interests of the agency or the environment in which the person happened to reside. It would not be about what was wholly in the best interests of that person. It would certainly not be because appropriate consideration had been given to less restrictive options. It would be proportionate, because in that situation "proportionate" was interpreted to mean "convenient" or "suitable", rather than anything else. That is why I raise this matter.

Alex Cunningham: I am interested in my hon. Friend's argument. It shows why, regardless of which part of the organisation or process we are dealing with, it is essential that there is an independent person involved in the process, whether that is to deal with a private hospital or a care home. There must be an independent person who can be an advocate and supporter for the person in care, rather than it being left to a care home or independent hospital to decide what is best for them.

Steve McCabe: I agree and I think that will be a recurring theme. As I tried to indicate this morning, the divide is between a person's precious liberty and the need to prove good care and protection for an individual. The whole reason we are here discussing this Bill and the Minister wants to change existing legislation is that it is thought not to be adequate and to provide appropriate independent overview and scrutiny. I certainly agree with that.

James Morris (Halesowen and Rowley Regis) (Con): I have a lot of sympathy for the points the hon. Gentleman makes. One of the underlying principles of the independent review of the Mental Health Act 1983 that was published just before Christmas was that we need to move towards a more care-led Act. That is reflected in some of the deliberations in this Committee.

Steve McCabe: I absolutely agree. From time to time we encounter horrendous examples of terrible practices by people who should never work in certain settings—things that are utterly inappropriate—but by and large, the people who work in care and helping professions do it as a vocation. They genuinely care about the people they are trying to look after, and they have nothing but the best intentions. That is my experience. None the less,

there is a tendency for the individual to be lost in the management of any kind of care system. The bigger the system or the more pressed the resources in it, the more it moves to a procedure-driven model and the less the focus is on the individual. That is the kind of point that the hon. Gentleman raises, and I agree—that is exactly how it seems to me.

Let me move on to the last part of my amendment that the Minister might consider including in the Bill. I am utterly realistic; I have served on one or two Bill Committees in the past, so I know it is very unlikely that the Minister will leap to her feet and say, "That's it—that's brilliant! I'm having those." That that is not on the cards is a severe disappointment to me, but I wonder if, rather than concern herself too much with the technical nature of my suggested additions to the clause, the Minister will reflect on the point I am trying to make about how to ensure that best interest is the first thing that people think about in this process, with less restrictive options and going the extra mile to try to find them, rather than going for restrictive options because they are convenient?

Finally, Sense argued in its briefing on the Bill that the cared-for person—this is the very point the hon. Member for Halesowen and Rowley Regis made—should be at the centre of the Bill, and every effort should be made to establish their feelings and wishes. My fear is that when the measures move from this nice green Government Bill and deliberations in this Committee to the operational stage of legislation, there is a real danger that they will become more about what we do to people, rather than what we do with and for the person concerned.

2.30 pm

I am raising this because I hope the Government will reflect that although it is absolutely right to try to streamline this process—it is never a bad idea to try to save money if it is being unnecessarily expended—we live in a world where the processes of organisations sometimes overtake the interests of individuals. The way we frame our legislation can make that easier or harder. There is an opportunity in the Bill and, I think, widespread support for that across the Committee, as we have heard today and in some things we have seen from a number of the organisations. There is an opportunity to make crystal clear that this is a modernising measure that in no circumstances will allow the person not to be at the centre, or the agency's needs to act against the interests of the person. It is a modernisation in which we will do everything possible to ensure that, where we are restricting a person's liberty, we do it because we genuinely explored everything else and worked out it is the best option, and not just the easiest mechanism to tick the box and close the file. Before Report, will the Minister consider whether there is a better way to emphasise those principal interests in the Bill?

Barbara Keeley: I thank my hon. Friend for introducing his amendment. Through the progress of the Bill, we are discussing the circumstances where it is appropriate to deprive someone of their liberty. That should never be done lightly. Nobody should be deprived of their liberty unless it is in their best interests. That point is really worth making and it should go without saying, but the Bill does not give an assurance that this will always be the case.

[Barbara Keeley]

I acknowledge that other areas of the Mental Capacity Act 2005 discuss this interest, but it is such a vital point that it bears being made again. We cannot leave practitioners in any doubt that best interest must be foremost in their mind when they are making decisions. Best interest, of course, should not be entirely decided by practitioners. Even where people lack capacity, we must do everything we can to take their wishes into account. Again, I hope this is an obvious point, but it is not in the Bill.

Part of the difficulty of having such a short Bill is that many words should be included to make the concept clear and they are not there. I am sure the Government do not wish to see people deprived of their liberty when it is not in their best interest. I am absolutely sure about that. I look forward to hearing from the Minister how the Government will ensure that that is the case.

The amendment also makes clear that deprivation of liberty should be allowed only if there are no less restrictive alternatives—that is a key point. Nobody should be deprived of their liberty because it is easier, cheaper or requires less paperwork, or, indeed, because it is more expensive and makes a profit for firms. If there is a way to keep somebody safe that does not deprive them of their liberty, we should always seek to pursue that.

I have touched on the fact that thousands of people with autism and learning difficulties are currently held in assessment and treatment units. A number of people in mental health hospitals, independent hospitals and others are being held under the Mental Capacity Act. I gave the numbers of applications that are made under the deprivation of liberty safeguards earlier. We know that they are kept in isolation and denied freedom. I have no doubt that in some cases they were exhibiting challenging behaviour, and that became the path of least resistance. That is why it is very dangerous. If the amendment were accepted, hospitals and care homes would have to consider whether there were less restrictive ways to keep someone safe. Those other less restrictive ways may not be the easiest to organise, but that is not a good reason to deprive somebody of their liberty.

As the Minister knows, these topics were all raised in the House of Lords. She may say that everything will be laid out in the code of practice, but we do not have that in front of us and, as I made clear earlier, it will not carry the same weight as statute. The Bill is relatively short and it can bear additions; indeed, it is so brief that it needs them. Putting these provisions in the Bill would make intentions clear to practitioners. The deprivation of liberty should be a last resort and, of course, should never happen if it runs against a person's best interest. The intention of the amendment by my hon. Friend the Member for Birmingham, Selly Oak is noble and I hope the Government will take it on board.

Caroline Dinage: I thank the hon. Member for Birmingham, Selly Oak for highlighting the issue, about which I always listen to what he has to say. Of course, he is quite brilliant in his own special way, and he has taken a lot of time to engage with me and to do his homework on the subject, which is close to his heart. I am grateful for that.

I share the hon. Gentleman's sentiment. As the hon. Member for Worsley and Eccles South said, we are talking about depriving somebody of their liberty, which

is our most fundamental human right, so we cannot do it quickly, based on cost, or based on the current system, which Simon Wessely described as a “perfunctory and box-ticking” exercise. It has to be done with people's best interests, and their wishes and feelings, at heart. Excellent care and the interests of the cared-for person have to be at the heart of everything we do.

In responding to the points the hon. Gentleman made in moving the amendment, it is worth reminding hon. Members that the Bill will not replace the current Mental Capacity Act 2005, but amend it. Best interest decision making remains fundamental to the existing Act, within which the liberty protection safeguards will sit. Before a liberty protection safeguards authorisation is considered, it will need to be decided that the arrangements are in a person's best interests. That is included in section 4 of the 2005 Act. It must then be demonstrated that arrangements to enable that care and treatment are necessary and proportionate.

I understand the hon. Gentleman's concern about the words “necessary” and “proportionate”, but the word “proportionate” was chosen because it has a specific meaning in human rights case law. It means that assessors must consider less restrictive options, and cannot base their decisions purely on cost or any other box-ticking exercise. The word “necessary” is used in conjunction with the word “proportionate” in the Bill, which means that the arrangements must benefit the person.

That part of the liberty protection safeguards takes place at the second stage test. I agree with hon. Members that it is fundamental for people deciding whether to authorise a deprivation of liberty to consider whether less restrictive options are available. A necessary and proportionate assessment would also include the consideration of less restrictive practices. Considering less restrictive alternatives is already an important aspect of the wider 2005 Act. In fact, the fifth principle of that Act specifies that decision makers have to have regard to less restrictive options. Nothing in the Bill changes that. Indeed, we will ensure that that is a core part of the consideration of what is necessary and proportionate.

On the matter of wishes and feelings, which the hon. Gentleman talked about so powerfully, it should be noted that they are already part of the first stage of best-interest decision-making under section 4 of the 2005 Act. I can confirm that the Bill does not change that. Wishes and feelings will form a key element of the necessary and proportionate test. During the Bill's passage in the other place, we tabled an amendment that makes it explicit that regard must be given to a person's wishes and feelings in relation to arrangements. We tabled a second amendment that explicitly requires the cared-for person to be consulted under the consultation duty. Those amendments were made purely because we agree that the person's wishes and feelings should be at the heart of the liberty protection safeguards process.

I hope that that provides some clarification and reassurance for the hon. Gentleman. I am certainly not in the business of keeping the Bill as small and tight as possible just for the sake of it; if there are amendments that I feel will materially add to the Bill, I am more than happy to take them on. In this case, I hope that the hon. Gentleman will withdraw the amendment.

Steve McCabe: I was not planning to press it, so I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Caroline Dinanage: I beg to move amendment 4, in schedule 1, page 11, line 19, leave out from beginning to end of line 7 on page 12 and insert—

“13 (1) As soon as practicable after authorising arrangements, the responsible body must ensure that a copy of the authorisation record is given to—

- (a) the cared-for person,
- (b) any independent mental capacity advocate appointed under paragraph 39 to represent and support the cared-for person,
- (c) any person within paragraph 39(5) in respect of the cared-for person (the “appropriate person”), and
- (d) any independent mental capacity advocate appointed under paragraph 40 to support the appropriate person.

(2) As soon as practicable after authorising arrangements, the responsible body must take such steps as are practicable to ensure that the cared-for person and any other person listed in sub-paragraph (1) understands—

- (a) the effect of the authorisation,
- (b) the right to make an application to the court to exercise its jurisdiction under section 21ZA,
- (c) the programme of regular reviews specified by the responsible body in accordance with paragraph 35(2),
- (d) the right to request a review under paragraph 35(3)(b),
- (e) the circumstances in which a referral will be made to an Approved Mental Capacity Professional under paragraph 35(4),
- (f) the circumstances in which an independent mental capacity advocate should be appointed under paragraph 39, and
- (g) the effect of there being an appropriate person in relation to the cared-for person.”

This amendment substitutes a new paragraph 13 of the new Schedule AAI to require that, as soon as practicable after arrangements are authorised, the responsible body must provide to the cared-for person and any other person listed in paragraph 13(1) a copy of the authorisation record and take steps to ensure that those people understand the matters described in paragraph 13(2).

This amendment relates to the responsible body’s duty to provide information to the person receiving protections, an appropriate person, or an independent mental capacity advocate. When depriving someone of their liberty, it is crucial that they are provided with all the information necessary for them to exercise their rights. Arrangements under liberty protection safeguards will not simply be something that is done to a person, but a process they are part of—I hope that I have already explained that quite plainly in answers to previous amendments.

The duty to provide information derives from article 5 of the European convention on human rights, which is brought into effect in UK legislation through the Human Rights Act 1998. The Law Commission did not outline this duty in its draft Bill. However, views expressed in the other place have made it clear that this Bill should reflect the right to information explicitly on its face. This amendment has therefore been tabled to provide clarity on exactly what is required.

The amendment requires the responsible body to provide a copy of the authorisation record to the person under protection, as well as any appropriate person or independent mental capacity advocate, or IMCA, as soon as practicable after the authorisation is granted. It also specifies that the responsible body must, as soon as practicable after authorisation, ensure among other matters that the person understands the effect of the authorisation and their right to challenge it in a Court of Protection.

The amendment replaces the amendment inserted in the other place on this matter, which was unfortunately not workable within the existing Mental Capacity Act.

The Lords amendment set out a range of information that should be shared with the person, but it did not provide clarity on where this information should be shared, which could lead to practical difficulties for practitioners and create exactly the sort of legal loopholes we are trying to avoid.

The Government amendment clarifies exactly what information needs to be provided and to whom, as well as specifying a clear point at which information should be shared. It will impose a legal duty on responsible bodies, so it must be clear where these duties arise. Information can, of course, be shared prior to this point, and in most cases we would expect and encourage this. We will set out more details of this in the code of practice and hopefully make that as explicit as possible.

The amendment is explicit about the point at which the information about the authorisation must be shared, and I hope the Committee will support it.

Barbara Keeley: Opposition Members cannot support Government amendment 4. The evidence provided to this Committee by Lucy Series suggests:

“Article 5(2) ECHR requires information to be provided to the person—or others capable of representing them—about the legal and factual basis for the deprivation of liberty and rights of appeal, in a language that they understand, so that they can exercise rights of appeal.

Both the DoLS and the MHA”—
the Mental Health Act—

“set out in statute who is responsible for providing this information to the person and any others representing or supporting them. It places explicit duties on the detaining authorities to take all practicable steps to help them to understand it. Surprisingly, this Bill did not contain rights to information when first read in the House of Lords; section 13 on ‘rights to information’ was inserted into the Bill after...a vote in the Lords.”

The Government’s new amendment would restore the fundamental imbalance in proposals that were removed by the House of Lords in the current paragraph 13 in regards to rights of information. Paragraph 13 established that the individual would receive information about their rights in a meaningful way in advance of the authorisation. That was a critical addition. Being giving information before authorisation of a deprivation of liberty is a fundamental human right.

Where a person would not be able to understand the information, it must be given to others capable of representing their interests. That is also a crucial condition, for several reasons, which were explained in the debate in the House of Lords. First, receiving information is critical because, in many cases, having information given to cared-for people and their families at the outset can clear up misunderstandings that can unsettle the cared-for person. Most people will not know what the liberty protection safeguards are, let alone have a good understanding of how they work. Knowing what the liberty protection safeguards are, the reasons for a cared-for person’s detention, and what recourse they have to change the situation in which they find themselves are critical parts of the entitlement to appeal. Knowing that the cared-for person can review this decision reduces anxiety, even if they do not wish to exercise that right of challenge at that point.

2.45 pm

The means of providing that information are just as important as the principle of the condition to provide it. For instance, providing only written information

would not always be appropriate. Some people may need easy-read information in plain English. Others may need to speak to someone about the reasons for their detention and to be able to ask questions about it. Some families or cared-for people might need a translator or to use sign language such as Makaton to understand the circumstances of their detention.

To demonstrate how important this right to information can be, I want to talk about the case of R, who lived in a care home but was unhappy with the arrangements and wanted to live elsewhere. They felt the arrangements there were too restrictive. They received support from an advocate to discuss and review their options when it came to appealing their case. Once R had had their rights explained, they initially felt that they would rather appeal to the local authority, as they did not want to bother the court. With the support of an advocate, R appealed to the local authority, but this was refused as the assessment in this case had been too recent.

R was, unsurprisingly, unhappy with this outcome and wanted to know what further steps they could take to get their care package amended. The paid advocate then informed R of their right to take the case to the Court of Protection at this stage. The outcome of the court case was that the local authority reviewed the authorisations and, as a result of that review, moved R to a less restrictive placement.

Despite R initially being unhappy with their placement, it was only when they were given the information on their rights that they came to challenge the decision. In R's case, this came after the authorisation had been granted. Had R been fully informed of their rights prior to the authorisation process, they would almost certainly have been in an inappropriate setting for less time. That is the difference that telling them about their rights made.

Government amendment 4 to paragraph 13 would simply serve to take away the duty to give information to cared-for people in advance of the authorisation process. Giving them the information after the fact is simply not acceptable. Furthermore, what the Government propose is narrower than paragraph 13 in several ways. It would not explain to the cared-for person the process they are about to undergo. For somebody with dementia, who may cope badly with strangers interrupting their daily routine, that is particularly important. Without information provided in advance of the process, they will have no idea what is happening when people they do not know are asking them questions.

The Government's amendment does not explain to the cared-for person that they have a right to an advocate. This seems counter-intuitive when the Government are also expecting people to request an advocate. How can somebody request an advocate if they do not know they have a right to do so?

The Government's amendment would make it harder to refer a case to court. As it stands, the responsible body must refer the case when the cared-for person wants to take it to court. There is no such provision in the Government's amendment. We cannot allow a situation where a cared-for person requests a court review but is given no support to make this happen.

The Government amendment would limit the information given to the authorisation record, which is a technical document detailing the decisions made. The authorisation record does not have to explain the process

undertaken, and there is no obligation for it to say why certain decisions have been made. It is not that we object to the information the Government say should be provided; our objection is to them removing provisions that are already in the Bill. If this amendment passes, we will be replacing a strong safeguard with a far weaker one.

The existing arrangements under paragraph 13 have wide third sector support, including from Mencap, Mind, Rethink Mental Illness, the Alzheimer's Society, Disability Rights UK, Inclusion London, Liberty, VoiceAbility, the National Autistic Society, Sense and a host of others. I am at a loss to know why the Government want to remove them.

As the evidence mentions, paragraph 13(5) of the Bill, as it was brought forward from the House of Lords, places a duty on responsible bodies to "ensure that cases are referred to court when the cared-for person's right to a court review is engaged."

However, this provision would be removed by the Government's amendment.

I gather the Minister has been assuring stakeholders—indeed, she made some reassurances to me—that provisions not added to the Bill will be added to the code of practice. An important point about the code of practice—we seem to keep coming back to this code of practice—was made in the House of Lords by Baroness Barker, and it ought to be repeated here. Statutory codes do not exist without a statute, and the majority of laws do not have a code of practice. Codes are there for when non-legal people are using the law directly. No one expects non-legal people to read or necessarily understand a statute, so a code is provided. Such a code follows what is in statute and sets it out in lay terms and at some length.

Steve McCabe: I assume that the Minister has given quite a bit of thought to this matter already. Does my hon. Friend think that this is one area where it would be extremely helpful for the Committee to be able at least to see what is in the draft code of practice covering this area before the end of our proceedings? If the Minister and her officials have been giving quite a lot of attention to this, there may be some reassurance in the draft code of practice. If there is not—if it is yet to be drafted—it would be close to a dereliction of duty for us to say that that is acceptable on such a crucial point, namely that the person does not even get the opportunity to raise issues about what is being done to them until after it has been done.

Barbara Keeley: I very much agree with my hon. Friend. I understand the Minister's difficulty with the code of practice. She has told us that it would have to be laid before both Houses, but the difficulty here is that the Government are trying to remove from the Bill provisions that strengthen safeguards, and are thus making those safeguards weaker. As I said earlier, I do not understand why this is happening at all; I do not understand why we would be expected to accept it or to think it was a good idea.

A code follows what is in statute, and sets it out in lay terms and at length, but it would not exist if the obligation in law was not clearly set out. I do not want the Minister to change obligations for information, yet that is what she appears to be doing. I want to make it clear that, for Labour Members, the right to information before authorisation must be on the face of the Bill.

It cannot be something added to the code of practice—even if we could see it now, and the trouble is we cannot—because it would not be a right.

There is existing case law about the Mental Capacity Act code of practice. In 2018, in the case of NHS trust v. Y, the Supreme Court said:

“Whatever the weight given to the Code by section 42 of the MCA 2005, it does not create an obligation as a matter of law to apply to court in every case.”

I think that says it all, really.

Paragraph 13 is the right approach in the case of this Bill. Furthermore, a number of Labour amendments, including amendments 17, 40 and 41, which we will come to later, would strengthen the duty on the responsible body to promote appeals.

Alex Cunningham: Again, it is a pleasure to serve under your chairmanship, Mr Austin. This Government amendment—this move to remove paragraph 13 from the Bill—leaves me and others seeking much more information on what exactly is intended. I did not really hear from the Minister what I needed to know. It was a very short introduction to the debate, given the fact that this was long debated in the other place. The Lords brought forward the amendment to the Bill, which is now part of the Bill, with good cause. I am concerned that it has been dismissed quite quickly.

My hon. Friend the Member for Birmingham, Selly Oak talked about the code of practice. It is critical that we have the reassurance that if we are going to have to depend on the code of practice, we know what it will say. Therefore, I ask the Minister whether she will, rather than just depending on dumping this stuff into a code of practice, make a commitment today to come back during our conversations over the next few days or on Report and spell out specifically how we can be assured that the items and protections in the Lords amendment, which is now part of the Bill, will be covered? How will she guarantee that what the Lords achieved with that amendment will be fulfilled on Report?

Steve McCabe: I am not sure whether I have understood this correctly. As my hon. Friend the Member for Worsley and Eccles South outlined her concerns, I tried to understand how someone could ever be confident that their wishes and feelings had been fully taken into consideration if they did not get the information explaining what was happening to them until after it had happened. How is that possible?

Alex Cunningham: It is totally impossible. If someone does not have the information, how can they make an informed decision? Likewise, people who advocate for someone, whether parents, relatives or whatever, cannot do that if they do not have that information. If there is no information, it cannot be acted on.

I made my career out of journalism, public relations and communications.

The Chair: An honourable trade.

Alex Cunningham: Some people say that all I need now is to be a lawyer and an accountant, and then I will have done all of the bottom four professions when it comes to public confidence and respect. However, I enjoyed my time as a journalist, my time in the gas industry and even my time running my own business. I have always believed that more information is better

than less, because people can then take what they want from it. They can understand what they want and they can challenge it.

However, the information also has to be timely and easily understood. In moving the amendment, the Government actually want people to have less information, and for it to be less timely. The Minister is shaking her head. Maybe even if there is the same amount of information, it will not come at the right time, and people will not be able to use it to understand, to decide a way a forward and to advocate for the person in care. In the light of what I just said, which the Minister refuted by shaking her head, what measures will the Government actually take to ensure that the information provided to the person being cared for and to appropriate persons is actually understandable, and in clear and simple language?

Many organisations and individuals submitted evidence to us that the consultation process for the Bill had been complicated and excluded people with learning difficulties. The very fact that we did not have an evidence session probably bears that out. Are there any guarantees that those with learning difficulties will actually be able to understand the copy of the authorisation record and other materials and what they mean?

A person with a specific speech and language problem may be able to make some decisions if information is presented to them in a way that they understand. Has the Minister made any assessment of the use of speech and language therapists to communicate the authorisation records and subsequent information relevant to a person's deprivation of liberty?

We have seen evidence from family members of those being cared for, and I have been contacted by constituents on this. They have told me that they are finding out about the authorisation of deprivation after the record has been issued, and that they are concerned that the cared-for person would not have been effectively communicated with. Does the Minister agree that speech and language therapists should be involved prior to the authorisation, to fully understand the circumstances?

Caroline Dinenege *indicated assent.*

Alex Cunningham: The Minister is nodding her head, which is very good news. She has given me that reassurance, so perhaps I do not need to continue with this particular line of questioning.

We should be very careful that a communication issue is not missed prior to an authorisation being recorded. Just because somebody cannot communicate in the same way that we can does not mean that they cannot communicate.

Steve McCabe: I do not want to disrupt my hon. Friend's flow. It is very good to see the Minister nodding her head, but is that the same as an assurance that there will be an obligation? It would be easy to suggest that a person is not very communicative, but that would not be quite the same as acknowledging that the person has some speech and language difficulty. A hard-pressed individual making a rapid assessment might not arrive at that conclusion unless it was absolutely clear that they were obliged to check out that area.

Alex Cunningham: That is most certainly the case. The Minister will forgive me if I mention resources again. If people are hard-pressed, we should perhaps

[Alex Cunningham]

have more resources in the system to deal with that. My hon. Friend is perfectly correct, and I take some comfort from the Minister's nodding. I do not so much like the bits where she shakes her head, but I like it when she nods. I think that that may indicate that she will be able to address the issue I raised at the beginning of this short speech and come back to us, either here in Committee or on Report, to spell out exactly how the protections will be covered elsewhere if they are removed.

3 pm

Have the Government considered what information is shared with the cared-for person and the appropriate persons before the arrangements are authorised? Surely, there must be ample opportunity for objection.

Caroline Dinenge *indicated assent.*

Alex Cunningham: Again, the Minister nods her head, but that opportunity must be long before a final decision on the deprivation of liberty. We must take every possible precaution to ensure that those with an interest in the wellbeing and care of the cared-for person are informed at every possible stage—before the point at which the Minister proposes that should happen. She must be clear that timely information must be given, and she must accept that to remove paragraph 13 of schedule 1 would weaken the rights of the vulnerable person, their family and any advocate. We need reassurances on those matters now, or on Report.

Caroline Dinenge: I completely agree that information sharing is vital in the system, and that it should be done at the earliest possible point. Liberty protection safeguards are not something that should simply happen to an individual, but something they need to be involved in from the outset. The Bill specifies that information must be shared after an authorisation is granted, purely because that is a legally cogent point. It includes having a watertight trigger point for information sharing from a legal perspective, but it does not prevent information from being provided beforehand.

Unlike the amendment tabled in the other place to existing paragraph 13, this amendment provides a clear trigger point to specify when information about the authorisation must be provided. We are clear that that point is absolutely the latest point at which information should be shared. In the vast majority of circumstances, that should be done much earlier, or at the very beginning of the process. The amendment does not prevent that from happening. The code of practice will provide detail regarding when it is appropriate to do that, and I have already made a commitment to the Committee to set out what will appear in the code of practice—

Barbara Keeley: The Minister cites legal points, but I read out earlier that article 5 of the European convention on human rights requires that a person be given information about the legal and factual basis for their deprivation of liberty so that they can exercise their right of appeal. Telling them after the authorisation process does not meet that requirement. I cited a case in which only on understanding their right to appeal was the person able to exercise that right, which brought about a less restrictive care situation. Apart from mentioning the code of

practice again, the Minister has not explained why the focus has shifted from before an authorisation to afterwards. That cannot be right.

Caroline Dinenge: I hope that what I will say gives the hon. Lady more clarity. Amendment 4 follows the current approach in the deprivation of liberty safeguards system—the DoLS system—which requires information to be provided as soon as practicable after authorisation is granted. We agree that from a legal perspective, that is a clear point at which we will always be able to carry out that duty. Amendment 4 removes the requirement to provide information about the process, which was in existing paragraph 13. This is a matter of drafting, but the paragraph did not list the significant parts of the process about which a person must be informed.

The Bill ensures that the person has the right to representation and support from either an advocate or an AMCP. If there is no appropriate person and the person does not have capacity, there is an effective presumption that an independent mental capacity advocate—an IMCA—will be appointed. Responsible bodies will ensure that the person has representation and support. The Government amendment includes steps to ensure that the cared-for person and the IMCA understand the authorisation and the right both to review and to access court.

Steve McCabe: Can the Minister share exactly what the draft code of practice says on the matter?

Caroline Dinenge: No, I do not have that to hand, but I have explicitly said that we will set out what the draft code of practice will include. I hope that that will give the hon. Gentleman more reassurance.

Alex Cunningham: When will that happen?

Caroline Dinenge: We will do that during Committee. The hon. Member for Stockton North spoke about the involvement of expertise, particularly in assessing those with speech and language difficulties. That is something that I am really interested in. It was also raised on Second Reading by the hon. Member for Swansea West (Geraint Davies), whom I met yesterday to discuss the matter. I am aware that sometimes a speech and language difficulty can be misinterpreted as somebody lacking mental capacity.

Speech and language therapists already play an important role. We are putting an individual's voice at the heart of the process, meaning that speech and language therapists will play an even greater role. We agree that their skills are essential and that all relevant health care professionals will recognise the role of speech and language professionals. That will be part of the training for this new role.

Barbara Keeley: There will be confusion about this, because the Minister is going back over what she has already said. Can she explain to me and my hon. Friends why the Government amendment would remove the following important steps:

“Prior to the authorisation process, the cared-for person must be fully informed of their rights... The responsible body must take such steps as are practicable to ensure that the cared-for person and any appropriate person... representing and supporting them understand the possible outcome of the assessments, the reasons why the cared-for person may be deprived of their liberty and their rights—”?

I do not understand why the Minister thinks it is a good idea to table an amendment that starts:

“As soon as practicable after authorising arrangements, the responsible body must ensure that a copy of the authorisation record is given”.

We will lose the vital early stage of explaining to the person or their advocate what is going to happen, and explaining the person’s rights. Existing paragraph 13 has widespread support. I have explained to the Minister that I think the Government have done badly in talking to stakeholders. To remove a provision that has widespread support—I have quoted some of the organisations that support it—is really rather shocking. For the Government to remove the requirement to provide explanations and fully inform a cared-for person of their rights seems to me to be a contravention of human rights and a serious matter. The Minister has not explained why the Government are doing this.

Caroline Dinéage: Let me explain why in two short sentences. In delivering a better and more effective system, we must ensure it is legally cogent. That includes having a watertight trigger point for information sharing.

Barbara Keeley: I do not understand that point.

Caroline Dinéage: I am very happy to discuss the matter further with hon. Members, but the issue is that there is not a watertight trigger point. When we say that information must be delivered at the earliest opportunity, it is very difficult to codify and define that in law.

Steve McCabe: I do not want to get bogged down in legal technicalities, but why is it necessary for the legal trigger point to be after the authorisation has been made? Why could it not be at the start of the authorisation process? That could also be a defined legal trigger point, surely.

Caroline Dinéage: I am happy to commit to going away and looking at the matter again. I understand that it worries hon. Members; if I am honest, it worries me, too. As I understand it, the reason is that the starting point is different, depending on the individual circumstances.

That is the problem we have had with the current Bill, from beginning to end. We are looking to create a Bill that satisfies the needs of somebody like my elderly uncle who was living with dementia, as well as the needs of a 16 or 17-year-old who was born with a learning disability. We want the same Bill to cover the needs of a 30-year-old who has been involved in a road traffic accident and has an acquired brain injury.

It is very difficult to ensure that we cover the legal bases and offer the protection needed by every one of those individuals, with their own personal support requirements. That is why we have to pay close attention to what is legally cogent, and why it is important to ensure that the Bill contains a watertight trigger point.

Barbara Keeley: I read out the evidence given by Lucy Series to this Committee. I am not a lawyer. We are talking about legal cogency, and I think that that is a difficulty, but the European convention on human rights requires information to be provided to the person or the people representing them about the legal and factual basis for the deprivation of liberty and about their rights of appeal in a language that they understand so that they can exercise rights of appeal. Where is that in Government amendment 4? It does not appear to me to

be anywhere. The amendment starts with “after authorising arrangements”. The Minister talks about cogent points, but she has not given me any cogent information about why she is shifting the point at which people are entitled to information to after the authorising of arrangements. That is not right. I have read out the evidence and advice given to the Committee by a very qualified lawyer, which is that the European convention on human rights insists that the information has to be given at the start, not halfway through the process.

Caroline Dinéage: I will say in response only that amendment 4 follows the approach taken in the current DoLS system.

Question put, That the amendment be made.

The Committee divided: Ayes 8, Noes 7.

Division No. 2]

AYES

Afolami, Bim	Morton, Wendy
Chalk, Alex	O’Brien, Neil
Dinéage, Caroline	Syms, Sir Robert
Morris, James	Whately, Helen

NOES

Cunningham, Alex	McCabe, Steve
Debonnaire, Thangam	Norris, Alex
Dhesi, Mr Tanmanjeet Singh	Sherriff, Paula
Keeley, Barbara	

Question accordingly agreed to.

Amendment 4 agreed to.

Barbara Keeley: I beg to move amendment 20, in schedule 1, page 12, line 12, leave out paragraph 14(b).

This amendment makes provision for the responsible body to take on all functions relating to authorisation of deprivation of liberty in cases relating to care homes.

The Chair: With this it will be convenient to discuss the following:

Amendment 21, in schedule 1, page 12, line 41, leave out paragraph 16 and 17.

This amendment is consequential on Amendment 20.

Amendment 22, in schedule 1, page 14, line 27, leave out from “means” to end of subparagraph (8)(b) and insert “the responsible body”.

This amendment is consequential on Amendment 20.

Amendment 23, in schedule 1, page 14, line 41, leave out sub-paragraphs (3)(a) and (3)(b) and insert “to the responsible body”.

This amendment is consequential on Amendment 20.

Amendment 24, in schedule 1, page 15, line 14, leave out from “out” to end of subparagraph (1)(b) and insert “by the responsible body”.

This amendment is consequential on Amendment 20.

Amendment 25, in schedule 1, page 15, line 39, leave out “or 16(d)”.

This amendment is consequential on Amendment 20.

Amendment 26, in schedule 1, page 17, line 14, leave out “or 17(2)(b)(iii)”.

This amendment is consequential on Amendment 20.

Amendment 27, in schedule 1, page 18, line 31, leave out paragraph 30(b).

[The Chair]

This amendment makes provision for the responsible body to take on all functions relating to renewal of deprivation of liberty in cases relating to care homes.

Amendment 28, in schedule 1, page 19, line 5, leave out paragraphs 32 and 33.

This amendment is consequential on Amendment 27.

Amendment 29, in schedule 1, page 19, line 36, leave out from “body” to end of sub-paragraph (1).

This amendment is consequential on Amendment 27.

Barbara Keeley: The purpose of this group of amendments is to remove the remaining conflict of interest in respect of care home managers. When this Bill was first presented to the House of Lords—many people will have read all the *Hansard* reports from that House—there were enormous concerns about the role of care home managers, because they would be judge and jury for deprivation of liberty applications within their own care homes. For organisations with a clear financial interest in keeping their residents in care homes, that represented a very clear conflict of interest, so I am grateful to Members of the House of Lords for their strident opposition—there is no other way of describing it—to such a system and I am glad that the Bill is improved somewhat. No longer will the care home manager automatically be the responsible body in all cases relating to their care home. No longer will they automatically be the person responsible for renewing authorisations in their own care home. No longer will it be the care home manager who decides whether a cared-for person should get an advocate. It is worth saying that those are welcome developments.

However, that does not mean that there is no longer a conflict of interest in the Bill. It will have been noticed that I referred to the fact that care home managers no longer “automatically” have certain powers. That does not mean that they never have them. The Bill now creates a system whereby local authorities can choose whether to trust care home managers to carry out their own authorisation process. Many things in relation to care involve a postcode lottery. This risks further entrenching the postcode lottery that we can already see in our social care system. Some local authorities will conscientiously retain this role themselves. We heard this morning about some good local authorities, which handled the DoLS process well: my local authority, Stockton local authority and others. However, that will not always be the case, because some authorities are struggling so much with resources.

Other local authorities, because they do not have the staff and resources or because they simply do not want to take on the work, will delegate the whole process to care home managers. They could do that, because there is no guidance in the Bill about when it is appropriate to give care home managers that responsibility. Our amendment proposes a clear answer to that question: it is never appropriate. On a matter as important as somebody’s liberty, it cannot be right that decisions are taken by the manager of an organisation that has a financial stake in the granting of the authorisation.

3.15 pm

All cases outside a healthcare setting fall under the remit of a local authority. Our amendment would ensure that local authorities carry out the duties themselves, rather than delegating them to a care home manager.

We have to be careful not to seem to be denigrating people involved in the sector, and I am sure that the overwhelming majority of care home managers want to do the right thing for the people in their care homes, but that does not mean that they should ever be given the power to deprive someone of their liberty without proper checks.

The Minister may mention that a number of checks are built into the system, which is right, but that does not mean that the conflict of interest is any less clear. Independent reviewers are not infallible and should not be the only safeguard against improper deprivations of liberty.

I refer again to the recent court case of *Y v. Barking and Dagenham*, which is the case of a young man who was placed in an inappropriate care home. Initially, his parents were satisfied with the placement, but over time, the quality of his care deteriorated and his health got worse. As constituency MPs who are interested and involved in such matters, other hon. Members will have seen in Care Quality Commission reports examples of care in homes degrading and deteriorating to the point of “requires improvement” or “inadequate”, as I have discussed in many debates.

A turning point in the case was when a teacher at the young man’s school reported that they had seen a member of his care staff violently push him into a wall. That appeared to be assault, but the care home later described it as a legitimate restraint technique. In two years, he was restrained 199 times. He suffered significant harm in the time that he was in the care home and his behaviour worsened. The key thing with learning disabled or autistic people is that their behaviour can degrade to a point where it becomes difficult to put them in a community setting, and that made it harder for him to move to living independently in the community.

The case of *Y* was revealed by an independent social worker, but the local authority dismissed the concerns of *Y*’s parents and instead took the word of the professionals working in the care home. That mistake is sometimes made when family members disagree with professionals—we will all have seen cases in our casework where people disagree with social workers.

As a result, *Y*’s case did not receive the scrutiny that it should have had. When the case went to court, the local authority accepted that it had been too quick to accept the care home’s reassurances and dismiss the parents’ concerns. *Y* eventually got out of the placement after his court-appointed guardian visited and raised concerns, but it took the intervention of somebody completely outside the system for that action to be taken.

That case is an example of why we do not want care homes to have only one independent check before deprivation of liberty is authorised. With the best will in the world, mistakes will be made by independent reviewers. A local authority will sometimes take the word of the care home when it should not.

Mr Tanmanjeet Singh Dhesi (Slough) (Lab): To ignore the conflict of interest would be an absolute dereliction of our duty as parliamentarians. Does my hon. Friend agree that pre-authorisation reviews should be carried out only by individuals who are not in any way connected with that independent hospital, the day-to-day care provision for that individual or the treatment of that cared-for person?

Barbara Keeley: I agree with my hon. Friend, who makes a good point.

In essence, the case outlines the situation that the Government propose in the Bill. The care home provided reassurances to the local authority that the situation was appropriate and necessary, which lengthened the time that the young man spent in that inappropriate setting. The local authority accepted those reassurances, including when the case was reviewed. The end result was that somebody—this young man—was held inappropriately for two years.

To protect against that, we want all cases to be initially authorised by an independent body, which would organise the assessments and consultations itself. Because it would do that, the care home would not be able to provide initial assurances that may turn out to be incorrect. That would provide another layer of protection against people being wrongly deprived of their liberty.

We have been told that paragraph 20(1)(a) of schedule 1, which would allow care home managers to carry out the consultation with the cared-for person and others, is of concern. I have heard of cases where care homes decide to cut off contact between a cared-for person and their family, often on highly dubious grounds. As the hon. Member for Halesowen and Rowley Regis said this morning, in some cases that may be because the family are not helping the situation. However, in other cases—I am afraid to say that this applies to most of the examples that I have encountered—it is purely because the family object to something that is being done.

Fear of something like that happening can make it hard for someone to stand up to the people providing the care, whether they are the cared-for person or somebody close to them. The risk of having contact cut off, or the risk of reprisals when there is nobody there to object, can make people compliant even when they do not want to be.

I ask hon. Members to picture this situation: neither the cared-for person nor their family are confident enough to stand up to the care provider and object to the support that is being developed, and then that very same care provider asks them if they have any objection to a deprivation of liberty being granted. How many cases can Members imagine in which nobody says anything, not because they do not want to but because they are scared of the consequences?

One such case would be too many, but I suspect that there will be many more. I will raise two cases now in which such a situation could have been an issue. In one case, a resident—Mr A—had removed his hearing aid and his daughter had had to shout to make herself understood. She was then accused of bullying him and of other misdemeanours, and she was banned from the care home. She had been a regular visitor and had helped with many personal caring tasks. She was subsequently informed that the matter had been referred to safeguarding and that a DoLS referral had been made. The investigation made it clear that the restrictions had been imposed because she had asked a number of questions about the deterioration in the home's standards of care, which the care home manager was finding difficult to answer.

In another case a daughter, Ms B, was concerned about her father, Mr B. Against all attempts to prevent it from happening, Mr B had been placed in a care

home. Ms B felt that that was against both his wishes and his best interests, which is the important point that was just made. However, both the care home manager and her stepmother were content with the placement. Mr B's behaviour quickly became increasingly aggressive and he made repeated attempts to leave the home, including by climbing out of a window. His daughter's visits were then blamed for his behaviour. As a result, the care home manager prevented him from meeting friends outside the home and Ms B was asked not to visit the home.

In both those cases, relatives with a valid interest in a cared-for person's welfare were restricted—on spurious grounds—from having contact with them. In both cases, the main “fault” of the relative was to express concerns about the care that was being delivered. If expressing negative views about a person's care can get a relative banned from seeing them, of course people will be reticent about making their feelings known when they are consulted by the care home manager.

Mr Dhesi: My hon. Friend is making a very powerful point. Hopefully the Minister will acknowledge that if family members are excluded from the care process, alarm bells should ring throughout the entire process, because so often for vulnerable individuals their family members are the only people who visit them. That is why we need to ensure that family members have a connection with them in the future.

Barbara Keeley: By moving this responsibility in the Bill to local authorities, which currently have this responsibility, we can ensure that people are more confident about expressing their feelings. The consultation process should act as a crucial safeguard to prevent people from being deprived of their liberty against their wishes. Without our amendments, I am afraid that all too often the Bill will not achieve its purpose.

I turn now to the burden of work that the Bill will place on care home managers, because that is an important aspect. I hope that I have made it clear that I do not think that it can ever be appropriate for a care home manager to have a role in this process, but more than that there is no evidence that care home managers want this role or could carry it out. There is currently a vacancy rate of 11% for registered care home managers—11% of care homes do not even have a manager. That is higher than for any other role in the care sector. Care home managers are overworked in many cases, having to manage care homes that are operating on increasingly narrow margins. They are not experts in mental capacity nor trained to carry out assessments. In short, the role that they may be given is not one that they are prepared for or want.

Given that they are overstretched, we can expect them to make mistakes on occasion—that is understandable. When people are placed in high-pressure environments and expected to do more than they reasonably can or want to do, something has to give. We should not be in a situation where that something is the proper process for the authorisation of the deprivation of somebody's liberty. It would not be acceptable if the result of the Government's underfunding of social care was that people had their liberty taken away based on a tick-box exercise by a care home manager who lacks the time and skills to do any more.

[Barbara Keeley]

I understand that the Government estimate that it will cost just £20 to train a care home manager to carry out this role. I think it was said at a recent meeting of the all-party parliamentary group on social work that it takes years to train a social worker to get to the point of carrying out assessments. Twenty pounds represents perhaps half a day of training. The idea that after a few hours a care home manager will be able to go out and manage liberty protection safeguards is not plausible. These complex issues should be carried out by people who have experience and expertise.

As we heard earlier, local authorities already have teams dedicated to deprivation of liberty safeguards, so it seems a wasted opportunity not to use that resource. Ultimately, it would not even save money.

Steve McCabe: As I listen to my hon. Friend, I wonder if people are a little confused between process and practice and, as a consequence, are doing a disservice to the local authority or whoever the appropriate responsible body is and to the care home manager. Surely, it is the job of a good care home manager to provide and oversee the care and to give regular reports and information that explain how the cared-for person is responding to the care regime that they are receiving—what seems to help them and what may hinder them. That is extremely useful, because the alternative to that is that the person is being warehoused and there is no way of knowing what happens over a period of time. The process is to assimilate that information and think about it in the context of what is in the person's best interests and where we should go next. By suggesting that the same person should do the same thing—and it is just the same thing—have we not ended up doing a disservice to both groups of people?

Barbara Keeley: I think my hon. Friend is right; that is the case. Ultimately, the point is that it would not even save money. Despite what the Government's out-of-date impact assessment may say, care home managers will not be able to carry out this role for free. Time spent carrying out these authorisations is time spent not doing other work. Care home managers are not currently sitting around doing nothing all day, so there will be cost implications. When care homes are struggling to remain solvent anyway, these small differences cannot simply be absorbed.

The Bill comes at a time when social care is under enormous pressure. Years of underfunding mean that care homes are hard pressed to keep their heads above water. The brutal reality is that without more funding for local authorities, they will not be able to increase what they are paying to care homes, and that means that some care homes will have to carry out these assessments without any extra resourcing. That will mean that less time is spent delivering hands-on care and more time is spent dealing with this process. This is where the proposed reforms to the Bill would have a real implication for the delivery of social care as a whole. We need to see reform across the board if this is not to become another cost that we expect care homes to bear, pushing more of them into dire financial straits.

It would not be the first time the Government have done that. When they brought in the living wage, they made no effort to support local authorities so that they

could pay providers more. When the Government updated their guidance on sleep-in pay, they made no guarantees to providers that they would support them to pay off their liabilities. The care sector cannot afford to continue to pay for Government decisions without being appropriately supported to do so.

3.30 pm

Because of the crisis in the funding of social care, the costs of carrying out deprivation of liberty assessments will be passed on to the local authority or—importantly for self-funders—to the cared-for person themselves. There is no mention in any of the documentation around the Bill of that point. Given that there is a cost involved in giving this role to the care home manager, it could be that the costs will eventually just be paid for by the self-funder or the local authority. I know that the Government say—we had Health questions in the interval today—that reform of social care funding is coming, but even if the Government's Green Paper were published next week or the week after, reform would still be years away. This measure will cost care providers now.

I have heard from care providers that are concerned that the extra work that this measure could place on their care homes might even force some care homes out of the market. People who lack capacity may start to be too much work for some homes. It is already difficult to get places in care homes for people with advanced dementia. A care home in Tameside closed for financial reasons recently and one of the people there with dementia had to be placed in the city of Durham—nowhere near Greater Manchester—and their family had to deal with that. There are already care deserts in parts of the country—places where people with certain levels of dementia cannot get a care home place.

The Government should be upfront about this. The purpose of the Bill should not be to save money or to shift the cost outside local government, despite the consequences that that would have. We cannot just move costs around and assume that it will not be a problem. The plans in the Bill would create an indirect cost, while removing crucial safeguards for some cared-for people. That seems to be the worst of all worlds.

Alex Cunningham: My hon. Friend talks about shifting the cost around. I know that we will get to it later in the Bill, but there is the issue of charges being made to the person living in a care home or elsewhere. They could end up shouldering this burden, rather than anybody else—it should be the state.

Barbara Keeley: I cannot see anything other than that self-funders would end up paying it. Self-funders might not just end up paying it for themselves; they might be paying it for everybody else who is in the care home, which is actually what they do—there is a certain transfer.

I want to make myself perfectly clear. Care home managers should not be involved in the authorisation of deprivations of liberty or the consultations around that. It is unlikely that they would be able to do it and, as far as I can ascertain, they do not want to do it. Given that, the best route is surely to move responsibility back to local authorities, which have considerable expertise in this area.

We also propose to remove care home managers from the process of renewing an authorisation through amendments 27 to 29. If anything, that is more critical. At authorisation stage there are some safeguards in place, but to renew an authorisation, all that a care home manager would have to do is carry out a consultation and then certify that they feel the authorisation conditions continue to be met.

I have covered our concerns about the consultation process, so will not go over them again. I cannot see how it can be appropriate, however, for an authorisation to be renewed without anyone outside the care home being involved. The Bill proposes that renewals could last for three years—longer than the initial authorisation—and we have our separate concerns about that. At the renewal stage, however, there is no independent review. There is no medical assessment by a person not connected to the care home. There is no independent consideration of whether the arrangements are suitable.

I understand the Government's argument, which was made in the House of Lords, that they do not want the renewal process to be stressful for the cared-for person where there is little prospect of anything changing, but that is not an excuse to remove vital safeguards. The most vital of those is that the decision is made by somebody with no vested interest in maintaining the arrangements. Only by doing that can we begin to make sure that the streamlined renewal process does not result in people being wrongfully deprived of their liberty.

Before I make my concluding comments on these amendments, I want to give Members another example of how things can go wrong in care homes. I recently heard from someone who was admitted to a care home after a spell in hospital. She was admitted to hospital after knocking herself out in a fall in her garden and being rescued by ambulance. A social worker had arranged her admission to the care home, which the person thought would be for a few weeks.

The care home was privately run and was

“full of elderly men and women from varied backgrounds. There were writers and businessmen and women, carpenters and vicars but they were all suffering from various degrees of dementia. I met only one resident who wanted to be there and she had been there for about 15 years and had chosen to go there after her husband had died. Most of the people there were women. Most of them were put there by their children and their houses had been sold to pay for their care or, if not, their children or their local council paid the enormous bills.

The home was a miserable place, the food was worse than school dinners and there were no events or outings organised at all. Each day had a routine of getting up, breakfast, sitting in chairs silently looking at the ceiling or knitting scarves, toilets, lunch, sitting, early tea and all in bed by 9 pm. There was no stimulation or crafts to do.”

The woman soon realised that it was difficult for her to get out, because she was given IQ tests and declared to have Korsakoff syndrome. This can happen, I understand, after a head injury. She said:

“The home wasn't interested in the residents' wellbeing or recovery. It suited them to have sedated residents sitting doing nothing all day. Their interest was making money. They owned a number of homes in the area. The guests were allowed visitors in the afternoon, but many didn't have visits at all. I continued to spend all of my days by myself, but read and researched lots of things, and insisted every day that I wanted to see someone about being released. I was told that they could release me if someone came to pick me up and took responsibility for me in their home.”

She started to do exercises designed to improve memory and got in touch with the local council. Someone from social services visited and arranged for a specialist doctor to conduct an IQ test, on which she got very high results. The social worker wrote to the home and to her, and used the deprivation of liberty regulations to secure her release.

The woman left this miserable care home some six months after being admitted there to live in a new house, which she had bought. She contacted me because she was grateful for the safeguards that enabled her to leave that place, which she saw as

“merely a depository for elderly unwanted family members.”

She told me that

“these commercial business homes are terrible institutions created to make money.”

We are asking that people like this person, if they are going to be deprived of their liberty, always have their rights guaranteed by an independent public body, rather than the organisation responsible for providing their care.

What is contained within the Bill is not a solution to a problem. There is near unanimity among stakeholders that it would be better if this role were never carried out by a care home manager. Our amendments would mean that care home managers are not given another task that they have neither the time nor skills to carry out. They would ensure that cared-for people and their families feel confident in speaking out when they disagree with the arrangements. They would ensure that people authorising deprivation of liberty are the people best qualified to do so: the well-trained professionals currently employed by local authorities for this very purpose.

More importantly, our amendments would remove one of the conflicts of interest that the Bill seems to seek to enshrine. They would ensure that nobody is deprived of their liberty in a care home on the say-so of the manager of that same care home, which is making profit from that deprivation of liberty. This is a matter of principle. Private companies should not be given responsibility for denying people their basic rights. It is right and proper that this responsibility should always lie with a public authority that is subject to democratic control. Amendments 20 to 29 achieve that and I hope that the Government will accept them.

Alex Norris (Nottingham North) (Lab/Co-op): Thank you, Chair: I know you have put in a double shift as Chair today. I think that might help us get to the root of why this room is so warm. We are trying to echo the micro-climate in Dudley, which I believe is quite tropical at this time of year. It is a pleasure to follow my hon. Friend the Member for Worsley and Eccles South.

This set of amendments follows on from amendment 19. When we were discussing amendment 19, the Minister said that she would take under active consideration the issue around independent hospitals; I am very glad about that. I hope that perhaps she will take these amendments in the same spirit, as they extend the same principle.

At the beginning, prompted by my hon. Friend the Member for Birmingham, Selly Oak, the Minister said she felt that independent hospitals would be a particular focus, because the revelations that we have seen on television showed that there is risk there. I suspect that the same risks are built into the care home sector, too, because the preconditions are similar—for example, a

[Alex Norris]

financial vested interest, a lack of outside scrutiny and an unhealthy power balance between those who run such schemes and those who are resident there.

The vast majority of the time, the leadership in such facilities is excellent and is geared towards supporting the individual. However, where that is not the case, those preconditions build up that risk. As I say, what we have talked about in relation to independent hospitals also applies here. We need to address a fundamental question. We have said that we believe that the DoLS system does not work, that the backlog is not tolerable, and that we ought to move to more effective arrangements. That view is very broadly shared, but I do not think that anyone would wish, in reaching a system that is more sustainable for the public purse and better for the individual, to downgrade the assessors from qualified social workers with specific qualifications in the area to others—in this case, care home managers. That is not a good way of saving money or getting things done more quickly, and the best way to make that clear is by finishing the process that began in the Lords, as my hon. Friend the Member for Worsley and Eccles South noted, and completely removing the relevant references from the Bill.

There are a couple of reasons why that is necessary. First, finances in care homes are marginal. We might sometimes blanch at the cost, but we know that they can go to the wall quite quickly. As a result, there are subconscious commercial pressures that could colour a judgment, shifting it away from the best interests of the individual and towards the best interests of the care home in general. That, of course, is not what we seek to do.

It cuts both ways. We have spoken about independent hospitals having a perverse incentive either to hold on to an individual when it is not appropriate or to provide a much more comprehensive service than is necessary, but it can cut the other way, too. I am not aware of the picture across the country, but in Nottingham the most complex care packages in a residential setting are hotly sought after and we do not have a mass market for them; the market for more general needs care in my city is quite mature and sustainable, but that is not the case for higher-end care. A different perverse incentive could therefore arise for a care home if there are individuals for whom starting the assessment process or conducting periodic reviews is more trouble than it is worth. Whatever path we take in the rest of the Bill, the issue will continue to be tested in case law, and I do not know of many care homes that would gladly take on the responsibility of being on the other side of it.

As well as perverse incentives either to keep people or to ensure that they do not stay, there is a second point, as my hon. Friend the Member for Worsley and Eccles South said: are care homes really the right responsible body? I did not know—I am disappointed that I missed it in my research—about the £20 training for care home managers in a really important subject. Of course that is not sufficient; I cannot imagine that it could cover anything beyond filling out a form in a legally compliant way. It instantly pushes us towards a tick-box approach, which nobody wants—an approach that is about clearing the necessary barriers to legal compliance, rather than working around the individual's needs and being person-centred.

As my hon. Friend said, there is a double risk. Some local authorities will identify the risk straightaway; others will not. Those that are feeling particularly hard-pressed will say, “It is our legal responsibility to ensure that somebody does this, but it does not have to be us.” With public sector cuts as they are, there is a series of perverse cost incentives throughout the health and social care system that result in individuals being pushed from one organisation to another; this will be one such incentive. Other local authorities—we have heard some good examples—will say, “Hang on a minute: this is far too important for that,” but portfolio holders and directors of adult social services are under incredible pressure.

Steve McCabe: Is this another situation in which we are in the dark because of the missing code of practice? It may be the case that if the Government have thought about that there will be examples in the code of practice saying how it should operate, what the minimum expectations are to avoid a tick-box approach, what good practice is and what people should aspire to achieve. If we had sight of that—if we had some indication that it was on the Government's agenda—it might be easier for us trying to scrutinise the Bill, and it would offer some reassurance to the wider public that the fears that have been expressed will not prove well-founded.

3.45 pm

Alex Norris: I thank my hon. Friend for that intervention. I am perfectly willing to concede that I might be being a bit too sensitive or nervous about this if a blue riband code of practice is going to be laid next to the Bill that plays out all the concerns and things that we are seeking to avoid, and that therefore really protects people and ensures that decisions in the moment will be the right ones. However, the problem is that we simply do not have that, so we are left to conceive of it, which is very difficult. We trust Ministers and civil servants to pursue the goals that they are talking about, and to pursue the best for individuals, but it is still very hard. We cannot fully discharge our responsibility if we have not seen that piece of the puzzle, so that is frustrating.

It is about knocking this bit of legislation into something that gets us to the final goal. I do not think that anybody has advocated a DoLS system that is streamlined and more financially possible simply by pushing the assessments away from someone who is exceptionally skilled and trained in the area to somebody who is not. I do not think that is desirable for the individuals who will be assessed or fair on those who will do the assessing. I hope that Ministers are minded to take that on board.

Alex Cunningham: During today's debate I have already raised concerns about independent hospitals, and about care home managers and their potential role in depriving people in their care of their freedom. I know that my hon. Friend the Member for Worsley and Eccles South has addressed that comprehensively, but I hope that I can still add some value to the debate.

Even if there was some way in which the Government could justify the role of care home managers as outlined in the Bill, there is still a huge number of reasons why the sector would struggle to deliver what Ministers want it to. My hon. Friend has talked about the fact that finances in care homes are very much on the margin—they could be bust one day and make a bit of profit the next.

However, some care homes do not even have care home managers. In hundreds of others across the country, the level of competence of managers in running care homes is alarmingly poor. We have some of them in my constituency. We have some great managers, and we have some excellent care homes, but we also have some that fall into the “inadequate” or “requires improvement” categories on inspection. It is not good enough for us to consider handing over this level of responsibility to people who might not be competent, or might not even be there in order to carry out the work.

On the CQC website, 2,550 care homes are listed as requiring improvement, with a further 223 deemed “inadequate”. Some of them are very large homes, but let us say that each one has an average of just 25 people in their care. That would mean that some 70,000 elderly people in care are being failed by the system. Leadership in those homes is one of the reasons they are being failed, and CQC reports bear that out time and again.

I know that that is symptomatic of a broken adult care system that has been neglected by the Government. I am sure that the Minister wants to wring my neck when I start talking about resources again, but it is about inadequate resources. Even after allowing councils to hike council tax to boost the social care budget, there is still insufficient money in the system. Profit-taking companies are often failing to provide adequate care, citing as the reason that they cannot afford to do so.

The system is in danger of failing further, as care homes close and the number of people requiring residential support increases. How on earth can the Government justify placing this most important duty on care home managers, asking them to play a central role in depriving the people in their care of their freedom? Given that the system is broken, that thousands of care homes are not anywhere near the required standard, and that in many cases there is no one competent—or no one at all—in the home, who will fill the gaps and deal with deprivation of liberty issues there? There may be other reasons why someone needs to do the work planned for the care home managers. If there is no care home manager, who are the Government expecting to carry out these assessments? Those managers do not want this duty, so what happens if a care home manager says, “I am simply not prepared to do this work; I do not want this responsibility”? Again, who will pick up that work? Will it fall on the local authority, the local GP commissioning group, or the health board?

Steve McCabe: Is not the reality that if the scenario my hon. Friend has depicted comes to pass, we will have a different backlog? We will have gone through this whole exercise and, rather than having fixed this system, we will have transposed one problem for a different one with exactly the same impact.

Alex Cunningham: Indeed that is the case. There are probably thousands of people in the system at this time who are illegally detained, or whose freedom has been denied them; we can do without additional problems of the sort that my hon. Friend describes. I talked about the fall-back position: if there is nobody in the care home who can do this work, and it does fall back on the local authorities or some other organisation, they are already dealing with very strained budgets and an overload of work, so how do we fill that gap? Again, I ask the Minister how she will ensure that these organisations

have the resources that they need, even if the duplication that she was describing earlier in the day is sorted out and the systems run far more effectively. I am aware that if our amendment is successful and these duties do not sit with care home managers, the bill for work by these other organisations will be all the greater. Again, how on earth will that be funded?

Of course, the system can work. I cite the case of the north-east of England, where the DoLS system probably works better than in other parts of the country—albeit that local authorities have chosen to take the political decision I talked about earlier. However, that is letting other services down because they feel that they must protect the interests of people whose liberty is at risk. I will return to my point about the north-east a little bit later, as I want to go back to the topic of care home managers. Does not the Minister agree that most of them should be working to improve or maintain their CQC ratings and all that comes with that, rather than carrying out those assessments of individuals in their care?

I intervened on the shadow Minister to talk about charges. Some care homes may even charge a self-funder an administration fee for the assessments. Who says that is fair, right, or proper—Members can use whatever word they like? Who on earth governs that, and who is protecting the person who is having to shell out the cash? What is to stop a care home manager from unnecessarily charging fees for “administration purposes”? Who is there to say otherwise? I said this morning that we need to protect the public purse and the purses of those who live in these establishments; this is another example of that. One of the pieces of written evidence we have received comes from a collective of organisations, including the Registered Nursing Home Association and Care England. It says:

“There is no reason for singling out care home managers for extra responsibility, over their colleagues in other care settings, except for to transfer significant costs from struggling local authorities to struggling care homes. The effect will inevitably be that some providers who continue in the sector...pass on the costs to the affected residents.”

My hon. Friend the Member for Nottingham North discussed that.

So there we are: care home associations do not want the responsibility of assessments; the persons involved will not want the care home to have that responsibility; and we Labour Members, who probably matter less than them, do not want care homes to have responsibility for assessments, so why are the Government continuing to push this? Any opportunity a care home manager has to improve their organisation’s financial outlook is bound to be considered. That is all the more reason why it should not be their job to carry out assessments for a person when they have a vested interest—and a financial interest, at that. The Alzheimer’s Society also has a concern; it argues that we urgently need clarification of the role of care home managers, and how to protect the independence of the person being cared for. That is currently dealt with by best-interests assessors. My council of Stockton-on-Tees has raised concerns with me about the fact that the decision as to the necessity of assessment still appears to rest with care homes.

I thank Angela Connor and Natalie Shaw from the Stockton DoLS team for taking the time to talk to me about their work and how it will be affected by the Bill. They provided me with some follow-up notes, for which I am very grateful, because in one hour they built my

[Alex Cunningham]

understanding more than all the reading that I had tried to do. Like others, they posed many questions. Where is the quality assurance? Who is going to check that what they are doing is both correct and within the law? Despite the obvious conflict of interest, local authorities rely on assessments made by a care home manager, including allowing care home managers to carry out a consultation to determine a cared-for person's wishes.

Between 2013 and 2018, there was a 5,000% increase in the number of applications under the Mental Capacity Act that my local authority received. Stockton-on-Tees Borough Council created the DoLS team in 2014 to manage the applications. As I said earlier, we are quite lucky in the north-east because there has been a regional arrangement in place that means that mental health assessors are paid a fixed fee of £175 for three assessments—buy two, get one free—and best-interests assessors are paid £175, again for three assessments.

As I mentioned earlier, the number of completions of DoLS in the north-east was higher than in the rest of the regions, and applications are taking a shorter time to process. Dedicated DoLS teams have been established across the region. Independent assessors are used, and that raises awareness with managing authorities. Yet the Alzheimer's Society tells me that the Bill would remove the post of best-interests assessor; part of their responsibility will shift to care home managers, who I think are ill equipped to perform the role. The DoLS team in Stockton tell me that they believe that the Government's proposals will lead to a diluted assessment.

I agree with what the Minister said this morning about ending the duplication of assessments, cutting out waste and targeting limited resources where they are most needed, but that must not be done by diluting the assessment process. I am interested to hear what the Minister has to say to address the concerns of so many stakeholders in this area.

The Government's proposals, under which care home managers, who are held responsible for providing care, are also responsible for assessment, are not in the best interests of the person affected. I do not believe that the Government intended to create this clear conflict of interest. If care managers are not to be removed from the process entirely, I hope the Minister will outline in detail exactly how this serious situation is to be avoided. We may have to rely on information provided later. A code of practice is all very well, but we need the detail now. If we do not have the assurances we require, how on earth can we support the Bill?

Caroline Dinagen: I thank hon. Members for raising important issues today. We have heard what amendments 20 to 29 would do. It is worth setting out that care homes already have an important role in the DoLS system. They are responsible for identifying where a person lacks capacity, and for working out where restrictions might be needed as part of care. They are responsible for making an application to a local authority. Because of the current backlog, they are responsible for chasing that deprivation of liberty safeguard, which gives them the legal protection that they need when they are keeping somebody in their care.

It is important that care home managers continue to play a central role in the liberty protection safeguard system, but we completely recognise that it would be a

conflict of interest to have care home managers completing assessments. I am not sure whether the hon. Member for Stockton North was a bit confused, or whether I misinterpreted what he said, but there is no plan for care home managers to do the assessments; they are just gathering the information required. We amended the Bill in the other place to reflect that.

4 pm

If we remove the care home manager from the process entirely, we remove a professional with expert training who is closely involved and responsible for the individual's care plan through their responsibility under the Care Act. We would be taking them out of the process, completely unnecessarily, to duplicate a system that we already know is not working and is broken.

Barbara Keeley: I have picked up that it was generally thought that Ministers, and possibly the Bill team, have a rather honeyed view of the relationship between local authorities and care home managers, and of how much care home managers get involved in care planning. She has just illustrated that point.

These are the points that the Minister seems to be ignoring and needs to answer. First, 11% of care homes have no manager; there is an 11% vacancy rate. Secondly, one in 20 care homes requires improvement or is inadequate. She has talked about care home managers being involved in care planning, but that does not happen in the 11% of care homes where there is nobody there to do it, or in inadequate homes. In the care home that collapsed recently in Tameside, the staff effectively took over almost everything. There are many care homes—thousands, according to my hon. Friend the Member for Stockton North—possibly dealing with 70,000 people, that are not in an acceptable situation. There appears to be no recognition in the Bill, or in anything around it, that that is the case with our care sector.

Caroline Dinagen: I understand the hon. Lady's concerns, but she is not 100% correct. Where there are concerns about the care home, it is possible for the local authority, which would normally be the responsible body, to carry out these functions. Care home managers should be able to arrange assessments and identify and provide valid assessments previously completed by the responsible body. Let me say why. This goes to the crux of why care homes and the system face this overwhelming bureaucracy today.

Let us take a straightforward case, such as that of my uncle, whom I spoke about earlier. He was in a care home—he is sadly no longer with us—and he was very happy. We were very happy with him being there. There was a clear medical assessment of his condition and his state on the care home's books. Why couldn't the care home manager gather that? If there was no care home manager, or if the local authority—the responsible body—had any concerns about that person, their role, or their ability to fulfil that function, they could do it themselves, as they currently do.

Steve McCabe: The Minister told the Committee earlier that she did not want to put too much detail in the Bill in case that in itself became a restrictive problem. If good care home managers are already involved in and informing the process as part of good practice, why does that need to be specified in the Bill? She is telling

us that this happens anyway. Presumably, this could be cited in her code of practice as an example of good practice. The role of the care home manager that she describes is one of informing the responsible person, and using their knowledge and experience, gained through engagement and regular contact with the individual, to help inform the process. Presumably, that is just existing good practice, and it could be included in the code of practice. She may want to follow her own example of not cluttering her Bill by being too specific. This is an opportunity to take something out to help her achieve what she wants to.

Caroline Dinagen: I am grateful to the hon. Gentleman for that kind offer, but we intend to build on the role that care homes already play. Care home managers already daily identify that a person may lack capacity and need restrictions, take part in constructing a care plan, and liaise with mental health professionals. We are committed to supporting them further in doing that, ahead of implementation. We want to make sure that training for the workforce is delivered, and want the development-type model that I have spoken about.

I spoke a lot today about reducing the backlog. That will help enormously in reducing the burden that falls on care homes. They will not have to keep chasing applications that are in local authorities' backlog in order to get protections regarding the legal right to hold somebody in their care. The care home manager is often in a strong position to identify whether a person objects to the arrangements. Having a role in the consultation allows them to do this.

Alex Cunningham: We can all acknowledge that there is a role for care home managers in the system, but I see them as a small cog in the engine, rather than the driver of the machine. Does the Minister understand the issues around the lack of competence in many homes? How will she spell out somewhere in the legislation who picks up the pieces? She replied to my hon. Friend the shadow Minister on this, but she has not been clear on who does the work that she is expecting the care home manager to do if the care home manager does not exist or is not competent.

Caroline Dinagen: I am more than happy to do that, and I will deal with that shortly. The amendments would remove the role from the care home manager entirely, and would separate the liberty protection safeguards from the wider care planning that is already being done. It risks recreating the existing failing system, in which DoLS are too often considered a separate, overly bureaucratic, one-size-fits-all, box-ticking exercise.

We have to be careful. The hon. Member for Worsley and Eccles South rightly spoke about not castigating local authorities. She also mentioned that we must not demonise care providers. I agree. Of our care providers up and down the country, 83% are rated good or outstanding. They provide an incredible level of professional integrity and care, as well as daily vocational commitment, sometimes in difficult circumstances.

Barbara Keeley: I want to pick up what the Minister for Care says about DoLS being a box-ticking process. I have given at least two examples of people being freed from a totally inappropriate care setting because of a well-run DoLS process. The DoLS process runs well in my local authority, in Stockton and in other large

authorities. Let us not denigrate that. With regard to care homes, 83% are better than satisfactory, but 17% are not, and 11% have vacancies. Unless we are talking about a figure in the high 90s, we cannot have confidence. We have properly trained DoLS assessors. She is calling that a box-ticking exercise, and says that half a day's training for a care home manager—when almost one in five of them are not doing an adequate job—is somehow going to be better. It is not. It will be disastrous in some cases.

Caroline Dinagen: I would just say to the hon. Lady that I am quoting Sir Simon Wessely. In his view, this is too often a bureaucratic tick-box exercise and does not put the individual, their wishes, feelings and best interests at the heart of what we are all trying to achieve. I would also reinforce what I said to her before: the responsible body can decide to carry out these functions where there are concerns about the quality of the care provider. That might be because there are inexperienced staff at the helm, or no care home manager, or even particularly strong social worker involvement. When it is appropriate, the responsible body can carry out the functions. The Bill already makes provision for the involvement of social workers and allows for that where appropriate. We also need to ensure that self-funders, who have had very little involvement from a responsible body, receive protections. Removing all forms of role for care home managers could easily risk such people falling through the cracks.

The hon. Member for Worsley and Eccles South raised a couple of issues that I want to address. We absolutely agree that families should be able to object, and the Bill is very clear that those with an interest in the welfare of cared-for persons can flag objections on the person's behalf. An AMCP can review the case. That can be done directly with the responsible body, bypassing a care home, which solves the problem where people have the experience that the hon. Lady spoke of, where they do not have a good relationship with the care home. If they do not have confidence or are worried about raising concerns, the AMCP can be triggered.

The Bill already makes provision for the involvement of social workers. It already allows that, where appropriate, the responsible body can take on the functions from the care home if there are any concerns. My biggest concern is, in a nutshell, that these amendments, if passed, would risk fundamentally weakening the protections available to people. On that basis, I ask hon. Members to think seriously about the amendments, which are effectively recreating a system that we have all recognised is not fit for purpose, and I ask the hon. Member for Worsley and Eccles South to withdraw her amendment.

Barbara Keeley: We have had a very useful debate. It has been really helpful to hear the useful contributions from my hon. Friends, although I have to say it is very quiet on the Minister's side. It is a pity that we are not hearing more from that side, as I am sure there are people here with useful experience as constituency MPs.

Although progress was made on this issue in the House of Lords, there is still potential for a conflict of interest to arise in relation to the role of care home managers. I do not resile from what I said: the provisions in the Bill risk further entrenching a postcode lottery in our social care services. We already have a postcode lottery and it could be much worse.

[Barbara Keeley]

We believe that this is a serious situation, where local authorities diligently retain some of their role, while others are delegated to care home managers. On the point that the Minister covered at the end of her speech, it is particularly unacceptable for care homes to retain a role in carrying out the consultation. I gave case study examples where cared-for people and their families become wary of expressing objections to the people delivering care for fear of reprisals. It is true that in care homes, with GPs and in NHS hospitals people do not always say what they feel about the treatment they receive because they are so worried about reprisals, and that is very much the case with ongoing care situations. I gave several examples where family members were stopped from seeing a cared-for person after objections were raised. We have to take that seriously.

As we heard, as well as it being inappropriate that care home managers retain a role in carrying out the consultation, it is not clear to me at all from meeting organisations such as Care England, the network representing care home managers, that they want or are willing to take on the role. As we mentioned, they are currently under significant strain. That is a real factor. Having an 11% vacancy rate for registered care home managers is another real factor. Adding another role to them, without proper resourcing, will inevitably lead to services suffering.

In our discussions on the Bill, we need to have a proper debate about resources, because there was no time to discuss it in the Lords. There has been no real discussion on it yet, and it is absolutely crucial. There is a cost, as I covered in my speech, and we cannot just shunt the role on to care home managers who do not even want it.

Some care home providers are concerned that local authorities will delegate the role without providing training or additional resources to care home managers. I talked about the backlog of pay claims for sleep-in rates, which is a problem. Care England and the care home networks feel very strongly that a shunting-across is going on that will lead to financial difficulties for them. It will lead to care homes either leaving the market or no longer taking on clients who require deprivation of liberty

authorisations. As I outlined, those could be cases of people involving dementia or brain injury. They will not take those cases if they think there is going to be a lot of admin linked to the processes.

4.15 pm

The issue of renewals is, if anything, even more important. The only safeguard at renewal stage is a consultation. I have talked about why it is not appropriate for care home managers to carry that out. Without our amendments, care home managers may be able to renew authorisations for up to three years based on their own opinion and a consultation in which people are afraid to express their objections.

I think that, in trying to deal with the backlog, which we all want to be addressed, the Minister is potentially moving the backlog from local authorities to care homes and setting up a new bureaucracy, which will involve a debate and perhaps legal cases between the two. I will press these amendments to a vote.

Question put. That the amendment be made.

The Committee divided: Ayes 7, Noes 8.

Division No. 3]

AYES

Cunningham, Alex	McCabe, Steve
Debonnaire, Thangam	Norris, Alex
Dhesi, Mr Tanmanjeet Singh	Sherriff, Paula
Keeley, Barbara	

NOES

Afolami, Bim	Morton, Wendy
Chalk, Alex	O'Brien, Neil
Dinenage, Caroline	Syms, Sir Robert
Morris, James	Whately, Helen

Question accordingly negated.

Ordered. That further consideration be now adjourned.—(Wendy Morton.)

4.16 pm

Adjourned till Thursday 17 January at half-past Eleven o'clock.

Written evidence reported to the House

MCAB01 Andrew Lee, Director, People First
 MCAB02 National DoLS Leads Group
 MCAB03 Eloise Jones, Best Interest Assessor/Senior Social Worker MCA/DoLS
 MCAB04 Roger Hargreaves
 MCAB05 Dr O Sorinmade, MRC Psych., MSc., LLM, Consultant Older Adult Psychiatrist
 MCAB06 Royal College of Speech and Language Therapists
 MCAB07 Andrew MacTaggart, Best Interests Assessor
 MCAB08 Mike Stone
 MCAB09 Steven Richards
 MCAB10 Dr Samantha Hamer
 MCAB11 Carol Wilkinson
 MCAB12 Kay Matthews
 MCAB13 Sarah Paxton
 MCAB14 Dr Anil Christopher Chopdar
 MCAB15 David Parker
 MCAB16 Andy Nash
 MCAB17 Colin Newland
 MCAB18 Rethink Mental Illness
 MCAB19 Derek Boothby
 MCAB20 Sue Adams, DoLS Practice Manager/AMHP/BIA
 MCAB21 Citizens Advice Sheffield
 MCAB22 Dr Camilla Parker, Just Equality

MCAB23 Royal Mencap Society

MCAB24 Association for Real Change (ARC), Care England, the National Care Association (NCA), the National Care Forum (NCF), the Registered Nursing Home Association (RNHA), and the Voluntary Organisations Disability Group (VODG)

MCAB25 Vincent Duffy

MCAB26 Nick Woodhead

MCAB27 Albert House Nursing Home

MCAB28 Dr Haider Malik, Consultant Psychiatrist

MCAB29 Bill O'Grady, Social Worker

MCAB30 Stephen Ward, Lead for MHA and MCA Isle of Wight Council and Isle of Wight NHS Trust

MCAB31 Tracey Hennis, qualified Social Worker and Best Interest Assessor

MCAB32 Dr Lucy Series, a Wellcome Research Fellow and Lecturer in Law at the School of Law and Politics, at Cardiff University

MCAB33 Sara-Jayne Williams, Mental Capacity Act Coordinator for Bedford Borough Council

MCAB34 Graham Hennis, a qualified Social Worker and a Best Interests Assessor

MCAB35 Roger Laidlaw, Social Worker and Deprivation of Liberty Safeguards Coordinator

MCAB36 Sian Phillips

MCAB37 Lucy Bright

MCAB38 Kings College Hospital NHS Foundation Trust, Adult Safeguarding Service

MCAB39 Learning Disability England

