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OFFICIAL REPORT

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Abbreviation	Party/Group
CB	Cross Bench
Con	Conservative
DUP	Democratic Unionist Party
GP	Green Party
Ind Lab	Independent Labour
Ind LD	Independent Liberal Democrat
Ind SD	Independent Social Democrat
Ind UU	Independent Ulster Unionist
Lab	Labour
LD	Liberal Democrat
LD Ind	Liberal Democrat Independent
Non-afl	Non-affiliated
PC	Plaid Cymru
UKIP	UK Independence Party
UUP	Ulster Unionist Party

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House of Lords

Wednesday 5 September 2018

3 pm

Prayers—read by the Lord Bishop of Southwark.

Visas: Forced Marriages

Question

3.06 pm

Asked by ***Lord McConnell of Glenscorrodale***

To ask Her Majesty's Government on how many occasions in 2017 visas were granted to men whose wives or family members had raised concerns about forced marriage.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, forced marriage is a terrible form of abuse and this Government are committed to tackling it. Where a suspected victim is made to sponsor a visa application, UKVI works with the joint Home Office and Foreign and Commonwealth Office Forced Marriage Unit to ensure that it is investigated further and, if appropriate, refused. The Home Secretary will reply to the Home Affairs Select Committee on the cases reported in the *Times*. I will ensure that the noble Lord receives a copy and that a copy is placed in the Library.

Lord McConnell of Glenscorrodale (Lab): My Lords, far too many young women are tricked into leaving this country, forced into marriage in a number of countries in the Middle East and south Asia, repeatedly raped until they are pregnant, brought back to the United Kingdom to have the baby, and are then involved in the corrupt practice of applying for a visa for their forced husband. Last year, 88 of those women or their representatives made representations to stop the husband they had been forced to marry from entering this country and in 42 of those cases, the Home Office granted a visa. Surely it is time to either use the laws that we have at the moment to ensure that these men do not receive visas and these women are granted anonymity, or we change those laws to make sure that these women are properly protected.

Baroness Williams of Trafford: I cannot disagree with much of what the noble Lord has said other than to say that a large majority of the 42 visas issued were referred to the Forced Marriage Unit by UKVI, rather than being the result of a reluctant sponsor. I thought that I should just correct that information which appeared in the *Times*. On the noble Lord's other point about what more can be done to protect these women—it is so harrowing to see these cases; and I was very surprised to learn that half the cases involved men who have had to enter into a forced marriage—the Home Secretary is acutely aware of the issue and is looking at ways of exploring what more can be done to protect these very vulnerable people.

Baroness Warsi (Con): My Lords, I am pleased to hear that my right honourable friend the Home Secretary is looking into this matter. Could he specifically look at this issue of where the rules effectively do not relate to the real-life circumstances that we are faced with? We have reluctant sponsors in this country who are not prepared to openly say that they are reluctant and, because they are not prepared to do so, the rules are not responsive enough to stop the husband coming in. Secondly, same-sex relationships and same-sex marriage are criminalised in many countries around the world. How are the rules responding to applications from same-sex individuals in same-sex relationships who apply to come to join their partners in the United Kingdom? The Government need to ensure that the rules are responsive to the real-life situations that these individuals face.

Baroness Williams of Trafford: My noble friend makes a very good point on same-sex relationships, particularly when the applicants come from certain countries. On her first point about reluctant sponsors, I think that some applicants are reluctant because they have been put in such a vulnerable position. Therefore, other reasons for the visa refusal will be given if they are available and "reluctant sponsor" will be given as a last resort. She has raised a really pertinent question on same-sex partnerships and I will raise it with my right honourable friend the Home Secretary.

Baroness Hussein-Ece (LD): My Lords, we have heard about evidence of the Home Office failing to protect victims who say they are at risk of forced marriage, for fear of being accused of racism, as in some of the examples we have been hearing about. But at the same time the Home Office was very happy to deport the Windrush generation, who were legally here, singling them out in a racist way. It has devastated people's lives on either side of the argument. I ask the Minister: when is the Home Office going to get a grip and ensure that it implements the proper lawful procedures to protect individuals?

Baroness Williams of Trafford: I hope that in my Answer to the noble Lord, Lord McConnell, I clarified the position on what appeared in the newspaper. In fact, it was the other way round: in the majority of cases it was proactive referral by UKVI to the Forced Marriage Unit, which looked at them as part of its safeguarding work, as opposed to visas being granted where there was a reluctant sponsor. To conflate the issue with Windrush is quite wrong because we are talking about two entirely different things. We discussed Windrush yesterday. Successive Governments have been to blame—if blame is the right word—for what went wrong with the Windrush generation. As the Home Secretary has repeatedly said, he wants to work with other parties to put right the wrongs that happened over decades.

Baroness Butler-Sloss (CB): My Lords, is the Minister aware of the large number of girls involved who are under 18? Will the Government review the fact that parents can give consent when girls are aged 16 to 18 and therefore can be part of this situation? Will the Government look at this and see whether it ought to continue?

Baroness Williams of Trafford: I take what the noble and learned Baroness says. In cases where there has been an objection, I understand that both the applicant and the sponsor were over 18. The noble and learned Baroness may have seen in some of the articles just how the system is played to ensure that they are not acting contrary to the law when they try to ensure that a forced marriage takes place. But I will certainly bring that point back. The noble and learned Baroness is absolutely right to be concerned about it.

Baroness Corston (Lab): Is the Minister aware that Jasvinder Sanghera, the founder of the forced marriage victim support charity, accused the Home Office of failing to act? She said:

"Even when officials know it's a forced marriage, they see tradition, culture or religion and they're reticent to deal with it. They are turning a blind eye".

Baroness Williams of Trafford: My Lords, I take what the noble Baroness says but I dispute that the Home Office was actually turning a blind eye to something that the now Prime Minister, formerly the Home Secretary, has given such focus and effort to in her tenure in both posts—and, of course, legislation has come into place to back that up.

Universal Credit

Question

3.15 pm

Asked by ***Baroness Sherlock***

To ask Her Majesty's Government what assessment they have made of the impact on claimants of the timing of Universal Credit assessments and payments.

Baroness Stedman-Scott (Con): One of the main building blocks of universal credit is the monthly payment cycle. It is important because we are trying to replicate the world of work where people receive their salary on a monthly basis. There are no issues for the majority of claimants. Universal credit has been designed to take earnings into account in a fair and transparent way. We do not want to prejudice the ongoing legal case, but I assure the House that we take any feedback very seriously. We welcome it. We care about our clients, and we want our system to work for them.

Baroness Sherlock (Lab): I thank the Minister and I am happy to give her some feedback right now. The Child Poverty Action Group has done some work on real cases and has found low-paid workers who are losing hundreds of pounds a year because their payday clashes with the monthly assessment period for universal credit. If someone is paid fortnightly or every four weeks, they can end up being paid twice in one universal credit month and not at all in the next. The result is that they lose a lot of money in work allowances. In the double month they can lose things such as free prescriptions because they seem to earn too much and in the lean month they can be hit by the benefit cap because they look like they earn too little. CPAG has made some really obvious recommendations, such as flexing assessments dates and averaging income figures. Are the Government going to look at this and, if so, when? It surely cannot be right that some people lose out just because of when they get paid.

Baroness Stedman-Scott: I am always happy to rely on the noble Baroness to keep us on our toes and I am grateful to her for it. She raised valid points which are in the report. We are listening to stakeholders. We understand the concerns raised in the report, and we are going to come back and say what can or cannot be done, but we cannot prejudice the legal case and, annoying as it is, I ask the noble Baroness to be patient. We are doing our very best to consider the report.

Baroness Couttie (Con): My Lords, will the Minister tell the House what support the Government are giving families who may have trouble budgeting when it comes to some of the variable payments when they transition to universal credit?

Baroness Stedman-Scott: There are many different supports that we give people. Personal budgeting support is offered to all universal credit claimants from the outset of their claim. It helps them as they transition to universal credit and adapt to the financial challenges that it gives them, some of which are significant. It can be online, telephone or face-to-face support. We are reviewing the universal support system and personal budgeting the whole time and we will do all we can to make sure that claimants are equipped to get the best from the system.

Lord Kirkwood of Kirkhope (LD): Does the Minister agree that the timeliness of payments should be a key performance indicator in any respectable social security system? Would she consider contriving a set of statistics broken down to universal credit full service payment areas, comparing the timely payment or otherwise of universal credit against the local performance for payment of the legacy benefits that universal credit is designed to replace?

Baroness Stedman-Scott: I am pleased to tell the House that 80% of new claimants are paid on time and in full, and 90% of universal credit payments across the board are paid on time and in full. That is not 100%, and we need to get there. I would like to have a conservation with the noble Lord to understand exactly what he wants, and if it is possible, I will do it.

Lord McKenzie of Luton (Lab): Where a claimant would be entitled to transitional protection under the migration management arrangements, what would be the effect of the rules that my noble friend outlined if a universal credit payment ceases, even if it is later revived? Would that transitional protection cease or would it continue?

Baroness Stedman-Scott: As I understand the transitional protection, there are ups and downs. I need to double check with officials before giving an answer that is not accurate; I have no desire to do that.

Baroness Watkins of Tavistock (CB): Will the Minister explain why no additional allowance is made to people on universal credit in the long school holidays when their children are not receiving free school meals?

Baroness Stedman-Scott: I can say that when children are on holiday from school, their parents or whoever is looking after them are responsible for feeding them. I do understand that that causes a problem, as these youngsters get school meals when they are at school. I am unaware of any plans to change that, but rather than get it wrong, I shall find out exactly and come back to the noble Baroness. If she has any ideas, I shall be pleased to have them.

Lord Mackay of Clashfern (Con): I wonder whether one of the difficulties is not still that when somebody is on another benefit and goes on to universal credit, that person gets no benefit for a period. During that period, it is possible to get a loan to cover expenses, but unfortunately the loan is then deducted from the benefit once that starts. The loan off the benefit means that the resulting net amount is extremely small. This has been a difficulty, and I understood that it would be looked at, but I am not sure that it has been satisfactorily resolved. Can my noble friend help me on that?

Baroness Stedman-Scott: When people are in financial difficulty, they can have 100% advance from day one. It has to be paid back but it can be done over six months and, in cases where there is real difficulty, over 12 months. Before this Question, I talked to people in Jobcentre Plus. Where the work coaches are in good relationships with their clients, which I hope is in the majority of cases, claimants can raise it with their work coach. I am assured by a district manager that solutions are being sought and people are not being left hanging, as it were.

Prudential Regulation Authority: Equity Release Sector

Question

3.22 pm

Asked by ***Lord Sharkey***

To ask Her Majesty's Government what assessment they have made of the report by the Adam Smith Institute*, Asleep at the Wheel: The Prudential Regulation Authority and the Equity Release Sector*, published on 7 August.

The Minister of State, Department for International Development (Lord Bates): My Lords, the Government take the issues raised in this report very seriously. Equity release offers an effective way for home owners to enhance their standard of living in later life, but must not threaten their financial stability or place consumers at risk. The Prudential Regulation Authority is alert to the issue. It is acting to set a clear and more precise prudential expectation for insurance companies' risk management of equity release mortgages.

Lord Sharkey (LD): The equity release mortgage market has trebled over the last five years and continues to grow strongly. Many of these mortgages have no negative equity guarantees—in other words, the loan value is capped at the price of the house when sold. The Adam Smith report says that insurance companies selling these mortgages have so misjudged the risk that another and bigger Equitable Life scandal is in prospect. Will the Minister say what action is being taken to prevent that?

Lord Bates: The responsibility for that lies directly with the PRA, the responsible regulator. It is in regular contact with the industry on setting new guidelines. That was already done in 2016. Just before the report, to which the noble Lord referred, was published, a new consultation was published by the PRA on this issue—the effective value test, which was used to calculate an appropriate amount that must be held in capital on the balance sheet to reflect the risks being entered into. That consultation is open until 30 September. There are some proposals, which, if they find support, will be implemented by the end of the year.

Baroness Kramer (LD): Is the Minister sure that the PRA is genuinely on top of this issue? We would all agree that it is essential that sufficient capital is held to deal with the risk inherent in equity release guarantees. When evidence was given to the Treasury Select Committee, in the same Session, in February 2017, Sam Woods, speaking for the Bank of England said that the capital required to be held was in the range of £126 billion. David Belsham, speaking for the then PRC gave the figure as only £80 billion. They were presumably part of virtually the same organisation. Does this suggest that there is some coherent thinking within the regulator and that it fully understands the risks it is facing?

Lord Bates: What it reflects better is an issue of pricing, which is a fair debate. The no negative equity guarantee, which is very important to lots of consumers, because they do not want to leave their families with the potential liability, is a key part of the offer. The pricing of that, depending on which measure you take, says either that we assume there will be house price growth over the next 15 to 25 years, or that there will be no growth at all, or that interest rates will accrue at 5% to 6% or at 1% to 2%. The variance that the noble Baroness has identified lies in whether you apply the effective value test at a different point between those two extremes to come up with a different number. The purpose of the consultation paper is to get clarity so that all interests are protected.

Lord Davies of Oldham (Lab): My Lords, the rate of increase in the market has been exceptional over the past five years, and there are clear indications that this will carry on at a rate not dissimilar for the immediate future, so I do not know the extent to which the regulators are being effective in this respect. It is obvious that home owners will be eager to borrow in circumstances where incomes can scarcely keep up with inflation, but we have to guard against things going badly wrong. What if house prices shudder to a halt or even fall? There are reasons to think that such

[Lord Davies of Oldham]
issues could arise in the economy and we would be back to Equitable Life, which caused such tremendous damage to people 20 years ago.

Lord Bates: That is of course why within the industry itself—and indeed with the regulator—the normal level at which borrowing is taken from the home is between 30% and 40%, to allow for that cushion. We have to recognise also that this has two benefits: to individuals as, for most people, their home is their largest asset and being able to release some capital to enhance their quality of life in later life is good; and to the annuity holders on the other side of the balance sheet from the equity release, who have been suffering badly as a result of gilt yields being around 1.5%. The ability of life insurance companies to match these two needs and to offer a better deal to both is something to welcome. The noble Lord is absolutely spot on when he says that we need to watch it; we need to watch it very carefully and what I have outlined is what the regulator is doing already and the rules that it has applied, and also the consultation that is open at this moment to see whether more needs to be done.

Baroness Altmann (Con): My Lords, I support wholeheartedly what my noble friend has said about the importance of the equity release market for certain families. Does he also agree with me that, as the Equity Release Council figures show, most equity release loans are only about 30% of loan to value—some may be around 50%? Even if house prices were to decline by 30% or more, the problems in the conventional mortgage market would be far greater than those in the equity release market. I was rather surprised to see such scary headlines on this particular segment of the market.

Lord Bates: My noble friend has great expertise in this area, which she brings to our consideration. Of course, the amount of capital at risk in the non-asset linked security on balance sheets amounts to some 3% of the total. It is, therefore, a relatively small amount but it is growing fast. We want to make sure that two things happen: first, that balance sheets correctly reflect the risks that are inherent in them and, secondly, that consumers get independent advice, take the right decisions and are aware of the risks that they face. Both are responsibilities that have to be shared between the PRA and the Financial Conduct Authority. We are watching this very carefully; we are not complacent and we want to make sure that that happens.

Northern Ireland: Misoprostol

Question

3.29 pm

Asked by ***Baroness Thornton***

To ask Her Majesty's Government what representations they are making to authorities in Northern Ireland to make the use of Misoprostol legal as is already the case in England, Scotland and Wales.

The Parliamentary Under-Secretary of State, Northern Ireland Office and Scotland Office (Lord Duncan of Springbank) (Con): Abortion law has been a devolved matter in Northern Ireland since devolution was established in 1999. The Government recognise that this is a sensitive issue and that views are strongly held by both sides. Any reform in Northern Ireland is rightly one for a restored Northern Ireland Assembly and Executive to debate and to discuss and ultimately to decide what policy and laws are right for the people of Northern Ireland.

In response to the specific question posed by the noble Baroness, she will be aware that my right honourable friend the Secretary of State for Northern Ireland is legally prohibited from making such representations under Sections 58 and 59 of the Offences Against the Person Act and the Criminal Justice Act (Northern Ireland).

Baroness Thornton (Lab): I thank the noble Lord for that Answer, although it is not surprising and it is completely disappointing, particularly for the women of Northern Ireland. I congratulate the Government on the fact that after Christmas women in England will be able to take the abortion pill Misoprostol at home; I congratulate the Government on taking that decision. Meanwhile, however, in Northern Ireland women are forced online to purchase these pills. They risk prosecution, and indeed have been prosecuted when they have done so. This is a human rights and equalities issue, and that is not a devolved matter. What steps will the UK Government take to end this inequality and the criminalisation of women in Northern Ireland?

Lord Duncan of Springbank: The noble Baroness makes an important point. We in England are making significant progress with regard to Misoprostol, but the reality remains that Northern Ireland has a number of challenges, all of which require a full and sustainable Executive to be in place. The last time that wider questions on abortion were discussed, only a few years ago, the diversity of opinion within the Assembly was significant. It is right and proper that these matters be addressed by the elected representatives of Northern Ireland. That is why my right honourable friend the Secretary of State for Northern Ireland is working tirelessly to bring about a restored Executive.

Baroness Barker (LD): Is the Minister aware that on Monday Belfast City Council, which has members from seven political parties, voted for the decriminalisation of abortion in Northern Ireland? Notwithstanding his remarks, does he understand that there is a growing desire to see abortion decriminalised in Northern Ireland, and that at the moment there is no way for that political will to be fulfilled?

Lord Duncan of Springbank: I am fully aware of the opinions that are being expressed in Northern Ireland, not just on abortion but on a range of issues. If only we could see such a unity of purpose and opinion across all the parties in Northern Ireland now, it would bring about a restored Executive and we could

see significant progress on this matter made by the right group of individuals—namely, those democratically elected by the people of the Province. That is the ultimate sensible and sure way of bringing about policies that have the endorsement of the wider population.

Lord Morrow (DUP): My Lords, as the Minister confirmed, this is a devolved matter—a matter for the Northern Ireland Assembly. Does he agree that, as recently as February 2016, the democratically elected Assembly decided not to change the abortion law in Northern Ireland? Does he also agree that, in this context, it would be wholly wrong for Her Majesty's Government or this House or the other House to change Northern Ireland's present legislation?

Lord Duncan of Springbank: The noble Lord brings to our attention a reality check, which is that in 2016 in the Assembly in Belfast there was not the unanimity of position that the noble Baroness on the opposite Benches alluded to in Belfast itself. That is a reminder of how sensitive the matter is, not least because it is a wider matter of conscience but also, again, as a fully devolved matter it should be taken forward by those elected to the Assembly in Northern Ireland.

Lord Winston (Lab): My Lords, it may be a devolved matter of conscience, but does the Minister agree that this situation is ridiculous? While women in Northern Ireland can take contraceptives that destroy a human embryo, they cannot have access to a simple procedure that prevents them having a much more dangerous operation later on during a pregnancy.

Lord Duncan of Springbank: The noble Lord raises some of the underpinning challenges in this area. It is now very clear that the situation in Northern Ireland can be brought to a sensible way forward only when we have an Executive best able to deliver against those policies. It should not rest either on this House or the other place to do that. I hope that all the representations that can possibly be made by noble Lords today will strongly encourage the parties of Northern Ireland to come back to that table and to secure agreement to form an Executive, so that these decisions can be taken where they need to be taken.

Lord Cormack (Con): My Lords, cannot my noble friend take steps to ensure that the Assembly, which has been elected, which exists and which could debate this issue, is called together to do so?

Lord Duncan of Springbank: My noble friend reiterates a point we need to stress, which is that the last time this matter was discussed in that Assembly, the consensus did not bring about the changes that I think a number of noble Lords wish to see. At present we need to have a fully functioning Executive to draw on the powers of the Assembly and take executive action in this area, should it be the will of the democratically elected MLAs in the Province.

Lord Morris of Aberavon (Lab): My Lords, following my noble friend Lady Thornton's Question, will the Minister clarify what is devolved and what is not devolved in this issue?

Lord Duncan of Springbank: The wider matter of abortion remains fully devolved. The evolution and introduction of new technologies and drugs that can bring about that abortion still rest under the overarching architecture of the legislation as it pertains to abortion. In these areas, to bring about appropriate legislation to address this, it must be developed and taken forward by the Assembly and the democratically elected individuals of Northern Ireland. That is very clearly the position that we must strive toward: to secure a sustainable Executive who can ultimately deliver their response to the very important questions raised by a number of your Lordships today.

Widowed Parent's Allowance

Statement

3.37 pm

Baroness Stedman-Scott (Con): My Lords, with the leave of the House, I would like to repeat a Statement made earlier in the other place by my honourable friend. The Statement is as follows:

"Mr Speaker, with permission, I would like to make a Statement on widowed parent's allowance. Widowed parent's allowance is paid to those families in receipt of child benefit, where one parent's husband, wife or civil partner died prior to 6 April 2017. It was replaced after this date by bereavement support payments, which are now paid by the Government to families who find themselves in the same unfortunate circumstances. New claimants have no eligibility to widowed parent's allowance.

Last week the Supreme Court ruled that the primary legislation that governs widowed parent's allowance is incompatible with the principles of European human rights law, as the benefit precludes any entitlement to Widowed Parent's Allowance by a surviving unmarried partner. We are in the very earliest stages of carefully considering the full implications of this ruling. Officials at the department are working closely with their counterparts in Northern Ireland to examine the judgment and decide what our next steps should be.

However, as the House will be aware, only Parliament is able to change primary legislation. Lady Hale ruled:

"A declaration of incompatibility does not change the law: it is then for the relevant legislature to decide whether or how it should be changed".

Therefore, the court's ruling does not change the current eligibility rules for receiving bereavement benefits.

I would like to remind the House that the question of opening up bereavement benefits to cohabitees was debated and decided against in this place during the passage of the Pensions Act 2014. It was this legislation that introduced bereavement support payments, the successor to widowed parent's allowance.

It is worth noting that restricting bereavement benefits to claimants who were in a legal union with the deceased has been a consistent feature of bereavement

[Baroness Stedman-Scott]
support in order to protect and clarify this entitlement. Other contributory benefits linked to national insurance contributions also contain special rules for claimants in a legal union. A legal union gives the surviving spouse the right to claim state benefits derived from their deceased partner's national insurance contributions. This principle provides a clear threshold for determining who can be provided for from a deceased person's NI accumulation, and serves to promote the institutions of marriage and civil partnership.

As I have stated, we are carefully considering the court's judgment and how the department should proceed in the light of this. When we have looked at all the options, I will come before the House to update Parliament further on this matter".

3.41 pm

Baroness Sherlock (Lab): My Lords, I thank the Minister for repeating that Statement and for advance sight of it. Last week the Supreme Court ruled that the denial of widowed parent's allowance to surviving partners of unmarried couples with children is incompatible with the law in upholding the appeal of Siobhan McLaughlin, who lived with her partner John Adams and their four children for 23 years, until John died in January 2014. John's national insurance contributions would have entitled Siobhan to WPA had they been married.

In the judgment, the Supreme Court said:

"The financial loss caused to families with children by the death of a parent ... is the same whether or not the parents are married or in a civil partnership".

The judgment relates to legislation in Northern Ireland, but unmarried couples are not eligible for widowed parent's allowance anywhere in the UK, so the principle established by the Supreme Court clearly has wider implications for the rest of the UK.

Today's Statement says that Ministers will think about it and get back to us but would the Minister consider conveying back to the department a sense of urgency about this? She must, I am sure, be aware that bereaved parents are already getting in touch with charities such as the Child Bereavement Network in the light of the judgment to ask what will happen to them and whether the situation has changed.

Ministers clearly knew this was coming. It was always a possible outcome of the case but, in any event, back in March 2016, the Work and Pensions Select Committee in another place warned the Government specifically that they could be forced to change their policy as a result of this case. The committee produced a report in 2016 called *Support for the Bereaved*, which clearly expressed the view that excluding unmarried couples was unjust on the children.

The Government were pressed on this point during the passage of the Pensions Act 2014, which reformed benefits for bereaved people. They abolished widowed parent's allowance and replaced it with bereavement support payment. That is payable for only 18 months as opposed to widowed parent's allowance, which was payable until either the children grew up, or the widowed parent remarried or cohabited. When this House debated the regulations that came from that primary legislation on 21 February last year, I asked the Minister to explain the Government's rationale for excluding unmarried couples. The response was simply to say that they would not extend it to cohabitees. The then Minister, the noble Lord, Lord Henley, cited complexity and said people could always get married if they wished to regularise their position.

Complexity is regularly cited by Ministers, but the DWP routinely judges someone to be cohabiting for the purposes of means-tested benefits on rather less evidence than the presence of four children in the house with parents who have been together for 23 years. Reference is often made anecdotally to toothbrushes, slippers and other evidence of the presence of a relationship. Clearly the process of making a judgment over whether two people are cohabiting is one with which the DWP is familiar and must have the means to do it. Indeed, the right reverend Prelate the Bishop of St Albans, when we were discussing those regulations, on 21 February at col. 10 GC, pointed out that the Armed Forces Pension Scheme successfully uses a definition of "eligible partner" to determine who may receive a pension.

It is also noticeable that the way that people lose widowed parent's allowance once they have got it is, as I said, because the children grow up, get remarried or cohabit—so cohabiting is not enough to get the benefit, but it is enough to lose it.

Those benefit reforms were generally quite controversial because they resulted in money being taken away from families with children. The DWP itself estimated that 75% of bereaved families with children would get less support under the new system than under the old. Ministers have told us repeatedly that the reforms were not about saving money, but the Government's own impact assessment told us that, although it would cost more for the first two years, in steady state it would save the Treasury £100 million a year. The Select Committee argued that the Government should use those savings to extend the system of bereavement benefits to unmarried couples.

I have some questions for the Minister. I understand that she may not be able to answer them all today, so I would be grateful if she would, if necessary, be willing to write to me if it is easier for her to do that. First, what assessment has the DWP made of the cost of bringing the legislation on eligibility for widowed parent's allowance in line with the Supreme Court judgment across the UK? Secondly, does the department believe that the primary or secondary legislation governing the new bereavement support payments are compatible with the principles of human rights law? Thirdly, what is the current estimate of how many of those savings scored against the bereavement reforms will in fact be realised? Finally, will the Government now review bereavement provision in the light of both this judgment and the concern expressed around the House repeatedly about the impact of the reforms of bereavement benefits, especially on parents of young children? To be a bereaved parent trying to support and raise your children while dealing with their grief and your own is about as tough as it gets. Therefore, I urge the Government to act quickly and to something to give people in that position both comfort and certainty.

Lord Kirkwood of Kirkhope (LD): My Lords, I wholeheartedly support the suggestion from the noble Baroness, Lady Sherlock, that we should take the opportunity that has been presented to us by this judgment to look again at bereavement benefits more generally, and I hope that the Minister will undertake to engage constructively in the way that the department has done on many issues in the past in this regard. Times have moved on. The introduction of universal credit changes things to the extent that the Government and the DWP accept that cohabiting couples are perfectly capable of making joint applications for that credit, and that is a change from the circumstances that applied under the national insurance contribution regime of previous years.

Can the Minister confirm that the Government will act urgently? I understand that the department cannot make payments to anyone until the law is changed and makes it possible to do so, but she must understand that there will be hundreds, if not thousands, of families waiting for a signal from the Government about how long it will take for them to decide how they are going to dispose of this legal judgment.

Baroness Stedman-Scott: First, I say to the noble Baroness, Lady Sherlock, that I will make sure that the department knows—as it already does—of the urgency of dealing with this issue properly. The questions that she has asked me in relation to estimates, assessments and so on will be covered comprehensively in our assessment of the ruling. I am sure that she and the noble Lord will understand that we are considering this carefully, and we will come back to the House as soon as we can. Rather than give quick responses, we want to deal with this matter properly. We understand that bereavement is traumatic and awful for people. In the early days of a bereavement, people's emotions are all over the place and they wonder where their life is going. That is one reason that we are putting money into those early stages—to help people through that—and once they have made a bit of a journey, there are other benefits and other support and help that we can give them. I make no apology for saying that one thing that helps people is looking for work so that they can be financially independent, but we are supporting them in the process.

Noble Lords will know of my previous job at Tomorrow's People, where we encountered people who had lost somebody very dear to them. They were despondent and depressed, and they did not know what would happen next. It took time and a lot of support but we were able to nurture them so that they could have a role in society and start to realise their destiny. That is what we want for everybody.

All the points that the noble Lord, Lord Kirkwood, has raised will be concluded in the assessment of the ruling. There is definitely a sense of urgency and, as ever, we will always engage where appropriate.

3.50 pm

Baroness Altmann (Con): My Lords, I commend my noble friend on the kindness and understanding she has shown in her responses so far. I echo the concerns expressed by the noble Baroness, Lady Sherlock, and the noble Lord, Lord Kirkwood. Might I suggest something that could be a compromise way forward? I know that my noble friend, and the Government, care deeply about bereaved families and the plight of bereaved children. There is clearly a difficulty felt across the House, first, that the bereavement allowance is not necessarily paid—or rather, not paid at all—to cohabiting couples, even if they are of long standing and have children together; and, secondly, that the payments will now be running out after just 18 months. Might we consider introducing a payment focused on the bereaved child rather than the bereaved parent, so that the national insurance status or marital status of the parent is not necessarily so relevant, and which might kick in after the bereavement payment has been extinguished? We could then continue the support beyond 18 months, which in many cases is not sufficient.

Baroness Stedman-Scott: I thank my noble friend for her thoughts on this and for trying to come up with solutions, which is always helpful. I will be happy to ensure that her suggestion is shown to Ministers. I cannot promise anything, though I wish I could. I am going to give the homework back to my noble friend and ask her to prepare a paper, to make it easier for me to do that.

Lord McKenzie of Luton (Lab): My Lords, we understand that this is not altogether straightforward: there are complexities within it. However, we can be clear on one point, raised by my noble friend Lady Sherlock. Though the implications of the judgment must be carefully considered, do the Government at least accept that the current position is incompatible with human rights legislation? That seems a separate and distinct issue, which the Government should have a view on now.

Baroness Stedman-Scott: The noble Lord, Lord McKenzie, asks an understandable question. All I can promise him is that that is being considered in the consideration of the ruling. I am sorry that I cannot say more; I have no desire to annoy him or put him off, but that is the accurate position. I am sure he will understand that.

3.52 pm

Sitting suspended.

Salisbury Update

Statement

4 pm

The Lord Privy Seal (Baroness Evans of Bowes Park) (Con): My Lords, with the leave of the House, I will now repeat a Statement made by my right honourable friend the Prime Minister in another place. The Statement is as follows:

"With permission, Mr Speaker, I would like to update the House on the investigation into the attempted murder of Sergei and Yulia Skripal and the subsequent poisoning of Dawn Sturgess and Charlie Rowley earlier this year. This was a sickening and despicable act in which a devastatingly toxic nerve agent, known as

[Baroness Evans of Bowes Park]
Novichok, was used to attack our country. It left four people fighting for their lives and one innocent woman dead, and I know the thoughts of the whole House will be with the family of Dawn Sturgess in particular following their tragic loss.

In March, I set out for the House why the Government concluded that the Russian state was culpable for the attempted murder of Mr Skripal and his daughter. I also said that, while we all share a sense of impatience to bring those responsible to justice, as a nation that believes in the rule of law we would give the police the space and time to carry out their investigation properly. Since then, around 250 detectives have trawled through more than 11,000 hours of CCTV and taken more than 1,400 statements. Working around the clock, they have carried out painstaking and methodical work to ascertain exactly which individuals were responsible and the methods they used to carry out this attack.

This forensic investigation has now produced sufficient evidence for the independent Director of Public Prosecutions to bring charges against two Russian nationals for: the conspiracy to murder Sergei Skripal; the attempted murder of Sergei and Yulia Skripal and Detective Sergeant Nick Bailey; the use and possession of Novichok; and causing grievous bodily harm with intent to Yulia Skripal and Nick Bailey. This morning, the police have set out how the two Russian nationals travelled under the names of Alexander Petrov and Ruslan Boshirov, names the police believe to be aliases. They arrived at Gatwick Airport at 3 pm on Friday 2 March, having flown from Moscow on flight SU2588. They travelled by train to London Victoria, then on to Waterloo, before going to the City Stay Hotel in Bow Road, east London. They stayed there on both Friday and Saturday evenings, and traces of Novichok were found in their hotel room. On Saturday 3 March, they visited Salisbury, arriving at approximately 2.25 pm and leaving less than two hours later, at 4.10 pm. The police are confident that this was for reconnaissance of the Salisbury area. On Sunday 4 March, they made the same journey, travelling by Underground from Bow to Waterloo stations at approximately 8.05 am, before continuing by train to Salisbury.

The police have today released CCTV footage of the two men which clearly places them in the immediate vicinity of the Skripals' house at 11.58 am, which the police say was moments before the attack. They left Salisbury and returned to Waterloo, arriving at approximately 4.45 pm, and boarded the Underground at approximately 6.30 pm to Heathrow, from where they returned to Moscow on flight SU2585, departing at 10.30 pm.

This hard evidence has enabled the independent Crown Prosecution Service to conclude it has a sufficient basis on which to bring charges against these two men for the attack in Salisbury. The same two men are now also the prime suspects in the case of Dawn Sturgess and Charlie Rowley. There is no other line of inquiry beyond this. The police have today formally linked the attack on the Skripals and the events in Amesbury such that it now forms one investigation. There are good reasons for doing so.

Our own analysis, together with yesterday's report from the Organisation for the Prohibition of Chemical Weapons, has confirmed that the exact same chemical nerve agent was used in both cases. There is no evidence to suggest that Dawn and Charlie may have been deliberately targeted, but rather they were victims of the reckless disposal of this agent. The police have today released further details of the small glass counterfeit perfume bottle and box discovered in Charlie Rowley's house which was found to contain this nerve agent. The manner in which the bottle was modified leaves no doubt that it was a cover for smuggling the weapon into the country and for the delivery method for the attack against the Skripals' front door. The police investigation into the poisoning of Dawn and Charlie is ongoing, and the police are today appealing for further information. But were these two suspects within our jurisdiction, there would be a clear basis in law for their arrest for murder.

We repeatedly asked Russia to account for what happened in Salisbury in March, and they have replied with obfuscation and lies. This has included trying to pass the blame for this attack on to terrorists, on to our international partners, and even on to the future mother-in-law of Yulia Skripal. They even claimed that I, myself, invented Novichok. Their attempts to hide the truth by pushing out a deluge of disinformation simply reinforces their culpability.

As we made clear in March, only Russia has the technical means, operational experience and motive to carry out the attack. Novichok nerve agents were developed by the Soviet Union in the 1980s under a programme codenamed Foliant. Within the past decade, Russia has produced and stockpiled small quantities of these agents, long after it signed the Chemical Weapons Convention. During the 2000s, Russia commenced a programme to test means of delivering nerve agents, including by application to door handles.

We were right to say in March that the Russian state was responsible, and now that we have identified the individuals involved, we can go even further. Just as the police investigation has enabled the CPS to bring charges against the two suspects, so the security and intelligence agencies have carried out their own investigations into the organisation behind this attack. Based on this work, I can today tell the House that, based on a body of intelligence, the Government have concluded that the two individuals named by the police and the CPS are officers from the Russian military intelligence service known as the GRU. The GRU is a highly disciplined organisation with a well-established chain of command, so this was not a rogue operation. It was almost certainly also approved outside the GRU at a senior level of the Russian state. The House will appreciate that I cannot go into details about the work of our security and intelligence agencies, but we will be briefing opposition leaders and others on Privy Council terms and giving further detail to the Intelligence and Security Committee.

Let me turn to our response to this appalling attack and the further knowledge we now have about those responsible. First, with respect to the two individuals, as the Crown Prosecution Service and the police announced earlier today, we have obtained a European arrest warrant and will shortly issue an Interpol red

notice. Of course, Russia has repeatedly refused to allow its nationals to stand trial overseas, citing a bar on extradition in its constitution. So, as we found following the murder of Alexander Litvinenko, any formal extradition request in this case would be futile. But should either of these individuals ever again travel outside Russia, we will take every possible step to detain them, to extradite them and to bring them to face justice here in the United Kingdom.

This chemical weapons attack on our soil was part of a wider pattern of Russian behaviour that persistently seeks to undermine our security and that of our allies around the world. They have fomented conflict in the Donbass, illegally annexed Crimea, repeatedly violated the national airspace of several European countries and mounted a sustained campaign of cyber espionage and election interference. They were behind a violent attempted coup in Montenegro, and a Russian-made missile, launched from territory held by Russian-backed separatists, brought down MH17.

We must step up our collective effort to protect ourselves in response to this threat and that is exactly what we have done since the attack in March, both domestically and collectively with our allies. We have introduced a new power to detain people at the UK border to determine whether they are engaged in hostile state activity. We have introduced the Magnitsky amendment to the Sanctions and Anti-Money Laundering Act in response to the violation of human rights. And we have radically stepped up our activity against illicit finance entering our country. We also expelled 23 Russian diplomats who had been identified as undeclared Russian intelligence officers, fundamentally degrading Russian intelligence capability in the UK for years to come.

In collective solidarity, and in recognition of the shared threat posed to our allies, 28 other countries as well as NATO joined us in expelling a total of over 150 Russian intelligence officers: the largest collective expulsion ever. Since then, the EU has agreed a comprehensive package to tackle hybrid threats; the G7 has agreed a rapid response mechanism to share intelligence on hostile state activity; NATO has substantially strengthened its collective deterrence, including through a new cyber operations centre; and the US has announced additional sanctions against Russia for the Salisbury attack. Our allies acted in good faith, and the painstaking work of our police and intelligence agencies over the last six months further reinforces that they were right to do so.

Together, we will continue to show that those who attempt to undermine the international rules-based system cannot act with impunity. We will continue to press for all of the measures agreed so far to be fully implemented, including the creation of a new EU chemical weapons sanctions regime, but we will not stop there. We will also push for new EU sanctions regimes against those responsible for cyberattacks and gross human rights violations, and for new listings under the existing regime against Russia. We will work with our partners to empower the OPCW to attribute chemical weapons attacks to other states beyond Syria.

Most significantly, what we have learnt from today's announcement is the specific nature of the threat from the Russian GRU. We know that the GRU has played a key part in malign Russian activity in recent years, and today we have exposed its role behind the despicable chemical weapons attack on the streets of Salisbury. The actions of the GRU are a threat to all our allies and to all of our citizens. On the basis of what we have learnt in the Salisbury investigation and what we know about this organisation more broadly, we must now step up our collective efforts, specifically against the GRU. We are increasing our understanding of what the GRU is doing in our countries, shining a light on its activities, exposing its methods and sharing them with our allies, just as we have done with Salisbury. While the House will appreciate that I cannot go into details, together with our allies we will deploy the full range of tools from across our national security apparatus to counter the threat posed by the GRU.

I have said before, and I say again now, that the UK has no quarrel with the Russian people. We continue to hold out hope that we will one day once again enjoy a strong partnership with the Government of this great nation. As a fellow permanent member of the UN Security Council, we will continue to engage Russia on topics of international peace and security, but we will also use these channels of communication to make clear there can be no place in any civilised international order for the kind of barbaric activity which we saw in Salisbury in March.

Finally, let me pay tribute to the fortitude of the people of Salisbury, Amesbury and the surrounding areas, who have faced such disruption to their daily lives over the past six months. Let me thank once again the outstanding efforts of the emergency services and National Health Service in responding to these incidents. Let me thank all those involved in the police and intelligence community for their tireless and painstaking work, which has led to today's announcement.

Back in March, Russia sought to sow doubt and uncertainty about the evidence we presented to this House, and some were minded to believe it. Today's announcement shows that we were right. We were right to act against the Russian state in the way we did, and we are right now to step up our efforts against the GRU. We will not tolerate such barbaric acts against our country. Together with our allies, this Government will continue to do whatever is necessary to keep our people safe. I commend this Statement to the House".

4.15 pm

Baroness Smith of Basildon (Lab): My Lords, I thank the noble Baroness for repeating what is a detailed Statement. The House is grateful for the information that she provided. This was undoubtedly a shocking and deplorable act. I am sure that the House will join me in sending our thoughts to those whose lives are in danger and our deepest condolences to the friends and family of Dawn Sturgess, who tragically died following exposure.

We must also pay tribute to the dedication of the staff at Salisbury District Hospital and their tireless work in responding to this appalling crime. Like the noble Baroness, I also want to praise the resilience of the residents of Salisbury, Amesbury and the surrounding area. They have lived with this from day to day while most of us were able to read about it then move on to

[Baroness Smith of Basildon]
something else in our lives. For example, nearly 100 Wiltshire Police officers and staff have sought psychological support following the attack. The chief constable said that the cuts to police increases the pressure on his officers. Given the impact that this has had on the local community, what support, including financial support, have the Government provided to Salisbury and in what form? We should also pay tribute to the extraordinary diligence of and forensic work undertaken by our police and security services to identify those responsible and establish both the identities of the two Russian suspects—who can now be charged—and on whose authority they were acting.

I congratulate the Prime Minister and I welcome the confirmation of a European arrest warrant being obtained and an Interpol red notice being issued shortly. We know from bitter experience that it is futile to seek an extradition warrant from Russia. What will happen to that specific warrant if we leave the European Union either without a deal or having been unable to negotiate the remaining part of the European arrest warrant? The noble Baroness will be aware that there are difficulties with us remaining. I appreciate that a pragmatic, common-sense decision has been taken, rather than an ideological one, but what will happen in future? What would happen to this warrant, had it not been executed and those two people detained, by the time we leave the EU?

Russia's reticence to allow its citizens to stand trial in the UK is unsurprising. Both suspects have been identified as officers of the Russian military intelligence service, known as the GRU. As referred to by the noble Baroness, the GRU is highly disciplined with a well-established chain of command. This attack was almost certainly approved at a senior level of the Russian state. The use of a nerve agent is a clear breach of the Chemical Weapons Convention and international law; we condemn the attack and its perpetrators in the strongest terms.

Given the findings of the OPCW and Russia's record of conducting state-sponsored assassinations, including against its own citizens and former intelligence officers whom it regards as legitimate targets, what action are the Government taking at an international level to ensure that state actors cannot act with impunity? What discussions have there been with the US and European countries about further sanctions against Russia? As we leave the EU, our relationships and partnerships with our European neighbours will undoubtedly change; additional effort from us will be required to maintain them. What action are the Government taking on this issue at both a European and international level? We need to ensure that we maintain those relationships for the future so that action can be taken.

How closely are the Government working with the UN to strengthen the international monitoring and prohibition of chemical weapons? I am sure the noble Baroness recognises that the first duty of any Government is the safety and security of their citizens. The noble Baroness may be aware from debates in this Chamber that the police and security services have been clear that in protecting our citizens, one of our greatest assets in the community is local knowledge provided by police officers on the ground, yet police officer numbers across the country are falling and police stations are closing. Some £3 billion has been lost from the policing budget over the past eight years and there are 21,000 fewer police officers today than there were eight years ago. What assessment is being made of the impact of falling police numbers on maintaining national security? Is this being kept under review, including with a commitment to any necessary funding? I know that funding for the security services will increase but I am talking particularly about the ability of police officers on the ground to get local intelligence.

On funding, I would like to ask about CBRN training and support. I have asked this question in your Lordships' House before, having previously been a Minister with responsibility for CBRN. In how many of our public services is training provided, and is funding being provided for the equipment, given the previous cuts?

Finally, I emphasise our gratitude for the work of our public servants and recognise the pressures we have seen on our health service staff, emergency services, the police and the security service in their ongoing work. They are not just dealing with this incident and the fallout from it; they are looking at ongoing threats from many different sources and they need our support, not just our words—and our response to their need for resources.

Lord Newby (LD): My Lords, I would like to thank the Leader of the House for repeating the Statement, which demonstrates what excellent work the police and security services can achieve when working together. They deserve our heartfelt congratulations for identifying the perpetrators of this terrible crime. Sadly, I suspect that identifying the perpetrators will prove to be the easy bit. The question is: what happens next? Central to the Government's response is issuing a European arrest warrant. I would like to echo the questions of the noble Baroness, Lady Smith, about the future of this vital component of our crime-fighting armoury. The Government's White Paper on the future relationship between the United Kingdom and the European Union recognised the importance of the European arrest warrant. On maintaining our ability to access the warrant, it says:

"The UK recognises that being a third country creates some challenges for the full operation of the EAW as it stands, particularly in terms of the constitutional barriers in some member states to the extradition of their own nationals. The withdrawal agreement will address this issue as part of the implementation period".

Could the Leader of the House explain exactly how the Government plan to achieve this, and what progress has been made since the publication of the White Paper?

The Statement also contains two further proposals for EU co-operation. It says:

"We will continue to press for all of the measures agreed so far to be fully implemented, including the creation of a new EU chemical weapons sanctions regime".

It goes on to say that,

"we will not stop there. We will also push for new EU sanctions regimes against those responsible for cyber-attacks and gross human rights violations".

But how credible is it for the British Government, at this point, to go into a meeting in Brussels and say, "We actually think it's crucially important that we have this new sanctions regime. Will you please do it? Oh, and by the way, we are then leaving you to it"? We have just passed legislation to set up our own sanctions and anti-money laundering regimes explicitly because we will not be part of these mechanisms, which the Government are here lauding as crucially important. How will the Government square that circle to make sure that we benefit from common European sanctions?

The response of our European partners to the Salisbury attacks, as the Government have said, has been truly extraordinary. I was in Estonia last week. It is a very small country which abuts Russia. Their Prime Minister, after literally years of delicate negotiations, had arranged to make a cultural visit to Estonian communities in Russia. Immediately after the Salisbury attack took place, he cancelled it. This is a big deal for them, but he did it in support of us. I think the question has to be raised about the extent to which we can expect members of the EU to show that kind of major solidarity, at a time when they feel sad, frustrated and neglected because of our actions in respect of Brexit.

The key question, however, concerning the European arrest warrant or anything else, is: how can we seek effectively to stop such attacks taking place in future? It is not credible to expect that we will get these two characters, whatever their real names are, in front of a British court. Obviously, there are no easy answers but I have two questions for the Leader of the House about specific action. First, is there any scope for the charge of conspiracy to be brought against individuals higher up in the GRU who must have given the orders, if intelligence suggests who those individuals might be?

Secondly, more generally and more likely to be effective—arguably, the most effective of all—is to look at attacking, if we can, those Russian oligarchs whom we know to be cronies of the Russian regime and who have put their money here in London. The Government talk of radically stepped-up activity in this area, but can the Leader of the House tell us what that radical stepping up means, how many unexplained wealth orders have so far been issued and how many she believes the Government could issue in the near future? If we are to be successful in stopping such attacks in future, we have to hit the Russian regime where it hurts: in the pockets of the people who benefit the most from it. This must be a key component of the Government's strategy. How confident is the Leader of the House that the Government have got a grip on that?

Baroness Evans of Bowes Park: My Lords, I am grateful to the noble Baroness and the noble Lord for their comments. As the noble Baroness did, I again pay tribute to the people of Salisbury and Amesbury and send them our very best wishes.

I assure the noble Baroness that we are committed to working alongside the local authority and emergency services to help the local area meet any further exceptional costs arising from the incident. We have already announced more than £7.5 million of funding to support businesses, boost tourism and meet some of those costs. The Home Office has also provided £6.6 million of extra funding to Wiltshire Police to cover its extra costs.

Both the noble Baroness and the noble Lord rightly raised the issue of the European arrest warrant. We want, as we have continually said, to continue our close relationship with the EU once we leave, and a key part of our negotiations, which we are discussing now, is how that will continue. Obviously, involvement in the European arrest warrant is part of that but the negotiations are ongoing. They will continue. Again, today's events reinforce the importance of maintaining the relationship with the EU.

The noble Baroness asked about America. The Prime Minister has spoken to President Trump and is contact with our other close allies. With regard to the United States' additional sanctions, we are co-operating with it closely as it works towards a potential second round of sanctions later this year. Noble Lords will also be aware that in June we led the diplomatic efforts to strengthen the ban on chemical weapons through the OPCW, despite Russian resistance, and we intend to work further with partners to empower the OPCW to attribute chemical weapons attacks to other states beyond Syria. Those discussions are ongoing.

The noble Lord asked about sanctions. He is absolutely right that we currently implement sanctions through the EU. We will be looking to carry over all existing EU sanctions at the time of our departure. As he rightly says, we have put in place a legislative framework through the Sanctions and Anti-Money Laundering Act to give us full control of our sanctions policy once we leave the EU.

The noble Lord also asked about criminal financing. To date, the NCA has considered around 140 cases where the use of an unexplained wealth order may be the appropriate course of action. A significant number of these are against assets believed to be held by Russian individuals. It continues its casework to apply for further unexplained wealth orders, adding to those currently in place. We are also reviewing all tier 1 investor visas granted before 5 April 2015, many of which were issued to wealthy Russians. We have not ruled out making further changes to the tier 1 investor route in order to ensure that it continues to work in the national interest.

I will have to write to the noble Baroness about her questions on CBRN as I do not have the details with me. I will do that.

4.30 pm

The Lord Bishop of Leeds: My Lords, will the Minister be able to comment on a question that hangs over all this—why the Skripals and why now? It is a matter of timing. Can a statement be made on that at some point because clearly there is a story behind it? My main concern is that we have heard this afternoon that a nerve agent—a chemical weapon—was brought through a civilian airport. I cannot even get a tube of toothpaste through, yet they managed to bring this through and then leave it behind rather indiscriminately, if that is what happened. What are the implications for airport security?

Baroness Evans of Bowes Park: I can assure the right reverend Prelate that the Home Office has increased checks on private flights and freight arriving in the UK under existing powers, but because of the national security dimensions I am afraid I cannot comment on specific cases. He is right that the two individuals held valid Russian passports under identities that we now know to be false, and they were able to obtain UK visas using official Russian documents. We have taken further measures in this area including, for instance, introducing a new power to detain people at the UK border to determine whether they are engaged in hostile state activity. Obviously this is an area where the Home Office will continue to be vigilant. We will take further steps if they prove necessary.

Lord Harris of Haringey (Lab): The noble Baroness the Leader of the House, in answer to a question from my noble friend Lady Smith, listed about £14 million of additional support that has been given to the local police force and the local community. Is she able to tell us the estimated cost of the investigations carried out and the work done by the security agencies and the counterterrorist police? I suspect that is also a very substantial sum of money. When she is writing to my noble friend about CBRN, will she be able to tell us how many operatives in the emergency services across the country are now trained and equipped to deal with CBRN incidents compared with, say, five years ago and 10 years ago?

Baroness Evans of Bowes Park: If the information is available, I will certainly include it in the letter together with a breakdown of the funding. I have the overall figures, but I will add what information I can, if it is available, to the letter that I will place in the Library.

Lord Cashman (Lab): I would like to press the Leader of the House again on a point raised by my noble friend Lady Smith. On the European arrest warrant, have there been any assurances been given to the Government about it in that we may have left before it is implemented, and particularly given that one of the Government's red lines is that the Court of Justice of the European Union will no longer have any jurisdiction and equally the Charter of Fundamental Rights will no longer apply in this country?

Baroness Evans of Bowes Park: As the noble Lord will know, our future security relationship with the EU is something for the negotiations. That will continue. We have obviously been talking to our EU partners and allies about the new evidence we have found in the incident and they have shown great solidarity in supporting us with their actions. This will no doubt continue as this investigation continues. As the information we have today becomes clearer and can be shared, those discussions will no doubt inform the negotiations that are going on about our future relationship.

Lord Jopling (Con): My Lords, one of the most interesting parts of the Minister's Statement was the clear connection between the two individuals concerned and the nerve gas in the hotel bedroom. Is she able to give a little more detailed information? I realise she may not be, but if she could tell us a little more about that connection, it would be of great interest.

Baroness Evans of Bowes Park: What I can say is the evidence found has pointed to the fact that the same chemical nerve agent in Salisbury was found in the hotel and that the bottle found was modified to allow smuggling into the country. The analysis by experts at DSTL has confirmed that the same chemical nerve agent was used in both cases. Yesterday, the OPCW provided independent verification of this after its own analysis of samples taken following the Amesbury poisoning. I am afraid that is all I can say on that issue.

Lord Lexden (Con): Reference has been made to the economic help that the Government are giving to the people and city of Salisbury. Is there any indication so far of the results of that assistance? Is the decline in the number of local businesses in the centre of Salisbury being arrested? Are there signs of revival in the number of visitors to Salisbury?

Baroness Evans of Bowes Park: Certainly we are working closely with the local authority and local businesses. A number of Ministers have visited, and I know the local MP is doing a lot of work to make sure that support is provided to the local area. With the Salisbury and Amesbury incidents—and this again today—I am afraid that I do not have the figures for visitor numbers to Salisbury. However, we remain committed to doing all that we can to help that area to revitalise and make sure the people enjoy the delights of Salisbury.

Baroness Smith of Basildon: As there is no other Back-Bench question, can I press the Minister on the issue of the European arrest warrant—a point made by me, my noble friend Lord Cashman and the noble Lord, Lord Newby? We understand that the Government now believe that we should maintain and remain a member of the European arrest warrant, or have access to it, and that they are negotiating for that. In the event of there being no deal, or the Government being unable to negotiate it as an outcome, what will happen to this particular arrest warrant? Will it fall, as no action has been taken? Have the Government given any consideration to that specific point?

Baroness Evans of Bowes Park: I am sure that the Home Office has. I am afraid that I do not have the information, so I will see what I can add to the letter that I have already committed to write.

Lord Hope of Craighead (CB): The European arrest warrant can be executed effectively only if the individuals are present within one of the European states; if for the moment they are outside that jurisdiction, the arrest warrant is a precautionary measure. The other way of keeping an eye on this is through the activities of Europol and other institutions of that kind.

Can the noble Baroness assure us that steps are being taken to maintain that channel of communication? The European arrest warrant will fall, I suspect, when we are no longer part of the European Union simply because it is dependent on being part of the structure which allows it to be enforced. If we are kept informed by Europe and other similar institutions, there are other ways of proceeding, by means of a request for extradition. That is very slow, I am afraid, but at least it is a step that could be taken if we know where they are.

Baroness Evans of Bowes Park: I am certainly happy to give that reassurance to the noble and learned Lord.

Mental Capacity (Amendment) Bill [HL]

Committee (1st Day)

4.37 pm

Relevant document: 7th Report from the Joint Committee on Human Rights

Clause 1: Deprivation of liberty: authorisation of arrangements enabling care and treatment

Amendment 1

Moved by ***Baroness Finlay of Llandaff***

1: Clause 1, page 1, line 9, at end insert—

"( ) After section 4A, insert—

"4AA Compatibility with other provisions in the Mental Capacity Act 2005

Nothing under section 4B of, or Schedule AA1 to, this Act permits the authorisation of any arrangements for enabling care or treatment of a person that give rise to a deprivation of liberty which conflicts with sections 1 to 4 of this Act, or a valid decision to refuse care or treatment by the donee of a lasting power of attorney or a court-appointed deputy or contained in a valid advance decision to refuse treatment.""

Baroness Finlay of Llandaff (CB): My Lords, I start by declaring my interest as chair of the National Mental Capacity Forum. It is in that role that I have been able to have meetings over the summer in Wales with several people from different professional groups across all sectors.

I hope that the House will bear with me as I try to explain why I have tabled the amendment right at the front of the Bill. The key word on which I want to focus is "conflicts" in the third line of the amendment. The reason is that the Bill adds to the Mental Capacity Act, and the principles of that Act must be paramount. In some of the meetings that I have had, I have been worried that there is a view almost that the Bill is free-standing rather than that it is completely connected to and falls out of the Mental Capacity Act.

So whatever we do, and whatever legislation goes forward, we must be aware that first of all the presumption of capacity is being overturned, and that it has to be overturned on evidence that it is for a specific decision at a specific time. People may need support to make their own decisions. Indeed, when somebody has impaired capacity they do need support, because it may be that their capacity can be maximised and they could take that decision. I have been concerned that speech and language therapists have not been a core part of best interests assessors because, when people have expressive and communication disorders, a speech and language therapist can be absolutely essential. It seems strange to have them acting almost as translators for other people who are then best interests assessors or for other clinicians when they have the skill set themselves and want to be trained. Of course, there are also people such as the independent mental capacity advocates.

People need time and a calm environment—but, for support to be provided, they also need somebody who knows them. That might be a parent, a friend, a relative or their child. But it takes time, and we need to recognise that the time taken in supporting somebody is not going to be given by a health professional or somebody perhaps running a care home who is under pressure of time and lots of other responsibilities. So we have to interpret what we are doing in that sense and maximise the ability of the person to be empowered.

Of course, the Mental Capacity Act also allows people to make unwise decisions. We need to think about how we manage harm to others under the Bill, when people may have very specific areas where they lack insight and capacity and are at particular risk. That applies particularly, I would suggest, to those likely to commit sexual offences in society because they do not have the ability to have control when they are in a situation of temptation. They may need to have some restrictions on their liberty to protect others.

When capacity is not there, we are left with best-interest decisions. That consultation must include P. There are amendments that we will come to later that stress that the cared-for person must be involved and at the top of the list, and I have my name on one of those amendments. That consultation must include everybody concerned with P's well-being, which brings me on to the latter part of my amendment, on where there is conflict with a valid decision to refuse care or treatment, which is probably self-explanatory. I will just say, however, that in some care settings it can be very difficult for people—for example in an emergency department—when somebody is just brought in, to know whether a decision to refuse care or treatment is valid, how it was drawn up and what was considered in the process.

The others who must be consulted are those who hold lasting power of attorney or are a court-appointed deputy for somebody who did not have anybody, so the court appointed them. We must recognise that, when somebody chooses a person to donate a lasting power of attorney to, it is a very difficult choice; it is somebody whom they trust deeply. The court-appointed deputy also has a duty to know the person well. But the person with lasting power of attorney may well have known this person for years and may have seen them through deteriorating health up to the point when the lasting power of attorney needed to be activated. I am concerned that, if the lasting power of attorney or the court-appointed deputy are not really given appropriate prominence in our process, we could

[Baroness Finlay of Llandaff]
find that the careful choice of a trusted person becomes effectively downgraded in the system when we are trying to consider what is in P's best interests. I hope that noble Lords will forgive me for using the term "P". It is shorthand for the cared-for person.

The other part of that consultation—for which I hope we will give due credit to the noble Baroness, Lady Barker—is the concept of an advance statement of wishes. Those of us who took through the old Mental Capacity Act—I say "old" because it was some years ago now—will remember the debates when the noble Baroness suggested that we needed a balance between an advance decision to refuse treatment and an advance statement of wishes. The more that I have spoken to professionals across all parts of health and social care, the more I have been struck by how the concept of an advanced statement of wishes has not been used adequately. That becomes important because we are talking about the care plan that will be the basis of our process. The care plan must be the way that somebody who lacks capacity for decisions is to be cared for, and that care plan must be flexible and must meet their needs, so the advanced statement of wishes can become very important in shedding light on somebody's wishes and feelings.

4.45 pm

The last of the five principles is of course that we must go for the least restrictive option. We are talking about liberty-protection safeguards, and language is important. If you talk about deprivation of liberty—that is, about taking away—the focus that we need to have is that if we are restricting liberty it is in order for somebody to live as freely as possible within the restrictions of their disease or whatever is limiting their life.

There are two questions that come out of those safeguards, which the Bill says must be necessary and proportionate. Necessary: why is it necessary? There must be evidence for why it is necessary. Proportionate: what other ways have been considered? In other words, what other least-restrictive options have been considered? I hope that in any assessment we will expect people to be quite clear about them.

All this revolves around Article 5 and Article 5 safeguards. It is important to remember that of course it is the liberty and the security of the person that are affected in Article 5. The current situation in relation to lasting power of attorney or a court-appointed deputy is that they cannot veto a decision for deprivation of liberty safeguards. We have to be quite careful about that. I had a discussion about this with the Public Guardian, who, fortunately—although I did put him a bit on the spot and it was in a telephone call rather than a face-to-face meeting—agreed that we should not downgrade the importance of the sincere lasting power of attorney: the person who is trying to do the best for them. The Public Guardian of course has a duty to investigate where an attorney is not behaving appropriately. So where perhaps there is a warring family, the Public Guardian may investigate.

If we allow that a court, an attorney or a court-appointed deputy must be consulted, we must accept that they can object to a proposed arrangement. If they do, I suggest that it is appropriate then to appoint an approved mental capacity professional. If that is not resolved, the matter should go to mediation. Only after mediation has failed should we think about court proceedings. The reason is that I am worried that otherwise the Court of Protection could be swamped by objections early on.

There is an important pilot that has been planned for the Court of Protection between some people in the legal profession who want to try to set up a pre-Court of Protection mediation service. This seems to be very helpful because, at the end of the day, if a court authorises a deprivation of liberty, that must be the last word. The court should have the last say.

I know that I have taken a bit of time to explain this amendment, but I have been worried that we have to put the best interests of the person at the forefront of all our thinking in the context of the whole of the Mental Capacity Act and also that we must consider the least restrictive option. I have also been worried that safeguarding and deprivation of liberty have become muddled in some places, and that in some authorities the safeguarding lead and the mental capacity lead are the same person.

I have been discussing this with general practitioners. I declare that I was on the safeguarding toolkit working party of the Royal College of General Practitioners. Safeguarding is different from liberty protection safeguards or a deprivation of liberty, but sometimes in people's thinking they get muddled up and unclear, and it becomes particularly difficult when you are talking about people who are cared for in their own home. I am sure that we will come on to that later, but I would be interested to know whether the Minister agrees that the general thrust we should be taking is that the care plan must be appropriate for that person and constantly revisited, and that we must be able to make sure that all the views of those people who have the welfare of the person at heart, and who have been perhaps chosen by that person to speak for them when they can no longer speak for themselves, are respected.

Baroness Thornton (Lab): My Lords, I will speak to Amendment 20, which is in my name on the Order Paper and has been grouped with the amendment in the name of the noble Baroness, Lady Finlay.

During the briefing we had with the Bill team and the Ministers, my notes tell me that the first clause is a key change to the new regime, and that it is concerned with the portability of deprivation of liberty. I understand that the noble Baroness's amendment makes sure that Section 4B—on the deprivation of liberty necessary for life-sustaining treatment or vital act—and Schedule AA1 are compatible with the provisions set out in the rest of the Bill and that they do not conflict with a valid decision to refuse care or treatment. The noble Baroness raises some important and substantial issues right at the beginning of the Bill and raises issues of conflicts which will need to be resolved.

Amendment 20 in my name comes from paragraph 15 of proposed new Schedule AA1 in the Law Commission's draft Bill, quoting it exactly. It prevents the responsible body authorising arrangements for the cared-for person to reside in, or receive care or treatment somewhere, if

those arrangements conflict with a valid decision by a donee of a lasting power of attorney or of a deputy appointed by the Court of Protection. As I say, the wording is exactly the same as that in the Law Commission draft Bill.

Under deprivation of liberty, a deputy and attorney may object to any deprivation of liberty and effectively block it, pending an application to the Court of Protection. I can see no obvious reason for excluding this from the Bill. The Government claim that it is already in the main provisions under the original Act—in Section 6(6)—but this is only the case where the basis for the deprivation of liberty is in "best interests". If the basis for DOL is risk to others, that would not necessarily be the case, and so for the avoidance of doubt it is important to include this clause. If we do not, the risk of litigation on this point is probably quite high.

Deputies and donees should be able to refuse a deprivation of liberty, so this amendment seeks to ensure that the views of those donees and deputies, who have been appointed by the cared-for person to make the decisions in their best interests—as was eloquently outlined by the noble Baroness, Lady Finlay—are given appropriate weight with regard to where the cared-for person resides for care and treatment.

I am pleased to say that this amendment and what the noble Baroness, Lady Finlay, said, enjoys widespread support from the organisations who have found the time, even under the pressure we have all been under, to say that they support this. They include Mencap, VoiceAbility, Mind, the National Autistic Society, Liberty, Age UK, Sense and many others. The amendment looks at the clash or overlap between the different regimes that govern this area of law. I must ask why the Government did not adopt the Law Commission formulation. The Minister should be aware that I will return to that theme throughout Committee, because the Government seem to have cherry picked the Law Commission report, and some of the most important safeguards of liberty seem to have been omitted or watered down by the Bill.

Baroness Browning (Con): My Lords, I refer to my interests in the register. I will pick up on two points that have been raised in the amendments, particularly the amendment in the name of the noble Baroness, Lady Finlay.

At Second Reading, I too raised my concern about the status of attorneys with lasting power of attorney, particularly over wellness and health. These are some of the most personal decisions. In some ways, I am more concerned about that than about attorneys who have power over the money. Money always seems a rather black and white matter—it either is or is not a good idea. But there are many shades of grey over health and, in particular, well-being. I should like to link this with decision-making and the other point in the noble Baroness's amendment, about the need for qualified speech and language support to interpret and make sure there is a clear understanding of what "P"'s interests really are.

When you look at certain people with certain disabilities, particularly those with communication disorders—such as autism, learning disabilities and, of course, dementia—it is not always the case that they cannot express a view. But getting to that view—unless it is a real, life-threatening medical emergency—takes quite a long time. First, particularly those with autism and a learning disability, the individual has to be comfortable and familiar with the person asking the questions, however experienced. It is no good sending a stranger in for a five-minute cup of tea and a quick chat and thinking that person will then disclose their innermost feelings. How many of us would?

The point is that getting to that view might often be about something known for many years by someone who has been appointed as an attorney with a lasting power of attorney. I believe the two things are linked in those cases. We know from the Alzheimer's Society that such a lot can be achieved for the quality of life and well-being of people with dementia and Alzheimer's by giving enough time, when asking a question, to allow the person to process the information before they give an answer. Brain function is very different in these people. They need time to process the question they are being asked and to process how they will communicate the answer; it can take quite a long time.

This point was picked up quickly by the Alzheimer's Society which says, for example, on a very simple matter, that when people with Alzheimer's in residential care homes are asked whether they would like tea or coffee and do not immediately reply, they are processing the question and that can take a long time. They might prefer coffee today, but because they had tea yesterday, the answer may be quickly assumed—"I expect you will have tea, you always have tea"—before they can even process the information and the way they will communicate the answer.

How much more complex it is, and how much more time is needed when people are being asked more complicated questions about potentially life-changing decisions. This cannot be left only to someone with speech and language experience, important as that is, and such people need to be experienced. But people with a lasting power of attorney, who might have held an LPA for many years, and who know the individual extremely well, are in a prime position to act as an interpreter when important decisions are being made.

I believe my noble friend is aware of my view on this already. Those of us who served on the original Bill and its pre-legislative scrutiny many years ago know that a lot of thought went into the existing Bill on LPAs. To have one part of a Bill give rights to an individual through their attorney but then to diminish that in another part of the Bill, through amendment, seems not only wrong but seriously, morally wrong. I hope my noble friend will address this point when he replies to this amendment.

Baroness Murphy (CB): My Lords, I have added my name to Amendment 20, tabled by the noble Baroness, Lady Thornton, and I give my strong support to the amendment in the name of the noble Baroness, Lady Finlay. I pay tribute to the good sense that the noble Baroness, Lady Browning, has just brought to our debate.

A theme that will run through our discussions and will come up again when we come to advance decision-making is that we must have more respect for those

[Baroness Murphy]
who have been trusted by an individual to make decisions on their behalf. We must encourage people to make plans and to think about the future, and we must ensure that those who make the very wise decision to appoint a lasting power of attorney are respected. As we have already heard, we do so in other parts of the Bill, and we should not remove that when we come to the question of deprivation of liberty. We must incorporate it in the general scheme of things. It seems absolutely crucial that we respect decisions made by people who have power of attorney and by the court's appointed deputies. I strongly support the amendment.

5 pm

Lord Cashman (Lab): My Lords, I start with an apology, as I have not spoken on the Bill before. I thank, in particular, POhWER, the organisation of which I am a patron, for alerting me to the Bill and to its concerns, as well as the concerns shared by a wide range of groups, including Liberty, Age UK, Mencap and so on.

As other speakers have outlined, it is essential that we get this absolutely right, because we are talking about potential deprivation of liberty. According to those organisations, people with dementia or a learning disability are at risk under the proposed changes. Therefore, I speak in support of Amendment 1, proposed by the noble Baroness, Lady Finlay, and Amendment 20 in the name of my noble friend Lady Thornton. I believe that this amendment would ensure that the views of the donees and deputies already appointed by cared-for persons to make decisions in their best interests were given appropriate weight with regard to where the cared-for person resides for care and treatment.

I will say no more than that because there are experts on this issue in the Chamber. I sit willing to support but more willing to listen and learn.

Baroness Barker (LD): My Lords, I apologise for being slightly late. I was taken by surprise at the swiftness with which we concluded our previous business.

I thank the noble Baroness, Lady Finlay of Llandaff, for many of the points that she made in her speech. It took a lot of work to get the concept of an advance statement on wishes into this legislation, and I, like her, regret that it has not been more widely adopted or accepted, particularly by the medical profession. She will know that when the Select Committee reviewed the legislation, one of the biggest disappointments was the extent to which the Mental Capacity Act had not been understood by the medical profession. She will perhaps remember that when representatives of different parts of the medical profession come to talk to us, they began by saying that in an A&E department it is extremely difficult to work out somebody's advance decision. We knew that when we passed the initial legislation, but that legislation was not meant solely to take its lead from that; it was meant to apply to a whole range of matters just within medicine. It is a shame that the medical profession still relies on a very conservative interpretation of the existing legislation and takes a read-out from emergency situations when it really should not, as there is plenty of time to discuss with the person what is happening and to understand their previously stated wishes and feelings.

I am glad that the noble Baroness has raised this issue. She is right that at the heart of the Bill is a fundamental change from the Mental Capacity Act. There will no longer be a whole series of decision-specific assessments of people who lack capacity, and that is not something that I object to. Over the last few years while this legislation has been in place, we have quite often found people being subjected to unnecessary assessments. It is quite clear that when somebody has a medical assessment for advanced dementia, say, they will not have the capacity to make the same decision, even though they go to live in a different place. I accept that it is possible to make a decision of a lack of capacity and to carry that forward throughout a person's care. What I am not clear about, though—given that people will be subject to fewer assessments, and therefore be less likely to have changes in their conditions brought to light—is the extent to which that will interplay with somebody's statement of advanced wishes. I would rather like it if the Minister, in his response, could talk about how that will work.

I agree with the noble Baroness, Lady Finlay. The safeguards on liberty and safeguarding have been thoroughly confused by many people. That is fundamental. Whether we turn this around from safeguards against deprivation of liberty or safeguarding the liberty of somebody, I do not think that anything I have seen in the Bill has yet addressed that fundamental misunderstanding. In fact, in some cases, it probably compounds it. I want to put that on record as we discuss the many issues the noble Baroness, Lady Finlay, has introduced so well.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, I thank the noble Baroness, Lady Finlay, for her amendment and also the noble Baronesses, Lady Thornton and Lady Murphy, for their amendments. I am delighted that the noble Baronesses were able to make it on time so that we could start on our deliberations of what are clearly very important issues.

The purpose of these amendments is to clarify that a liberty protection safeguard authorisation cannot override a valid decision to refuse care or treatment by the donee of lasting power of attorney or a court-appointed deputy or contained in a valid advance decision to refuse treatment. The comment that the noble Baroness, Lady Finlay, made at the start of the debate, about conflict and avoiding conflict by recognising valid decisions where they have been made, was very important. I hope that all noble Lords know that the intention of the Bill is to enhance the role and agency of those deprived of their liberty and those with an interest in the care and welfare of that cared-for person. That is why this debate on the first grouping of amendments is so important.

This debate gives me the opportunity to clarify and confirm that the Bill does not allow a decision to be made that conflicts with that made by a donee of a lasting power of attorney or a court-approved deputy's valid, best interests decision. I am glad of the opportunity to do that. Section 6(6) of the Mental Capacity Act already provides for this, and the Bill does not change that. Therefore, an authorisation under the liberty

protection safeguards could only be given if it was in accordance with a valid decision—namely, one that is authorised in the lasting power of attorney—by the attorney or deputy.

The Bill also does not change the current position regarding advance decisions to refuse treatment, and those will remain an important part of care planning. I absolutely recognise the important role that the noble Baroness, Lady Barker, and others in this House played in introducing that. I assure all noble Lords that there is neither the intention nor action in the Bill to water down the power and validity of those in any way. If a person has made a valid advance decision to refuse medical treatment, that treatment cannot be given and it would not therefore be possible to deprive someone of liberty in order to provide it. We intend to give further explanation of the legal position in the code of practice. I hope that that answers some of the key issues raised by the noble Baronesses, Lady Finlay, Lady Thornton and Lady Murphy, in their comments.

Those comments were echoed by my noble friend Lady Browning, and she is quite right to discuss the importance of support for those with communication difficulties so that they are able to enunciate the kinds of decisions and indications of future treatment that would adhere to their own wishes. We will return to this issue later in Committee, particularly when we get on to the issue of IMCAs—the advocates—but she is right to reiterate the point made in the proposed amendments that those acting on behalf of the cared-for person, whether they are the family, have an interest in care or have been formally appointed to do so, are, in the end, responsible for taking those decisions on behalf of that person, and their decisions should be respected, as the noble Lord, Lord Cashman, pointed out.

The fundamental question that underpins these amendments is: why is the Bill not explicit on these issues when, as the noble Baroness, Lady Thornton, pointed out, the Law Commission's Bill is? Because there is no change in the current position, there is therefore no reason to outline what is already the case. Nothing is changed about what is already in the Act by what is being proposed through this Bill. Therefore, there is no need to reiterate what is already the case and will not be changed. I hope through the course of this debate that we have aired this issue. It is one that the Government agree with and, in the way that the Bill is structured, I can confirm to the Committee that there is no change in the status quo about the validity of those decisions.

With those reassurances, I hope that the noble Baroness is prepared to withdraw her amendment. I recognise that there is great concern, not least among many of the campaign groups, service providers, commissioners and others who are implementing these rules and laws every day, and they need to know that there is consistency. As we move between now and Report, I am more than happy to meet with noble lords and others to discuss these issues and make sure that we can give every reassurance so that they can be sure that the law as it stands today has not changed and will not change as a consequence of this Bill.

Baroness Finlay of Llandaff: My Lords, I am most grateful to the Minister for his reassurance, which is quite clear. There can be no doubt that the views of the holder of the lasting power of attorney or the court-appointed deputy must be taken into account and respected. Given that the principle behind this Bill is the importance of good care planning, I am glad to have that assurance. Of course, it is the person who has lasting power of attorney who will be in a good position to oversee the ongoing care of the person to detect whether things have improved or got worse and whether some restrictions could be lifted and things changed.

I can provide a word of reassurance to the noble Baroness, Lady Barker, and I hope that it is not misplaced. I have challenged the deans of medical schools, with my forum chairmanship hat on, on two occasions now. I have also rather sneakily gone in to different clinical consultations semi-incognito—it is difficult to be completely incognito—and I have been impressed by the changes that I have seen in the last couple of years, particularly in care of the elderly settings where there was respect for the need to empower someone's decision-making. I hope that, if things were revisited, they would now see a difference.

We talk a lot about liberty protection safeguards. With the confusion between safeguarding and deprivation of liberty, I wonder whether that is the right word and whether we should be talking about "liberty protection assessments" or something else. I worry when we look at the domestic setting that safeguarding where there is a problem and the role of a liberty protection safeguard—which is to enhance the living of the person to live as well as they can within the restrictions of whatever has happened to them—more than overlap. They will always overlap a little, but they are becoming a little muddled in the system.

Having said all that, I beg leave to withdraw the amendment.

Amendment 1 withdrawn.

5.15 pm

Debate on whether Clause 1 should stand part of the Bill.

Lord Hunt of Kings Heath (Lab): My Lords, I was not able to be present at the Second Reading and I have recently been apprised of concerns by the Residents & Relatives Association about care home residents without mental capacity who, they believe, are at risk of being let down by some of the proposed changes in the Bill. At Second Reading, the noble Baroness, Lady Tyler, mentioned that the timing of the Bill had taken many by surprise and added to that the rather pick-and-mix approach of taking some aspects of the Law Commission proposals but not others, which means that extensive scrutiny is well deserved. Unfortunately, the scheduling of the first day of Committee so soon after we came back means that many of the briefings from key stakeholders have come too late and we have not been able to translate them into amendments. So I thought it might be useful if I used a debate on the first clause to discuss some of these issues.

[LORD HUNT OF KINGS HEATH]

In particular, let me make it clear that I do not disagree with the aim of the Bill. I support its general intent, and therefore the aims of Clause 1, but there are some real concerns, particularly with the Government's decision to depart from the Law Commission proposals regarding the role of care home managers. There are some real concerns here: first, the conflation of care planning with significant deprivation-of-liberty decisions; secondly, the burden and risk being shifted to providers; thirdly, the inherent conflict of interest being placed on managers and providers in the design of the new system; and fourthly—this came up at Second Reading—the capacity and capability of the sector to implement the proposals.

These concerns emanate from the decision to move responsibility to form the new assessments from local authorities to the care provider. This means that, in effect, care managers will become responsible for organising and conducting the assessments necessary for the liberty protection safeguards, when they are responsible for that person's care. The Department of Health's argument is that all it is doing is taking the Law Commission's proposition that care planning should be at the heart of the new model, but the Law Commission did not say that these assessments should be done by care managers. In any case, if we are talking about a preventative approach, and if the aim is for assessments to take place prior to admission, which I think it is, one has to ask how it can possibly be appropriate for the care home manager to do that job.

The reality is that care home managers will have the responsibility to make crucial decisions about restricting a resident's freedom that were previously made by independent people. The assumption seems to be that the resident's best interests will generally coalesce with that of the provider, but we know from experience that that is not necessarily so. The Relatives & Residents Association, which has a helpline that receives lots of calls from anxious relatives and friends, points out that currently, families can be in conflict with the care home when the resident and their next of kin or lasting power of attorney may wish to move elsewhere, about who may or may not visit, and about whom they may or may not wish to see. This sometimes results in relatives or friends being restricted or banned, or residents being given notice to quit by the care provider.

These examples alone ought to give rise to concerns about what could be described as draconian powers now being given to care home managers. The responsible body makes its decision having regard to the report by the care manager and supporting evidence, but there is no requirement that I can see to have regard to other evidence. Although the responsible body must be satisfied that the care manager has been through the process in the Bill, the impact assessment suggests that this will be merely a desktop exercise. I would be glad if the Minister could confirm that, or say just what it is that the local authority can undertake. At the moment, on the face of it there is a massive conflict of interest with no external checks if the manager reports that the person is not objecting. That would, for instance, open the door to collusive relationships between the home and relatives.

There is then the question of training, which was raised at Second Reading by a number of noble Lords. We have already heard that there were problems with people in the field understanding the requirements of the existing legislation. What is now being put forward is, in my view, in many ways a more demanding and wide-ranging process, certainly in the care sector. Despite the statement in the Government's impact assessment that they have engaged with service providers, it is noticeable from the briefings we have received in the past two days from many care providers that they too are very concerned about the responsibilities being placed upon them. The consultation seems to have been selective, in that the people who were consulted do not appear to speak on behalf of the sector. Again, it would be useful to nail this one as we go through our debates.

The impact assessment assumes a zero cost to homes and that half a day's training will suffice. Surely the Government cannot be serious about that. Are they really saying that these new responsibilities can simply be subsumed into the everyday business of care homes at the moment? That surely gives the lie—the concern is that the deprivation of liberty in relation to people covered by this amendment Bill is not being taken seriously enough.

Over the weekend I read a briefing from a national group of regional deprivation of liberty safeguard leads, who should know a thing or two about this. They point out that, as we know, the provisions relating care homes were never part of the original consultation, and that at no point have local authorities had an opportunity to road test how taking on such a significant assessment role would work in care homes. They say that this is all the more important because the Bill leaves the detainer determining whether the conditions for detention are met, and again, this potentially creates a conflict of interest and risks a return to the state of arbitrary detention.

In summary, it is not appropriate to give care home managers these new and inappropriate responsibilities for vulnerable and often isolated residents for the following reasons. First, they clearly require the care home manager all too often to be judge and jury about decisions in which they were involved, and in which the viability of whose business may depend on income received from detained patients. Secondly, the state of the sector surely gives rise to concern. I know that there are some fantastic care homes, but one in five has no registered manager in post, despite this being a mandatory requirement, while turnover is estimated to be a massive 27%—and they need only half a day's training. That is simply not believable.

I question whether care managers have the background, time or training to carry out this onerous role. I also question why care home residents, who are surely part of the community, are being treated differently from peers living in their own homes who may be equally vulnerable. This is worth a more general debate, although I recognise that there are amendments to come. However, the Government need to think again and at least explain in rather more coherent terms why they think it is reasonable for care home managers to carry responsibilities which have built into them clear conflicts of interest.

Baroness Jolly (LD): My Lords, I will resist the temptation to rerun Second Reading, but I thank all the organisations which have provided us with informative briefings as well as all the individuals, academics and carers who have done so—you all know who you are.

This rather ugly Gorgon of a Bill matters. It matters to those who are vulnerable and will unknowingly place their future in its hands. It matters to diligent professionals from both the NHS and care services. They do not know it, but it matters to the general population, too—many will become carers one day.

I wish someone had had the courage to tear it up and write a Bill that was clear, compassionate and contemporary—but they did not. Because we care we will spend the next few days in Committee and beyond, trying to make it fit for purpose. The noble Lord, Lord Hunt of Kings Heath, has given us the briefing around which we shape this debate on Clause 1 stand part and for which I thank the Relatives & Residents Association. It covers the role of the care manager, the centrality of the cared-for person and their views, best interests and advanced wishes; an understanding of what deprivation of liberty is, access to information and, indeed, cost.

It is worth mentioning that there are amendments from all over the House that cover each of these areas. Like others, I am concerned about the role of the care manager as assessor. Over the last few years I have met many kind, efficient care managers, both professionally and in my role as a carer. As professionals, they run hotel services, ensure that care needs are met and rosters are filled and deal with people who lack capacity with compassion. But experts in mental capacity they are not and I am concerned that they are given such a key role in this Bill. As chair of a not-for-profit organisation that cares for people with learning disabilities in residential settings, I know how hard it is to do this on the money that local authorities give us.

An efficient home is a full home. The person who determines whether someone should enter that setting or go somewhere else should, under no circumstances, be the manager. The conflicts of interest, no matter what checks and balances are in place, will always be there and that is the same for the private sector, not-for-profit and even, where it still exists—and I believe it does in parts—the public sector. Training and awareness should minimise this but we must be on our guard.

Everyone accepts that the 2005 Act has become not really fit for purpose and that this is a patching exercise. Everyone accepts that DoLS has run its course. Many believe that what we are trying to amend is drafted to save costs and that goes back to the briefing that this debate is based on—people live longer, care costs increase and these processes are not cheap. Can the Minister confirm that these amendments are all drafted to be the most effective way to deliver a better service and not as a cost-cutting exercise?

The noble Lord, Lord Hunt of Kings Heath, mentioned consultation, which is something that we on these Benches are concerned about. My understanding is that consultation did go on but it was with individuals grouped together—they were like focus groups of care home managers, social workers and so on. There was no consultation of the organisations, the umbrella bodies. I phoned many organisations before putting my thoughts together and tabling my amendments. All of them came back to say that they are going to see the department this week or next week but that they have not spoken yet. I think that is disappointing.

Much as there might be a temptation to scupper this Bill by supporting Clause 1 stand part, I know that it is for now the only alternative. I will do that in the hope that the Minister tells his right honourable friend the Secretary of State for Health and Social Care that it is barely good enough and that future patching of legislation is not acceptable. The people we are discussing really deserve better.

Baroness Murphy: My Lords, I support the noble Lord, Lord Hunt, in his endeavour to raise this important issue about care homes. I know we will return to it. This is a very good example of where I had not really thought about the twin-track approach to raising the safeguarding issue. I understand completely how this came about as an attempt to try to improve on the monstrous bureaucracy of DoLS. This is a very good example of that, to which I think the noble Baroness, Lady Jolly, alluded. We have a monstrous Bill at the moment. I remember discussions at the Law Commission with the Royal College of Psychiatrists as to how we might make it more streamlined and reduce costs, which in my view is pretty crucial if we are to target the right people. That led to the production of a process to involve care home managers which, on the face of it, looked as though it would cut bureaucracy.

5.30 pm

The noble Lord, Lord Hunt, is very polite about care home managers. I am quite happy to be less polite. Of course there are some good, even excellent, ones. However, the notion that the majority who flit through the system on short-term contracts and training—many of whom come from outside the European Union—can, in half a day, master the Mental Capacity Act, be trained through this process to make a proper assessment and identify people within the meaning of the Act is completely ludicrous. It will not be possible. The costs of that sort of training programme and of rejigging the sort of people who are being appointed to roles to take account of this is quite outwith the scope that the Bill is likely to achieve. It is worth thinking long and hard about both the conflicts of interest and who is being appointed to make these extraordinarily difficult decisions. I support the noble Lord, Lord Hunt. I doubt whether we should stop the debate at this point but we will return to this important issue in other amendments.

Lord Touhig (Lab): My Lords, I thank the Minister and his team for their engagement with Members across the House, which has been very helpful. I strongly support the attempt, on the initiative of my noble friend Lord Hunt, to have this clause stand debate.

In the past day or so, I have spent some time looking at advertisements for care home staff and managers. They vary greatly; there is no standard at

[LORD TOUHIG]
all. One advert for the role of a care home manager said, "You will assume all aspects of responsibility for your care home and have exceptional man management skills". A minimum of two years' experience of managing a care home, with no other qualifications, was the only candidate requirement. Another advert said that there was an opportunity for someone seeking to develop their career who must have a solid residential care background on applying. It said that applicants should have a full working knowledge of CQC requirements, possess leadership and organisational skills, and be either qualified in or working towards an NVQ level 5 in social care management, a QCF 5 or equivalent. It took more of an interest in qualifications and was a bit hit-and-miss on whether the person should be fully trained. It said that candidates should have three years' experience of social care and it would be preferable if they had some previous management experience.

A third advert offered an exciting opportunity for a care home manager with a view to becoming a registered manager if the applicant was not one already. The skills and qualifications needed were an NVQ level 5 in leadership and management, or to be working towards that. Again, that does not mean being qualified with all the necessary education and training. A fourth advertisement sought candidates with proven home management experience, strong marketing, commercial and business acumen and a clear and thorough knowledge of CQC standards. Your Lordships should note that possessing knowledge of CQC standards came third after marketing, commercial and business acumen.

My point is that this demonstrates that there is no agreed national standard for care home manager training. With this Bill, we are proposing to give them a huge new responsibility that will affect the quality of life of many vulnerable people in our society. This really needs to be revisited. We are taking a big risk with people who have no one else to defend them if we do not start defending them here.

Baroness Finlay of Llandaff: My Lords, to intervene fairly briefly, it is important that we remember that the current DoLS system has effectively fallen over. We have 108,000 people currently waiting to be assessed, so we have to do something. We cannot leave it running so there is an urgency to come up with some way forward. I remind the Committee that, whenever somebody is in a place of care such as a care home, the deprivation of liberty safeguards application—form 1—is a request for standard authorisation and has to be completed and sent in. That form asks about the purpose of the standard authorisation, and for a relevant care plan to be attached. It also asks why less restrictive options are not possible, and other things. So a degree of assessment is already going on at the care home and these forms are sent in. They are then sent to somebody to authorise them.

I worry that, in some of the briefings that we have had, it looks as though the care home manager will be able to authorise in totality, whereas, as I understand it—the Minister may correct me if I have this wrong—the care home manager will still be required to have the responsible body authorise. That responsible body will be able to look—and one would want them to look—at objections that may come forward from somebody. It is to be hoped they will go and visit if they feel there is a discrepancy between the care plan submitted and the original care and support plan that came from the local authority, which may have been involved in the pre-placement assessment that went on.

The idea behind these new approvals is that there is portability: the person may reside in one place, then be moved to hospital, go to outpatients, spend time in hospital and then come back to the care home. Within that portability, however, there is a requirement to review, if the circumstances change. We will come later to amendments that look at discrepancy between the care plan and the care and support plan as submitted. In other words, these are things that should trigger red flags in the mind of the authorising body, rather than the authorising body just being a rubber-stamping exercise, which is, I think, a misunderstanding that there may have been. If it is a rubber-stamping exercise, there are all kinds of dangers in that. Somehow, we have to filter out those people who really need an in-depth assessment and review from those people where the current processes are just burdensome, time-consuming and not contributing to improving their care. That filtering is really difficult. I offer that in the debate at this stage because it is worth looking at these forms, which I hope will be improved because there is not that much room to write on them.

Baroness Tyler of Enfield (LD): My Lords, I make a brief intervention, primarily to underline the importance of two points that the noble Lord, Lord Hunt, made when introducing his amendment. Like my noble friend Lady Jolly, I fear we have no alternative other than to carry on and scrutinise this Bill. The reasons for doing something have just been set out very clearly by the noble Baroness, Lady Finlay, but I retain two really key concerns which I raised at Second Reading.

The first—referred to by the noble Lord, Lord Hunt—is that of timing and understanding the relationship with the review of the Mental Health Act. I understand that it is due in the autumn—I am not quite sure when—together with amendments to the Mental Capacity Act, given that both Acts relate to non-consensual care and treatment. It seems that the overlap between the two systems is one of the reasons why the current system is so complicated, and why so many staff struggle with it. Frankly, it is why I struggle with it so much. There must be real concerns that changes to address problems under one system will have unintended consequences for the other. Clarity is needed from the Government over when patients should be subject to one Act over the other, so that, in the words of Sir Simon Wessely, chair of the Mental Health Act review,

"arguing over the framework does not get in the way of delivering the care that the person needs".

I could go on at length—I will not, your Lordships will be pleased to hear. I have just one more thought on this. In addition to the need for clarity on when the Mental Capacity Act or the Mental Health Act should be used, it is really important that patients do not find that they are deprived of their liberty by both Acts at the same time. There are examples of this happening, particularly when a patient has both a mental disorder and an unrelated physical disorder.

That is my first point. My second point, which was made very cogently by the noble Lord, Lord Hunt, is about the consultation that is taking place with the sector. Like everyone else, I have received a large number of briefings in the past few days. Frankly, it has been difficult to take them all on board. I have done my best. I was particularly concerned by a survey that was published only a couple of days ago by an organisation called Edge Training. I do not know it personally, I do not know exactly what else it does, but I do know that it was a survey of 900 people and nearly half the respondents were best-interests assessors, with the rest being primarily social workers, health professionals and independent mental capacity advocates. I will not go through what they said, other than to say that there were really very high levels of concern—80% this and 90% that—particularly in relation to the new roles being placed on care home managers, the potential conflicts of interest, plans to charge care home managers with deciding whether it is in a resident's best interests to have an advocate if they lack capacity to request one, and the lack of a specific requirement to consult the person themselves about a proposed deprivation of their liberty.

My conclusion from all this is that the sort of consultation that should have gone on with the sector for a change such as this, which really has to work—this is not political, it is about something that has to work on the ground and people who do this have to understand it and feel that it does work—cannot have happened to the extent to which I think it should have happened, and that has real importance for the pace at which this can be taken forward and the consultation and implementation timescale.

Baroness Barker: My Lords, I just want to share the thoughts that I had over the summer, when we had a very long time to look at this proposal. I have been wrapping my head in wet towels looking at this legislation, trying to work out what it is all about, and to answer a key question: why this Bill now? I am still not happy that I have the right answer.

The noble Baroness, Lady Murphy, referred to the Mental Capacity Act as a "monstrous" Act—the DoLS part of it. But let us be fair, when the Select Committee did its review, we found that the Act was held in quite high regard; the problem with it was that it was not properly understood and that had caused problems with its implementation. It is true that we said in the Select Committee report that there needed to be an absolute root and branch review of DoLS, but we prefaced all our recommendations for the review of the Act on one other premise, which has been ignored by the Government. We said that one of the reasons that we saw for the failure of the Act to be properly implemented was that there was no central ownership of the Act and no single body responsible for its implementation. The Government have chosen to ignore that. Instead, they have shoved responsibility for the MCA on to the CQC, where it does not get specialist attention. There is nothing like the attention paid to the Mental Capacity Act that there is to the mental health legislation, and yet if it is not properly implemented, people can be deprived of their liberty.

5.45 pm

What we asked for in the review of DoLS was that what was brought before us was fit for purpose and compatible with the style and ethos of the rest of the Mental Capacity Act. In his first response to the noble Baroness, Lady Finlay, the Minister talked about this being an amending Bill. I accept that part of the difficulty in understanding the Bill is that it is an amending Bill. Frankly, it is very difficult to see which parts of the original Mental Capacity Act remain in force and which do not. I put it to the Minister that what has been produced is not what was recommended by the Select Committee. That is important because the chief failure of DoLS is that they are not properly understood by practitioners. Unless we have greater clarity than this Bill affords, we are simply going to compound existing problems. I am sure that that is going to happen if the Government continue to make the mistake that was made before, which was to rely heavily on the code of practice rather than putting important facts in the Bill.

Others have talked about consultation. Given that we had the Select Committee review and the experience of people, such as Mark Neary who tried to stick up for his son, it is regrettable that we do not have a Bill that truly reflects a lot of what came out of that.

One of the key problems that we will talk about in greater depth is that the replacement of things such as the best interests assessment—as I understand it, although there is some substitution of that—with the proposal in the Bill that the decision should be proportionate and reasonable is not anchored anywhere. It is not explained in the legislation and I do not see how professionals seeking to implement it are going to be any clearer than they would be under DoLS. I accept that as a result of the Cheshire West decision referrals for DoLS authorisations have gone up to a point which is not possible to handle. What is not clear and is critical—this is the point made by the noble Baroness, Lady Finlay—is who decides whether somebody is in need of active support and safeguarding and who decides whether the conditions under which somebody is living do not require any further review or intervention. That is a fundamental weakness in this Bill.

The Bill makes sense in terms of cost-cutting, but like many other Members of your Lordships' House I do not understand why many of the safeguards that the Law Society proposed needed to be retained have not been retained. If the Minister can explain that, and the strength of the connection back to the principles of the Mental Capacity Act, then perhaps his job in the next few days might be a good deal easier than it will otherwise be.

Baroness Thornton: I am grateful to my noble friend for tabling this clause stand part. It was necessary for a number of reasons. I am also grateful for the contributions that have been made because they bear out the reason why it was important to put down this debate. The first reason has been alluded to by many noble Lords and is the very unsatisfactory scheduling of the Bill. It means that noble Lords and stakeholders have not had sufficient time to consider the Bill and all its amendments for today. The vast majority were put

[Baroness Thornton]
down last week, and the Marshalled List became available yesterday. It was difficult for anybody to see whether the tabled amendments probed the Bill sufficiently and made all the improvements that noble Lords deemed worthy of consideration.

There is a lesson here about scheduling: if you have the Second Reading immediately before a recess, a sufficient number of sitting days must be given to allow noble Lords to table amendments and have the necessary discussions with stakeholders and each other. Getting almost 100 amendments tabled from a standing start when the House rose is pretty good going, and I congratulate noble Lords across the House for that. Some of us were emailing each other and the Public Bill Office from the poolside or the middle of fields during the Recess. However, people are playing catch-up, which does not bode well for a thorough-going scrutiny.

I congratulate the Bill team for managing to talk to noble Lords during the Recess, but in some ways they must have had an unsatisfactory time as well because we did not have the full list of amendments until Friday evening. As many noble Lords have said—it is clear from my mailbox too—in the last two or three days stakeholders are also playing catch-up and are expressing great concern about some aspects of the Bill. In a way, the frustration that that has raised is why my noble friend has tabled his amendment to oppose the clause stand part. That allows us not only to mention things that are not covered in amendments but to raise these points.

From my point of view, and from these Benches, depending on what the Minister says in his reply, we might need to raise issues of scheduling and time to consider some of the serious implications of the Bill, and possibly table amendments at the next stage that address some of the concerns raised in this debate—particularly the issue of care home managers. Notwithstanding the issues raised by the noble Baroness, Lady Finlay—she may well be right about people understanding the processes in the Bill—that does not alter the fact that we do not know who will authorise or whether it will work.

This links to my second point, which is about consultation. I would like to know where the care home manager's role in this came from. It happened between the Law Commission draft Bill and this Bill. Suddenly, the care home manager is it, and I think that that might probably have been a surprise for some people—certainly for the noble Baroness, who did not hold back in her views about care home managers. On the consultation issue, it is clear from the Law Commission report that it did extensive consultation, leading to the creation of its draft Bill. There were something like 83 nationwide events and 583 written responses from interested persons and organisations. Some of those events were very significant indeed, with many stakeholders. Where did the issue of the role of care home managers come from? I should like the Minister to share that with us, as he must be aware of the level of disquiet about the expectations and the responsibilities that would have to be assumed by care home managers for the assessment required to authorise the deprivation of a person's liberty when the person lives in their care home.

I also want to know the view of the CQC on this proposal. What is the view of the care providers, the ADASS and the LGA? They are all key stakeholders in that decision. I should be grateful to have the Minister's take on the view of those important organisations on this proposal. I could not find the issue among the material circulated by the Minister or, indeed, in the letter he sent, which I found useful and informative.

My noble friend has done the House a favour in raising these issues and allowing a large number of questions to be asked at this stage, which might inform the next day's discussion in Committee, the next stage of the Bill and perhaps also the discussions that we will need to have in the coming weeks.

Lord O'Shaughnessy: I start by agreeing with the noble Lord, Lord Hunt of Kings Heath, that of course extensive scrutiny is deserved for legislation of this kind, which we have achieved both at Second Reading and, for those who could not be there, in the second Second Reading debate that we have just had. That scrutiny is obviously reflected in the 100 or so amendments that have been tabled. It is worth using this opportunity, as the noble Baroness, Lady Finlay, did to some extent, to remind ourselves why we are here pursuing this legislation.

The noble Baroness, Lady Barker, asked why now? Well, in 2014, the House identified that the DoLS system was not fit for purpose and the Government tasked the Law Commission with completing its report into DoLS. It recommended that the current system needed to be replaced as a matter of pressing urgency. I will come on to the point about the discrepancies between the two approaches but, nevertheless, that was its view. The Government stated that we would do this as soon as parliamentary time allowed—part of the issue around scheduling is indeed "when parliamentary time allows". It is important to use opportunities when they arise to do important things, even if it means that people have to work during the summer or holidays. I realise that that is not always ideal, but the scheduling, for example, of Committee over a long period—and we will then need to think about Report—should give lots more time for these kinds of discussion. I reassure noble Lords that we want to have and are open to those discussions.

The model that we have created is based on that developed by the Law Commission and, like the Law Commission, we want to increase the protection of some of the most vulnerable people in society, to protect their rights, not just in theory but in practice, and to improve access to justice. I confirm to noble Lords that we have worked and continue to work with a range of stakeholders to build on the Law Commission's model and to produce a streamlined system. "Streamlined" is an important way of describing this, because the noble Baronesses, Lady Jolly, Lady Barker and Lady Murphy, talked about cost-cutting. This is in fact about creating a system that has the effect that we want with the budget that it is given; that is the point. As we know from the backlog, lots of people are being denied access to justice because of a system that is disproportionate in its application. That is what we

are trying to solve, so that those cases that really do deserve the highest level of scrutiny are able to receive it. That really is at the heart of what we are trying to do. I emphasise that Nicholas Paines, the Law Commissioner who led this review, said that this Bill,

"will go a long way towards addressing the flaws of the current system and better protect the most vulnerable in our society".

I would not claim at this point in the proceedings that it is perfect. I am sure that we can improve it, but it is important that we are doing it, that we are doing it now and that it has support from the Law Commission itself.

More recently, the *Independent Review of the Mental Health Act: Interim Report*, which was referenced by the noble Baroness, Lady Barker, and led by Simon Wessely, stressed the need for an,

"appropriate calibration between resources spent on delivery of care and those spent on safeguards surrounding the delivery of that care".

That is what we are trying to achieve through this process. I reassure the noble Baroness, Lady Tyler, who was quite right to talk about the interaction and interface between the two Acts and how they operate that, while we are taking this opportunity to act now while we can, if there are future recommendations that mean there have to be further changes, we would be open to those. This will not be the last opportunity to make sure that the interface between the two Acts, once the reviews have been completed, could be amended, if that is what is necessary. It is important that we have acted now and that those 108,000 people currently in the backlog will have swifter access to justice—that is the main argument. That is my Second Reading speech summarised and repeated.

From what the noble Lord, Lord Hunt, has said, I do not think that he wants to remove this clause, not least because it would remove the new system while not stopping the repeal of the current system, and nobody wants that. At the heart of what the noble Lord spoke about is this focus on care homes, which I think is worth dwelling on. The system has been carefully designed to ensure that there is independence and proper accountability. Care homes will not authorise any applications. That will fall to a wholly independent responsible body—the local authority.

6 pm

The noble Baroness, Lady Thornton, asked where the care home role came from. I think it was described by the noble Baroness, Lady Finlay. Care home managers are already required to make applications and to consider capacity and restriction. Effectively, the new model recognises what they are doing but also allows for a further escalation to put to a responsible body the approved mental capacity professional, where required. That is not the case if it is already required. This is not an entirely new function that has been developed—rather, it is recognising actions that are already taking place and making sure that they are recognised while retaining proper opportunity for escalation as well as independent accountability.

An allied issue, about which the noble Baronesses, Lady Tyler and Lady Murphy, and the noble Lord, Lord Touhig, asked, is training. That is a really good question. The noble Lord, Lord Hunt, asked about this as well, and about the impact assessment. That is an ongoing cost, but we also know that there is a need for training ahead of implementation, which would be an additional requirement. We intend to work with the sector in the coming months to make sure that the support required for implementation, including training, is there. I hope that, in the course of deliberations on this Bill, we will be able to set out a bit more detail to noble Lords of our intentions in this area. I agree that there is no point in creating a new system without preparing those who will be implementing the system to do so properly. If we do not do that, we will clearly risk repeating the failures that we have had historically.

In a further group, we will have the opportunity to discuss the reasons for doing this, as well as the role of the care homes, the arguments and the reasons, the responsibilities, the authorisations, regulatory functions and so on, which is why I have not touched on them here. On that basis, I do not think we should be stopping what we are doing. We have a responsibility to make sure we proceed to fix what is clearly a faulty system to the best of our ability so that those people who are currently being denied justice will not be. On that basis, I hope that the noble Lord, Lord Hunt, will withdraw his opposition to Clause 1 standing part.

Lord Hunt of Kings Heath: I am grateful to the Minister, although I am reeling from the shock that he thinks that I called for a second Second Reading debate to take place on a Clause 1 stand part discussion.

I of course agree that the current system is not fit for purpose. I agree with the Minister and with the noble Baroness, Lady Finlay, and other noble Lords. I agree with the need for a streamlined system, but it has to be the right system. I say to the noble Baroness that one of the briefings that I received was from 39 Essex Chambers, which is pretty expert in this area. It was a very interesting piece by Victoria Butler-Cole which sets out seven changes to the Mental Capacity (Amendment) Bill that the courts are likely to make unless Parliament gets there first.

We have to be very careful that in wishing to support the Government to get a streamlined process through we do not build in mistakes and errors that, rather like the Cheshire West decision, will lead to the court, and then to further legislation. In her piece, Victoria Butler-Cole says that the Court of Protection has a record of rejecting capacity assessments conducted by consultant psychiatrists with years of training in mental health and specifically in relation to the MCA. The Bill permits care home managers to assess capacity in this context. There is no way that will withstand scrutiny by the court, and there are likely to be even more cases in which assessments of incapacity are overturned as care home managers with little or no relevant training are required to carry out what can be a complex task. That seems to me to be the problem.

I know that this has to be signed off by the local authority. The impact assessment makes it clear that in the vast majority of cases that will be a desktop exercise. That does not fill me with confidence that these assessments will be scrutinised effectively by local authorities which themselves are very hard pressed.

[Lord Hunt of Kings Heath]
That is why I think that, when it comes to the detailed amendments, this is a very important part of this legislation. We need to be very careful to ensure that this is going to work effectively.

On training, the noble Lord has made some very welcome comments, but I refer to the fact that there is an annual turnover of 27% in this sector among the people who are going to have to do this work. I say to the noble Baroness, Lady Murphy, that I was trying to be polite. This is a very vulnerable sector, with low-paid people who have low qualifications being asked to deal with issues to do with the fundamental liberty of people in this country.

My gut feeling is that it will not do. This cannot be left to care managers. The Government will have to look again at the Law Commission's assumption that local authorities would do the work. I of course do not wish to prevent Clause 1 standing part of the Bill.

Baroness Barker: My Lords, I hope that it is permissible for me to rise again. For the avoidance of doubt, will the Minister confirm that I understood him correctly? Is he saying that the role of the care home manager has not changed? I understand that, under the existing law, a care home manager may request that somebody's capacity be assessed, but that assessment is not usually done by them. That assessment is done by somebody else. Is he saying that that is not going to change? I am sorry, but I think it very important that noble Lords understand what the Minister says.

Baroness Thornton: I understood that the Minister said "escalate", which means that something changes. Perhaps when he is answering the question of the noble Baroness, Lady Barker, he could also explain the word "escalate".

The Government may need to think about carrying out some form of assessment of the appropriateness and suitability of care home managers to undertake this task. If that has not been done, perhaps it needs to be done in the next month or so.

Lord O'Shaughnessy: In answer to the noble Baroness's question, the point that I was making is not that the role of the care home manager will not change but that they are not being asked to do something of which they have absolutely no experience or responsibility for at the moment. As the noble Baroness, Lady Finlay, pointed out, care home managers are already required to make applications and to consider capacity and restrictions, so they already have a role. The distinction is that, as the Bill sets out, the assessments can be made within the care home itself—of course, not by a person with direct responsibility for care. That is one of the issues, of avoiding conflict of interest. In all cases, those will be authorised by the local authority. If there is any reason, through that authorisation, for concern—for example, of conflicting views between the person cared for and their family—then the AMCP, the mental capacity professional, will have the opportunity to decide on the right course of action. That is what I meant by escalate—not that there is a choice of whether to escalate authorisation to the responsible body, as that will happen in all cases, but that there is a further opportunity for consideration by an AMCP if there is any sense of this happening. We will explore in more detail in future groups whether there is a reason for further investigation, including, of course, speaking to the cared-for person, their family and others.

Lord Hunt of Kings Heath: With regard to what is going to be a desktop exercise, the question then arises as to how the local authority will know that there are concerns. On conflicts of interest, it seems that the job of the care home manager is to make sure that their home is filled. There is a fundamentally wrong issue here. The initial assessment will be done by someone with a financial interest in its outcome. It is wrong.

Lord O'Shaughnessy: Perhaps I may say that to some extent we are getting ahead of ourselves, because we will explore these issues in further amendments. There is clearly already a system in place, which will continue and will be enhanced, to make sure—whether it is through family members and others with an interest, or, as we have discussed before, through those with a lasting power of attorney—that those who have an advocate working for them are able to register their concerns, objections or whatever it is through the process. So it is not simply the case that the care home manager would be able to wrap up the entire discussion and not let any other point of view be heard—quite the opposite. And, as I said, we will discuss that in further detail.

On training issues, addressing the second point talked about by the noble Baroness, Lady Thornton, she is quite right. That is precisely why I said that it is important for us, the Government, to explain, on the basis of consultation with the sector, what will be required to make sure that those who will have these extra responsibilities will be able to exercise them properly. We will discuss that outside this Chamber. I know that noble Lords want to make sure that, where there is a proposed change, even if they still require some reassurance about the benefits of such a change, it will be implemented properly. Clearly, that has big implications for training, capacity and so on. So we will take that away and make sure that we are able to provide more detail on it.

Clause 1 agreed.

Schedule 1: Schedule to be inserted as Schedule AA1 to the Mental Capacity Act 2005

Amendment 2

Moved by ***Baroness Thornton***

2: Schedule 1, page 6, line 2, leave out "18" and insert "16"

Baroness Thornton: My Lords, we are moving to the issue of changing "18" to "16" and applying the provisions of the Bill to 16 year-olds. I have four points to make.

First, this amendment is supported by the LGA and the ADASS. Secondly, the GMC is concerned that, given that the Mental Capacity Act applies to people aged 16-plus, excluding those below 18 from

the liberty protection safeguards in the Bill may leave an important gap in the liberty safeguards. Thirdly, the Royal College of Psychiatrists has pointed out that case law has established that the parents of children under 16 may give consent to what would otherwise constitute a deprivation of a child's liberty where the matter falls within the "zone of parental responsibility", but it has been held that a parent cannot give equivalent consent for a 16 to 17 year-old. It therefore argues that the Bill should be extended to 16 to 17 year-olds to provide them with better safeguards, as they are not served well at present.

Finally, the Law Commission looked at this in some detail. It was part of its remit from the Government that it should consider,

"the position of young people aged 16 and 17 (but not children aged 15 or younger). Most of the Mental Capacity Act applies to people aged 16 and over. However, the DoLS only apply to adults aged 18 and over. There are several legal provisions that permit the deprivation of liberty of children … Under section 25 of the Children Act 1989, a child who is being looked after by a local authority can be placed or kept in secure accommodation in England, provided for the purpose of restricting liberty. The Mental Health Act can be used to detain a person of any age suffering from mental disorder for the provision of medical treatment. Beyond these cases, the deprivation of liberty of a young person can be authorised by the Family Court or Family Division of the High Court under their respective inherent jurisdictions or by the Court of Protection".

There is of course a complicating factor: namely, that,

"the Strasbourg court has recognised the right of parents—in certain cases—to consent to restrictions placed on their child which would otherwise amount to a deprivation of liberty".

That refers to the Birmingham case, which noble Lords may well be familiar with.

6.15 pm

The consultation that the Law Commission conducted was thorough, and it said that the majority of respondents to the consultation supported the proposal to include 16 and 17 year-olds in the new scheme. Most organisations argued that this would,

"provide consistency with the rest of the Mental Capacity Act, and that in many cases the use of the Mental Health Act and section 25 of the Children Act would be inappropriate".

The two recommendations from the commission's report, as the Minister will be aware, were that:

"The Liberty Protection Safeguards should apply to people aged 16 and above"—

which would be given effect by their inclusion in the commission's draft Bill—and that the Government,

"should consider reviewing mental capacity law relating to all children, with a view to statutory codification".

On a personal note, I have a 12 year-old niece who has severe mental capacity issues. I discussed what will happen to her when she is 16 and became aware that there seems to be a vacuum; there is an issue here which this legislation needs to address. So, in my personal capacity, I hope that we can resolve this issue. I beg to move.

Baroness Murphy: My Lords, I support this amendment. As the noble Baroness, Lady Thornton, has already said, the Royal College of Psychiatrists feels strongly that this would clarify decision-making. There may be issues arising from the fact that when the Bill was being put together we had not yet had the Birmingham judgment, which is why we are not quite there yet. However, having the four regimes that we currently have to choose from for this age group makes it very difficult to make appropriate choices. This would clarify it. It was strongly supported by the Law Commission in its first recommendations, and I support it.

Lord Cashman: My Lords, I too support Amendment 2 in the name of my noble friend Lady Thornton, and the consequential amendments. I am grateful to her for bringing her personal experience to this and reminding us of the young individuals involved. This amendment and the subsequent amendments are to be welcomed. By including 16 and 17 year-olds, it offers better safeguards to those who are not served well at the moment. The amendment would see 16 and 17 year-olds protected by the LPS. It would simplify the system, would bring clarity and ensure that their rights under Article 5 of the European Convention on Human Rights were therefore protected. For those reasons and many more, I support this amendment and the subsequent amendments.

Baroness Tyler of Enfield: My Lords, I rise briefly to support this group of amendments. I strongly support bringing 16 and 17 year-olds within the scope of the Mental Capacity Act, and support the proposed amendments to the authorisation and safeguards scheme. I will raise a couple of points, and I would be grateful if the Minister were able to provide some answers or reassurance.

First, clarity will be needed on the role of those who currently have parental responsibility, and how that will fit in with the proposals that are being put forward. Secondly, we need to make sure that there is a fully co-ordinated and joined-up approach across a number of different pieces of legislation. I have already talked about the join-up between the Mental Capacity Act and the Mental Health Act, but I am conscious that, when we are looking at 16 and 17 year-olds, we need to look also at other legal mechanisms that authorise a deprivation of liberty, such as Section 25 of the Children Act 1989, and at how the model dovetails with legal frameworks for the provision of care and support, such as education, health and care plans under the Children and Families Act 2014. So I would ask for some reassurance that someone is looking at the join-up with other relevant bits of children's legislation.

Lord Hunt of Kings Heath: My Lords, I would like to follow that up. Clearly, the Government accepted in principle that these provisions should extend to 16 and 17 year-olds but then entered the caveat that,

"changes will need to carefully consider wider rights",

as the noble Baroness has said. The Government said then that they would consider these matters carefully before bringing forward legislation. The question I would like to ask is: how far has that work got, and is there a prospect of seeing legislation in the reasonable future in relation to it, or is this our opportunity? Other opportunities may not come for some time to

[Lord Hunt of Kings Heath]
come. I realise Ministers are reluctant to commit themselves to particular legislation, but it would be helpful to the House if the Minister could at least give some indication of the work that is now being undertaken and when it is likely to come to fruition.

Lord Touhig: My Lords, the Law Commission supports this and I certainly support the amendment as tabled by my noble friend Lady Thornton. Including 16 and 17 year-olds would offer some legal protection for organisations such as the National Autistic Society, of which I am a vice-president. We do a huge amount of work with young adults and strongly believe that this is important for them—for their work and for their future. This was raised during Second Reading by a number of people—I was one of those who raised the matter. The Minister indicated that he would look at it and, indeed, in a letter from him on 24 July, he said:

"During my speech I indicated that I would like to reflect on the matter of how the model could fit with 16 and 17 year old young people".

Perhaps, when he gets up, he will have some good news for us.

Lord O'Shaughnessy: I would like to thank the noble Baronesses, Lady Thornton and Lady Murphy, for tabling these amendments, which seek to apply the liberty protection safeguards to 16 and 17 year-olds in the same way that they apply to adults. Noble Lords have been absolutely right to point out, as they did at Second Reading, that in the Government's response to the Law Commission report, we accepted in principle that 16 and 17 year-olds would be included in the new liberty protection safeguard system. I know that noble Lords are motivated not just get to get this right in general but also, as the noble Baroness, Lady Thornton, said, in relation to specific cases that are known to them, sometimes very close to home. I understand and sympathise absolutely with the desire to do that.

The noble Lord, Lord Touhig, is also right to say that it is something I said I would consider and would seek to bring further news. We are still considering this very actively. What is clear even from this brief debate is that, as the noble Baroness, Lady Tyler, pointed out, there are some critical interactions that we need to get right with other bits of the system. These include the role of parents, how the safeguards would apply to looked-after children, and interaction with processes such as the education, health and care planning processes for those with special needs and disabilities. As the noble Baronesses, Lady Murphy and Lady Thornton, reminded us, we need also to be mindful of the current court case.

At this stage, I repeat and underline our commitment to make progress and to offer the best possible protection for this group of vulnerable young people. Proper scrutiny and detailed thought is required, and that thought is ongoing. I recognise the arguments for including this group. Like all noble Lords, I want to make sure we get this right and get the interactions right, so that they do not end up being fixed subsequently by the courts, as the noble Lord, Lord Hunt, pointed out in a different context.

Our intention is to use the time between now and Report to continue having those discussions, both with noble Lords and with stakeholders throughout the sector, to make sure we can get this right. On that basis, having given the commitment that we will work hard to do what we can between now and Report to get the right outcome, I hope the noble Baroness will be prepared to withdraw her amendment.

Baroness Thornton: I thank the Minister for that. What can I say but, "Thank you, and let us hope so"?

Amendment 2 withdrawn.

Amendment 3

Moved by ***Baroness Tyler of Enfield***

3: Schedule 1, page 6, line 4, leave out "is of unsound mind" and insert "has any disorder or disability of the mind"

Baroness Tyler of Enfield: My Lords, the essence of this amendment is about language and use of language—in particular, the term "unsound mind". I think we would all agree that language is important; it sends very important signals. Many noble Lords raised this point with passion at the Second Reading debate. I was pleased that the Minister's helpful letter of 24 July referred to the debate about "unsound mind" and made clear that the Minister was sensitive to the points made and would welcome views. I guess this amendment is my way of putting forward my views.

The fact remains that, despite growing awareness and acceptance of mental illness, stigma and discrimination remain a regular experience of people with mental illnesses and their families and can put people off seeking help. We were given to understand that the use of the term "unsound mind" within the Bill was to ensure that it was in line with the ECHR—but this was written in the 1950s. Many people, both inside this Chamber and outside, have expressed serious concerns about the inclusion of this language in the Bill in 2018. Frankly, it perpetuates very unhelpful negative stereotypes. I would contend that the phrase "unsound mind" is out of place in today's society; it is out of place in legislation being looked at in 2019; it is stigmatising and has no clear clinical meaning; indeed, I would say it is offensive to many.

Therefore, my amendment proposes that, in paragraph 2(2)(c) of Schedule 1 to the Bill, the term "is of unsound mind" is replaced by "has any disorder or disability of the mind". This terminology is already a well-established term in the Mental Capacity Act and has proven to be compliant with the ECHR without, in my view, having anything like the same stigmatising connotations of "unsound mind". A disorder or disability of the mind, I am informed by the Royal College of Psychiatrists, has a clear clinical meaning. It is well understood by clinicians and should be no more stigmatising than saying someone has a physical disability.

I am aware that the BMA, which supports not using the term "of unsound mind", has put forward a proposition that this term should be reconsidered and experts and patient groups consulted to find an alternative to it. The BMA may be right, but I felt that, for my

starter for 10, I wanted to put forward terminology that I thought was right. I am sure that others will be able to improve on it.

To conclude, above all this Bill must put the people most affected centre stage—that means some of the most vulnerable people in society, as we have already heard. In my view, it is simply not good enough to continue using terms that lawyers and drafters of legislation may find helpful—it might help them fit things in with other bits of legislation and other conventions—but which causes harm and distress to those we are all trying to help. I believe there is a real and welcome opportunity to change the narrative and discourse in a positive way, and this amendment is a way of taking that opportunity.

Lord Cashman: My Lords, it is a great pleasure to support this amendment. Language is crucial. Several times during the day I question whether I am of sound mind, and I think that the concept of unsound mind is extremely dubious. I welcome the amendment from the noble Baroness, Lady Tyler, because it seeks focus and clarity, substituting for "is of unsound mind" the words,

"has any disorder or disability of the mind".

I believe that the Royal College of Psychiatrists has supported this approach. The BMA also suggests that there should be a different approach because the term "unsound mind" reinforces stigma and discrimination, and equally it is outdated. Its continued use merely perpetuates negative stereotypes of vulnerable people, particularly when we are trying to get over those stereotypes in order to get people to speak more openly at the beginning of their problems—our problems—with mental health issues. Therefore, it is a pleasure to support this amendment.

6.30 pm

Baroness Murphy: My Lords, the noble Baroness, Lady Tyler, has produced a perfectly adequate descriptor which would substitute perfectly well for "unsound mind". We always face this difficulty in discussing terms that relate to stigmatised disorders. We have to keep changing the language to keep it up to date and to refresh people's thinking about what we are dealing with. "Unsound mind" went out in the 1960s and 1970s—I do not think that I have ever diagnosed anybody as being of unsound mind—and we must now have an alternative. We do not need the convenience of it remaining as it was back in the 1950s. Therefore, I support the descriptor given by the noble Baroness, Lady Tyler. It is a very good one. We have used it before and it would be perfectly adequate. Let us ditch "unsound mind".

Baroness Barker: My Lords, I shall not detain the Committee for long but it is important to recap on a bit of history. The original legislation that came before your Lordships' House on this issue—the Mental Incapacity Bill—was subject to the first ever pre-legislative scrutiny. In going through that then very innovative procedure, Members of this House and another place did a couple of things which at that time were game-changing. One was that we invited people who lacked capacity to come and give evidence to us. But we went further than that. When we produced our report, we invited them back to discuss with them what we had listened to and what we had changed. One of the first and most important things that we did was to change the title from the Mental Incapacity Bill to the Mental Capacity Bill. We also, for the first time ever, produced an easy-read version of a Bill.

I strongly support my noble friend Lady Tyler because this feels like a real regression in thinking. I understand that the term is there because somebody somewhere believes that it has a legal meaning. We came up against those same arguments all those years ago and this House led the way in getting lawyers and counsel to change their minds. I do not see a reason for us not to do the same again.

I wish to add one point. I vividly remember listening to the people whom we invited back to talk to us after we had produced our report. At this point, there were only Members of your Lordships' House in the room—the Commons were busy and had not turned up. I remember one particular gentleman who said, "When I first saw this, I thought it was really rubbish, but actually you've done quite a good job". I have to say that in all my years in your Lordships' House I do not think that I have ever received a more sincere accolade. That is not to belittle anybody's contribution to this, but I think that my noble friend has made a very strong point.

Baroness Thornton: These Benches support the amendment. As the noble Baroness, Lady Tyler, and others have said, the reference to unsoundness of mind is offensive to those with learning disabilities, dementia and brain injuries and their families. The noble Baroness, Lady Barker, has just demolished all the legal arguments for including the phrase in the Bill, and indeed a lot of organisations, including the Royal College of Psychiatrists, say that it out of place in today's society. The GMC argues that it is not clear what added protection or benefit is achieved by using the term. VoiceAbility says that "unsound mind" is not used in modern psychiatry and that it could lead to debate in disputes. Therefore, I hope that the Minister will be as agreeable about this amendment as he was about the last one.

Lord O'Shaughnessy: I do hate to disappoint. I thank the noble Baronesses for introducing this point. We discussed it at Second Reading and I have huge sympathy with the concerns about this kind of language. Frankly, it is not the kind of language that we use. As the noble Baroness, Lady Murphy, pointed out, she has not diagnosed anyone as being of unsound mind for decades. It is a throwback and we are in the process of destigmatising mental health issues, as the noble Lord, Lord Cashman, pointed out. That is an endeavour that we are engaged in earnestly together. However, it is important to distinguish between the operational language used in care and the language used in the courts, and I want to discuss that.

This is not just about semantics; it is about terms that have established legal precedent and a jurisprudence based on their interpretation. It is worth discussing

[LORD O'SHAUGHNESSY]
the consequences of deviating from a term that is in current use because of its role and the fact that the phrase is used in the European Convention on Human Rights. As the noble Baroness, Lady Tyler, pointed out, the term has not changed since the 1950s and the creation of the ECHR, and it has subsequently been used by the Strasbourg court. There is a risk, and it is worth recognising, even if it is one that noble Lords might be prepared to contemplate. The risk is that a different expression such as the one proposed by the noble Baroness, Lady Tyler—it is a perfectly reasonable starter for 10, as I think she called it—could create a gap for some people who need access to liberty protection safeguards but do not meet the criteria of having a disorder or disability of mind, although they would have met the criteria of unsound mind.

It is important to note that the Law Commission used this language. We have been accused of deviating from the Law Commission Bill but it used this language and we have copied it to ensure that the liberty protection safeguards are compliant with the ECHR and that there is no gap with people not being covered. This could include people with learning disabilities, brain disorders or disorders of consciousness. In essence, the problem here is not this Bill. In a way, the Bill has a problem because of the language that has not been changed since its creation in the ECHR.

Therefore, although I agree with the sentiment behind the amendment, new terminology would risk creating a gap for people between the ECHR and this proposed law, and we are all concerned to avoid such gaps. Any gap would require people to have recourse, instead, to the Court of Protection. Therefore, it is not the case that people would have no recourse; they would have recourse to the Court of Protection, but we know that the people being cared for and their families and carers can find that an intimidating and difficult process.

It is also important to note that the Court of Appeal has indicated that some people with certain forms of learning disability might not be considered mentally disordered under the definition put forward by the noble Baroness but would still be considered of unsound mind for the purposes of the convention. That is another reason why there is a risk of a gap. For example, there is a particular risk that some individuals with brain injuries, or certain disorders of consciousness, might fall within the gap.

At Second Reading I did say, earnestly, absolutely and honestly, that I wanted to take this away and consider it, because of the frankly unsatisfactory nature of the term when it comes to modern practice. We have also listened to the contributions of a range of stakeholders—a number of people are of course very interested in this, and not just in this House—and to the contributions of the Joint Committee on Human Rights to see whether it is possible to use better language. I know this is not something the House will welcome, but I have concluded that, although the term is regrettable, there is a risk in using alternative language of creating a gap. Between those who would be captured under the definition suggested by the noble Baroness, Lady Tyler—or, indeed, potentially any other definition—and those currently captured under the terminology "of unsound mind"—

Baroness Murphy: I really struggle to understand where these gaps might fall. For example, these people who have brain damage, which gives rise to a mental disorder, or people who have transient episodes of epilepsy, which might lead to some fugue state—would they not also be included in mental disorder, under the definition suggested by the noble Baroness, Lady Tyler? I cannot see where these gaps might arise. Have they been identified by psychiatrists? If we look through the *Diagnostic and Statistical Manual of Mental Disorders*, or the *International Classification of Diseases*, if you prefer, I cannot understand where these gaps might arise.

Lord Woolf (CB): If the real purpose is to ensure protection under the Human Rights Act for those we are concerned about, has the Minister considered whether that might not be achieved merely by stating that the category of people we are looking at should have the benefit of the relevant section of the Human Rights Act? When I say the Human Rights Act, I mean the convention.

Baroness Barker: The Human Rights Act was in force when the Mental Capacity Act was being debated. During the passage of that Act we considered very carefully what language we should use. Is the Minister saying that we got that wrong, and have there been cases of people who have fallen into the gap? If so, how many are there, and can he give the evidence by which the Government arrived at the conclusion they have now?

Baroness Watkins of Tavistock (CB): It might be complex to find the right nomenclature, but I heard the noble Baroness, Lady Tyler, say that this was a starter for 10. I cannot see why we have to regress to 1959 language in the Mental Health Act without further exploration of whether we could redefine the term about perhaps affecting the mind, to take in that very small minority of people with severe physical illness that occasionally affects the mind. We have worked so hard to destigmatise both learning disability and mental health that it seems very sad that we cannot work a bit harder at this point on this issue.

Lord Cashman: I want to reaffirm the point made by the noble and learned Lord, Lord Woolf. Surely it is not beyond the wit of drafters and our legal experts, when referring to the starter for 10 offered by the noble Baroness, Lady Tyler, to refer to the European Convention on Human Rights and the jurisprudence arising from the European Court of Human Rights? It seems to me that it is elegantly simple to take such an approach, reassuring the rights that relate to the "unsound mind" in relation to the new definition offered. I hope my intervention makes sense—it is not often best practice to speak on the hoof on such legal matters. I hope that noble Lords will forgive me if I have not made sense.

6.45 pm

Lord O'Shaughnessy: I am glad that we have had a subsequent opportunity to discuss this. I would like once again to restate that I personally, and government Ministers, officials and others, do not find this comfortable

language. I know that the noble Baroness, Lady Watkins, did not mean it this way, but this is absolutely not a case of trying to take us back to the 1950s. In proceeding with this legislation, we have to make sure that people who currently get protection do not lose it. I know that we all agree that we do not want that to happen. If you like, that is the goal; the law is the means, if I may say so to the noble and learned Lord, Lord Woolf. The key is making sure that we have the terminology that will reflect that we do not want people falling through the gap. It is perfectly reasonable to ask, "What is the nature of this gap?"

The Court of Appeal in G v E said that a gap would arise. Our understanding and advice from lawyers is that current case law indicates that there might be individuals—I do not have specific details of the kind of conditions from which those people might be suffering. It is worth pointing out that the Court of Protection also uses the term "unsound mind" at the moment. It is a term that is clearly operable in a legal context but which has become inoperable in a medical context. That is the challenge we face and which we have explored in this discussion and at Second Reading.

We have given this very careful consideration. We need to be incredibly conscious of not creating that gap. However, I also understand that noble Lords would like to see more evidence of two things. First, there is the reality of the gap: who, what kinds of people and what situations? That is a perfectly reasonable thing to ask. Secondly, has there been further exploration of alternatives to what we all agree is an outmoded and regrettable phrase? I am absolutely prepared to commit to do that between now and Report, because I share noble Lords' intentions that we should make sure both that we move with the times and that we do not remove protections from people currently entitled to them or who would have been entitled to them in the future. On that basis, I hope the noble Baroness might be prepared to move on from her starter for 10 and withdraw the amendment.

Lord Woolf: In the list of people whose help the Minister is going to seek, may I suggest that parliamentary counsel be invited to consider whether it is possible, through the use of language in the Bill, to ensure that there is no gap?

Baroness Tyler of Enfield: I am grateful to the Minister for his response, particularly the last bit, which I found a tiny bit more reassuring. I thank everyone who has contributed. It has been an excellent short debate and we have benefited hugely from highly distinguished medical and legal expertise.

I understand that the Minister may have concerns around risks and gaps, but we need—and he has agreed to bring forward—examples and evidence of what these gaps and risks are and why they could not be dealt with by language that is perhaps slightly different from that which I proposed. There is a huge opportunity to be seized here. I have made it very clear that the wording I propose may well not be quite right. I am sure that others could come up with better wording that meets the Minister's concerns, which I understand are legitimate. I am grateful that he said he will think further and come back with further evidence. I should like to put down a marker that I will wish to return to this on Report.

Amendment 3 withdrawn.

Amendment 4

Moved by ***Baroness Murphy***

4: Schedule 1, page 6, line 4, at end insert ", and

(d) if living in a care home or supported accommodation, meets any one of the following conditions—

(i) is under continuous supervision and is not permitted to leave the premises on their own, or

(ii) is subject to the use of physical barriers to limit their access to particular areas, or

(iii) is subject to the use of force, including physical, mechanical or chemical restraint, or

(iv) is subject to constant close observation and surveillance."

Baroness Murphy: My Lords, we have come to what I regard as the most important and possibly stickiest, most difficult issue that we face. It addresses the reason why we are all here today with a new Bill to try to solve the problem of the old one, which did not work. Why did the old DoLS not work? Because they were overbureaucratic, very expensive—we are talking about £2 billion a year and this is cheaper at £300 million, although someone said to me that this costing business is rather a science fiction at the moment—could not be implemented and were predicated on a judgment in Cheshire West that extended the previously accepted notion of deprivation of liberty. I wanted to have a first go at introducing a restricted definition of what constitutes deprivation of liberty for the purposes of this Bill.

I am primarily concerned not about the cost, but the risk. When tens of thousands of people are subjected to a procedure, those whose circumstances really need scrutiny and review—because they themselves or their families or professional carers are objecting to their care or placement—are not receiving the focus and energy of the safeguarding process because they are simply lost in the morass of processing so many cases. Already we know that the tick-box mentality has pervaded the existing procedures, and that is not because the people who are trying to implement them have not been doing their best. There are not enough of them. They are trying to rush around with a list as long as your arm and they cannot get through it.

I had heard that there are now 140,000 unassessed cases, although I think the noble Baroness, Lady Finlay, mentioned 106,000. Noble Lords should think how long that list would take to deal with. With a mean length of stay in residential care of two years from admission to death, many elderly people with dementia—who, after all, are being cared for because of a terminal illness—will never be assessed before the great final assessment. By the way, I only hope that when they encounter Saint Peter at the pearly gates they do not find that a specially approved angel has been designated to assess whether heaven is in their best interests or

[Baroness Murphy]

not—it is quite possible. To return to more serious matters, it is crucial that we reduce the numbers that will be scrutinised by this system so that those who are truly at risk of abuse or of receiving less than adequate care are better safeguarded.

Of course, we could wait for another case to come before the Supreme Court for the penny to drop, but Parliament should surely provide a statutory definition of what constitutes deprivation of liberty in the case of those who lack capacity, in order to clarify the application of the Supreme Court's acid test and bring clarity for families and frontline professionals. There is a risk that the Law Commission's proposals—the safeguard principles have much merit—will become unworkable both in the domestic sphere, where we have hardly started to take people into the system, and with the potential expansion of the scheme into domestic care settings, which will become exceedingly invasive and difficult to operate. And that is in the context of care homes and joint living arrangements that are not being adequately met.

Many legal experts, including Lord Carnwath and Lord Hodge, found the decision in the case of Cheshire West puzzling. They said,

"nobody using ordinary language would describe persons living happily in a domestic setting … as being deprived of their liberty".

In their evidence to the Joint Committee on Human Rights, Sir Nicholas Mostyn and Sir William Charles, retired Family Court judges, submitted that the proposed liberty protection safeguards are based on an acid test in which the starting point is legally wrong, and should be revisited. Sir Nicholas noted that,

"no case from Strasbourg has come close to saying that the case of someone of 'unsound mind' (as Article 5 puts it) falls within the terms of that article if they are being looked after in their own home".

Further, he argued that,

"it is surely vanishingly unlikely that Strasbourg would disagree with the narrower test",

that used to be used. He said that,

"it is after all completely consistent with its jurisprudence, which mandates a fact sensitive approach and which looks at the range of factors such as the intensity of the restrictions in question".

The Joint Committee on Human Rights agreed with that point and introduced in its report the case of Mark Neary. I will not go into that case now because of shortness of time, but a number of cases were described where people were clearly being deprived of their liberty and families could not understand why it was happening. The new definition from Cheshire West cast a very wide net, capturing people who were content and those who had expressed de facto consent, albeit not valid consent for the purpose of the law. That has led to incredible family distress—people felt that their loved ones were being deprived of their liberty as a result of care plans—as well as resource issues. It sits at odds with the UN Convention on the Rights of People with Disabilities, which emphasises respecting the autonomy and wishes of those with disabilities.

The question is whether an amendment could be introduced to solve this problem. The Scottish Government gave some thought to amending their own Act and suggested a number of principles that might be followed. First, if a regime looks like detention, it does not lose that characteristic just because the person does not display opposition. Secondly, if a regime does not look like detention but the adult displays opposition to staying there, that should be considered as placing significant restrictions on a person's liberty. Thirdly, a person may be perfectly content to move to another place of residence, but may not agree with aspects of their care, which amounts to a significant restriction on their liberty. Fourthly, a person may remain in the same residential setting, but become subject to changes in aspects of their care that mean they become subject to significant restrictions on their liberty. We often see that in care homes where people are moved from a general unit to a specialist unit for dementia, or to an elderly mental care unit when they become "unmanageable", with quite serious restrictions placed on them.

A person may be considered as having significant restrictions if: the adult is under continuous supervision and control and is not free to leave the premises; barriers are used to limit the adult to particular areas of premises; or the adult's actions are controlled by physical force or the use of restraints, by the administering of medication for that purpose or by close observation and surveillance, which can be very intrusive. However, measures applicable to all residents in a given place that are intended to facilitate ordinary, proper management of the premises, such as security cameras at the front door and front door locks—the sort of things we might have in our own homes—should not necessarily be regarded as restricting liberty.

It is crucial that the first principle of the Mental Capacity Act be paramount in any decision. Whenever possible, a mentally incapacitated person should be listened to and their wishes respected. While short-term memory may be seriously diminished, the individual often still recognises the people around them and can express a wish. Where there is a clear agreement between an adult, their family and professional carers, I believe the state should keep its legislative nose out. This may not be the right amendment, and I look forward to listening to others whose ideas are also contained in amendments tabled in this group, but it seems we should concentrate our resources on those who are really at risk, where we are confident that we have the resources to concentrate training and interest on a smaller group.

7 pm

I have another amendment in this group, which is slightly off the point, so I am going to do it very quickly and turn away in order that we can concentrate on this criteria business. I wanted originally to add a new principle to the Mental Capacity Act with the deprivation of liberty safeguard to say that we should be doing nothing to intervene in an individual's freedom without a clear indication that it will be beneficial to them. I wanted to add a new principle. If somebody does something that is beneficial to something, it is different from being in their best interests. Does it do them any good? So far we have DoLS implemented with huge bureaucracy, which has done nobody any

good. For maybe one in five of the people subject to DoLS procedures it has at least come to scrutinise their care. But that has not happened all that much; it has been a procedure that has been done largely on paper from a series of tick boxes and cursory examinations. It seems to me that, if we are to implement any legislation that intervenes in this bureaucratic fashion, we must be absolutely clear that what we are doing is beneficial to the individual who is subject to it.

I was told that I could not put a new principle into the Mental Capacity Act—that this was not the Bill to do it—so I am going to leave it at that point and just say that I tabled this amendment and it was slipped into this group. I am not expecting anybody to support it, but I hope that I will gather some support for restricting the criteria for the definition of a deprivation of liberty, in order that we can make the Bill fully workable and manageable for the people who really need it. In a perfect world, it would not be necessary. If we had loads of money, and thousands of assessors, legal experts and social workers involved, we might do it. Under our current and likely future resources, we cannot do it, so we should do the best we can with the resources we have and concentrate them on trying to improve the care of people who really need it. I beg to move.

Baroness Jolly: My Lords, there is always a risk in your Lordships' House when an amateur follows a professional. I feel that I have a bit of a starter-for-10 moment as well, because both the noble Baroness, Lady Murphy, and I tabled similar amendments, Amendments 4 and 5, to achieve the same sort of aim. I could take noble Lords through my arguments, which again are similar to hers, but time is of the essence, so it might be worth putting both of them before the Minister to ask whether the Government would consider bringing back an amendment that would put a clear definition of deprivation of liberty in the Bill. There has been a lot of pressure from various parts of the sector for this to happen. At the moment, only case law gives an indication of deprivation of liberty, so to have something in the Bill would be helpful.

Baroness Finlay of Llandaff: My Lords, I have an amendment in this group that does not sit terribly well with the first two—but so be it. I will be brief. These attempts to define a deprivation of liberty are nobly submitted, but I worry about potential unintended consequences from the wording. I will not go through them in detail, but I hope that the Minister will assure us that this is something we can take away and look at. One difficulty is that one person's imprisonment—a deprivation of liberty—might not be a deprivation of liberty to another, so this may be very personal in some aspects.

On Amendment 81 in relation to a "vital act", I hope that the noble Baroness, Lady Murphy, will take reassurance from me—I do not know whether the Minister will agree with this or not—that anything done must be in a person's best interest. Part of that is that it is a benefit and not a burden—or it may be a burden, but the benefits outweigh the burden. That has to be a fundamental principle in clinical decision-making.

The reason I tabled Amendment 82, which relates to an urgent authorisation, is that, looking through, I was concerned about unintended consequences from the way the legislation was written. I could see two, possibly—but they may be misplaced anxieties. First, in a true emergency situation, as a consultant in emergency medicine said to me, you just get on and do what you have to do. You do not go and look at paperwork. So, in an emergency situation, you may have to restrict somebody's liberty to do what you have to do, which is in their best interest. You do not do something that is not in their best interest—and the last thing we want to do is impose any more bureaucracy or paperwork.

So I suggest that, possibly in the code of practice and not in the Bill, it should be clear that an urgent authorisation is an authorisation to begin longer-term care, but in an acute situation, in a clinical decision, nobody would expect people to even begin this process until we get to about 48 hours. I say that because a clinical decisions unit will normally have people staying in it for under 24 hours, as they may even on an acute medical ward, before being moved to a longer-term in-patient unit where their longer-term care may be assessed. Of course, we have people who have a transiently impaired capacity because of illness and the treatment of that will restore their capacity, such as the diabetic whose diabetes is out of control through either hyperglycaemia or hypoglycaemia, and things such as hypocalcaemia as well. None of those should be included.

The concern at the other end was that an urgent authorisation could be used for example to take a confused person with advanced dementia where care at home had completely collapsed. Possibly their main carer at home had suddenly been admitted to hospital. They would then have to be moved into a nursing home placement at great speed, but that may not be what they want and they cannot consent to it. They would have to be moved to that place, be in a placement and be assessed there. There needs to be some time limit so that this cannot linger on for months or years, with somebody saying, "Oh, well, they are here under an urgent authorisation", rather than a longer-term authorisation. That is why I tabled the amendment. I accept that it is not perfect, but I hope it is something we can look at. It may be that the code of practice can clarify those issues.

Baroness Thornton: I have added my name to the amendment tabled by the noble Baroness, Lady Jolly, precisely because I thought we needed to have this discussion. That was exactly right. I would hate to choose between the two amendments, but this sets out when deprivation of liberty occurs:

"Arrangements that give rise to a deprivation of … liberty",

are when the cared-for person is placed,

"under continuous supervision and control",

they are "not free to leave" and the responsible body believes that it is in the cared-for person's "best interests". That is worth putting on the face of the Bill if at all possible.

[Baroness Thornton]

The Joint Committee on Human Rights made a strong argument in favour of a statutory definition. I read its report and it seems absolutely right that that is what we should do. I would be interested to hear what one of the lawyers in our midst might have to say about this: whether they think that it would be a useful thing to do and whether the stabs we have made at it so far are helpful. We are interested in this discussion but we realise that this is the beginning of the discussion rather than something that may be appropriate right now.

When listening to the noble Baroness, Lady Finlay, talking about her amendment, it occurred to me that this is one of those occasions when technology is important. When you have an emergency admission, you need to be able to input the name of the person into a PalmPilot, which will tell you whether a DoLS is already in place and whether a do not resuscitate order has been made. Recently I have had experience of exactly this situation with a family member. Because the information was not readily available in an emergency, we ended up where we did not want to be. I just add that to the debate because I know that the Minister and his boss are very interested in technology and its uses in the health service. This is another of those occasions where it might be useful.

Lord Woolf: Perhaps I may respond by giving one lawyer's view on the matter referred to by the noble Baroness, Lady Thornton. I should put on the record that I am a member of the Joint Committee on Human Rights and therefore was a party to the report, and of course I support it.

When the opportunity arises to deal with a situation where it is clear that a decision of the Supreme Court has had consequences which may never have been anticipated, it would sometimes be helpful if the judges had the opportunity to look at the matter again. If the sort of steps so ably advocated by the noble Baroness, Lady Murphy, were taken, I would suggest that serious consideration should be given to them as they could have a beneficial effect from the pragmatic point of view as well as on the point of principle.

I am sorry, but I ought to have added that I have a relative who could be affected by this legislation, and I declare that.

Lord O'Shaughnessy: I am grateful to all noble Lords who have spoken to their amendments, which have produced this discussion on the application of the liberty protection safeguards. Indeed, the noble Baroness, Lady Murphy, said that this goes to the heart of why we are here in the first place. I know that she has long-standing concerns about the DoLS system both in its application and the scenarios where it may or may not be appropriate, to whom it should best be applied and so on. I know that that is what has motivated her attempt in this amendment. She and others, including the noble Baroness, Lady Thornton, have said that this is the start of a process.

The first amendment in the name of the noble Baroness addresses the circumstances in which the authorisations could be given in a care home or supported accommodation environment, and people deprived of their liberty as interpreted in the Cheshire West case. As the noble and learned Lord, Lord Woolf, pointed out as a member of the committee, the Joint Committee on Human Rights has recommended introducing a statutory definition of the deprivation of liberty in its report *The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards*. I can tell him and all noble Lords that we are considering its findings closely. Many noble Lords have expressed a desire, whether in the form set out in the amendments in this group or otherwise, to explore the possibility of including a statutory definition in the Bill. Following this discussion, that is something I should like to consider further. It is worth stating, however, that there are risks in doing so because it means that to change a definition requires primary legislation. Noble Lords are much more knowledgeable about and aware of those risks than I am, but nevertheless it is something that warrants further consideration.

I am also sympathetic to the sentiment expressed by the noble Baroness, Lady Murphy, about the state involving itself unnecessarily in family and private life while also being mindful of making sure, as we all are, that individuals are not denied the safeguards they need and that we are complying with our obligations under Article 5 of the ECHR. The effect of her amendment would be to limit the circumstances in which arrangements giving rise to deprivation of liberty in a care home or in supported accommodation can be authorised under the liberty protection safeguards, but of course that would mean that such arrangements would still have to be authorised by the Court of Protection. We have already discussed how that can be burdensome and expensive for families. It is for that reason that domestic arrangements were included in the deprivation of liberty safeguards. Given that, while in general I would like to have a further discussion around definitions, there is a problem with the definition that the noble Baroness has provided because of its application in that case.

7.15 pm

Baroness Murphy: Perhaps I may just say that the amendment is my first stab at the issue with no help in creating it or any legal consultation. My next will be a lot better.

Lord O'Shaughnessy: I am sure it will be and I look forward to seeing it.

As she pointed out, the noble Baroness has a second amendment which makes the point that the steps taken to deprive a person of liberty, life-sustaining treatment or a vital act should be of benefit to that person, and of course we all agree with that. But as the noble Baroness, Lady Finlay, pointed out, before any authorisation is made or arrangements take effect, a decision will first need to be taken that the care or treatment is in the person's best interests in accordance with Section 4 of the Mental Capacity Act 2005. It is important to note that this amending Bill does not change it, so that will continue to be true if the Bill before us in this House is taken forward as it stands. The legislation is already clear that if actions are taken

to deprive someone of their liberty in these situations, it must be to the benefit of the cared-for person. That was at the heart of the amendment spoken to by the noble Baronesses, Lady Jolly and Lady Thornton, so I want to take this opportunity to say that that provision continues to exist because the best interests test foreruns the subsequent necessary and proportionate test, which we will explore in a subsequent group.

On the point made by the noble Baroness, Lady Finlay, about limiting the time for the duration of authorisation of the steps necessary for life-sustaining treatment or vital acts, the intention, as she will know better than me, is to move consideration of the deprivation of liberty to earlier in the planning stage. Nevertheless, there will be cases where it needs to be applied in an emergency situation. I do not need to bring that to light because other noble Lords have done so. Her amendment, which I think is probing, would require authorisations to be renewed every seven days. She will know that there are limited periods at the moment, but unfortunately they are not always adhered to. If we are honest, they can become a target rather than a limit, and I think that is what is happening. We need to make sure that we have a system which gives providers greater clarity but does so in a way that is more sophisticated than could be achieved in legislation. I therefore agree with her that the code of practice is the right vehicle for that because it will be able to outline the different circumstances and scenarios and thus give a much richer picture of the kind of situations and principles that ought to be considered.

This has been a very useful debate and, as I have said, I should like to take some time between now and Report to consider the opinion expressed by noble Lords and in the report of the Joint Committee about the benefits of a statutory definition. Having started that discussion, which is obviously the phrase of the evening, I hope the noble Baroness will feel able to withdraw her amendment.

Baroness Murphy: My Lords, I am grateful to the Minister for his positive response to the ideas if not to the amendments themselves. We will return to this at the Report stage, as he has said, and I hope that we may have forthcoming from those associated with the Joint Committee on Human Rights some support at that point for the further debates in this area. With that, I beg leave to withdraw the amendment.

Amendment 4 withdrawn.

Amendments 5 and 6 not moved.

Amendment 7

Moved by ***Baroness Barker***

7: Schedule 1, page 10, line 7, leave out "and" and insert—

"(ba) the arrangements are in the best interests of the cared-for person, and"

Baroness Barker: My Lords, Amendments 7 and 8 in my name are yet another attempt to make some sense of this Bill. Perhaps they might not have been tabled had we been able to have more discussion over the Recess. As several noble Lords have already mentioned, there has been considerable disquiet about the non-appearance of best interest assessments in this Bill. Indeed, a number of noble Lords attempted to table amendments that, at the very least, like this amendment, were trying to probe where the best interests of the cared-for person would come into play.

This particular part of the Bill—Part 2 of Schedule 1—is on "Authorisation of arrangements". In putting down these probing amendments, I was particularly taken by the briefing given to us by the Law Society, which suggested:

> "Remove the distinction between the 'arrangements' and 'care and treatment' as it will result in difficulties when applied in practice. For example, how would a person's capacity to make medical treatment decisions or decisions about contact with others be distinguished from decisions about the 'arrangements' to provide that treatment or to prevent contact with others?".

In light of that, at the very least we ought to be asking the Minister how this is going to work. I accept a number of the points made by the noble Baroness, Lady Murphy, about the clumsiness of the existing DoLS procedure, but the removal of best interest assessors is one that has caused a fair degree of disquiet among the different groups.

Amendments 7 and 8 are also meant to begin to probe a key provision in the Bill—the assertion that the arrangements need to be "necessary and proportionate". There is no further explanation in the Bill about what the term "necessary and proportionate" might mean, who will make the decision and on what basis it will be judged and reviewed. This goes back to some of the points made by the noble Lord, Lord Hunt of Kings Heath, that, given the increased role—let us say that—of care home managers, they will be making the assessments of what is necessary and proportionate.

No doubt I am going to be told that these amendments are either deficient or unnecessary, but they are here to begin to probe some very unclear but key parts of the Bill about the authorisation of arrangements. In that vein, I beg to move.

Baroness Finlay of Llandaff: My Lords, I support the principle behind Amendment 8 in particular. Perhaps this is something the Minister will want to view as going in the code of practice, as I am not sure that putting this on the face of the Bill is necessarily the right place for it—although I completely understand the sentiment, which is to avoid serious risk. We live in a risk-averse system, and it is serious risk that we must be concerned with.

A case that I heard about in the last few days came to mind. An elderly lady with dementia became extremely agitated when it snowed. Because of her tendency to wander, she was not going outside unescorted. A conversation with her son revealed that she had been a meteorologist, so her view was that when it snowed she had to go outside and measure the depth of the snow and telephone the Meteorological Office. What they did was simply wrap her up really well, let her go out and measure the depth of the snow, give her a telephone and let her make a mock phone call to the Meteorological Office. She was very calm and happy. You do not want her to go wandering because she is

[Baroness Finlay of Llandaff]
near a main road and a railway line and all the other risks, but it was not a serious risk to let her out in the garden, well-wrapped up when it was snowing. That illustrates the granularity of the need to take appropriate decisions focused around the individual person.

Other cases that do concern me are those people who will become sexually disinhibited when exposed to great temptation. That struck me about a case I came across in a home for people with a history of sexual offences. There had been a DoLS in place for somebody not to go unescorted through woodland because, if he came across a young girl on her own in woodland, his sexual drive would overcome his rational behaviour—exposure to porn sites would also overcome his rational behaviour. However, the rest of the time, he could live well. Sadly, that DoLS was apparently overturned by the Court of Protection and, within weeks, he offended and ended up being imprisoned for his offence, but he had been living well with an enormous degree of freedom prior to that point. I think that the serious risk to the cared-for person has to be considered, because there the risk to him was that he would offend and, sadly, that came true.

I hope that the Minister will look sympathetically on the sentiment behind this.

Lord Hunt of Kings Heath: My Lords, my Amendments 27 and 28 follow the same lines of argument that we have heard from the noble Baronesses but relate to paragraph 16, "Determination that arrangements are necessary and proportionate", on page 12 of the Bill.

I know the Minister will refer us back to Section 4 of the Mental Capacity Act, which is very comprehensive in defining what "best interests" are. Clearly, the intention is that, because it is stated there as a principle at the front of the Act, that permeates through all of the issues that we will be discussing in this amendment Bill. There is always an issue when you have an amendment Bill. It is not incorporated in the principal Act and is quite difficult to follow. It will be difficult to follow for the practitioners who are going to have to operate the new provisions. This must relate, too, to the code of practice. We seek certain reassurances that it will be made clear to the people at the front line who are going to operate it that the best interests provisions in this amendment Bill will apply equally.

What is confusing is the wording "necessary and proportionate". In a sense, the Government are saying there is a qualification—that things have to be necessary and proportionate. I wonder whether that is helpful. It is confusing that we have a qualification of necessary and proportionate, but in the principal Act it is "best interests". Clearly, these are probing amendments, seeking to tease this issue out, but I wonder whether the Government could give further consideration to how we can ensure that everyone involved is very clear that the best interests apply.

Lord Touhig: My Lords, at Second Reading I expressed the hope that the Government were in listening mood. They certainly needed to be. To be fair, the Minister and his team are to be congratulated on the level of engagement that they have been willing to participate in to help us perhaps make a better Bill at the end of the day. But—there is always a but—the Bill might have had a smoother passage if the Government had published an equality impact assessment. They are yet to do so; perhaps the Minister can tell us why. Many concerns have been expressed in debate on other amendments, which might have been assuaged—and we might have made more progress—had such an assessment been available to us.

7.30 pm

As things stand, it is up to the legislature—today, that task falls to Members of this House—to persuade the Government to think again and strengthen the Bill. If the Bill is about a single issue, it is putting the quality of life of the cared-for person above all other considerations. Their wishes and feelings must be integral to the purpose and operation of the legislation. Legislation of this nature does not lend itself readily to piloting and being trialled in different parts of the country to test its capacity to deliver, but it will need an implementation strategy, full and necessary resources and a code of practice so that we have clear objectives that can be measured and tested against outcomes.

Amendments 7 and 8, so ably proposed by the noble Baroness, Lady Barker, help to fulfil my point about the cared-for person's best interests. Even the most casual observer of our proceedings this evening would see that the amendments are common sense—although I remember my late mother's warning when she told me that I would find in life that sense was not that common.

At Second Reading and in discussions with officials, I and other noble Lords expressed concern about the apparent removal of the individual's best interests from an authorisation. If I understand the Government's position, I think they believe that the best interests assessment is catered for in Sections 1 and 4 of the Mental Capacity Act, but I am not alone in believing that the assessment would be general in relation to an individual's overall care and not necessarily assess whether the deprivation of liberty was in their best interests. The schedule presents itself as a comprehensive test for authorisation. Therefore, it is not unreasonable to suggest that it will be seen as the entire process that needs to be followed. The Government have said that they expect a best interests decision to be made, but this is not reflected in the Bill. Therefore, the amendment of the noble Baroness, Lady Barker, largely reflects the Government's stated policy and should be accepted.

It is also important that an individual's best interests are considered in relation to both the decision to deprive them of their liberty and their overall care. This will ensure proper consideration of whether their care arrangements are the best and least restrictive possible. Amendment 7 simply adds best interests as a step in the overall authorisation. Arrangements will still need to be necessary and proportionate, considering the whole situation balanced against someone's best interests. Amendment 27, in the names of my noble friends Lord Hunt and Lady Thornton, would ensure that the best interests test assessment remains in force; Amendment 28 adds weight to that.

In summary, the amendments ensure that the wishes and feelings of the person concerned, if ascertained, must be reflected in any decision about their care. If any one of us or anyone in our families were in such a situation, would we not want that for ourselves and them?

Lord O'Shaughnessy: I am very grateful to all noble Lords who have contributed to the debate for their desire to be brief, which I know was shared by others who have not been part of the discussions on the Bill, but it is also important to be comprehensive in discussing these issues because, as pointed out by the noble Lord, Lord Touhig, the best interests of the people being cared for is what this is all about.

I know that this is an issue for noble Lords; it was raised at Second Reading and has been raised again in this debate. It is important to state that best interests decision-making for care and treatment remains fundamental to the Mental Capacity Act. In a way, it is the founding stone around which the rest is built. The liberty protection safeguards sit under the aegis of the Act. The Bill does not change that. One request made by noble Lords at Second Reading was for us to publish the Act as amended by the Bill. We have done that; I understand that it is in the Library. I can make sure that a digital copy is circulated, and I will make sure that it is sent to all concerned. Clearly, understanding the flow of how it is read in not just legislation but the code of practice is critical. I want to make that clear and I understand that important desire.

Under the current system, there are two different best interests tests: one exists under Section 4 of the Mental Capacity Act—the decision, usually made by a clinician, to provide care or treatment—and a second, separate, additional one falls within the tests required for the DoLS system. The Law Commission recommended that the DoLS tests be replaced with a necessary and proportionate test. In that sense, we are following where it led. Prior to a liberty protection safeguards authorisation being considered, the decision will need to be taken, normally by a clinician, that the care or treatment enabled by the arrangements is in the person's best interests. As I said, that will apply under Section 4. Subsequently, it must be demonstrated that the arrangements to enable that care and treatment are necessary and proportionate. Of course, that is the single test applied by the liberty protection safeguards; it is a secondary test following a consideration of best interests.

The current requirement that the deprivation of liberty must be necessary, proportionate and in the person's best interests is instead replaced by a single, primary best interests test in an attempt to avoid confusion and conflict—the word used by the noble Baroness, Lady Finlay, at the beginning of the debate—between two determinations. The focus of the second-stage test on what is necessary and proportionate is an attempt to remove this confusion. It is not an attempt to downgrade in any way the primary and prior importance of a person's best interests being taken into consideration.

As well as giving that assurance, I want to pick up on the point made by the noble Baroness, Lady Finlay, that avoiding risk to the cared-for person will form part of the necessary and proportionate test. There is already a principle in the Mental Capacity Act to use less intrusive arrangements, which will continue to remain, unamended, an important principle in the new model. As was brought to light by the noble Baroness, Lady Finlay, and other noble Lords, the application of "necessary and proportionate" requires a degree of granularity that makes it difficult to overdetermine in legislation, and that is the reason why the code of practice is so important. That is why it will contain a range of scenarios, principles, circumstances and so on of what the application of a necessary and proportionate test should look like.

I hope that I have been able to assure noble Lords, whose considerations I take very seriously, that best interests are foremost in our minds and will remain so in the legislation, unamended by the changes brought in by the Bill. Clearly, I want to make sure that this sentiment and its legal power are understood by all concerned, particularly if there is concern in the wider sector. As I said, I do not believe that a second test is necessary; as said by the Law Commission, it could be counterproductive. It is important that we make sure of a clear understanding of the primacy of the best interests test. I would like to explore that with noble Lords to make sure that it is properly understood by all; we can do that between now and Report. On that basis, I hope that the noble Baroness will be prepared to withdraw her amendment.

Baroness Barker: I thank the Minister for his helpful response. As we begin to get to the heart of the debate, he will understand that he and the Bill team can perhaps see the Bill as a whole, but the rest of us are struggling to do so. Therefore, we have to test individual elements of it, perhaps to a greater degree than he may think is warranted. None the less, it was helpful of him to put those statements on record. With that, I beg leave to withdraw the amendment.

Amendment 7 withdrawn.

Amendment 8 not moved.

House resumed. Committee to begin again not before 8.40 pm.

Northern Ireland: Legacy of the Troubles

Question for Short Debate

7.40 pm

Asked by ***Lord Dannatt***

To ask Her Majesty's Government how they propose to address the legacy of the Troubles in Northern Ireland, with particular regard to the role of the security forces.

Lord Dannatt (CB): My Lords, I first thank the usual channels for making time for this short but important debate; I also thank the Minister in advance for answering it.

[Lord Dannatt]

The most depressing aspect of the subject under discussion is that we have to have this debate at all. After the shameful investigations and allegations of misconduct by the military in Iraq and Afghanistan, one might have thought that the appetite for further investigations into the conduct of members of the Armed Forces in other conflicts might have diminished. Sadly, this is not so. Despite the Iraq Historic Allegations Team looking at over 3,500 allegations, the only case that has come to court has been that of a bent investigator. Yet attention has returned, this time to Northern Ireland.

Many noble Lords will have seen the powerful intervention if the media by Field Marshal the noble and gallant Lord, Lord Bramall. The noble and gallant Lord focused on the 2010 Saville report into Bloody Sunday and opined quite correctly that Saville should have been the end of Bloody Sunday. On publication of that report, the then Prime Minister, David Cameron, apologised for the actions of a very small number of soldiers and the residents of Londonderry seemed to accept that apology. But now the case of Sergeant "O", one of those who gave evidence to the noble and learned Lord, Lord Saville, has become prominent eight years later—some 46 years after the incident itself. There is a horrible suspicion among veterans that the non-self-incriminatory basis on which they gave evidence to Saville has been broached, and that some soldiers now stand liable for further investigation and in fear of a knock on the door. I would be grateful for a categorical assurance from the Minister that the confidential nature of the evidence given to the Saville Inquiry has not been used in subsequent investigations. There is considerable scepticism in the veteran community on this point.

The case of Sergeant "O" is not unique. The case of Corporal Major "H" is also worrying. He was questioned over the case of a young man with learning difficulties, who was shot dead on 15 June 1974. However, after a joint investigation by the civil and military police, within a year, the Ministry of Defence was informed that there would be no prosecution. I have seen a copy of that letter. Nevertheless, the Historical Enquiries Team, set up in September 2005 by the Blair Government, decided to look once more at the Corporal Major "H" case but concluded in 2013 that there was no basis to reopen it formally. After the Historical Enquiries Team was closed down in 2014, a new legacy investigation unit returned to the "H" case, leading the Police Service of Northern Ireland to arrest the corporal major on 21 April 2015 and deport him to Northern Ireland for interview. He was interviewed 26 times over the next four days—16 more times than Harold Shipman—and was charged with attempted murder on 24 April 2015. A complicated court case is still ongoing. The corporal major is now over 75 years old and a sick man.

That knock on the door is not confined to elderly retired paratroopers, riflemen and cavalrymen. On my last day as Chief of the General Staff on 28 August 2009, the final scheduled appointment in my diary, before I left the Ministry of Defence for the last time in uniform, was with two investigators from the Police Service of Northern Ireland's Historical Enquiries Team. They had travelled from the Province to London to quiz me about the killing of a young man in Belfast some 36 years before. Having explained the circumstances of the day in question, I assumed that the matter was closed. This was not so, as one of my corporals—now 76 years old—was subsequently questioned, with the police finally accepting that events in our statements, nearly 40 years before, were an accurate account of a hostile attack which had been responded to professionally within the terms of the yellow card and within the law.

Time precludes description of other high-profile cases similar to those of Sergeant "O" and Corporal Major "H", but there are troubling issues with them all. First, while the Army kept extremely good operational records, the terrorists did not. This makes a very uneven playing field on which to conduct these retrospective investigations.

Secondly, all allegations were investigated by service and civil police at the time and statements were taken. It therefore raises the question of why revisiting whatever evidence that may still exist 30 or 40 years later is likely to bring any greater clarity.

Thirdly, of the 2,547 cases referred to the PSNI Legacy Investigation Branch, 2,265 are deemed terrorist cases and only 282 to be British Army/Royal Ulster Constabulary cases—just 10%. But the reality is that 90% of cases that were killings by nationalist and loyalist terrorists were murder by any description of the word, while the 10% attributable to the security forces were deaths brought about by troops and policemen who, in the vast majority of cases, were doing their lawful duty. There is a very strong suspicion that, for the reasons I have just outlined, the low-hanging fruit of security forces cases are being plucked first and, on past evidence, are likely to be so by the proposed historical investigations unit.

Fourthly, while over 500 prisoners convicted of terrorist offences were released on licence as part of the Belfast agreement, another 365 royal pardons were handed down over the last 35 years and over 300 on-the-run letters were issued. In the same period, just four servicemen were convicted for murder, while another 10 were prosecuted and acquitted. Does this not speak volumes about the integrity of the Army?

To move to the present, the Secretary of State for Northern Ireland, Karen Bradley, has launched an open consultation entitled *Addressing the Legacy of Northern Ireland's Past*. In the preamble to the consultation, she says that the legacy proposals should be,

"balanced, fair, equitable, and crucially proportionate".

From what I have described so far, historical and current activity is demonstrably not,

"balanced, fair, equitable, and crucially proportionate".

Furthermore, from a military veteran's point of view, this consultation is already flawed in that it has precluded at the outset the introduction of a statute of limitations ending these historical investigations. However, I am aware that, in pursuit of the objective to be "equitable", there is a concern that a statute of limitations to protect former members of the security forces would mean that terrorists would, in effect, be given an amnesty as well.

So the Army is caught in the crossfire between the Sinn Féin nationalist agenda to rewrite history and paint the IRA as having fought some form of just war against their self-styled oppressive state, and the Democratic Unionist Party and Ulster Unionist Party's insistence on bringing predominantly nationalist terrorists to justice. It is also worth remembering that the proposed historical investigations unit will examine only fatalities, ignoring the 40,000 people—including 6,000 soldiers—injured during the Troubles, without investigating those responsible for over 15,000 explosions in the Province during that time. Is this "equitable"? What is to be done?

First, it should be recognised that the British Army is a national institution which should be regulated under the authority of the Westminster Parliament and not allowed to become victim to the intrigues of Stormont, whenever that Assembly might reconvene. The welfare and duty of care towards servicemen and military veterans should clearly be championed by the Secretary of State for Defence and not left to the outcome of a consultation by the Northern Ireland Secretary.

Secondly, it should be remembered that incidents in which members of the security forces fired their weapons were fully investigated by the military and, where appropriate, the civil police at the time. In the vast majority of cases, a decision was made that lethal force had been used within the prevailing rules of engagement and no further action was necessary or appropriate. I submit that those investigations should be confirmed now as legal, binding and final. Furthermore, I submit that any subsequent reinvestigation breaches the principle of double jeopardy.

Thirdly, if the principle of double jeopardy is accepted, it would be quite appropriate for a statute of limitations to apply to those cases and individuals that had already been investigated. This would protect policemen and soldiers who were doing their duty in pursuit of the sovereignty of the Crown's right to rule over the whole of the United Kingdom and Northern Ireland but, crucially, it would leave exposed to the full rigours of the law those terrorists who have never been exposed to investigation. That, I submit, is,

"balanced, fair, equitable, and crucially proportionate".

In conclusion, I add that to many soldiers fighting in the Province during the 1970s and 1980s in particular, it felt like a war zone, although the IRA insurgency was never branded as such. Indeed, we should not forget that in 1972 alone, 102 British soldiers lost their lives fighting in the Province. Of course, the peace process since the Good Friday agreement has brought better times but the continuation of that peace cannot—and must not—be at the expense of more soldiers' lives ruined.

Soldiers fully understand von Clausewitz's classic dictum:

"War is but a continuation of politics by other means".

But to paraphrase Clausewitz, perhaps Miss Bradley in the Northern Ireland Office might reflect on the reverse: a peace process should not be a continuation of war by other means. The nationalist agenda to divorce Northern Ireland from the United Kingdom is as alive today as it was throughout the 38 years of the Troubles. The British Government must not sleepwalk into that agenda.

Viscount Younger of Leckie (Con): My Lords, all speakers bar the Minister should heed the point on timings: as soon as two minutes appears on the clock, speeches should be concluded immediately. If not, the cumulative effect will undoubtedly squeeze the Minister's remarks.

7.51 pm

Lord Browne of Belmont (DUP): My Lords, I congratulate the noble Lord, Lord Dannatt, on securing this very important debate. Our Armed Forces and security services served heroically and valiantly during the Troubles in Northern Ireland. These ex-servicemen put their lives on the line daily to defend us against the evils of terrorism and many hundreds of them paid the ultimate price for doing so. The courage they displayed in protecting us and upholding democracy and the rule of law must never be forgotten. We should not tolerate the rewriting of Northern Ireland's history by those who wish to legitimise the actions of murderous terrorists; nor must we allow a campaign to take hold where veterans are continually persecuted in order to appease a narrow agenda. There can be no moral equivalence between unapologetic terrorists or those accused of terror offences and people accused of having committed offences when they were members of the Armed Forces, trying to protect us from the terrorists.

The April 2017 report by the House of Commons Defence Committee, *Investigations into Fatalities in Northern Ireland Involving British Military Personnel*, referred to a proposed statute of limitations. My party, the Democratic Unionist Party, is open to consideration of a UK-wide statute of limitations for soldiers and police officers who face the prospect of prosecution in cases—this is very important—that have previously been the subject of full police investigations. No one should be above the law. Let me be clear: we are talking about cases that were previously the subject of rigorous police investigations. It is wrong that our veterans are sitting at home wondering whether a third or fourth investigation will take place into their case simply because some "make a quick buck" human rights lawyer thinks it is a good idea to reopen their case. Any consideration regarding a statute of limitations should apply not to Northern Ireland alone but be part of broader reflection on other military deployments. This would not be an amnesty, as each case will have previously been the subject of a thorough investigation; rather, it is an appropriate and necessary measure.

Finally, I believe that such an issue will always be for Westminster to determine, rather than the Northern Ireland Government, on a UK-wide basis.

7.53 pm

Lord Empey (UUP): On 19 December 2013, two senior DUP representatives, Sir Jeffrey Donaldson and Emma Little-Pengelly, came to persuade my party to support their idea for investigating the legacy of the Troubles. The historical investigations unit was the

[LORD EMPEY]

centrepiece of their plan. They expected that it would give victims a better experience. These proposals became part of the Stormont House agreement and, subsequently, on 28 September 2015, Sir Jeffrey said:

"The Stormont House Agreement provides a good deal for victims and survivors".

As my colleague Mike Nesbitt pointed out recently:

"The fatal flaw with the HIU is that it excludes many more victims than it is designed to include. Specifically, it is proposed it will investigate only 1,700 of the 3,500-plus Troubles-related killings and none of the 47,000 injured".

Sir Jeffrey was wrong to include survivors as no survivor will have access to the HIU. Imagine if the chief constable said that the PSNI will investigate only crashes in which someone was killed and ignore cases where six people suffered life-changing injuries—there would rightly be uproar.

The former Justice Minister, David Ford, made clear his assessment of the likely effectiveness of the HIU. On 7 October 2015, in answer to a question on the likely prosecution rate of the HIU, he said that,

"the HIU might at best produce one or two prosecutions".

The Government seem to be driven by a false interpretation of how to be compliant with Article 2 of the European convention and have done nothing to challenge this.

Most victims see these proposals as another pay-off to Sinn Féin, to help it rewrite history and hound retired police and soldiers, using records from Kew, assisted by 300 investigators recruited to the HIU, which will become a parallel police force. Terrorists have no records and they will not tell the truth. The Government's commitment to release records is not matched by the Irish Government, who reserve the right to redact documents.

I call upon the Democratic Unionist Party to withdraw its support for these proposals and not subject those who loyally served the state to a decade of anxiety and anguish as they wait for a knock on the door.

7.56 pm

Lord King of Bridgwater (Con): My Lords, I congratulate the noble Lord, Lord Dannatt, on introducing this very important debate. Even though I am allowed only two minutes in which to give my views, I want to make it absolutely clear that I think a completely fresh approach is now needed.

I lived through some pretty troubled times during my time in Northern Ireland. I certainly saw atrocities of all kinds, serious ones, which many of your Lordships will remember. There was a couplet that stuck in my mind:

"To hell with the future and long live the past
May God in his mercy look down on Belfast".

I worry about this legacy and the idea of reliving it the whole time. I want to see reconciliation, rather than this endless regrinding of old grievances, going on and on. Some of your Lordships may have seen on "Channel 4 News" Cathy Newman interviewing somebody who has made a film called "The Ballymurphy Precedent". He said, "I did it because I want the British Army to learn the lessons so that it does not happen again". The lesson the Army is supposed to learn was 47 years ago and the idea of regrinding all this is a disaster. It is hugely expensive.

Of course I do not condone unlawful killing. We saw the idea established by the Bloody Sunday inquiry, costing £200 million—how much better could that have been spent on helping the cause of reconciliation and helping some of those who suffered from the Troubles in that time, rather than all the expensive lawyers at Central Hall discussing these issues in the Bloody Sunday inquiry.

This is not a very helpful comment to the Government but I think we have to change completely the processes we have been following, which are quite unsatisfactory. The Defence Select Committee said that they were quite unacceptable. We need to stop and say, "Is it really sensible to keep going back over all this old ground? Should we not instead concentrate on what is important, which is establishing reconciliation and spending on reconciliation the funds that would otherwise be wasted on these legacy issues?"

7.58 pm

Lord Judd (Lab): My Lords, it is incumbent upon the whole House to put on the record our admiration for and thanks to the service men and women who served in Northern Ireland with such effectiveness. Their role was to establish order, the rule of law and trust. That is why it is vital that we pursue transparently, openly and convincingly any issues which may raise doubts and anxieties about things that could have happened. But we must be careful how we do that because we cannot simply load all the responsibility on to service men and women who were serving in impossible conditions.

Northern Ireland is not in a good place. We still do not have a Stormont. We are hurtling towards March 2019 with no hard evidence of how we are going to reconcile the problems of the border.

I just make this point: what has led to reconciliation and peace in Northern Ireland owes a great deal to ordinary people in both communities who have worked tirelessly at building trust and confidence. The importance of the EU charter of rights cannot be overestimated. It was vital because it gave confidence to both communities that there was a setting of commitment to justice. In the current situation, the term "justice" becomes more important than ever, but let us remember that this has high significance for building a sense of shared responsibility between both communities.

8 pm

Lord Craig of Radley (CB): My Lords, I too commend the noble Lord, Lord Dannatt, for highlighting this disgraceful, dishonourable treatment of veterans. Yes, PSNI should seek to uphold the law, but the investigations are a travesty of justice, jumping from the failure of the Historical Enquiries Team to the failed Legacy Investigation Branch, both now superseded by the Historic Investigations Unit—HIU. It is odds on that HIU will fail and collapse. To be charitable, the failure is more to do with mission impossible than those who tackle it. It brings echoes of the equally discredited

IHAT and its successors in Iraq. These protracted, expensive procedures fail. They are not fit for purpose and should not be perpetuated. They may claim to follow the law—piffle! They do not provide justice or fairness. There is weakness in leadership. What is needed is resolution. As Churchill might have noted, action this day. Will the Government act now?

For the future, the Armed Forces need a statutory limitation on investigations of combat operations. Invoking Section 10 of the Crown Proceedings (Armed Forces) Act 1987 has been mooted. Surely we can do better and have in the Armed Forces Act a clear statement of limitation with no requirement to legislate on this vital issue in haste or confusion at the time of conflict. Those on live operations must know where they stand, free from worry in the heat of battle that their decisions and actions then will become the domain of a section of lawyers seeking to adduce criminal conduct years, even decades, later. Promises have been made by this and previous Administrations. All have stalled or petered out. This Government must do better.

8.02 pm

Lord Astor of Hever (Con): My Lords, in an article in the *Daily Telegraph* last month, the Northern Ireland Secretary said:

"This Government wants to do the right thing by our brave veterans and ensure that they have all the support they deserve",

so I hope she will do what she can, by whatever means, to prevent ex-servicemen being hauled through the court in their old age, having previously been investigated and cleared of any wrongdoing, particularly when there is a perception that terrorists are being treated more favourably than former soldiers.

When I served in Northern Ireland during the Troubles, the article of faith was that if we did the right thing and followed the rules of engagement, the system would always back us up. This was essential in inspiring confidence—often a soldier had only a split second to make a decision, as was faced by Corporal Major "H", who was mentioned by the noble Lord, Lord Dannatt. The Government sent me and others to Northern Ireland to support the police in upholding the rule of law in mostly very difficult circumstances. In the interests of justice and even-handedness, I do not believe that the Government can now wash their hands of the responsibility for what is happening to those who were their soldiers. I very much support what my noble friend Lord King said about reconciliation.

8.04 pm

Lord Evans of Weardale (CB): My Lords, in view of the time pressures I will seek to make rapid progress, but regrettably I do not think the Government have been making rapid progress. It is new 20 years since the Good Friday agreement. I remember when I was in the Security Service I received a delegation of retired RUC officers who were very concerned about this issue. That was 12 years ago. I engaged with the Consultative Group on the Past 10 years ago, and we now have a consultation document from the Government which does not seem to move the story forward very far. My view is that we need to make rapid progress and that the current consultation fails to achieve that. It suggests that the Historical Investigations Unit might aim to complete its work in five years. I think the chance of it completing its work in five years is virtually zero. I would be very surprised if it completed its work in 10 years.

In view of this, the Government need to show leadership and to accept a degree of risk. They need to decide that there will be a statute of limitations. I would even accept one which covered both the security forces and the terrorists. Although that is a very unattractive idea, we need to draw a line under this. If we do not, we will be having a similar debate in 10 years' time and it will be a disgrace.

8.06 pm

Lord Hay of Ballyore (DUP): My Lords, I very much welcome the debate in the House this evening. The legacy of the Troubles still haunts Northern Ireland. Failure to agree on how to deal with the past has left many victims angry and marginalised. Questions that are important to victims about why things were allowed to happen are left unanswered. For Northern Ireland to move forward, we need a balanced approach in how we deal with the legacy of the Troubles. The current arrangements for dealing with the past are totally unacceptable. There is a clear imbalance, with disproportionate focus on the activities of our Armed Forces and the police. This includes the work of the Legacy Investigation Branch of the PSNI, the various ongoing inquiries, the police ombudsman, the Public Prosecution Service and the so-called legacy inquests that are demanded on a daily basis by the republican movement.

There is a great push in Northern Ireland today in the republican movement to try to rewrite the past. It is something we must vigorously oppose. When you talk to former members of the security forces who served in Northern Ireland, they believe that they have borne the brunt of those investigations. A stream of negative stories has been devised and highlighted to undermine the credibility of the Armed Forces and the police. The truth is that our Armed Forces should be praised for their sacrifice and service in extremely difficult circumstances. Our party holds veterans of our Armed Forces and those who have served in the police not only in Northern Ireland but across the United Kingdom in the highest esteem. I believe that we will not move Northern Ireland forward until we find a way through to an agreement on the past.

8.08 pm

Viscount Hailsham (Con): My Lords, in the two minutes available to me, I can only summarise my conclusions rather than set out the detail of my reasons. I do not want to see members of the security services prosecuted or, indeed, sued in respect of any killing or wounding which they were involved in during the Troubles and prior to the Good Friday agreement. I do not think that it is possible politically or in law to make a distinction between the security services and former terrorists or, indeed, within those classes, and I therefore conclude that there should be a statutory bar on all Trouble-related killings or woundings committed

[Viscount Hailsham]
prior to the Good Friday agreement. That should be statutory, not administrative, and could take the form of a statute of limitations, an Act of oblivion or a statutory amnesty and it should apply to both criminal and civil proceedings. I entirely agree with the noble Lord, Lord Dannatt, when he says that it is likely that members of the security forces would be targeted for legal proceedings to a disproportionate extent. I would find that deeply offensive.

I also find it unconscionable—indeed, an abuse of process—that members of the security forces could be prosecuted or sued, while former terrorists now either hold or have held prominent positions in the political life of Northern Ireland and have participated in the Administration of that Province. It is for those reasons that if a Bill is brought forward, I shall certainly vote for a statutory bar of the kind I have identified and, if necessary, I will trigger such a vote.

8.10 pm

Lord Maginnis of Drumglass (Ind UU): My Lords, I am grateful to the noble Lord, Lord Dannatt, for raising the legacy issue but somewhat frustrated by the time limit. This issue should long ago have been raised by the Government, who have recently lumbered us with a succession of Secretaries of State for Northern Ireland who have had one thing in common, in that they have consistently, systematically and actively ignored those of us who actually know what we are talking about.

I came to Parliament in 1983, having been a principal schoolmaster for 23 years and having served in the Ulster Defence Regiment for 12 years; and both prior and subsequent to coming here, I have survived 10 confirmed assassination attempts. From 1994 until 1998 I was part of the Belfast agreement team of the noble Lord, Lord Trimble. Noble Lords might believe that at almost 81 years of age, I would be enjoying some respite but, although it is too long to read, I have here a letter dated 1 July 2015 from an IRA lawyer, Kevin R Winters, giving notice that a brother of two of the three Ballygawley bus bombers who murdered eight soldiers 30 years ago has instructed him to claim damages from me. That was because I shared their names with Prime Minister Thatcher and, a few days later, they were ambushed as they sought to carry out yet another attack on a member of the security forces.

I seek only to set the scene as to what the people of Northern Ireland suffered at the hands of the provisional IRA between 1969 and 1994, so that our Government can be persuaded to look at the legacy catastrophe over which they actively preside and can perhaps reconsider a process that threatens 70 and 80 year-old ex-soldiers with ongoing prejudice and revenge for defeating the IRA.

Time forces me to conclude, but as one who could never take his children in his own car to church, Sunday school, youth organisations or music, I have paid the price, as many other soldiers have done. Finally, in my 12 years' service, I never had a complaint made against me or any soldier under my command.

8.13 pm

Lord Ramsbotham (CB): My Lords, like my noble friend Lord Dannatt, whom I congratulate on obtaining this important debate, I had the privilege of commanding troops in Northern Ireland during the Troubles: first, my battalion in West Belfast for four months in 1974-5, and then the Belfast Brigade from 1978-80.

Internal security operations are the most difficult that an army can be asked to undertake because, rather than operating on a battlefield against other armed forces, individuals are required to make instant life or death decisions involving civilians. All ranks must be carefully trained in the circumstances in which they may open fire, confident that if they act in good faith and within the law, they will be supported by the authorities. In Northern Ireland these were listed on a yellow card and, on every occasion when a member of the security forces opened fire, the circumstances were investigated on the spot by what was called a "flying lawyer" service, with those found to have broken the law being immediately charged.

The Romans had two words for war: bellum, the justifiable use of force between states, and guerra, the unjustifiable use of force within a state. The then Government committed their security forces to guerra in Northern Ireland in 1969, but I well remember the confidence engendered by feeling that it was behind all efforts to restore law and order—a confidence that is so vital to the motivation and morale of members of the Armed Forces. Sadly, I am not confident that the Prime Minister fully understands the importance of this to members of the Armed Forces, whom she may commit to war. Of course, they must act within the law, but I call on her to stand up to those authorities in Northern Ireland who are threatening legal action against some former servicemen, particularly those who, after investigation, have been given to understand that such action would not follow.

8.15 pm

Earl Attlee (Con): My Lords, I too am grateful to the noble Lord, Lord Dannatt, for initiating this debate. I agree with everything that he said. The Corporal Major "H" case appears to be even more unfair than I thought hitherto.

Many noble Lords have talked about the statute of limitations, and I strongly support that. One proviso is that we need different provisions according to the circumstances. The most important consideration is: was the relevant incident reported and investigated properly?

There is a very serious risk attendant on these historical inquiries. The military needs prudent risk-takers and decision-makers. However, they may be deterred from joining the Armed Forces because neither Ministers nor the chain of command appear willing and/or able to protect service personnel and veterans from unfair treatment. Who wants to have imprudent risk-takers in the Armed Forces?

This is not divisible business, but the next quinquennial review of the Armed Forces Act is, I think, in 2020—not that far away. If any noble Lord tabled a suitable amendment on the statute of limitations, I would support it, no matter what my friends in the Government's Whips' Office said.

8.16pm

Lord Bew (CB): My Lords, much has been said tonight that is critical of the Government. I think we have to accept one thing: they are in a difficult position. They are caught and linked in to the hard-won Stormont House agreement. At this difficult moment, the Government will not walk away from the only semblance of an agreement between the parties, the Irish Government, and so on. However, we will be where we are now for several months.

The Secretary of State, in talking about the legacy arrangements, has made the point that above all we must promote reconciliation. That is impossible in these particular arrangements. I note, by the way, that one of the key people in the Democratic Unionist Party has already moved away in public from the key paragraph 34 in the legacy section of the Stormont House agreement.

Some movement is now going on. I do not know where the chips will fall, but these arrangements will not bring about any form of reconciliation. I draw the attention of noble Lords to Dr Maguire, the police ombudsman, who is no stooge of the British state. He is causing a great deal of irritation to many people retired from the services. He said recently that we are stuck and are making no progress towards resolution. He makes the very important point that in two of his investigations, in which he decided that there was no collusion, the families would not accept that and could not come to terms with it. It made no difference, so he carried out an investigation. He is well known for being, to say the least, critical of the security forces at times. He says to the families, "Sorry, there is nothing there", and they do not accept it. Why are we then considering a huge set of institutions to just reproduce this experiment into the future?

8.18 pm

Lord Hain (Lab): I agree with the noble Lord, Lord Dannatt, that dragging long-retired military police and security officers out of retirement to pursue prosecutions is unjust when it is much easier than discovering evidence against paramilitaries. Proposing a quasi-amnesty or statute of limitations must be done for all, or not at all—a point ably made by the noble Lord, Lord Evans. Currently, we are witnessing a massive diversion of resources into investigating old crimes with no prospect of a successful outcome, with many old citizens—notably retired soldiers and police officers—being stressed out by protracted inquiries.

Then we had the politically destabilising farce of one of the key architects of the peace process, Gerry Adams, being arrested in May 2014, detained for several days with media speculation on an intense scale and then predictably released. Where is all this getting us? Meanwhile, there is no proper compensation or recognition for the victims. As the noble Lord, Lord King, said, we have to draw a line and prioritise victims and reconciliation and allow the police to prioritise current crime, not history.

8.20 pm

Baroness Suttie (LD): My Lords, I, too, congratulate the noble Lord on securing this extremely important and timely debate and for his, if I may say, deeply moving speech. In the two minutes available, I shall limit myself to a few brief remarks on this highly complex subject. There is just too much hurt and too many demands for truth and justice to simply draw a line under the past in Northern Ireland. Northern Ireland must be able to deal with its past in a manner that promotes reconciliation and is consistent with the shared future.

The vast majority of those who served in the Armed Forces during the Troubles did so to uphold the law and operated entirely within the law. They acted with honour and integrity and we pay tribute to their courage and sacrifice. We would be doing a disservice to these soldiers if we introduced a procedure that is contrary to the rule of law and our human rights obligations. As such, we would have concerns that an amnesty could inadvertently undermine the contribution of the vast majority of those who served so honourably. But justice must be—and must be seen to be—even-handed. Can the Minister reassure the House that nothing in the consultation and proposed legislation will give rise to a fishing expedition among former members of the Armed Forces? Can he also say whether those in the security services against whom prosecution is being considered will be offered ongoing support and advice as well as effective legal representation, and how that assistance will be funded?

8.21 pm

Lord Murphy of Torfaen (Lab): My Lords, I of course pay tribute to the Armed Forces and all their work over 30 years. I also understand the feelings of victims across the board in this matter but, after spending seven years of my public life as either a Minister, shadow Minister or Secretary of State in Northern Ireland, I have now come to the conclusion, like the noble Lord, Lord Evans, and my noble friend Lord Hain, that we must draw a line. The issue is how we do it, when it is done, where it is done and, of course, whether it can be accepted right across the community in Northern Ireland—which it must be for it to be effective.

This debate has been important in highlighting this issue. The matter now rests with the Government. They have decided that they want a consultation process on the legacy of the past, and I hope that what has been said in this important debate will be taken into account by the Minister and Secretary of State in dealing with what now is the most difficult issue facing people and their political leaders in Northern Ireland.

8.22 pm

The Parliamentary Under-Secretary of State, Northern Ireland Office and Scotland Office (Lord Duncan of Springbank) (Con): My Lords, this has been an important and I must begin by thanking the noble Lord, Lord Dannatt, for bringing it before us this evening. Let me stress that the Government are consulting and the consultation will be extended until 5 October. Let me also say that legacy is a constant companion to all those who have lived in Northern Ireland and indeed to all those who have served there. We can be under no illusion: they will carry that legacy until the day they die.

[Lord Duncan of Springbank]

There are currently many organisations in the Province of Northern Ireland responsible for investigating historical legacy issues, each constituted under slightly different arrangements and each with slightly different approaches. The reality is that, as the noble Lord stressed, there appears to be a very clear skewing of those investigations towards those who have served inside the military and the police services. This widespread view has been echoed tonight. There is no doubt that it is a tragedy that those who served with honour in Northern Ireland, who sought to uphold the rule of law, have found themselves in their retirement years struggling with a legacy that they are unable to respond to and are unclear about when it will end. At the moment, inquests into the Troubles seem primarily focused on former soldiers and police officers. That is under the current arrangements.

The reason that we are consulting today and have brought forward an indication of how we might move this in a different direction is that the current arrangements do not work. It is the current arrangements that have brought us to the situation that we find ourselves in, and that is why we need to think afresh. There needs to be a different approach. We cannot have a situation in which the state, which necessarily records the actions of all those who perform a service for that state, is therefore more likely to be pursued than those who belonged to paramilitary organisations which—as many noble Lords have pointed out—simply did not keep records. We need to recognise that reality. We cannot those who have served this nation being prosecuted simply because it is easier to prosecute them. Justice must be served, but justice must be blind.

I am also aware that in this consultation, as raised by a number of noble Lords, we have focused only on fatalities. It is of course right to strengthen the point that the number of those who were injured is an order of magnitude greater. I would welcome—in fact, I would strongly urge—those who hold that view to make it very clear to the Government that injuries also need to be considered in the wider approach as we seek to bring this consultation towards a conclusion.

It is important to remember certain aspects that we have not touched on as much this evening, such as that the police ombudsman, by its nature, will investigate only those who are former police officers and, by its nature, 100% of the investigations will necessarily affect only the police services. That is why, in looking at the new institutions that should emerge from this consultation, we need to see how we can address the very issues with which we are so familiar and have heard so much about this evening.

There is no easy answer. If reconciliation were achievable by simply asserting it, we would have made greater progress. But that cannot be done. The question then of a statute of limitations, or indeed of an amnesty, is a challenge that we must confront foursquare. The issue is: shall we now draw that line and say that, before a particular date, all shall therefore be left behind, whereas after that date we shall act? It is not the policy of the Government to move forward with an amnesty but, as has been pointed out, an amnesty could not apply only to one side; it must apply equally to all. Again, I would welcome from noble Lords strong representations to the Government on this, so that we may hear very clearly those points being made; we would therefore need to understand where the will of the House rests on this issue. Importantly, we cannot overlook the reality of what the Troubles meant for those who lived through them and experienced those tragic circumstances. As the noble Lord, Lord Bew, reminds us, to some extent, nothing that we can do could ever truly satisfy those who have been bereaved and those who have experienced the trauma and tragedy of events. I do not believe, if I am honest, that anything that can be achieved from this particular consultation could deliver that satisfaction.

I am aware from listening to a number of contributions this evening, not least from my noble friend Lord King, of the cost of these investigations, what that money represents as a loss, in truth, to the wider Province of Northern Ireland, and how that money could perhaps have been spent on other aspects. Again, as we look at the responses to the consultation, we must hear that, if indeed that is a view that is expressed very strongly.

It is necessary, as we begin to consider what will emerge from the consultation, to see whether we can secure what I hope will be a consensus in moving forward. I suspect the challenge will be that that consensus will be absent. It will call therefore on the Government to lead, to determine what that policy that we will move forward with needs to be. We have, as noble Lords will be aware, adopted the Stormont House agreement, which was hard-fought. It sought to draw on the knowledge and experience of a wide breadth of participants in public life in Northern Ireland. It also sought, again, to explore the views of a wider constituency beyond that. It is upon that Stormont House agreement that we seek to make progress through this consultation.

It has taken too long. Of that there is no doubt. We should have been making progress on this matter when the momentum was with us and the wind was in our sails, but that has not been the case. It would be too easy for me to say, as I have said on so many occasions, "If only we had a devolved Executive. They could just sort it all out". Unfortunately, this is a bigger challenge than just saying, "We must wait for that Executive to be in formation". That is why, in putting forward this consultation, and ultimately depending on what emerges from it, we seek to determine a course of action that can bring about each of the elements that we, I believe, all wish to see. Among them is the wish that justice be done; that those who serve with honour do not continue to be persecuted and prosecuted over a lengthy period, as a number of noble Lords have mentioned this evening; and that those who have served their country, be it in the police service or in the Armed Forces, are able to experience a retirement without threat or fear of continued persecution through this process.

The Stormont House agreement gives us a foundation on which we can work, but it will not solve all the problems. We must ensure that those institutions that are developed are able to deliver almost the impossible, which is to satisfy those who have lived through the Troubles, to address those who would seek justice, and to address those who believe that justice simply cannot

be served. We must also make sure that those who serve in the military, those who have served in the military and those who might serve will not be victims of an ongoing persecution that will continue long after they have resigned their commission or retired from the services.

We are asked, as a Government, to do a great deal. In formulating a new Historical Investigations Unit and in seeking to recognise that thus far the previous incarnation of that entity has sought to gather the low-hanging fruit, we need to recognise that it is only fair and proper that the future activities of such an institution address each fairly, that justice be served blindly and that we do not simply cast our eyes to the horizon and say, "This will never end". It will continue for as long as it must continue. In limiting it to five years, we recognise the challenge that that represents, but we also recognise the near impossibility of delivering within that. None the less, there must come that time when a line is drawn. The line will be drawn either by the Government or in due course by the passing on of all those who have experienced tragedy or have been in the Troubles.

I do not believe the Government can easily answer those questions, but they must try. They must do so irrespective of whether a new Executive are formed, because the time is slowly but surely trickling through the hourglass. As well as the Historical Investigations Unit, the Government have put forward three other institutions for consideration. One is a commission on information retrieval, which will be an independent institution established by agreement between the UK Government and the Irish Government to enable victims and survivors in the UK and Ireland to seek and privately receive information about the Troubles-related deaths of their relatives. That will be an important step forward. Another is an oral history archive—again, independent—enabling people from all backgrounds to share experiences and narratives related to the Troubles. The third is an implementation and reconciliation group, again an independent institution to promote reconciliation and to review and assess the implementation of the aforementioned institutions to deal with the past. Those are anticipated within the overall consultation. However, I stress again that the key, beating heart of this is the belief in the fairness and transparency of the actions, and that this too will come to an end—because it must. We do not wish to see hundreds of millions of pounds spent trying to achieve the impossible. None the less, we wish to see a move forward that gives satisfaction to those who have lived through the Troubles in whatever capacity they themselves did.

I therefore say to the noble Lord, Lord Dannatt, that the current system does not work. It has been a prosecutorial system which has sought to gather the low-hanging fruit, and that has been intrinsically unfair. There have been a number of difficulties in trying to prosecute and pursue those guilty of terrorist atrocities. Just because it is hard does not mean that it should not be pursued with the utmost rigour. Justice must be done and must be seen to be done. It would be patently unfair for the perception of skewing to manifest itself in any way as a reality.

I know noble Lords will be offered an opportunity to revisit this as the consultation itself concludes, but before we get to that stage it is critical that the views that noble Lords express, which represent a large constituency of various interests, are part of the consideration of that consultation. We must make sure that what emerges from that consultation works, because the current arrangements do not. We must make sure that there is confidence in those arrangements—that there is fairness, honesty and integrity and, ultimately, that justice is served by them. Perhaps hardest of all, we must also recognise that this consultation and the institutions it may yet deliver will not themselves salve the wounds of those who were harmed or hurt in the tragedies. None the less, they may serve as a final attempt to address the concerns expressed by those pursuing justice, as they have done over the years.

It will not be an easy outcome. The Government are fully aware of how difficult it will be to satisfy each of the constituent elements, some of whom have spoken this evening. However, two things must stand above all else. First, the British Armed Forces served with honour in Northern Ireland. There have been occasions, as inevitably there will be in any comparable situation, where difficulties will have arisen, and they need to be pursued to the fullness of justice. But equally, justice cannot focus only on the state actors, which is why we must move forward on both.

On the notion of an amnesty, which many of Lords have spoken of—again, I strongly urge noble Lords to make those points clearly in the consultation itself—it is not the policy of my party or of the Government to believe that we are in a situation where we can overlook those crimes of the past. We believe that they must be pursued to the fullness of justice: that is what we ultimately wish to do. We must also recognise, however, that old men forget and that, with the passage of time, it becomes ever more difficult to find the truth and gather the evidence, and ever more trying to bring yourself into a situation in which you can secure that which I believe all would wish to see: justice done and justice served.

A number of noble Lords have stressed how important it is that this be a sensible solution, and that we should not simply believe that by casting further hard-fought money into a procedure we can achieve the ultimate ambition of salving the wounds of all who grieve. We cannot do that. But we must be in a position where the Government have been seen to do their job, which is to recognise that those in Northern Ireland who seek justice are in a position to believe that justice has been done. We must also be in a situation in which those who have served the state in Northern Ireland do not find themselves enjoying, one would hope, their twilight years while always finding themselves pursued to the point of ill health.

It would be easy for me to simply say, "It's a consultation—let's wait and see". But the reality remains that we must act and must do so on the basis of consensus, which we hope we shall draw ultimately from this consultation. This has been a worthy debate, which has made me think very carefully about many different aspects of it, so I thank your Lordships very much.

Mental Capacity (Amendment) Bill [HL]

Committee (1st Day) (Continued)

8.40 pm

Amendment 9

Moved by ***Baroness Barker***

9: Schedule 1, page 10, line 8, at end insert "to safeguard the well-being, wishes and feelings of the cared-for person."

Baroness Barker (LD): My Lords, we return to the topic that we were discussing before the break: the conditions that have to be met for authorisation of deprivation of liberty arrangements. During the dinner break, I reflected on what the Minister said in response to the previous Amendments 7 and 8, which were in similar territory. I understand entirely what he said about the best interests test being in the Mental Capacity Act and that being the first stage of assessment. However, on the secondary assessment for arrangements for either care and treatment or deprivation of liberty, the Minister seemed to suggest that there was a possibility of conflict between those two things or a misunderstanding of them. I will go back over some of that territory again; that may irritate the Minister, but it has been clear all afternoon that one of the main purposes that these proceedings in your Lordships' House may serve is to enable people outside in the lobby groups, who, like us, have not been able to see a clear read-across from this Bill back to the original legislation, now to do so.

Amendments 9, 10 and 30 seek to reiterate or reintroduce concepts which will be very familiar to all those who took part in the deliberations during the passage of the Mental Capacity Act. Under that legislation, it was always to be made clear to a person who was possibly going to be subject to a deprivation of liberty, and to anybody involved in that decision-making, that the well-being, wishes and feelings of that person had to be taken into account, that any decision would be the least intrusive as possible, and that the arrangements being made for the person were the least restrictive, particularly with regard to where somebody should reside. That is for many people, particularly older people, perhaps one of the most contentious decisions. It is often one of the subjects on which there can be conflicting views between families and individuals or between professionals and individuals.

I have said before and—given that the one thing that has stuck out in the Bill is the enhanced role for care commissioners and, particularly, home care managers—I do not think it is unreasonable to go back again and satisfy ourselves that, when the authorisation of arrangements happens, these key parts of the Mental Capacity Act will again form part of the assessment. I hope, when we come to further amendments down the line, that they will be part of the record of decision-making. I do not make any apology for raising these amendments. I am sure the Minister will bat them back, but if he will do so with a deal of explanation then I think we will have served a purpose. I beg to move.

8.45 pm

Baroness Hollins (CB): My Lords, Amendment 29 seeks to ensure that the views of those consulted are taken into account in determining whether the arrangements are necessary and proportionate and, importantly, that particular weight is placed on the wishes and feelings of the cared-for person. I declare an interest as I also have a family member who is directly affected by the matters we are debating today; indeed, much of my Recess was spent trying to sort out his care needs taking into account his views.

While the Bill includes a duty to consult, I and many in the sector are concerned that, as currently drafted, the Bill does not adequately weight things towards the cared-for person's wishes—the person who, of course, should be at the centre of all this. This also reflects the Law Commission's advice about giving more weight to an individual's own wishes and preferences regardless of whether they have been judged to have decision-making capacity—this is quite important. In a fairly recent case, Wye Valley NHS Trust v Mr B, the judge concluded:

"that an incapacitated person's wishes and feelings should be assumed to be determinative of his best interests unless there is good reason to depart from the assumption".

Earlier, the noble Baroness, Lady Browning, spoke importantly about the difficulties sometimes of communicating with and listening properly to people who have communication disabilities. I accept entirely that conversation with people who lack, or may lack, capacity can be challenging and requires additional communication skills, training and understanding. It is crucial that we get this right, because the consequences are significant and will lead directly to improvements or deteriorations in people's health and independence.

It is often the case that the family are the most skilled at communicating with their loved ones and are, therefore, the ones most likely to understand their feelings and wishes. This may in some circumstances be communicated with subtlety and nuance. I declare another interest here as I chair the charitable community interest company Beyond Words. The wordless health and social stories that we create facilitate discussions and support decisions, but the discussions they facilitate are about people's wishes and understanding; they support decisions that at the outset might appear too difficult or challenging.

Anything that enhances the understanding of the person—and of the carer, social worker or health provider—about what the person is thinking and might want takes time and skill. Sometimes people need special tools to help them. Effective engagement by support workers and carers with each individual can improve their understanding about the type of support the person requires and I hope will lead to less restrictive interventions being provided.

On this whole issue of who sits with, communicates with and listens to the person, I think many working in the care sector assume it will be an expert who comes in, yet the experts do not see that as being part of their job either. So there is a gap, where often nobody is actually doing the listening or communicating, because everybody assumes that it is somebody else's job.

Lord Hunt of Kings Heath (Lab): My Lords, I have added my name to the amendment tabled by the noble Baroness, Lady Hollins. As she eloquently said, the puzzle relates to paragraph 17 of new Schedule AA1 on consultation, which references those who must be consulted. The aim of the consultation is,

"to try to ascertain the cared-for person's wishes or feelings in relation to the arrangements",

but the paragraph does not specify that the cared-for person must be consulted. The Minister might just refer me to Section 4 of the Mental Capacity Act and say that it is covered there, but so are the provisions in sub-paragraphs (a) to (e) in paragraph 17(2)—they are all listed in the best interests test. Therefore, the puzzle is why the Government have decided that there should be no attempt, at least in statute, to seek the cared-for person's wishes and feelings. We are already concerned that these measures are not focused on the interests of the cared-for person; they are about streamlining bureaucracy and saving money, and this rather lends to that suspicion. I hope that the Minister will be able to agree to the noble Baroness's amendment, because it is a very important symbol of what this is really all about.

Baroness Thornton (Lab): My Lords, this group of amendments tests the proportionate nature of the decisions being taken. Amendment 29 would put the views of the cared-for person at the centre of the assessment and ensure that adequate weight was given to their wishes and feelings. I have not been able to find in the Bill where that is expressed, and that is shocking and surprising. We have to see a clear statutory duty to consult the cared-for person, and the scope of that consultation must include their past wishes, feelings, values and beliefs. I invite the Minister to tell me whether he believes that the Bill as it stands achieves that, because I cannot see that it does. If this amendment is not agreed to, the Minister and the Bill team must think about how they can best make sure that the Bill reflects the need for consultation with the cared-for person.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): I thank noble Lords for tabling their amendments and for contributing to a debate that has continued the discussion that we had before dinner. It again gets to the heart of why we are here, which is to make sure that when people need to be deprived of their liberty, it is in their best interests to do so and that the restrictions are proportionate and necessary and so on.

I agree with the spirit of the amendments. It is important that we intend to, and do, safeguard the well-being, wishes and feelings of the cared-for person. Dealing with the first set of amendments, I take this opportunity to reassure noble Lords that the changes being sought are already required by law in several ways.

First, the European Court of Human Rights has made it clear that a decision on whether arrangements are necessary and proportionate must include consideration of the cared-for person's wishes and feelings about the arrangements. It should also be noted that, as the noble Lord, Lord Hunt, pointed out, wishes and feelings are already a part of the first-stage best interests decision-making under Section 4 the Mental Capacity Act and I can confirm, as I have done already, that the Bill does not change this. Furthermore, wishes and feelings will also be considered as part of the "necessary and proportionate" test, and the code of practice will provide further detail about how that will work in practice.

Going even further, as has been referenced by several noble Lords, we have created in this Bill a specific requirement to ascertain a person's wishes and feelings in relation to the proposed arrangements through the duty to consult with anyone with an interest in the cared-for person's welfare—first and foremost the person themselves, as well as their family, carers, friends, advocates, interlocutors or anybody with a substantive interest in their care. I believe that there is substantial legal protection, force and direction to make sure that the person's wishes and feelings are considered first and foremost in any of these kinds of arrangements. As this debate has demonstrated, there are clearly lingering concerns that that is not the case, because of the existing framework, notwithstanding the enhancements through the duty to consult that we are introducing. However, I am eager to make sure that it is well understood, and to work with noble Lords so we can make clear that those responsibilities already exist, both in statute and—

Lord Hunt of Kings Heath: I understand the Minister's argument, were it not for the fact that the amendment, in paragraph 17(2)(a) to (d), just copies what is already in the best interests clause. I would argue that, if we are going to copy four of those, why do we not copy the issue about the cared-for person being listened to? The Minister is arguing different points from amendment to amendment on this.

Lord O'Shaughnessy: We try to be consistent, but it is not always possible. The noble Lord makes a good point; it is something that I would like to explore further.

Turning to the matter of considering less intrusive arrangements, again this is incredibly important. Case law establishes that the test of whether the arrangements are necessary and proportionate must also include consideration of whether less intrusive arrangements are available and have been fully explored. As we discussed in the last debate, it is already a principle under the Mental Capacity Act. The code of practice will provide further detail about how that will work in practice.

This has been a useful debate, continuing, in some ways, the previous debate on best interests. As we have all agreed, it is important that the person's wishes and feelings are at the centre of arrangements being proposed. That is certainly our intention through the liberty protection safeguards scheme that we seek to introduce. I want to continue working with noble Lords over the coming weeks to make sure that there is clarity that that is the case. I hope that on that basis, the noble Baroness will be prepared to withdraw her amendment.

Baroness Barker: I thank the Minister for that reply. We started with the mental capacity legislation, which is explicit in having the person at the centre of everything that happens. Yet we know from several reviews that have been conducted, including the review by the Select Committee, that the implementation of that legislation has been very patchy. To then be faced with a piece of legislation in which consultation with the person is not on the face of the Bill seems to be moving a long way from that original principle.

I have let the Minister talk about the code of practice repeatedly and I have not mentioned it so far, given that we have other amendments to debate. However, we found out with the Mental Capacity Act that reliance on the code of practice was one of the reasons why the Act was not implemented as well as it should have been. We will come on to that in far more detail, but there are some things that are so fundamental to the operation of this that we should know by now that leaving them to the code of practice is not acceptable. We can talk about implementation within the code of practice, but there are some things that need to be on the face of the Bill. For me, we really have hit that. If we are not even going to attempt to consult people, that for me is a red line, so I am pleased that the Minister has agreed to talk to us about that.

The points made by the noble Baroness, Lady Hollins, about the weighting of the wishes and feelings are also important. Those wishes do not sit on an equivalent level with the views of everybody else. They should be pre-eminent.

9 pm

Lord O'Shaughnessy: I take the points that the noble Baroness is making. Obviously we will discuss this further. But it is important to reflect on the new duty to consult. It is not a duty to consult everybody but the person, so it is not fair to say that there has not been an earnest attempt in the Bill to make sure that the person is fully consulted in the necessary and proportionate test, even if the noble Baroness does not like the precise way that that has been done. It is important to set that out.

Baroness Thornton: It is a spectacular omission not to mention the very person whose liberty is being restricted. I ask the Minister and the Bill team to remind themselves of Articles 5 and 8 of the UNCRPD, which mandate such consultations.

Baroness Hollins: This needs emphasis because of the culture of care that we have in this country. There is still such a paternalistic attitude towards the person, that not to emphasise it is to miss the point.

Baroness Barker: I thank noble Lords for their support. We will need to return to this and I am glad that the Minister has taken that point.

Another reason for tabling the other amendments to ensure that arrangements are the least intrusive and least restrictive option is that, as we will debate on later amendments, the Bill is somewhat deficient in the extent to which it requires that people should be given information on which to base the consultation.

I make no apologies for raising this again at this time. It is something that we I hope we will discuss between now and later stages of the Bill. I hope that the Minister can understand the reasons for the concerns that lay behind the amendment. Having said that, at this point, I beg leave to withdraw the amendment.

Amendment 9 withdrawn.

Amendment 10 not moved.

Amendment 11

Moved by ***Baroness Hollins***

11: Schedule 1, page 10, line 10, leave out ", other than care home arrangements,"

Baroness Hollins: My Lords, Amendments 11, 12 and 13 deal with a perceived conflict of interest pointed out by numerous charities and care providers with regard to the role that care home managers are intended to play under the Bill. As drafted, the Bill places a new duty on care home managers to carry out the assessments and consultation prior to authorisation. My amendments would ensure that the duty for carrying out assessments resides with the responsible authority, with a retained duty to involve care home managers in carrying out those assessments.

I raise a puzzle that I have. I have been trying hard to get my head around some of the possible unintended consequences of the way in which we think about care homes and care home managers and the relationship between different kinds of care and support that are provided. Some services, with great encouragement from local authorities, have been trying to convert their residential care homes into supported living houses. That has been the trend. Often, these new supported living houses are located on the same site as the remaining residential care homes or in the same area but with the same organisation running them and the same chief executive. Sometimes, the registered care home manager is not only the care home manager for the residential side but is also the manager for the supported living homes. They are located on the same site, close together and within the same organisation within the same management structure, but the organisation will have two different systems for authorising the provisions of the Act, which will be very confusing for it.

I wonder whether there might be a perverse incentive for adult social care to reverse its previously encouraged trend towards supported living, to reduce its administrative burden and to register more care homes. This seems to be a backwards step when, in times of personalisation, we want to move more people to settings that are not registered care homes, but are more supported and likely to take note of their personal wishes, if that is not too much of a conundrum. It is one of the real puzzles I have been struggling with over the Bill.

The whole ethos of DoLS was that those making the decisions about deprivation of liberty were independent of those providing care to the person, and that independent assessment is an important safeguard. More specifically, the new arrangements raise concerns

that a number of stakeholders have pointed to. For example, it can be easier to care for someone by placing more restrictions on their freedom. It is harder to support them in the least restrictive way possible and to maximise their choice and freedom. We know that health and social care professionals are naturally risk-averse and, if there are some possible risks, they will often choose the perceived safer, albeit more restrictive, option over increasing liberty.

I believe the vision, which is great, is to integrate decisions about liberty protection safeguards and deprivation of liberty into care planning. This means that, at the point of making decisions about placement, decisions about restrictions are also considered, with a view to seeking the least restrictive option. This makes sense, but I do not see how this can happen if the care home is making the determination. It is already a done deal that the cared-for person is going to be in that care home. Their care manager will be looking at the arrangements within the care home. They are unlikely to say that the person would be better off and able to have more freedom in a different setting—for example, a supported living setting. There is a bit of a conflict of interest here.

Currently, the care provider feeds into the DoLS assessment, sharing their expertise as a provider. That is a different role and skill set from making decisions about necessity and proportionality. Consulting with relevant people is a different role from being one of those consulted. The assessments are complex and this new role is being placed on care managers who, by definition, have a different skill set. The sector is trying to deliver care for people who, in many cases, have complex needs and require intensive support to live as independently as possible. I am interested to know what conversations the Minister and officials have had with those upon whom this new duty would fall, as I suspect they will have raised many similar concerns.

Perhaps it is worth reflecting on the judgment by Lady Hale in the Cheshire West case. In speaking about the extreme vulnerability of the people concerned, she said:

"They need a periodic independent check on whether the arrangements made for them are in their best interests. Such checks need not be as elaborate as those currently provided for in the Court of Protection or in the deprivation-of-liberty safeguards (which could in due course be simplified and extended to placements outside hospitals and care homes). Nor should we regard the need for such checks as in any way stigmatising of them or of their carers. Rather, they are a recognition of their equal dignity and status as human beings like the rest of us".

I wonder whether this paperwork exercise for non-objecting people is what she envisaged as an independent check. In his response, I would appreciate the Minister's view on whether he sees a conflict of interest here and whether he agrees that the assessment should be carried out by someone independent of the care home, and who that should be. I wonder if we need to make more use of service brokers to do the care planning, listen to the person's wishes and ensure that the decisions made lead to an effective care plan. I beg to move.

Lord Hunt of Kings Heath: My Lords, I have added my name to that of the noble Baroness. She has succinctly put forward the case for the removal of care home managers from this important position, and at this point, I am very supportive of that. While we debated this issue earlier, I want to come back to point raised then. The argument was put that we ought not to worry because the local authority remains the body that approves authorisations; it will provide independent scrutiny and oversight. I have already referred to the fact that the impact assessment treats this essentially and mainly as a desktop exercise, but my advice from Professor Lucy Series of Cardiff University is that unless care home managers themselves indicate that an AMCP referral is required, all the responsible body will be able to make the decision on is the information supplied by those care home managers. She states that that is a very weak independent safeguard, and indeed it is when care managers have a financial interest in these decisions. That is why this arrangement simply cannot be allowed to stand.

The other thing I would point out to noble Lords is the evidence I received on Monday from ADASS, the association for the directors of adult social services. Like everyone else, it supports the overall thrust of the Bill—there is no question about that—but it has some concerns relating chiefly to the expectation that care home managers will be responsible for the assessments required to authorise the deprivation of a person's liberty. It says that it is in discussions with the Care Quality Commission and the Care Provider Alliance, which both have similar concerns. That answers the point raised by noble Lords about where the CQC stands in relation to this. I am not surprised that the CQC has concerns because of the very difficult challenges it faces in the care sector generally. One has to think carefully about whether adding to its responsibilities is the right course of action.

ADASS has stated:

"Whilst registered care providers have previously been required to assess individuals, to determine that they can meet the person's needs and to undertake care planning, they have not been required to assess to protect people's liberty. Planning Care and assessing whether deprivation of liberty is in a person's best interest when they are unable to decide for themselves are very different things. ADASS therefore believe this to be a new activity, requiring new skills and resources. We have real concerns relating to a) care home capacity, b) care home staff competence, c) perverse incentives and potential conflicts of interest, d) additional cost (for training and additional capacity) and e) whether and how such costs will be resourced".

Noble Lords who know those at ADASS will know that they do not make such statements without very good evidence. The noble Baroness is proposing in her amendment to take out the reference to care managers, and my assumption is that the role of assessing will be restored to the local authority, which of course was in the Law Commission's original plan. From what I have heard, surely we have to stick to what the Law Commission proposed.

9.15 pm

Baroness Finlay of Llandaff (CB): My Lords, I have listened to the debate and have ended up feeling slightly puzzled. If we are looking at how we improve the quality of life of "P", what they experience day to day in how they are looked after is what influences that quality of life—in other words, how well the care plan is planned and executed. It cannot be just about the

[Baroness Finlay of Llandaff]
planning phase but about how well it is executed and how that execution of the care plan is monitored, day to day and week by week. In a care home, the person ultimately responsible for care plans has to be the manager because you must have a vertical structure, even though the plans may well be written by staff at a different level. If a person is in supported living, someone will be responsible for overseeing the care and provision in that supported living arrangement by dint of it being supported. Therefore, that must also be planned for and it will not be a care home manager but somebody else overseeing their care.

I can see that there is enormous concern over care homes. We all know that there are some excellent care homes and we have all, sadly, encountered care homes that are not excellent, where one would have concerns about their ability. If we are trying to drive up a person's experience and quality of life, and make sure that what is done is necessary—because there is no other way of managing them—there need to be restrictions proportionate to the problems that they pose. I add here that we must consult and make every effort to listen to the person. We have that in another set of amendments later.

It may be that our grouping of amendments at this stage is not right because there is so much that interweaves between them. The worry is that if we then say that the people on the ground and the care plan are not the main part of the assessment, we go back to somebody basically helicoptering in, doing an assessment, seeing how they are and going again and leaving approval—that may be for a year—without any pressure to constantly review. Later amendments seek to put pressure on to review whenever the situation changes—to make it a more dynamic situation that really reflects that people deteriorate. Fortunately, some sometimes improve but most of the time you are faced with deterioration.

The other problem is that local authorities are, we know, incredibly short of finance. We know that they already cannot cope with the burden of assessments that they are being asked to carry out. I cannot see how asking them to take back the role and possibly do three assessments rather than six will tackle the problem of the number of people needing to be assessed and thought about being far greater and not matching—I think it never will match—the resources available.

It is easy to say that we need more people to do this but realistically the number of trained and experienced people is just not there. We have to find another way forward. There is a tension because whoever does the assessment may have a conflict of interest, whether about funding the care or receiving the income from the care. Somehow we need a system that improves the quality of life of the person and is subject to scrutiny more often than just on the occasions that the assessment is done initially or when it is reviewed after a fixed time.

I wonder whether a group of us needs to go away, sit down and really try to work this through with worked examples. I should declare that at one of the meetings I had in Wales we used worked examples in different settings. When we started to work through it for supported living arrangements—that was the table I was on—it became easier to see how it could work and how the triggers could work. I am not saying it was a perfect solution. I think the intention of these amendments is superb but I worry that they might not solve the problem.

Baroness Tyler of Enfield (LD): My Lords, I was not going to intervene on this group of amendments but I have listened carefully to all the points that have been put and they have all been absolutely excellent. There is a tension here, as the noble Baroness, Lady Finlay, just said. My main reaction, particularly when I read the letter from ADASS—I shall not read it out again; I have it in front of me—was of real concern. As the noble Lord, Lord Hunt, said, they are not the sort of people who say these things lightly. They do not scaremonger. They do not exaggerate. They make very carefully calculated judgments, as you would expect of people at that level. I read the letter with great concern.

I was equally concerned when I read the briefing, as mentioned earlier, from the Relatives & Residents Association. One phrase really resonated with me, about the association's great concern that too often we were asking care managers to be judge and jury about decisions in which they were involved. That is how it was expressed. The noble Baroness, Lady Finlay, made some excellent points. We have to find a way through. It would be genuinely helpful if, as in her proposition, there was time to think about those who will be most involved, as they must be, in care planning for these very vulnerable people, and a sufficiently independent element in arrangements so that people feel that care home managers are no longer judge and jury. I do not think we are there yet. I cannot articulate it at the moment but we must work together to secure a slightly different way forward.

Baroness Barran (Con): I echo the appreciation of the noble Baroness, Lady Tyler, of the explanation of the noble Baroness, Lady Finlay, of the choices we face between the care home manager, who in the best cases will know "P" well, and the local authority assessor, who, as was said, might be parachuted in. It underlines the need for the now-familiar new paragraph 17(2) to be well thought-through and implemented. It is clear that the Bill's intention is for this to be one of the critical safeguards of how this all works in practice, along with the scrutiny role of the responsible authority, which we will no doubt cover in detail.

Amendment 11 in the name of the noble Baroness, Lady Hollins, raises an important point about supported housing and care homes. It raised in my mind a slightly different question, which may have occurred to other noble Lords: do we need more clarity in the Bill on how it applies in domestic settings? For example, when someone who is normally cared for at home is in a care home for a short stay, perhaps because their carer is in hospital, what is the position in the home once the protection of liberty safeguards have been authorised? I wonder whether my noble friend could consider whether there is a need to clarify exactly the role of the safeguards in domestic settings and how they interface with the Care Act and other bits of legislation that would apply in such cases.

Lord Touhig (Lab): My Lords, I am very pleased to follow the noble Baroness. I think she made her maiden speech at Second Reading; it was an important contribution. She has sat through this debate and made a few important points. We certainly welcome her and look forward to further remarks from her as we proceed with our considerations.

I support the amendment in the name of the noble Baroness, Lady Hollins, addressing as it does concerns expressed by me and other noble Lords at Second Reading. The Bill provides a different route of authorisation for a deprivation of liberty when a cared-for person lives in a care home. In this circumstance, it places a new duty on care home managers to carry out the assessments and consultation prior to authorisation. I echo the noble Baroness's concerns that this creates a conflict of interest. We have already considered some of these aspects earlier but none of us needs make any apology for coming back to it because it is so very important. Care home managers will have an important insight into an individual's needs and they should be included as a source of information, but a responsibility to carry out the assessment requires more than simply providing information. It is a different skill set from their expertise as a provider.

Furthermore, care home managers are not independent and although they are not responsible for granting the overall authorisation, the contents of those assessments will be key to local authorities' overall determination. This is particularly important where there are concerns about weaknesses in the pre-authorisation review outlined in Clause 18. That clause does not, as drafted, secure the independence of the person carrying out the review. It does not ensure that a rigorous review is carried out. As it stands, it risks the pre-authorisation review. The overwhelming majority of care home managers would undertake their duties honestly and assiduously.

However, we have to face facts. This Bill, as drafted, leaves the door open for a dishonest assessment, and we have to speak plainly about it. That should concern this Committee as we are debating the system of legally depriving some of the most vulnerable people of our society of their liberty—nothing can be important than that. Furthermore, it is unclear what assessment the Government have made of the burden this would place on the care home managers. This will account for more of their time, which is scarce in any event. It will also add new complexities to their role; perhaps the Minister might want to further tell us how the Government envisage a proper training programme and what resources will go alongside it to allow them to perform these new duties.

The concerns I have outlined are widely held. They have been expressed not just by me but also by a number of charities. It should be noted that the amendment before us has the support of the National Autistic Society, of which I am a vice-president, Age UK, the Alzheimer's Society, the British Institute of Human Rights, Liberty, Mind, Rethink Mental Illness, the Royal Mencap Society, Sense, and VoiceAbility —we could go on. They have also been expressed by the Law Society. Those concerns are also held by professionals.

A survey carried out on the Government's proposals by Community Care and Edge Training & Consultancy asked professionals whether they agree with the proposals that care home managers would carry out assessments. An overwhelming majority—86%— disagreed. My goodness, we could have those votes in some elections. It is certainly a very powerful message. That question also provoked the highest number of written comments and these are relevant to our debate. One said: "This is the most obvious concern with the new proposals: there is a direct conflict of interest with the provider". Another said: "Where is the independent viewpoint?" A third said: "This process will be a waste of time at all levels if the initial process is not completed thoroughly".

It is right that we subject this aspect of the Bill to thorough scrutiny. It was not part of the draft Bill produced by the Law Commission and therefore has not been spoken about and debated at length, as have other aspects. It has gathered significant criticism too, and we should be prepared to listen to that criticism. Therefore, the noble Baroness's amendment strikes a very sensible balance. It ensures the independence of the assessment process, it alleviates some concerns about the independence of the pre-authorisation review, and it also secures the important role of care professionals in providing vital insight into the individual's needs. I echo the noble Baroness's requests for the Minister to give us his views on the conflict of interest that arises from this clause, and whether we may instead consider ensuring that any assessment is carried out by someone independent of the care home. This is a very important matter which we will be coming back to a lot, I am sure.

Lord O'Shaughnessy: My Lords, I am grateful to the noble Baroness, Lady Hollins, and the noble Lord, Lord Hunt, for tabling these amendments and to all noble Lords who have given us the opportunity to explore what is obviously emerging as a critical part of the proposals in the Bill. As noble Lords have said, the amendments would remove the inclusion of care home arrangements from the Bill—that is, the duty of care home managers to arrange the various assessments—and instead substitute a duty on the responsible body to carry out those assessments while involving the care home manager in such cases.

In 2014, this House found that the DoLS process was bureaucratic and overly complex and that is what we are trying to address. We are trying to create a streamlined system that does not—the noble Lord, Lord Touhig, is right to warn that it should not—open the door to dishonest assessment, but rather make sure that everybody gets an appropriate assessment of whether their deprivation of liberty safeguards is in their interests, necessary, proportionate and so on. That is what we are seeking to do. I want to spend a bit of time going into this issue because I think there is a misunderstanding about what is proposed by the Bill.

Under the arrangements in the Bill, in care home cases, the care home manager would be responsible for arranging the assessments for the responsible body—not necessarily carrying out, but arranging; I will come to who carries them out in a moment. This would ensure that existing assessments and assessors who know the

[Lord O'Shaughnessy]
person best can be used where appropriate. Noble Lords have asked who will be carrying out these assessments. I will explain that in a moment.

9.30 pm

Under DoLS, as we have been reminded, care homes already play a role in arranging assessments. They identify deprivation of liberty. They notify the relevant local authority. They need to explain the care capacity assessment restrictions and follow least restrictive practice. A best interests assessor then visits and carries out assessments. It is worth noting that in that process, where the best interests assessors are looking at the assessments that have been organised by care home managers, only a very small proportion of those reviews bring about a change in the care of that person. Notwithstanding some of the slightly negative comments that have been made about the capacity of care home managers to organise, not necessarily to carry out, these kinds of assessments, we are confident that, by and large, care homes are getting this process right.

Under the system of safeguards that we are proposing, care home managers will have a duty to arrange the assessments, but in many cases this will be carried out at the care assessment stage—that is critical to early planning—and often by social workers. These will form the basis of assessments carried out by the responsible body. The liberty protection safeguards do not require assessments to be carried out by the care home manager. This may not be the case for some self-funders, but these assessments would still be performed by people with appropriate expertise and knowledge, as required by binding case law.

Who would that be? This is the critical point, which was referred to at the beginning of today's proceedings by my noble friend Lady Browning. For medical assessments, it would be medical experts, including family GPs, psychiatrists and others—we will come on to discuss that. Capacity assessments would be carried out by nurses, social workers and speech therapists. The necessary and proportionate test would be carried out by exactly the kind of people I have listed, or other suitably experienced and knowledgeable healthcare staff. The point I am trying to make is that the people who are carrying out these assessments may have been commissioned by the care home manager but in the vast majority of cases will not be the care home manager; rather, they will be people with the appropriate skills, knowledge and professional expertise to carry those out properly.

Subsequently, the role of the responsible body will be to ensure the necessary oversight of the system. Of course, the responsible body will be responsible for authorising every single assessment and scrutinising the applications before authorising them. In answer to the noble Lord, Lord Hunt, if there is any reason for an AMCP—an approved mental capacity professional—to believe that there is cause for further investigation, it is not true that only care home managers can give the signal that there ought to be some further investigation. The Bill allows for families, appropriate persons and advocates to be able to raise those kinds of flags outside of, or augmenting, the range of assessments that care home managers organise.

I apologise for dwelling on this at length, but it is important to describe exactly what is proposed. It is not the case, as perhaps might be imagined, that a group of people with official, desk-based jobs will be carrying out the kinds of assessments for which they are not prepared. They will be done by people with suitable expertise. Having said that, it is also important to reflect on the fact that, notwithstanding some of the adverts that the noble Lord, Lord Touhig, read out earlier, there are CQC standards in place for care home managers. They have to pass the fit and proper test. It includes necessary qualifications, competent skills and experience to manage the regulated activity. Registered managers and providers have to provide services which meet fundamental standards as set out in regulations, including those which relate to DoLS or, as we propose, the liberty protection safeguards. I think it has been important—and I hope it has been helpful—to set out exactly what is envisaged.

The noble Baroness, Lady Finlay, makes a good point. We perhaps need to describe better what some of these processes would look like. That is something that the code will do, but it might be an exercise for us to carry out in a couple of weeks so that we can describe better than it has been done—because there is a misunderstanding—how it will work in practice. The risk is otherwise that we just load it all back on the local authority and we would be back where we started, with the assessments in theory being carried out but in practice not being done. That is the role of the care home manager.

Quickly moving on, of course we want sufficient oversight of care home applications. Every application will be considered by a responsible body, including with a pre-authorisation review by somebody completely independent from the care home, and an authorisation can be given only by a responsible body. That is different from what happens in the NHS, which is able to do both assessment and authorisation, albeit it is different bits of an NHS provider. Independence in the system will also be maintained by ensuring that cared-for persons have access to support and representation. There is referral to an AMCP where there is an objection, as the noble Baroness, Lady Finlay, pointed out, and regular reviews as well.

The role of the CQC is to ensure compliance. That is its job in the care home sector. It will continue to do so. It will inspect compliance with the amended Act and take enforcement action where necessary. If it hears through its inspections that somebody is being unlawfully deprived of liberty, there is a range of actions it can take in relation to the care home manager. It is not the case that any dishonest assessments, should they arise—and of course, we are at pains to make sure that they do not—would not result in regulatory action.

I apologise for talking at some length on this topic, but it is clearly a very important one to explore. We need to pursue this route because it does two things: it gets consideration of the deprivation of liberty earlier in care planning and gives a more proportionate system. I also understand that we need to do more work to

explain how the system we are proposing secures against conflicts of interest and provides independent oversight and expert input at every step along the way.

Baroness Hollins: I asked about the difference between care homes and supported living and just that conflict.

Lord O'Shaughnessy: I will briefly come to that. In supported living arrangements, the local authority, the CCG or the local health board would arrange the assessments. It would automatically be that body, as opposed to the supported living provider. I hope that will provide the reassurance the noble Baroness is looking for. It would be the commissioning body in that case.

Baroness Hollins: It may be that a lot of the thinking has been done around elderly people and people with dementia as opposed to people with learning disabilities. In the learning disability world, there has been such encouragement towards supported living that they are often within the same organisation, even within the same setting. It seems very strange that you would have a manager who ends up being responsible for a care home, where they have the responsibility, and for supported living, where somebody else has the responsibility.

Lord O'Shaughnessy: I am grateful to the noble Baroness for clarifying that. I will seek to understand the implications of the Bill for those cases, and I will make sure that I write to her and all noble Lords with an explanation of what is envisaged.

Baroness Finlay of Llandaff: I hope the Minister will forgive me because we are now on an incredibly important part of the Bill. If we can get together and work through it, I wonder whether we need to look at a way that a specific person from the local authority—I gather that it happens in some parts of England and Wales but not everywhere—has a link to different care settings and gets to know them well. We are talking about the people we know about, but the people who are most vulnerable are those we do not know about, who have not been notified into the system. If that person knows a place and the quality of the care there, they may be inclined to have a lighter touch there than on places where there has perhaps been a turnover of staff, a change of management, and so on. They may feel that they want to do some face-to-face assessments to verify the quality of the care being provided—not in the CQC role, but in terms of the care delivered to the person who has impaired capacity.

I put that out there now because I am sure that this debate is being watched and monitored. It might be interesting to see whether we get any feedback on some of the points we have raised during the debate, because so many people have expressed concern and want to know what we are saying.

Lord O'Shaughnessy: I shall give just a brief response to that. It is a good idea. The Government think that the proposals for care homes, how they will carry out commission-needs assessments and the process for reviewing and authorising where necessary are a critical part of creating a more proportionate system that does what it says it will do, rather than the current system, which says it will do a whole bunch of things and then does not actually do them. That is where we want to get to.

I am being robust, as it were, in defence of the model. I want to explain—I think noble Lords are enthusiastic about this—how this will work in practice with the kinds of people who are most likely to be in the most difficult situations, so there is a clear explanation of the safeguards that exist to prevent conflicts of interest, provide independent oversight, make sure there is advocacy to support, and so on. It is clearly the case that there is not yet that understanding, and we need it to proceed.

Baroness Barker: I thank the Minister for his explanation, which has been very helpful. Over the next few weeks, while he is seeking to give further clarification, I wonder whether it would be possible to explain this. One of the Government's arguments is that the consideration of deprivation or the safeguarding of liberty should come much earlier in the care planning process. Most care is commissioned, most of it by local authorities. Can the Minister explain—perhaps not now at this late hour—how the commissioning of services will change to reflect the new system?

Lord O'Shaughnessy: There is a useful flowchart that exemplifies it and brings it to life. I will make sure that it is shared. I agree that we need to find ways of bringing it to life, and that is something we can do outside this Chamber.

Baroness Hollins: My Lords, I am most grateful to the Minister for his reassurance that the care home manager's responsibility is only to arrange the assessments. The Mental Capacity Act is so important that we have to be sure that we do not make it worse. It is a good Act, and the main problem identified in the Post-legislative Scrutiny Committee was that it was not well understood. It is emerging that the stakeholders are not understanding what is intended. We should be trying to make it easier to understand and operate, not more complicated.

The noble Lord spoke of trying to legislate for a streamlined process. I am rather worried about legislating for some of these matters, and I am beginning to think that some aspects need to be in regulations rather than in the Bill, just to make things as simple as possible, but also amendable without having to come back to primary legislation. I beg leave to withdraw my amendment.

Amendment 11 withdrawn.

Amendments 12 and 13 not moved.

9.45 pm

Amendment 14

Moved by ***Baroness Finlay of Llandaff***

14: Schedule 1, page 10, line 35, at end insert—

"(aa) the information provided by the care home appears to be consistent with either the assessments under paragraph 15 or the care and support plan held by the responsible body,"

Baroness Finlay of Llandaff: My Lords, this is really integrally linked. I have been trying to look at what would send a red flag, an alert, to an authorising body

[Baroness Finlay of Llandaff]
that this assessment needed to be looked into in detail and gone through with a degree of rigour—possibly with more time being able to be spent on it than can be spent currently—and that, in commissioning care, the local authority will have a care and support plan that defines what it is commissioning. It should have done a needs assessment and should commission against that and what it expects to be provided. What comes back on those assessments should mirror that care and support plan. What I have tried to do with this amendment is to highlight that, if there is not an almost identikit fit, that should not be given a margin of error but should trigger the need to visit that person and to look in detail at the care plan and its delivery. That might be the first sign that all is not well.

It may be that someone from the local authority visits and finds that the care and support plan, as commissioned, has been altered slightly because the person's needs or ability to undertake activity has changed. It may be, in the best of circumstances, that something has been put in place that has enhanced the person's ability to express themselves. I would use the example of music, where it has been found that by providing people's favourite playlists, some people with really severe dementia are almost "unlocked" by the music—they are able to move in time to the music and their mobility and communication are better. Some people who have been unable to speak, even for years, recover some phrases and then, from that, begin to communicate verbally as well. And of course, we all know of people who appear to not be able to communicate but will then sing along to their favourite song, with all the words coming back again.

The purpose of the amendment is to say that, if there is not a close fit, that should be enough for the local authority to say that it is going to look at that in detail. That was the motivation behind my amendment. I beg to move.

Lord Touhig: This is a very small but very important amendment. Having spent 27 years in newspapers and publishing, I constantly came across issues and stories where people were having all sorts of difficulties, public services failed and systems failed because of lack of information. Certainly from my time as a councillor, as an MP and as a Minister, I passionately believe that we must be open and transparent and must share information. That is key to this part of the Bill, and we certainly strongly support the points made by the noble Baroness.

I do not intend to detain the House more than that, other than to say that the noble Baroness, Lady Finlay, may not be aware that, when I was a Wales Office Minister and she was a new Member of this House, she terrified my officials. They would come in and say, "Minister, it's that Baroness Finlay again; she wants information on so and so". She is pursuing her quest for information even today, which I think is very important and valuable. We strongly support her efforts in this area.

Lord O'Shaughnessy: I am grateful to the noble Baroness for tabling this amendment and to the noble Lord, Lord Touhig, for endorsing it. I will not detain the House other than to say that, clearly, the intention to make sure that there is not a discrepancy and, where there is, that there is a flag, is one that we share. We need to be alert to any issues of concern that would warrant further investigation, or indeed referral to an AMCP.

This is something that I think best sits within the code of practice, and I can confirm and commit that instructions along these lines will form part of the code of practice, as well as many other examples of where an authorising body should be seeing signs of concern. I am grateful for the opportunity to confirm that, and I hope that reassures everyone.

Baroness Finlay of Llandaff: I am grateful to the Minister and to the noble Lord, Lord Touhig, for his remarks in support—including his humorous ones. On the basis of that, I beg leave to withdraw the amendment.

Amendment 14 withdrawn.

House resumed.

House adjourned at 9.51 pm.

Grand Committee

Wednesday 5 September 2018

3.45 pm

The Deputy Chairman of Committees (Baroness McIntosh of Hudnall) (Lab): My Lords, I remind the Committee that if there is a Division in the Chamber while we are sitting, the Committee will adjourn for 10 minutes from the moment when the Division Bells are rung.

Crime (Overseas Production Orders) Bill [HL]

Committee (1st Day)

3.45 pm

Clause 1: Making of overseas production order on application

Amendment 1

Moved by ***Baroness Hamwee***

1: Clause 1, page 1, line 10, at end insert—

"( ) A judge may order that notice of an application for an overseas production order be served on a controller or a data subject."

Baroness Hamwee (LD): My Lords, I am speaking for these well-populated Benches. It would be right to start by saying that the number of amendments that we have tabled does not indicate outright opposition to the Bill—the Minister is grinning. There are serious issues to be considered, particularly the human rights aspects of the proposals in the Bill, and we welcome in particular the judicial element which it provides. I anticipate that the response to many of our amendments will be that we are saying rather inelegantly what the Government in fact propose, or something very like it, and that we do not need to worry. We feel it important to have on the record, at the very least, how the Government will operate the Bill. Some things are not clear; I am not suggesting that what is in the Government's mind is in any way malign, but things should be on the record at least and—better—in clear terms in legislation, whether primary or secondary. I wanted to make those points before speaking to the first of the amendments, which is Amendment 1, grouped with Amendments 2 and 40.

This grouping is about transparency. There is somebody else in the Grand Committee who can speak to this matter with far more experience than me, but I think it unusual for a court to be asked to make an order without hearing both sides of a case. We want to hear the reason for this procedure. I do not believe it can just be speed, because we can have procedures for urgent situations as an exception, as we have in other legislation; I do not believe that the requirements will be urgent in every case—we cannot know that, but it is unlikely. Amendment 1 therefore provides for a notice of application to be given to those affected: the data controller or the data subject.

Amendment 40 would import definitions from the Data Protection Act. I want to get my defence in first: the Data Protection Act cross-references other parts of the Bill, so the amendment is technically flawed, but we are only probing and it was the summer and I bottled out of substantial drafting. A data controller or subject can apply to vary or revoke an order, but that would be after the event. It is important that they be able to defend their interests initially. There is a discretion in respect of Clause 3. We will come to confidential personal records later in the Committee, which might add to the arguments for providing for a notice in Clause 1. We think that significant protections are required. We will come later to the issue of balance and how the court will weigh the interests.

We also propose in Amendment 2 the appointment—or the possibility of an appointment; it is discretionary—of an independent adviser in connection with assessing whether the requirements for the order have been met. I use this opportunity to ask the Minister to explain how this not very usual procedure will operate. I beg to move.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): I thank the noble Baroness for her introduction and I am very glad that the number of amendments does not reflect the level of controversy of the Bill. To address her first point, I say that the Bill does not preclude a judge from being able to require that notice be given to anyone affected by an order pursuant to court rules. Court rules will provide the judge with the ability to require that notice be served on anyone affected by the order, which is the case at the moment under court rules dealing with domestic production orders. This means that a data controller or a data subject may be given notice of an application, but while in principle any person affected by an order should be given notice, there will be cases where it is not appropriate because the giving of a notice to a particular person could prejudice the investigation to which the order pertains: for example, where a notice to a data subject might tip off a suspect where law enforcement agencies are seeking data for the prosecution or investigation of a serious crime.

I thank the noble Baroness for giving me the opportunity to set this out in greater detail. However, given that court rules provide a judge with the power to consider notice being given, I suggest that the amendment is unnecessary. She knew that I was going to say that.

With respect to Amendment 2, the court already has the applicant, who has a duty to assist the court, so it is an established principle that an applicant seeking an order without giving prior notice to the person on whom the order is to be served or to whom it relates is obliged to provide full and frank disclosure to the court. This includes disclosure of relevant legal principles and facts, even if they are not in the applicant's favour. The principle therefore already ensures that the information put before the court must be balanced.

I stress that the Bill reflects the existing position in relation to production orders that can be served on a company based in the UK, and the court will be dealing with the same considerations where an existing

[Baroness Williams of Trafford]
production order is sought. Such domestic orders apply the same legal considerations without the need for an independent adviser, and I do not see why we should deviate from that existing practice simply because an order can be served on an entity based elsewhere.

The third amendment aims to define the terms "data controller" and "data subject" referenced in the amendments to Clause 1. Given that we do not believe that the Bill should be amended in the way suggested by the noble Baroness, it follows that there is no need to include definitions of data controller and data subject in Clause 17. I hope that in the light of those clarifications, the noble Baroness will feel free to withdraw her amendment.

Baroness Hamwee: I do not challenge the applicant's duty to assist the court, but there is no opportunity for challenge at the initial stage, which is what I am concerned about. That feeds into my question: if a no-notice procedure will, as the Minister suggested, not be the norm and may be the exception, why does the Bill not provide that a judge may, in exceptional circumstances, make the order on a no-notice application? It seems to me that that would reflect what the Minister has said in explaining how this would operate. I do not imagine she will have a direct answer to that at this moment, but it might be helpful if we could discuss it further. The Minister has already invited us to discuss the Bill between today and the next day in Committee, so perhaps we can talk further about this issue. The Bill launches us straight into the no-notice procedure and, whatever the court rules may say, I suggest that people will look at the Act first. Having said that, I beg leave to withdraw Amendment 1.

Amendment 1 withdrawn.

Amendment 2 not moved.

Amendment 3

Moved by ***Lord Paddick***

3: Clause 1, page 1, line 19, at end insert—

"( ) The Secretary of State may not make regulations designating an international co-operation arrangement with a state which is a party to or participates in it which has not abolished the death penalty unless the agreement provides that it will apply only if the other party or participant has given assurances that the death penalty will not be imposed in any case in which or in whose preparation electronic data obtained under this Act has been used."

Lord Paddick (LD): My Lords, in moving Amendment 3 in my name and that of my noble friend Lady Hamwee, I will speak to Amendments 4 and 7 in our names. I will also mention very briefly Amendment 8 in the names of the noble Lords, Lord Rosser and Lord Kennedy of Southwark.

Before I launch into the meat of the amendment, I hope the noble Lord, Lord Anderson of Ipswich, does not mind me mentioning that, on the way into the Moses Room, he said that he enjoyed reading my amendments. I am extremely grateful for the extensive work carried out by my noble friend Lady Hamwee with regard to these amendments—if you know what I mean.

As we have heard, the purpose of the Bill is to allow UK law enforcement agencies to more easily obtain electronic evidence when it is sought outside the UK. Of course, evidence so secured would be subject to safeguards in the UK, but presumably the countries that enter into international co-operation agreements with the UK—a prerequisite for the operation of overseas production orders—will expect their own law enforcement agencies to be able to apply through their own domestic courts for equivalent orders that would allow them to seek stored electronic data directly from service providers based in the UK; the reciprocal agreement. Amendments 3 and 4 seek to probe how legal and human rights concerns over privacy and the security of personal data will be addressed and the issue of such evidence potentially resulting in the death penalty being passed on a subject. Amendment 3 requires that the Secretary of State may not make regulations entering into an international co-operation agreement in relation to states where the death penalty can be imposed unless the agreement restricts access to UK-held data to cases where an assurance has been given that the death penalty will not be imposed.

Article 2 of the European Convention on Human Rights—together with Protocol 13, of which the UK is a signatory—provides for the total abolition of the death penalty. My recollection of a meeting with the Minister on this very issue is that the UK would not hand over evidence in the knowledge that it would result in the possibility of the suspect being executed. However, since that meeting, noble Lords will recall the case of two former British citizens accused of being members of an ISIS cell. In a leaked letter, the Home Secretary apparently agreed to co-operate with the United States by sharing evidence but said that he would not seek a death penalty assurance. In an apparently totally inconsistent statement, he went on to say that,

"it is the long-held position of the UK to seek death penalty assurances, and our decision in this case does not reflect a change in our policy on assistance in US death penalty cases generally, nor the UK government's stance on the global abolition of the death penalty".

We now appear to be in a situation where government policy is to ensure that evidence does not lead to the suspect potentially facing the death penalty and to encourage the global abolition of the death penalty, except when the Home Secretary decides otherwise. How can the Government advocate the abolition of the death penalty globally on a case-by-case basis? Amendment 3 seeks to put into the Bill that an international co-operation agreement cannot be entered into with a state unless there is an agreement that the sharing of evidence would not lead to the imposition of the death penalty.

4 pm

In relation to the United States of America, the imposition of the death penalty is legal in 31 states and illegal in 19 states and the District of Columbia. Can the Minister confirm whether separate international co-operation agreements will be entered into with individual states, with different wording dependent on

whether that state allows the death penalty? Would it be possible for noble Lords to see an example of what an international co-operation agreement might look like? Would such an agreement be legally binding on both parties or would it simply be a non-legally binding memorandum of understanding? I appreciate that the Bill is about giving UK law enforcement agencies easy access to evidence held overseas but, as I mentioned before, surely foreign Governments will insist that these agreements work both ways.

Amendment 4 probes these issues of reciprocity, compliance with human rights principles and what happens in cases where UK law and the law of the other state are at odds, and is intended to ensure transparency. It uses the term "relevant UK law" and Amendment 7 therefore defines what is meant by relevant UK law. We believe that Amendment 8 seeks to achieve the same ends as our amendments but rather less elegantly—but we would say that, wouldn't we? I beg to move Amendment 3.

Lord Rosser (Lab): My Lords, as the noble Lord, Lord Paddick, has said, we have tabled Amendment 8 and its objectives are obviously similar to those of the amendments that he has moved and spoken to. At Second Reading, we expressed our concerns over potential difficulties with the implications of the Bill and our amendment seeks to probe this point further.

The Explanatory Notes state that the electronic data in question may include the "content of private communications" being made "available to the state", and that:

"These intrusions into ECHR rights can be justified as necessary in a democratic society for the prevention of disorder and crime and in the interests of national security and public safety, and are proportionate in light of the requirements that must be met before a judge can make an overseas production order, and the other safeguards set out in the Bill. To the extent that the electronic data made available may include journalistic material, the requirement that an order is made by a judge provides prior judicial oversight for the exercise of the power, and accordingly an Article 10 compliant safeguard".

We said at Second Reading that those words might not be accepted without question by everyone.

Our amendment is intended to seek further detail and clarification from the Government about the extent of the safeguards on international human rights obligations, the similarity of interpretation of subjective wording in the Bill and the position in respect of the death penalty—not least in the light of the Home Secretary's recent apparent change, which the noble Lord, Lord Paddick, referred to, in this Government's previous position of principle on this issue.

Bilateral agreements with another country or countries will need to be concluded for the provisions of the Bill to be implemented. Presumably, we shall be required to provide the same access arrangements to electronic data in this country as we are seeking from those countries: namely, that an order made in their courts will be capable if necessary of being enforced or implemented here with apparently little or no judicial oversight in this country. What then will be the position if the overseas production order for the electronic data in question was being sought in respect of a case or investigation where the outcome for a defendant—if found guilty—could be the death penalty, as might apply for example in a number of states in the United States, as the noble Lord, Lord Paddick, has said? Will we allow the electronic data to be handed over or accessed in such circumstances, as we would apparently be required to under the terms of the Bill in any bilateral agreement?

At Second Reading, the Government said:

"The agreements will recognise a shared acceptance of the laws in another country with which we are entering into an agreement. It will recognise the other's rule of law, due process and judicial oversight for obtaining and dealing with information and evidence with regard to serious crime".—[*Official Report*, 11/7/18; col. 929.]

What exactly do those words mean in relation to handing over electronic data to another country with which we have a bilateral agreement which could lead to a defendant being found guilty of a crime which carries the death penalty in that other country? Some clarification of those Government words at Second Reading will help.

The Minister wrote in a letter dated 20 July that:

"With regards to death penalty implications, it is the long-standing policy of the UK to oppose the death penalty as a matter of principle. We will ensure that the operation of any agreement, including with the US, is consistent with this position".

One could argue that those two sentences are open to more than one interpretation. One might argue that you could oppose the death penalty in principle—tell the world that that was your position—but nevertheless still allow electronic data to be handed over under the terms of the bilateral agreement with the other country concerned, even though the crime being prosecuted or investigated was one that, in that other country, carried, or could carry, the death penalty.

Will the Government give an unequivocal statement that under no circumstances under the bilateral or other agreements enabled under the Bill will electronic data be handed over to another country or access given to it to another country if it could contribute to a defendant being found guilty for a crime which carried the death penalty? No such unequivocal assurances appear to have been given at Second Reading and no such unequivocal assurance appears to have been given in the Government's letter following it.

Amendment 8 also states that:

"The Secretary of State may not make regulations designating an international co-operation agreement unless they have laid before both Houses of Parliament a statement certifying that—

(a) all parties to the agreement adhere to international human rights obligations".

What is the difficulty in the Government agreeing to this amendment—or to its spirit—unless they envisage circumstances in which all parties to the agreement will not be able to signify their adherence to international human rights obligations?

The amendment refers to,

"freedom of opinion, expression and association",

but how far does the Bill protect that in relation, for example, to journalistic data, about which certain representations have been made? A later clause provides that an application for an order must be made on notice if there are reasonable grounds for believing that the electronic data consists of or includes confidential

[Lord Rosser]
journalistic data. However, who will draw the distinction when making the application between confidential journalistic data and other journalistic data? How will they know what is confidential and what is not? Why did not the Government decide that any journalistic material should require an order to be made on notice and illuminate this problem?

Clause 12, which concerns this, also excludes material as being created or acquired for the purposes of journalism. If it was created or acquired with the intention of furthering a criminal purpose, that must mean that if at any point in its history information was intended to be used for a criminal purpose, it will not be protected under the Bill as journalistic material. That appears to apply, even if the criminal purpose never transpired and had nothing to do with the material being held by the journalist or how the journalist acquired it. Could not the issue of criminal intent be taken into account by the judge when deciding whether to make an order rather than an issue which loses the material to journalistic classification and with it its procedural protection? Amendment 8 raises that issue.

Amendment 8 also refers to the terms "public interest", "substantial value" and "terrorist investigation" being interpreted in substantially the same way in the courts in each of the parties to an international co-operation agreement. Once again, we raised the issue at Second Reading when we asked if any arrangement or agreement with another country would incorporate the same standards and criteria and interpretation of those criteria that would apply in our country before making an order when a court in that other country makes an overseas production order for a British national or company based here to produce stored electronic data or give access to it. If that will be the case—and surely there is a strong possibility of different interpretations of the wording concerned in different countries, or perhaps even within states of America, for example, where we know we have advanced some way towards reaching an agreement—we also asked how we will be able to satisfy ourselves that the other country making such an order was interpreting the criteria in the same way as we would anticipate our courts would do. If we were not so satisfied, what means are available, and to whom, to step in and stop the order being enforced against the named person or company in this country? I do not intend to go into the issue of enforcement or rights of appeal, since this is addressed in later amendments.

The issues I have referred to are those on which we seek some clarification and further explanation from the Government as to exactly what is meant by the wording in the Bill: that is the purpose of Amendment 8, to which I have just referred.

Baroness Williams of Trafford: Both noble Lords rightly raised the point of the death penalty in relation to any designated international agreement, through Amendments 3 and 8. It may be useful if I make it clear at the outset that the Bill is about outgoing requests from the UK: it puts into legislation the ability for our law enforcement agencies and prosecuting authorities to request access to electronic data stored by companies based outside the UK. The Bill is a framework within which international agreements can operate but any such agreement will, of course, be subject to parliamentary scrutiny in the usual way, as both noble Lords alluded to, following the procedure set down in the Constitutional Reform and Governance Act 2010—otherwise known as CRaG. It usually involves laying the agreement in Parliament for 21 sitting days before it can be ratified by the Government.

The negotiation and operation of any international agreement must be compliant with the Government's guidance on overseas security and justice assistance, which deals with the death penalty and human rights considerations. As part of that rigorous process, a detailed assessment of any human rights risks associated with a particular international agreement must be carried out. As part of reaching an agreement with any country, we can impose restrictions on how the other country can use information sought from a UK service provider. This would be considered as part of the process of developing and entering into a potential agreement and will depend on the risks that are identified during the OSJA assessment process. As I have said, these amendments focus on the extremely important issue of human rights and the OSJA guidance and assessment process already exists to ensure that human rights considerations are taken into account.

In relation to the death penalty in particular, the Government do not believe that these amendments are the appropriate way to address concerns about it but I recognise the strength of these concerns. As the noble Baroness, Lady Hamwee, said, we are going to discuss this issue in more detail on Report.

4.15 pm

The additional subsection proposed in Amendment 4 aims to put in the Bill requirements that must be contained in an international co-operation arrangement. In respect of the first of these requirements, arrangements that the UK enters into will be based on trust and mutual respect for each country's adherence to principles including the rule of law, due process and judicial oversight for obtaining and dealing with information and evidence with regard to serious crime. I made that point at Second Reading but it is worth repeating here. The negotiation and operation of any agreement must be compliant with HMG's guidance on overseas security and justice assistance, and that guidance has at its heart human rights considerations.

The proposed new definition in Amendment 7 raises the issue of enforcement. It suggests an agreed means of enforcement where there is inconsistency between UK law and the law of the other participating country. These agreements are expected to be negotiated on a case-by-case basis. However, it is reasonable to expect that some form of dispute resolution mechanism would be in place to help determine any differences in the event that there is a dispute over compliance with an order. These international co-operation arrangements are intended to be created and used in an environment where they are readily complied with. Any agreement is intended to create a permissive regime, by removing in domestic law barriers to compliance with a request for evidence from a country with which an agreement has been entered into. The agreement would allow

entities storing data in one country to comply with lawful orders for electronic communications from the other country without risk of breaching the host country's domestic laws.

However, if there was any doubt about the ability of a person on whom an order was to be served to comply with that order, appropriate officers could opt to obtain the evidence required via mutual legal assistance, which will remain as an effective judicial co-operation tool to ensure that compliance can be effected through another country's domestic powers. The Bill does not directly deal with reciprocity, however, as it merely provides the power for relevant law enforcement officers and prosecutors to apply for an overseas production order and sets out a way in which those orders are intended to operate.

As noble Lords may be aware, each agreement negotiated with another country will be designated under Section 52 of the Investigatory Powers Act 2016. This would allow another country to serve its equivalent of an overseas production order on a UK telecommunications operator. Under this provision, the Secretary of State has the power to impose additional conditions which must be met before any agreement can come into force and before a company in either country can give effect to an order from the other participating country.

The noble Lord, Lord Paddick, asked to see an example of what an agreement might look like and mentioned a state in America. However, we would not make an agreement with a state; it would be with the United States, not on a state-by-state basis. Any agreement reached with another jurisdiction—in this example, the United States—would be subject to parliamentary scrutiny in the usual way. Therefore, those agreements would be published in full and, of course, the OSJA process would be applied in each case. An international agreement reached with another jurisdiction and requiring ratification could not be ratified unless the scrutiny process under Part 2 of the Constitutional Reform and Governance Act 2010 had been complied with. This entails publishing a copy as a Command Paper, laid before Parliament in the usual way. I should also stress that regulations designating an international agreement under Section 52 of the IP Act will be subject to parliamentary scrutiny via the negative procedure and regulations imposing additional conditions will be subject to the affirmative procedure.

I have just received notes from the Box on various points that noble Lords have made. The noble Lord, Lord Rosser, asked: if another country has a lower threshold for what is regarded as reasonable belief, what would we do about the arrangement as it is all about mutual recognition of legal systems? I hope it comforts him if I say that the UK would not agree to any arrangement where the threshold did not provide similarly protective standards to those in the UK, so the agreements will actually recognise that shared acceptance of the laws of another country when we enter into them. Any agreement that the UK enters into will be based on trust and mutual respect for each other's adherence to principles including the rule of law, due process and judicial oversight for obtaining and dealing with information and evidence with regard to serious crime. Under any proposed agreement, the UK would require the other country to set out the powers that it intended to use in the pursuance of requests made under the agreement. The UK would also ask the other country to commit that it would not rely on another power unless agreed by both parties. In addition, it will specify the evidential standard required before requests are made and ensure that the UK is satisfied with those standards before designating an agreement for incoming requests.

The noble Lord also asked the important question about why the Bill differentiates between journalistic material and journalistic material held in confidence. The Bill develops the on-notice safeguards that already exist under the PACE Act 1984 while recognising that this Bill is about the investigation of serious crime, including terrorism. In categorising material for additional protections, the Bill takes a similar approach to the IP Act 2016 by identifying confidential journalistic material for those on-notice protections. Other explicit and implicit protections under the Bill will apply to all types of journalistic material, such as: judicial control of access; the requirement for it to be in the public interest for such material to be obtained; and the requirement for all decisions to grant access to be compatible with our human rights obligations, including those that protect freedom of expression and privacy.

I end on the point about the death penalty, which of course is at the heart of these amendments and first and foremost in this discussion. I am looking forward to further discussions on Report and the meetings that we will have ahead of it. I invite the noble Lord to withdraw the amendment.

Lord Rosser: Before the noble Lord, Lord Paddick, gives his answer, as I understand it this matter has been under formal discussion with the United States since at least 2016; I think that was indicated previously in Parliament. We seem to be dancing around a bit on the issue of the death penalty. If this matter has been in discussion with the United States since 2016, why has it not been ironed out in that period of two years? I do not think a clear answer has necessarily been given on the question—or at least if it has, I have not understood it—of what our approach will be. Under an overseas production order, are we going to ensure that the information would not be used against a defendant in a case where, if they were found guilty, the death penalty could apply?

Maybe I misinterpreted or misunderstood the wording but, since the Minister talked about enforcement on this, at Second Reading she said on behalf of the Government:

> "The Bill is about requests from the UK rather than to the UK, but UK-based providers will not be compelled to comply with overseas orders".—[*Official Report*, 11/7/18; col. 929.]

If that is the case—and perhaps the Minister could confirm that they will not be required to comply with overseas orders—presumably there is no issue over enforcement because they will just decide not to comply. Have I misunderstood the significance of what the Minister said at Second Reading in her response?

Baroness Williams of Trafford: To deal with the first point on the death penalty, I thought I had made it clear but clearly I have not. We have meetings scheduled and I would like to discuss it further before Report. I hoped that I had explained that the OSJA process was effectively a risk assessment process that sought protections and risk assessment on such things as the death penalty and other human rights issues, but I would be very grateful if we could discuss that before Report. On the other issue, that of compliance, UK companies are not compelled by UK law but they may be compelled by the other jurisdiction—that is the point that I made at Second Reading—depending on the country in question.

Lord Kennedy of Southwark: It is not only my noble friend Lord Rosser who is confused about the death penalty, as I am confused as well. It is not just that the Minister has not been clear with us; it also involves some of her right honourable friends in the department and the comments they have made. We need to address the problem there. Comments are made but then if we look at the policy on paper, they do not add up. That is the problem we have.

Baroness Williams of Trafford: I understand the point that the noble Lord is making. I, not least, look forward to the discussion that we are going to have.

Lord Paddick: My Lords, I am very grateful for the comments of all noble Lords on this group of amendments. I do not want to prolong the agony; I accept that the Bill is about outgoing requests but in order for outgoing requests to be complied with, there would be an expectation by the foreign state that a similar application to the UK would be met. We are potentially talking about UK service providers providing evidence to a foreign state that would enable that state to carry out the death penalty on a suspect. Having agreements based on trust and mutual respect, rather than a legally binding agreement, where if there are differences of opinion about what particular terms mean there would be some form of dispute resolution—no more reassurance than that—while the IP Act 2016 could impose restrictions, but might not, all seems rather vague and general. When we are talking about someone's life potentially being ended, we would seek more concrete reassurances that evidence provided by the UK is not going to lead to that.

I understand that the intention is to have an agreement with the United States of America as a whole. However, bearing in mind that the death penalty is an issue in some states but not others, and that other agreements would be on a case-by-case basis—presumably on the basis of the human rights record of the states that the agreement was entered into with—it seems odd that a blanket agreement could be entered into with the USA when there is that crucial difference between states as to whether the death penalty could be carried out. Obviously, we are in Committee, which is about understanding concerns and the Government's position. We need to further develop that in meetings and on Report. In the meantime, I beg leave to withdraw the amendment.

Amendment 3 withdrawn.

4.30 pm

Amendment 4 not moved.

Amendment 5

Moved by ***Baroness Hamwee***

5: Clause 1, page 1, line 22, after "arrangement" insert "in the form of a treaty (as defined by the Constitutional Reform and Governance Act 2010) and"

Baroness Hamwee: My Lords, our exchange on the previous group of amendments, when the Minister gave a lot of assurances, makes me even keener on Amendment 5, which would require writing into the Bill that a designated international co-operation agreement must be in the form of a treaty. I understand that that is what was intended, so I think it would be more than appropriate to say so. Taking only the discussion about the death penalty, it argues for the amendment, given that the procedures for dealing with the treaty under the Constitutional Reform and Governance Act 2010 include safeguards to be met before a treaty can be ratified which include transparency, debate in public, and so on.

The Minister gave a list of matters—I failed to write down all of them—to which the Government would have regard. I got down trust, mutual respect, judicial oversight and "must be compliant with HMG guidance". The reference to guidance has my antennae twitching in this context. We do not want to rely on guidance; we want to rely on legislative certainty and the involvement of Parliament.

The Minister said either at Second Reading or in a meeting before Second Reading—we are always grateful for such discussion—that the Government would not enter into an agreement with North Korea. I could add to that nightmare not a treaty but a memorandum of understanding with North Korea, which would come nowhere near Parliament. Our laws have protection against a mad Executive and we should commit to using them.

We have had a long but inconclusive discussion about how human rights would be protected. A statement to Parliament under the 2010 Act procedure would deal with this. It might also set out standard clauses. I am unclear whether we should expect standard clauses in different co-operation agreements. They should be relatively straightforward in most cases.

For similar reasons, Amendment 38 would apply the affirmative procedure to regulations designating the co-operation arrangement. We all know about the problems with scrutinising secondary legislation.

Amendment 6 is to ask what is meant by participation in this context. Clause 1(5) refers to an arrangement,

"to which the United Kingdom is a party or in which the United Kingdom participates".

What is participation in this context? I beg to move.

Lord Kennedy of Southwark: My Lords, the noble Baroness has done her usual forensic job of going through the Bill and done a service to the Grand Committee. It is important that we are clear about what we are agreeing. I look forward to hearing the

Minister's response. It is right that Amendment 5 makes it clear that we are talking about the treaties which are subject to the Constitutional Reform and Governance Act 2010. It is a sensible move.

Amendment 6 is a probing amendment at this stage. What is meant by participation? If you are a party to something, then there is what you are participating in, so clearly the Government think that there are two different things. It will be good to hear the Minister's view on the difference between those two things and why they both need to be in the Bill. I am sure that "form of a treaty" needs to be in the Bill.

Finally, Amendment 8 ensures that whatever regulation is agreed will be subject to the affirmative resolution procedure in the House. Again, I think that is important. Will the Minister confirm that the Government would do that anyway and, if so, say why it is not in the Bill?

Baroness Williams of Trafford: I thank the noble Baroness, Lady Hamwee, and the noble Lord, Lord Kennedy, for their points. I turn first to Amendment 5. Clause 1 outlines the circumstances in which an overseas production order can be made. This includes that an application must specify a designated international co-operation arrangement. This is defined in Clause 1(5), to which the noble Baroness has proposed her amendment. The amendment would ensure that only treaties as defined by the Constitutional Reform and Governance Act 2010 would be capable of designation as an international co-operation arrangement under the Bill.

The definition of "designated international co-operation arrangement" in Clause 1(5) has been drafted to take into account that there may be circumstances in which a relationship with another country is established which would not attract the procedures set out in Part 2 of the Constitutional Reform and Governance Act. Those procedures require that, prior to ratification, a treaty is to be laid by a Minister of the Crown before Parliament for 21 sitting days without either House having resolved that it should not be ratified. The process does not apply to certain types of treaties including those covered by Section 5 of the European Union (Amendment) Act 2008, which include treaties that amend the founding EU treaties.

Also, some treaties can come into force on signature and do not require formal ratification and are therefore not subject to the Part 2 procedure. The definition of "treaty" in the Constitutional Reform and Governance Act also excludes instruments made under a treaty, so EU instruments would not be capable of being designated. Without necessarily knowing which countries the UK may choose to operate this arrangement with, the clause had been intentionally drafted to be wider than the definition of "treaty" under the Constitutional Reform and Governance Act to ensure that the UK can enter into arrangements with international partners where both have committed to remove any barriers to compliance for an overseas production order. In reality, it is unlikely for either the UK or another country to commit to complying with orders that have extraterritorial scope without acknowledging this through a formalised agreement or arrangement.

The noble Baroness also mentioned the point about standard clauses in all international agreements. This is a new approach to cross-border data access for law enforcement purposes. Actually, there are no templates to follow. If she means something different by "standard clauses", perhaps we could have a further discussion. We are working with the US to develop an agreement as a matter of priority and we hope that this will act as the template for future arrangements with other appropriate countries.

On Amendment 6, the definition of an international co-operation arrangement is expansive to account for a situation where the UK itself is a contracting party to an arrangement, in the form of a bilateral treaty or multilateral convention, as well as a situation where the UK is a member of a supranational body and that body is a contracting party to such an arrangement in its own right, or has created its own internal rules which apply to its members. In the latter case, those rules would be the international arrangement in which the UK participates. Current membership of the EU is a good example whereby, in many cases, the EU—not the individual member states—is the party to an arrangement between it and a non-EU country. Further, the EU creates internal rules in the form of regulations and directives in which the UK participates as a member state. In both these scenarios, the UK participates by virtue of its membership of the EU. I hope that is as clear as mud to everyone.

I accept that with the UK's imminent departure from the EU, a scenario in which the UK participates indirectly in an arrangement through its membership of a supranational organisation is less likely to happen. However, until that time and as long as the UK remains an EU member state, legislating along these lines recognises the status quo as now, which is that the UK can be a participant to an arrangement without necessarily being a party to it.

On Amendment 38, I refer noble Lords to the Delegated Powers and Regulatory Reform Committee memorandum, which sets out our justification for the approach that we have taken. In the memorandum, the Government state that:

> "The Bill specifies in full what the implications of a designation are, and does not permit the implementation into UK law of any international arrangement in relation to the investigation or prosecution of offences, but only one that reflects the terms of the Bill. The provisions of the Bill will ensure that an order is only served where it meets the requirements of the designated international co-operation arrangement … Further, most international arrangements entered into will be subject to the procedure in Part 2 of the Constitutional Reform and Governance Act 2010, so Parliament will have had an opportunity to scrutinise the arrangement before it is ratified by the Government … Accordingly, since any exercise of the power is subject to the safeguards set out in the Bill and Parliament will already have had an opportunity to scrutinise the arrangements, the negative procedure is proposed".

For the purposes of outgoing requests which the Bill is to be used for, any international co-operation arrangement would set out the terms of our UK law enforcement being able to make requests from another country. Although the terms will set out the reciprocal process, the arrangement will also be designated under regulations made under Section 52 of the IP Act 2016, which is how the UK will recognise any international arrangement for an incoming request. Regulations

[Baroness Williams of Trafford]
under Section 52 are also subject to the negative procedure, so the approach taken here is consistent. With those words, I hope that the noble Lord and the noble Baroness might feel happy to withdraw or not press their amendments.

Lord Kennedy of Southwark: I thank the Minister very much as I have learned something today about participants, which is useful and very good. I think the Minister was saying that Amendment 5, moved by the noble Baroness, Lady Hamwee, was too restrictive—that it would remove other treaties and arrangements. Can she maybe say a bit about what would then be the parameters if the Bill stays as it is? If I accept her point about it being too narrow, what parameters are the Government actually asking for? It is important that we are clear what we are passing.

Baroness Williams of Trafford: Put simply, I think the parameters we are discussing are that there might be circumstances in which a relationship with another country is established, which would not attract the procedures set out in Part 2 of the Constitutional Reform and Governance Act. In my view, that would therefore appear to be the scope of this. The noble Lord does not look entirely convinced.

4.45 pm

Baroness Hamwee: The noble Lord, Lord Kennedy, may be thinking, as I am, that that begs another question. Clearly, the Minister's reply will require and deserve reading. As she started, I thought that I should thank her for giving me some material for an amendment on Report; that may still apply. She talked about circumstances which depend on the relationship with international partners. It is the interface between politics and the law that needs resolving here. I am not sure that I can suggest anything now, but we will certainly think about it.

On standard clauses, a question was asked by the chair of the Joint Committee on Human Rights, of which I am a member—although the term there was "model clauses". During the recess, she wrote to the Home Secretary raising a number of questions about the Bill and the Minister for Security responded, but I cannot immediately find a direct answer to that. This is linked with our earlier discussions about human rights. If there are model clauses which deal particularly with human rights, the reassurance given would be considerable.

The amendment regarding the affirmative procedure for regulations was to my mind an alternative to dealing with the arrangements by way of a treaty.

Baroness Williams of Trafford: I do not usually intervene, but the noble Baroness's words are worthy of reflection before Report. Let us have another discussion. It sounds like we can have Committee stage in the form of a meeting shortly.

Baroness Hamwee: Of course, I am grateful for that. I was going to say that we have the delegated powers memorandum, but we do not yet have the report of the Delegated Powers and Regulatory Reform Committee, which may or may not have something to say on this. We will have another discussion when we have had an opportunity to digest the Minister's comments on these amendments. I beg leave to withdraw Amendment 5.

Amendment 5 withdrawn.

Amendments 6 and 7 not moved.

Clause 1 agreed.

Amendment 8 not moved.

Clause 2: Appropriate officers

Amendment 9

Moved by ***Lord Paddick***

9: Clause 2, page 2, line 25, after "person" insert "exercising law enforcement functions"

Lord Paddick: My Lords, the amendment is in my name and that of my noble friend Lady Hamwee. I shall speak also to Amendment 10.

Clause 2 lists appropriate officers who can make an application for an overseas production order. The list clearly indicates what this legislation is about: securing evidence to present before a court. It is not, for example, a search for intelligence; intelligence officers are not listed. Clause 2 is a list of law enforcement officers and, as such, subsection (1)(a)(vii) and (b)(v), which allow the Secretary of State by regulation to specify others as appropriate officers, should be restricted to specified law enforcement officers and not simply be left open to any person of a description specified in regulations. Our amendments would place such a restriction on the regulating powers of the Secretary of State. I beg to move.

Lord Kennedy of Southwark: My Lords, the noble Lord raises an important point. In response, I am sure that the noble Baroness will explain to us why the Government deem it necessary to take this wider power and not restrict it, as the noble Lord, Lord Paddick, has sought to do, to officers from wherever who are actually enforcing law enforcement functions. On the face of it this seems a very sensible amendment, and I look forward to hearing why the Government think they need this wider power in this context.

Baroness Williams of Trafford: My Lords, I hope that this amendment will not require any further meetings or probing on Report. The Bill provides that an appropriate officer is able to apply for an overseas production order where an indictable offence has been committed, where proceedings in relation to that indictable offence have been instituted or investigated, or where the order is sought for the purpose of terrorist investigations. Therefore, the clause is already limited to officers who are exercising law enforcement functions. In fact, the clause already makes clear that where a listed appropriate officer has functions other than for law enforcement purposes, it is only where the appropriate

officer is exercising functions in relation to the investigation or prosecution of criminal conduct that they may apply for an overseas production order. For example, a person appointed by the FCA can conduct both civil and criminal investigations and the clause ensures that they can apply for an overseas production order only in connection with criminal investigations or prosecutions. I hope that that provides reassurance.

Lord Paddick: My Lords, I am very grateful for that explanation provided by the Minister. The meeting of 20 minutes we have scheduled before Report will not be further extended as a result of this amendment and I beg leave to withdraw it.

Amendment 9 withdrawn.

Amendment 10 not moved.

Clause 2 agreed.

Clause 3: Meaning of "electronic data" and "excepted electronic data"

Amendment 11

Moved by ***Lord Paddick***

11: Clause 3, page 3, line 32, at end insert "but not bulk data"

Lord Paddick: My Lords, Amendment 11 is in my name and that of my noble friend Lady Hamwee. We debated long and hard in this House about when and how law enforcement agencies and the security services can secure authority to access bulk data. The Investigatory Powers Act 2016—not to be confused with the investigatory powers Act 2018, which exists only on BBC1 on Sunday evenings—contains some safeguards against state access to bulk data and it is essential that those safeguards are not circumvented by the Bill. The Government will no doubt say that accessing bulk data held overseas is not the purpose of the Bill, but what other reassurances can the Minister give that the powers under the Bill will not be used inappropriately by law enforcement agencies? Amendment 11 seeks to achieve this by amending Clause 3(2), changing the definition of "electronic data" to exclude bulk data. I beg to move.

Baroness Williams of Trafford: Again, I hope that I can provide clarity on the noble Lord's amendment. When applying for an overseas production order an officer must specify or describe the electronic data sought under an order. In addition, the judge must be satisfied that a number of requirements are met before making an order under Clause 4. These include that the judge must be satisfied that the person against whom the order is sought has possession or control of all or part of the data specified in the application; that the data requested is likely to be of substantial value; and that it is in the public interest for all or part of the data to be produced. It is very difficult to see how a judge could be satisfied that these requirements are met if they were considering an application for an order seeking bulk data.

The reason is that bulk data requests are for sets of information, often about a large number of individuals who may or may not be known to law enforcement agencies. The Bill has been drafted to require appropriate officers to consider carefully what data they are targeting—which, of course, is not the case with bulk data—and where the information is stored, in order to help with the investigation and prosecution of serious crime, in addition to demonstrating that the data will be of substantial value to the investigation and in the public interest. It feels to me that there are sufficient safeguards in place, because of the processes I have outlined, and I hope that the noble Lord will feel happy to withdraw the amendment.

Lord Paddick: My Lords, I am grateful for the Minister's explanation. I am not sure that it entirely satisfies us about the potential for misuse of the legislation, but we will reflect on what she said and perhaps discuss it with her before Report.

Lord Rosser: If there is any doubt in this matter, as I understand it from the briefing that we had from the House of Lords Library, the UK's Deputy National Security Adviser, giving testimony to the US House of Representatives' Judiciary Committee in June 2017, said that the UK Government were "in full agreement" with the US Department of Justice that a UK-US bilateral data sharing agreement should limit access to targeted orders for data and not bulk access to data.

Baroness Williams of Trafford: I thank the noble Lord because that underlines my point.

Lord Paddick: If that is the case, there is no reason why it should not be stated in the Bill.

Baroness Williams of Trafford: I am sorry, but I think I need to intervene. All sorts of things could be stated in the Bill, but given its purpose, I do not think it is necessary. I think that the noble Lord, Lord Rosser, pointed that out.

Lord Paddick: With the greatest respect to the noble Lord, Lord Rosser, he is talking about a bilateral agreement with United States of America and not a global reassurance given by every country with which we might enter into an agreement. Therefore, my concerns remain but, at this stage, I beg leave to withdraw the amendment.

Amendment 11 withdrawn.

Amendment 12

Moved by ***Lord Rosser***

12: Clause 3, page 3, line 39, leave out subsection (5)

Lord Rosser: This amendment is in my name, that of my noble friend Lord Kennedy, the noble Lord, Lord Paddick, and the noble Baroness, Lady Hamwee. It would delete Clause 3(5), which states:

[Lord Rosser]

"Where an application for an overseas production order is made for the purposes of a terrorist investigation other than a terrorist financing investigation, this Act applies as if references to excepted electronic data did not include electronic data that is a personal record which is a confidential personal record".

Confidential personal records are generally included as excepted data in the Bill, but this subsection provides an exception so that in terrorism cases, confidential personal records can be requested in an order.

A confidential personal record is defined in Clause 3 as a personal record,

"created in circumstances giving rise to an obligation of confidence owed to,"

an individual, whether living or dead,

"and the obligation continues to be owed",

or the personal record,

"is held subject to a restriction on disclosure, or an obligation of secrecy, contained in an enactment (whenever passed or made)".

I seek to find out why this subsection is in the Bill, why the Government seek to make this exception or distinction in respect of terrorism investigation and what substantial electronic data information the Government think could be secured in terrorist investigations through Clause 3(5) which would otherwise be impossible to secure.

I and indeed others have already raised the question in an earlier debate of how consistently the parties to a bilateral agreement will interpret the term "terrorist investigation". If more electronic data can be obtained through determining that an investigation was a terrorism one, and that would be the case for other serious crimes, there could be a temptation to define an investigation as a terrorism one under an overseas production order, purely or largely for that objective. What safeguards will there be to prevent that happening? If the view is taken that the term "terrorist investigation" is being rather loosely interpreted by a party to an international agreement on overseas production orders, how can that decision be challenged? I beg to move.

5 pm

Baroness Hamwee: My Lords, my noble friend and I put our names to the amendment from the noble Lord, Lord Rosser—strictly speaking, we put down the same amendment, but the noble Lord got there first. I shall add just this question to his comments: would it not be a different way of dealing with this to allow for specific application in the case of terrorism investigations? That might be more satisfactory from every angle.

Our Amendment 13 deals with Clause 3(7)(c), on the counselling or assistance, or a record of it, that is excepted. It is only when the counselling is given by the entities listed that it is excepted. Why does counselling given by someone who is not within paragraphs (i) to (iii) not come within the clause? To put it another way, who is the Home Office seeking to exclude? If the individual was "counselled" by a friend who was a person of interest to the security services, one could understand that just claiming that the record was of counselling would not be sufficient. However, Clause 3(8) defines a confidential personal record by reference to obligations of confidence and restrictions on disclosure, and I would have thought that adequate.

Amendment 20, to Clause 5, is about the contents of the order. Clause 5(2) provides that:

"The judge must not specify … data that the judge has reasonable grounds for believing … includes excepted electronic data".

I wondered whether this meant that there would not be entirely objective approach to this issue—in other words, an objective approach to the order not specifying excepted data. How do you appeal against or apply to vary or revoke an order, given the wording of this clause? Would you not be appealing against the judge's reasonableness when actually you should be addressing the character of the data? I do not know, but I am worried. Similar points would apply to Amendment 27 to Clause 7, which is about variation or revocation. There is a lot more to get our teeth into and, as my noble friend said, that half-hour meeting is not going to be adequate.

Baroness Williams of Trafford: It sounds as if the meeting could last more than a day. Amendment 12 would amend Clause 3(5) by excluding from scope any confidential personal records that may be in electronic form from terrorist investigations.

Police are currently able to apply for a domestic production order for confidential personal records for the purposes of a terrorist investigation under Schedule 5 to the Terrorism Act 2000. Paragraph 4 of the schedule provides that a production order can be made for material consisting of special procedure material or excluded material. These terms are defined in paragraph 3 of the schedule to have the same meaning as in the Police and Criminal Evidence Act 1984. Sections 11 and 12 of the 1984 Act define "excluded material" to include confidential personal records. The definition is essentially the same as that used in the Bill at Clause 3 (7) and (8).

The noble Lord asked about the value of confidential personal records for terrorist investigations. The value of such information is determined at operational level and obviously depends on the circumstances of each case. There may be clear operational value in having access to confidential records in the investigation, pursuit or prosecution of an offender accused of terrorist offences. However, in any event, the judge will grant such an order only if the conditions listed in Clause 4 are met. These include that the information is of substantial value to the proceedings or investigation and that it is in the public interest to seek this data.

The intention behind the provision was to ensure parity with production orders made at home and new production orders capable of being served overseas. The drafting is therefore intended to reflect the powers that currently exist for domestic production orders made under the Terrorism Act 2000. Our law enforcement in the UK should be able to access the same information from overseas as they would in the UK, and Clause 3(5) reflects this.

Parliament has long recognised that a power to require the production of confidential and personal records, subject to the important safeguard of judicial authorisation, is both necessary and proportionate in order to protect the public in the exceptional circumstances of terrorism investigations. The power in the 2000 Act

replaced an equivalent one in the Prevention of Terrorism Act 1989. Given the high level of threat to public safety that can arise in a terrorism investigation and the need to be able to investigate quickly and to disrupt such threats, this is an important power in the police investigative toolkit and it is right that it should be available for international production orders. In the context of the current heightened terrorist threat, its omission would be irresponsible.

The Government resist Amendment 12 on the grounds that it causes disparity when gathering evidence here or abroad and would erode a well-established and operationally important power which is routinely used by the police in counter-terrorism investigations.

Amendment 13 relates to Clause 3(7) which defines "personal record" when providing counselling or assistance to an individual for their personal welfare. I reiterate the Government's position in respect of the Bill: it has been drafted to ensure parity with domestic production orders. The intention is to avoid disparity between gathering evidence in this country compared with gaining evidence abroad. The same powers for law enforcement should exist for overseas production orders as for those in the UK.

The noble Baroness, Lady Hamwee, asked why—I cannot read the writing. Shall I send it back?

Baroness Hamwee: Shall I ask the question again?

Baroness Williams of Trafford: She asked: why only professional counselling? The Government believe this to be an expansive definition drawing on professional counselling services rather than conversations between friends or family who can be deemed to be giving counselling advice or assistance. The definition leaves little doubt as to what is considered as counselling or support to a person's welfare. Broadening the definition does not provide the certainty required when deciding whether or not to grant an order based on whether the material sought is excepted data.

Baroness Hamwee: My Lords, we have two definitions: "personal records" and "confidential personal records". It is the latter that is important. Clause 3(8) makes it quite clear that there has to be some restriction or obligation of confidence, which you would certainly find in connection with professional "counselling"—and I am grateful for that way of describing it in one word. That criterion would be applied in the context of this clause overall. It may be unlikely that a non-professional counsellor would be able to meet the criteria in Clause 3(8), but it is not impossible. It seems to me that, as long as Clause 3(8) can be relied on, we should not attempt to narrow what is meant by "counselling" in Clause 3(7).

Baroness Williams of Trafford: The noble Baroness may now have confused me. Both Clauses 3(7) and (8) have been drafted to reflect existing protections in domestic production orders, which are intended to afford protection to legally enforceable relationships of trust and confidence, as well as to relationships between an individual and someone who holds a position of trust in a professional capacity—for example, a doctor—where such relationships may generate confidential information from an individual. This is different from a person who voluntarily shares information in confidence with a friend or family member who does not formally or professionally hold a position of trust and is not under a duty of confidentiality in respect of the person sharing the information.

Baroness Hamwee: My Lords, I think that was my argument. Might it be possible, between now and Report, for us to be given the references to the other legislation that this reflects?

Baroness Williams of Trafford: We can certainly do that—in fact, magically, we have it here. It reflects the definition in the PACE Act 1984, Section 12 of which defines "personal records". As such, this material is excluded from the scope of a PACE production order.

The noble Baroness asked about safeguards. The Bill has been drafted to include multiple safeguards so that a person is not required to produce excepted electronic data. Clause 5(2) includes one of these safeguards: that a judge must not specify or describe data in an overseas production order where he or she has reasonable grounds for believing that the data sought includes or consists of excepted data. The wording "reasonable grounds for believing" is used in other parts of the Bill—for example, in Clauses 1 and 7, where further safeguards place a similar restriction on the applicant applying for an overseas production order and where an applicant is applying to vary an order.

At the time of considering an application for an order, there will be cases where neither the judge nor the applicant can be certain whether the data sought does in fact include excepted data. This is simply because the contents of the data cannot be known by the judge or the applicant until they are produced. In my view, it is therefore appropriate for the term "reasonable grounds for believing" to remain in the Bill to make clear that the judge has the ability to consider whether excepted data might be obtained, taking into account the other factors that might help them reach such a conclusion. With that explanation, I hope that the noble Lord feels happy to withdraw the amendment.

5.15 pm

Baroness Hamwee: My Lords, I should just say that I accept that the terminology is used elsewhere: one of my amendments objects to its use elsewhere. I am still troubled by how it applies here, as I am not sure how one would apply for the revocation, but I will of course go back to look at it.

Lord Rosser: I thank the Minister for her response. I will reflect on what she said about Amendment 12. I was not entirely clear about her response to my question: if a view was taken that the term "terrorism investigation" was being rather loosely interpreted by a party to an international agreement on an overseas production order, how could that decision be challenged? I may have missed her response but, if so, could she repeat it?

[Lord Rosser]

Baroness Williams of Trafford: I am not sure that I answered that point, other than to say that we would not want to narrow the scope so that omission would lead to a terrorism investigation being curtailed. Perhaps I could come back to the noble Lord on the other point.

Lord Rosser: Yes, I am sure that we can discuss that on another occasion or at the intended meeting. However, I hope that the Minister will take my point that some countries may have a rather looser definition of who or what is a terrorist than we would in this country. Although I appreciate that the Bill is about orders made in this country, nevertheless, before we have that arrangement there has been an agreement the other way, so it is relevant to talk about what other countries might demand or seek from us.

Baroness Williams of Trafford: I am sorry to intervene on the noble Lord, but at the heart of the Bill lies the principle that we would not be dealing with countries with hugely differing levels of legal thresholds or judicial considerations, and all the other things that we have talked about. But yes, perhaps we can talk about that further.

Lord Rosser: I understand the point that the noble Baroness has made more than once: that we are unlikely to be signing a deal with North Korea. I fully accept and understand that, but I think that there may be one or two other countries with whom we might sign a deal who may have a slightly different definition of who or what is a terrorist than we might choose to apply. That is important under this, because it gives you access to information that you would not otherwise have.

Again thanking the Minister for her response, I beg leave to withdraw the amendment.

Amendment 12 withdrawn.

Amendment 13 not moved.

Clause 3 agreed.

Clause 4: Requirements for making of order

Amendment 14

Moved by ***Baroness Hamwee***

14: Clause 4, page 4, line 34, after "requirements" insert "which must be consistent with the provisions of this section"

Baroness Hamwee: My Lords, I have been consulting my noble friend as to whether I should be moving an adjournment so that we can all get a cup of tea or possibly soup, but he thinks that that is a matter for the Government Whip. So I will instead move Amendment 14—I do not think it will be exciting enough to warm us up.

Clause 4(1) applies requirements for seeking an overseas production order set out in subsections (2) to (6), and such additional requirements as the Secretary of State adds through regulations. I acknowledge that the regulations will be subject to the affirmative procedure but, as I said earlier this afternoon, we all know the problems of scrutinising secondary legislation and the almost insurmountable problem of amending or stopping it. We also know about the importance of protecting against an overweening or out-of-control Executive.

My amendment refers to the characteristics of the additional requirements as being consistent with the provisions of what will be Section 4, because the very fact that no limiting factor is expressed raises the issue. I accept, before the Minister says it, that these are additional requirements, so, in any event, they should comply with subsections (2) to (6).

Amendment 15 would leave out "(so far as applicable)", because I for one do not understand what,

"additional requirements … specified in regulations … (so far as applicable)",

means. The words must mean something. If the additional requirements are not applicable, they will not apply, so what are we worried about? I beg to move.

The Deputy Chairman of Committees (The Countess of Mar) (CB): I tend to sympathise with the noble Baroness. I was warned to bring my coat in before I came.

Baroness Williams of Trafford: My Lords, if I was a Whip, I would allow a short break if for no reason other than to go and get a hot water bottle. I am still in summer clothes.

Subsections (2) to (6) of Clause 4 set out the substantive requirements for a judge to consider when making an overseas production order. These include the judge being satisfied that there are: reasonable grounds for believing that a person on whom an order is served operates or is based in a country outside the UK with which the UK has a designated international co-operation agreement; reasonable grounds for believing that an indictable offence has been committed and is being investigated—or proceedings have been instituted—or that the application relates to a terrorism investigation; reasonable grounds for believing that the data sought is likely to have substantial value to the proceedings or investigation; and reasonable grounds for believing that it is in the public interest for the electronic data to be produced.

The amendment would ensure that any additional requirements made by way of regulations under Clause 4(1)(b) are consistent with the requirements under Clause 4(2) to (6). Any further requirements made by way of regulations will be in addition to existing requirements already set out in Clause 4. It follows therefore that any additional requirements cannot contradict the provisions already set out, as these will have to be complied with. There will not be a scenario where only additional requirements as set out in regulations are complied with. In every case, the requirements under Clause 4 must be satisfied before granting an order.

In addition, unless there is express provision in the enabling Act, delegated legislation cannot amend or vary it. Therefore, an additional requirement as set out in regulations under this clause could not have the effect of contradicting or undermining the requirements

of the Bill. For example, a regulation which sought to change the type of offence as already set out in Clause 4(3) from an indictable offence to a summary offence could not be adopted under the provisions of the Bill.

Furthermore, the scope of secondary legislation is limited by the scope of the enabling legislation. As the power is to provide for "additional" requirements, it follows that those requirements will be compatible with those already in Bill. The power to provide additional requirements and regulations is subject to the affirmative procedure. Should additional regulations be required, the House will have an opportunity to scrutinise the proposed requirements before they come into law.

The language in Clause 4(1), which the noble Baroness is seeking to amend, clarifies that the additional requirements set out in the regulations may not apply in all cases or in every application for an order. There may be international agreements the terms of which do not warrant additional requirements to be specified in regulations to be made by the Secretary of State. This could be because both the UK and the other country participating or party to the arrangement may choose a wide-ranging agreement that does not place any further restrictions on that which is already proposed in the Bill. The clause therefore reflects the reality that in some cases a judge need only be satisfied of the requirements met in Clause 4(2) to (6) without necessarily having regard to all additional requirements that may have been specified in regulations made by the Secretary of State. With those words, I ask the noble Baroness to withdraw her amendment.

Lord Rosser: Before the noble Baroness responds, I have a question for the Minister. I have listened hard to what the Minister said. Is the clause in there because the Government think it would be helpful as there might be a need to make additional requirements, or do they actually have a view at this stage on what kind of additional requirements those might be?

Baroness Williams of Trafford: In a sense, this is the same issue that the noble Lord referred to before. Because this is a framework Bill, as I said, a judge may be satisfied that the Bill itself provides enough but the additional requirements—as yet unknown—may be applicable in another agreement, as yet unspecified. It gives that scope where it might be required in future.

Baroness Hamwee: My Lords, I would like to think about the response to Amendment 15. I think I made clear that I anticipated the Minister's response to Amendment 14 but she said it much more nicely and fully, and I am glad to have it on the record. I beg leave to withdraw the amendment.

Amendment 14 withdrawn.

Amendment 15 not moved.

Amendment 16

Moved by ***Baroness Hamwee***

16: Clause 4, page 5, line 8, leave out "substantial" and insert "significant"

Baroness Hamwee: My Lords, this is another amendment in my name and that of my noble friend. Under Clause 4(5) the data must be of "substantial value". I read that as meaning that it must not be trivial. I wonder whether it should be "significant value", which I think would make a difference to the proceedings or the investigation. I may be told that this repeats language in other legislation, and if that is the case then again I would be grateful for the reference. However, I wonder whether there is a distinction between something that adds weight to what you already know and something that, if it is not a game-changer, you would not get from elsewhere.

We are told that this legislation is likely to be used to enable access to data held by American companies so, as well as wondering whether the terminology reflects other legislation in this country, it occurred to me that maybe it reflects something in American legislation in the cloud. This is of course a probing amendment. I beg to move.

Baroness Williams of Trafford: I am very happy to tell the noble Baroness that this is purely British. "Substantial" is a well-established test laid out in PACE 1984. Under Section 8 of that Act a justice of the peace must be satisfied that the material on the premises is likely to be of substantial value before authorising a production order application. "Substantial" is a familiar term to appropriate officers, who will be making applications. They will have many powers at their disposal, and creating a consistent regime is clearly beneficial to quickly understand what will be required to apply for an overseas production order. Given that the term "substantial" is well-established, it is obvious that there exists a body of case law that helps further define and interpret the term, both for appropriate officers and, of course, for the judiciary.

The case law establishes that "substantial" is to be given its plain and ordinary meaning, which will please the noble Baroness, who likes the plain and ordinary in linguistic terms. For example, in the case of Malik v Manchester Crown Court, the High Court found that "substantial" was an ordinary English word and that "substantial value" was a value which is more than minimal: it must be significant. I hope that that provides great clarity to the noble Baroness and that she will feel happy to withdraw her amendment.

5.30 pm

Baroness Hamwee: My Lords, I think I ought, after today, to consult my noble friend, who will know all about PACE, as I do not. Yes, of course, I beg leave to withdraw the amendment.

Amendment 16 withdrawn.

Amendment 17

Moved by ***Baroness Hamwee***

17: Clause 4, page 5, line 11, leave out from second "that" to "having" in line 14 and insert "the public interest in all or part of the electronic data specified or described in the application for the order being produced or, as the case may be, accessed outweighs the public interest in privacy,"

Baroness Hamwee: My Lords, these amendments are about public interest and the balance between public interests. Clause 4(6) requires the judge to consider the public interest and whether it is in the public interest for the data to be produced or accessed, having regard to the matters set out in Clause 4(6). There is a public interest as well in access to data and privacy and it seems to me that the various interests here cannot be judged in isolation. I should like to insert a reference to the public interest in privacy, but in any event to understand at this stage how that balance is dealt with, since the judge is required to have regard to one public interest only. There is a public as well as an individual interest in privacy rights, and I beg to move.

Baroness Williams of Trafford: My Lords, Amendments 17 and 18 do not add any protections for privacy rights to those already contained in the Bill and under the Human Rights Act 1998. Without these amendments, the judge would still be required to take into account the impact on an individual's right to privacy when determining whether the public interest requires production of the data sought.

We understand the need to balance a citizen's rights and interests against the public interest in law enforcement officers' ability to investigate crimes and use powers to obtain evidence. This is why the existing requirements in Clause 4 consider not only whether data sought would be in the public interest but whether it would be of substantial value to the investigation or proceedings. A judge is under an obligation to balance the rights of an individual against the state's need to investigate a crime and to reach a decision which is compliant with the individual's rights under the ECHR.

I hope that, with those reassurances, the noble Baroness feels happy to withdraw her amendment.

Baroness Hamwee: My Lords, I am grateful for those helpful remarks. I beg leave to withdraw the amendment.

Amendment 17 withdrawn.

Amendment 18 not moved.

Amendment 19

Moved by ***Lord Paddick***

19: Clause 4, page 5, line 19, at end insert—

"( ) The judge must be satisfied that the electronic data specified or described in the application is not confidential journalistic data."

Lord Paddick: My Lords, in moving Amendment 19 in my name and that of my noble friend Lady Hamwee, I will speak to our Amendments 33 and 34 in this group.

Journalistic data of any kind is not excepted electronic data as set out in Clause 3, despite representations made by media organisations that it should be. Instead, under Clause 12 the application for an overseas production order, if there are reasonable grounds for believing that the electronic data specified or described in the application consists of or includes journalistic data that is confidential journalistic data, must be made on notice. Confidential journalistic data consists of data created or acquired for the purposes of journalism and in circumstances that give rise to an obligation of confidence that continues or is held subject to a restriction on disclosure or an obligation of secrecy.

This begs the question: how does the judge make a judgment about whether there are reasonable grounds for believing that confidential journalistic material is involved? Does the judge take the word of the applicant? If the judge determines that confidential journalistic material is involved, how will notice be served on the parties concerned and how will those parties make representations? To probe these issues, Amendment 19 seeks to insert the requirement that:

"The judge must be satisfied that the electronic data specified or described in the application is not confidential journalistic data".

Clause 13 prohibits the overseas parties from concealing, destroying, altering or disposing of the data, or disclosing the application to anyone else, once they are given notice of the application. What sanction can be imposed for failing to comply? Can it be contempt of court, bearing in mind that at that stage the judge has made no order, only given notice that an application for an order has been made?

Amendment 33 seeks that Clause 12(1) should specify that the notice should be served on the data controller and the data subject specifically, as well as anyone else the judge considers necessary. Amendment 34 amends Clause 12(4) to specify that notices should be served on a person R, referred to in Clause 12(3): that is, the person who receives electronic data from another person who intended it to be used for journalistic purposes. I beg to move Amendment 19.

Lord Rosser: I referred to the general issue that is the subject of the amendments spoken to by the noble Lord, Lord Paddick, when I spoke to Amendment 8. We share the concerns expressed by the noble Lord, subject to what the Minister may have to say in response, about the possible difficulties or issues that might arise.

Baroness Williams of Trafford: I thank the noble Lord, Lord Paddick, for his points and the noble Lord, Lord Rosser, for his intervention. The effect of Amendment 19 would be to exclude confidential journalistic material from the scope of an application and order. I should first point out that Clause 4 reflects the position in the PACE Act 1984. Journalistic material can already be sought under Schedule 1 to PACE through special procedure, and under Schedule 5 to the Terrorism Act 2000, when it is held by a company or person based in the UK. The Bill extends this to circumstances where the data is held by an entity based outside the UK and where a relevant international arrangement is in place.

I do not think that we should introduce in the Bill a difference between material that can be obtained—subject of course to appropriate requirements and safeguards—when it is held in the UK, as opposed to being held by an entity based on the country with which we have

entered into an agreement. I should also stress that similar standards are set out in the Bill as already exist in domestic legislation, and that the term "reasonable grounds for believing" is readily used by our court system. Reasonable belief requires more than just a guess or a hunch. It will require the judge, marshalling all the facts before them, to come to an assessment on whether the information sought does or does not contain this type of data. It is not the first time that that standard has been used in legislation, and of course it will not be the last. Where confidential journalistic material is sought, the Bill requires that such applications can only be made on notice. That means that anyone put on notice, which can and may include the journalist whose data might be sought, has the opportunity to make representations to the court as to whether it is appropriate for the data to be obtained.

The effect of Amendment 33 as drafted would be that an application for an overseas production order that included confidential journalistic material had to be made on notice to a data controller and the data subject. I understand the sentiment behind the amendment but I do not agree that it is required, for two reasons. First, the rules of court will set out the process by which a judge can ensure that anyone affected by the order is notified of any given case. Consideration of notice by the judge relating to such a request is left to his or her discretion to allow for the circumstances where notice to a data controller, data subject or anyone else is deemed appropriate by the judge when granting an overseas production order. I think giving the judge discretion to determine which is appropriate in any given case is the right approach.

Secondly—this is a point that I have made before and will make again—we are providing in the Bill the means to serve an order on a company based outside the UK in a country with which we have a relevant agreement, in the same way as is currently the case with a company based in the UK. In those cases the respondent and any other person affected by the order would ordinarily be given notice and therefore the opportunity to make representations, unless under rules of court the judge is satisfied that there are good reasons for not doing so—for example, because of the risk of prejudice to the investigation. We are proposing that the same should apply to overseas production orders.

The intention of Clause 12 is to require an application for an overseas production order to be made on notice where there are reasonable grounds for believing that the electronic data sought consists of, or includes, confidential journalistic data. The effect of the clause as drafted is that notice should be served on the respondent—that is, the person who would be required to produce the data if the order is made. In most cases, this would be a service provider rather than the customer on whose behalf the data is stored. However, a requirement to give notice to the respondent under Clause 12(1) does not preclude the judge considering the application from exercising his or her own discretion under rules of court. Under rules of court they may require notice to be given to other persons who may be affected by an order requiring the production of confidential journalistic material, including a person who in his or her professional capacity has acquired that data. It will be a matter for the judge's discretion, but he or she is likely to insist on notice being given unless the applicant can demonstrate that doing so would prejudice the investigation—for example, where the journalist himself or herself is the subject of the investigation or prosecution.

An example of where it might not be appropriate is where there is a hacking investigation and the journalist might actually be the subject of an inquiry. The judge may decide that putting someone on notice could potentially harm the investigation or risk the dissipation of the material. It is the Government's intention, however, to ensure that where an application relates to confidential journalistic data, notice can and should be served on journalists and on whoever the judge deems appropriate given the circumstances of the application. The PACE Act 1984, for example, requires service to be made on the respondent only, otherwise notice requirements are set out in court rules.

The noble Lord, Lord Paddick, made an important point about sanctions to comply. It is difficult to construct a proportionate regime to ensure nondisclosure prior to an order being made and, in practice, law enforcement would not apply for an order where there was an unacceptable risk of damaging disclosure. I ask noble Lords not to press their amendments and I shall consider their comments before Report, if that is amenable to them.

Lord Paddick: I am very grateful to the Minister for her explanation and her offer to consider further the issues that the noble Lord, Lord Rosser, and I have raised in connection with these issues. Obviously, Amendment 19 is a probing amendment, a mechanism by which to debate these issues, but with the promise of further discussions to come before Report—perhaps the Minister could also establish whether the Government have consulted the National Union of Journalists on these issues—I beg leave to withdraw the amendment.

Amendment 19 withdrawn.

Clause 4 agreed.

Committee adjourned at 5.47 pm.