Vol. 793
No. 189

Monday
15 October 2018

PARLIAMENTARY DEBATES
(HANSARD)

HOUSE OF LORDS

OFFICIAL REPORT

ORDER OF BUSINESS

Lords wishing to be supplied with these Daily Reports should give notice to this effect to the Printed Paper Office.

No proofs of Daily Reports are provided. Corrections for the bound volume which Lords wish to suggest to the report of their speeches should be clearly indicated in a copy of the Daily Report, which, with the column numbers concerned shown on the front cover, should be sent to the Editor of Debates, House of Lords, within 14 days of the date of the Daily Report.

This issue of the Official Report is also available on the Internet at
https://hansard.parliament.uk/lords/2018-10-15

The first time a Member speaks to a new piece of parliamentary business, the following abbreviations are used to show their party affiliation:

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

No party affiliation is given for Members serving the House in a formal capacity, the Lords spiritual, Members on leave of absence or Members who are otherwise disqualified from sitting in the House.

House of Lords

Monday 15 October 2018

2.30 pm

Prayers—read by the Lord Bishop of London.

Death of a Member: Baroness Hollis of Heigham

Announcement

2.36 pm

The Lord Speaker (Lord Fowler): My Lords, I regret to inform the House of the death of my friend, the noble Baroness, Lady Hollis of Heigham, on 13 October. On behalf of the House I extend our condolences to the noble Baroness's family and friends, and in particular, of course, to the noble Lord, Lord Howarth of Newport.

Asylum Applications

Question

2.37 pm

Asked by ***Baroness Berridge***

To ask Her Majesty's Government what plans they have to improve the assessment by the Home Office of asylum applications made on the grounds of religious or belief based persecution.

Baroness Berridge (Con): My Lords, I beg leave to ask the Question standing in my name on the Order Paper and draw attention to my interests as outlined in the register.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, all asylum decision-makers undertake a bespoke training package on how to assess religious and belief-based persecution claims. UK Visas and Immigration is currently working with the All-Party Parliamentary Group for International Freedom of Religion or Belief to develop a specialist considering religion or belief in the asylum claim training course. This will be introduced in the new year and will enhance asylum decision-makers' religious literacy in dealing with these complex issues.

Baroness Berridge: I thank the Minister for the work done by her and her officials since the publication of a report co-authored by the All-Party Parliamentary Group drawing attention to the problems with assessing these claims and, in particular, to policy and practice being somewhat different. Will the Minister outline what plans the department has to monitor and evaluate the effectiveness of that training so that in a few years' time we are not facing the same difference between training and the decisions being made?

Baroness Williams of Trafford: I thank my noble friend for her Question, her follow-up question and the tenacity and commitment she has shown on this issue. The new specialist course will form part of a continuous training package for asylum decision-makers, technical specialists and senior caseworkers. UKVI expects to roll it out in early 2019. UKVI has an internal audit process to assess the quality of decisions and interviews and the application of policy. Allowed appeals are also regularly analysed. In addition, independent audits are carried out by the operational assurance and security unit.

Baroness Bakewell (Lab): My Lords, there was considerable publicity around the case of the Pakistani humanist Hamza bin Walayat who failed his asylum application in part, it is thought, because he failed to identify Plato and Aristotle as humanists. What steps will the Home Office take to ensure that asylum assessors are better educated about the beliefs of non-religious people, including humanists?

Baroness Williams of Trafford: The noble Baroness outlines precisely why training in religious literacy and indeed about those who have no beliefs or are humanists, which is a belief in and of itself, is required in order to make proper decisions.

Baroness Hussein-Ece (LD): My Lords, the Minister will be aware of the report *Still Falling Short*, which was produced recently by the UK Lesbian and Gay Immigration group highlighting that LGBT+ asylum seekers were routinely disbelieved by Home Office decision-makers, and were falling short of the legal standard required in asylum applications. For example, one applicant was told that LGBT+ people cannot possibly follow a religion and that their application was rejected. What is being done to address this failure?

Baroness Williams of Trafford: I think I outlined the process to my noble friend, but the noble Baroness is right to point out that you can be LGBT and have a religion. The care with which asylum case decision-makers make their judgments is very important, as are the sensitivities around interviewing LGBT people and those who are persecuted for their faith.

Lord Alton of Liverpool (CB): My Lords, having visited Pakistan earlier this month and seen first-hand the abject, festering conditions in which many of the country's religious minorities live, and having heard accounts of abduction, rape, the forced marriage of a nine year-old, forced conversion, death sentences for so-called blasphemy—the Minister may have heard the interview on the "Today" programme on Saturday morning with a young woman whose mother has spent eight years on death row for so-called blasphemy with a death sentence hanging over her—and in one case, children being forced to watch as their parents were burned alive, I ask the Minister: how can the Home Office in all those circumstances continue to say that what is happening in Pakistan to religious believers and humanists is merely discrimination, not persecution?

Baroness Williams of Trafford: I do not think I or the House would disagree with the noble Lord in the examples that he cites, particularly those in Pakistan of certain religious groups being persecuted under blasphemy laws. Sadly, the laws in Pakistan are quite

[Baroness Williams of Trafford]
different from the laws here; unpalatable though we might find them, they are the laws there. Nevertheless, each application to our asylum system should be dealt with in terms of the persecution that people might face.

Lord Elton (Con): My Lords, how long will it take from rollout for the whole of the relevant force of people to receive the training? What oversight will there be to make sure that it has been understood and implemented?

Baroness Williams of Trafford: I think I outlined that process just now to my noble friend Lady Berridge. We are expecting to roll it out in 2019. With regard to quality assurance, the audits are going to be carried out by an operational security unit for both the quality of the decision and the application of the policy.

Lord Rosser (Lab): My Lords, there have been media reports that a further problem is that staff considering asylum applications are rushed because there is a backlog to deal with, and that in addition staff have targets to meet in respect of the number of decisions they have to make each week on whether to grant or refuse asylum seekers. Is there still a backlog of people waiting for an asylum decision or for an appeal to be heard? If so, how big is that backlog? What targets in reality are staff making asylum decisions expected to meet each day, week or month?

Baroness Williams of Trafford: My Lords, it is important that the decisions made are the right ones. I could not comment on decisions being rushed, but I can go back to the department to ask that question. There are certainly a lot of decisions to be made, because people want to come to this country, and I can try to ascertain a figure for the backlog.

The Lord Bishop of Leeds: My Lords, before training is rolled out, will some religious leaders in this country be consulted on what sort of training might be appropriate, and the sort of questions that may be asked of asylum seekers? At the moment, I should be hard-pressed to answer some of them.

Baroness Williams of Trafford: I would struggle with the questions proposed by the noble Baroness, Lady Bakewell, and might also struggle with questions on my religion. Religious leaders have been engaged. What is to be established is the reason for persecution, therefore religious literacy is needed for the assessors—it is not a test of religious facts.

Education and Training

Question

2.46 pm

Asked by ***Lord Haskel***

To ask Her Majesty's Government what steps they are taking to adapt education and training to address the needs of the changing economy.

The Parliamentary Under-Secretary of State, Department for Education (Lord Agnew of Oulton) (Con): My Lords, we are working with employers to make the skills system more responsive to employers' needs. This includes supporting industry to create high-quality apprenticeships and developing a national retraining scheme. This will give adults the skills they need to thrive as the economy changes. We are also introducing T-levels, a high-quality technical alternative to academic education, and establishing institutes of technology to meet higher-level technical skills needs.

Lord Haskel (Lab): I hear what the Minister says, but with the Open University and FE colleges cutting back and several training companies in difficulty, the usual routes for skills and social progress via Earn and Learn, lifelong learning and adult reskilling, are in decline, as are apprenticeships. As a result, the number of skilled job vacancies is soaring, and high employment is based on low-skill, low-paid and low-security jobs. To me, this is not a route to a modern economy but a race to the bottom. How will the Government reverse that?

Lord Agnew of Oulton: My Lords, there are a lot of questions in that question but I can pick out some of the strands. I mentioned the national retraining scheme, which we have announced, which is investing £100 million in retraining. It will include a phased series of impactful interventions, and initial interventions will be in digital and construction. I mentioned national colleges, which are specialist colleges for technical areas. We have started with two for the nuclear industry and high-speed rail. We are also tendering for the institutes of technology at the moment. I assure the noble Lord that we are very focused on this important area.

Lord Baker of Dorking (Con): My Lords, is the Minister aware that the 2,000 leavers from university technical colleges since July included virtually no NEETs and that 30% of them became apprentices, which compares to the national average of 7%? Of the 47% who went to universities, three-quarters studied STEM subjects, which is double the national average. As he is the only Minister who has visited UTCs in this or the previous Government and I know he likes them, could he spread his enthusiasm among the Government, because these are outstanding schools—some of the most successful in the country—and we need many more of them, because they produce the skilled engineers at 16 and 18 which the economy needs?

Lord Agnew of Oulton: My Lords, I am sure the whole House will recognise the enormous effort that my noble friend Lord Baker has put into the UTC movement. He is right: I have put a lot of my own time into it, because I think UTCs are a vital part of the skills network. We are doing as much as we can; the system still needs to improve. I am encouraging the Baker Dearing Educational Trust to allow more UTCs to join multi-academy trusts so that their resources can be pooled. I am also trying to encourage my noble friend to adjust the entry age of UTCs so that they are not in conflict with surrounding schools. Then, local areas can work in harmony.

Baroness Garden of Frognal (LD): My Lords, has the Minister had any further thoughts about giving more support to careers education, so that young people are more fully aware of the range of work opportunities in the world of tomorrow?

Lord Agnew of Oulton: Again, the noble Baroness asks a very important question. We have our careers strategy, underpinned by the Gatsby benchmarks, which among other things help students to learn from the career and labour market information available. The curriculum should be linked to careers, for example by bringing STEM subjects to life, and young people should have real engagement with employers and receive personal guidance. The performance of 3,000 schools and colleges has now been diagnosed against the Gatsby benchmarks, and awareness in schools is increasing all the time.

Lord Watts (Lab): My Lords, the creative industries have lots of vacancies they cannot fill with UK citizens. What are the Government going to do to address the shortage, which has mainly been caused by changes in the education system?

Lord Agnew of Oulton: My Lords, I am not sure if this is a question about Brexit and skills from abroad or about training our own people, but even the artistic and creative industries need well-educated children. One of the first things the coalition Government did was to get rid of 3,000 pointless qualifications, to encourage children to learn proper subjects—including creative subjects.

Lord Aberdare (CB): Further to the noble Lord's answer to the question asked by the noble Baroness, Lady Garden, what are the Government doing to ensure the availability of enough qualified careers professionals to deliver the admirable goals of the careers strategy?

Lord Agnew of Oulton: As noble Lords may be aware, we recently established the Careers and Enterprise Company. It is working with schools to ensure that there are enough career advisers in the system. We have 2,000 schools and colleges within the enterprise adviser network, 700 schools and colleges in career hubs and the Government have announced a doubling of the number of career hubs to 40 to meet this rising demand.

Lord Watson of Invergowrie (Lab): My Lords, one of the issues on which the Government's ongoing post-2018 review of education will focus is how to deliver the skills the country needs as we enter unknown terrain when we leave the European Union.

Lord Foulkes of Cumnock (Lab): If we leave.

Lord Watson of Invergowrie: I defer to my noble friend Lord Foulkes. In a debate in your Lordships' House in July, the Minister's colleague, the noble Viscount, Lord Younger, said that the review panel's interim report would be published at some point this year. Can the Minister be more specific about when we can expect to hear the initial thoughts of the people charged with the important task of mapping a route that links schools, apprenticeships, further education, higher education and industry with a view to filling the skills gaps now and into the future?

Lord Agnew of Oulton: My Lords, there are several parts to this answer. To deal with the initial concern about a post-Brexit scenario, as noble Lords will be aware, the Migration Advisory Committee has just issued its own recommendations on how we should adjust to a post-Brexit environment, including that we lift the cap on Tier 2 visas—at present only 20,000 a year are allowed in that area—and that we add 140 more categories to that sector. Turning to our economy and our school system, we created the skills advisory panels last year, which initially are convening in the opportunity areas to liaise with the LEPs and other employer groups. We have also created the institutes of technology, which are designed to be at a higher level of the skills matrix to ensure that the STEM skills the noble Lord referred to are given priority.

Prisoners: Purposeful Activity

Question

2.53 pm

Asked by ***The Lord Bishop of London***

To ask Her Majesty's Government how they plan to ensure that every prisoner can participate in purposeful activity during their sentence.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, the introduction of offender management in custody and the associated staffing means that prisons will be better equipped to run fuller regimes with more opportunities for purposeful activity. Our education and employment strategy, launched in May, will create a system where prisoners are on a path to employment through increased opportunities to gain experience of work in communities while released on temporary licence.

The Lord Bishop of London: My Lords, I thank the Minister for his response. In Prisons Week, does he accept that continuous efforts must be made to ensure that our prisons are places of safety for those serving their sentences, and are places of hope for those who intend to avoid reoffending once released? Although I welcome the constructive use of additional staff through the promising new offender management in custody scheme, I invite the Minister to acknowledge the important role that chaplaincies, community chaplaincies, charities and churches can play in the rehabilitation of offenders.

Lord Keen of Elie: My Lords, the right reverend Prelate makes a very good point about the need for rehabilitation and for safety in prisons to be as effective as possible. In addition to the strategy that she mentioned, we have launched the education and employment strategy,

[Lord Keen of Elie]
which will create a system in which each prisoner is set on a path to employment from the outset. We hope that governors will be in a position to deliver that strategy by next April. I confirm that there are chaplaincy facilities in all our prisons, of course.

Baroness D'Souza (CB): My Lords, there has been considerable success in introducing theatre of all kinds and acting in some prisons. How far do the Government support those efforts and how far are they prepared to finance them?

Lord Keen of Elie: My Lords, I understand that the introduction of theatre is part of the wider educational programme in prisons. I am not able to say that there is any identified or closed funding for that aspect of the process.

Lord Harris of Haringey (Lab): My Lords, Her Majesty's Chief Inspector of Prisons reported in June that 38% of those in young offender institutions are locked in their cells for more than 22 hours a day. How on earth can they receive any proper training and rehabilitation if they are locked up for such lengths of time? Why has the Ministry of Justice repeatedly refused to collect data on how long people are locked up in prison? Is it because it does not want to know, or because it knows that it will not like the answer?

Lord Keen of Elie: My Lords, on the last point, we do not have clear and identifiable data from all institutions that would enable us to determine how long prisoners actually spent in individual cells. That is clearly a matter for which individual governors have considerable responsibility. Regarding young offenders, the noble Lord may recollect the announcement made by the Secretary of State on 2 October about the introduction of the first secure school, which will open at Medway in 2020.

Lord Cormack (Con): My Lords, if we do not have this data why do we not get it?

Lord Keen of Elie: My Lords, it is a matter for consideration, but the collation of such data is a massive task and there are other, more immediate issues in our prisons to be addressed.

Lord German (LD): My Lords, one of the principal barriers to meaningful activity in prison is the unnecessary movement of prisoners between one prison and another. Courses and training are disrupted and the receiving prison frequently does not have the appropriate vacancy or the necessary course. Does the Minister acknowledge that problem, which is primarily caused by overcrowding in prisons? People are moved to create space and to wherever there is a space. That leads to a reduction in the amount of time that can be given to people to train and learn; when they leave they are without the appropriate skills.

Lord Keen of Elie: My Lords, I do not accept that there are unnecessary movements of prisoners between prisons. There are reasons why prisoners have to be moved from one institution to another from time to time. That is dependent on the category of prison and the category of prisoner. From time to time there may be disruption to courses that prisoners are undertaking, but there may equally be an issue about preparing them for release on licence or about trying to ensure that they come into closer contact with their family, for support.

Baroness McIntosh of Hudnall (Lab): I return to the question posed by the noble Baroness, Lady D'Souza. I advise the Minister that this very afternoon my own daughter, as a professional opera singer, is in one of Her Majesty's prisons in this city working with prisoners who are about to present a production of "Carmen". Will he acknowledge that these interventions have a significant effect on the confidence and self-esteem of prisoners who are able to participate, but that not enough of them are able to do so? I ask him respectfully to reconsider the answer he gave and perhaps suggest that the Government put a little more effort into this.

Lord Keen of Elie: I am obliged to the noble Baroness, although I do not seek to reconsider my earlier answer. I acknowledge the importance of the work being done; of course it contributes to self-esteem and to the re-establishment of sensible relationships required of those in our prisons. It is part of an educational process that leads some prisoners to a point where they are able to secure suitable employment when they leave prison.

Police and Crime Commissioners

Question

3 pm

Asked by ***Lord Hunt of Kings Heath***

To ask Her Majesty's Government what assessment they have made of the concerns raised by the National Police Chiefs' Council about Police and Crime Commissioners and their impact on applications for Chief Constable positions.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, we are committed to ensuring that policing continues to attract the leaders that it needs for the future. The 2015 College of Policing *Leadership Review* set the foundation, and we have built on this by funding a leadership hub. Chiefs, PCCs and the college are rising to this challenge.

Lord Hunt of Kings Heath (Lab): My Lords, I am grateful to the Minister for that Answer, but she will be aware that there is increasing concern about the rapid turnover of chief constables, particularly women. It seems to be a problem, too, that new appointments are often made from a shortlist of one—often, the deputy chief constable. She will be aware that Her Majesty's Inspectorate of Constabulary has expressed concern that bright officers are not applying for these posts because they think police commissioners have already made up their minds. Will she use the powers that she has to determine that any appointment must

be made from a strong shortlist, and that no one should become a chief constable unless they have also undertaken a senior post with another force, rather than simply being promoted from the inside?

Baroness Williams of Trafford: I certainly recognise the point that the noble Lord makes about the feeling that people are promoted from the inside and, therefore, that perhaps officers do not apply from other forces. On female turnover, we should welcome the fact that we have a female commissioner of the Met police, which is fantastic news. The chair of the National Police Chiefs' Council is also a woman, and the director-general of the NCA is also female. However, I understand the noble Lord's point. I also think that chiefs themselves have a role to play in attracting and encouraging talent coming up through the pipeline. The College of Policing published a code of ethics, guidance on flexible working and guidance on the use of positive action to increase the recruitment and retention of underrepresented groups, including females.

Lord Paddick (LD): My Lords, it has always been the case that incumbent chief officers have had an advantage over outside candidates, but this has been made worse by the fact that there is a one-to-one relationship between the police and crime commissioner and his or her chief officer team. Why will the Home Office not reimpose the requirement that a national Home Office-led assessment is part of the selection process? Even the noble Lord, Lord Sugar, has a panel of experts to help him decide who his apprentice will be.

Baroness Williams of Trafford: The PCC, in recruiting his chief constable, has to be mindful of the quality of candidate he is recruiting. The thing about PCCs, which was not true of police authorities when they existed, is that the public can hold them to account at the ballot box.

Lord Bach (Lab): My Lords, I declare my interest as the police and crime commissioner for Leicestershire. As the Minister knows well, Leicestershire has a long-standing chief constable—who is still fairly young, by comparison—who it is a pleasure and an honour to work with. Police and crime commissioners do come together in their joint concern—a concern the Minister will know of, and which is shared around the House—that Her Majesty's Government have allowed cuts in this area to go too far, and this is seriously putting at risk the ability of the police anywhere to do their jobs.

Baroness Williams of Trafford: First, I express my sympathy with the noble Lord—Parliament's one and only PCC—regarding the number of times that his Benches stand up and criticise PCCs. I have been to Leicester, I have seen him in action, I have met his chief constable and I pay tribute to the work that they do. In terms of funding, the noble Lord will know that the Policing Minister visited every police force in England and Wales with regard to coming to a funding settlement for 2018-19. In addition, my right honourable friend the Home Secretary has recently said that he appreciates the pressures that the police are under, not least because of the things that they have had to deal with in the last 12 months.

Lord Sherbourne of Didsbury (Con): My Lords, my noble friend referred to the fact that PCCs can be held accountable, but does she not recognise the problem in the case of Wiltshire? After Operation Conifer, the chief constable moved to another area and the PCC is not standing for re-election. How, then, can the public make their views known?

Baroness Williams of Trafford: I fully understand the sentiments expressed by both my noble friend and Members of the House on this issue in general. In terms of the chief constable, although I am not referring to this particular case, moving force does not of itself absolve someone from accountability for their actions. As I said, certainly the PCC who, is much more high-profile than local police authorities, can be held to account by his or her voters.

Lord Harris of Haringey (Lab): My Lords, I refer to my interests as listed in the register. When I was involved in appointing chief officers in the police service, we had the benefit of receiving advice from the Home Office senior appointments panel, which the noble Lord, Lord Paddick, referred to, which told us whether the shortlist was adequate and broad enough, and we also had the benefit of advice from Her Majesty's Inspectorate of Constabulary. Legislation now precludes the Chief Inspector of Constabulary from providing advice to chief constables. Why is that?

Baroness Williams of Trafford: My Lords, I do not know the answer to that question. I will have to take that back, if the noble Lord does not mind, and come up with a reply, because I am not quite sure of the history of this.

Lord Foulkes of Cumnock (Lab): My Lords, is the noble Baroness aware that a senior police officer who had to leave Police Scotland under allegations of bullying has been appointed an inspector of constabulary in England? Has she any comments on that?

Baroness Williams of Trafford: As I said, I do not have comments to make on individual cases, but I said in response to a previous question that moving forces does not absolve you from being accountable for the actions that you have taken in another force.

Grenfell Tower: Toxins

Private Notice Question

3.08 pm

Asked by ***Lord Kennedy of Southwark***

To ask Her Majesty's Government what steps they will take in response to concerns over the level of toxins found at the Grenfell Tower site and calls for survivors, firefighters and local residents to undergo immediate tests to monitor any damage to their DNA.

Lord Kennedy of Southwark (Lab Co-op): My Lords, I beg leave to ask a Question of which I have given private notice.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, human biomonitoring—the measurement of chemicals in biological tissue such as blood or saliva—cannot be used to determine whether those who were exposed to contaminants in the incident 16 months ago suffered any damage. That is because results from this type of analysis provide information on total exposure over many years which could be influenced by a multitude of factors not related to a specific period of exposure. In addition, there would not be a baseline—that is, results prior to the fire—against which to compare new results. Consequently, Public Health England does not recommend human biomonitoring in this scenario, although other environmental monitoring continues to take place.

Lord Kennedy of Southwark: My Lords, can the noble Lord say whether it is true that Professor Anna Stec, a world-leading expert on toxicology, has privately urged Public Health England and the Department of Health to organise a range of tests to ensure that any potential health risks can be properly assessed and that Public Health England has decided not to do that until receipt of Professor Stec's report some time next year? Is he also aware of reports of what is being called the "Grenfell cough", which Professor Stec has said seems to indicate a high level of atmospheric contaminants?

Lord O'Shaughnessy: The Government are of course very concerned about all the consequences for mental and physical health that may result from the Grenfell fire. As the noble Lord will know, there has been a huge concerted effort to try to ameliorate those.

The noble Lord asked about environmental monitoring. Since summer 2017, monitoring has been ongoing, with weekly reports published by the London Air Quality Network, which is operated by King's College London and is, therefore, at arm's length from government. The reports provide information on the levels of particulates, asbestos and other contaminants in the air. The London Air Quality Network has found no evidence that the levels are above average for London, but monitoring continues. Public Health England is in discussions with the local authority and the local NHS trust to make sure that any signs of public health threats, from whichever area they emerge, are looked into seriously. However, we have not yet had those findings from the professor, and Public Health England is very keen to see that information as soon as possible.

The Countess of Mar (CB): My Lords, the concentration has been on the chemical effects of the tower cladding. Does the Minister appreciate that thousands—and I mean thousands—of chemicals are involved in furniture and furnishings being burned? While the air may be clear, I understand that the soil has been contaminated, and it is not just by inhalation that people can be poisoned but also by skin absorption. Will the Minister please ensure that GPs and others treating people from this area are closely monitored? It is not necessary for them to have blood tests but, if their health deteriorates, as much as possible must be done to help them.

Lord O'Shaughnessy: I completely agree with the noble Countess that toxins can be found in different media, soil and air being two of those. That is why Public Health England is keen to see the results from Professor Stec's work. She has said that it is not yet finished, and we need to see its outcomes. It is one of many pieces of work going on to make sure that, if there are any concerns about the near environment, they are spotted and dealt with before they turn into public health threats.

Baroness Pinnock (LD): Does the Minister agree that it is understandable that residents who were involved in the dreadful Grenfell fire, and the emergency responders, are additionally anxious having read reports in the national papers and other media that carcinogenic toxins have been found by the investigating professor, and that additional anxiety is exactly what they do not need? Does he agree that it is therefore important that the Government, through Public Health England and other institutions, respond in a positive way to their fears? I understand that, at the moment, the Government are expecting people to wait for six or 12 months, but those involved are anxious that carcinogenic toxins resulting from the fire will impinge on their good health.

Lord O'Shaughnessy: I completely concur with the noble Baroness on the levels of anxiety. We know that a number of people who are affected, directly and indirectly, are suffering from post-traumatic stress disorder. The north-west London NHS trust, which delivers mental health services, is dealing with thousands of people, not just those who live locally but those who worked on the site of the fire. I agree that there is a need to reassure people, wherever possible, who have been through this difficult and traumatic experience. I encourage the noble Baroness and all noble Lords to look at the environmental monitoring report on the ongoing levels, which is published weekly. It provides a huge amount of detail and is carried out independently. It does not, at this stage show any cause for concern regarding higher-than-average levels of asbestos, of which none has been found, and other toxins. However, that monitoring has to continue, and as soon as any sign is captured and verified as being statistically significant, it needs to be acted on. That is why we are so keen to see the professor's work.

Lord Shipley (LD): My Lords, the Minister indicated that we should wait for the formal publication of Professor Stec's report. However, she has briefed officials in a variety of agencies about the dangers that she thinks are apparent. Given that toxins have been found up to a mile away from the Grenfell Tower site, and given that the absorption of toxins through the skin is a serious danger—which it seems is not being checked

for—would it not have been wise for NHS England, which must have been aware of this pending report, to have announced last week that, rather than just provide screening for survivors to assess the effects of smoke inhalation, it would assess for skin absorption of toxic material?

Lord O'Shaughnessy: It is not about waiting for the report. Public Health England met with Professor Stec in February of this year and asked for specific details of her research. Repeat requests have been made and I am told by Public Health England that it has yet to receive those details. Of course, there is a need to get good information and to make sure it is reliable, so those requests continue. I can reassure the noble Lord that no one is waiting around looking for information and that extensive monitoring is going on. That kind of information is requested because if there are causes for concern—as seems to be the case from the media reports—they can be investigated urgently.

Mental Capacity (Amendment) Bill [HL]

Committee (2nd Day)

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

3.16 pm

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

Amendment 14A

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

14A: Schedule 1, page 10, line 36, leave out from beginning of line 36 to end of line 8 on page 11

Baroness Finlay of Llandaff (CB): My Lords, any restriction to a person's liberty is a serious step that calls for a corresponding level of scrutiny. To do otherwise would devalue the currency of liberty. We must remember how this legislation will work in practice and that it is authorising one citizen to detain another, usually more vulnerable, citizen. This decision carries risks, not least the risk of undermining an individual's self-esteem and dignity. Therefore it is imperative to ensure that only appropriate and experienced individuals are given the authority to assess capacity and plan the care programme for the cared- for person, with their best interests at the heart of decision-making.

I will speak to the amendments in this group that are in my name—Amendments 14A, 16A, 19C, 19E, 19F, 30C and 32C—which seek to probe an alternative to involving the care manager directly in the process and to align it more closely with the Care Act. Much anxiety has been expressed since Second Reading about the role of the care home manager because there has been concern that the manager is not an appropriate person to carry out or even co-ordinate assessments. There have also been concerns that the cost of providing adequate training would be high and that the proposed training of a few hours would prove grossly inadequate.

The Minister gave assurances on the first day in Committee when he explained that,

"the care home manager would be responsible for arranging the assessments for the responsible body—not necessarily carrying out but arranging".—[*Official Report*, 5/9/19; col. 1882.]

He pointed out that care homes already play a role in arranging assessments because they are responsible for identifying deprivation of liberty and then notifying the relevant local authority which under current arrangements, will then send out a best-interests assessor to visit and assess. He pointed out that the assessments that the care home manager will have a duty to arrange will be carried out at the care assessment stage as part of early planning, often by social workers.

However, in discussion with stakeholders, concern has highlighted self-funders, who could risk getting a low level of protection in law and find that the cost of assessment is rolled into their care home costs. Whatever is decided, a care home manager will remain responsible for identifying those whose liberty is restricted and therefore will be responsible for triggering assessments. Nothing in the Bill permits searches to case-find anyone who has not been flagged up and therefore is illegally detained.

Unfortunately, the concerns expressed by stakeholders have not diminished, despite the many meetings at which reassurances have been offered. Those concerns include that the care home manager, even if not undertaking assessments directly, would have a power of veto and that the authorisation of assessments would become a paper exercise. There is also concern that the costs associated with making the assessment would be transferred from the local authority to the care home, but that the funding would not move from the local authority to the care home, leaving the person being assessed, if they are a self-funder, to carry the burden of additional costs.

Regarding conflicts of interest, although some care managers are excellent, not all have the appropriate background experience, and the local authority would remain liable in law for authorising the deprivation based on information from the care home manager. But we must not lose sight of why the Bill is here. The number of people waiting for assessments seems to be rising exponentially and is currently around 125,000 in England and Wales. Even if money was thrown at assessments now, there are not enough people and the current process is too complicated to ensure that they happen.

It is relatively easy to talk about a process, but we must focus on the individual. To the individual, it is not the assessment per se that protects their liberty but the way that they are cared for on a day-to-day basis. They can have the most thorough assessment in the world, but if it is a once-a-year process, they may spend the rest of the year with restrictions on liberty that go unnoticed. That is why a new process to protect liberty must link directly to the care plan that contains details of how the person's freedoms will be enhanced and how they will be empowered within the ethos of the Mental Capacity Act to live as well as possible. Some may argue that you can have a well-written

[Baroness Finlay of Llandaff]
care plan that is not carried out, but later amendments would enable people to raise concerns and request a reassessment.

It is important to recognise that necessary and proportionate arrangements may restrict liberty in some areas in order to empower the person to live as fully as possible despite the restrictions that their disorder has imposed on them. In some care homes a great deal is done to enhance living through outings, personalised crafts and musical arrangements, or when residents are encouraged to pursue their interests while keeping them safe from obvious dangers. Sadly, in other care homes residents are left sitting in a circle around a blaring television. Their experience means either that they have a low quality of life or in effect feel imprisoned.

It is the day-to-day living experience that matters. The way the care is delivered to allow that experience should be enshrined in a good care plan that encompasses encouraging social interaction and contact with the family, and accepts a reasonable degree of risk while avoiding clearly identifiable major risks. It should specify what the protection of liberty arrangements are that need to be approved by the responsible body. Words matter. Perhaps we should drop the words "liberty protection safeguards" because they can be confused with safeguarding procedures and instead use the term "liberty protection arrangements", which would probably be abbreviated to PoLAs to replace DoLS.

I know that Amendment 14A looks strange because it comes half way through a paragraph. Ideally the amendment would delete the whole of paragraph 13 in Part 2 of Schedule 1, but given that we reached the end of line 35 on day one of Committee, I believe that the amendment can start only at line 36. However, I hope that the other amendments I have tabled in this group make better sense if we understand that the whole of paragraph 13 should have been deleted.

We know that we cannot throw money at a failing system and that not everyone needs the full might of the current assessment process of DoLS. If care homes are not described differently, it may open the way for others to be required to do the assessments in all settings by the responsible body's direction, which would mirror Section 42(2) of the Care Act, which states:

> "The local authority must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken in the adult's case (whether under this Part or otherwise) and, if so, what and by whom".

That subsection was designed to safeguard by triggering an inquiry if there is a suspicion of unmet care needs, abuse or neglect. In the amendments I have tabled, I have tried to make the responsible body reflect the same arrangements so that it would either provide assessments or cause them to be provided. Many supported living settings are competent to do such assessments and many care homes could do them in routine cases by being asked for information by the responsible body without any power of veto resting with the care home manager.

I am grateful to Lorraine Currie, the professional Mental Capacity Act lead in Shropshire, for discussing this with me in detail. I hope that by more closely aligning liberty protection with the Care Act we might have a more streamlined process. I beg to move.

Lord Hunt of Kings Heath (Lab): My Lords, Amendments 17A, 19A, 30B, 30D, 32B an 32E are in my name. The noble Baroness, Lady Finlay, expressed very well some of the key challenges we face in scrutinising the Bill. My amendments would remove the role of the care manager in overseeing the determination that the arrangements are necessary and proportionate. They would also remove the care home manager from carrying out consultation to try to ascertain the cared-for person's wishes or feelings on the arrangements. In both cases, the result of my amendments would be that responsibility falling to the responsible local authority.

The noble Baroness, Lady Finlay, spoke about the issues facing the sector in trying to implement the current legislation. The problem seems to be that the Government, in their haste to respond to this and the undoubted challenge of the Cheshire West judgment, have come up with a streamlined procedure in which the human rights of the cared-for person are sacrificed on the altar of bureaucratic convenience. The careful balance that the Law Commission put into the draft Bill has been overturned, safeguards have been removed and protections have been overridden. The analyses we have received have been very valuable, but the Law Society's analysis is a succinct, devastating critique of the Government's approach.

The proposal means that the very people with a vested interest in keeping cared-for people occupying beds in care homes have been placed in the driving seat in the process of overseeing the restriction of their liberty. According to the Bill, those cared-for persons have lost the right to participate in decisions affecting them, have no right to be consulted, have no right, like their relatives, to be told how to challenge a deprivation of liberty and have no right to request a review. On that latter point, they must rely on the interested person who, when you look at the Bill, remarkably turns out to be the care home manager; nor is there any obligation for the responsible body to meet the cared-for person before signing off on their deprivation of liberty. That is the background to why the amendments are so important and why the Bill's basis is so flawed.

I cannot find an explicit duty to consult the cared-for person about their wishes and feelings. That is worrying in itself; it is a major defect in relation to the existing legislation. I also find worrying the extraordinary proposition that the care home manager should carry out the consultation. Essentially, they are judge and jury for the person's liberty, since the consultation is about the outcome of the required assessment that the care home manager is responsible for arranging. As far as I can see, the care home manager will choose who will make that assessment and, presumably, pay their fees. They are also the gatekeeper for the appointment of an independent mental capacity advocate, which cannot happen without the care home manager saying that it is in the cared-for person's best interests. However, we can see that the care home manager has a vested

financial interest in these matters, as does the care home. On consultation, the Bill must be seriously rethought. That also applies to paragraph 16 of Schedule 1 on the determination that arrangements are necessary and proportionate. Currently under the Bill, it falls to the care home manager to decide who should make the determination. This, of course, is a vital test and the determination of the arrangements relates directly to the practice under Article 5 of the European Convention on Human Rights.

3.30 pm

When we briefly touched on these issues the Minister made it clear that assessments would be carried out by medical experts—nurses, social workers and speech therapists. But there is no requirement in the Bill to make that happen. As we have seen, there is a clear conflict of interest. Surely this must rule out the care manager from having this role in relation to the proportionate and necessary test. This is why I believe that given the construct of the Bill, the only alternative is to give it to the local authority responsible body.

The Minister may say that local authorities do not have the resources or capacity to do that. Evidence at the moment suggests that they are under considerable pressure, but why should care home managers have the resources or capacity to do it? Our debates on the first day in Committee examined and found wanting the impact assessment, which seriously misrepresents the cost that would be borne by care homes arising from their new responsibilities.

As the noble Baroness, Lady Murphy, noted in that debate, the notion that the majority who flit through the system, on short-term contracts and training, many of whom come from outside the EU, can in half a day master the Mental Capacity Act and be trained through this process to make a proper assessment and identify people within the meaning of the Act is completely ludicrous. The care home manager will be responsible for these people and for ensuring that all the things in this Bill actually take place. I do not believe, in all justice, that they are the people to do it, nor do I think they have the capacity to do so.

Baroness Murphy (CB): My Lords, I find myself in something of a dilemma because I have already said that I am very anxious about the role foreseen for care home managers in this Bill. I am also getting the heebie-jeebies about how we are criticising the Bill because of how we have got here in the first place. The noble Baroness, Lady Finlay, and the noble Lord, Lord Hunt, have already mentioned that we are here because at the moment we have a bad piece of legislation; it is not being implemented appropriately because we cannot afford it. The Law Commission, the Department of Health and the Ministry of Justice have tried to bring forward a piece of legislation that makes it a lot simpler.

We are used to having conflicts of interest in public sector services. Every time a GP refers somebody for a hospital appointment or surgery or prescribes expensive medication they have a financial conflict of interest, but we live with that because of the way that the system works. We are used to it—we take account of it day by day.

I am not going to oppose these amendments but we have to say to ourselves that the care home manager is there and we know that the local authority has not got the resources. Would it work better if we could give care home managers proper training? I do not know, but I know that we must at every stage think very carefully about the alternatives that we propose instead of the departmental proposals. We have to make the process simpler. We have to reduce the numbers of people who are subject to it. Perhaps if we reduced the number of people subject to it, we could put in place these better arrangements. Maybe then we can take out the care home manager. Until we do so I still have this great anxiety that we have not come up with an alternative that will really work.

Although I share the anxieties about how care home managers will discharge this responsibility, I have some anxieties about the alternatives. We have to make the process simpler and more affordable. I neither support nor oppose these amendments. We need to give some very careful thought to making sure that we do not end up with a more complex and difficult process than is implementable and affordable.

Baroness Meacher (CB): My Lords, I was not planning on speaking to this amendment at all. I am certainly not an expert on the Mental Capacity Act, but it was suggested to me by BASW that the Bill will cover people in domestic situations. It questions whether those people could be taken out of the Bill. I very much follow the point made by the noble Baroness, Lady Murphy, that it might be a good thing to do something really well for people in institutions while maybe avoiding duplication for people in domestic situations. There is the safeguarding procedure, which, as has been suggested by my medic daughters, is already incredibly bureaucratic, but I will leave that to one side for the moment. If at least the people in domestic settings were left to be assessed by the safeguarding system, that would achieve something and reduce the number of people covered by the Bill. This is particularly true because, as we go along, more and more people will be looked after in domestic settings rather than in care homes.

Baroness Thornton (Lab): My Lords, it is our job to look at how things will and will not work and what the alternatives are. The noble Baroness takes a perfectly legitimate position that says, "If this won't work, what will?" In a way, that underlines a lot of the discussions we have been having in this House: we need some time to discuss this Bill and we have not been able to have that.

My name is to the amendments tabled by my noble friend Lord Hunt. We are questioning the ability of the care home manager to be able to do this at all. The words that have been used to us by the stakeholders—we have now talked to dozens of stakeholders in the last month or so—are "capability" and "capacity" of care home managers. Professionals question the capability and local government and other institutions question the capacity. Those words are being used constantly while we discuss this issue.

[Baroness Thornton]

It is also worth mentioning the voice of the care home managers themselves, which is starting to emerge. We recently had a briefing from a large group of care home managers who feel that they are not qualified to take on this role or to carry out assessments and that the administrative burden they could carry could mean that they will not have the capacity to take on the extra work to carry out liberty protection safeguard assessments.

There is some confusion here with what the Minister said during the first day in Committee and in the letter he wrote to us all following Second Reading. I admit that I am confused as to whether we are talking about initiating and carrying out assessments and what the powers of the care home managers are. It seems that the Bill team and the Minister have given us several different descriptions of what those roles might be. That has not helped our consideration of our concerns.

Mencap has stated that it believes that the views of the cared-for person have to be at the heart of this part of the Bill and that it should be refocused accordingly. The comments made by my noble friend and the noble Baroness, Lady Finlay, suggest that that has not yet been achieved, and that the role of the care home manager makes it less rather than more likely. That has been said to us not just by Mencap but by many stakeholders. They are concerned that the cared-for person is not at the heart of the Bill. It is therefore legitimate to ask whether the Government have got this aspect of the Bill right and whether they need to find a different way of delivering it.

Baroness Barker (LD): My Lords, I wanted to respond in part to the points made by the noble Baroness, Lady Murphy. The original legislation was brought in on the basis of agreement across all parties in the House; so, too, was the report which reviewed the workings of the Mental Capacity Act. There was a unanimous view that DoLS need to be revised; they are not working.

It is interesting that many of the criticisms that have come to light in recent months have been from people who do not defend the current system but who have grave concerns not just about capacity but about some basic assumptions being made—not just about the role of care managers but about how the arrangements will work in practice. There is a quite legitimate view that the legislation will not solve the problem nor necessarily deal with a backlog; it will just shove it somewhere else. We need to think our way carefully through that because, as I will go on to say in debates on later amendments, there is no doubt that there is a watering down in the legal protections proposed by the Government. The noble Baroness and the noble Lord, Lord Hunt, are therefore right that we should examine in some detail exactly what the Government are proposing, because up until this point it has been quite difficult to understand it.

I thank the Minister for sending his letter of 4 October —he did so in the characteristically open and respectful way in which he treats this House. However, I want to ask a question which is germane to what the noble Baroness, Lady Finlay, is trying to achieve in her amendment. The letter states:

"Care home managers will be responsible for arranging the assessments that are needed for the authorisation. In most cases, they will use assessments that have been completed by a social worker or a medical professional or others as part of the care planning process. This means we will reduce the duplication that exists in the current DoLS system and ensure that people access the safeguards they need".

Exactly what assessments is the Minister talking about? DoLS assessments are different from assessments under the Care Act. It would be very helpful if he could say that, because it is one of the fundamental assumptions that we are all working to and which may turn out to be incorrect.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, I want first to thank noble Lords for their amendments and for their contributions to the debate. Reflecting on our first day in Committee and on Second Reading, it seems to me that an enormous number of the questions with which we are dealing are about the creation or definition of a new role for the care home manager—a number of the amendments that we will consider today deal specifically with it. I shall deal with those and the many questions that noble Lords have asked.

Given that it has been more than a month since we had the first day in Committee, I would like to reflect on some of the other issues that were discussed on that first day to demonstrate that there has been some progress. I will also explain why, although we are undoubtedly dealing with some difficult and complex issues that we know we have to get right, I am confident that if we work together, we can do that. I am quickly going to pick three issues in respect of which there has been some progress.

The first issue that was raised is extending the scope of the Bill to include 16 and 17 year-olds. I said in Committee that we would look at that and I can tell noble Lords that we will bring forward proposals to include that group in the scheme. I will also reflect on the points made by the noble Lord, Lord Hunt, and the noble Baronesses, Lady Thornton, Lady Finlay and Lady Barker, about the role of the cared-for person being front and centre. In fact, that was the one obligation to consult that was not translated from the Law Commission report into the Bill. Clearly, if we want to get the improvements that we want to see, it is essential that that person's wishes and feelings about proposed arrangements be at the heart of the model, so we will ensure that the Bill reflects this.

3.45 pm

Baroness Thornton: I am very pleased to hear what the Minister is saying, but he and the Bill team need to talk to the stakeholders because they do not feel heard. In particular, they do not feel heard on this issue. I am counselling the Minister that it is not good that the stakeholders are coming to all of us and do not feel heard.

Lord O'Shaughnessy: I am sorry to hear that that is the perception. I know that the team is engaging with stakeholders and, clearly, we will do better. I take the noble Baroness's advice very seriously. As I said, we

will make sure that the Bill reflects the need to consult the cared-for person. We have also taken on board the comments about the phrase "of sound mind", which is used in one of the amendments later on. That is one reason why we might want to reconsider it. I know that there is a great concern that the language is inappropriate and that creating a new definition might create a gap, but, having looked at this further, we think we would be able to change this language and carry out various other work to reduce the gap to a minimum. That is something that we intend to bring forward, so I hope that that will be welcomed by many people.

I only give those examples to demonstrate that we are making progress as we go along. Perhaps noble Lords will say that we should have done this beforehand, but we are where we are, and we are trying to fix a creaking system and are using our best endeavours to do that. As the noble Baroness, Lady Finlay, pointed out, the latest data suggests that the situation is getting worse, not better. There were a total of 227,400 DoLS applications received in 2017-18 and 125,000 people in the backlog, 48,000 of whom have been waiting for more than a year already. In 2013-14, when the House found the DoLS system in need of reform, there were just 12,400 applications. We know the reason for that leap, but it suggests that this problem is not sorting itself out and it is urgent that we address it. Clearly, that is what we are all endeavouring to achieve in this process.

It is for that reason that I come to the role of the care home manager. That is obviously a critical role to avoid duplication and to ensure that cases that are relatively straightforward can be dealt with at a level that is close to the person being cared-for can be integrated into care planning without involving referrals upwards-even though there will continue to be reviews by responsible bodies and the opportunity for the AMCP to intervene where there is any cause for concern. To make sure that this is a manageable process, it is integrated into care planning. I still believe that that is the right model. We need to determine how this model can be developed and delivered in a way that overcomes the very many concerns, many of which I have sympathy with, that have been expressed in this debate and will I am sure be expressed this afternoon in other debates. The onus is on the Government to lead that process and put as many of those concerns to bed as possible while, as I have said, protecting the model because it gives us a way out of the duplication and backlog that we have now.

I want to address some specific issues raised in regard to care managers. For example, the noble Lord, Lord Hunt, and others raised the point about care home managers being responsible for arranging assessments but not generally for conducting them. In response to the question from the noble Baroness, Lady Barker, that will be the case for all assessments—DoLS assessments and assessments regarding care planning—and it will include determining whether arrangements are necessary and proportionate. However, although those managers have a responsibility to arrange the assessments, the Bill allows for them to be conducted by others involved in the person's care, who must have a medical qualification or be suitably trained, as will be explained in the code of practice. So while there is that responsibility to arrange the assessments, those assessments will be carried out by somebody other than the care home manager, except in nursing homes, for example, which might be run by a nurse with a suitable qualification. It would be somebody with the appropriate training to ensure that whatever kind of assessment it is, it can be carried out properly.

I understand that that still leaves a small set of assessments which a care home manager could both arrange and carry out, because they had suitable training. If noble Lords are still concerned about the appropriateness of that kind of activity, I would be absolutely willing to discuss how we can minimise any concerns about conflicts of interest. However, as the noble Baroness, Lady Murphy, pointed out, such conflicts of interest happen all the time and we rely on regulation—

Baroness Thornton: The noble Baroness, Lady Murphy, is quite right that people such as her good self have to manage conflicts of interest all the time and they do it superbly, but such a conflict of interest is actually to do with profit and earning money. It is to do with keeping capacity in the care home, which creates a profit for that company. It is quite different from a conflict of interest involving what kind of medicine a doctor might prescribe, for example. It is directly due to the fact that a care home manager's job is to keep their care home as full as possible, so that it continues to make money. Some of them are in not-for-profits and some are in for-profits, but it is an absolutely different kind of conflict of interest.

Lord O'Shaughnessy: As the noble Baroness says, there are conflicts of interest of various kinds; the important point is that there are protections against any conflict of interest. Typically, those will be through the regulatory authorities, whether the professional bodies or the CQC, which of course inspects all care homes and has found that 80% of them provide good or outstanding care. I believe that there are systems within the current regulatory framework that will provide for that oversight and prevent conflicts of interest. There is also the fact that the responsible body will carry out the reviews and that there is an opportunity to refer to an AMCP.

Baroness Barker: My Lords, the Minister has made several points, each of which needs to be gone over with great care—but I want to take him back to one of them. In his letter of 4 October, he said that the Bill is explicit that a necessary and proportionate assessment must be completed by someone who is suitably qualified and that case law establishes who is qualified to conduct other assessments. However, that is not actually so. What the Bill says in paragraph 16 of Schedule 1 is:

> "The determination required by this paragraph is a determination that the arrangements are necessary and proportionate … The determination must be made by a person who appears—(a) to the care home manager, if the arrangements are care home arrangements, or (b) to the responsible body … to have appropriate experience and knowledge".

So that wording does not say that it has to be a medically qualified person, and I am not sure whether case law establishes that a capacity assessment must be carried out by a nurse or a social worker. Under the

[Baroness Barker]
Mental Capacity Act, you get best interest assessors who are not medically qualified; that relates to an amendment tabled by the noble Baroness, Lady Finlay. I suggest to the Minister—and I will suggest this quite a lot—that it should be in regulations rather than in the code that the minimum standards for completing assessments should be made.

On the first day in Committee the Minister said:

"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".—[*Official Report*, 5/8/18; col. 1829.]

At the moment care home managers do not make many of the assessments. They do not do capacity assessments. They do not make decisions about whether somebody is objective. It is not up to them whether an advocate comes in to see somebody. It is taking the truth to its outer limits to liken what happens now to what is intended under LPS.

When the Minister uses the word "escalate", what is clearly understood not just by noble Lords but by stakeholders is that many of the protections, such as access to an advocate or to an AMCP, have deliberately been weakened in the Bill from what they are under DoLS. So I do think the Minister is somewhat overstating the case. That is what has given rise to many of the fears that have been expressed by a remarkably wide range of stakeholders. I therefore take some issue with what he said.

Lord O'Shaughnessy: We believe that case law does establish that suitably qualified people need to be appointed. Clearly that is something we need to continue to discuss to persuade the noble Baroness that that is the case, but that is our understanding. As she pointed out, "suitably qualified" can include medical and other qualifications.

On care home managers' capacity, they are of course carrying out some assessments. The intention is they will carry out more assessments. I agree with the noble Baroness on that point. The point that the noble Baronesses, Lady Barker and Lady Thornton, raised was about the capability and capacity of this group of people to carry out these roles. On our previous day in Committee I committed to explain how we would ensure that that group of people had the requisite training and skills to carry out these kinds of assessments.

The noble Baroness made a point about weakened access. I want to update the House on our thinking about making sure that the person is consulted. We are trying to create a more proportionate system such that, where all those concerned with the care of a person are content that the arrangements have been properly put in place, it does not need to be escalated and reviewed by an AMCP or similar person. The problem we have at the moment is that the system takes every decision to the highest possible level. This is not about weakening access but about trying to have a proportionate system and also about making sure—we will debate this further tonight—that at every stage there are the right opportunities to seek advocacy support and to refer concerns so that an AMCP or responsible body can intervene and review a case if necessary.

Unless we find a way to deliver a more proportionate system we will simply be re-enacting the system we have now, which is not working. This is why I am so keen to work with noble Lords to make sure that we can determine the proper role and responsibilities of, and checks and balances on, care home managers so that we can get the system right and deliver a reform that saves money, enables more people to have their cases reviewed and enables us to make sure that people are protected, which is what we want to do.

Lord Hunt of Kings Heath: The Minister read out a list of safeguards that will still be in place despite the streamlined nature of the Bill. The issue I have with that is that the care home manager seems to act as the gatekeeper to many of them. I hear what he says about a streamlined approach, which I agree with, and I also hear what he says about the people who will do the assessment. But there is still a real issue about why the care home manager, of all people, is the person overseeing this whole process. If the Government are really willing to sit down and talk about how to achieve a streamlined programme but continue with some of the essential safeguards that are in the Bill at the moment, clearly the role of the care home manager has to be looked at seriously.

I am not really hearing from the Government whether they are seriously prepared to debate the fundamental construct that they have come forward with. It seems to me that they dreamed up an answer to the problem but did not consult fully—they had selective consultation where individuals were picked off—and the result is that they do not now have consensus support, and the Bill is in trouble because of that.

4 pm

Lord O'Shaughnessy: I say to the noble Lord, as I have said to all noble Lords from the beginning, that we are determined to reform the system so that it delivers what it ought to for people who are being deprived of their liberty. The Government believe that the care home manager, the person ultimately responsible for the care planning and delivery for individuals under their care, must have a central role in arranging assessments when someone has been deprived of their liberty.

I say to the Committee that, given that so much of the success of the Bill will revolve around our ability to define this role properly and to ensure that there are appropriate checks and balances and appropriate training so that it delivers the capacity and capability that noble Lords have talked about, I want to work with stakeholders and noble Lords to ensure that we can do that. I think that is both possible and desirable, but I also recognise that it is not something we have yet achieved. I hope that as we go through our deliberations today and next week, and as we look forward to Report, that is something that we will be able to deal with so that the consensus that the noble Lord talks about currently being absent is something that we can build. On that basis, I hope the noble Baroness will feel able to withdraw her amendment.

Baroness Finlay of Llandaff: My Lords, I thank those who have spoken in this very interesting debate. The last part of the debate was extremely rich and I think we all need to go away and read it. I thank the Minister for giving us the assurance that things that had caused great concern, such as the issue of 16 and 17 year-olds, the wishes and feelings of the cared-for person and the stigmatising term "unsound mind", will all be dealt with. I am sure I speak for everyone in the House and outside it when I say that looking at that is most welcome.

When we are debating this subject, we have to remember that we are not talking about a deprivation of liberty in care homes Bill; we are talking about a Bill that amends the Mental Capacity Act as a whole for people wherever they are. We have had a huge debate about care homes but it was partly about looking at people in other care settings. In the light of some points raised previously by my noble friend Lady Hollins about people in supported living environments, it seemed worth floating the question of whether there was a way to align more closely with the Care Act. Then of course there are domestic settings as well.

As the noble Baroness, Lady Murphy, said, we have to make it simpler and, if we can, decrease the number of people subject to the Bill because we cannot replicate the current system. If the current system were working and everyone had better care as a result of their assessments, we would not be here now. We are here because the current system does not work. I have been concerned that a great deal of anxiety has been expressed to us but not so many solutions. Some solutions have been very refined—they are tabled as amendments and we will be discussing them later—but we must not lose sight of the need for solutions that are elegant and applicable and that do not lock us into another system that will go on to fail as the current system has.

I was not aware that 48,000 people have been waiting for over a year for their assessment. We need to hold that figure in our minds because it is really worrying. I can see that the amendments that I have tabled do not do the job, but I hope they have opened the debate and forced us to think about other things. I thank the Minister for all the movement that there has been to date and hope we will have more movement as the day goes on. I beg leave to withdraw the amendment.

Amendment 14A withdrawn.

Amendment 14B

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

14B: Schedule 1, page 10, line 40, after "manager" insert "or the person responsible for the care plan"

Baroness Finlay of Llandaff: My Lords, with the leave of the Committee, I shall move Amendment 14B briefly, if the Minister will allow me. I apologise for my error: I claim jet lag, having just come back from Bahrain.

The amendments in the second group, which are all in my name, are designed to meet the statement and explanation made by the Minister that the care home manager would arrange assessments but not undertake them directly. They attempt to clarify in the Bill the assurance given by the Minister that the care home manager would arrange assessments on behalf of the responsible body. He pointed out that care homes already play a role. They are currently frightened by an increased level of responsibility and believe that they will be conducting assessments rather than having a co-ordinating role. The care home manager will always remain responsible for identifying people where there is a restriction of liberty.

In this set of amendments, the responsibility for performing assessments is clearly not with the care home manager, who has only an administrative role, making sure that the relevant assessments have been done and forwarded to the authorising body. They must be undertaken as part of care planning. I suggest that this would require pulling together medical assessments of the person's condition, which may be from the GP in care of the elderly or from other specialist departments where that person has been. Sometimes, medical details may be obtained from people such as rehabilitation teams, where the person had a head injury. That becomes important because some aspects, such as frontal lobe damage, need a highly specialised assessment. You could not have a general practitioner assess some of these people, because it is beyond the scope of most clinicians.

The capacity assessment must be done by someone who is suitably qualified, and the care plan must consider the person's wishes and feelings and the type of person they were before the illness struck. To use a simple example, a professional musician's needs will probably differ greatly from those of an agricultural worker in terms of aspects of liberty that need to be enhanced, such as access to whatever instrument they played before, and how the environment needs to be adapted, such as allowing the agricultural worker to have much more time outside if that is what they need, to protect their ability to live well.

I have discussed this with a range of concerned stakeholders, and there are genuine concerns that if care home managers were to hold the responsibility to undertake assessments themselves, there could be conflicts of interest. Although some could be trained to a certain extent, others would need extensive training and would probably move on before they were able to undertake that role. There is general agreement that care home managers cannot do the assessments themselves, but they could have a co-ordinating role. Whatever the final pattern of assessment, many care home staff need better training in mental capacity overall. I feel a great burden of responsibility on my shoulders, as I chair the National Mental Capacity Forum.

In Amendment 30A, I require the assessment to be made by a registered professional who has responsibility for the care plan and appropriate experience and knowledge to lead the care planning process for the cared-for person. We must have a thorough debate about what the Minister was explaining to us on the first day of Committee, which I fear has been poorly understood by many outside this Chamber. In gratitude to the Committee for allowing me to speak to the amendments, I beg to move.

Baroness Barker: My Lords, I am very grateful to the noble Baroness for moving the amendment. It gives me the opportunity to return to the question I asked previously, to which I do not think we have yet got the right answer. It is about the nature of the assessment. The noble Baroness talked about the sort of assessments made under the Care Act—assessments to support somebody. They are not DoLS assessments, which assess whether someone is being deprived of their liberty. In what the Minister has said so far, in reference to care home managers, there is a failure to make that distinction. A DoLS assessment is a very serious assessment of whether someone has been deprived of their liberty. It can also be viewed in court. It is some stretch for a care home manager or someone in a community setting—making genuine operational assessments about supporting somebody—to make a decision that deprives that person of their liberty. We will come on to records of authorisation, but I have to say nothing the Minister has said so far has reassured me we are talking about an assessment system that would come anywhere near DoLS or be accepted by a court.

Baroness Finlay of Llandaff: My Lords, if I may come back very briefly on that, the noble Baroness makes an important point. I worry that some of the DoLS assessments are very long and complex, yet make little difference to the lived experience of the person on the receiving end of care, so I hope they will become better tailored. A badly drawn-up care plan could also be presented in court if there was a dispute, not only the assessment forms. Some of the forms I have seen will have taken a great deal of time to complete; I wonder whether the detail replicates that obtainable elsewhere, and whether there is a problem of proportionality. Also, I worry that we should be looking at the minimum amount of restriction on liberty, rather than deprivation of liberty. If someone is imprisoned, the whole system has failed. They must be encouraged and empowered to live as well as they can while being kept safe from dangers that, without due care and attention, would probably end for some of them in their deaths—wandering on to a motorway or whatever.

Baroness Barker: I take the point made by the noble Baroness; she is absolutely right. There are some pretty awful assessments. I am not sure the Bill will stop that—I think she is rather wishful in her thinking if she thinks otherwise. She will have talked to practitioners, as I have. Sometimes DoLS work really well, particularly when trained assessors use the conditions. These can be something quite simple, such as the right to see a priest once a week or go out on a pass. I find myself in a slightly different position from the noble Baroness, Lady Murphy. As I sit in these debates I find myself becoming ever more defensive of DoLS because some of the case made against them is exaggerated. A lot of the reason for the backlog is not that the system is complicated but that there are not enough assessors out doing the work. I take the point made by the noble Baroness, but I still go back to the need for assessors who are trained, understand their purpose and carry it out in a proportionate and timely way.

4.15 pm

Baroness Thornton: The noble Baroness, Lady Finlay, has done the Committee a great favour. The previous group of amendments was about whether care managers should do this at all. This group is about how they do it, which is a fair question to ask. I have three points to make, and they run like a stream through the Bill. The first is, if care managers have powers and responsibility, how will that work? Will they be qualified and, if so, how? As my noble friend Lord Hunt stated on the first day of Committee, many care homes do not even have registered managers. They are very small and are not capable of doing this. Secondly, who decides and who pays? I appreciate that the amendments in the name of the noble Baroness, Lady Finlay, are exploring how care home managers would manage, but some amendments in this group actually water down even further the rights and responsibilities relating to deprivation of liberty.

Baroness Tyler of Enfield (LD): I have a fair degree of sympathy with the sentiment behind this group of amendments. It is right that the Committee looks at what an appropriate role for the care manager might be. We have not got it right yet and it is clear from the debate so far, and the representations received from the sector and from people who deal with this day to day, that there must continue to be some sort of more independent element in the assessment. It cannot simply all come down to the care manager. However, I equally have some sympathy with the idea which was partly behind the Bill. We need better integration between care planning and the difficult decisions that have to be made about deprivation of liberty.

That is why we must explore further what an appropriate role might be. I am not quite sure what it is. Is it simply making referrals or some sort of co-ordination? I share the concerns of other noble Lords about dilution of safeguards, conflicts of interests and all that, but equally we must make sure that the care manager has an appropriate role and is not left out of the picture. We are talking about a very important sentiment.

I welcome what the Minister said in response to the previous group of amendments about the position he has now come to on including 16 and 17 year-olds and putting the cared-for person at centre stage to ensure that they are part of the consultation. I particularly welcome what he had to say about changing the language of unsound mind.

Lord O'Shaughnessy: I thank noble Lords for a concise but incisive debate on this group of amendments. As the noble Baroness, Lady Thornton, said, this is really about the role of those organising assessments for the deprivation of liberty and about who is responsible for pre-authorisation reviews. As has been mentioned by the noble Lords who tabled them, many of these amendments specify that pre-authorisation reviews must be completed by someone who is not employed by an organisation involved in the day-to-day care of the cared-for person or in providing any treatment to that person.

Paragraphs 12 and 13 of the schedule outline that, in all cases, arrangements must be authorised by the responsible body, which is either a local authority, hospital manager, CCG or local health board. It is our intention that only the responsible body, or an individual working on their behalf, will conduct the pre-authorisation review. Currently, senior social workers will often review DoLS applications when they are received. Similarly, we expect that, under the liberty protection safeguards, those for care home cases will be completed by a senior social worker. There are circumstances in which the responsible body is also the organisation that delivers the day-to-day care of treatment—and that is one of the concerns raised about conflicts of interest. This will usually be the case when NHS organisations are the responsible body, but it will also be the case for authorisations in local authority-run care homes.

Unfortunately—although I understand the motivation behind them—the amendments tabled by the noble Baronesses, Lady Jolly, Lady Thornton, Lady Murphy, Lady Barker and Lady Finlay, would make it harder to satisfy the pre-authorisation review requirement where the responsible body also delivers the day-to-day care and treatment; this would be especially so for smaller NHS bodies such as some trusts and CCGs. It would mean such bodies having to hire people from outside organisations specifically for the role, which could introduce complexity and lead to delays.

Baroness Thornton: I hate to interrupt the Minister, but I think he might be answering the next group of amendments. I am not sure—perhaps he is answering both groups together—but it feels as though he is answering a speech I have not yet made.

Baroness Finlay of Llandaff: I would like to intervene for a moment as I think this has been a valuable debate, even though short. I shall pick up on the point made by the noble Baroness, Lady Barker, on conditions, which are incredibly important. She cited one example, and I return to the musician to whom I referred earlier. Most professional musicians will feel that their instrument is an integral part of their own personality. If they lose speech, they will communicate through their instrument, especially their mood—their feelings, responses and so on—so it is a terrible deprivation of liberty to separate a musician from their instrument.

If the musician plays a trumpet or another loud instrument and they are in a care home, it will be important to find somewhere they can go to play their instrument without disturbing everybody else. It sounds humorous but it is incredibly important to people. I was struck when I visited a care home some time ago and saw a man playing a piano. I thought he was a volunteer brought in to play—beautifully—to people. When he finished playing, I started to engage in conversation with him and it became clear that, while his recall for the symphony he had been playing from memory was superb, he could recall or discuss remarkably little else from which I could gain a modicum of sense. As a result, we had a bizarre conversation, other than about the symphony.

Conditions are absolutely essential. My hope would be that, in the code of practice, we require conditions to be put into the care plan that must be enacted on a daily basis. This should not be just a set of recommendations that could be ignored. My concern is that we link care planning to the delivery of care; that is extremely important.

I was grateful also for the support—albeit somewhat tentative—from the noble Baroness, Lady Tyler. I draw a distinction between the care manager and the care home manager. The care manager should be the person overseeing the direction of care planning; they could be the district nurse for somebody at home, or whoever runs the supported living environment on a day-to-day basis and looks at alterations in the care plan.

In a large care home, the care home manager often manages the building and the staff. They make sure that regulations are maintained and that the lifts work, dealing with all the things that happen on a day-to-day basis, but can have remarkably little contact with individuals. I do not want to sound disrespectful to care home managers when I say that I would envisage their co-ordinating role as much more like that of an administrative secretary, rather than as somebody who gets information directly from the person or the family. However, I would want them to make sure that the family had been consulted, that all the people who cared about the person had been spoken to and that that information was properly documented, with a package being put together for the local authority to inspect. I believe that the local authority will know which care homes on their patch are working well and which need an eye to be kept on them. I think I have half given my response to the Minister's response.

Lord Cashman (Lab): My Lords, before the Minister gets to his feet, I want to thank the noble Baroness, Lady Finlay, for that clarification. Precisely those concerns about the role of the care manager and the care home were put to us when we met 30 or so representatives from the different services. They also dealt with the potential conflict of interest. As was said earlier by the noble Baroness, Lady Murphy, there are always conflicts of interest in professional fields. Here, we are dealing with a conflict of interest around someone's deprivation of their liberty, and we need to get it absolutely right. With that clarification, I say that the amendments make us think again about precisely how we can deal with the backlog and how we can be effective but give the individual the rights and protections they deserve.

Finally, I also thank the Minister for his early intervention and assurances around the inclusion of 16 and 17 year-olds and on the phrase "unsound mind", which I raised during our first day in Committee. I hope that I have not detained him from his notes.

Lord O'Shaughnessy: I am grateful to Members of the Committee for their sympathy and for giving me breathing space. I was flustered by flipping forward and almost missing out this group of amendments.

As the noble Baroness, Lady Finlay, said, the issue of concern is the distinction between the person who is responsible for somebody's care and the person who manages a care home—they are of course different. What we are trying to get right here—I understand

[Lord O'Shaughnessy]
that this is what the amendments are exploring—are the relevant responsibilities of those people, bearing in mind that we want to integrate liberty protection safeguards into the process of care planning.

The noble Baroness, Lady Barker, knows huge amounts about this topic and I very much respect her opinion. She pointed out that DoLS assessments are different from assessments under the Care Act. There are some overlaps. As she will know, there are similar questions or parts in both assessments concerning consent, for example, but she is right that they are different types of assessments. I want to explore whether her or indeed the Committee's concern is that those assessments should not be carried out by care home managers or whether—a more positive view—they should be carried out by certain types of professional. Those are subtly different points. Perhaps I may give her the opportunity to respond in a moment, as I am really keen to explore this matter.

Clearly, we are trying to make sure that those who have the professional expertise to carry out certain types of assessments do so. Equally, we are trying to make sure that a co-ordinating body has responsibility for ensuring that these assessments are carried out in a proportionate way and are included with care assessments in an overall care plan, with people being answerable to the relevant regulatory bodies. If the noble Baroness would not mind, I would be grateful if she, along with other noble Lords, gave her perspective on that. I want to make sure that we determine the appropriate role of the care home manager.

Baroness Barker: I thank the Minister very much for that because it enables me to point out something that I am sure he and all noble Lords know—that, when it comes to deprivation of liberty, the body which is ultimately responsible for that in court is not the care home but the state body, which would be the NHS body or the local authority. The Minister said that responsible bodies currently receive from care homes the referral forms and then do a desk-top assessment of those. Yes, they do that; however, they do it in the knowledge that the person will be seen by a qualified person. The problem with the Bill as it stands is that that is not an automatic assumption that a responsible body can make because of the gatekeeping role of the care home manager.

4.30 pm

One of my concerns is that this Bill might produce a further delay and set up a ping-pong process between the responsible bodies and the care homes. For example, as a responsible body, I am the body that will have to defend this in court. I will, therefore, have to keep going back to make sure that the information I have been given is in fact correct. However, the actual assessment is completely different from the two-page DoLS referral that care home managers carry out now.

What I am trying to say is that those assessments should be made by a professional. I agree with the noble Baroness, Lady Finlay, that care home managers will, by necessity, have only some of the information needed to make it. It is therefore right that there should be greater involvement of someone experienced in care planning. I also want noble Lords to be aware that there will be a group of people for which there may have been no care planning: those who are self-funding. We need to get the right people aligned in the right process at the right time. That is, I think, what a number of noble Lords are trying to probe.

Lord O'Shaughnessy: That is helpful, and I am sure the noble Baroness, Lady Finlay, will respond to those comments from her perspective. The noble Baroness goes to the point of the noble Baroness, Lady Tyler, about making sure we get the definition of the role of the care home manager right and the various types of case studies. As the noble Baroness said, there are self-funders, those in local authority-funded homes, those in homes funded by the NHS and so forth. In a sense, that is the point I was trying to make in the first group of amendments as I realise that we have not clarified that to a sufficient degree so as to put people's minds at ease that what we are proposing is appropriate and deals with people's concerns or exposes those concerns as being well founded and then enables us to do something about it by the time we come back on Report.

I apologise again for the false start in my response. However, this has been a useful debate and I am keen to hear the reflections of the noble Baroness, Lady Finlay, as, I hope, she withdraws her amendment.

Baroness Finlay of Llandaff: I thank the Minister; I am very grateful to him. If I have understood it correctly, the noble Baroness, Lady Barker, supports my Amendment 30A, which requires that a registered professional—who, if they really get it wrong, would lose their registration—who has responsibility for the care plan and appropriate experience and knowledge, should make the determination. In other words, it is not good enough just to be a professional. I go back to the example of people with a head injury, who need a highly specialised assessment and overview so that a lead can be taken on the care planning process.

Baroness Barker: My Lords—

Baroness Finlay of Llandaff: I will just finish, if I may. I completely share the concern about self-funders. They must have a care plan, because they are in receipt of care once they are in the system. It is appalling if there are people who are paying to be cared for in some kind of chaotic way without a proper, co-ordinated plan that they and their family can know about, so that everyone coming and going, be it out of hours or whatever, can understand what is happening.

I am beginning to think that there is not that much difference between us, and I agree that the current forms are inadequate. I apologise if, in the previous debates we have had, my comments about notification from the care home manager to the local authority were not well worded—on re-reading, I can see that, and I accept that I was wrong in the way that I worded it.

Baroness Barker: I do not want to get up the hopes of the noble Baroness, Lady Finlay, too strongly. She is a medic and therefore her go-to place is medical

qualifications. There are some excellent best interests assessors who are not engaged in the care of the person. I wish to make that point. I shall keep coming back to the valid point of the noble Baroness, Lady Murphy, about the need to wind up with an affordable and manageable system. Noble Lords who have been involved in discussions with stakeholders will not be surprised to know that some of us think there is a way in which that could be done but it would involve reliance on advocates and assessors. Having said that, I agree with the noble Baroness.

Baroness Finlay of Llandaff: I beg leave to withdraw the amendment.

Amendment 14B withdrawn.

Amendment 15

Moved by ***Baroness Jolly***

15: Schedule 1, page 11, line 1, leave out "in accordance with paragraphs 18 to 20" and insert "by an Approved Mental Capacity Professional"

Baroness Jolly (LD): My Lords, I again refer noble Lords to my interests in the register. I am revisiting an area that we covered at Second Reading. Many of the issues we have been discussing, as we have just discovered, weave in and out of my comments, but this is about the appropriateness of the care home manager to carry out pre-authorisation reviews.

I should make it clear, given previous comments, that I recognise that DoLS needs replacing and that, in finding that replacement model, professionalism and expertise are important. This is not a personal, solo crusade—I do not fail to understand what a manger of a care home does and I recognise their professionalism in doing it. However, the noble Baroness, Lady Thornton, had it spot on when—it seems like hours ago—she used the description that they had used to her around the concerns about their capability and capacity.

Many of us have been supportive of this Bill, with briefings from and meetings with household-name charities, providers, royal colleges, academics, lawyers and interest groups. The two amendments in my name were drafted by a charity whose reputation for policy on older people is respected and admired—Age UK. It has several concerns about areas of the Bill and would welcome a meeting with the Minister to discuss them.

The cared for person's interests are central to the Care Act, and I am delighted that the Government will bring forward amendments which will allow the voice of the cared-for person to be heard in this process, including 16 and 17 year-olds, and will do away with the term "unsound mind". I join with all noble Lords in that.

At Second Reading, conflicts of interest were debated and we agreed that the cared for person's interests must come first. However, this could be at odds with the care manager's duty to keep their care home viable. Vulnerable people are at the heart of the Bill and how they are reviewed at a critical point in their care—the pre-authorisation review—sets the tone of the professionalism within their care. These reviews should be carried out by a trained professional—an AMCP—but, as currently drafted, only those objecting to the proposed arrangements will be provided with an AMCP. Generally, care home managers have not received professional training other than in running a care home—as the Minister mentioned, they may well have had that kind of training—and if they have, I would have no objection whatever to them carrying out the review.

However, many AMCPs have a first degree—possibly a masters—and professional training, with regular supervision and refreshers, and, whether they are social workers, mental health nurses, OTs or clinical psychologists, all will have the professional ethos and expertise instilled into them in their daily working. It is what they do. The proposed half-day familiarisation course does not really measure up.

This amendment will also protect the care home manager from accusations of conflict of interests or vested interests. It was a manager who made that point to me. I had not thought of it because I was looking at the issue from the point of view of managers considering their care home to be a business that needs to operate at 99% capacity for it to be effective. Managers have said that they would welcome an amendment similar to this one because it would give them some sort of cover. Perhaps I may remind the Minister that, in mental health legislation, an assessment made in a private setting must be carried out by an independent assessor. This amendment does not break new ground or indeed set a precedent.

While we are on the issue of finance, the noble Baroness, Lady Finlay, repeated a concern expressed in the sector about the costs of assessments and reviews being added to the bills of self-funders, which might be seen as a licence to print money. We know already that some care homes are charging £250 for a referral, but an assessment is a much more complicated piece of work and might well cost £1,000. People in the sector are concerned about this. Fee levels are not regulated, so I wonder whether the Minister could take the issue away and look at it. I welcome his willingness to listen and I look forward to his response. I beg to move.

Baroness Meacher: My Lords, I applaud the noble Baroness, Lady Jolly, for tabling this amendment and I will add a few comments to those she has made. In my view, all pre-authorisation reviews should be undertaken by a professional who really understands the assessment of capacity. I accept that the amendment goes further than the Law Commission recommended, but it is not clear that the commission envisaged care home managers undertaking or being responsible for assessments and pre-authorisation reviews.

The whole point is that too often it is just assumed by everyone that somebody with limited capacity does not have a view or that they are content. Also, the person may not even have adequate information on which to base a view or make a comment. They may therefore not feel able to make an objection. It is not reasonable to expect care home managers to know about all the alternative and possibly less restrictive

[Baroness Meacher]
options available; why would they? As the noble Baroness, Lady Thornton, argued, the care home manager has a job to do in keeping costs down and filling beds.

It is not a criticism of care home managers to suggest that independent scrutiny is essential in all cases to ensure that those imperatives do not lead to an understandable failure to focus on the needs of the individual. Again, we should not expect care home managers to put the interests of the individual ahead of their business imperatives. I understand that many care homes close because they cannot cover their costs. They are desperate to fill their beds, and that is going to take priority. We just have to respect that that is simply how life is.

In the letter from the department to noble Lords dated 24 July following Second Reading, the Minister said that the local authority would undertake the authorisation itself, thus providing independent scrutiny and oversight. I think that the Minister will recognise, however, that if no concerns are raised during the pre-authorisation review, the local authority will be in a very poor position to question the conclusion of the care home manager. The noble Baroness, Lady Barker, suggested that there might be a form of to and fro between the local authority and the care home manager, but I am not sure how meaningful that can be when all the work and the pre-authorisation review has been done. Given that, I would have thought that the local authority would just not be able to get at it.

Another concern is that it is in the gift of the care home manager to identify whether a person would benefit from advocacy. It seems that most of these people will, but the current proposals are unclear about who will pay for the advocate. I would be grateful if the Minister could clarify that issue.

4.45 pm

Another concern is that the pre-authorisation review may be a paper exercise—although the Government made it clear in their response to the Law Commission that they want the person's voice to be at the heart of the process. Surely the pre-authorisation review should ensure that the Government's objective is achieved. Indeed, the Government said in their response that the pre-authorisation review would provide adequate scrutiny and ensure that the individual's rights are protected. So they are clear that the real responsibility sits with the pre-authorisation review, undertaken in many cases by the care home manager.

It is worth remembering the Bournewood case, where the self-harming behaviour of a patient was recognised not as a symptom of their deep unhappiness with the care arrangements but as evidence of the need to continue the placement. It seems essential for a professional in mental capacity to have oversight of the assessment process to ensure that we do not repeat the Bournewood errors. Perhaps the Minister would like to comment on that point.

Of course, we will need parts of Clause 19 for a revised amendment on Report, but the crucial point today is that in all cases the pre-authorisation review must be carried out by an AMCP. I know that the Minister does not currently accept that point, but I hope that on further reflection he might.

Lord Hunt of Kings Heath: My Lords, my Amendment 37A would preclude the care home manager undertaking the pre-authorisation review, which follows on from what the noble Baroness, Lady Meacher, was saying. However, the Minister floated his answer to this point very recently. I thought I caught him saying that the pre-authorisation review can be done only under the auspices of the responsible body. Perhaps he can confirm that when he comes to speak because it is not clear in the Bill, as I see it. On page 10, paragraph 12 of Schedule 1 states:

"The responsible body may authorise arrangements, other than care home arrangements, if … a pre-authorisation review has been carried out in accordance with paragraphs 18 to 20".

That relates to those cases where the care home manager does not have a role. Paragraph 13 of Schedule 1 simply states:

"The responsible body may authorise care home arrangements",

if a number of qualifications have been met, including if,

"a pre-authorisation review has been carried out in accordance with paragraphs 18 to 20".

I cannot see anything in the Bill that says that the pre-authorisation review cannot be carried out by the care home manager. If that is the case, it would be nice to see its inclusion in the Bill, which would provide some reassurance.

I know that we always stray here because we keep coming back to the issue of a conflict of interest. Has the Minister read the Law Society's view, which we received over the weekend? The society described the fact that the care home manager has been put into a position of co-ordinating the way in which the Bill needs to be operated when a care home setting is involved as a "conflict of interest". It stated:

"Vulnerable adults would be put at risk if care homes were given increased responsibility for decisions about their liberty".

It also said that important safeguards "would be weakened", stating that the,

"shift of responsibility for carrying out independent assessments of vulnerable people from local authorities to care providers",

is not something that the Law Commission developed. However, we are working on the basis of a Law Commission draft Bill.

Although the noble Lord is as committed as ever to the care home manager having this key role, I am not at all convinced that this really is feasible. It will not be good enough for the Government to provide reassurance, which I doubt they can, about the training of care home managers and their capacity to carry out this responsibility, particularly in view of the big backlog that will have to be confronted, I suppose, by the care homes. I do not see any provision in the Bill for the current backlog to be dealt with under the existing legal requirements. There is a great deal of scepticism about whether this is going to work.

Baroness Finlay of Llandaff: My Lords, I have one amendment in this group and I wonder whether the group is focused on lines of answerability. Who is going to be responsible? If the person is in the community in any setting the responsibility will go or should go, as I understand it, to the local authority. If the person is in hospital then it would go to the hospital. However, we have a problem. A lot of people on continuing care funding are in the community. I am concerned that if the authorisation for those people sits with the clinical

commissioning group rather than the local authority, we may end up with some people getting lost in the system. The standards and criteria against which the different assessments and processes are benchmarked and what is expected, particularly how the process is monitored, could be unclear. It will be much harder to monitor out in the community than in a hospital or in-patient setting.

Following on from our previous debate, I had a quick look at the requirements to be a best interests assessor. As far as I can see, to enrol on the course you must have had two years' post-registration experience as an approved mental health professional social worker, registered with the Health and Care Professions Council, or be a nurse, a psychologist or an occupational therapist. The people who potentially will migrate to become approved mental capacity professionals are registered professionals. That is incredibly important and we should not lose that in any aspect of the Bill. If they are registered professionals they have a raft of professional duties that go with that.

This part of the Bill and the process is not terribly clear, and I worry particularly about people on continuing care out in the community, or those who may become self-funders, managing their own budgets for care.

Baroness Murphy: My Lords, I added my name to the amendment of the noble Baroness, Lady Jolly. In view of my previous comments, people may be surprised that I did because it seems to be making life more complicated. In fact, I saw the more professional pre-authorisation process for the smaller group who will eventually be subject to this Act, I hope, as introducing something for the high-risk people who will be assessed by professionals. I like the role of the new AMCP, which sort of takes over from the best interests assessor, because I think it will be a well-qualified group. It would add some solid support if the care home manager's role is to continue. I saw this, when I first read it, as a good way of providing some pre-authorisation backstop, if you like—a solid foundation on which we would have more confidence that the care manager role could work. I am still anxious about the care management work for all the reasons that the noble Lord, Lord Hunt, and the noble Baroness, Lady Thornton, mentioned, but this was one way that I saw of adding some professional expertise that would give confidence to the mental capacity community that we were taking this seriously.

Baroness Thornton: My Lords, I added my name to the amendments of the noble Baroness, Lady Jolly, and to my noble friend Lord Hunt's amendment. Pre-authorisation review is essential. We support these amendments because they propose that everyone should have access to an approved mental capacity professional. As drafted, my understanding is that the Bill gives that access only to those who object to the proposed arrangements. If everybody had access to an AMCP it would lessen concerns about the significance of the independence of the reviews.

Age UK has said:

"In respect of self-funders in private homes, there is an existing principle in mental health law that where an assessor has a financial interest in the decision to deprive someone of liberty there must also be an independent external assessor. A preauthorised review by an Approved Mental Capacity Practitioner … will bring this section of the Bill into line with this principle, which is currently reflected in the Conflicts of Interest Regulations to the Mental Health Act. Without such a requirement a significant conflict of interest for the care home manager is likely to arise".

I will not say more because I think that we have explored that issue.

There also seems to be an assumption that care homes will already have existing written capacity assessments and that staff will have the knowledge to carry out such an assessment. As we have already discussed, that is clearly not the case.

This is a significant group of amendments. The Minister needs to take heed that we are, in a way, returning to some of the fundamentals that underpin the legislation. We on these Benches have listened carefully to stakeholders and are fairly sure that the Government have not got it quite right. As the noble Baroness, Lady Barker, said, in this House we have always proceeded on mental capacity issues on a consensus basis. We would much prefer that that was the case because we have come up with solutions to these very difficult, knotty, complex problems that cut across health, justice and liberty, and take account of things such as the United Nations and the European Union's rights of the individual. This House is famous for doing that—I wanted to say that at some point this afternoon. This group of amendments lends itself to that because if we get the pre-assessment regime right then a lot of other things will flow from it that will lead to the right decisions and minimise the risk of local authorities, health authorities and CCGs ending up in court because the right procedures have not been taken and the rights of the individual have not been managed.

The noble Baroness, Lady Finlay, mentioned the qualifications needed to be an assessor. We have had several briefings from BASW, for which I am very grateful, that explain how well qualified the people involved in this process are. That of itself creates a problem for care home managers to undertake these issues.

I will paint a scenario for the Minister. If the local authority is the responsible body and therefore will end up in court if this does not work out—it will be expensive and time-consuming and behind it will be an individual who has not been treated properly—it seems quite likely that the local authority will be very risk-averse to the tick-box system that the Bill suggests to assess whether the right procedure was gone through in the assessment process.

Does the Minister agree that we might actually increase the bureaucracy and delays in the system, simply because we did not get the pre-assessment right? That could create one of two things: either a local authority will keep referring back the assessments for reprocessing or it will let through assessments which do not do the trick and therefore bear the risk of ending up in court because somebody's individual rights have not been properly taken into account. Not only is this an issue of doing right by the individual but there is possibly a compelling case for why it is important to get the pre-assessment right. If we do not, the Bill fall shorts on Article 5 of the ECHR. Had

[Baroness Thornton]
the Government followed the Law Commission's draft Bill, which contained these safeguards, I think that we would not be having this debate in this form.

5 pm

Lord O'Shaughnessy: My Lords, I thank all noble Lords who have tabled amendments in this group. I am grateful for what has again been a high-quality and well-informed debate.

I want to deal with the main issue raised by the noble Baroness, Lady Jolly, at the beginning of her comments, which is the subject of the amendment in the names of the noble Lord, Lord Hunt, and the noble Baroness, Lady Thornton. The amendment would clarify in the Bill that a pre-authorisation review cannot be completed by a care home manager, who would be excluded from such a role. I am happy to assure all noble Lords that the role of care home managers in the new system is to provide the statement to the responsible body and, where necessary, to arrange assessments—as we have discussed. Their role is not to authorise arrangements. It would not be appropriate for care home managers to complete pre-authorisation reviews. I assure the Committee that we will make sure that the Bill reflects this. I hope that is at least one brick in the road towards defining the proper role for care home managers. In these amendments we are discussing the degree of independence and making sure that we minimise conflicts of interest.

A later amendment in the name of the noble Lord, Lord Hunt, and the noble Baroness, Lady Thornton, specifies that the person who completes a pre-authorisation review should also be qualified as a medical practitioner, nurse, social worker, speech therapist, occupational therapist or other profession as may be specified in regulations. I assure noble Lords that we would expect people from those professions to take on this role. That will be specified in the code of practice.

There is also a specific requirement that the pre-authorisation review be completed by somebody not involved in the day-to-day care of the person or delivering treatment to them. That is another safeguard.

Amendments in the names of the noble Baronesses, Lady Jolly, Lady Thornton, Lady Murphy, Lady Barker and Lady Finlay, would make sure that smaller NHS bodies sought external people to carry out reviews. I understand the motivation behind them, but I am concerned that they would introduce complexity and lead to delays. The issue is resolvable within the system proposed because of the independence and quality of AMCPs, or approved mental capacity professionals—referred to the by noble Baronesses, Lady Murphy and Lady Finlay. They will consider all applications to authorise a deprivation of liberty where it is reasonable to believe that the person objects to proposed arrangements, or in other complex cases. Reflecting on a point made by the noble Baroness, Lady Thornton, we may need to provide more detail and studies of the kind of cases that we are talking about or envisaging, where an AMCP would be involved in the review. I take very seriously the point made by the noble Baroness, Lady Thornton, about the consequence of that, given that the responsible body will have the legal duty to ensure that it is carried out properly. I find that reassuring because it will not be a tick-box exercise: it will need to make sure that the assessments have been carried out properly. That was one of the questions put by the noble Baroness, Lady Meacher, when she asked about the access of the responsible body to such assessments. It will mean that that body will probably err on the side of caution, but it will also mean that we will have a more proportionate system than we do now. That is to be welcomed. Those AMCPs, as has been pointed out, could be salaried professionals within a local authority; they might even be close to commissioners, but their role will be independent, just as best-interests assessors are independent, and they will be responsible to their own professional bodies. That is something in the system on which we can rely.

The noble Baroness, Lady Meacher, and other noble Lords mentioned advocacy, and I know that we will be turning to that later. It is important to state—not only as I did at the beginning of the first group about making sure that the person involved is properly consulted—that they have the right to request a review, that they have access to representation from an independent mental capacity advocate or another appropriate person, and that ultimately those responsible for their welfare and care can challenge the authorisation in the Court of Protection.

I know that there are a couple of outstanding issues. The noble Baroness, Lady Jolly, asked if we could look at fee levels and that is certainly something that I will look at. The noble Baroness, Lady Meacher, asked how IMCAs are paid for. That is currently allowed for in the Mental Capacity Act and that is not changed by this Bill, but I will write to her to clarify that.

I hope that this response—particularly about the role that care home managers will not play in preauthorisation reviews—provides reassurance that we are conscious of the need to provide that independence in the system to reduce, and indeed remove, conflicts of interest and perceptions of conflict of interest wherever possible. As ever, as has been the theme of today, I continue to want to work with all noble Lords to ensure that we determine that the system, which still has great merit, is able to respond both to the needs of the people who are being cared for and to any concerns on behalf of those people from their families and stakeholders that there are conflicts of interest. I believe that the pieces of the puzzle are coming together, but I am conscious that we need to continue working together to complete it. On that basis, I hope the noble Baroness will feel able to withdraw her amendment. I look forward to further discussions on this topic to make sure that we are able to introduce as much independence as possible into the system.

Baroness Jolly: I thank the Minister for his remarks. The only point I would like to make at this stage is about the use of the code. The code offers something that might not be permanent, whereas anything that goes into legislation is permanent, so I would just be wary of that. I will study *Hansard* carefully, but for the moment I beg leave to withdraw the amendment.

Amendment 15 withdrawn.

Amendments 16 and 16A not moved.

House resumed.

Brexit: Negotiations

Statement

5.08 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 ahead of this week's European Council. We are entering the final stages of these negotiations. This is the time for cool, calm heads to prevail and it is the time for a clear-eyed focus on the few remaining but critical issues that are still to be agreed.

Yesterday, the Secretary of State for Exiting the European Union went to Brussels for further talks with Michel Barnier. There has inevitably been a great deal of inaccurate speculation, so I want to set out clearly for the House the facts as they stand. First, we have made real progress in recent weeks on both the withdrawal agreement and the political declaration on our future relationship. I want to pay tribute to both negotiating teams for the many, many hours of hard work that have got us to this point.

In March, we agreed legal text around the implementation period, citizens' rights and the financial settlement; we have now made good progress on text concerning the majority of the outstanding issues. Taken together, the shape of a deal across the vast majority of the withdrawal agreement—the terms of our exit—are now clear. We also have broad agreement on the structure and scope of the framework for our future relationship, with progress on issues like security, transport and services. Perhaps most importantly, we have made progress on Northern Ireland, where the EU has been working with us to respond to the very real concerns we had on its original proposals.

Let me remind the House why this is so important. Both the UK and the EU share a profound responsibility to ensure the preservation of the Belfast or Good Friday agreement, protecting the hard-won peace and stability in Northern Ireland and ensuring that life continues essentially as it does now. We agree that our future economic partnership should provide solutions to the unique circumstances in Northern Ireland in the long term. While we are both committed to ensuring that this future relationship is in place by the end of the implementation period, we accept that there is a chance that there may be a gap between the two. This is what creates the need for a backstop to ensure that if such a temporary gap were ever to arise, there would be no hard border between Northern Ireland and Ireland, or indeed anything that would threaten the integrity of our precious union, so this backstop is intended to be an insurance policy for the people of Northern Ireland and Ireland.

Previously, the European Union had proposed a backstop that would see Northern Ireland carved off in the EU's customs union and parts of the single market, separated through a border in the Irish Sea from the UK's own internal market. As I have said many times, I could not accept that, no matter how unlikely such a scenario may be. Creating any form of customs border between Northern Ireland and the rest of the UK would mean a fundamental change in the day-to-day experience for businesses in Northern Ireland, with the potential to affect jobs and investment. We published our proposals on customs in the backstop in June and, after Salzburg, I said that we would bring forward our own further proposals. This is what we have done in the negotiations and the European Union has responded positively by agreeing to explore a UK-wide customs solution to this backstop, but two problems remain.

First, the EU says there is not time to work out the detail of this UK-wide solution in the next few weeks so, even with the progress we have made, the EU still requires a "backstop to the backstop"—effectively, an insurance policy for the insurance policy—and it wants this to be the Northern Ireland-only solution that it had previously proposed. We have been clear that we cannot agree to anything that threatens the integrity of our United Kingdom and I am sure that the whole House shares the Government's view on this. Indeed, the House of Commons set out its view when agreeing unanimously in Part 6 of the Taxation (Cross-border Trade) Act to what is now Section 55, on a 'Single United Kingdom customs territory'. This states:

> 'It shall be unlawful for Her Majesty's Government to enter into arrangements under which Northern Ireland forms part of a separate customs territory to Great Britain',

so the message is clear not just from this Government but from this whole House.

Secondly, I need to be able to look the British people in the eye and say that this backstop is a temporary solution. People are rightly concerned that what is meant to be only temporary could become a permanent limbo, with no new relationship between the UK and the EU ever agreed. I am clear that we are not going to be trapped permanently in a single customs territory, unable to do meaningful trade deals. So it must be the case: first, that the backstop should not need to come into force; secondly, that if it does, it must be temporary; and thirdly, while I do not believe this will be the case, if the EU were not to co-operate on our future relationship we must be able to ensure that we cannot be kept in this backstop arrangement indefinitely. I could not expect this House to agree to a deal unless we have the reassurance that the UK, as a sovereign nation, has this say over our arrangements with the EU.

I do not believe that the UK and the EU are far apart. We both agree that Article 50 cannot provide the legal base for a permanent relationship and that this backstop must be temporary, so we must now work together to give effect to that agreement.

So much of these negotiations is necessarily technical, but the reason this all matters is because it affects the future of our country. It affects jobs and livelihoods in every community. It is about what kind of country we are and about our faith in our democracy. Of course it is frustrating that almost all of the remaining points of disagreement are focused on how we manage a scenario which both sides hope should never come to pass and which, if it does, will only be temporary. We cannot let

[Baroness Evans of Bowes Park]
this disagreement derail the prospects of a good deal and leave us with the no-deal outcome that no one wants.

I continue to believe that a negotiated deal is the best outcome for the UK and for the European Union. I continue to believe that such a deal is achievable, and that is the spirit in which I will continue to work with our European partners. I commend this Statement to the House".

5.16 pm

Baroness Smith of Basildon (Lab): My Lords, I am sure I am not the only Member of your Lordships' House who spent much of yesterday evening with a sense of intrigue as the Brexit Secretary dashed to Brussels for what we were told was a spontaneous meeting with Michel Barnier. With expectations of an October deal being downplayed in recent weeks, it seemed that there might have been a sudden, and possibly decisive, breakthrough. For a brief, shining moment it seemed that the Prime Minister's attendance at this week's European Council summit could amount to a victory parade rather than an interrogation—another opportunity, perhaps, to break out the dance moves. Alas, as those experienced in government will know, last-minute meetings are more likely to be about crisis management than celebration.

I appreciate that in her Statement the Prime Minister says that she wants to,

"set out clearly … the facts as they stand".

But I am surprised that this Statement is being made at all. First, it is customary for a Prime Minister to report back from a summit but not to give a preview of one. Secondly, if anyone was in the best position to update the Commons on the events of yesterday evening, surely it was the Brexit Secretary—but perhaps the Prime Minister owes Mr Raab, who rescued her from making last week's Statement. Thirdly, and more importantly, it contradicts the Prime Minister's words of a little more than two years ago when she said:

"We will not be able to give a running commentary or a blow-by-blow account of the negotiations because we all know that isn't how they work".

Perhaps the rules have changed.

Recent progress at the technical level must be welcomed, but, as the Prime Minister's Statement makes clear, the sticking point remains Northern Ireland and the backstop. Since the backstop was first agreed, we have heard different interpretations from the Government about what they thought it meant when they signed up to it. Too often in this debacle the Prime Minister and Ministers have sought to get past the immediate political crisis of their making without working through the longer-term implications.

The Chequers agreement was published in July. It quickly became clear that a facilitated customs arrangement would not wash with Brussels, yet the Government failed to put forward any alternative proposals. Unsurprisingly, Chequers is not even mentioned in today's Statement. Despite red lines and protestations, the Prime Minister has had to accept what she calls a temporary customs union. She has done so because it is so clearly in the best interests of the UK and goes some way to address the Northern Ireland issue.

The Government argue that the customs union arrangement can be temporary because we will be transitioning to a new relationship with the EU—but there is nobody in government who can tell us what the new relationship will be. Has the time not come to admit that an ongoing customs union and a strong single market relationship are essential and desirable? Can the Minister tell your Lordships' House today what we are going to be transitioning to? The Statement refers to,

"protecting the integrity of our United Kingdom",

and to how the Prime Minister wants to,

"look the British people in the eye".

But if her foremost advisers on Northern Ireland are the DUP as they prop up her Government, she will not be able to fulfil those objectives.

Can the Minister shed any light at all on why the UK Government stepped in to request that the EU 27 did not publish their draft political declaration? It is an important point; they would have published it, but the UK Government requested that they did not. If she cannot explain that today, I hope she will write.

After rebuffing the Prime Minister in Salzburg, the President of the European Council said:

"In October we expect maximum progress and results in the Brexit talks. Then we will decide whether conditions are there to call an extraordinary summit in November to finalise and formalise the deal".

When the Prime Minister returns to the summit on Wednesday, does she still expect to deliver an after-dinner speech to EU leaders in the evening? And is there anything she can say at that summit that will last until the end of the following Cabinet meeting? Do the Government believe that the conditions are there for the extraordinary summit in November, or does the Minister agree with the Irish Prime Minister that there is a chance of it slipping even further, possibly to December?

Time is running out—and I do not just mean for the Prime Minister. Time is running out for the Government to get this right in the interests of the country.

Lord Newby (LD): My Lords, I am grateful to the noble Baroness for repeating the Statement, which is sober and sobering. It begins by saying that the Prime Minister wishes to set out clearly the facts as they stand. Unfortunately, as the noble Baroness, Lady Smith, said, there are virtually no facts in the Statement at all. It is extraordinarily difficult simply by reading or listening to it to have the faintest clue as to what is really going on.

Take, for example, not the immediate cause of the rupture but the longer-term relationship. The Prime Minister says:

"We … have broad agreement on the structure and scope of the framework for our future relationship, with progress on issues like security, transport and services".

Leaving aside that the "like" covers 80% of the economy, it is clear that there is no agreement on these issues. Indeed, Dominic Raab said last week in relation to them that,

"we continue to make progress … although there is still some way to go".—[*Official Report*, Commons, 9/10/18; col. 51.]

In other words, we are nowhere near having an agreement.

I think that answers the noble Baroness's question as to why the future relationship document did not go to the Commission last week as was expected: not enough of it had been agreed. But how do we know? We do not have the faintest clue. There are no facts or even suggestions from the Government as to how discussions on the future relationship document are progressing.

So we come to the immediate cause of the breakdown: the question of the backstop and its backstops. If we were on a cricket field, we would be inventing new fielding positions, each one more ludicrous than the last—and each one unnecessary if we had a well-run team. As far as the backstop is concerned, the Prime Minister states the obvious concern of the EU that,

"while we are both committed to ensuring that this future relationship is in place by the end of the implementation period, we accept that there is a chance that there may be a gap between the two".

In other words, the Government do not believe that they can sort this out during the transition period. So is it surprising that the Commission is saying, "Actually, let's work out what we do in those circumstances"?

That brings us to the backstop to the backstop. The Prime Minister says that there are two problems with this. The first is that the backstop we proposed—I hope that everyone is following this—has not been accepted by the EU because, it says, there is not time to work out the detail of this UK-wide solution in the next few weeks. Well, why is that? Whose proposal is it? Can we not just tell the EU that we know what it is going to be? Are we expecting the EU to tell us how our backstop—not the EU's backstop—works? The clear implication of the Prime Minister's Statement is that we are waiting supinely for the EU and not helping it out on our problem and our proposed solution to it.

The next problem is the issue of "temporary". This is a huge issue because it is an attempt to define the undefinable. All Members of your Lordships' House know that the word "temporary" is in the same category as "in due course" and "soon" as definable only in the mind of the speaker at the time. No two people using those phrases necessarily have the same thought in their mind—so it is hardly surprising that it is a struggle to define it. But why would you need to define it anyway? The only reason is that there is no trust or good will between the parties.

There are two problems about "temporary". The first is that a large proportion of the Tory party in the Commons does not trust the Prime Minister that temporary means temporary and thinks that it is being sold down the river. The other is that the EU more generally does not trust the Government and there is no body of good will that would enable it to agree on something such as this without a definition of something that cannot be defined.

So we have a withdrawal agreement on which progress has stalled because an attempt to define the indefinable failed, and the future relationship negotiations clearly have a long way to go. As the noble Baroness, Lady Smith, said, this leads us to the question of timing. She asked whether it would be possible to get a deal in December. Earlier today, for the first time, I read the suggestion that a summit was being cooked up for January, because we are so far behind that the chances of getting a deal in December are now deemed to be not all that good—not necessarily that there will be a crash out, but the British Government have not come forward with enough detailed proposals to enable us to get to that point.

Can the noble Baroness the Leader of the House say, from her experience of negotiations within government, whether there is any discussion of a further summit in January to discuss where we might have got to by then? Indeed, in the Government's view, what is the latest date by which an agreement not just on withdrawal but on the future relationship would have to be signed and sealed if they are to meet their deadline of 29 March? Can she give us any glimmer of hope that the passage of time might reduce to a manageable level the splits within the Tory party that have made today's sobering Statement necessary?

Baroness Evans of Bowes Park: My Lords, I thank the noble Baroness and the noble Lord for their comments. I reassure both of them that we have made real progress on the political declaration on our future relationship. We have broad agreement, as the Statement set out, on its scope and structure, and progress on specific issues such as security, transport and services. The Prime Minister has been very clear that we will publish a joint political declaration on the future relationship to Parliament alongside the withdrawal agreement, because we are extremely conscious that Parliament will expect to be able to look at those two documents together. That remains our aim and our commitment.

We want to get on with securing this deal as planned, and this week's Council will be an important step. The Prime Minister is looking to continue negotiations as planned in November, and the noble Baroness and noble Lord do not have to stress to me the consciousness of the amount of time we have and the fact that Parliament will want to properly scrutinise the withdrawal Bill—and obviously there will be a vote in the other place. I am extremely cognisant of that, and I hope that they know me well enough to know that I am making those points very strongly within the Cabinet. Indeed, the Prime Minister is making those points strongly with our EU partners, because the European Union itself has deadlines through its Parliament. So we are aware of that.

In relation to Northern Ireland, as the Statement made clear, we are committed to ensuring that our future economic partnership should provide the solutions to the unique circumstances of Northern Ireland. We want a future relationship to be in place by the end of the implementation period, but we must accept that there is a chance that there may be a gap. The Prime Minister has been extremely clear: we do not want to use the backstop at all. We think that it is possible to work out the details of a UK-wide customs solution, which is why we will continue to work through our negotiations to move forward on it, because we believe that it will be possible within the timeframe.

5.29 pm

Lord Lilley (Con): My Lords, the Government have repeatedly promised they will not enter into a legally binding withdrawal agreement that commits us to

[Lord Lilley]
giving away £40 billion of public money without a detailed political statement committing us to our future trading relationship with Europe. Yet the Prime Minister's Statement contains nothing on that. Can my noble friend reassure me this is not a hyped-up concern about the Irish border and the squared back-ups as a kind of bait and switch manoeuvre to distract attention from the fact we are giving away money with nothing in return?

Baroness Evans of Bowes Park: I hope I made clear in my answer to the noble Baroness and the noble Lord that the Prime Minister has been clear: we will be publishing a joint political declaration at the time of the withdrawal agreement, because we completely understand Parliament will want to see the two documents together.

Lord Reid of Cardowan (Lab): My Lords, today's Statement was completely predictable. Among others, I pointed out as early as January this year that the only way to square the circle of the Prime Minister's two promises—to the EU, that there would be complete regulatory alignment between Northern Ireland and the Republic of Ireland; and to the DUP, that there would be the same alignment between Britain and Northern Ireland—was to remain in the customs union. Today the Prime Minister laid that out, under another name but as her strategy. This is not a backstop; this is a three-year deferral until December 2021, the date used by the Prime Minister today. But it creates two problems—out of the frying pan, into the fire. Why should the European Union unilaterally, in advance, abrogate its right to the promise we made in the event of not having a solution in 2021 and just abandon the backstop that we signed up to? Secondly, if it does not do that, and gives a conditional break clause in 2021, our remaining in the customs union will be permanent, or at least indefinite, and the Prime Minister will never get it through Parliament. How does the Minister think we can square that circle?

Baroness Evans of Bowes Park: As was laid out in the Statement, we put forward our proposal for a UK-wide customs backstop to deal with these issues. That is what we will continue to work towards. The EU proposal is unacceptable. We believe we are not so far apart that we cannot come together but, as the Statement sets out, there are issues between us that we need to continue to work through, and that is what we will do. We will not renege on our commitment to the Good Friday agreement or our promises to the people of Northern Ireland.

Lord Tugendhat (Con): My Lords, I am encouraged by the Prime Minister's Statement, and very much agree with the line she has put forward. But does the Leader of the House understand there is great concern, not so much about the position the Prime Minister is taking up, but about whether the Cabinet is capable of agreeing on the position the Prime Minister brings back from Brussels? This is the nub of the concern: it is not what the Prime Minister's position is, but whether her colleagues are capable of agreeing. At a time when the Leader of the House and the Prime Minister are calling for support for her negotiating position, it really is intolerable that Cabinet Ministers and ex-Cabinet Ministers should be briefing the press in a manner more disloyal than any I can remember.

Baroness Evans of Bowes Park: I can assure the noble Lord that the Prime Minister is leading the negotiations, the Cabinet is behind her and we will continue to support her.

The Lord Bishop of Leeds: My Lords, the question I have is not political, it is phenomenological. The statement:

> "We cannot let this disagreement derail the prospects of a good deal and leave us with a no-deal outcome that no one wants",

is a statement of unreality. It is clear that there are people, even within the Cabinet, who would be very happy with a no-deal outcome. I wonder if the Minister could comment.

Baroness Evans of Bowes Park: I am afraid I disagree with the right reverend Prelate. We have made real progress on the withdrawal agreement and the political declaration on our future relationship. We have been clear, as we were in the Statement, that there are a couple of outstanding issues that we need to resolve, but we are moving forward and remain confident we will get a good deal for both sides.

Baroness Ludford (LD): My Lords, can the noble Baroness the Leader of the House explain how the furious No. 10 spin operation on speed of the last 24 hours has helped to achieve serious, calm progress in the negotiations? I read in the *Evening Standard* this afternoon of the Prime Minister hitting out at a secret new plan for a failsafe to avoid a hard border in Ireland. This is nothing new. It is just that the UK Government have failed to convince Brussels that their plans—we do not actually know what they are—will work. There is nothing new from what the Prime Minister agreed to last December. How does all the journalistic noise we have heard in the last 24 hours help? Would the Government not do better—as my noble friend Lord Newby suggested—by getting on with providing some facts, suggestions and concrete proposals?

Baroness Evans of Bowes Park: We have been consistently clear that we are committed to avoiding a hard border between Northern Ireland and the Republic of Ireland. That is not new. We have been consistently clear we want to preserve the economic integrity of the UK in all scenarios. That is not new. That is what we have been saying to the EU throughout. And we have been clear from the beginning: the backstop proposal is not acceptable to us. As the Statement makes clear, the EU have responded positively by agreeing to explore a UK-wide customs solution, and that is what we will continue to discuss over the coming days and weeks.

Lord Bridges of Headley (Con): My Lords, I agree with the sentiments expressed by the Prime Minister in her Statement this afternoon about maintaining the integrity of the United Kingdom. However, referring back to the statement agreed—I understood—by both the European Union and the UK Government in December, it said in paragraph 49:

"In the absence of agreed solutions"—

that is, as regards the Irish border—

"the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement".

In light of the Statement this afternoon, am I to take it the UK Government no longer stand by that statement?

Baroness Evans of Bowes Park: No, we are committed to ensuring that our future economic partnership should provide solutions to the unique circumstances of Northern Ireland and that the future relationship is in place by the end of the implementation period. We accept, however, that there is a chance of a gap, which is why the backstop is, in effect, an insurance policy for the people of Northern Ireland and the Republic of Ireland.

Lord Foulkes of Cumnock (Lab): Of course, the Northern Ireland border and all aspects of our trade are vital. So, too, are the rights of UK citizens resident in Europe and EU citizens resident in the United Kingdom. Are they to be totally abandoned? If not, what agreement is going to be reached? What progress is being made regarding their position?

Baroness Evans of Bowes Park: The noble Lord will be aware there has been agreement on that, and it will be in the withdrawal agreement.

Lord Anderson of Swansea (Lab): My Lords, in the referendum, there was a clear majority for remain in Northern Ireland. Yet the DUP purports to speak on behalf of the people of Northern Ireland. Must this not be very puzzling to our EU partners? Are the Government not in thrall to a minority in Northern Ireland? When will someone in this Chamber and in the House of Commons speak on behalf of the majority of Northern Ireland?

Baroness Evans of Bowes Park: The noble Lord will be aware we had a referendum across the United Kingdom. The vote was clear and we are now working on the wishes of the people.

Lord Campbell of Pittenweem (LD): My Lords, it seems to me this Statement is a triumph of draftsmanship over reality, and the noble Lord, Lord Tugendhat, put his finger on it: does the Cabinet agree? Beyond that is a further question: will the House of Commons be willing to agree? Of course, among the things not mentioned in this Statement is the fact the Secretary of State for Scotland and the leader of the Scottish Conservative Party have both threatened to resign if special arrangements are made for Northern Ireland which are not also extended to Scotland. Have they withdrawn that threat?

Baroness Evans of Bowes Park: The whole Government are clear that we want to protect the integrity of the United Kingdom in all scenarios. The House of Commons will indeed have a vote. We believe that we will bring forward a deal that the Commons will be able to support, but it will be for it to make that choice.

Lord Green of Deddington (CB): My Lords, this is a field day for the Opposition. Is it not the case that the Europeans might now be deciding that there will not be a deal and, as I believe they are, preparing themselves for no deal? Should that not be the focus of our own work very soon?

Baroness Evans of Bowes Park: As I said, we believe we are not too far apart. We have obviously been discussing some key issues today. We believe we will still get a good deal, but we have been working to prepare for a no-deal scenario, as the EU has and as any responsible Government would. We have published over 106 specific technical notices to help businesses, citizens and consumers prepare for no deal. There is work going across government, but I repeat that a good deal for the EU and the UK remains our focus and we believe that we will get that deal.

Lord Liddle (Lab): My Lords, does the noble Baroness agree that if we are to meet the commitment we made in December—that under no circumstances would there be a hard border between north and south in Ireland—the talk of the backstop being time-limited is a logical impossibility? How can an insurance policy be time limited?

Baroness Evans of Bowes Park: As we have said, we do not want to see the backstop used at all. We anticipate that we will be able to move seamlessly from the implementation period through to our future partnership but, to have this insurance policy, we need a backstop. We have been very clear about what that backstop must not do. We have put forward proposals to make sure that we can offer a solution to that and we will continue to discuss with the EU how to ensure that we achieve that outcome.

Lord Soley (Lab): I am relieved to hear that the Cabinet is behind the Prime Minister, but I have to say that some of them look and sound remarkably like Brutus, so she should be advised to take caution. The Minister and the Prime Minister have both used the word "gap". Is that a gap of months or years? Is there some indication of how long it will take?

Baroness Evans of Bowes Park: I say again: we do not intend there to be a gap.

Baroness Smith of Newnham (LD): My Lords, in response to the noble Lord, Lord Foulkes, the Minister suggested that there was no issue for EU citizens and UK citizens resident elsewhere in the European Union, because that deal had been done. But was that legal text of March not contingent on there being a withdrawal agreement? If that agreement does not happen—if there is no deal—what security and certainty is there for EU citizens?

Baroness Evans of Bowes Park: I am afraid that I obviously take a very different view from your Lordships. I anticipate that we will get a deal and we will continue to honour the commitments we have made to EU citizens. The Prime Minister has also been clear that,

[Baroness Evans of Bowes Park]
in the event of no deal, we want EU citizens to stay. We have made that offer already. We have said that we will look at the assurances that we can give and we will continue to do so. I reiterate: we believe we will get a deal.

Lord Hutton of Furness (Lab): We all want the Prime Minister to come back with a good agreement. Most noble Lords accept that an agreement is vastly preferable to no deal at all. However, we can all hear the sound of the can being kicked down the road. I welcome the fact that we have a little more time, but it is now pretty clear to all that the only credible way that the Government can meet their commitment on preserving the current arrangements between the Republic of Ireland and Northern Ireland is for the UK to remain in some kind of a customs union beyond the three-year period that the Prime Minister mentioned today.

Baroness Evans of Bowes Park: The noble Lord is right: we are entering the endgame of the negotiations and things are obviously getting more fraught. We are cognisant of and understand the timeframes that both sides are working on. That is why intensive negotiations are going on. However, we have been very clear that we will be leaving on 29 March. We will have an implementation period that we see ending in December 2020. We anticipate and are working towards a new future partnership agreement after that.

Lord Dobbs (Con): My Lords, I am delighted to hear that we are making real progress, we are moving forward and we are not far apart. These are words of great encouragement. To avoid it looking as though this is a game being played by elites in Brussels, London and elsewhere, and given that we are "not far apart", will the Government consider publishing the details of that which has already been agreed so that everybody—not just this House, but the people in the country whose futures are at stake—know precisely what is on offer?

Baroness Evans of Bowes Park: My noble friend will be aware that various texts have been published on things that are agreed. However, we are still negotiating and it is not normal practice to publish a live text that is still under review as we work on it.

Baroness Smith of Basildon: I refer the noble Baroness back to the question from my noble friend Lord Foulkes and the follow-up from the noble Baroness, Lady Smith. The Minister referred to the position of UK nationals being resolved in the agreement. Will she look at this again? I understand that the position on onward movement of UK nationals within the EU has not been resolved and was taken out of the original document. Will she clarify the exact position on onward movement of UK nationals after Brexit?

Baroness Evans of Bowes Park: The noble Baroness is right. She has pushed me on this point in various ways and is completely correct. The last time she asked this question, it was still a matter for negotiation. I have to confess that I do not know whether that is still the case—whether it has been firmed down or is still within the bounds of negotiation, as it was when she last asked me the question. I will go back and check on that and will write to her about the exact position. I am not sure if things have moved on since our last discussion.

Lord Stevenson of Balmacara (Lab): I do not know if other noble Lords have had the same experience but, when involved in negotiations, one is often heartened by the prospect of the opposition saying that we were so close that we must surely be able to reach an agreement. It usually means that you have won. There are many other borders that are also in dispute. Will the noble Baroness make a statement about Gibraltar?

Baroness Evans of Bowes Park: The noble Lord will be aware that the primary forum for engagement with Gibraltar is the Joint Ministerial Council, which has been meeting regularly. The Government of Gibraltar have been actively involved in these meetings and we are working closely with them on the practical implications arising from our exit. Those discussions are continuing positively.

Lord Whitty (Lab): My Lords, the Government have promised the House of Commons a meaningful vote on the outcome of these negotiations. When does the Minister now expect that vote to take place? How many times will we have to vote in a meaningful way to complete the process? How many votes does that mean Parliament will be presented with before the end of the transition period?

Baroness Evans of Bowes Park: I am not in a position to comment on the timing of the votes, but I assure noble Lords that the Chief Whip and I are fully aware of things. Although we do not have a meaningful vote, we will be discussing a take-note Motion. We will work through the usual channels to make sure that this House is able to fully put forward its views in the course of the discussions.

Mental Capacity (Amendment) Bill [HL]

Committee (2nd Day) (Continued)

5.47 pm

Amendment 17

Moved by ***Baroness Barker***

17: Schedule 1, page 11, line 9, after second "a" insert "written"

Baroness Barker (LD): My Lords, I move Amendment 17 and will speak also to Amendments 19, 54 and 57, which are in my name. Like other noble Lords, I thank the Minister for statements he made earlier about having listened to concerns over the duty to consult with the person and over the inclusion of 16 and 17 year-olds. He will appreciate that a number of amendments tabled by noble Lords stemmed from that deep concern about the lack of a statement on the Bill that the person being cared for should be seen by the person arranging for their assessment.

On a matter of form and detail, I do not like the term "cared-for person". I prefer the scheme used under the Mental Capacity Act, where the person is referred to as P. They are considered as a person in their own right; they are subject to the legislation as a whole person. It is a stylistic matter. We got there with "unsound mind"; perhaps if we keep going, we might be on a roll—you never know—so I throw that in.

These amendments dig at some of the same concerns as those at which the noble Baroness, Lady Finlay, was getting on a previous set of amendments. As noble Lords will know, under the DoLS legislation there is a duty to ensure that not only does the cared-for person know what their rights are and have access to justice, but the people who care for them also know that what is proposed is the least restrictive option. There is a real question under the liberty protection scheme, as laid out, as to how somebody who lacks capacity or the people who look after them would know that. Furthermore, there have been concerns—assuming the care home manager was responsible for much of the assessment—over how they too would know that what was proposed was a least restrictive option. These amendments are about seeking to establish a duty to ensure that people are fully informed.

That takes us to another basic criticism of the Bill, which is about what I would say was an overreliance on the code of practice. Noble Lords have many years' happy experience—some of it on the other side of the Dispatch Box—arguing about the importance of codes of practice as opposed to law. There has to be a statement in the Bill for anything in a code of practice to have force. As the Minister will know, practitioners need only have regard to the code of practice; effectively, they may not have regard to it. It matters more towards the back-end of the Bill, where much of the Mental Capacity Act is amended.

Put simply, nowhere in the Bill does there seem to be a duty to provide this information to the cared-for person or to the people who care for them. In the coming set of amendments the Minister will no doubt make much of the new requirements to consult, but that is something slightly different. We felt it was important to restate this and back up what is already the intention under the best interests of the Mental Capacity Act, but that we felt had been ignored in this Bill. I beg to move.

Baroness Finlay of Llandaff (CB): My Lords, I added my name to Amendment 17 because I think it is important that things be written down clearly, particularly for the cared-for person—which is the term we are using—if they have fluctuating capacity or need to absorb things very slowly but want to understand. Also, their families and those concerned about them will not necessarily be there when someone comes in to assess them or formulate a care plan, but they will certainly have concerns and they may have a very good idea about wishes and feelings that could have been overlooked—not maliciously, but because people did not know about them. A written record will provide evidence for everybody about what is happening.

The way the consultation is conducted should therefore, I agree, demonstrate that restrictions have been proportionate and necessary, and that alternatives have been considered—and the reason they have been discounted should be given. I would like us to give people much more access to all their clinical records; the caring family, in particular, should have access to the records. Often, information held by family members and others close to the person is effectively like gold dust when it comes to planning their care, and would benefit from being shared.

Where someone's condition deteriorates, if this has all been written down clearly you have a baseline against which you can measure changes. If they improve, the baseline shows the reason that things were put in place as restrictions, which could then be lifted. Again, that gives a benchmark against which to measure, which would make care more personalised. I hope this concept will be well received. I am unsure as to whether it should go in the Bill or in the code—it is easy to put lots into the Bill—but the principle is important.

Baroness Hollins (CB): My Lords, I have some amendments in this group. I welcome the explanations given by the noble Baroness, Lady Barker, in her introductory comments. The Bill requires the responsible body to complete an authorisation record containing important information for the cared-for person. However, it does not require the responsible body to provide this information to so-called cared-for persons themselves. I rather like the term "cared-about person"; that is what families have in their minds, that they are caring about the person. While this is about official, statutory care, we still want that essence of caring about the person to be central to it.

The responsible body does not currently have to provide the information to the person themselves or to their family or an IMCA should they be involved in supporting that person. Amendments 51 and 52 seek to address this omission, by ensuring that the person themselves and any appropriate person or IMCA supporting and representing them are given copies of the authorisation record as soon as possible after authorisation is granted. Amendment 53 would require that the person is told of the options to appeal and notified of the outcome of reviews, variation or termination of an authorisation.

I support my noble friend Lady Finlay's advice that information should be shared. I add that it should be shared in a timely, not reluctant, way. Perhaps the Minister can confirm that omission of the requirement to inform the person about options to appeal and about outcomes is just an oversight and that it can quite easily be added to the Bill.

6 pm

Article 5 of the ECHR requires the person to be given information about the reasons for depriving them of their liberty. Case law says that this should be in a language accessible to the person and, if the person is not likely to understand it, it should be communicated to a representative on their behalf. If the person or those representing them do not know why they are being detained, they cannot challenge it and, if they cannot challenge it, that undermines the point of Article 5 safeguards, which are about limiting arbitrary power to a system of checks and balances.

[Baroness Hollins]

My Amendment 53 also places explicit duties on an IMCA to ensure that the cared-for person, P, and the appropriate person understand the information and their rights to request an AMCP assessment, advocacy and review, and to challenge the authorisation in court. My fourth and fifth requirements in Amendment 53 draw from the Joint Committee on Human Rights report, which said that,

"the responsible body should be under a clear statutory duty to refer cases",

to court,

"where others fail to do so."

Lord Touhig (Lab): My Lords, I do not recall, in some 25 years in both Houses of Parliament, rising to speak in a debate feeling more despair about a piece of legislation than I feel about this Bill as it stands. Amendments 17, 19 and 36 are so necessary and so blindingly obviously needed that I cannot understand why the provisions they cover were not included in the Bill in the first place.

Amendment 17 would require a statement from a care home manager to be a written statement. Of course it should be a written statement. Amendment 19 would ensure that the cared-for person and those involved in their care were informed of the proposed arrangements and any possible alternatives. Of course they should be informed and of course they should be told that there are alternatives. Amendment 36 would put right an obvious injustice that the Bill in its present form would create.

I am not alone in having grave doubts about the Government's whole approach to giving responsibility to care home managers to initiate the process and considerations, as we heard in earlier debates today—but if ever there was a case when, in a hole, it is time to stop digging, this aspect of the Bill is certainly part of that. The Bill places a duty on the responsible body or the care home manager to commence an authorisation record covering a range of information and detail, but the person most affected and that person's family may not be given that crucial information. This is out of the script of "Yes Minister". The noble Baroness, Lady Hollins, is absolutely right in her approach and her amendments. The cared-for person and his or her family must be given copies of the authorisation record. With regard to Amendments 54 and 57 in the name of the noble Baroness, Lady Barker, I know that she is not too happy with the term "cared-for"; nevertheless, it underpins a person's rights.

Last week, I was at the Parliamentary Assembly of the Council of Europe in Strasbourg. It is an organisation that Britain helped to create after the horrors of the last war to protect and defend human rights. The combined all-party British delegation, so ably led by Sir Roger Gale, has an exemplary record of defending human rights. I hope that when we return to Strasbourg for the next session in January, it will not be with the stain of having seen our Parliament enact legislation that removes many basic human rights from most of our vulnerable fellow citizens. The Bill needs to be changed and the Government need to start listening.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): Well, I shall see whether I can lift the gloom from the noble Lord. I think that there was a slight mischaracterisation, in that the Government are listening. Indeed, we have responded and made changes. I hope that in responding to these amendments I will be able to show further that we are taking a positive and constructive view on improving the Bill, making sure not that it removes rights but quite the opposite—that it provides access to liberty-protection safeguards for people who do not currently enjoy them.

I begin by thanking the noble Baroness, Lady Barker, for leading the debate and I also thank other noble Lords. I shall go directly to her Amendment 17. Of course she is right, as are other noble Lords, about the arrangements for the cared-for person—person P—being written. I am very happy to confirm to all noble Lords that that is our intention and that we will make sure that the Bill reflects it.

With regard to other amendments, the entire thrust of policy across government, whether in health and care or anything to do with data, is about providing more people with the information that the state holds about them. I can give the absolute commitment to noble Lords that that is what we intend to do in the Bill and in changes that we make to the Bill going forward. It is essential that cared-for persons, their families, appropriate persons, IMCAs and so on are given full information about their authorisation and their relevant rights, including their rights to review and appeal. I can tell noble Lords that that will be set out fully in the code of practice.

On the code of practice—I can see the noble Baroness, Lady Barker, grimace—I will say two things. First, it is a statutory code of practice involving a consultation arrangement and a laying before Parliament—noble Lords know how these things work. The noble Baroness asked about the force of the code of practice and it is true that the Bill says "have regard to". But case law confirms—I am happy to write to noble Lords with this opinion—that the code of practice must be followed unless there are cogent reasons not to do so. That means that there will be some occasions when the code is not practised, but those not following it will have to justify, potentially in court, why they did so in the interests of a person's care. So the code of practice is statutory and it has very great force. It is worth pointing that out, not least because on this group and future groups we will be talking about information or an instruction that will be within the code of practice. I will take the opportunity to make that clear at this point.

Baroness Barker: I thank the Minister for that. This is a very important part of our discussion. I have two questions which I am absolutely certain he will not be in a position to answer, but I hope that he will write to me. First, how many cases of a failure to follow the code of practice rather than a failure to follow the law have gone to the Court of Protection? Secondly, can the Minister confirm that the original Mental Capacity Act code of practice was never reviewed and that it is not possible to make individual amendments to a code of practice: it has to be changed in its entirety? I shall

not put the Minister on the spot now but we need to return to those matters in a further discussion because they are really important.

Lord O'Shaughnessy: The noble Baroness is quite right: I do not have the answers to those questions, but they are very good questions and I will make sure that we answer them for noble Lords in a communication following this debate.

On the point about access to information, I think that two other aspects are worth considering. One is that under the general data protection regulation, which came in on 25 May this year, the cared-for person or their family, IMCA or somebody holding a lasting power of attorney—that is, somebody acting on their behalf—will, and indeed does, have access to their authorisation record. I believe, although I will clarify, that that has to be done free of charge. I know that that is certainly the case with medical records and GPs. In terms of access to information, that is an important advance.

Again, I want to get further clarification on exactly what is involved, but the NHS and the LGA have created a programme of local health and care record exemplars. It happens in a few parts of the country and it is about creating a single health and care record that contains all the information about a person's health and care. Obviously it spans both health and care settings. That will be available not only to inform the care carried out by a clinician or someone in a caring role but information to that person and those with responsibility for them.

That obviously has huge implications for improving joined-up care. It is an important programme by which we set a lot of store. What I will take away from this discussion is the need to ensure that what we are describing here, around access to information by the cared-for person or by those caring for them, ensures that they will have access to the local health and care record, which would contain the kind of information we are talking about. If it does, we have a vehicle; if it does not, we need to think about what the right vehicle is.

The amendments in this group also support the IMCA to help the cared-for person understand their rights under liberty protection safeguards. I can confirm that this will be a key role for the IMCA. It will be defined in their job description and, again, contained in the code of practice.

Once again, we have already made changes, and are committing to changes in the Bill, that will deal with the questions raised about access to information. I absolutely concur with the sentiment behind the questions. There is good reason to believe that expanding programmes and mechanisms in the system will give us the opportunity to do that, and in a much more thorough way than is done now. I want to continue to work with noble Lords to make sure that we get that right as we move towards Report, so that it is properly reflected in the Bill. I hope that, on the basis of my comments and reassurances, the noble Lord, Lord Touhig, will feel a little less despairing and the noble Baroness will be prepared to withdraw her amendment.

Baroness Barker: I thank the Minister for his comments. I hear what he says about GDPR, but if he could send Members a small briefing note, that would be extraordinarily helpful. Clearly, there has been a significant change. I and other noble Lords will remember times in the past when individuals were not able to access historic care records because they contained information about a third party. A whole series of cases had to go through the European courts to establish exactly what the rights of access to care records were.

I will study what the Minister said. However, we need to be absolutely certain that the spirit of these amendments is reflected. Perhaps we may come back to this at a later stage with a simple amendment introducing a requirement in the Bill to provide information. How that is done can be set out at considerable length in a code of practice, but the requirement to do it needs to be in the Bill. With that, I beg leave to withdraw the amendment.

Amendment 17 withdrawn.

Amendments 17A to 18 not moved.

Amendment 18A

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

18A: Schedule 1, page 11, leave out lines 12 and 13 and insert—

"(b) that the liberty protection arrangements impose physical restrictions on the cared-for person,"

Baroness Finlay of Llandaff: My Lords, previously we struggled with the definition of restriction of liberty. From the original judgment from the noble and learned Baroness, Lady Hale, the term "a gilded cage is still a cage" has become common currency and is sometimes used as a benchmark. The difficulty we face with this legislation is how we define the restriction of liberty for an individual and the normal variations of everyday living that vary from family to family and culture to culture, and with which we would not wish to interfere.

My noble friend Lady Murphy tried to provide a definition when we last debated this. Following her lead, I have tried in my amendments to come up with a definition which respects the personal cultural background of an individual, the right to private and family life that existed before they entered care, and the need for an appropriate way of living to be respected as they require some restrictions on their liberty to keep them safe. I want to avoid the risk-averse approaches that are sometimes taken and which can result in disproportionate restrictions, such as restricting the friendships and relationships that may form, particularly when a risk-averse approach may be motivated by the convenience of those responsible for providing care rather than a true balance of weighing up of risks. My noble friend Lady Hollins illustrated that very clearly in a previous debate on restrictions.

6.15 pm

To avoid processes being burdensome within the system, it is important to differentiate temporary types of restrictions that may be imposed in order for treatment

[Baroness Finlay of Llandaff]
or other intervention to be given that is aimed at achieving therapeutic improvement—for example, in an emergency situation—from restrictions imposed in the long-term planning of the care of a person to keep them safe and empower them to live as well as they can. In addition, we must differentiate between the restrictions imposed by those providing care and the restrictions that come about inevitably because of the underlying illness or disorder—for example, due to the nature of neurological damage. Additional restrictions are then imposed by those providing care, which should be designed to be the least restrictive option—hence the amendment to reinforce that part of the Bill—to optimise the person's ability to live well.

The Mental Capacity Act states that, acting in a person's best interests, the decision-maker should take the least restrictive option. Although this is stated up front in the Act, to which this Bill is an amendment, it is worth restating here that arrangements must protect the liberty of the cared-for person and must align as much as possible with their wishes and feelings. We must remember that other legislation comes into play where there is evidence that those responsible for providing care are not motivated by the cared-for person's best interests. That comes into the realm of safeguarding, and there was a very sad case recently, where the Modern Slavery Act was brought into force.

The problem is the tension between a universally applicable definition of a "restriction" and a more subtle approach, whereby one person might feel they are restricted when another person might not. Let me give noble Lords a simple example. A man who had been a table tennis champion was in a care home and was very withdrawn. A charity offered to fund a specially adapted ping-pong table—it was a little like a mini squash court. This gentleman was encouraged to try to play ping-pong. Initially, he seemed to fail to understand, but then quite suddenly he started to hit the ball effectively and efficiently. This coincided with a remarkable cognitive improvement, and as his physical strength improved, because he was moving better, his risk of falls also decreased and he communicated better. Without the insight that he had been a champion and had skills that could be built on, he could well have been left to linger, and nobody would have realised how much recovery could be achieved.

When we think about people with a severe head injury, it is important to remember that, when the frontal lobe is damaged, assessment can be extremely difficult. At first sight, these people might appear to be cognitively intact, but, if they are not properly assessed, they can rapidly run into all kinds of major problems because they are unable to do the weighing-up part of the decision, with the implications that that has for themselves and others. Therefore, we have to have some kind of definition, but it will be difficult to have a single definition in the Bill.

In summary, these amendments seek to ensure that we personalise the definition; that we do not confuse restrictions through disease and disorder with restrictions imposed by people. All restrictions imposed by people must be fully recorded and justified to empower the person to live as well as possible. I am not sure that we will come up with a concise definition in the Bill—perhaps it may be better if we do not carry on trying—but we must address the concepts in a code of practice or even, possibly, in regulation, which could be changed more easily. Otherwise we risk another legal case of poor care and poor decision-making which then goes on to have unintended consequences. I fear that at the moment we are living with some of the unintended consequences of things that have happened historically. I beg to move.

Baroness Murphy (CB): My Lords, I congratulate the noble Baroness, Lady Finlay, on again introducing this discussion on a difficult topic. I do not share her pessimism that it is impossible to find a definition. It would be quite simple to have a definition in the Bill which would enable us to distinguish between those who are and are not being deprived of their liberty.

The fact that people are deprived of their liberty, in reality, by their condition is an irrelevance. We have to stick with what is happening to people; what we, the state or the carer are doing to the individual. We would not find it too difficult to decide what is or is not a restriction. You can compare the living accommodation of a person in a care situation to that of someone who is living in the same place without those restrictions. Care home managers would not have too much difficulty in saying who was and who was not restricted.

We should not give up trying to have some kind of definition that lists those conditions. People might be receiving sedative medication so that they cannot move around and others might be restricted physically—there are still people being restricted physically—in dreadful chairs and so on who cannot move about. We could define fairly well what the conditions are. I hope we will come back on Report with some clarification of what they are so that we can put something in the Bill. I worry that if they are in the code of practice it will be so flexible that it will result in a postcode lottery, with one area's policy different from another's. That would be a disaster.

We should be able to get something in the Bill. I hope that we will not give up at this stage.

Baroness Barker: Following on from the observation made by the noble Baroness, Lady Murphy, one of the most common restrictions of liberty is medication and medication reviews. We often think of it as being physical but it is not. New medicines often come online and create change. I take her point and hope we will be able to work towards a definition.

Baroness Thornton (Lab): I will not add much more because the noble Baroness, Lady Finlay, has done us all a favour by putting forward great questions exploring the Cheshire West ruling. The Joint Committee on Human Rights agrees that a definition needs to be found, otherwise—the noble Baroness is right—we will be back in a situation where things have not gone right and we end up in court again. We all need to put our minds to this. We should be able to find a definition and I look forward to the Minister leading that particular discursive discussion across the Committee.

Lord O'Shaughnessy: I shall do my best. I thank the noble Baroness, Lady Finlay, for continuing to make sure that we grapple with the most difficult questions, as the noble Baronesses, Lady Murphy, Lady Barker and Lady Thornton, have enjoined us to do. It must be right that we at least give it a go while recognising that this is a challenging topic.

The amendments of the noble Baroness, Lady Finlay, are about restricting liberty protection safeguards to certain circumstances where physical restrictions are imposed, and outline the liberty in which the feelings of the cared-for person should be protected. Her intent was not to provide that definition but to provide a platform for us to have a discussion about the definition. We have been strongly encouraged by the Joint Committee on Human Rights to do so and, as I said in our previous discussion on this topic, we are considering the Joint Committee's findings very closely.

I sense, and have sensed throughout, that there is a desire among noble Lords to provide such a statutory definition within the Bill. Obviously there are huge benefits of doing so. It would provide clarity; the noble Baroness, Lady Murphy, mentioned avoiding a postcode lottery; and families, professionals and the people themselves would benefit. There are compelling arguments for it. At the same time, we are weighing it against the safeguards that cared-for people need and ensuring that we comply with our obligations under the ECHR.

We obviously have not got there yet—no one is suggesting that we have—but I want to use this spirit of determination and problem solving to see whether we can get to that point—hopefully by Report. It is a topic for a longer discussion, which does not need to be in this Chamber, but we have to recognise that there is not a consensus among stakeholders. That is a challenge. We need to consider whether we can bring the entire disparate community along with us, otherwise we will have a problem and not solve the challenges we are dealing with.

I will commit to all noble Lords to see whether we can get to that point. There is a hierarchy about the ways in which we can achieve it—in the Bill, through regulation or through a statutory code of practice—but at the very least we should make a determined endeavour to do it. So I am happy to give that commitment. As noble Lords would expect, the Government have been working hard on this. We would like to share our thinking with noble Lords and start to build that consensus in the House and beyond to see whether we can get to that point. I hope that will give noble Lords the reassurances they are looking for.

On the substance of the amendment of the noble Baroness, Lady Murphy, that depriving a person of their liberty in emergency and interim cases should benefit the person and that that deprivation, life-saving treatment or doing a vital act cannot be done without depriving a person of their liberty, the Bill already states that steps depriving a person of their liberty must be necessary in order to give life-sustaining treatment, and the Mental Capacity Act requires that such steps must be in a person's best interests. So that reassurance is there.

Baroness Murphy: I believe that it is the amendment of the noble Baroness, Lady Finlay.

Lord O'Shaughnessy: I thought Amendment 81 was tabled in the name of the noble Baroness, Lady Murphy. Anyway, it does not matter in whose name it was, those reassurances are in the Bill. If there are any niggling concerns about that we can, of course, make that clear offline. On that basis I hope the noble Baroness will be prepared to withdraw her amendment and begin those discussions in earnest.

Baroness Finlay of Llandaff: I thank the Minister for that reply. Fuelled by the optimism of my noble friend Lady Murphy, we are moving forwards, and as the Minister has said, we need to give it a go but we must also take all the stakeholders with us. We will need some careful round-table discussions about this. I take completely the point about medication, and not using that word in the amendments I have drafted is an omission that needs to be corrected.

When I was considering emergencies, I was concerned about situations that are not necessarily life-threatening but still constitute some kind of emergency. They arise quite commonly in social care out in the community and emergency primary care settings. I do not think that they can be ignored when we are looking at a definition. We have to be quite broad, otherwise we might suddenly find that a gap emerges again, which would not be helpful. I look forward to thinking with others and I hope that they are more successful than I have been today. I beg leave to withdraw the amendment.

Amendment 18A withdrawn.

Amendments 19 to 20 not moved.

6.30 pm

Amendment 21

Moved by ***Baroness Barker***

21: Schedule 1, page 11, line 41, after first "person," insert "based on evidence,"

Baroness Barker: My Lords, again I preface my remarks by saying that these amendments were drafted when the role of the care home manager was less clear than perhaps it is now. Nevertheless, they take us to the important point about determinations on mental capacity and the requirement to make sure that they are evidence based. In the Bill as it stands, a huge amount of discretion is given to care home managers and people involved in care to determine whether someone has capacity. We do not believe that that is right. Determining whether someone has capacity is difficult to do and something for which a great deal of training and experience is required. We keep coming back to what would be acceptable levels of training and qualifications to exercise that determination.

Amendment 21 seeks to provide that there should be an evidence base and that those making the capacity assessment should go through it and be ready to justify their decisions accordingly. I will go back to a

[Baroness Barker]
point and reiterate it, although it must be rather boring: a DoLS assessment is different from a care assessment, and whoever makes and records such assessments should know that they are challengeable in court, which is a big responsibility.

Amendment 22 again endeavours to make sure that the person carrying out the assessment of capacity should be properly qualified, a point I have made before. I do not think that the Bill as it stands is sufficiently robust about the level of professional training needed and therefore this is a matter to which we should return.

Amendment 25 in a way follows on from our previous discussion. With this Bill we will move into a new position where the assessment of capacity is not as clearly specific to the situation as it is under the Mental Capacity Act. We are also moving towards a position in which assessments can be rolled over for longer periods. I am not saying that that should not happen and I take absolutely the point that a number of the assessments being required under DoLS are unnecessary. When someone has had a diagnosis of dementia, for example, their capacity to make decisions may not fluctuate or change, but we need to be altogether a lot more precise in the terminology being used in the Bill. It is not just a change in someone's condition but may also be a change in their circumstances which has led to the deprivation of liberty. We are bringing in a new test to show that things are necessary and proportionate. I do not think that it is that clear or that it will clarify the decisions which are going to have to be made. This is an attempt on our part to move away from what we believe to be a position where the subjective judgment of care providers would have been given too much weight in the determination of capacity. The amendments on that issue are probing in nature and I beg to move.

Baroness Tyler of Enfield (LD): My Lords, I rise to lend my support to Amendment 21 tabled in the name of my noble friend Lady Barker and to speak to Amendment 22, which is tabled in my name. Amendment 22 is essentially about who should be able to determine whether an individual is, as it currently states in the Bill, "of unsound mind". That is the terminology being used, but I would prefer to see terms like a "disorder" or a "disability" of the mind. That is one of the three key authorisation conditions. Perhaps I may say again how very pleased I am that the Minister has indicated his willingness to look at some new language so that we do not use the term "unsound mind", which in my view is stigmatising and has no place in today's society.

I return to Amendment 22. Currently, the authorisation arrangements in this part of the Bill state that a medical assessment has to be made but do not state who has to make it. It is likely that most people would assume—indeed, it may well be that the Government are assuming it and no doubt the Minister can reassure us on the point in his response—that a medical assessment needs to be carried out by a registered medical practitioner. However, it would be helpful and reassuring to have that made clear in the Bill. The report published earlier this year by the Joint Committee on Human Rights is clear that, in order to comply with human rights law, any deprivation of liberty under Article 5 requires,

"objective medical evidence of a true mental disorder of a kind or degree warranting compulsory confinement, which persists throughout the period of detention".

Given the requirement for "objective medical evidence", my contention is that there needs to be a guarantee in the Bill that only a registered medical practitioner with appropriate training has the power to determine whether someone has an unsound mind or mental disorder, depending on which language is going to be used.

Baroness Thornton: My Lords, I will speak to two amendments in my name in this group, although I may also come back on what has been said.

Amendment 23 concerns supported decision-making and is based on Clause 12 of the Law Commission's draft Bill. The amendment would require a clear determination,

"made on an assessment that steps to establish supported decision making are not practicable".

It states:

"Steps to establish supported decision making are practical if, in relation to decisions about their personal welfare or property and affairs (or both), a cared-for person— … is aged 16 or over, and … has capacity to appoint a person to assist them in making those decisions".

Amendment 24 concerns the restriction of defence and is based on Clause 9 of the Law Commission's draft Bill. It states:

"The assessment must include … a description of the steps which have been taken to establish whether the cared-for person lacks capacity".

NICE recently released guidelines on what it thinks the Bill should say regarding supporting a cared-for person:

"Support people to communicate so that they can take part in decision-making. Use strategies to support the person's understanding and ability to express themselves in accordance with paragraphs 3.10 and 3.11 of the Mental Capacity Act".

NICE also recommended:

"Practitioners should make a written record of the decision-making process, which is proportionate to the decision being made. Share the record with the person and, with their consent, other appropriate people. Include: … what the person is being asked to decide; … how the person wishes to be supported to make the decision … steps taken to help the person make the decision … other people involved in supporting the decision … information given to the person … whether on the balance of probabilities a person lacks capacity to make a decision … key considerations for the person in making the decision … the person's expressed preference and the decision reached … needs identified as a result of the decision … any further actions arising from the decision … any actions not applied and the reasons why not".

These basic and important matters were included in the Law Commission's draft Bill but not adequately included in this Bill. I am pleased to be part of this group and able to raise these issues. I will let my noble friend Lord Hunt talk about Amendment 50ZA.

Lord Hunt of Kings Heath (Lab): My Lords, I am very grateful to my noble friend for that invitation. Amendment 50ZA refers to circumstances in which the pre-authorisation review is not undertaken by an

approved mental capacity professional. Paragraph 18(2) of Schedule 1 sets out the circumstances where that applies, stating that the AMCP will be brought into play where,

"the arrangements provide for the cared-for person to reside in a particular place, and it is reasonable to believe that the cared-for person does not wish to reside in that place, or … the arrangements provide for the cared-for person to receive care or treatment at a particular place, and it is reasonable to believe that the cared-for person does not wish to receive care or treatment at that place".

Paragraph 20 of Schedule 1 sets out what the person carrying out the review needs to do,

"if the review is not by an Approved Mental Capacity Professional",

but it does not say who should do it. I want to raise this issue with the Minister. Clearly, there is concern that it may not come to the attention of the responsible body that the cared-for person does not wish to be treated in a particular place or receive a particular form of care or treatment. We could go back to the architecture of the Bill. We think that it puts too much authority in the hands of the care home manager who, in many cases, has to unlock the door to allow these concerns to be raised. Given that some people should be assessed with their review undertaken by an AMCP, but this will not happen, it is important to know the circumstances under which the review would then take place.

Essentially, my amendment is a probing one. The pre-authorisation review referred to in paragraph 20 of Schedule 1 does not have to be done by an AMCP, but Amendment 50ZA says that the person who undertakes it should at the very least,

"be qualified as a medical practitioner, nurse, social worker, speech therapist, occupational therapist or other profession as may be specified in regulations".

That covers the point made earlier by the noble Baroness, Lady Finlay, that those professions are regulated. It is important for us to be clear. Some people may fall through the net and not be seen to qualify under paragraph 18(2) of Schedule 1. Therefore, the people doing the reviews who are not AMCPs must have enough professional standing to identify problems that might arise. I hope that the Minister, who is in a concessionary mood today, will agree to look at that.

6.45 pm

Baroness Finlay of Llandaff: My Lords, three amendments in this very important group are in my name. I fully support the stress being placed on the need to see whether, with additional help and support, the cared-for person could make their own decision. It is always better if they can take their own decision over any aspects of their care that need to be in place. For example, providing support to young people with learning difficulties or people with an expressive disorder may require special skills, time and patience to support them to make their own decision. However, the Mental Capacity Act is clear that every effort must be made to support people.

It is also right that the way in which support is provided, as well as the evidence for why such support may have failed, should be recorded—as in Amendment 23, which I strongly support. Decisions should be based on evidence as much as possible, not on the personal opinion of the assessor, although there will always be a degree of interpretation of evidence. For people in community and supported living settings, this will be important to stress as they may agree with and consent to certain aspects of the care plan but not understand others—so it is not an all-or-nothing. However, even if the person does not appear to understand, everything must be explained as fully and clearly as possible. It will be important for any such evidence submitted to support the deprivation of liberty to come from the professional responsible for the care plan, whoever that is.

We have already debated the role of the care home manager. For consistency, I have removed the care home manager from this part of the Bill. I should apologise to care home managers for my use of "secretary" in relation to their role, which could be misinterpreted. I did not mean to cause offence; I just wanted to make sure that we recognise that the care manager and the care home manager are often different people.

In response to the amendment tabled by the noble Baroness, Lady Jolly, I would advise caution. In some situations, a specialist clinical psychologist may be better than a medical practitioner at undertaking the assessment. I would hate for us to end up with the view that the doctor would always be the best person to do the assessment because I do not think that they always would be; there may well be others.

I welcome the addition of speech and language therapists. They have a great deal to offer to people with expressive disorders and can often establish communication when other people think that the cared-for person lacks capacity but in fact they simply cannot express themselves.

Baroness Thornton: Yesterday or on Friday—whenever it was—we received a very helpful briefing from the Royal College of Psychiatrists. I found what it had to say on Amendment 22 very useful:

"The Royal College of Psychiatrists believes that only a 'Registered Medical Practitioner' should be able to determine whether an individual has a 'disorder or disability of the mind' … Currently the authorisation arrangements in Part 2 of the Bill say that a capacity and medical assessment has to be made, but does not say who has to make it. It is likely that the Government is assuming that this would be carried out by a 'Registered Medical Practitioner' but it would be helpful to have it on the face of the Bill.

The JCHR report was clear that in order to comply with human rights law, any deprivation of liberty under Article 5(l)(e) requires 'objective medical evidence of a true mental disorder of a kind or degree warranting compulsory confinement, which persists throughout the period of detention'.

Given this requirement for 'objective medical evidence', there needs to be a guarantee in the Bill that only a Registered Medical Practitioner with appropriate training has the power to determine whether someone has an 'unsound mind' or 'mental disorder'".

Lord O'Shaughnessy: I am very grateful to all noble Lords for tabling amendments on this very important topic of making sure that when these decisions are made and the assessments of them carried out that they are done on the best possible evidence. That informs all the amendments in this group.

We have talked already about the role of the care home manager in arranging assessments and providing a statement to the local authority while the assessment is conducted by a suitably qualified professional. Clearly

[LORD O'SHAUGHNESSY]
we will explore that further following the debate tonight. It is also clear that in many cases care home managers will be using assessments that have already been conducted, wherever possible, ensuring that we reduce duplication. There is clearly a balance between making sure that we have access to the best possible information and not creating extra burdens on the system to duplicate work where a previous assessment would be useful, up to date and valid.

I will deal with the amendments in turn and try to think about how we can get that balance. Amendment 21 in the names of the noble Baronesses, Lady Barker and Lady Jolly, would remove the ability of care home managers to rely on previous medical and capacity assessments. It would mean that assessments could be relied on only if responsible bodies judged it appropriate. Our belief is that where valid assessments are already in place and have been completed by a suitably qualified professional—such as those completed as part of a care plan—they should be used. We are concerned about the implications of the amendments in this group because of the duplication that could arise, particularly perhaps if there is a difference between assessments and each person who carried out the work is still of the view that their judgment was the correct one. We need to be concerned about that as we are trying to simplify the system.

We also do not believe it would be proportionate to expect care home managers to seek permission from a responsible body on every case where there is a previous or equivalent assessment, especially when it is clear for example that somebody has a lifelong diagnosis such as a learning disability and a previous assessment can be reasonably expected to provide valid and reliable evidence of this.

I understand the intention of the noble Baronesses in wanting to avoid care home managers relying on previous assessments when it is not appropriate to do so, which I think is what has informed these amendments. That is where the responsible body reviewing is incredibly important. Generally speaking it will be a senior social worker who will be able to examine the case and if there is an overreliance on past—particularly quite long-dated—assessments in that statement, it will be a flag for escalation to the AMCP.

I understand why there is concern about giving too much leeway to the care home manager, but I also think the amendment would deliver a disproportionate system. It would not provide the degree of flexibility we want and therefore we intend to outline the appropriate use of previous assessments in the code of practice. I think that that is the appropriate vehicle.

Amendment 22 in the name of the noble Baroness, Lady Tyler, seeks to ensure that medical assessments are completed by a registered medical practitioner. Clearly our intention is that that should be the case, and that the person who conducts the medical assessment must be suitably competent. I use that word rather than "qualified" and we will set out further detail in the code of practice. As was stated by the noble Baroness, Lady Thornton, and others, human rights case law already requires that a deprivation of liberty must be based on objective medical expertise. That can be done on a competence basis rather than on qualifications. Qualifications change whereas competencies, by and large, remain the same. That is why we will focus on a competence-based approach rather than listing professions in a code of practice. A code of practice gives us the ability to exemplify the kind of competencies we mean without being restricted, which would be the case if it were in the Bill, to only certain categories of worker, which might change over time.

Amendment 23 in the names of the noble Baroness, Lady Thornton, and the noble Lord, Lord Hunt, creates a duty under liberty protection safeguards to assess whether steps to establish supported decision-making are practical. As I am sure noble Lords know, supported decision-making is already part of the law, and indeed it is the second principle of the Mental Capacity Act. Perhaps one of the reasons that this amendment has come forward is that this is an amendment Bill and therefore there can be a dislocation sometimes between what we are considering and the wider context.

It is already the case that steps should be taken to support people to make their own decisions. We have not brought forward the Law Commission's recommendation to set up a formal supported decision-making scheme because that legal entitlement already exists. Wherever possible, of course, people should make decisions for themselves and be supported to do so. However, as I say, the second principle of the Mental Capacity Act provides that legal force and in the code of practice we will set out the guidance about how that should work in principle.

The noble Baroness, Lady Thornton, introduced Amendment 24, which describes the process of how someone should be deprived of their liberty. It was helpful for her to refer to the NICE guidance on this. We have already talked tonight about a written record—I think that goes some way—and the basis on which it is shared, which is also important. I will provide more detail on that. The concern about the way that this has been framed is that it is too specific to be in the Bill and the process and the terms may change over time. Although I am sympathetic to the idea that there needs to be clarity about what the appropriate process is, that is best done in the code of practice rather than in the Bill.

The noble Baroness, Lady Finlay, introduced Amendments 24A, 24B and 24C. I need to reflect further on the implication of these amendments because the way she described them was perhaps not how we had previously interpreted them. My only concern is that one of the effects might be that only responsible bodies could decide to rely on previous assessments, because she has taken care home managers out.

Amendment 25 from the noble Baronesses, Lady Barker and Lady Jolly, would require the care home manager or responsible body to have regard to any change in a person's circumstances when seeking to rely on a previous or equivalent capacity or medical assessment. I agree with the intention of the amendment, which is to ensure that before relying on a previous or equivalent medical or capacity assessment proper consideration is given to whether it is reasonable to rely on it. The Bill allows for this already. Such an

assessment can be used only if it appears to be reasonable to rely on it. As we have said, responsible bodies when reviewing such statements are obviously legally liable for making sure that the reasonableness test is carried out. Again, we will provide more detail in the code of practice about where it is reasonable to rely on an assessment.

The noble Baroness talked about the difference between condition and circumstances, or the complementary nature of the two. If circumstances change and this affects a person's capacity or diagnosis, it would also need to be considered before relying on previous or equivalent assessments. We are reflecting at the moment on whether the Bill as drafted achieves our aim here. So this is a topic for a further conversation to make sure that we can get the appropriate balance in this area without introducing too many additional terms that might in themselves provide greater unclarity—which of course is something we are trying to avoid.

Amendment 30 deals with less restrictive arrangements. This is a principle of the Mental Capacity Act and the Bill makes no change to it. Again, we will provide more detail in the code of practice as to how the new model will work in the wider health and care system, including the Mental Capacity Act and the Care Act.

7 pm

That brings me, at last, to Amendment 50ZA, introduced by the noble Lord, Lord Hunt. I think that its aim is to ensure that the pre-authorisation review is completed by a qualified person, as set out in regulations. As I said, under the current DoLS system, applications will often be reviewed by a senior social worker. We absolutely expect this to remain the case where the local authority is the responsible body. Where a hospital trust, CCG or local heath board is the responsible body, we would expect this role to be conducted by a medical professional. Again, that will be clarified in the code of practice. That is the appropriate mechanism for it, for the reasons I gave: descriptions and qualifications change over time. However, as I also said, since the code of practice will be statutory that will give it force, as will case law.

I have one final point on Amendment 50ZA. I believe that it would also allow responsible bodies to determine in care home cases whether somebody has the necessary skills and experience to complete a necessary and proportionate assessment. I think that was the intention.

Lord Hunt of Kings Heath: No, it was not.

Lord O'Shaughnessy: In which case I will not go any further.

On that basis, I hope that I have dealt as thoroughly as I can with the substance of all the amendments in the group. Clearly, we want to make sure that the evidence is as good as possible when making these very important and serious decisions. As I said, in this instance the code of practice is a good vehicle for much of this work. On that basis, I hope noble Lords will not press their amendments.

Baroness Barker: My Lords, I thank all noble Lords who took part in this debate. It has clarified some matters to a certain extent. I very much welcome the Minister's suggestion that we should meet further. There is agreement on the part of everybody that we want to cut down the number of unnecessary repetitions of assessment, but to do that we need to be quite clear that the assessments are done correctly and by the correct person.

The Minister talked about qualifications changing and wishing to move towards a competency-based arrangement, but the parallel with Mental Health Act and approved mental health practitioners is a good one. All sorts of people from different disciplines and backgrounds are approved mental health practitioners. As the noble Baroness, Lady Finlay, illuminated, a whole number of people from different professional backgrounds could be AMCPs. The important thing is that they have demonstrable expertise in this legislation. I yet again make the point to him that he talks about using different assessments, but assessments under this legislation are not the same as care assessments. They are particular ones. We have not had the discussion about the implications for the changes to Care Act assessments if this Bill goes through, but we need to because we need consistency between the two.

Nevertheless, I am heartened by the Minister's response. We are not quite there yet on this. We need to do a number of different things to make sure there is consistency and clarity across the range of professionals engaged in doing these assessments, and that the people who are being cared for and their families, and care home managers, can have a reasonable expectation that these crucial assessments—it is assessment of someone's capacity; it is a really important one—are done consistently under the Act. It is when assessments are done badly that these things start to unravel. I very much thank the Minister for his response and at this stage I beg leave to withdraw the amendment.

Amendment 21 withdrawn.

Amendments 21A to 25 not moved.

Amendment 26

Moved by ***Baroness Jolly***

26: Schedule 1, page 12, line 9, at end insert—

"(4) If the arrangements are care home arrangements, the assessment must be carried out by an individual who has attended and passed the accredited training authorised by the local authority under section (Training for care home managers)."

Baroness Jolly (LD): My Lords, this group is all about training the professionals referred to in the Bill for the new world. I completely support the amendments from my noble friend Lady Barker and those of the noble Baroness, Lady Hollins. They fit well together. As a group of amendments they cover many training bases. Under the Bill, care home managers will be required to undertake assessments currently conducted by the responsible body, such as the local authority, the NHS or the CCG. While some care home managers and staff will possess a significant

[Baroness Jolly]
knowledge of procedures, the fact that they will now be required to carry out an assessment of whether somebody's liberty is being lawfully deprived and is in the person's best interests will require a much deeper level of qualification and understanding.

At present there are no fewer than six assessments for a DoLS application: age assessments, no refusals assessments, mental capacity assessments, mental health assessments, eligibility assessment and best interests assessments. For care home managers to be able to conduct these assessments to replace the DoLS scheme, they will need the appropriate qualification. In considering what is requisite to become best interests assessors, social workers must complete specific and complex training in addition to their university education. We wish to avoid the inadvertent authorisation of care and treatment arrangements that do not comply with the Mental Capacity Act, so training must include in-depth consideration of that Act and be of a depth that reflects the existing training of best interests assessors.

Other professional training has its roots in secondary legislation in the same way as outlined in the amendment, so we believe it is totally appropriate that training for care home managers in this regard should follow the same pattern. However the Bill ends up, training will be required. I would welcome an indication from the Minister about current plans for training individuals referred to in the Bill. I beg to move.

Baroness Meacher (CB): My Lords, I support Amendment 91, to which I have added my name. There is concern out in the field that care home managers will not be in a position to identify who will undertake the assessments under the Bill. It is not clear what training will be required for assessors. In his earlier comments, the Minister alluded to best interests assessors becoming the assessors under the Bill, but can he confirm exactly who will be undertaking the assessments? Only then can we be clear about what training they need.

The Minister also seemed to give the House an assurance that care home managers would not undertake pre-authorisation reviews. Again, could he confirm that and explain exactly who will undertake the pre-authorisation reviews? Again, the training of these people will depend absolutely on what their role is.

The 2008 regulations define who can undertake assessments. An assessor must be a qualified social worker, psychologist, nurse or occupational therapist. Also specified is precisely what training and testing the deprivation of liberty assessors have to undergo. Even though they are professionals and are required to have two years of experience in their profession, the deprivation of liberty training is also very precise. We need to know the extent to which the professionalism of the present system will be replicated.

The aim of the Bill is to streamline the process for authorising the deprivation of liberty. Any streamlining has to be thoroughly welcomed. I mentioned one idea of the British Association of Social Workers for streamlining. It has another interesting idea: that some streamlining could be achieved if the existing practice frameworks for care assessments and the Mental Capacity Act assessments were combined. The result would be that a trained professional undertook the deprivation of liberty assessments in the course of their other assessment work rather than having separate people. It would require revision of the codes of practice for the Mental Capacity Act and the Care Act, but it could be a useful way forward. Can the Minister explain whether this option has been considered? If not, would he be willing be to meet the British Association of Social Workers, and possibly me, to explore whether it has merit?

At present, we are clear neither about the roles of different people—assessors and pre-authorisation reviewers—nor about what their training might and should be. I would be grateful if the Minister could clarify some of these things.

Baroness Hollins: I am grateful to my noble friend for her support for my Amendment 91, which calls for a comprehensive training strategy to be published to accompany the Act. The amendment comes about in part because little has been said of the training that those in the care sector will receive and on whether they will be resourced to undertake it.

The impact assessment estimates that care home managers will need only half a day's "familiarisation" regarding the new regime. Given my own difficulties in understanding the Government's intention despite spending considerably more than half a day reading and researching it and attending many briefings—many of this during recess—I doubt that half a day would be enough.

One reason for the implementation of the Mental Capacity Act being slow is that health and care professionals probably did not receive enough training effectively to embed the Act in practice. This Bill extends liberty protection arrangements to a much larger group of people, including those living in the community. My concerns in this group of amendments, as in previous groups today, focus on the needs of people with learning disabilities and their families, who make up the second largest group of people who will be affected by these changes—in care homes, in hospitals and in the community. Many of them may have been in receipt of such care for a long time, so we are talking not about a sudden referral for care but something which has been long established and where their current deprivation of liberty may be coming to attention now.

Despite this, the impact assessment does not put a figure on the number of people with learning disabilities who will be affected and thus the number of people in a rather wider range of settings who may need training—I may be wrong about this, but I could not see that.

Any training strategy must also consider ongoing training needs and how they will be resourced. We know that the sector is stretched to breaking point, so any additional, unfunded responsibilities will undoubtedly be keenly felt. The training will also need to address the current power imbalance where people with learning disabilities and family voices are often ignored. The fear is that training will be unable to change this culture and that the power imbalance could become

worse when care home and hospital managers are able to choose whom they consult. So there is a real concern about the culture.

For this reason and others, my amendment recommends that vulnerable individuals and their families be included in developing and delivering the training. Having co-delivered training for health professionals together with people with learning disabilities and families, I know what a difference this makes in bringing pertinent issues to life for those being trained. If the wishes and feelings of cared-for people are to be at the heart of the system, they must be consulted and involved in the training. I would be grateful for the Minister's comments on this and for explanations to noble Lords about how those responsible in the sector will be trained and the resources made available.

7.15 pm

Baroness Barker: My Lords, I have two amendments in this group, Amendments 60 and 62, to which I shall speak briefly. To reiterate, the responsibility for this law lies and remains with the responsible bodies, and not with the care providers. If things go wrong, it is they who will end up in court. Consequently, and rather like the bodies under the Mental Health Act, they retain responsibility for ensuring enough sufficiently trained people are available to ensure that the law is applied properly.

Part of the reason for all noble Lords having such an interest in this issue is that we know from the review of the Mental Capacity Act that availability of trained staff is one of the biggest reasons why the Act failed to be properly implemented. Furthermore, we have statistics on the patchy nature of implementation by local authorities and some in the health service. Some authorities absolutely get this and implement it properly, but a lot just do not. It is an almost random distribution, which has a knock-on effect.

The other reason for noble Lords wanting to talk about these issues is the impact assessment. We have not really talked about the impact assessment for this Bill. The noble Baroness, Lady Murphy, used some particularly strong words, but she let them off very lightly, because I do not see how that impact assessment stacks up. Perhaps I may ask the Minister about one of the many assumptions made in the impact assessment. My understanding is that it assumes that training under this Bill will be needed for 10% of doctors and 10% of social workers. Can the Minister explain—if not now, then perhaps at a different juncture—that assumption and how it has come to be? I would be really surprised if the figure for social workers was 10%. Ten per cent for doctors is possible, but a figure of 10% for social workers needing to be trained under this Bill seems very low. My amendments were designed to enable us to have this sort of probing debate.

Baroness Murphy: I support the comments made by the noble Baroness, Lady Hollins, on some of the training issues. Like many people here, I suspect, I have spent a great number of years training junior doctors in how to use mental health legislation, as well as social workers and occupational therapists. One of the most difficult things is to convey the culture of what we are trying to achieve in legislation of this kind. We all refer to the European court and the agreements, but what we are trying to achieve for individuals and why is difficult for many people to grasp when they have grown up in a very didactic, academic environment, where these things are not necessarily considered.

A key aspect of that cultural shift which is so required is the problems that arise between relatives, carers and professionals over what should happen to an individual. All the way through this Bill, I have been scratching my head and thinking, "Will this solve the Bournewood problem?" All the cases from Bournewood onwards have arisen because of a cavalier approach or attitude by professionals to discussing with relatives and carers what the individual wanted, needed or was used to. If we do not get those things right, we will not solve the problem and there will be another case because it will all be up again for grabs where the professional training has not been accurate.

I note that there are some very specific proposals about care home managers. There are some very specific difficulties about what training care home managers currently have, and it is absolutely basic and rudimentary. It is largely about keeping the accounts right. We need to find a way to get the culture of what we are trying to achieve for individuals and families into this Bill. Exploring those training options is crucial if we are to avoid another Bournewood.

Lord Hunt of Kings Heath: My Lords, the noble Baroness, Lady Murphy, has made a very telling comment. Part of the issue of training is cost. It seems to me that part of this Bill is about cost shift from local authorities, which have found managing this process very difficult, to care homes. We have not discussed this very much, but will the Minister tell us who he expects to pay the cost of this whole process? I suspect that the answer is that it is going to be in charges, mainly for self-funders, who not only will probably pay the cost of their own assessment, but will probably—as they do at the moment—have to subsidise the cost of local authority-funded people who come under the provisions of the Act. Clearly, the Government did the RIA on the basis of trying to show that the cost will be minimal in order to prevent being rumbled on essentially what they are seeking to do, which is clearly to cost shift the public sector in favour of self-funders.

The RIA is simply non-believable, and puts into question quite a lot of the architecture of the Bill. We know that care home managers, as the noble Baroness, Lady Murphy, said, have rudimentary qualifications. We also know that the turnover for care home managers is quite high. Therefore, major new responsibilities are being given to people who are in a sector where they are often pretty poorly paid; they do not have much training, and they do not have professional qualifications in many cases.

Training is very important indeed, and we need to have some answers as to how this is actually going to happen and who is going to pay for it. If the answer is that it will mainly be paid for by self-funded, vulnerable people, I do not think that is right.

Baroness Jolly: My Lords, I want to reflect on training and the cost of training. What is really interesting is where it is put on the balance sheet. If training is seen as a cost to an organisation, people will complain and feel that it is not necessarily money well spent. If training is seen as an investment, however, and is treated as such—certainly for local authorities—it would be a really good investment if it avoided court cases leading to very high legal bills. If training could be seen as an investment rather than a cost, while the problems will not go away, people might learn to think about things differently.

Baroness Finlay of Llandaff: My Lords, unless training becomes mandatory on some level, the problem is that we will always train those who are willing to be trained while not reaching those who perhaps need to be trained more. If we could make training a little bit like fire training or manual handling, with very short bursts of realistic training, it might be much more effective. Over the years I have seen very costly, ineffective training and very low-cost extremely effective training. Often the most effective training includes a realistic assessment because assessment drives learning. I strongly support the comments made by my noble friend Lady Hollins because case-based training involving the people themselves has a huge emotional impact and therefore embeds change in the behaviours and attitudes to the person on the receiving end. On a slightly optimistic note, I am rather hoping that within Wales, we might manage to get an agreement that all doctors at every grade need at least a minimum awareness of the Mental Capacity Act and that we might then be able to build on that. I keep my fingers crossed.

The other point that we have to be careful of when we talk about training is that this is not about broadcasting information that might sound quite legalistic and frightening. One of the most important skills is listening, and listening skills have often failed in these cases, such as the ones referred to already in which the relatives were not listened to early on. They were not believed early on, the cared-for people were not adequately listened to and things spiralled down. Some of that lack of listening is just a result of poor communication skills training. I am not sure that we have to be overspecialised, but we need to raise the skills of everybody across the board. It needs to be embedded in revalidation—you might train somebody now, but in five years' time there will be drift. The training, therefore—particularly if people are being trained to take on specific responsibilities—needs to be refreshed over time to ensure that it remains authentic.

Baroness Thornton: My Lords, this has been a very useful and essential discussion about training. The noble Baroness, Lady Hollins, is quite right that there needs to be a strategy. I am concerned that there does not seem to be a strategy, so can the Minister tell us what consultation there has been about how this training—even the minimal familiarisation—would be achieved? Even the Minister accepts that that is clearly not going to be acceptable.

In terms of the stakeholders, the MHA—a charity providing care, accommodation and support for older people throughout the UK—heard from a care home manager in Hereford, who said, "As home managers without a mental health nursing background, it would be impossible to expect a home manager to undertake these assessments, as with the continuing health assessments, which we are deemed unable to complete as we are not healthcare professionals". Well, quite.

Age UK says that at present there are no fewer than six assessments for a DoLS application. In order for care home managers to be able to conduct these assessments—or indeed be party to them, if only to act as secretaries, as outlined by the noble Baroness, Lady Finlay—they are going to need the requisite training.

The LGA point out that the Government should recognise the problems caused by these additional responsibilities and the financial pressures—as mentioned by my noble friend Lord Hunt—put on care homes by the provisions in the Bill, especially when the sector is already facing significant challenges in terms of both resources and workforce recruitment and retention.

Voiceability expressed its concerns about the new requirements on care home managers. It is concerned that this transfer of responsibility sets up potential conflicts of interest, which we have already discussed. Mencap says that there has to be significant consultation with the care sector about the implications of the new requirements on care home managers.

I am just wondering how we have got to this point in the Bill without that consultation having already taken place. We need to play catch-up because this is such an important area: not only are there funding implications, but we should not be expecting people who do not have appropriate skills to be carrying these responsibilities.

7.30 pm

Lord O'Shaughnessy: My Lords, I thank all noble Lords who have laid these amendments and contributed to this debate. The issue of training has obviously had a high profile in our discussions, from Second Reading onwards. I think we are all agreed that we can move to the system we want only if the people involved in delivering it have, in the previous words of the noble Baroness, Lady Thornton, the capacity and capability to do so. Again, I would like to deal with these amendments in groups and with other issues mentioned in the debate as they arise.

Amendments 60, 61 and 61A, tabled by the noble Baronesses, Lady Barker and Lady Finlay, would require local authorities to appoint a named officer responsible for the training, conduct and performance of approved mental capacity professionals and would give the Government regulation-making powers to prescribe the period of time within which an individual must be reapproved to continue to practise as one. The Bill is already clear that local authorities have the responsibility of approving individuals to become approved mental capacity professionals; subsequent regulations will make provision for training and eligibility for approval. Of course, this will build on the existing best interests assessor system that has been referred to, and which I believe is generally held in high regard.

The regulations will allow for a prescribed body to specify their training; in England, this is expected to be undertaken by Social Work England—the noble Baroness, Lady Meacher, raised a question on that. However, the local authority will clearly need to monitor the post-education training, conduct and performance of approved mental capacity professionals in order for such a professional's approval to be continued. It is correct that we have not set out in the Bill how this should operate. The reason for that is to allow local authorities to decide for themselves how to organise and manage it, assisted, where relevant, by the code of practice.

With regard to the reapproval of AMCPs and in regard to Amendment 62, tabled by the noble Baroness, Lady Barker, we do not think it is necessary for the Government to give themselves this regulatory power to prescribe timeframes. Instead, it can be set out in the code of practice, which again is suitable for something as specific as this.

Many noble Lords, led on their amendments by the noble Baronesses, Lady Hollins and Lady Jolly, highlighted that, as we know, a huge amount of work will be required in the health and social care sector to implement the new system. Amendment 91, tabled by the noble Baroness, Lady Hollins, would require the Government to publish a training strategy. This does not in my view need to be set out in the Bill, but I can give a commitment this evening that a training strategy will be published within six months of the Bill's passing.

Amendment 90, tabled by the noble Baroness, Lady Jolly, would give the Government regulation-making powers to prescribe the body responsible for training care home staff. Clearly, we will need to have and are committed to providing the necessary training to care home managers for their new role. That will include developing a range of training materials, co-produced of course with the sector, and other support for a range of roles in the workforce. We will be providing our statutory code of practice and other guidance to do that. We are already working with the Association of Directors of Adult Social Services to help shape this work. We are also beginning to explore a comprehensive programme of work on supporting this model by working with Health Education England, Skills for Care, the Social Care Institute for Excellence, the royal colleges and others. It is clearly important that we work with all providers to ensure that we have the right training strategy and deliver it through training providers endorsed by Skills for Care, which is the Health Education England-like body for social care, as noble Lords know.

We of course recognise that there is a cost to the sector. The noble Lord, Lord Hunt, and the noble Baroness, Lady Hollins, asked about the half a day's training. We clearly recognise that more training than that is required. The noble Baroness, Lady Barker, asked about some of our assumptions on the 10% and I will come to her with more detail on the reasoning for that. In a regulatory impact assessment, it is always the case that you produce a version of what you think might happen. The reality will no doubt be somewhat different, but we recognise that there will be a cost for the sector to prepare to implement this new system, once it comes into being.

We are therefore considering what is called a workforce development model to ensure that that training is of high quality. This would allow us to provide financial help to providers to assist with training and events. The fund is flexible and would enable employers to support their staff, not least in providing backfill for them while they undertake training. It could also be used to pay for an instructor to conduct the training. I know that there is a desire to understand more not just about training but about how we will fund it. I can reassure noble Lords that there will of course be a comprehensive and properly resourced training programme in place.

I do not believe that regulation-making powers or details are required in the Bill, but I also recognise that the proof of the pudding is in the eating. As we have discussed since Second Reading, noble Lords will want to see much more detail about our intentions in this regard. What I can say is that I will do everything I can to facilitate that development, so that there can be the right degree of confidence that the training programme and its funding will be forthcoming to support the implementation of the new system.

Noble Lords raised a few other issues in the discussion. The noble Baroness, Lady Meacher, said that we need greater clarity on the roles of various people. I think we covered that in our earlier discussion of care home managers. The noble Baroness, Lady Hollins, made an excellent point about making sure that training includes the skills to work with working-age adults with learning difficulties. Using those people and their families to co-produce training is also an absolutely excellent idea, which I would like to take up with her.

Perhaps I may deal with two other issues. First, the noble Baroness, Lady Murphy, talked about cultural change. Training can help but of course it does not deliver a cultural change. We have to think carefully as we go forward about the other levers that exist to any Government to provide that cultural change that go beyond the standard ways of doing things. I would be interested in pursuing that discussion with noble Lords outside the Chamber.

Secondly, the noble Lord, Lord Hunt, asked about cost shift. There will clearly be a redistribution of responsibility, but the intention of these changes is that they should deliver a system that not only delivers justice to people who are currently denied it but does so in an affordable way, moving funding away from duplication and complexity towards greater caring. The intention of the Bill is not to rob Peter to pay Paul, as it were, but to ensure that there is a properly resourced and deliverable system and that its different parts are trained and capable and have the capacity to deliver the responsibilities that we are asking them to fulfil.

On that basis, I again thank noble Lords for a very useful discussion. There is clearly more detail that we can and will want to provide as the Bill progresses. I hope that noble Lords will feel content not to press their amendments.

Baroness Jolly: My Lords, I thank all the speakers who took part in this debate and I thank the Minister for such a comprehensive and positive response. Taking all that into consideration, I beg leave to withdraw my amendment.

Amendment 26 withdrawn.

Amendments 27 to 30D not moved.

House resumed. Committee to begin again not before 8.25 pm.

Property Guardians

Question for Short Debate

7.40 pm

Asked by ***Baroness Jones of Moulsecoomb***

To ask Her Majesty's Government what assessment they have made of issues relating to the protection of property guardians.

Baroness Jones of Moulsecoomb (GP): My Lords, first, I thank the London Assembly's cross-party housing committee and its chair, my Green Party colleague Siân Berry, for doing the work on which this debate is based. I recommend its report, which will explain fully the situation of property guardians and the problems they face. Property guardians are people who act as a kind of security for sometimes interesting empty buildings—for example, schools or unused cinemas—but the law has not kept up with this new form of renting and such property guardians have no legal protection.

I shall start by laying out what I hope to achieve from this debate. I want to ensure that people living in a vulnerable housing situation are properly protected; I want to ensure that this issue is on the Government's radar; and I want the Government to see that this is an issue with challenges that also presents a massive opportunity to put empty buildings to use in housing more of our population.

In England alone it is estimated that there are 279,000 long-term empty residential properties. If we add the number of empty commercial properties and places such as closed-down care homes, we could probably double that number. It is a total waste for them to be left empty when so many people are living on the streets, sofa surfing or staying with their parents because they cannot afford to live elsewhere. Councils spend huge amounts of money putting people up in temporary accommodation while a huge property down the street might be completely empty and costing someone money on security.

People have written to me ahead of this debate telling me how much they have enjoyed living as property guardians, sharing unusual properties with interesting people at a reasonable price in some of London's most overheated property markets. For many guardians it is a fun lifestyle that saves them money. For property owners, property guardianship is an attractive option. Having property guardians living in an empty building can be much cheaper than the traditional options of boarding the place up or hiring private security. Any problems such as burst pipes can be reported immediately and damage minimised. Trespassers and vandals can be deterred by the property being occupied. These are the positives which show the massive opportunities that property guardianship can offer. That is why part of what I am calling for today is for the Government to embrace property guardianship and make it part of their housing strategy.

However, property guardianship is not without its flaws. The report from the London Assembly's housing committee highlighted a number of them and asked the Government to act. The biggest issue is that property guardians seem to exist in some murky grey area of housing law. This has made it difficult for people living in those situations to enforce their legal rights, or even work out what those rights might be. Local authorities and other statutory bodies seem unclear about what enforcement powers they have over guardianed properties. As a result, some people are living in completely unsuitable properties that are outright dangerous. In one case, the fire service closed down a property which posed an "imminent danger to life". In less extreme and much more common situations, guardians report feeling unable to raise concerns with their management company for fear of facing retribution or being evicted.

These concerns are made possible by the fact that property guardians have very little in the way of housing rights. The majority of the legal protections that apply to a normal rental agreement do not apply to property guardians. This is because they live under a licence agreement rather than a tenancy agreement. The differences are stark. For one, the statutory eviction protections under Section 21 of the Housing Act do not apply. People are not protected from being evicted in retaliation for raising concerns, there is no deposit protection and none of the contractual terms implied in tenancy agreements, such as a requirement to keep the property waterproof, are implied in a licence agreement. By far the most common complaint I have come across is regarding the underprovision of toilets and sanitary facilities. I am not sure what, but something seems to cause multiple toilets to break down in these properties, leaving only one or two bathrooms available for sometimes more than 20 residents. This kind of situation is unacceptable and needs action, but local authorities do not seem to understand how to apply the relevant legislation.

Property guardians used to be people who wanted to stay in hip, trendy places and live cheaply, but research is showing a move towards people in full-time employment who earn below average incomes. For many people, especially in London's overheated housing market, property guardianship might be their only option to live somewhere affordable without having a two-hour commute to work. It really is becoming a stopgap for the failure to provide affordable housing.

The property guardian industry is dominated by a small number of companies which essentially connect guardians with empty properties. I was pleased to get an email telling me that an industry association has been formed, literally two weeks ago, in response to the London Assembly's report. I am told that, collectively, this group is responsible for more than 80% of the

property guardians in the country. It aims to work together to create common standards and improve the conditions in which property guardians live. It is developing a deposit protection scheme and a complaints process. I welcome the creation of this body. Will the Government meet them to hear more of the problems and the solutions?

Having said that, it cannot be left to the industry alone to patch the gaps that currently exist in the law. I was frankly appalled by the Government's initial response to the issues raised in the London Assembly report. It just does not make sense to me. The Minister wrote to Siân Berry, the committee's chair, saying that,

"we do not encourage such schemes and I do not have any plans to introduce regulation in this area which could be regarded as tacitly endorsing the use of property guardianship schemes as a legitimate housing option".

The Minister went on to say:

"People are free to make their own housing choices, and I do not have any plans to stop the use of property guardianship schemes. However, it is very important that anyone considering living in such a building clearly understands the limitations of these schemes and that they will have very limited rights".

I really hope that that is not the response I will get from the Minister tonight.

From those statements, it is clear that the Government recognise that there is a big problem in terms of housing rights for property guardians. However, rather than doing anything to help, the Government have said that it is not a legitimate housing option but that people are free to make their own decisions. This means that the Government have both rejected the big opportunity posed by this, while simultaneously rejecting giving property guardians any rights. That really is not very good.

The only action promised was in the final paragraph of the Minister's letter, which said:

"My Ministry has, therefore, committed to publishing a short factsheet on its website which highlights the fact that the Government does not endorse these schemes and draws attention to their clear drawbacks, including the fact that the buildings may frequently be unsuitable to be used as accommodation and that an occupier of such buildings has very limited rights".

It seems odd to me that the Government recognise that there are such large potential problems and that people have such limited rights, but they do not either fix the problems or ban the practice altogether. Just sitting on the fence and doing nothing is the worst possible option from a public policy perspective.

To me, it is obvious that something needs to change. The people living in these schemes say change is needed, and the industry has formed a body to make change. So it is only the Government who support inaction. There are three obvious action points for change. The Government should review the whole body of housing law and its application to property guardians, and, where there are gaps, they should legislate. The Government should produce statutory guidance for local authorities and other bodies which sets out how they should apply the laws regarding property guardian schemes. Government leadership is needed to ensure consistency. The Government must stop putting their fingers in their ears and ignoring property guardianship. They should make the law fit for purpose and then make property guardians a small but key part of their housing policy.

At the beginning of my speech I omitted to thank the noble Lord, Lord Kennedy, who drew my attention to the report and encouraged me to request this debate.

7.48 pm

Lord Shipley (LD): My Lords, I remind the House that I am a vice-president of the Local Government Association. I welcome this debate and thank the noble Baroness, Lady Jones of Moulsecoomb, for bringing this important issue before the House.

During the passage of the then Housing and Planning Bill in April 2016, the noble Lord, Lord Beecham, moved an amendment on this matter. He expressed a number of concerns which I thought were justified, and we on these Benches were strongly supportive of them. Despite the Government winning that vote, I think it is time for them to look again at the issues underlying the guardianship schemes. While there are only around 5,000 to 7,000 property guardians in the UK, the number is likely to rise significantly. In the Netherlands there are some 50,000 property guardians, and we have a much higher population here so a rise seems likely. Yet in the debate on the Bill the Government refused to acknowledge that they had a role, as the noble Baroness, Lady Jones, has mentioned. The noble Baroness the Leader of the House said on 11 April 2016:

"We as a Government do not endorse these schemes and do not have any plans to introduce new regulation in this area as we believe that doing so could be regarded as tacitly endorsing the use of property guardianship schemes as a legitimate housing option".—[*Official Report*, 11/4/16; col. 111.]

The Government's subsequent factsheet for current and potential property guardians confirms this in paragraph 3, which says:

"The government does not endorse or encourage the use of property guardianship schemes as a form of housing tenure".

I have come to the conclusion that that is insufficient in the circumstances. It may be true that a number of protections exist in law already for licensees acting as property guardians but they do not cover everything, and it is surely the role of the Government to regulate when regulation is needed. In the Netherlands the property guardianship sector has created an independent property regulator to set standards and monitor compliance. It also has a complaints board. Even though membership is not mandatory, it means that standards are clearly defined. I understand that in this country there is to be a property guardian providers association, and I welcome the fact that seven providers covering 80% of the sector are involved, although that of course raises questions about the other 20%. It will be interesting to see how its powers and effectiveness compare with the Netherlands, but I nevertheless welcome the efforts being made by the sector itself.

I acknowledge the work of the London Assembly and the 11 recommendations in its report published earlier this year. For the time being this is primarily a London issue, but there are signs of growth across the country so what is done in terms of property guardians in London will be relevant elsewhere. There would be merit in taking the London Assembly's 11 recommendations and the mayor's response and using it as the basis for consultation. Issues needing

[Lord Shipley]
clarification concern redress schemes, deposit schemes, the role of the planning system, financial issues around business rates and council tax and the absence of property guardianship as a form of tenure from any existing legislation.

In principle I agree with the noble Baroness, Lady Jones, that, properly run, property guardianship can be beneficial to both landlord and licensee. It gets empty property into use and gets it looked after, and for many people the system works well. For the landlord, they have someone helping to protect the property. For the licensee, it is usually much cheaper than a conventional tenancy; it means that they can save more for a deposit to purchase a home; it means they can leave at a month's notice; in most cases they have the benefit of being with other people; and it can be more conveniently located for them in terms of work. It gives opportunities too for social enterprise and, through social enterprise, for volunteering. I noticed that one of the companies involved, Dot Dot Dot, has a requirement for 16 hours of volunteering a month. This approach is to be commended.

The problem is that there is also a downside. As we have heard, it is usually not residential accommodation that is used, and some licensees can be exploited simply because they urgently need somewhere to live that they can afford in the absence of sufficient social housing. As a consequence they can end up in poor accommodation, and there have been numerous reports of poor plumbing, poor lighting, dirty conditions, a lack of adequate fire protection—that is, conditions that do not meet the standards required for residential accommodation. Indeed, in their factsheet the Government seem to admit this. Paragraph 8 says that the properties may be,

"in poor, unsafe and unclean condition with poor physical security and limited access to facilities".

The key question is whether the properties are meeting regulatory standards that would apply to residential accommodation. I am afraid I do not think it is enough simply to advise licensees that they should approach their local housing authority or citizens advice bureau. It takes a lot of time, knowledge and effort to complain in that way. Clearer, publicly understood regulation would be so much better.

There is a remaining issue that I hope the Minister may be able to comment on: the implications of the Bristol judgment, where a property guardian was confirmed in his view that he was actually an assured shorthold tenant, not a licensee. The reaction to that judgment seems to be that you simply have to reword the licence to turn a tenancy into a licence, but I would appreciate the Government's view on that because it seems to me to be a very important judgment. Indeed, the question sums up the need for clarification on the rights of property guardians as a whole.

The noble Baroness, Lady Jones, said she wants this issue to be on the Government's radar. She also said there was a massive opportunity to use empty properties. I concur with both views: there is a massive opportunity here but, because of that and because many more properties might become used under licensee terms as property guardianship, there is a need for the Government to ensure not just that the issue is on their radar but that they have regulated when regulation is needed.

7.56 pm

Lord Beecham (Lab): My Lords, I refer to my local government interests as an honorary vice-president of the Local Government Association and a councillor in Newcastle. I join the noble Lord, Lord Shipley, in congratulating the noble Baroness, Lady Jones, on bringing this important issue to the attention of the House—such as it is composed of this evening. She is initiating a debate that will go rather wider than the small number of Members here tonight.

I first came across the concept of property guardians, as the noble Lord, Lord Shipley, indicated, in February 2016 during the passage through the House of the ill-fated Housing and Planning Bill. At that time, it was estimated that some 4,000 people were living as property guardians, often at high prices and, increasingly, in unsuitable living conditions. The properties involved were frequently disused former commercial buildings, often awaiting sale or major alterations. A Durham University academic, in the course of looking into the issue at the time, found one space formerly occupied by three people that was then occupied by 15. Properties used for this purpose, ostensibly to ensure that they were not vandalised, often had limited kitchen and sanitary provision and their owners paid no business rates.

I urged the then Minister, the noble Baroness, Lady Williams, who confessed to not being briefed on the issue, to bring forward an amendment to the Bill. She wrote to me and confirmed that,

"property guardianship schemes have a range of drawbacks",

adding that buildings,

"may be in unsafe condition with inadequate physical security",

and that guardians can be,

"required to leave at short notice".

However, all that the Government proposed to do was to,

"publish a short factsheet on its website which explains that the Government does not endorse the schemes, that buildings may frequently be unsuitable to be used as accommodation and that an occupier of such buildings has very few rights".

In Committee she said:

"The Government do not support the schemes",—[*Official Report*, 9/2/16; col. 2223.]

but did not believe it was appropriate to apply the relevant parts of the Landlord and Tenant Act to guardianship agreements.

The noble and learned Lord, Lord Mackay of Clashfern, expressed sympathy with my view and wondered,

"whether it is possible to build something satisfactory on a foundation so unsatisfactory as a guardianship scheme for residential property".—[*Official Report*, 11/4/16; col. 111.]

Alas, he still voted with the Government and my amendment to apply the Landlord and Tenant Act provision for human habitation and repairing obligations was defeated.

We now have between 5,000 and 7,000 people living as property guardians, mainly in London, as we have heard, no longer just young people looking for a cheap place to live and work for short periods but now up to

60 years of age and older and apparently staying for much longer than used to be the case—and still without the protection afforded by an assured shorthold tenancy.

The London Assembly's housing committee report, published last February and referred to by both noble Lords, identifies many concerns, not least in relation to the condition of the properties: 22% relating to repairs and maintenance and 37% cited mould and condensation. The guardians are either unaware of or too worried to seek support from the local authority's powers to address those issues. They even have to pay for fire safety equipment. For this far from satisfactory provision, York University has discovered that guardians pay an average of 37% of their income, which, in turn, averages £24,800 a year—the latter being significantly lower than the average for tenants of private rented property in London.

The Assembly report identifies a problem in that, where a commercial building is used for guardians, they have to pay commercial rents for utilities, phones and internet access, which can be much higher than for residential properties. In addition to regular costs of that kind, they may face difficulties in securing the return of deposits and, in addition, fork out an average of £148 for references, fire safety checks and criminal record checks.

It is also disturbing that some licensing agreements bar guardians from raising concerns about the property even with the owner, let alone the local council or, tellingly, local media. The report recommends that the mayor and the department should provide guidance about the legal rights of guardians and where they can access help. It would be even better if they could obtain legal aid and advice, although of course this is effectively limited in housing cases to eviction and repossession cases. Of course, any such recommendations would apply also to places other than London.

It is not just guardians who are affected by the system. The London report points out that guardianship can save owners up to £2,000 per week compared to engaging professionals, as well as reducing insurance costs. Of course, owners of properties with resident guardians will save the cost of council tax and empty business rates—up to as much as 90% for the latter. This is an issue which the Government should also look into.

The report makes a number of recommendations for the oversight and improvement of the sector in the context of a better system of regulation, citing the examples of the Netherlands—already been referred to by the noble Lord, Lord Shipley—and France. Crucially, the London report calls for clarification of what the Housing Act 2004 applies to property guardian premises and, if not, for the Government to bring forward the necessary legislation. Will the Minister undertake to look into these and other issues raised tonight and report back?

It is only fair to say that some businesses in this growing industry are adopting a responsible approach, as referred to by the noble Baroness in moving her Motion. Seven leading companies in the field, which provide 5,000 places—some 80% of the sector—have formed the Property Guardian Providers' Association, aiming to promote, monitor and ensure safety standards and regulations are adhered to or exceeded by its members, securing temporarily vacant properties and providing safe and viable low-cost accommodation. In addition, it is issuing a set of benchmark standards, including: a redress scheme, under which a guardian can take a complaint to a redress panel; security payment protection, requiring members to prove that they have set up separate guardian accounts for payments and comply with rules for handling the accounts; and prescribing transparency of fees. I suggest that the Government should consult the association about developing a common standard for the whole sector and make this a condition of a licence to provide property guardianship schemes.

Guardianship should be limited to the type of property originally exemplified, where the notion of guardianship implies a temporary usage pending redevelopment for a non-housing use, and not extend to ordinary residential properties, for which of course, lamentably, there is already large unsatisfied demand. Those properties ought still to be available for either owner occupation or rent; as opposed to what was originally thought to be temporary occupation, where guardianship relates to non-residential buildings left vacant until such time as they came into use again.

8.04 pm

The Parliamentary Under-Secretary of State, Ministry of Housing, Communities and Local Government and Wales Office (Lord Bourne of Aberystwyth) (Con): My Lords, first, I thank the noble Baroness, Lady Jones, very much for bringing forward this issue, which I take seriously and do not dismiss as others may have in the past. It is an issue of significance, and I welcome the work done by the London Assembly and the University of York. I assure her that I am looking at it closely. Perhaps I may deal first with the contributions made and then outline my proposals, which noble Lords have probably kindly suggested that I do anyway, for the new association, which I also welcome.

First, the noble Baroness was very balanced and fair and said that this is often something that we should embrace and can work very well. Without really thinking about it, much as Monsieur Jourdain spoke prose without realising it, I suddenly thought, "I have been a property guardian in my past before these things were fashionable", looking after a house for family friends who were overseas for a period. Such informal arrangements often—indeed, almost invariably—work well, and I am sure that is the case now.

There are worlds apart: this covers a wide area of activity, as I think noble Lords would agree. Some of it is clearly not the sort of thing that we should be legislating for; some of it is where, if not legislating—legislative time at the moment is precious, and there may be a need to move more quickly—we should be looking at what we can do. I am certainly keen to do that.

Again, I thank the noble Baroness for bringing the issue forward. The noble Lord, Lord Shipley, was, as always, very fair. He said that the scenario had changed. Over time, I am sure that that is what has happened. Like the noble Baroness, the noble Lord, and the

[Lord Bourne of Aberystwyth]
noble Lord, Lord Beecham, I welcome the new organisation, of which Graham Sievers is the acting chairman. It has not yet had its first official meeting or launch. As I understand it, that will happen on Thursday in Birmingham—perhaps we have had the same email. I am keen to meet Graham Sievers, and we have already taken steps to ensure that that happens to see exactly what is being done to promote best practice and safety among the organisation's members. I think the organisation includes seven of the United Kingdom's leading property guardian companies, and I shall discuss with ministerial colleagues how we take that forward. I shall endeavour to meet Graham Sievers as quickly as feasibly possible, if he becomes the chair, as this suggests he will, to see what the organisation proposes and report back.

The noble Lord, Lord Shipley, asked me to comment on the Bristol judgment, which was really a question about whether that arrangement was a tenancy or a licence. The significance of that and other decisions is that what the agreement says is not necessarily definitive of the position. It can say that it is a tenancy but be a licence and vice versa. It is about weighing up all the circumstances, and each case, as lawyers say, will turn on its own particular facts. That is probably not incredibly helpful to the noble Lord, but it indicates that it is about the nature of the agreement, rather than what it is called.

In the normal course of events, if someone is a licensee rather than a tenant, they still have rights, of course. In all but a few excluded licence cases, there would, for example, be protection under the Protection from Eviction Act of 28 days' notice. That base right would exist. The housing, health and safety rating system would apply, as would electrical safety hazards protection, in so far as this is a dwelling. There may be issues about whether a particular arrangement is a dwelling. Normally, if someone is resident on premises, it makes it a dwelling, but I appreciate—and would want to probe this a little further—that that is not necessarily conclusive. Similarly, the rules on gas safety, smoke, carbon monoxide arrangements and so on would apply under a licence as well as a tenancy. I appreciate that it is a lesser level of protection, but it is not that there is no protection at all.

Options that I want to probe certainly involve best practice and disseminating it. That may mean working with this new organisation and certainly with the GLA. I am very happy to correspond with it on this issue, which I have not done as yet. Improving enforcement guidance seems to me quite important, because, as I say, there are rights at the moment, and maybe they are not always enforced or known. There is work to be done supporting occupants and raising awareness, and I agree the outline we have about the factsheet is not, of itself, sufficient. We need to make it more widely available, disseminate best practice and look at enforcement guidance. These are things I intend to carry forward and report back on. I am very happy to meet the noble Baroness in the interim. As soon as I have spoken to the nascent organisation, I will seek her out for an informal word about how we can carry this forward before writing to the Peers who have participated in this debate and putting a copy in the Library.

In short, this is an issue worthy of attention; I certainly do not dismiss it as having no merit. I will discuss it with colleagues in the department and report back. Once again, I thank the noble Baroness for bringing this forward and noble Lords who have participated in this debate.

8.11 pm

Sitting suspended.

Mental Capacity (Amendment) Bill [HL]

Committee (2nd Day) (Continued)

8.25 pm

Amendment 31

Moved by ***Baroness Jolly***

31: Schedule 1, page 12, line 18, at end insert—

"(3) Where any interested party objects to the determination that arrangements are necessary and proportionate, an Approved Mental Capacity Professional (AMCP) must be engaged and the AMCP may, where they deem it necessary, refer disputes to the court."

Baroness Jolly (LD): My Lords, a cared-for person has rights, and it is the duty of all those dealing with that person to understand those rights and to ensure that they are respected and recognised. I am certain that the rights of a cared-for person should be at the heart of liberty protection safeguards. One way to ensure this is to provide an automatic referral pathway to an AMCP in those cases of dispute, objection or disagreement that cannot easily be resolved. We know that a group of cases referred to court has been pivotal in ensuring that people's rights are upheld in the field of mental capacity. These cases provide AMCPs with the authority to refer to the court. If this authority is on the face of the Bill, it will provide an added level of reassurance that the interests and wishes of the cared-for person will be fully considered.

Cared-for people are found in many different settings in this context—in hospitals, care homes and, indeed, their own home—whether they are supported by friends and family or by a care provider. I believe that this amendment will have particular relevance in cases involving potential deprivations of liberty within the cared-for person's own home. Although the Minister's letter addressed after Second Reading stated that all applicants will be subject to an independent review before authorisation, the Bill as it currently stands does not reflect this—nor the ability of the AMCP to refer to the court any issues that have evaded amicable resolution. I wonder whether the Minister will look at this when he sums up, and bring back some government amendments on Report to resolve these omissions.

Baroness Barker (LD): My Lords, some amendments in this group are in my name. The purpose of putting these amendments down is to enable a debate about the extent to which the Bill relies on family members to take responsibility for escalating up and—as it seemed to us when we started to read the Bill—challenging

care home providers, as well as challenging any deprivation of liberty. We know from the experience of Mark Neary that he relied heavily on provisions of the Mental Capacity Act—particularly covering review procedures—to equip him with what he needed to challenge what was being done to his son. It seemed to us that, because of the way the Bill was written, there was a greater expectation that it would fall to relatives to bring matters before the court, which is not easy to do.

We realise that going to court is an expensive and time-consuming business. We do not want to refer cases to court where there is no need to do so—we want to rationalise—but in our view this part of the Bill is inadequately written. It does not contain sufficient safeguards, and therefore we wanted a debate on these matters to probe exactly what support family members will have where there is a need to challenge decisions made under LPS.

8.30 pm

Baroness Finlay of Llandaff (CB): My Lords, I have Amendments 47 and 50 in this group. They are concerned with the point at which court proceedings are triggered. It is appropriate that there is an ability to appeal, but it is also important that courts are not inundated and that disputes are resolved outside court as much as possible. Going to court should be the last port of call, but it should be accessible and should occur only when other interventions such as mediation have failed.

Sadly, sometimes cases need to go to court, which is why I have worded an amendment to allow the AMCP to consider going to court as part of their role. However, the AMCP must also be able to verify information and meet independently with the primary source—that is, the cared-ford person. That might mean setting up a meeting well away from other people who have previously been involved so that they can form their own view on whether there are other avenues that might be pursued before resorting to the court.

Baroness Hollins (CB): I have added my name to Amendment 49 in the name of the noble Baroness, Lady Barker. My concern is that a failure to meet the person directly might lead to a desk-based review, which would not enable the necessary scrutiny of the appropriateness of the care arrangements.

Baroness Meacher (CB): My Lords, I support Amendment 45 in the name of the noble Baroness, Lady Jolly, and Amendment 47 in the name of the noble Baroness, Lady Finlay, to which I have added my name. These amendments strengthen the human rights-based duties of the approved mental capacity professional.

As it stands, the Bill weakens considerably the abilities of a person or their family or friends to exercise the convention right, under Article 5.4, of any detained person to take their case speedily to court. I think that all noble Lords understand perfectly well how this has come about. Paragraph 36 of Schedule 1 seems to indicate that an IMCA will be appointed only if the care home manager gives the relevant notification. I would be grateful if the Minister could clarify in what circumstances an independent mental capacity advocate would not be appointed under the new system.

At Second Reading, I raised my concern that the Bill was going ahead before we knew the outcome of the Mental Health Act review. The Law Commission urges the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals to review the question of the appropriate judicial body to determine challenges to authorisations of deprivation of liberty under the Bill. The Law Commission also urges the establishment of a single legislative scheme governing non-consensual care or treatment of both physical and mental disorders where there is a lack of capacity.

At that point I have to delete chunks of my speech, having just had a meeting with Sir Simon Wessely, head of the Mental Health Act review, and Judge Mark Hedley, a former head of the Family Division, who knows all about mental capacity and everything associated with it. The Mental Health Act review will recommend that there should not be a bringing together of the Mental Health Act and this legislation. Therefore, I hereby withdraw my concern expressed at Second Reading.

As I said, following that meeting, I have deleted chunks of my speech, and I am not quite sure where I can pick it up again. Basically, they agreed with me—we agree about everything, in fact—that appeal to a court should be an absolute last resort. It goes without saying that court cases are incredibly time-consuming, stressful and expensive. It has to be seen as a failure of the system if recourse to a judge is needed. I certainly have a great deal of sympathy with the argument that, as far as humanly possible, we need to focus all the resources we can on the care of individuals, whether in the community or elsewhere.

We know that, if a court demands reports, the care of the patient has to come second to those reports being produced. This comes at a time when 10% of psychiatrists' posts are not filled and vast numbers of all doctors' and nurses' posts are not filled, and it is proving more and more difficult to recruit—we will not mention the reason why. It seems to me, following discussion with Simon Wessely, that it is crucial to get the process right to minimise the need to access the courts. That is what his Mental Health Act review will concentrate on, albeit it will be a lot more liberal and professional than the current Act. It is an excellent process so that we can reduce the need for access to the courts.

Baroness Thornton (Lab): My Lords, I have added my name to Amendments 31 and 48 from the noble Baroness, Lady Jolly. Apart from supporting the amendments and regarding the approved mental capacity professional as an issue of great importance in the Bill, I did so to be able to ask a few questions.

It might be simply that I do not understand, but my concern is this: how will the person who cannot object, but who needs to object, do it? The Bill states that people can automatically access the approved mental capacity professional if they object, but what happens for the person who cannot object but probably ought to? Who decides that a person's family or those around

[Baroness Thornton]
them will be consulted to make sure that, if there is a need for an objection, it is heeded, which then puts them in the right place to access the AMCP? Those concerns have been expressed by lots of our colleagues in different ways. It is still not clear to me how that will happen. How will that person be protected under those circumstances?

Baroness Stedman-Scott (Con): My Lords, I thank all noble Lords for initiating this discussion about approved mental capacity professionals and providing me with an opportunity, for the first time ever, to respond to amendments to a Bill.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): Hear, hear.

Baroness Stedman-Scott: I thank my noble friend for that intervention. I have been hugely impressed by the commitment on all sides of the House to interrogate this Bill to make sure that it is fit for purpose and does the right job for the people we all seek to serve.

The amendments from the noble Baronesses, Lady Thornton, Lady Jolly and Lady Finlay, would have the effect of requiring that, in each and every case referred to an approved mental capacity professional, the AMCP would have to explicitly consider whether the case should be referred to the Court of Protection. We are clear that if a person wants to challenge their authorisation in the Court of Protection they have the right to do so. However, part of the reason we are creating the approved mental capacity professional role is so that cases where the person is objecting to the proposed arrangements can be considered outside having to go court, which we expect to be in line with the people's wishes. It is always good to remind ourselves—as has been done many times during today's business—of what we are trying to achieve and what we are trying to avoid. If we can avoid going to court, as has already been said, but serve people well, then we will have achieved something.

I am conscious that we do not want to create a situation where approved mental capacity professionals defer their responsibility to the Court of Protection and individuals have to undergo court procedures unnecessarily, particularly as we know this can be burdensome for people. In the short debate about this group of amendments, we have all agreed that we should avoid court at all costs, not only fiscally but because of the burden, stress and blockages that it puts into the system. However, I would like to reassure noble Lords that the responsible body has a responsibility to ensure that individuals who want to bring a challenge, in line with their Article 5 rights, have access to the Court of Protection, and the approved mental capacity professional would be important in identifying where this will be the case.

The amendment of the noble Baroness, Lady Barker, would have the effect of requiring the approved mental capacity professional to meet with the cared-for person unless there is agreement with consulted persons that it is not necessary or appropriate to do so. We are clear that our intention is for approved mental capacity professionals to meet with the cared-for persons in almost all cases. Exceptions would be extreme circumstances, such as if the cared-for person is in a coma or clearly expresses a wish that they do not wish to meet with the approved mental capacity professional. I am sure that noble Lords agree that in these exceptional cases it is right that the approved mental capacity professionals do not meet the person.

To reflect this, we have imposed a duty to meet the person where it appears to the approved mental capacity professionals to be appropriate and practical to do so. I understand that the intention of the amendment is to limit the circumstances in which an approved mental capacity professional does not meet with the cared-for person. However, I am conscious that there could be situations—for example, where the AMCP and all consultees bar one agree that it was not necessary or appropriate to meet the person. However, if one consultee did not agree, it would mean that one consultee would effectively have a veto and the AMCP would be required to meet the person. We will ensure that guidance regarding that rare circumstance where it is not practical and appropriate is included in the code of practice.

The amendment of the noble Baronesses, Lady Barker and Lady Hollins, and the noble Lord, Lord Hunt of Kings Heath, requires the person completing the pre-authorisation review, where this is not an approved mental capacity professional, to meet with the cared-for person regardless of whether this is appropriate or practical. We appreciate that there may be circumstances—

Baroness Thornton: I am not sure whether my question has been answered so I will repeat it. Does this mean it is automatic that the cared-for person will see the AMCP? Is that what the noble Baroness is saying? She has started tying me up in knots. Will it be automatic? Except, obviously, in the cases that have been mentioned, is that what will happen?

Baroness Stedman-Scott: Let me confirm that they will not automatically meet with the AMCP.

Baroness Thornton: In that case, who takes the decision?

Baroness Stedman-Scott: I was saving my answer to that question for the end of my speech, but as the noble Baroness is pushing me, I shall respond now. Since I have been in this House I have always been advised that when you do not know something, you fess up to it. So I have to tell the noble Baroness that I cannot answer that question right now unless someone to my left has a magic piece of paper that will get me out of jail free on this one. More seriously, I will come back to the noble Baroness because it is a very pertinent question, if that is acceptable to her.

Baroness Thornton: Thank you.

8.45 pm

Baroness Stedman-Scott: We will ensure that guidance regarding the rare circumstances where it is not practical or appropriate is included in the code of practice. The amendment tabled by the noble Baronesses, Lady Barker

and Lady Hollins, and the noble Lord, Lord Hunt of Kings Heath, requires the person who completes the pre-authorisation review, where they are not an approved mental capacity professional, to meet with the cared-for person regardless of whether it is appropriate or practical.

We appreciate that there may be circumstances where it is appropriate for the reviewer to meet the person, and the Bill does not prevent this happening. Indeed, in some cases it would be our expectation that this would happen, and further detail on this will be provided in the code of practice. However, in many cases the circumstances will be straightforward. For example, where someone consented to be in a care home but subsequently lost capacity, a meeting with the cared-for person would not challenge the outcome and it would not be proportionate to require that person to undergo the process again. The Bill provides that, prior to an application being authorised, it must first be reviewed by somebody who is not involved in the day-to-day care and treatment of the cared-for person. Where this is not an AMCP, the person who completes this review must review the information and determine whether it is reasonable for the responsible body to conclude that the authorisation conditions are met.

DoLS leads in local authorities have told us that they are already giving a great deal of thought to what they will need to see to be satisfied that the conditions are met for a liberty protection safeguards authorisation. We would do well to wait and see what the detail of that is. We will set out further guidance on this matter in the code of practice, but it is not right to require on the face of the Bill the reviewer to meet the cared-for person in every case. The Bill carefully balances the requirements necessary for authorisations across all the people involved: the cared-for person, their carers and their families, along with the healthcare workforce.

I now have a piece of paper, so I can tell the noble Baroness, Lady Thornton, that, yes, it is automatic for the AMCP to meet the person. The AMCP makes the decision on whether it is or is not appropriate or proportionate, which I believe I said earlier. Also, the noble Baroness, Lady Jolly, has made sure that we understand that what is important in this are the rights of the individual. Those are at the heart of what we are doing. She was particularly concerned about people in care homes. The system that we are bringing forward and trying to fine-tune will certainly make sure that they are given the due consideration they need. I will not repeat the points that have been made about going to court, which incurs all manner of personal and fiscal costs as well as bureaucratic costs. An appeal to the court on these things should be a last resort, because I agree completely with the noble Baroness, Lady Meacher, that such action would mean that there has been a failure in the system, which is something that we are desperately trying to avoid.

I hope that I have answered all the questions, but I know that noble Lords will tell me if I have not. On that basis, I hope that the noble Baroness will feel able to withdraw her amendment.

Baroness Jolly: I thank the Minister for her response. We have had a short but interesting debate and I expect that many of us are keen to talk to the noble Baroness, Lady Meacher, because we are all quite interested in the conversation that she has just had with Sir Simon Wessely. I understand that there is no desire on his part to combine both Bills, although I feel that there should be some learning for this Bill from his deliberations. However, I will read *Hansard* carefully and reconsider the matter before Report.

Amendment 31 withdrawn.

Amendment 32

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

32: Schedule 1, page 12, line 19, leave out "Consultation" and insert "Duty to ascertain wishes and feelings of the cared-for person

(A1) The main purpose of the consultation required under this paragraph is to try to ascertain the cared-for person's wishes or feelings in relation to the arrangements and the likely impact of the arrangements on the cared-for person's wellbeing."

Baroness Finlay of Llandaff: My Lords, this group of amendments takes us to the heart of the duty to ascertain the wishes and feelings of the cared-for person. For that reason, I am most grateful to the noble Lord, Lord Hunt of Kings Heath, for adding his name to my amendment, which would rename this part of the Bill, changing a consultation to a duty, and move up this paragraph from lower down:

"The main purpose of the consultation required under this paragraph is to try to ascertain the cared-for person's wishes or feelings".

That must be paramount. If we do not make arrangements that fit with and respect the known wishes and feelings of a person—or we make arrangements that cut across the feelings of others and cannot justify them very carefully—we will have failed completely in what we are trying to do. We should be empowering people to live as they want to live as much as possible while accepting that we need some restrictions in place.

That is why this group of amendments would also move the cared-for person to the top of the list of people to be consulted and make it clear that the professional responsible for the care plan needs to undertake the consultation. That will then inform what is happening and how the care is to be organised on a day-to-day basis and in the longer term, as well as ascertain whether the restrictions that may be put in place are necessary and proportionate in the light of knowing the cared-for person's wishes and feelings.

It is important to remember that people do not object only actively. They may signal objection by becoming more withdrawn or less active. They may start eating less or there may be changes in toileting and so on—all of which can signal that someone is unhappy. All these changes should be considered in thinking about whether somebody is objecting in the broadest sense to whatever has been provided for them. They may well signal that their wishes and feelings are not being adequately respected. I beg to move.

Baroness Hollins: My Lords, I welcome the amendment tabled by the noble Baroness, Lady Finlay, which seeks to ensure the wishes and feelings of the person

[Baroness Hollins]
are at the heart of decision-making. My Amendment 33 follows this principle by adding the cared-for person to the list of people with whom the assessor is required to engage before arrangements can be authorised.

Self-advocacy groups and charities supporting people with learning disabilities and their families have shared their concerns that the Bill does not require sufficient regard to be paid to their views in particular. I will quote some views expressed by Learning Disability England, a membership organisation:

"Disabled people and their families are especially worried that there is no requirement to consider the person's own wishes. That is how the institutions were … We do not want to go back to the days of the institutions … There is a risk that we take away people's independence and give power to people that may not be doing a good job".

Consulting with people who lack capacity can be challenging and requires quite advanced communication skills. It is crucial that we get this right as the consequences are significant and lead to other improvements or deteriorations in people's health and independence. I declare an interest here as chair of the Books Beyond Words community interest company, which develops resources and pictures to help doctors, nurses, care staff and others to communicate more effectively with people with learning disabilities and others who find pictures easier than words and to support decisions which, at their outset, appear too difficult or challenging.

Amendment 35 is designed to oblige those carrying out the assessment to explore less restrictive alternatives thoroughly. This would need to take into account the cared-for person's family and others who know them well and have an interest in their welfare, who are likely to have important information and expertise to share about the person's needs and what good support, which maximises their freedom, might look like.

Lord Hunt of Kings Heath (Lab): My Lords, I have added my name to two of these amendments. We heard earlier that the Minister has agreed that the Bill at some point in the future will reflect the need to consult the cared-for person. This is clearly a great advance and sets the context for the debate on this group of amendments. I particularly commend the suggestion that the consultation should be not just about what the assessment has concluded should be done to the cared-for person—I fear that the sense of the Bill at the moment is "done to"—but what the alternatives are.

This is where I come back to one of our problems with the architecture of the Bill. So much responsibility is given to the care home manager who, inevitably it seems to me, must think about residence in a care home as being the only option because their job is to make sure that occupancy is of the highest level in order to maximise the viability of the home. It would be good to know how the Government think with this Bill and the new arrangements we are going to ensure that the alternatives are properly looked at before someone's deprivation of liberty is actually authorised.

Baroness Barker: My Lords, can I take this opportunity to ask the noble Baroness some questions? Can she confirm my understanding that this duty to consult does not come under Article 4 of the Mental Capacity Act? As I read the Bill, the responsible body or the care home manager is under a duty to consult only in so far as they deem it to be practicable or appropriate to do so. They make that decision. Is that correct? Under DoLS, if somebody was "unbefriended" and if there was nobody to consult, that automatically triggered the right to an advocate. I do not believe that is the case under the Bill. Finally, this duty to consult is a stand-alone one. What happens as a result of that consultation? For example, it does not make it clear that if a family—like Mark Neary—objects to a placement, it does not trigger the need for an AMCP or another assessment. Yes, there is a long list of people but, as I understand it, there is no nearest-relative rule as there is under mental health legislation. There is no sequential order. My basic question is: what happens as a result of this duty to consult? It is not clear to me that anything necessarily happens.

9 pm

Baroness Watkins of Tavistock (CB): My Lords, I support this group of amendments in particular because many cared-for people can express their wishes in the ways people have said. I want to give your Lordships an example from when I was working as an in-reach mental health nurse into a range of homes for people with learning disabilities. There was a young man who was extremely happy in the home in which he had been placed because it was near his parents. They used to visit regularly and they used to be able to take him out together and accompany him, because he was not safe to be out unaccompanied. When his parents died he showed all the signs and symptoms that the noble Baroness, Lady Hollins, outlined, which the staff put down to the fact that he was distressed that his parents had died. Actually, that was in part true, but he was terribly sad that his sister could visit him only once a month because she lived 200 miles away. She was very willing to visit him more and to take him out accompanied but could not do that unless he changed his home and moved nearer to her.

This actually had a successful outcome, so it is not a depressing story, but Amendments 32 and 35 in particular would make it a duty for the care home in which such a resident was living to think again. This particular young man was a very high fee payer paid by the council because his needs were very complex. There was not much in it for the care home to arrange for his transfer because it would be quite difficult to fill the place at the same cost outside. I want to bring reality into the Committee in relation to these two amendments and explain why I am so supportive of us considering them in a positive vein.

Lord Touhig (Lab): My Lords, the questions from the noble Baroness, Lady Barker, deserve an answer. I am sure that if the Minister cannot provide one tonight we will get one because she raised some very important points. The example that the noble Baroness, Lady Watkins of Tavistock, just gave gives us a practical idea of how these amendments might apply if they were part of the Bill.

Amendments 32 and 34 underpin the absolute need to discover the wishes and feelings of the cared-for person. Mencap summed it up pretty well in the briefing that it sent to noble Lords when it said that the views of the cared-for person should be at the heart of this clause. That point was made by my noble friend Lady Thornton during the debate on the first group of amendments today.

Putting the focus on ascertaining the wishes and, just as importantly, the feelings of the cared-for person is central to this, as is right and proper. I and others spoke about this at Second Reading and, frankly, we hope that the Government will respond positively to these proposals. Amendment 33 in the name of the noble Baroness, Lady Hollins, would address this by adding the cared-for person to the list of those who must be consulted, and Amendment 35 would ensure that views were sought on whether any less restrictive alternatives were available—all good sense.

When faced with legislation like the Bill and the issues it raises I often think, "If this Bill was about me, what would I want?" Most certainly I would want the protection and defence of my basic human rights that these amendments offer. Is this not something that every noble Lord in this House would want? If it is, we should ensure that it is there.

Baroness Stedman-Scott: I thank all noble Lords for their important contributions to these amendments. I agree completely with the noble Baroness, Lady Finlay, about the importance of ascertaining the cared-for person's wishes and feelings when consulting as part of the liberty protection safeguards processes. Sometimes it is more important to listen to what is not said or expressed over and above that which is said. Watching people's behaviour and demeanour can tell us a lot about how they are feeling. The noble Baroness, Lady Watkins, gave us a good example of somebody who lost their parents and was terribly distraught about it, although what was causing him most angst was being able to see his sister only for short periods because of the distance travelled. We must make sure, in taking through this Bill, that we do everything we can to read those signs and that people are empowered to make the best decisions.

On care home managers completing the consultation and how we ensure that alternatives are considered, I can say to the noble Lord, Lord Hunt, that a wide range of people are consulted. Previous consultations conducted by professionals often relied on things that were not meaningful or in the best interest of the individual. We want the least restrictive as a principle—a requirement of Article 5 in case law—that must be considered and will be set out in the code of practice. The code of practice will be very important.

I say to the noble Baroness, Lady Barker, that the care home manager would consider whether a decision was appropriate and the decision would be reviewed by the responsible body. Any family member, IMCA or appropriate person could challenge a decision not to consult the cared-for person. The Government are committed to making sure that the consultation around the cared-for individual is at the heart of everything. We must move heaven and earth to make sure that we understand exactly what they want and that the consultation is respectful in every way.

The Bill already outlines that the main purpose of the consultation is to ascertain the cared-for person's wishes and feelings. This is to ensure that the liberty protection safeguards are consistent with the focus of the rest of the Mental Capacity Act, which places the wishes and feelings of the person, even if they lack capacity, at the heart of the process.

The noble Baroness is also right to highlight the importance of considering the impact of the arrangements on the person's well-being. Similarly, we are also clear that we expect the impact of the arrangements on the person to be addressed when undertaking consultation. However, the purpose of the consultation would be to consider the impact from the person's point of view. This is crucial to how the Mental Capacity Act works.

The concept of well-being is not mentioned in the Mental Capacity Act. It is a legal concept which has particular meaning under the Care Act and the Social Services and Well-being (Wales) Act. We are concerned that it would cause confusion if this concept were inserted into the liberty protection safeguards.

However, the liberty protection safeguards will be in place to support living and will be positive for a person's well-being. The accompanying code of practice will outline how the model works within wider care provision, including the Care Act, which has duties in relation to promoting well-being.

The amendment in the name of the noble Baronesses, Lady Hollins and Lady Finlay, explicitly requires that the cared-for person be consulted. Noble Lords raised this issue on our previous day in Committee and I know that there is enthusiasm for this proposal, as it is felt that it will more clearly place the person at the centre of the determination of their wishes and feelings.

The Government have also heard very clearly that noble Lords felt that the person themselves must be consulted. Again, I agree. If we are to secure the improvements that we want, it is essential that the person and their voice, wishes and feelings about any proposed arrangements are placed at the heart of this model. We will make sure that the Bill reflects this. I am grateful for the expert views of noble Lords in helping to improve the Bill to put this beyond doubt.

I agree with the noble Baroness, Lady Hollins, and the noble Lord, Lord Hunt, that it is important for those deciding whether an authorisation for deprivation of liberty should be given to consider whether any less restrictive options are available. Considering less restrictive alternatives is also an important aspect of the wider Mental Capacity Act. For example, the fifth principle of the Act requires decision-makers to have regard to less restrictive options. Nothing in the Bill changes this. The code of practice will set out how the liberty protection safeguards will work within the wider framework of the Mental Capacity Act and the care landscapes more widely.

Respectfully, therefore, I maintain that there is no need to add the words suggested by the amendments because they already form an integral part of the assessment process. We have made clear that the main

[Baroness Stedman-Scott]
purpose of the consultation duty is to ascertain the person's wishes and feelings in relation to the authorisation, and this can include the person's views about acceptable levels of restrictions.

For example, a person might wish to receive care in a care home where they have freedom to spend time in the community rather than in a care home where there is less freedom to do this. This might be because the conditions are less restrictive. This is an essential part of the liberty protection safeguards and is delivered through the assessment process. The noble Lord, Lord Touhig, made a very valid point when he asked whether we would want this for us. We must make sure that we treat people and respect them in the way we would like to be treated and respected ourselves.

I hope I have been able to provide a satisfactory explanation, but if there are outstanding concerns, I am happy to discuss them further. I trust that the noble Baroness will be able to withdraw her amendment.

Baroness Finlay of Llandaff: My Lords, I must admit that during the Minister's very positive response, my hopes were up that she was going to accept the amendment and the change of title of this paragraph in the new Schedule. The reason I say that is that words matter: they set the tone. It would be very useful to be able to discuss this further so that we might take out the word "Consultation", which has connotations of medical consultations and other things, and that we might state on the face of the Bill as a heading that there is a, "Duty to ascertain the wishes and feelings of the cared-for person".

The noble Baroness, Lady Hollins, reminded us of the importance of wishes and feelings and that we should not slip back in time to old-fashioned, awful institutional care. The well-being Act in Wales was behind some of the wording as well, and the reason for moving that part of the Bill higher up.

The noble Baroness, Lady Barker, asked some very valid questions. Best-interest decision-making should be a process, not a one-off, and for that process to happen, it is very important that the person is consulted because their previously expressed wishes and feelings might no longer be their wishes and feelings now that they are in a different situation, but they might need help expressing those wishes and feelings as they are now. That process should also include their beliefs and values, some of which they might still hold on to and some of which they might have abandoned over time. There are other factors that the person might be likely to consider if they were able to consider them: their current views and past views might be expressed by others who know them well and care about them.

I hope that we can pursue the discussion further, but, at the moment, although I will withdraw the amendment, I would like to reserve the right to come back to this on Report, because unless we get wishes and feelings up there, in bold type as a heading, we might well find that, inadvertently, we fail the very people for whom we are arguing. I beg leave to withdraw the amendment.

Amendment 32 withdrawn.

Amendments 32A to 37A not moved.

9.15 pm

Amendment 38

Moved by ***Baroness Hollins***

38: Schedule 1, page 13, line 10, after "person" insert "or those interested in their welfare"

Baroness Hollins: My Lords, my Amendments 38, 39, 40, 41 and 43 would add in families, friends and carers. They build on and support Amendments 15 and 16, which were debated earlier and tabled by the noble Baroness, Lady Jolly. They would require that every cared-for person has access to an approved mental capacity professional, regardless of whether the assessor considers that the cared-for person might object to the care and treatment proposed.

Not everyone will be able or willing to risk expressing an objection to those currently providing their care. It can be very hard for a person to object to care given by a staff member on whom they may be totally dependent, and may feel obliged to agree with, when they view them, correctly, as somebody who has power over them. I suggest that for some people this will not be an easy judgment even if they are trying to object, particularly if they have difficulty communicating. It is often the case that family members are the most skilled at communicating with their loved ones, as I suggested earlier, and are therefore most likely to understand their feelings and wishes—feelings which may be communicated with subtlety or nuance, and which are unlikely to be confided to unfamiliar people or people perceived to have power over them.

In those situations where someone is not able to communicate their objections, it is vital that their family and others with an interest in their welfare are able to object for them and to trigger a referral to an AMCP—someone whom they can be confident has the right expertise. Otherwise someone with profound communication impairments might not be able to object while those close to them have serious concerns about the arrangements, yet are not able to request an AMCP. Those with the most profound impairments must not miss out on the involvement of an AMCP in this situation. In the 2014 report from the House of Lords post-legislative scrutiny committee, Nicola Mackintosh spoke about the compliant nature of many incapacitated adults. She said that,

"if you have a vulnerable person detained in a care home who is physically or verbally expressing a wish to leave, those cases are more likely to be raised before the court than cases involving a compliant, incapacitated person. That was the case in the Bournewood case. I do not think the DoLS scheme has cured the illegality".

I do not think that the Bill, as amended, will fill the Bournewood gap. My Amendment 44B has identified a similar issue to that in Amendment 44A, proposed by the noble Baroness, Lady Thornton. It has been tabled to protect the rights of people detained for treatment in assessment and treatment units, and other hospital settings, for treatment for mental disorder. It would include NHS and independent hospitals. These are often the most restrictive settings where the liberty protection arrangements will apply and there are serious concerns about the rights of patients with learning disabilities who are placed in these settings.

However, due to the rules governing the interface between the Mental Capacity Act 2005 and the Mental Health Act, which this Bill leaves largely untouched, these patients will not receive any independent assessment by an AMCP. The reason for this, as I understand it and put as simply as possible, is that the Mental Capacity Act cannot be used to authorise a detention if the person is viewed as objecting to their detention; the Mental Health Act must then be used. This means that patients detained in hospital under DoLS or its successor, the LPS, will by definition be regarded as not objecting by those responsible for their detention. This would include people such as HL in the Bournewood case, who may not be capable of expressing an objection or whose behaviour is hard to interpret by those who do not know them well.

Under the Bill, a person will qualify for an assessment by an AMCP only if there is reason to believe that they are objecting, so for this group a specific trigger is needed to ensure that their detention is scrutinised by an independent, specially trained professional to ensure that it is justified, having regard to the alternatives. Last year there were 4,670 DoLS applications for patients in this category. I hope the Minister will agree that it is important for people in these settings to have access to an AMCP automatically.

I have also had some communication with Professor Sir Simon Wessely today, but I did not achieve the same certainty as my noble friend, who is not in her place. I hope that the Wessely review will remove the learning disability exemption in the Mental Health Act, which allows people with a learning disability to be detained if their behaviour is abnormally aggressive and so on, and that instead their detention will be on the same grounds as for any other person. I beg to move.

Baroness Barker: There are two amendments in my name in this group. Amendment 44 is designed to probe an issue that is clearly worrying lots of noble Lords: that the condition that triggers an AMCP is that the person is objecting to their care in a particular place. The noble Baroness, Lady Hollins, is always very good at helping us to understand legislation from the point of view of people with learning disabilities. My background and my chief concern is with older people with dementia who are probably disproportionately likely to be overlooked by this provision because they will not necessarily be vocal.

I return to the questions raised by the noble Baroness, Lady Thornton: why would you object if you do not know what you are objecting to? What will happen if you do object? Will you receive any help? Currently, best interests assessments are required for DoLS detentions but, as I understand this, where a person does not object they do not get to see an AMCP. If they are in a care home, it is the care home staff, but in hospital and community settings the responsible body can use evidence from other assessments to make a determination for somebody. What is the evidence base for this? Do we know how many people currently object to their care and treatment? Why is that considered a sufficiently robust basis on which to make this a criterion in law? There is something deeply flawed and deeply wrong about this.

Amendment 59 may seem a bit strange on the face of it. It inserts a requirement to keep a record of refusals of authorisations. One of the things that the Select Committee of your Lordships' House found was that the evidence base for DoLS is very sketchy. I have to make it clear that the Select Committee's report was put together and came out just around the time of the Cheshire West ruling. In the light of that ruling, the number of applications shot up. We have never had a robust evidence base for the way DoLS work. I agree with the noble Baroness, Lady Hollins, that this is not going to close the Bournewood gap, but we should at least try to cover up some of the deficiencies there have been in the past. Therefore, trying to get together some basic stats and information, including how many times things like DoLS have been refused, is important.

I know, as will other noble Lords, that among professionals, or rather among stakeholders, there was a big discussion prior to Cheshire West about whether having lots of DoLS applications was an indication that in fact you were a good provider or whether that would somehow be indicated by the fact that you had none. That is not the right calculation; you can argue it either way.

We still need to get to the bottom of the transparency of the decision-making around this. That was my reason for tabling what might seem to be a rather strange amendment.

Baroness Thornton: My Lords—

Baroness Finlay of Llandaff: My Lords—

Baroness Thornton: You go ahead of me.

Baroness Finlay of Llandaff: I beg your pardon; I have an amendment in this group as well. Oh dear, I seem to have spattered them in every group.

I have a real concern that triggering a review that is based on whether or not the person is thought to be objecting is far too narrow, and that anyone who has concerns about that person should be able to trigger a review independently—whether that is family, friends or somebody working in the place where the cared-for person is supposed to be being cared for.

I have an interest, or at least an experience, to declare: some years ago I was asked to help the police look at a care home where they had serious and justified concerns. The alert had come from somebody working at an extremely junior grade within the care home, not from anybody senior or from a professional. Following that, I was asked to review the case notes in detail. The people concerned all had severely impaired capacity and, often, an inability to express themselves—but, by meticulously looking at the case notes, one could see trends, and when I mapped them against the staff off-duty rota the trends became clearer.

I am very concerned that, if we leave this just as it is written, we will not allow the very people who have contact, possibly on a day-to-day basis, to put up a red flag about what may be happening in one person's life. It may be that nine out of 10 people in an institution are very happy, but if one of them is not and one

[Baroness Finlay of Llandaff]
member of staff has got to know them and sees subtle changes in their behaviour, that member of staff must be empowered, with the cover of anonymity, to trigger an independent review, because that may be the only way to protect the cared-for person.

I put in my amendment that a review should be triggered if,

"the rationale … is based on the risk to others".

The concept of "risk to others" is quite difficult to justify being in this Bill rather than in the Mental Health Act as the sole rationale for using the Bill, so I think that it becomes an exceptional circumstance that warrants that type of review. Similarly, if the restrictions are on contact with named persons, I worry that there could be a bias from the staff towards the named person. When somebody is very upset, they may appear to be an aggressive or angry visiting relative and may be a bit more difficult to handle—but actually it may be that that is simply the way that they are expressing their anxiety and their emotions towards the person who is now deteriorating and want to do their best for them. I worry about excluding a close relative without great justification; it should not be undertaken lightly.

Baroness Barker: When the Minister responds, will she confirm the point made to us by a number of stakeholders that harm to others, rather than harm to self, which is the basis of decision-making in best interests, is included in the Bill—because it is not explicitly ruled out and it was in the Law Commission's proposals. If that is the case, that is a very significant change. The number of people included may well differ solely for that reason.

9.30 pm

Baroness Thornton: That is a very good point. I will speak to my Amendment 44A, which is in this group. My amendment provides for a pre-authorisation review to be carried out by an approved mental capacity professional if the cared-for person is in an independent hospital and receiving mental health assessment or treatment. Where a person is in an independent hospital for the purposes of assessment and treatment for mental disorder, they may need to come under the liberty protection safeguards, and there must be an independent assessment by an AMCP.

I am concerned about the lack of independent assessment and oversight to guard against conflicts of interest in these settings. It is an issue that I know that organisations supporting people with learning disabilities and autism—Mencap and others—are also very concerned about. It is recognised that too many people with a learning disability and autism are stuck in assessment and treatment units and other in-patient settings due to the lack of the right support in the community.

Following the learning disability abuse scandal at Winterbourne View hospital, the Government and NHS England promised to tackle this issue and reduce the number of people with a learning disability and autism in these settings. Through their Transforming Care programme, they have committed to developing the right community support to reduce the number of in-patient beds. However, to date there has been little reduction in the number of people in these settings. Often, high levels of restrictive practices are used in these settings. It is recognised that children, young people and adults with a learning disability and/or autism in in-patient settings are at risk of overmedication, restraint and being kept in solitary confinement, as we have seen in the press in the past couple of days.

The average length of stay for assessment and treatment is nearly five and a half years. The Learning Disability Census 2015 stated that 72% of people in in-patient units had received antipsychotic medication, but only 29% were recorded as having a psychotic disorder; 56% had experienced self-harm, an accident, physical assault, hands-on restraint or being kept in seclusion. A recent shocking BBC "File on Four" programme revealed highly restrictive practices in these settings. It had obtained information that there had been a large increase in the use of restrictive practices between 2016 and 2017. This is of great concern.

According to the latest NHS digital data, 2,375 people with a learning disability or autism are in in-patient settings. Of those, 1,045 are in independent hospitals. The data show that currently, most are detained under the Mental Health Act, but of course there are people who are under DoLS in these settings, and who will be under the liberty protection safeguards in these settings in future. It is vital that there are robust independent assessments for people in these settings who may fall under the liberty protection safeguards. It is therefore essential that there is a requirement for an AMCP to undertake an independent assessment in these situations.

Can the Minister clarify: under the liberty protection safeguards, who will be responsible for signing off the LPS authorisations for people in independent mental health hospitals?

Baroness Stedman-Scott: My Lords, many exam questions are coming out this evening. Let us hope we can answer them to your Lordships' satisfaction.

Baroness Thornton: We want to ensure that the noble Baroness gets the full context of what it is like dealing with amendments in Committee.

Baroness Stedman-Scott: I appreciate that very much; I am touched and can confirm that you have passed that exam with flying colours.

This is clearly another important element of the Bill, and I thank everyone for their contributions. I pick up the point about independence in the system, and have always been of the view that when you have situations like this, some independence is greatly helpful. Without wishing to make you laugh or belittle what we are trying to do, I say that I have just spent some time in the States and was subject to the awful rigours of President Trump and the Kavanaugh situation. I can tell you there was no independence there whatsoever. So I am absolutely at one with all noble Lords about independence when making judgments and trying to help people improve their lives.

I think the noble Baroness, Lady Hollins, made a terribly important point. Where somebody is having something explained to them and does not feel comfortable

objecting, or feels the environment is not right—I doubt there is one of us who has not been in that position at one time—it is horrible. We have to make sure the environment is correct and healthy for people to do so.

I think the points the noble Baroness, Lady Barker, made, in referring back to the evening exam question asked by the noble Baroness, Lady Thornton—how do people know?—have to be answered. I take on board the point raised and think we must get to the bottom of that. However, I can tell you that approximately 30% of people do object to their DoLS review, if that is helpful. Also, the noble Baroness, Lady Barker, raised an important point about evidence base. In a job once, someone wanted me to get the evidence for what we thought we were doing, and I was terribly nervous about it because I thought I would be out of a job. Actually, when we got an independent group in to look at it, we were just blown away by the evidence, which you could not argue with. I know it is costly to gather evidence, and I have no idea if it is practical or realistic here, but I have no doubt the case will be stronger one way or the other for having some evidence. The noble Baroness, Lady Finlay, made numerous excellent points today, but the independence and the review is what is resonating in my mind. I am glad to confirm to the noble Baroness, Lady Barker, that harm to others is included.

Baroness Barker: I thank the Minister very much for saying that. It is a very significant point she has just made, and perhaps one that noble Lords may have to come back to at a subsequent stage.

Baroness Stedman-Scott: The noble Baroness is pleased with me; that makes me worried.

The amendments from the noble Baroness, Lady Hollins, and the noble Lord, Lord Hunt of Kings Heath, would mean that the referral to an approved mental capacity professional would also be required in the following circumstances: if any person interested in the person's welfare does not wish them to receive treatment at the place, if any other person interested in the person's welfare makes a request, or if there is reason to believe that an approved mental capacity professional should carry out the review. I am assured that the Bill is already explicit—where it is reasonable to believe that the cared-for person does not wish to reside or receive care or treatment at a place, an approved mental capacity professional must consider their arrangements. If an objection is made on the person's behalf by a family member of the person or someone who is interested in their welfare, we would generally consider this to constitute a reasonable objection. We will provide detail—including examples—of when an approved mental capacity professional should complete a review in the code of practice. We plan to set out in detail where this would apply in the code of practice but it will include complex cases such as arrangements proposed for people with acquired brain injuries, and people in independent hospitals receiving mental health treatment.

While I understand the intention of the amendment tabled by the noble Baroness, Lady Hollins, the effect would be that any objection by any person with an interest in the person's welfare would trigger a referral to an approved mental capacity professional. In short, this would mean that anyone could trigger a referral. An acquaintance from social media or a distant relative would be able to raise an objection. While this might be appropriate in some cases, there may be others where it would not represent the person's wishes and feelings. As currently written, the amendment would undermine the purpose of the duty, which is to ensure that the views of the person are central to the process. I am sure that noble Lords agree that a focus on the views of the cared-for person is vital. That is why the Government have made this core to the new model.

The amendment in the name of the noble Baroness, Lady Finlay, would require a referral to an AMCP when others have expressed concerns, when an authorisation is being justified because of risk to others, or when the arrangements involve restrictions on contact with named persons. I thank her for raising these points and we will consider this carefully for the code of practice. I also hope I can provide reassurance that the Bill only enables authorisation of arrangements that give rise to a deprivation of liberty necessary for the purpose of receiving care or treatment. We would not ordinarily expect the liberty protection safeguards to be used to authorise a restriction on contact and we will make this clear in the code of practice. I am also sure that the noble Baroness is aware that risk to others is being considered as part of the Mental Health Act review.

The noble Baroness, Lady Thornton, wants to ensure that an AMCP conducts the pre-authorisation review for everyone in an independent hospital receiving a mental health assessment or treatment. I am sympathetic to this and wish to consider the matter. Such cases should be referred to an AMCP. Detail of this will be provided in the code of practice.

We have tried to respond to all the points made by noble Lords this evening, but there is more to do. If it is acceptable to your Lordships, we should carry on talking about these issues. The Government are absolutely committed to doing this. On that basis, I hope that I may have passed the exam set by the noble Baroness, Lady Thornton, and that the noble Baroness, Lady Hollins, will be able to withdraw her amendment.

Baroness Hollins: My Lords, I am grateful to all noble Lords who have spoken on the amendments in this group and asked very astute questions. I am grateful to the Minister for her optimistic response, but I am not completely reassured. I disagree with her interpretation of my amendment's intentions. I reserve the right to bring this matter back on Report after further consideration. I will certainly read *Hansard* carefully and look forward to any other communication which may be forthcoming from the Minister's office. I beg leave to withdraw the amendment.

Amendment 38 withdrawn.

Amendments 39 to 50ZA not moved.

Amendment 50A

Moved by ***Baroness Hollins***

50A: Schedule 1, page 13, line 36, at end insert—

"Clinical ethics committees

20A(1) The Secretary of State must by regulations made by statutory instrument make provision for all NHS bodies to have access to a clinical ethics committee.

(2) The main objective of a clinical ethics committee is to provide advice on clinical ethics to professionals on matters relating to Schedule AA1.

(3) The regulations in sub-paragraph (1) must make provision for the membership, funding and constitution of the clinical ethics committee.

(4) The regulations in sub-paragraph (1) may make provision to require certain cases to be referred to a clinical ethics committee, such as in cases where a dispute has arisen.

(5) The Secretary of State must review the operation of clinical ethics committees and prepare and publish a report on the outcome of the review before the end of the period of three years beginning with the day on which this paragraph comes into force.

(6) A subsequent report must be published before the end of each period of three years beginning with the day on which the previous report was published.

(7) The Secretary of State may arrange for some other person to carry out the whole or part of a review under this section on the Secretary of State's behalf.

(8) The Secretary of State must lay before both Houses of Parliament the reports published under this paragraph.

(9) A statutory instrument containing regulations under this paragraph may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament."

Baroness Hollins: My Lords, these amendments in the name of the noble and learned Lord, Lord Mackay, and myself are about mediation, conflict and decision-making. It is a complex area and made more complicated now that the Bill is being extended to 16 and 17 year-olds. Rather than taking time in your Lordships' House this evening, I believe the noble and learned Lord, Lord Mackay, would prefer to discuss this matter with the Minister and decide whether the Bill is the right place to progress this issue. I am grateful to the Minister for already having agreed to discuss it. I reserve the right to return to this on Report if no progress is made.

Lord O'Shaughnessy: We have had a discussion about the issues under consideration here, which are in some ways prompted by the experience of the Gard family and their son Charlie; we are all aware of the tragic circumstances at the end of his life. We agree with the noble Baroness and my noble and learned friend that these are incredibly important issues, and we are grateful to them for tabling the amendment. However, I think this would be best pursued outside of the confines of the Bill. I give her my commitment to do that; I am keen to work with her and with all noble Lords who have a particular interest in this issue, to ensure we come to the right conclusion. On that basis, I am sure she will withdraw the amendment.

Baroness Hollins: I thank the Minister and beg leave to withdraw the amendment.

Amendment 50A withdrawn.

Amendment 50B

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

50B: Schedule 1, page 13, line 42, at end insert—

"(aa) any arrangements that are not authorised or are authorised subject to conditions,"

Baroness Finlay of Llandaff: This group of amendments relates to the authorisation record. I have added an additional criteria in Amendment 50B because there may be arrangements put in place after an initial authorisation has begun—or that were subject to conditions—and parts of the authorisation may need early review. Amendment 62A is designed to ensure consistency—the care home manager will not do the assessments but will arrange them. Amendment 58B relates to renewal; if part of an authorisation no longer has effect it must be reassessed from scratch, not simply renewed. Amendment 58C requires that original evidence is submitted, not a second-hand report. It would allow the responsible body to see the authentic assessment rather than an interpretation of any original material.

Baroness Barker: My Lords, I am afraid that I think some of the amendments standing in my name have been wrongly grouped. I am sorry; I have been busy this afternoon going through everything else and I am now a bit stuck regarding the procedure and what I should do. I will speak to them, although I am rather reluctant to start this group.

Baroness Stedman-Scott: My understanding is that the noble Baroness does not have to speak to them.

Baroness Barker: But am I right in thinking that if I do not speak to my amendments today, they will automatically fall?

Baroness Finlay of Llandaff: It might be of assistance if I intervene here. If the noble Baroness is referring to amendments in the group beginning with Amendment 58A, I understand that if she does not speak to them now, they can be dealt with in the next group.

Lord O'Shaughnessy: I am no expert in parliamentary procedure but my understanding is that, as they come after the amendment we are considering now and indeed the one that we would consider next, they can be retabled.

Baroness Barker: I am grateful. I will do that.

Lord O'Shaughnessy: I am grateful to the noble Baroness, Lady Finlay, for initiating this discussion. Clearly the purpose of her amendments is to make sure that an authorisation cannot be renewed if it

wholly or in part ceases to have effect. In some cases, an authorisation will not be renewed if in part it is no longer valid, but there might be other cases where minor changes to the restrictions are needed and that should not prevent an authorisation being renewed. We want to provide further detail in the code of practice and I would appreciate the opportunity to work on that with her.

The noble Baroness has also tabled amendments outlining that authorisation records should detail when arrangements are not authorised or if they are authorised with conditions, and that in care home cases responsible bodies should consider other relevant information, as well as information provided by the care home manager. I can tell her that in some cases if arrangements are not authorised, it might be useful to include them in the authorisation record. However, given the debate that we had on the previous grouping about the general trend towards the inclusion of data or information within records that are then made available to patients, their families and so on, I want to reflect on whether they should always be included and I will come back to that on Report.

The Bill allows the responsible bodies to consider information other than that provided by the care home manager, and further detail on the circumstances and kinds of information will be provided in the code of practice. On that basis, I hope that the noble Baroness is reassured and will feel able to withdraw her amendment.

Baroness Finlay of Llandaff: I am most grateful to the Minister for that clarification. I agree that some parts of this would be better in the code of practice than in the Bill, particularly because they might need modification as experience develops. If they are in primary legislation, we are effectively stuck with them for a time, whereas otherwise they can be altered. Therefore, I beg leave to withdraw the amendment.

Amendment 50B withdrawn.

Amendments 51 to 54 not moved.

House resumed.

House adjourned at 9.52 pm.

Volume 793
No. 189

Monday
15 October 2018

CONTENTS

Monday 15 October 2018