PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

MENTAL CAPACITY (AMENDMENT) BILL [*LORDS*]

Sixth Sitting

Tuesday 22 January 2019

(Afternoon)

CONTENTS

Clauses 2 to 4 agreed to.
Schedule 2 agreed to, with amendments.
Clause 5 agreed to, with an amendment.
New clause considered.
Bill, as amended, to be reported.
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 26 January 2019

The Committee consisted of the following Members:

Chairs: † Mark Pritchard, Ian Austin

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

Adam Mellows-Facer, *Committee Clerk*

† attended the Committee

Public Bill Committee

Tuesday 22 January 2019

(Afternoon)

[Mark Pritchard *in the Chair*]

Mental Capacity (Amendment) Bill [*Lords*]

Clause 2

Deprivation of liberty: authorisation of steps necessary for life-sustaining treatment or vital act

Amendment proposed (this day): 17, in clause 2, page 3, line 4, at end insert—

"(10) Where this section is relied on to deprive a cared-for person of his liberty, the person relying on this section must—

(a) inform the cared-for person and any person with an interest in the cared-for person's welfare of that fact;

(b) keep a written record of the reasons for relying on this section;

(c) supply a copy of the written record of reasons to the cared-for person and any person with an interest in the cared-for person's welfare within 24 hours of the deprivation of liberty commencing; and

(d) if any of the following apply, make an application to the Court of Protection immediately—

(i) the cared-for person objects to being deprived of his liberty;

(ii) a person with an interest in the welfare of the cared-for person objects to the cared-for person being deprived of his liberty; or

(iii) the donee of a lasting power of attorney or a court-appointed deputy objects to the cared-for person being deprived of his liberty."—(*Barbara Keeley*.)

2 pm

Question again proposed, That the amendment be made.

The Chair: Good afternoon, everybody. I call the shadow Minister to resume her speech.

Barbara Keeley (Worsley and Eccles South) (Lab): As I said, emergency authorisations do not come with the same protections that are built into standard authorisations. Those safeguards include advocacy, independent reviews and independent assessments.

This amendment is designed to add some safeguards to the emergency authorisation process. They would kick in after the authorisation has been granted, and outline how and when it should be escalated. In particular, it would make it absolutely clear when an application to the court should be made.

Given that there is no provision for advocacy under emergency authorisations, this responsibility is falling on whoever makes emergency authorisations. The provisions mean that we are not reliant on family members, who may be under enormous stress, to make the referral. That said, we will be pushing this amendment to a Division.

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 8.

Division No. 23]

AYES

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

NOES

Afolami, Bim	Morris, James
Chalk, Alex	Morton, Wendy
Dinenage, Caroline	O'Brien, Neil
Moore, Damien	Whately, Helen

Question accordingly negatived.

Question proposed, That the clause stand part of the Bill.

The Minister for Care (Caroline Dinenage): It is a pleasure to serve under your chairmanship once again, Mr Pritchard. Clause 2 relates to the authorisation of steps necessary for life-sustaining treatment or vital acts. This clause is incredibly important. It allows care givers, in limited situations, to deprive someone of their liberty for a short period of time prior to an authorisation being made or in an emergency. This can be done only to provide a person with life-sustaining treatment or to prevent serious deterioration in their condition.

The clause replaces the urgent authorisations that exist under the current deprivation of liberty safeguards system. Urgent authorisations last for up to 14 days in a situation where the need to deprive someone of liberty is urgent. However, providers are left without legal cover when the authorisation runs out and, due to the backlog, the council has not completed the necessary assessments.

We of course want to ensure that there is adequate oversight and that the measure will not be misused to push through unjust deprivations of liberty. Records will need to be kept and provided after the event. The regulators—which, in England, we expect to be the Care Quality Commission and, in Wales, to be Healthcare Inspectorate Wales and Care Inspectorate Wales—can use this to monitor whether adequate care is being given. With that in mind, I recommend that clause 2 stand part of the Bill.

Question put and agreed to.

Clause 2 accordingly ordered to stand part of the Bill.

Clause 3

Powers of the court to determine questions

Barbara Keeley: I beg to move amendment 18, in clause 3, page 3, line 14, leave out

"whether Schedule AA1 applies to the arrangements"

and insert

"any issue in relation to the application of Schedule AA1".

This amendment seeks to clarify that all relevant issues pertaining to Schedule AA1 can be addressed by the Court of Protection, for example whether an IMCA should be appointed or an AMCP involved.

It is a pleasure to serve under your chairmanship in this part of the Committee, Mr Pritchard. Amendment 18 may appear to be minor, but it could have significant

consequences for the proposed system of liberty protection safeguards. The Bill removes the section of the Mental Capacity Act 2005 that deals with court appeals for deprivation of liberty, and clause 3 proposes a new section in its place.

The Government have made few substantive changes to the power of the Court of Protection. We believe that this is a missed opportunity. The Law Commission said in its report:

"significant reforms should be made to the Court of Protection to ensure that it works for the people who apply to it."

The fact that the Government have refused to consider this as part of the Bill is another sign, I am sorry to say, that this Bill is being rushed through. Rather than considering this issue in the round, they are simply seeking to reproduce the current deficient system. The people who are subject to the Mental Capacity Act deserve better, so when the Minister replies, can she reassure us that the Law Commission's comments are being taken on board and that a full review of the Court of Protection will be forthcoming?

At the moment, the Bill gives the Court of Protection a limited set of powers. It can determine whether the liberty protection safeguards apply to the case; it can determine the length of authorisation; it can rule on the arrangements the authorisation relates to; and it can determine whether the authorisation conditions are met. So that hon. Members are clear on that final point, let me remind them what the authorisation conditions are. Paragraph 12 of schedule 1 reads:

"The authorisation conditions are that—

(a) the cared-for person lacks the capacity to consent to the arrangements,

(b) the cared-for person has a mental disorder, and

(c) the arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and seriousness"

of that harm. When the court is asked to rule on whether a liberty protection safeguard should have been granted, those are the only things that it can determine.

The court cannot determine whether a cared-for person should have been given access to an independent mental capacity advocate—we had a very full debate this morning about the role of advocates. It cannot determine whether the case should have been reviewed by an approved mental capacity professional. It cannot determine whether any of the assessors had a conflict of interest that should have precluded them from carrying out an assessment. It cannot determine whether the consultation has been properly carried out. It cannot determine whether the person was given the information that they should have been given. In short, it cannot determine whether any of the safeguards that we have discussed in this Committee were properly applied.

In some cases, the process will be every bit as important as the outcome, and I remind hon. Members of a case I mentioned previously. Ethel, an 85-year-old woman living in a care home, wanted to leave the care home and return to her own home. She was subject to a deprivation of liberty safeguard. With the help of an advocate, she appealed her case to the Court of Protection. Although the court ultimately ruled that Ethel should remain in the care home, the advocate found during the appeal process that the conditions placed on her authorisation had not been read and were not being applied until the Court of Protection made sure those conditions were attached to the authorisation. If the process is carried out improperly, it may be that less restrictive options for the person's care are not considered. It may be that a strong objection from a close family member, which could have altered the decisions made, is not expressed.

These concerns are widely shared. The Law Society has supported this amendment, as has a wide range of stakeholders, including Mind and Learning Disability England. It is my hope that the Government did not intend to exclude all the vital areas that I have just discussed, but I simply cannot understand why we would not want to give the Court of Protection the widest possible remit in this case. The court is intended to be the final safeguard against deprivation of liberty being used incorrectly or inappropriately, and if we restrict the issues that it can rule on, we blunt its effectiveness. The Opposition do not want to hear, a year or two down the line, of cases in which the responsible body has clearly not followed the correct process but the courts find themselves unable to do anything about it. Our amendment is designed to avoid such a situation ever arising, and I hope the Government will accept it.

Caroline Dinenage: I understand that hon. Members want the Court of Protection to consider matters such as whether an IMCA is appointed or an AMCP is involved. That would mean that the court was considering procedural matters regarding the liberty protection safeguards process. The hon. Member for Worsley and Eccles South has asked me about the review of the role of the Court of Protection; she will be aware that the Ministry of Justice is currently reviewing courts in the round, and that review will of course include the regionalisation of the Court of Protection. However, the Bill is clear that the pre-authorisation review must be completed by an approved mental capacity professional in cases in which an objection has been raised. That provides a clear route for arrangements to be considered if that is something the person wishes to happen.

Government amendment 9 is clear that, in independent hospital cases, an approved mental capacity professional must complete that review—that is a duty—and if an independent hospital as a responsible body fails to do that, it would be in clear breach of its responsibilities and could be subject to legal challenge.

With regard to IMCA appointments, the Bill introduces an effective presumption that an IMCA will be appointed by the responsible body if there is not an appropriate person in place, which ensures access to representation. With that in mind, I hope that I have provided reassurances that the system will be robust regarding IMCA appointments and access to AMCPs. I therefore hope that hon. Members are willing to withdraw the amendment.

Barbara Keeley: As I said, the amendment seeks to clarify the role of the Court of Protection. It broadens the narrow set of responsibilities in the Bill, giving the court the explicit right to rule on any matter relating to the new liberty protection safeguards. It ensures that the process, as well as the outcome, of authorisations is covered by the court.

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 8.

Division No. 24]

AYES

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

NOES

Afolami, Bim	Morris, James
Chalk, Alex	Morton, Wendy
Dinenage, Caroline	O'Brien, Neil
Moore, Damien	Whately, Helen

Question accordingly negatived.

Question proposed, That the clause stand part of the Bill.

Caroline Dinenage: Clause 3 sets out that the Court of Protection can hear challenges in relation to liberty protection safeguard authorisations. The court already considers challenges under the current system, and the Law Commission recommended that it continue to do so under liberty protection safeguards, pending the outcome of a Government review.

In designing the new system, we put safeguards in place to ensure that arrangements would be considered fairly and independently. We know that most people want to avoid courts and tribunals if possible, so it is important that they can access protections without needing to go to the Court of Protection. However, it is also important to us that people who want to challenge their authorisations in court are able to do so, which is why the right to non-means-tested legal aid will be maintained under the liberty protection safeguards system. Cost will not be a barrier to a person's ability to access the court.

Question put and agreed to.

Clause 3 accordingly ordered to stand part of the Bill.

Clause 4

CONSEQUENTIAL PROVISION ETC

Question proposed, That the clause stand part of the Bill.

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

Government amendments 14 and 15.

That Schedule 2 be the Second schedule to the Bill.

Caroline Dinenage: With your leave, Mr Pritchard, I will speak about amendments 14 and 15 before moving on to the clause stand part debate.

The amendments amend section 36 of the Mental Capacity Act 2005 to ensure that regulations about the functions of independent mental capacity advocates can make provision for advocates appointed under the LPS to support the new role of appropriate person. Amendment 14 also amends sections 38 and 39 of the 2005 Act.

Broadly, the provisions require an IMCA to be appointed when an NHS body or local authority proposes to accommodate a person in a hospital, care home or long-stay residential accommodation and there is no one else to consult about what would be in that person's best interest. The amendments continue the position under DoLS, so that the duties to appoint an IMCA in sections 38 and 39 will not apply if one has already been appointed under the LPS in relation to the same accommodation. That is to avoid a person having two IMCAs carrying out similar roles. Amendments 14 and 15 also make consequential amendments that reflect the change from the deprivation of liberty safeguards to the liberty protection safeguards.

Clause 4 gives the Secretary of State and Welsh Ministers a regulation-making power to make provision that is consequential to the Bill, including changes to existing legislation. The power will be used to make any necessary consequential changes as a result of the LPS coming into force—for example, to update references to schedule A1, which contains the existing deprivation of liberty safeguards, to references to schedule AA1, where the liberty protection safeguards will be set out.

Finally, clause 4 will introduce schedule 2, which will make minor and consequential amendments that update other legislation to reflect the change from deprivation of liberty safeguards to liberty protection safeguards. I commend the clause and the schedule to the Committee.

2.15 pm

Barbara Keeley: Government amendments 14 and 15 will alter the power to make regulations under the Mental Capacity Act 2005. It is fair to call them drafting amendments to fill an obvious gap in the Bill that would have left the Government with no way to instruct an independent mental capacity advocate in how to represent an appropriate person. It is a sufficiently large omission for me to wonder how the Government failed to notice it earlier, but I understand that things are missed when a job is being rushed, as the Bill certainly is. However, I am glad to see that the Government are remedying the situation. We support the amendments.

Question put and agreed to.

Clause 4 accordingly ordered to stand part of the Bill.

Schedule 2

MINOR AND CONSEQUENTIAL AMENDMENTS

Amendments made: 14, in schedule 2, page 28, line 22, at end insert—

"3A (1) Section 36 (functions of independent mental capacity advocates) is amended as follows.

(2) In subsection (2)(a) leave out "("P") so that P" and insert "or support so that that person".

(3) In subsection (2)(c) leave out "P's wishes and feelings" and insert "the wishes and

feelings of the person the advocate has been instructed to represent ("P")".

(4) After subsection (2)(d) insert—

"(da) in the case of an advocate instructed to support an appropriate person where paragraph 40 of Schedule AA1 applies, supporting that person to ascertain—

(i) what the wishes and feelings of the cared-for person who that appropriate person represents and supports would be likely to be and the beliefs and values that would be likely to influence the cared-for person;

(ii) what alternative courses of action are available in relation to the cared-for person who that appropriate person represents and supports;".

3B (1) Section 38 (provision of accommodation by NHS body) is amended as follows.

(2) For subsection (2A) substitute—

"(2A) And this section does not apply if—

(a) an independent mental capacity advocate is appointed under paragraph 39 of Schedule AA1 to represent and support P, and

(b) the arrangements which are authorised or proposed under Schedule AA1 in respect of P include arrangements for P to be accommodated in the hospital or care home referred to in this section."

(3) In subsection (3), in the opening words, after "arrangements" insert "mentioned in subsection (1)".

(4) Omit subsection (10).

3C (1) Section 39 (provision of accommodation by local authority) is amended as follows.

(2) For subsection (3A) substitute—

"(3A) And this section does not apply if—

(a) an independent mental capacity advocate is appointed under paragraph 39 of Schedule AA1 to represent and support P, and

(b) the arrangements which are authorised or proposed under Schedule AA1 in respect of P include arrangements for P to be accommodated in the residential accommodation referred to in this section."

(3) In subsection (4), in the opening words, after "arrangements" insert "mentioned in subsection (1)".

(4) Omit subsection (7)."

This amends the regulation making power in section 36 of the Mental Capacity Act 2005 to ensure that equivalent provision can be made for advocates who support a cared-for person's "appropriate person" as for other advocates. It also makes other changes to that Act consequential on amendments made by Schedules 1 and 2 to the Bill.

Amendment 15, in schedule 2, page 28, line 23, at end insert—

"4A In section 40 (exceptions)—

(a) in subsection (1), for ", 39(4) or (5), 39A(3), 39C(3) or 39D(2)" substitute "or 39(4) or (5)";

(b) omit subsection (2)."—*(Caroline Dinenage.)*

This amendment is consequential on the amendments made to the Mental Capacity Act 2005 by Schedules 1 and 2 to the Bill

Schedule 2, as amended, agreed to.

Clause 5

EXTENT, COMMENCEMENT AND SHORT TITLE

Barbara Keeley: I beg to move amendment 52, in clause 5, page 4, line 16, at end insert—

"(3A) Before the Secretary of State makes any regulations under subsection (3)(b) above, the Secretary of State must publish his or her consideration of the conclusions of the Independent Review of the Mental Health Act relevant to the deprivation of liberty in accordance with the provisions of the Mental Capacity Act 2005, and in particular Schedule AA1 of that Act."

This amendment ensures that the Government cannot enact the provisions of this Bill until such a date as it has responded to the findings of the Independent Review of the Mental Health Act, specifically the interface between the Mental Health Act and the Mental Capacity Act.

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

Amendment 53, in clause 5, page 4, line 16, at end insert—

"(3A) Before the Secretary of State makes any regulations under subsection (3)(b) above, the Secretary of State must—

(a) publish a full implementation strategy, outlining how local authorities and other responsible bodies will be resourced to process applications under this Act; and

(b) publish an updated Impact Assessment on the impact of the provisions of this Act."

This amendment ensures that the Government cannot enact the provisions of this Bill until such a date as it has published an updated impact assessment, and set out an implementation strategy for the new system.

Amendment 54, in clause 5, page 4, line 16, at end insert—

"(3A) The Secretary of State may not make any regulations under subsection (3)(b) above, unless—

(a) the Secretary of State has—

(i) consulted on the Code of Practice,

(ii) published a Code of Practice,

(iii) laid that Code of Practice before Parliament, and

(b) that Code of Practice has been approved by a resolution of each House of Parliament."

This amendment ensures that the Government cannot enact the provisions of this Bill until such a date as it has published a new Code of Practice, which has been approved in a vote in each House of Parliament.

Barbara Keeley: The amendments would impose a condition that the Bill should not be implemented until the Government have responded to the findings of the independent review of the Mental Health Act 1983 and dealt specifically with the interface between that Act and the Mental Capacity Act; published an updated impact assessment; and published a new code of practice approved by a vote in each House of Parliament.

I said on Second Reading that

"reform of the Mental Capacity Act 2005 requires methodical planning".—[*Official Report*, 18 December 2018; Vol. 651, c. 732.]

The issues that the Committee has discussed over the past two weeks have far-reaching implications for as many as 2 million people who may lack capacity. I am pleased that the tone of our debate has risen to the magnitude of the issue, but I feel that the difference in the depth of contribution, depending on which side of the debate we are on, has been marked. That is important because the debate has been a discussion of the fundamental rights of some of the most vulnerable people in our society. I thank hon. Friends who have given proper scrutiny to the Bill and its impact on the liberty of very vulnerable people. Cared-for people deserve no less.

The Bill remains deeply flawed in a host of areas. It is very disappointing that the Minister has been so stubborn in rejecting all our amendments out of hand. We entered Committee in a spirit of co-operation, but I feel that that has not been matched by the Government. Our amendments were not a Christmas list of things that would be nice to have; they were the minimum reforms needed to make the Bill fit for purpose. The fact that so many remedial amendments were needed shows that the Bill has been put together in anything but a methodical way. The reality is that the Government are pushing ahead at breakneck speed, contrary to all the warnings from a wide group of concerned stakeholders. That is not a proper way to treat an issue of such importance.

A key concern raised by stakeholders relates to the interface between the Mental Health Act and the Mental Capacity Act. The two are deeply intertwined; indeed, the existing interface is so complex that a senior judge has noted:

[Barbara Keeley]

"When you write a judgment on them, you feel as if you have been in a washing machine and spin dryer".

The Acts provide different legal frameworks for treating someone without consent and depriving them of their liberty by detaining or confining them in a hospital or care home. The Mental Capacity Act can be used only when a person lacks capacity to consent to their confinement; where it is used, professionals must use deprivation of liberty safeguards to authorise detention and protect a patient's rights. At the moment, if someone has capacity and objects to their admission or treatment for a mental disorder, the Mental Health Act must be used because they are being compulsorily detained against their will.

Professor Sir Simon Wessely wrote in his final report that the review's intention was to take the use of the Mental Health Act

"back to the position that it can only be used for people who are obviously objecting to treatment."

That is key. The Mental Health Act should not be used simply because someone lacks the capacity to consent to their admission. Troublingly, the review found that the Mental Health Act had been used, at least in some cases, because it is easier to use than DoLS. Furthermore, it found a significant number of cases where the Mental Health Act had been used for patients with dementia because of doubts or disputes as to whether the person was objecting to their admission.

While that cannot be confirmed with the data available, the Care Quality Commission observed an increase in the numbers of people over 65 detained under the Mental Health Act. In one older-adult ward that the CQC visited, the increase was from 15% to 85% of residents between 2013-14 and 2016-17.

The confusion as to which statute to use arises from the issue of whether someone without capacity is objecting to their treatment. It means that either the Mental Health Act or the DoLS can be used, depending on where the decision is being taken, and on the cared-for person. Professor Sir Simon noted that it is unhelpful to have two different options for the patient who cannot consent but who is also not objecting. His review argued:

"The patient is facing a lottery between two different legal positions. Whilst at first it may be attractive to use the MHA because, generally, it is considered to have greater safeguards than the MCA, it is also extending the reach of compulsory powers."

The review recommended that

"the law should be amended so that only the MCA framework"—

specifically the liberty protection safeguards—

"can be used where a person lacks capacity to consent to their admission or treatment for mental disorder and it is clear that they are not objecting."

We are aware that objection is not always easy to identify—we have had some excellent case study material today around the issue of whether a patient is objecting. An objection can be very difficult to identify, especially in people with cognitive impairments. The Mental Health Act review noted that

"whilst it may be relatively easy to determine whether or not someone is objecting to treatment in a psychiatric hospital, it will not be so easy when the patient is in a general hospital but treatment for a mental disorder is being considered. However... objection is the term that is currently used in both the MHA and MCA, and is a familiar enough concept not just for professionals, but for anyone."

The review said that that was "the right dividing line" between the Mental Health Act and the Mental Capacity Act. However, it recommended that

"clear guidance will be required as to what objection looks like in practice in both the MHA and MCA...and what practitioners should do where a person who was previously objecting is no longer doing so (and the other way around)."

The Law Society has reinforced that recommendation, pointing out that it is not feasible to expect care home managers to navigate the complex interface between the two pieces of mental health legislation. It is concerned that it would be difficult to reach a conclusion on whether a liberty protection safeguard would be excluded, due to the operation of part 7 of the Bill, for many capable people. We have yet to see any guidance or a full code of practice, which is why we are seeking assurances through this amendment.

More broadly, there seems to be little evidence of any consideration of that interface. That is because the Bill was introduced before the final recommendations of the independent review of the Mental Health Act were published, which happened in December. That is problematic because the Bill replicates the complex interface, which will persist until the Mental Health Act is amended. I am afraid that, given the complex relationship between the two Acts, this is another example of the Government's careless approach to reform of the legislation.

A whole host of stakeholder organisations—including, most prominently, Liberty— has called for a pause in the Bill process, in order to consider the implications of the Mental Health Act review. The amendment reflects the depth of stakeholder concern and requests that the Bill does not take effect until a response has been given to the Mental Health Act review. The purpose of some form of pause before enactment would be in part to allow time to develop a clear and workable interaction in the Bill, which would need to be understood by those subject to liberty protection safeguards and their families, as well as those who are operating them.

Turning to amendment 53, one concern that stakeholders have raised repeatedly since the Bill completed its passage through the House of Lords is the issue of the Government's impact assessment. The Government published an impact assessment on the Bill on 29 June 2018, although an equality impact assessment was published only one day before Second Reading in the House of Commons on 18 December.

There are several problems in the overall impact assessment, which sets out a number of cost assumptions for the review of the liberty protection safeguards system. First, many of the calculations appear to be based on those drawn up by the Law Commission and included in its own impact assessment, which accompanied its draft Bill. Of course, the measure we are debating is not that draft Bill. As we have said many times, this is a cut-down version of an earlier Bill.

I will take as one example the total cost of advocacy—a key aspect of the Bill on which we had a good debate this morning. The Government's impact assessment says advocacy will cost a total of £23.08 million. This appears to be calculated by multiplying the average cost of advocacy per authorisation, £76, by the number of applications in the new system, 304,132. Why has the

Government's impact assessment calculated the average cost of advocacy per authorisation? Under the proposed liberty protection safeguards, many cared-for people will not receive a paid advocate—something on which we urged the Minister to take action this morning.

Would it not be better to calculate the figures according to the actual cost of providing advocacy, based on the total number of advocates that are expected to be used in these cases? Will the Minister say how much that would be? It would surely be a more logical way of calculating this figure and its impact.

Further costs need clarification, including those that depart from the Law Commission's assertion, such as the cost of administration in the form of desktop reviews. That will cost a total of £47 million and will be borne by local authorities. It is calculated as the number of applications per year under the preferred model—the figure I gave earlier of 304,132 multiplied by the cost of administration of £155.

In calculating that, the Government's impact assessment took the cost of administration of the current DoLS system from the Law Commission's impact assessment, but then inexplicably halved the cost to £155 to account for the fact that it would be less intensive than under DoLS at present. Will the Minister explain how the calculation in the impact assessment was arrived at? How have we quantified how much less intensive the system will be? What is the methodology behind that?

Secondly, a number of assertions in the impact assessment are woefully out of date, given the changes made to the Bill in the House of Lords that have made several key cost estimates entirely redundant. For example, the impact assessment assumes no net change in cost to providers of authorisations and administrations. It was assumed that providers would no longer need to complete an existing form of comparable length and complexity to request an assessment or deal with uncertainty and delay as a result of the assessment being provided by an under-resourced system.

The Minister has assured us that in many cases local authorities will carry out authorisations. Why does this not affect the cost of authorisations in the impact assessment? The issue of the resourcing of local authorities has been raised by Labour Members a number of times and is absolutely key.

I could point out further examples of inconsistencies. The cost of approvals by approved mental capacity professionals is assumed to be £10.5 million a year. However, that figure does not take into account the cost of AMCP approvals for cases in independent hospitals in the light of amendments to the Bill made by the Committee. The Government tabled amendments in relation to AMCPs and independent hospitals. Were cost estimates made of this change, and what is the additional cost?

There have been a number of expressions of concern about training. The total cost of doctor and social worker training in the new system is apparently £780,000 or £23 per doctor or social worker. That seems a rather miserly amount. What will the training constitute and how long will it last? The impact assessment calculates the number of doctors and social workers needing training as 10% of the total number of doctors and social workers. How have the Government arrived at that figure?

A key figure is the cost of familiarisation, which is put at £1 million. That is based on care home managers undergoing half a day's training in this entirely new system. Does the Minister think that is a reasonable cost estimate of the amount of time care home managers need to become literate in a new system of liberty protection safeguards? How was it calculated? Given our debate on the role of the care home manager, how realistic does the Minister think that that figure is? This is absolutely crucial. We have tried by tabling amendments to remove the impact of the role of care home managers. To assume that they will get by with half a day's training on this new system is very worrying.

2.30 pm

These examples show that there are still glaring inconsistencies between the Bill and the existing impact assessment. What is missing entirely—and is important for the Bill overall —is an indication of the cost of reducing the backlog of DoLS applications, which, as I described earlier, has got out of control because of the Government's decision to starve local authorities that are processing the applications of funding. There are key questions relating to the implementation of the Bill that need to be answered urgently. What calculations have been made by the Department of Health and Social Care about how much it will cost to reduce that backlog? How long will it take to reduce the backlog, and what will happen to cared-for people whose applications have yet to be processed? What guarantees can the Minister give that no one will fall between the cracks of the two systems?

It is precisely because the Government have so far failed to answer those questions in their haste to get the legislation through Parliament that we have felt it necessary to table amendment 53, which requires the Government to publish an impact assessment and an implementation strategy before they can enact the provisions of the Bill. Opposition Members will not take on trust the Government's assertions that the costs will be lower and the system more efficient. There must be a clear plan of action and a revised estimation of costs for the Bill to have any credibility.

In the same vein, I want to address the subject of amendment 54, which aims to ensure that the Government publish a code of practice. We have heard on many occasions in Committee that the Government will put many finer details about their provisions in a code of practice. If we have heard anything in the Committee, we have heard about the code of practice, which is an important accessory to legislation where non-legal people are using a 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 length. However, as I have said previously, statutory codes do not exist without a statute, and the majority of laws do not have a code of practice. I have previously mentioned the 2018 case of an NHS Trust and others (Respondents) *v.* Y, in the Supreme Court, and it is salutary to raise it again.

Mr Tanmanjeet Singh Dhesi (Slough) (Lab): We have referred to the code of practice, or the Minister has, on several occasions. We have consistently asked for it to be published. Surely the provisions would be nonsensical without it given we are being referred to it in relation to

[Mr Tanmanjeet Singh Dhesi]

so many of the provisions we are arguing for. If a code of practice does not exist, where does that leave us in this whole scenario?

Barbara Keeley: Indeed. It is salutary to use the following quotation again:

> "Whatever the weight given to the Code by section 42 of the Mental Capacity Act 2005, it does not create an obligation as a matter of law to apply to court in every case."

We have wanted to know what is in the code of practice. We think knowing what is in it is important in deciding our position on what is in the Bill. The Government have declined to put too many aspects in the Bill and have instead favoured the code of practice. When legislation and codes of practice exist together, they are drawn up together and published together. That has not happened in this case and it is the wrong approach. We cannot leave crucial details about how a new system of protections would work, including what resources will be given to it, to a code of practice that has not been drawn up yet, but that is what the Government have done.

On the first day of this Committee the Minister said that she would supply Committee Members with a list of what should be contained in the code of practice, and I thank her for doing so last night. Unfortunately, that does not answer many of our concerns. For instance, we raised concerns about the length of authorisations. It is welcome that there will be guidance in the code of practice, but we still do not know what it will say. Similarly, the Minister's letter says that the code of practice will contain

"guidance on the necessary separation and operation independence from any independent hospital an AMCP is conducting a review in".

Again, I am glad that there will be guidance, but we still do not know what it will be. Nothing prohibits any of the relationships we are concerned about and have discussed at length: it simply says that some relationships may be prohibited. That is simply not good enough at this stage. As such, the Minister's letter does not answer the concern of my hon. Friend the Member for Slough. We remain worried that there will not be proper oversight of this code of practice. Without seeing the full code, we cannot be certain that its contents are sufficient or appropriate.

Overall, the Government's approach of constantly mentioning the code of practice as being the place where whatever is not in the Bill will be plays fast and loose with the rights and liberties of cared-for people. It further reinforces the mess that the Government have made of the Bill by rushing it through Parliament. Had they done the sensible thing and paused the process, they would have had time to draw up a draft code of practice so that we could consider it alongside the Bill, as is commonly the case. They have given reassurances that many of the concerns can be addressed in subsequent regulations and the code of practice, but that is simply unacceptable to those of us on the Opposition Benches. To that end, we have tabled the amendment to ensure that the Bill cannot be enacted until a code of practice has been published and approved by votes in both Houses, rather than just published.

An important principle that I want to discuss briefly is that legislation can begin in the House of Lords where it is deemed to be non-controversial. That was not the case with the Bill. It is not simply a reproduction of the Law Commission's draft Bill, which was widely consulted on. As the recent media coverage in places such as *The Guardian* has shown, the Bill is not without controversy. The code of practice should not be passed through a negative resolution procedure in secondary legislation on the grounds that it is non-controversial. The Minister has indicated that the code of practice will have a real vote in both Houses. Let us see whether that will be a meaningful vote.

Alex Cunningham (Stockton North) (Lab): It is a pleasure to serve under your chairmanship, Mr Pritchard.

On amendment 52, a great deal of concern was expressed in the written evidence submitted to the Committee about how the Bill interacts with the Mental Health Act 1983. In fact, that the Government have not thought that through enough was one of the many reasons why it was felt that they should not be rushing to push the Bill through. They have not made any statements even to claim that everything will be fine. Due to the overlapping nature of the two pieces of legislation, we must take additional precautions to ensure that they work together. To do that, we must know what the Government's response to the independent review is prior to the provisions coming into force.

It is regrettable that neither this Committee nor the Committee in the Lords took any oral evidence. It is all the more important therefore to get some of the written evidence before the Committee so that everyone is aware of what organisations have been saying. Such organisations as Mencap have added their voices to the concern about the complex interface between the Mental Health Act and the Mental Capacity Act. I will quote from what Mencap said at some length not only because it is worth listening to, but because it is right. It said:

> "Sir Simon's review proposes to redraw the dividing line between when a person should be detained under the MHA and when they might instead fall under the MCA…The proposed dividing line is objection, so that if a person without capacity does not object to admission or treatment they should be placed under the MCA…The proposed new dividing line of objection needs thorough and broad consultation, possible pilot testing, and pre-legislative scrutiny—none of which are possible under the timescales set by Government for this Bill…Given that Sir Simon Wessely's review has only just been published, there is a strong case for looking at the interplay between this Bill and the recommendations around the MHA. To not do so, risks creating legislation which fits together poorly."

Does the Minister disagree with Mencap's assessment and concerns about the interface between the two Acts? Does she accept that much needs to be done before the Bill's provisions are brought to bear on our vulnerable people?

James Morris (Halesowen and Rowley Regis) (Con): I have a lot of sympathy with the hon. Gentleman, but will he recognise that one of the central drivers for the Bill is the delay in assessments that has built up over time because of the issue identified in Chester? Obviously there is a timing issue, but does he agree that, ultimately, whatever legislation comes out of the independent review will mark a major change in how we approach the detention of people under the Mental Health Act? There probably will need to be more synergy between the two pieces of legislation, but the timing imperative is driving the need to get this legislation on the statute book.

Alex Cunningham: I think the imperative is the other way around. It is important for us to have the understanding of what the Government are proposing and their attitude to the review, so that we can understand how the legislation will work and how the two Acts will work together.

I believe the Government would be reckless to plough ahead with implementing the provisions in the Bill while that piece of legislation relating to it is still being reviewed. The Challenging Behaviour Foundation has also added its weight to the concern of the interface of the Bill with the Mental Health Act review. Providing written evidence to the Committee, it said:

"The current confusion in the use of Deprivation of Liberty within the MCA and the MHA often means the needs of people with learning disabilities are not being met in a timely and appropriate fashion…The independent review of the MHA has considered this and made recommendations around when a person should be detained under which Act around objection…The Mental Health Act Review makes the recommendation that the Code of Practice for the MHA and for the MCA make clear in what circumstances professionals should consider whether or not someone has capacity to make decisions…We also think that both Codes should make clear who should carry out capacity assessments in these situations. This needs to be explored further and needs to be considered under this Bill to ensure both legislations work together."

That is very clear evidence from the sector. Perhaps the Minister will share with us her perspective on the interface between the Bill and the Act. There is a theme running through the written evidence submissions that we have received. The conclusion they come to is that the Government are rushing this Bill through.

Mr Dhesi: I thank my hon. Friend for raising the concerns of organisations such as Mencap. Does he agree that the likes of Mencap not only enhance our understanding through national policy formation but, as I have learned from my experience as a member of the Gravesend and district Mencap society, they also work on the ground? People such as Linda and Chris Norris and other volunteers, through their work, help their national organisations in policy formation. As parliamentarians we would be very wrong to ignore their recommendations.

Alex Cunningham: I very much commend the work of organisations from the grassroots right through to the national level. The reason I sat down with people from my local authority before the start of this Bill Committee was so that I could understand what was happening at the grassroots. That grassroots work that feeds all the way through the system informs us and it is important that we take account of it.

My hon. Friend the Member for Slough will know that, with the amount of written evidence submitted to the Committee, we could have stood here and made three-hour speeches ensuring that we raised the issues that they wanted raised. Some of us are a little more kindly and will be relatively brief.

This is not a matter to be pushed through with little consideration because the consequences of getting it wrong are significant. I ask the Minister to think carefully, not just about the comments made by hon. Members but about the evidence that has come from the sector. We raise that evidence out of concern that the Government might be making the wrong move. We need to tread carefully and understand the implications.

Amendment 53 seems sensible and proportionate. How can we possibly pass legislation that would have an undue impact on local authorities and other responsible bodies without giving them the resources to carry out the functions required? I have spoken in previous sittings about care home managers and the impact provisions in the Bill would have on them. Not only do I believe that they do not have the adequate skills to carry out assessments. I am also concerned that they have a severe conflict of interest if they are expected to be involved in the assessment of those who reside in their care.

2.45 pm

On resources, we know that care homes and local authorities have tight budgets and that costs are rising. If the Government do not publish an updated impact assessment and a strategy for implementing the new system, the cared-for persons will lose out. I asked the Minister during the debate on a previous clause what assessment she had made of the potential cost that will fall on care homes for their extended role in the process. I also asked what data she had received from the sector on costs and whether she would publish it.

I am keen to understand who will pick up those costs. Will it be the person being detained, the CCG, the private hospital or the care home? I did not receive an answer then, so I hope the Minister can tell us now who will be responsible for the new costs in the system. Surely she should publish that assessment so that we can understand the additional financial burden being placed on the sector before the measures of the Bill come into force. As colleagues know—I have said it before—we have received a significant amount of written evidence, and many organisations and individuals share a concern over funding. The Leicestershire County Council DoLS service is concerned that there

"remains a huge potential…that we end up with another underfunded system that prevents responsible bodies from meeting their statutory duties to the detriment of citizens and their rights."

My hon. Friend the Member for Worsley and Eccles South has gone into the resources and training in some detail. I agree with the Royal College of Nursing, which states:

"All health and care staff should be educated to understand the deprivation of liberty processes and the impact that this Bill will have on the patients they care for…Without adequate education, healthcare professionals cannot make provision for the best interests of the person in care."

Does the Minister agree? The RCN is at the sharp end. If she agrees, will she ensure that care professionals have the resources to carry out this vital training?

The care sector is under-resourced—I will not repeat what I said last week. All jobs websites show dozens of adverts for care assistant jobs involving long hours and minimum pay. The Minister seems content to make it harder for bodies such as care homes to cope with the pressures. That is before we get onto the subject of local authority funding and pressures which, again, I will not repeat. Surely we must ensure that the provisions are not enacted until a full implementation strategy is published. I would ask the Minister: when are we going to see it?

On amendment 54, much of the detail debated during the Committee will be addressed in the code of practice. We have raised our concerns over and over again. Does the Minister agree that legislators, healthcare staff, assessors and advocates—the list goes on—should be fully informed

and aware of the code of practice prior to the revisions in the Bill being implemented to give them a fighting chance to prepare? I am concerned that any code of practice will not be subject to the scrutiny of both Houses to provide other pieces of legislation, particularly as this Government do not have a good track record of welcoming scrutiny from other Members or from outsiders. Perhaps the absence of an oral evidence session demonstrates that. There is concern that the code of practice will contain significant flaws and gaps. This morning, the Minister was not even prepared to talk about it in general terms, and said that we would have to wait for the detail and the views of experts and further consultation. I accept that, but we could still have some sort of comment on the general terms of the code.

Caroline Dinenage: The hon. Gentleman might be slightly misquoting me. I have spoken in general terms about the code of practice, and have indeed circulated a draft of what will be included in it among hon. Members, as well as what we have committed to including in it as part of the discussions in the House of Lords and during this Committee.

Alex Cunningham: It is never my intention to misrepresent anyone. All I am concerned about is that we should have clear detail as soon as possible in order for us to understand what will happen. It is not just for us to understand—it is also for people outside in the world who have to deal with this on a day-to-day basis. The Minister just answered the question I would have posed at the end, so I will not bother asking it.

Caroline Dinenage: I thank hon. Members for initiating this discussion. Amendment 52 would delay the introduction of liberty protection safeguards until the Department has fully responded to the report of the independent review into the Mental Health Act.

The hon. Member for Worsley and Eccles South said that I was stubborn. I am sure that a number of people, not least my husband, would agree with that sentiment. I think she would agree that I have committed to looking again. A number of issues have been raised during the Bill's passage through Committee, not least ensuring that people get information as early as possible—I agree with her on that—and how we can maximise protection for those being cared for in an independent hospital. I am sure she would agree that I would be being equally stubborn if I were to take the amendments on board without giving them careful and due consideration, and without checking the legal ramifications and making sure that we are offering all the protections that we need to. I am sure that the hon. Lady, other Opposition Members and stakeholders will forgive me for making sure that we consider everything thoroughly and properly.

On amendment 52, I welcome Sir Simon Wessely's landmark report and I am sure that it will very much set the direction for improving the way the Mental Health Act works for thousands of vulnerable people. The Government have already committed to bringing forth mental health legislation when parliamentary time allows, taking that very important report into account. We have already accepted two important recommendations, which will give service users more choice and control, but it will take time for us to consider the rest of the recommendations, of which there are 152. We will respond to the remaining recommendations in due course, but Sir Simon said that the Government would need to consider the "practical implications" of the interface recommendations, and that it would be "problematic" to introduce those recommendations in this Bill.

Hon. Members will be aware that the reforms in the Bill are desperately needed—I cannot repeat often enough that we cannot wait any longer to improve the situation of the backlog of more than 125,000 people who have been deprived of their liberty without authorisation. As much as there are concerns among stakeholders—I have met a number of stakeholders and we will continue to consult them, to take their views on board and to make sure that we work with them at every step of the way when it comes to the code of practice—they also share our concern that 125,000 people have been deprived of their liberty without authorisation, that their loved ones have been deprived of peace of mind and that their care providers have been deprived of legal protection.

Barbara Keeley: I have two points to make to the Minister. I remind hon. Members that we have heard examples of authorities—they include mine, that of my hon. Friend the Member for Stockton North and some London boroughs—where there is no backlog and where the local authorities have dedicated enough resource to the situation. Despite the number of DoLS applications increasing since the Cheshire West case, they are dealing with it. Let us not talk in Committee as if it is the same everywhere; it is not. Some local authorities are coping perfectly well with the backlog, and there is no pressure in those local authorities to change to a worse system that will cause a problem.

Secondly, I asked the Minister about the cost of dealing with the backlog, and I hope she will touch on that. She has raised the backlog again and again as a reason for rushing the Bill through. It is not a reason for rushing through a new piece of legislation that is this important. I hope that she will come on to say exactly how the backlog is to be dealt with and what resources will be available to deal with it, because that is an important issue. If the backlog is the reason for doing things this way, how is the backlog going to be dealt with?

Caroline Dinenage: Yes, of course I will go on to talk about the transition between the two systems and the backlog. I also say gently to the hon. Lady that she and others may be in the fortunate position where their local authorities have got to the stage where they do not have a backlog—in many cases, that is due to a political decision to prioritise it—but I think all those local authorities would recognise that there is duplication and cost in the system that they could do without. They have had to take very tough decisions to prioritise this issue over other things that they could be spending their money on, when money is tight. I do not think the attitude of, "I'm alright, Jack, there's no backlog in my constituency," is a very good one, when 125,000 other people are waiting.

Alex Cunningham: I do not have a particular problem with what the Minister is saying—local authorities do want to see reduced costs and to ensure that responsibilities are carried out—but she used the expression I used last week. It was a "political decision" by local authorities such as Stockton to take money from other services and

invest them in this matter. Surely local authorities should not have to face that choice. The Government should properly fund our whole social care service, never mind the issues around the Bill.

Caroline Dinenage: I agree with the hon. Gentleman—the whole of the health and social care system needs funding, and that is where the additional money for the NHS comes in. The Government have given councils access to more than £10 billion over this three-year period. The fact that they are still struggling shows the scale of the problem. We do not want to waste money on duplication when that money could be valuably spent elsewhere. The desire to streamline the system to avoid unnecessary duplication, which drives costs but does not offer any further protection, is what this is all about.

Alex Cunningham: It is has been estimated that the Minister will save about £200 million as a direct result of the changes in the Bill. What will that money be used for?

Caroline Dinenage: We have to be careful not to conflate our language. There is no intention to save money on the process. We know that if DoLS were implemented correctly all across the country, as they are in the hon. Gentleman's constituency, the cost would be £2 billion. However, we are not looking to save money here; we are looking to ensure that it is spent more wisely—not on duplication, but in a way that offers people the protections that they need. This is not a cost-saving exercise; it is about ensuring that money is spent wisely and effectively to offer that protection.

Amendment 53 would delay the introduction of liberty protection safeguards until the Department has published an updated impact assessment and implementation strategy. I thank hon. Members for reminding us of those items, which are important for the successful implementation of the Bill. We are in the process of preparing the updated impact assessment to reflect the amendments made in the Lords. We are keen to make the Bill as successful as possible and to listen to the concerns of those in the other place. We will shortly publish the impact of the amendments made there, and the Government have also made changes to the Bill in this House that will require us to update the impact assessment further.

The noble lord, Lord O'Shaughnessy—I am not sure whether I am allowed to name him—has committed to publishing a training strategy before the Act comes into force. With regard to training, we will work closely with the sector, local authorities and NHS organisations on implementation as part of our strategy, and we welcome Members' contributions. I completely agree with hon. Members that adequate training for health and social care staff is vital. Ahead of the implementation, we will consider the most appropriate way to ensure that everybody is appropriately equipped.

We have considered training costs as part of the updated impact assessment that we will publish shortly. We know that there will be an impact on transitional costs. We will support the sector and we will deliver training through a workforce development model delivered by and in partnership with Skills for Care, as we do for other things.

With regard to the implementation, ahead of day one we will work with local, national and Welsh DoLS networks in partnership with the Local Government Association and the Association of Directors of Adult Social Services to clear the existing backlog of applications. Those who remain in the backlog on day one will have their applications handled under LPS—a streamlined system that minimises duplication. Existing assessments can be used, if appropriate. For example, there may be no need to commission a doctor to do a new mental health assessment. That efficiency will allow local authorities and other responsible bodies to tackle the backlog effectively.

Cared-for persons who have an existing DoLS authorisation on day one will remain under that authorisation until it expires, after which a new application will need to be made under the new system. Those in settings that newly fall under LPS, such as those in the community, who may have an authorisation from the Court of Protection, will remain under that authorisation until it ends. A new application will then need to be made under LPS. We will work closely with responsible bodies and care providers to ensure that the transition period is as smooth as possible, and that vulnerable people are protected.

Amendment 54 would require the code of practice to be approved and published before the introduction of liberty protection safeguards. That statutory guidance is essential. It will outline the details of how the system should operate and will be a valuable tool for practitioners. The Government are required by section 43 of the Mental Capacity Act to consult when preparing the code of practice.

We are already in the first stages of developing the code. We will work with the sector to co-produce it. I am happy to commit to publishing the code of practice before the scheme comes into force. I also commit to laying the code in draft before Parliament, giving both Houses the opportunity to resolve not to approve it, as section 43 of the Mental Capacity Act also requires.

I hope that I have been able to provide reassurance and that the hon. Member is able to withdraw the amendment.

3 pm

The Chair: Before I call the shadow Minister, the Minister was perfectly in order to say Lord O'Shaughnessy and the next time she wants to, there is a variety of options for referring to the other place. That is perfectly in order.

Barbara Keeley: I only realised recently that we have changed the way that we refer to the House of Lords. We do not have to keep saying "the other place". We can say the House of Lords and use names.

The Chair: We have modernised, finally.

Barbara Keeley: Going back to amendment 52, the process of bringing the Bill forward has been disappointing. It has been rushed and stakeholders feel that their views have not been taken on board. How do we know that that is the case? A letter was published in *The Times* today under the headline "Mental Capacity Bill Attracts Criticism" from a group of organisations including Liberty, Mind, Alzheimer's Society, the National Autistic Society, POhWER—to which we have referred a number of times in our debates—the British Institute of Human Rights, Sense, Compassion in Dying, YoungMinds, Learning Disability England, Voluntary Organisations Disability Group and Headway—a very comprehensive list of organisations. They say:

[Barbara Keeley]

"It is with dismay that we note the lack of improvement within the Mental Capacity (Amendment) Bill. The bill would replace existing deprivation of liberty safeguards with an entirely unfit new system of protection. To avoid the risk of exploitation and abuse it is vital that there are robust safeguards in place.

Alarmingly, the bill proposes to triple the time that people can be deprived of their liberty without review…while not doing enough to guarantee that all patients have access to independent and impartial advocates."

This is what we have been debating.

The letter continues:

"The bill also creates a worrying conflict of interest for care home managers, giving them a greater role in the assessment process. Many vulnerable people will find it hard to express their concerns to a person providing them with care. The result is a rushed, incomplete and unworkable bill that will replace one dysfunctional system with another".

That encapsulates everything that we have been trying to say.

Alex Norris (Nottingham North) (Lab/Co-op): My hon. Friend lists a range of the most eminent and significant organisations in the field that we are discussing. They use words such as "dismay", "rushed" and inadequate. Should that not be a big, flashing red light for hon. Members to say that perhaps this course of action is not the right one to be taking?

Barbara Keeley: Absolutely, I agree with my hon. Friend. On Second Reading, I said that the Bill should be paused, while we wait for the Government's response to the Mental Health Act review. Every time I mention this, there is a groan from the Government Benches. We should not be rushing these complex areas. Even senior judges find the interface between the two pieces of legislation very difficult. We should not be introducing legislation that will be out of date almost immediately.

The impact assessment was produced over six months ago and it is now out of date. We have no idea how much the proposals in the Bill will cost or how much they will help to reduce the backlog of applications. We are being asked to debate and vote on the Bill now, and it is difficult with a six month old, out of date impact assessment. Even in the original impact assessment, it was unclear where some of the costs came from. The Government have not adequately explained the cost of their proposals. In the last sitting, I asked a series of questions about implementation. I would be grateful if the Minister could write to me with responses to those important questions.

We have heard constantly in our debates about how things will be included in the code of practice. On the first day of Committee, the Minister said that she would supply an outline of what it will contain. We only saw that document last night. An outline of what areas will be covered does not give us the full idea of what the code will contain. To some extent, it is better than nothing, but we have no idea of the detail. We cannot be asked to agree to a new system when so much of the detail is yet to be published. We need Parliament to approve the code of practice, rather for it to be taken through in a method that is near impossible to stop. If there are problems with the code of practice, we should be examining the Bill and the code of practice side by side. We will press the amendment to the vote.

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 8.

Division No. 25]

AYES

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

NOES

Afolami, Bim	Morris, James
Chalk, Alex	Morton, Wendy
Dinenage, Caroline	O'Brien, Neil
Moore, Damien	Whately, Helen

Question accordingly negatived.

Amendment proposed: 53, in clause 5, page 4, line 16, at end insert—

"(3A) Before the Secretary of State makes any regulations under subsection (3)(b) above, the Secretary of State must—

(a) publish a full implementation strategy, outlining how local authorities and other responsible bodies will be resourced to process applications under this Act; and

(b) publish an updated Impact Assessment on the impact of the provisions of this Act."—*(Barbara Keeley.)*

This amendment ensures that the Government cannot enact the provisions of this Bill until such a date as it has published an updated impact assessment, and set out an implementation strategy for the new system.

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 8.

Division No. 26]

AYES

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

NOES

Afolami, Bim	Morris, James
Chalk, Alex	Morton, Wendy
Dinenage, Caroline	Sherriff, Paula
Moore, Damien	Whately, Helen

Question accordingly negatived.

Amendment proposed: 54, in clause 5, page 4, line 16, at end insert—

"(3A) The Secretary of State may not make any regulations under subsection (3)(b) above, unless—

(a) the Secretary of State has—

(i) consulted on the Code of Practice,

(ii) published a Code of Practice,

(iii) laid that Code of Practice before Parliament, and

(b) that Code of Practice has been approved by a resolution of each House of Parliament."—*(Barbara Keeley.)*

This amendment ensures that the Government cannot enact the provisions of this Bill until such a date as it has published a new Code of Practice, which has been approved in a vote in each House of Parliament.

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 8.

Division No. 27]

AYES

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

NOES

Afolami, Bim	Morris, James
Chalk, Alex	Morton, Wendy
Dinenage, Caroline	O'Brien, Neil
Moore, Damien	Whately, Helen

Question accordingly negatived.

Caroline Dinenage: I beg to move amendment 1, in clause 5, page 4, line 25, leave out subsection (9).

This amendment removes the privilege amendment inserted by the Lords.

The Chair: With this it will be convenient to discuss clause 5 stand part.

Caroline Dinenage: Parliamentary procedure requires a privilege amendment to be included in a Bill that starts in the House of Lords and has financial implications. It is then removed in the House of Commons as a standard procedure.

Clause 5 sets out the territorial extent of the Bill, which is England and Wales. This clause sets out that clause 4, except subsection 6, and clause 5 come into effect immediately the Bill is passed. The rest of the Bill comes into force on a day nominated by the Secretary of State. Different days may be appointed for different purposes or different areas of the Bill. Clause 5 also gives the Secretary of State a power to make transitional arrangements by regulations. I recommend the clause to the Committee.

Barbara Keeley: Government amendment 1 is, of course, entirely uncontroversial. We cannot implement a new system until the Government are authorised to pay for it. I have a question for the Minister, following our conversation about the financial impact of the Bill: in the light of the changes that have been made to the Bill in the past few months, will she give us an estimate of how much expenditure we are being asked to agree?

We will not oppose the amendment, but I feel that members of the Committee should have an idea of what they are agreeing. We definitely need to have the updated impact assessment as soon as possible and certainly before Report stage. It is not acceptable to have an impact assessment that is six months out of date. We want to know how much the new system will cost before the Bill concludes its passage through the House. Only if that happens, will we be confident of the amount of expenditure agreed to.

On clause 5 more generally, I am disappointed that the Minister has opposed all our amendments. In particular, I remain concerned about the code of practice, when it is finally produced. I counsel her against trying to rush it through the House, with little opportunity for Members to provide feedback. We have tried valiantly on this Bill Committee to bring up issues of great importance in the Bill, and they need to be listened to.

The Government have said that the new system will not come into force until the code of practice has been published, so there is no real reason not to agree to have the code of practice approved by each House before the Bill is enacted.

I hope the Minister will reflect carefully on what has been said in our debate on the Bill. As is evidenced by the letter from all those organisations in *The Times* today, the Bill contains significant flaws. It would not be unreasonable for some of our concerns to be addressed before the Government even try to bring in the new system. With that, we will not oppose clause 5 stand part, but we hope the Minister will use the powers in the clause to ensure that the Government get the system right before they roll it out.

Amendment 1 agreed to.

Clause 5, as amended, ordered to stand part of the Bill.

New Clause 1

MEANING OF DEPRIVATION OF LIBERTY

"(1) After section 4 of the Mental Capacity Act 2005 insert—

'4ZA Meaning of deprivation of liberty

(1) In this Act, references to deprivation of a person's liberty have the same meaning as in Article 5(1) of the Human Rights Convention and, accordingly, a person is not deprived of liberty in any of the circumstances described in subsections (2) to (4).

(2) A person is not deprived of liberty in a particular place if the person is free to leave that place permanently.

(3) A person is not deprived of liberty in a particular place if—

(a) the person is not subject to continuous supervision, and

(b) the person is free to leave the place temporarily (even if subject to supervision while outside that place).

(4) A person is not deprived of liberty if—

(a) the arrangements alleged to give rise to the deprivation of liberty are put in place in order to give medical treatment for a physical illness or injury, and

(b) the same (or materially the same) arrangements would be put in place for any person receiving that treatment.

(5) A person is free to leave a particular place for the purposes of subsections (2) and (3) even if the person is unable to leave that place provided that if the person expressed a wish to leave the person would be enabled to do so.'

(2) In section 64(5) of that Act (interpretation) for the words from 'same' to the end substitute 'meaning given by section 4ZA.'"—*(Caroline Dinenage.)*

This New Clause provides the meaning of "deprivation of liberty" for the purposes of the Mental Capacity Act 2005.

Brought up, and read the First time.

Caroline Dinenage: I beg to move, That the clause be read a Second time.

The new clause provides statutory clarification in relation to the meaning of deprivation of liberty for the purposes of the Mental Capacity Act. The Mental Capacity Act defines a deprivation of liberty by reference to article 5 of the European convention on human rights. The proposed new clause adopts the same fundamental approach, by anchoring the meaning of deprivation of liberty to article 5.

[Caroline Dinenage]

As Committee members will be aware, the 2014 Supreme Court Cheshire West case changed what was commonly thought of as a deprivation of liberty, resulting in an eighteenfold increase in people entering the DoLS system, and applications are still growing year on year. That resulted in a significant rise in resource use for local authorities and the care sector, resulting in a backlog of over 125,000 people waiting for their applications to be authorised, as I have mentioned on numerous occasions during our debates.

The Law Commission was against a definition of a deprivation of liberty, but noble peers, stakeholders and the Joint Committee on Human Rights have all called for a definition to be included in the Bill, to bring proportionality to this situation and ensure that liberty protection safeguards are appropriately applied. The new clause does that by bringing clarity to prescribing circumstances, or exceptions, that are not a deprivation of liberty. If a person meets the conditions in one of its subsections, they are not being deprived of their liberty and so do not fall under the liberty protection safeguards. These subsections are drawn from case law.

The Department has decided not to include a full definition of a deprivation of liberty because primary legislation needs to be extremely clear and precise, and case law is constantly evolving. That makes it difficult to draft a definition that will remain sufficiently precise, given that the definition may change as case law develops. For that reason, we must be extremely wary of the unintended consequences of including a full definition in relation to such a complex matter. By taking this exclusionary approach, we will enable the definition to remain valid as new cases come forward, as there should be sufficient flexibility within the clause for case law to develop in parallel.

An important point to make Committee members aware of is that the clause would be accompanied by detailed statutory guidance and case studies within the code of practice. Here we would set out scenarios as workable examples of the subsections, to assist practitioners as they determine whether someone is being deprived of their liberty. I would like to assure colleagues that these supporting materials will give the detail and depth required for those in the sector, and local authorities, to identify a deprivation of liberty. We are working with stakeholders already to gather these scenarios in a wide range of settings, including care homes, private domestic settings and supported living. The clause would apply to 16 and 17-year-olds, as the rest of the Bill does, but we recognise that the circumstances of this vulnerable group of people can be different, and that will also be reflected in the guidance.

The inclusion of a clause in relation to consent has been carefully considered, but one has not been included. That is for several reasons. First, to give valid consent, an individual would need capacity, as set out by the Mental Capacity Act. If they have capacity and are consenting to the arrangements, then that automatically cannot be a deprivation of liberty. Secondly, there is not enough in case law to support the validity of de facto consent—that is, consent given by someone without capacity—and I am concerned that it would not be compatible with the Human Rights Act 1998. Above all, we must protect the rights of cared-for people.

The new clause will clarify issues post Cheshire West, it will determine when the LPS should and should not apply, and it will support those planning care in considering the least restrictive options to enable greater freedom for those in their care.

3.15 pm

Barbara Keeley: Over the last few sessions, we have talked at great length about when it is appropriate to deprive somebody of their liberty and how can we prevent this being done inappropriately. We have talked about the safeguards that could be put in place to protect the cared-for person. I regret to say that, as we speak now, the Bill contains fewer and weaker safeguards than the Opposition would have liked.

However, we are not quite finished yet. We have one substantial amendment left to discuss. There is one question that anyone watching these proceedings will no doubt have been asking themselves: what precisely do we mean when we talk about depriving somebody of their liberty? In practice, what does that legal term mean? As the Minister said, the term itself comes from the European convention on human rights. Article 5 says:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases in accordance with a procedure prescribed by law".

One of those cases is that of

"the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants."

It is the provision relating to "persons of unsound mind" that we are discussing in this Bill. I am glad to say that the Bill itself no longer uses the somewhat stigmatising phrase "unsound mind" and instead talks of having a "mental disorder". That may not be to the letter of article 5, but it is preferable.

As always with the European convention, the terms used do not give us an immediate definition of what counts as deprivation of liberty. That task is frequently left to the courts. In 2014 the Supreme Court ruling in the case of Cheshire West and Chester Council *v.* P drew a far broader definition of deprivation of liberty than had previously applied. We have referred to that case on a number of occasions during the Committee. This broadening led to the number of applications for deprivation of liberty safeguards increasing by a factor of 17, rising from around 13,000 in 2013-14 to over 225,000 in 2017-18. That is a major reason for the backlog of applications discussed in this Committee.

Cheshire West and Chester Council *v.* P set out an acid test that should be followed when deciding if somebody is deprived of their liberty. Unfortunately, that acid test is not as clearcut as might have been desired. In her judgment, Lady Hale referred to "complete supervision and control" and the person being "not free to leave". For Lord Neuberger, the crucial conditions were

"continuous supervision and control and lack of freedom to leave",

as well as the

"area and period of confinement".

Lord Kerr went further, and focused on the duration for which a person is restricted.

When the Government set out their plans to reform the deprivation of liberty safeguards, there were calls for them to include a statutory definition of deprivation of liberty. As the Minister said, there were many calls in

the House of Lords. A definition would provide practitioners and cared-for people with greater surety as to whether deprivation of liberty was taking place.

I am glad the Government have listened in this one case, but there are issues with the definition we have, and some matters on which I hope the Minister can provide us with clarity. There are two strands of objection to the Government's proposed definition, both of which have been strongly put to me by stakeholders.

The first major objection is that it is not clear how the proposed definition would interact with case law. The Minister has referred to this, but we need to be clearer. Not only is there the case of Cheshire West and Chester Council *v.* P, but there are a number of judgments handed down by the European Court of Human Rights. My question to the Minister is, is this deliberate or accidental? If it is deliberate, why does she feel that a brief definition—on which there has not been wide consultation—is better placed to define deprivation of liberty than an extensive body of case law? We had a meeting with stakeholders, and half the people in the room had not seen the definition at that point—it had not been circulated. If the change is accidental, then I look forward to hearing how the Government will rectify the situation.

One of the immediately apparent issues in the definition is proposed new subsection (3)(b). This holds that a person is not deprived of their liberty if

"the person is free to leave the place temporarily".

In the case of Cheshire West, MIG, MEG and P frequently left their accommodation to go on outings with support, yet the Supreme Court held that they were still deprived of their liberty. Given this, will the Minister confirm whether her definition does not properly describe the case law, or is she seeking to overrule the Supreme Court through this new clause?

It is not just the Supreme Court that has disagreed with this principle. One of the landmark cases heard by the European Court of Human Rights in relation to mental capacity is Stanev *v.* Bulgaria. Mr Stanev was a man with learning disabilities who lived in an isolated care home in rural Bulgaria. He was permitted to go on trips and outings on his own. However, to do so he had to ask permission from the care home where he was resident. When he tried to leave for longer than was expected, the care home took steps to force him to return. The European Court of Human Rights was clear that that amounted to a deprivation of his liberty.

Other cases have been raised in evidence to this Committee that show how temporary outings from a setting do not mean that someone has not been deprived of their liberty. In both DD *v.* Lithuania and K *v.* Poland, the individuals were allowed outside the residential establishment, but only with permission, and under the control and supervision, of the management of the facility.

It is clear that both the Supreme Court of the United Kingdom and the European Court of Human Rights feel that being able to leave temporarily is not a guarantee that somebody is not deprived of their liberty. Yet the Government are proposing the opposite. I cannot understand how they think this definition will withstand challenge in the courts.

I also raise a concern about the phrase "continuous supervision", as used in proposed new subsection (3)(a). In Cheshire West and Chester Council *v.* P, both Lady Hale and Lord Neuberger referred to continuous supervision and control. That is a crucial difference.

I hope the Minister can provide clarity. Is her amendment failing to describe adequately the case law, or is it seeking to overrule the judgment handed down by the Supreme Court? That would create a number of issues. The first, and most serious, is that the new liberty protection safeguards will fail to protect all the people who need them. An ambiguous definition of deprivation of liberty risks seeing people excluded when they should not be.

The second issue is more mundane. If I can see a number of tensions between case law and the Government proposal, I am sure there will be numerous lawyers who specialise in this topic who will have done the same. That will result in further costly litigation in future. I am sure the Government did not intend to create a hefty legal bill for responsible bodies, but I am afraid that may well be what the Bill does.

It has been suggested to me that one reason the definition is so tightly drawn is to reduce the number of people who are subject to the liberty protection safeguards. I feel sure that was not the Minister's intention, but when a statutory definition seeks to define deprivation of liberty more tightly than the courts do, she will understand that people draw their own conclusions.

We must be careful that we do not resolve the issue in front of us by sweeping it under the carpet. Reducing the backlog should not be achieved by redefining which groups of people are covered. That runs the risk of people who need the protections of a liberty protection safeguard being denied them.

The second major objection to this definition is that it is not sufficiently clear as to be useful. I have seen examples that I think illustrate that particularly well, and I will share some of them now. I should stress that, although they are based on real cases and on the views of care home managers on how they interact with the proposed definition, some details have been changed to protect the cared-for people. I would like to thank Care England—the representative body for care homes—for assisting with the preparation of these examples.

The first case is that of Jimmy, who lives with an alcohol-related dementia in a specialist care home that allows no access to alcohol. He was admitted having had an extremely squalid lifestyle and was found to have advanced cirrhosis of the liver. If he drinks alcohol, it will kill him very rapidly and unpleasantly. He lacks capacity to consent to remain and was admitted from hospital after treatment for a broken hip, which he could not explain.

Jimmy has been in the care home for five years, successfully abstinent, except for one episode when he was permitted to go out alone. When he goes out, it is with staff, so he cannot drink. He says he "quite likes" the care home and the food and that the staff are kind, but he is obsessed with living alone in a flat in the community, and is open about the fact that that is only so he could drink.

The local authority is clear that it could not fund the necessary staffing to prevent him from drinking in the community and provide the help he needs with daily living. So is Jimmy deprived of liberty? It would certainly seem so. He wants to move somewhere else, but that request has been denied. It might be in his best interests to remain, but it is not his preference. Under the Government's amendment, he would not be seen as deprived of his liberty. He is not subject to continuous

[Barbara Keeley]

supervision while in the care home, and he is able to go on outings with supervision. Either of those would exclude him from the Government's proposed definition.

In reality, this case is based on that of DM in 2017. DM was enabled by article 5 to challenge the authorisation of a deprivation of liberty safeguard. The case went to court, where a judge eventually ruled that the least worst option was for him to stay in the care home for the duration of the authorisation. Both the judge in DM's case and the Official Solicitor were clear that DM was deprived of his liberty. Which is to take precedence—the Government's definition or previous decisions of the courts, as in this case? If we pass this definition, will DM suddenly cease to be deprived of his liberty?

A second case is that of Sara, who is 21 and has a learning disability. She was moved from her family home to a care home following a safeguarding alert caused by bruising that was thought to be the result of physical abuse by a family member, but evidence swiftly emerged that she had been seen to punch herself when arguing with another young person on an outing. The local authority refused to return her to the family home, stating that she was settled in the care home and showed no signs of wanting to return. Her parents visit her and take her out with her siblings. Within the care home she has privacy in her bedroom, so she is not regarded as being under continuous supervision. Sara has no verbal communication, but carers and others noted that when her visitors were leaving she would take her clothes off their hangers, put them in a bag and then drag the bag to the door while holding the hand of the visitor.

According to the Government's proposal, Sara is not deprived of her liberty; she is not subject to continuous supervision and she is allowed to go on outings. Furthermore, the local authority says that she is happy in the care home and has not expressed any desire to leave. On this basis, the local authority says, there is no deprivation of liberty. It is clear that if Sara wanted to move, she would be enabled to. Because Sara is not seen as being deprived of her liberty under the proposed definition, she and her parents would be powerless to enable her to access the rights that article 5 would give her.

In that case, the disproportionate response to the original bruising, which had in fact been satisfactorily explained, and the nature of Sara's objection to being forced to live away from her home being non-verbal were only noted as part of the investigation by the Court of Protection. This happened only when Sara's representative challenged a deprivation of liberty safeguard authorisation on her behalf. If she was not recognised as being deprived of her liberty, this could not happen. The court was appalled that her unhappiness and wish to be at home were not recognised.

The purpose of any definition is to provide absolute clarity to practitioners and, perhaps more importantly, cared-for people and their families. It exists to tell people when they are deprived of their liberty and thus have certain rights that can be engaged. As such, it is of little use if people cannot use it to make such a determination. At the moment, the definition does not serve this purpose. Had P read this definition, they would almost certainly have concluded that they were not deprived of their liberty, and their case would never have gone to court.

I know that the Government have said that their code of practice will contain far more detail on how this definition will be applied. Once again, the Minister is asking us to accept assurances that everything will be fine, when we have no evidence to suggest that this will be the case. A detailed code of practice would not in and of itself prevent this definition from being ruled incompatible with the European convention on human rights. The law is what it says, and a code of practice exists only to provide guidance on its interpretation.

I hope that I have explained why we have deep reservations about the definition that the Government have put forward. We have not tabled any amendments that seek to alter the Government's proposed definition of deprivation of liberty, but let me be clear that that is not because we feel that it is fit for purpose. This is an issue of immense importance and complexity and should be treated as such. The reality is that the Government have done no such thing. Their definition was introduced late on and stakeholders had very little time to make their views known.

This is a fundamental pillar of our human rights system. A definition that attempts to distil and seemingly alter a huge body of case law is not a straightforward insertion and it cannot be rushed through. If we get this wrong, we will be letting down tens of thousands, if not hundreds of thousands, of people who are deprived of their liberty and need access to the safeguards of the LPS system.

Our view on what should happen now is clear. The Government should withdraw their new clause, put their proposed definition out to a wide public consultation and listen to what experts have to say. Once they have done that and produced a definition that carries broad support, they should introduce it on Report. If they remain determined to rush the Bill through, they should introduce it at a later date. If they do not do so, they risk creating a legal mess.

On Second Reading I said that nobody wants to create a Bill that requires amendment some months or years down the line. This new clause would do just that. It is pitted against decisions of the Supreme Court and the European Court of Human Rights.

3.30 pm

Caroline Dinenage: Is the hon. Lady suggesting that there should not be a definition?

Barbara Keeley: No, I welcomed the fact that the Government were trying to put in a definition, but this definition is not fit for purpose. The problem is that, as with everything else in the Bill, it was rushed. At the meeting I had with stakeholders not very many weeks ago, almost everyone in the room had fears about it. Many of them had not even seen it. The process has been wrong.

I made it clear to the Minister what I think the Government should do. They should withdraw new clause 1 and not put it to a vote. They should put the definition out to consultation, and not introduce it again until those involved with the definition are happy with it. Then we can be clear. Pitting a Government

decision against decisions of the Supreme Court and the European Court of Human Rights is not wise; it is a knotty problem. I am not a lawyer myself, but I have listened enough to people who are experts in this area to know that it is a problem.

Perhaps I can encapsulate the problem in one final question to the Minister. On the front of the Bill the Secretary of State certifies that he feels it is compatible with the European convention on human rights. Given some of the points that I have just raised about the definition, is the Minister confident that the Bill would still be compatible if we agreed to the new clause?

Alex Norris: Liberty, Mind, the Alzheimer's Society, the National Autistic Society, POhWER, Parkinson's UK, the British Institute of Human Rights, Sense, Compassion in Dying, YoungMinds, Learning Disability England and Headway all say that this is "rushed, incomplete and unworkable", and that in general they feel the whole exercise is entirely unfit. It is well within the prerogative of the Government of the day to say that they are right and that all those organisations are wrong, but it is, dare I say it, quite a brave thing to do. For the benefit of the Committee, and of everybody else who has taken an interest in these proceedings, it might be worth explaining why the Government feel that they are right and the Bill is fit for purpose, and that the new clause, which very much puts the cherry on top of the Bill, is worth standing part of it.

Mr Dhesi: Does my hon. Friend agree that that is an indictment of the whole process, and of the rushed manner in which the Bill has been introduced? To have one organisation from among those 13 eminent organisations come forward in *The Times* today and use words such as "rushed", "incomplete", "unworkable", "unfit" and "dysfunctional" would be bad enough; to have all 13 do so makes the entire process look like complete folly.

Alex Norris: I completely agree. To me it is a big, blinking red light that says that perhaps we need to pause and think again. Nothing typifies that more than new clause 1. It is helpful to have a definition in the Bill, and there is broad support for that. I also have some sympathy for its being exclusionary, rather than put in a positive manner, because we know, irrespective of what ends up in the Bill, that it will end up in court.

This is a hotly contested area of case law. It feels a bit like what it must be like to be an American legislator—we are almost waiting for what we do to be tested in court to see if it is okay. I have no doubt, with things as they are currently comprised, that we will be back. I do not know whether it will be a couple of months down the line or a couple of years, but if we carry on we will certainly be back.

The approach laid out by my hon. Friend the Member for Worsley and Eccles South is sensible and proportionate, and it might give us an opportunity to resolve the issue, by sending the new clause, which has appeared between stages, to the sector and asking, "How do you feel about this?" in order to get some engagement. That would give us more time for the lawyers to do their thing too. That seems quite sensible.

It would also give us a chance to take a breath on the whole Bill, and a little more time to see whether we can resolve some of the issues that we have discussed over the last two weeks. Many of the things we as an Opposition have put forward have had merit; perhaps our approach has not always been perfect, but to find better ways to try to address those things would be good for us all.

I will move on to my second concern. If new clause 1 becomes part of the Bill and the Bill becomes an Act, the smoke will come out of this place and send a clear signal: "We know that DoLS doesn't work and hasn't worked for a long time. Here is what is going to come next. Here is what we mean by 'deprivation of liberty' and here is what you can expect." I maintain my anxiety that we will have only solved half of the problem, or one of two problems, because it is entirely possible for a big problem—in this case DoLS, the backlog and people's experiences of that process—to be multifactorial.

No one has contested the fact that the DoLS system did not work and ought to be replaced, but there is a big, yawning and currently unanswered question of resources. I was concerned to hear the Minister say that they are the result of political decisions. I have been in that chair, as the local adult services lead on my council for three years, wrestling with DoLS. Is it a political decision? Yes, maybe it is, in the sense that we are basically trying to juggle whether to deal with assessing new people on their social care needs, assessing whether the needs of people currently in the social care system have gone up or down or, indeed, areas such as DoLS, all of which carry enormous risk to an individual, a local authority and a community as a whole.

In the sense that it is a political choice, it is like saying, "Your house is on fire; are you going to put out the lounge or the kitchen first?" You would just grab the bucket of water and chuck it at it, frankly. There is no political decision in that, or certainly not one of due prioritisation. Ultimately, if we are going to include this new clause in the Bill to set up the new system and legislation to set the new way, we must have absolute clarity that the finances are going to be met. Otherwise, the system will fail and we will, certainly with new clause 1, have elevated people's expectations. At the moment people expect to be disappointed, because they know the system does not work. Now we are going to tell them that we have a new system that works, and then it will not. I suspect that is why all those eminent organisations have said that it is where it is.

On this point and on others, I feel that we on the Opposition Benches have made strong arguments about ways of improving the Bill, but it is not just us. It is not just partisan knockabout; it is not political. It is not a case where the Government say one thing so therefore the Opposition oppose. We should look at the organisations that are also saying, with flashing lights, "Please stop and have a think about this." Otherwise, as I say, we will be back.

Caroline Dinenage: I think it would be helpful if I began by setting out how we got to where we are, for the sake of clarity, although I know that many hon. Members know this. The case of MIG and MEG and P widened the understanding of the scope of deprivation of liberty safeguards with the Supreme Court decision that:

"A gilded cage is still a cage".

Even though the cared-for person was happy in their situation, it was still a deprivation of liberty and required safeguard. The acid test set out by Baroness Hale in Cheshire West had two limbs: first, is the person is

[Caroline Dinenage]

subject to continuous supervision and control, and secondly, is the person free to leave? We can see that test running through this clause. We cannot directly challenge or go against Cheshire West, as it is the Supreme Court's articulation of article 5, and our Bill must be compliant with the European convention on human rights. That is why deprivation of liberty continues to be defined by reference to article 5 of the ECHR.

We are confident that the exceptions in subsections (2) to (4) represent existing case law. The clause defines deprivation of liberty in that way, and the subsections are consistent with and drawn from existing case law—for example, as I have detailed, subsections (2) and (3) are based on the Cheshire West acid test. It is unlikely that there will be a mismatch between our clause and the High Court's view; it may be that the clause is subject to litigation in future, but we are confident that the Government's approach of providing for situations that would not constitute a deprivation of liberty will give sufficient flexibility for the meaning of the clause to develop alongside case law as that evolves.

Much of the discussion has emphasised how incredibly complex a legal matter this is; the clause must be drafted incredibly carefully to ensure that it is legally compliant. We have worked with other Government Departments such as the Ministry of Justice to develop the clause. We listened to stakeholders and peers during the progress of the Bill through the House of Lords to understand their requirements for a definition and drafted the new clause in a way that would achieve what they wanted legally. Since drafting it, we have shared it with stakeholders to explore its impact. We are consulting a wide variety of organisations to gather case studies, which we will use in the statutory guidance.

Steve McCabe (Birmingham, Selly Oak) (Lab): I wonder whether the Minister can explain how, if there was consultation with stakeholders, my hon. Friend the Member for Worsley and Eccles South has that impressive list of organisations with such grave reservations. That suggests the consultation was a bit inadequate.

Caroline Dinenage: The decision to put the definition in the Bill was made in the House of Lords. We had to work carefully on the definition. That information has been shared with stakeholders only in the past couple of weeks. The definition is where we have been working most latterly.

Stakeholders have agreed to work with us and to bring forward case studies that we can put in the statutory guidance that will make it very clear how the Bill will work in every instance and for all the different types of vulnerable people we have discussed. That is what we need to provide clarity. Those case studies will demonstrate how the exceptions will apply in different settings and scenarios, provide clarity, and aid practitioners in identifying when one of the exceptions applies. We are working with stakeholders to co-produce that guidance to ensure that it is clear, unambiguous and of real help to those who use it. It would not be appropriate to include that kind of detail in primary legislation. As I have tried to articulate, the new clause needs to be precise and to fit with evolving case law.

Barbara Keeley: I constantly get the feeling when I listen to the Minister that she is describing a happy situation that, unfortunately, the evidence suggests does not exist. The notion that she is co-producing the definition with stakeholders is not what stakeholders say. My hon. Friend the Member for Nottingham North and I read out the list of organisations that object to the Bill and the severe comments they have made about it. If the Minister were in fact co-producing parts of the Bill and the definition with stakeholders, they would not be writing to *The Times* describing the Bill in that way.

Caroline Dinenage: We are talking about the definition. I am not saying we have co-produced it with stakeholders, but we have given a copy of it to stakeholders, asked for their feedback and asked them to supply case studies. Some have welcomed it and see it as absolutely necessary to provide the clarity we are looking for.

The Law Commission report shows that overly cautious application of DoLS is unnecessary, but we want an effective system with access to safeguards, as required by article 5 rights. The hon. Lady raised a number of case studies, including Stanev *v.* Bulgaria, in which Mr Stanev needed permission to leave. We will make it very clear in the code that a person is not free to leave if they require approval or permission. That is also clarified in subsection (5) of proposed new section 4ZA of the Mental Capacity Act.

We intend to set out in the statutory guidance, by reference to case studies, how that should be interpreted. For example, we understand that in care homes, cared-for people are often left unsupervised for many hours of the day yet may still be regarded as being deprived of their liberty. We do not intend to exclude those people without discretion. We will set out in the guidance the circumstances in which someone should be regarded as not being under constant supervision, such as how frequently they are checked and the monitoring that is present. We are also conscious that "continuous supervision" means different things in different settings, and I welcome the contribution of my hon. Friends towards that.

There is also a sliding scale of situations we expect to be excluded by subsection (3)(b) of proposed new section 4ZA. We will expand on that in the guidance in consultation with stakeholders. For example, the place must be one to which the person has a wish to go rather than one solely of staff's choosing. It is worth pointing out that both limbs of subsection (3) must be met for a person to be excluded by it. For example, if a person is not continually supervised in a care home but is not free to leave temporarily, the subsection does not apply.

Although we aim to bring clarity, we recognise that every case is different. I hope I have articulated that this will be a person-centric system. We do not want a one-size-fits-all approach, which is the problem with the system that we have now. That approach is no longer fit for purpose for such a vastly different and vulnerable group of individuals. With that in mind, I ask that new clause 1 stand part.

3.45 pm

Barbara Keeley: I gave some good examples of cases where the Government's definition clashes with case law, which is why I think it will run into problems very soon. It is still the Opposition's view that the Government should withdraw the new clause. As we said, they should put the proposed definition out to wide public

consultation—passing it round a few individual stakeholders is not the way to do it—and listen to what experts say. Once they have done that and produced a definition that carries broad support, which they do not have at the moment, they should introduce it on Report, which needs time. If the Government are thinking of rushing to Report stage while so much is left in an unsatisfactory and poor situation—if they remain determined to hurry the Bill through—it should be introduced at a later date. The Opposition's view is that the Government risk creating a legal mess should they not do that.

Question proposed, That the clause be read a Second time.

The Committee divided: Ayes 8, Noes 7.

Division No. 28]

AYES

Afolami, Bim	Morris, James
Chalk, Alex	Morton, Wendy
Dinenage, Caroline	O'Brien, Neil
Moore, Damien	Whately, Helen

NOES

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

Question accordingly agreed to.

New clause 1 read a Second time, and added to the Bill.

Question proposed, That the Chair do report the Bill, as amended, to the House.

Barbara Keeley: May I thank you, Mr Pritchard, and Mr Austin? In our first sitting, we not only had a horrible sauna of a room, but a number of us had not sat on a Bill Committee or, in my case, had not done so recently. There has been excellent chairing, supported very ably by the Clerk who we have had working with us. Everyone has done a wonderful job. The *Hansard* Reporters always do a wonderful job of making sense of what we churn out, and we have kept the Doorkeepers busy with many votes.

I said at the outset that we would proceed in the spirit of co-operation, which I think we have. The Opposition have treated this subject with respect for the required depth of scrutiny. It is only a short Bill and we have scrutinised it well, which is nothing less than cared-for people, who will be affected by it, deserve.

Given that they have worked very hard, I offer my sincere thanks to my hon. Friends, who have contributed so thoughtfully and carefully to this important debate. My hon. Friend the Member for Birmingham, Selly Oak has been assiduous at getting to the heart of the Bill. My hon. Friend the Member for Stockton North brought his critical eye—he tells us it comes from being a journalist—to this very complex Bill, and he explored the issues with great humanity.

My hon. Friend the Member for Nottingham North brought to our proceedings his immense knowledge of DoLS from his time as a councillor, and his other insights have been very useful. My hon. Friend the Member for Stockton South, who is not in his place at the moment, brought valuable insights from the perspective of a medical practitioner—that is always useful to have, as medical practitioners will have a role in the proposed system. My hon. Friend the Member for Slough made a number of a interventions and gave a very good speech this morning, holding the Government to account in his debut on a Bill Committee. Our hard-working and wonderful Whip, my hon. Friend the Member for Bristol West, worked with the Government Whip to ensure that proceedings ran smoothly. My hon. Friend the Member for Dewsbury made some excellent contributions in her first appearance on a Bill Committee.

I thank the many stakeholders and practitioners who have written to us to express their concerns about the Bill, and who have worked with us. I also thank everybody who submitted evidence to the Committee—it must have been a real rush for people to get that evidence in. They are too many to name, but I will mention a few. Lucy Series has done sterling work in unpicking the legal ramifications of the Bill. POhWER and VoiceAbility provided many of the excellent case studies that have been used to demonstrate the importance of advocacy in caring and to highlight some of the issues facing the Government's proposed definition of deprivation of liberty, which we just discussed.

I hope the Government will reflect on what we have discussed. Many areas of the Bill are still deficient, and the concerns of stakeholders have not been addressed. We will continue to work in a constructive spirit in order to build a system that protects the liberties of all cared-for people in our country.

The Chair: Before I put the Question, I thank the hon. Lady for her thanks. It is always wise to thank the Government and Opposition Whips. I had not noticed that it was the first time on a Committee for so many colleagues. It has been an absolute delight, because everybody has conducted the business so professionally. I put on record my thanks to my co-Chairman, the hon. Member for Dudley North—Dudley is a marvellous place and very close to my constituency—and to Adam, who has done a sterling job as the Clerk, keeping us on the straight and narrow. I join the hon. Lady in thanking the Doorkeepers, who do a great job—particularly opening the windows in the sauna that we had for a few days. I thank the *Hansard* Reporters and officials for their excellent work. Lastly, I thank all of you for being so well behaved. You are the best Bill Committee that I have served on, and I thank you very much indeed.

Question put and agreed to.

Bill, as amended, accordingly to be reported.

3.52 pm

Committee rose.

Written evidence reported to the House

MCAB63 Leicestershire County Council DoLS Service

MCAB64 Royal College of Nursing

MCAB65 Nigel Hodder, Best Interests Assessor for DoLS

MCAB66 Liz Gale, Mental Capacity Act Lead, Bi-Borough Adults Social Care and Public Health, Royal Borough of Kensington and Chelsea and Westminster City Council

MCAB67 Devon County Council

MCAB68 Doughty Street Chambers Court of Protection Team

MCAB69 Dr Amanda Thompsell (Chair, Faculty of Old Age Psychiatry, Royal College of Psychiatrists), Dr Hugh Series (Consultant old age psychiatrist), and Dr Sharmi Bhattacharyya

MCAB70 Adrian Watts

MCAB71 Dr R. L. Symonds

MCAB72 Liz Spires, social worker

MCAB73 Penny Calthrop

MCAB74 Tom Grace

MCAB75 Challenging Behaviour Foundation

MCAB76 Wendy and Graham Enderby

MCAB77 Association of Directors of Adults Social Services (ADASS)

MCAB78 Catherine Brewin