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PARLIAMENTARY DEBATES
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HOUSE OF LORDS

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

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 22 October 2018

2.30 pm

Prayers—read by the Lord Bishop of Salisbury.

Youth Crime: London

Question

2.36 pm

Asked by ***Baroness Hussein-Ece***

To ask Her Majesty's Government what steps they are taking to reduce youth crime in London.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, the *Serious Violence Strategy* sets out our response to tackling serious violence, including recent increases in knife crime, gun crime and homicide. The strategy emphasises early intervention and prevention to stop young people getting involved in violence in the first place. On 2 October, the Home Secretary announced further measures, including a £200 million youth endowment fund that will support children and young people to prevent their involvement in violence and crime.

Baroness Hussein-Ece (LD): I thank the Minister for that response. The alarming rise in knife crime and the number of deaths by stabbing of young people in London prompted me to put this Question down, on behalf of those of us who have boys and are terrified about whether they will come home in one piece. The streets are not safe any more for young people. According to figures, knife crime has gone up by 15% in the past year in London, with 91 killings. That means an average of 40 knife crimes per day. Will sufficient police resources be put in place to tackle this, as well as a public health approach, which the Youth Violence Commission has recommended and which worked so well in Glasgow? It was the knife crime capital of western Europe but has seen a decline following a public health approach. Will the Government put proper resources in place to tackle this?

Baroness Williams of Trafford: I mentioned in my Answer to the noble Baroness's original Question the £200 million youth endowment fund. In addition, and given that the noble Baroness is talking about London—this does, in many ways, seem to be a particular problem for London—in July, the Home Secretary doubled the early intervention youth fund to £22 million. Through the trusted relationships fund, we are supporting nine projects that will support children vulnerable to county lines criminal exploitation. Four of these are based in London and will receive a total of £4.8 million. Further, £175,000 has been provided to support Redthread to expand work in London hospitals that will help victims of violent crime avoid or withdraw from gang activity, and £150,000 to support Safer London in its work to deliver young people's advocates for young women in gangs and to reduce knife crime.

Lord Garel-Jones (Con): Is the Minister aware that, since 2012, about 30 youth centres in London have closed? While this might not wholly explain the worrying rise in violence, it must have been a contributory factor. Will my noble friend tell the House whether the Government have any plans to substitute that loss?

Baroness Williams of Trafford: My noble friend will of course know that youth provision is a decision for local authorities and how they allocate funds.

Noble Lords: Oh!

Baroness Williams of Trafford: Before the House gets totally fed up with me, I will tell noble Lords that the Government have given £40 million, and £40 million has come from the Big Lottery Fund, for youth provision and social action. We continue to fund the growth of the very successful National Citizens Service, and £700,000 has gone into the Delivering Differently for Young People programme.

Lord Kennedy of Southwark (Lab Co-op): My Lords, I draw the attention of the House to my relevant interests. There has been a cut to policing in real terms since 2010-11. In London, as the noble Lord, Lord Garel-Jones, mentioned, 81 youth centres have closed, 800 full-time youth workers are no longer there and there has been a £39 million cut in youth services in the capital since 2011. Does the Minister not accept that these spending reductions have a direct effect on the ability of the police and local authorities to tackle knife crime?

Baroness Williams of Trafford: My Lords, we have talked a lot in this place about police funding. It is important to note that public investment in policing has grown by over £1 billion from £11.9 billion in 2015-16 to £13 billion in 2018-19, including investment in counterterrorism policing, local policing and funding for national programmes. There are other funding streams, including the £175 million police transformation fund and special grants.

Baroness Meacher (CB): My Lords, in view of the IDPC report published today, which shows huge increases in the use of drugs across the globe despite harsh punishments and criminalisation, will the Minister seriously consider decriminalising the possession and use of drugs, as Portugal did very successfully more than 20 years ago? That would massively reduce youth crime and is probably the quickest and best way of doing that. It would also increase children's recovery from drug use and enhance their ability to return to education and work.

Baroness Williams of Trafford: The noble Baroness will know that my right honourable friend the Home Secretary has no intention of decriminalising drugs, but intends to get a better understanding of who drug users are, what they take, how often they take it and so much more. He is launching a review into the market for legal drugs.

Baroness Hamwee (LD): My Lords, I declare an interest as a trustee of Safer London, as mentioned by the Minister. Does she recognise what is behind the following tweet from a young person today:

"We're desperate to see police patrols. Friendly neighbourhood officers who know the community. All we now get is aggressive cops jumping out of bully vans"?

Does the Minister realise the impact of the loss of community policing and local intelligence both on young people's fear, which often leads to their carrying knives, and on stop and search?

Baroness Williams of Trafford: My Lords, I pay tribute to the work that the police do. Of course, the PCC decides how to allocate funding to the various types of policing mentioned by the noble Baroness. I also point out the initiative to reduce moped crime, which noble Lords were so concerned about. There has been a 32.6% fall in that type of crime. That is not to undermine exactly what noble Lords are saying, which is that certain types of crime are increasing, but the police are working to reduce crime in local areas in the way that it presents itself.

Lord Harris of Haringey (Lab): My Lords, the noble Baroness has told us about a blizzard of initiatives—some worth £150,000, some worth £700,000 and so on—but that does not alter the fact that the totality of services, by which I mean the whole-system approach, which is surely what is needed here, has suffered. We have seen huge reductions in local government funding, in health funding and in policing. How on earth can the Government continue to blame local authorities, police and crime commissioners and everyone else for the fact that it is their policies that are creating this situation?

Baroness Williams of Trafford: My Lords, I am not in any way seeking to blame local authorities or PCCs; rather I am saying that they have budgets and they can decide what their priorities are for their budget allocations. However, I will say that my right honourable friend the Home Secretary and the Policing Minister recognise the strain under which the police find themselves, particularly in the light of changing crime patterns and of course the terrorist attacks that this country saw last year.

Online Marketplaces: VAT Evasion

Question

2.45 pm

Asked by ***Lord Leigh of Hurley***

To ask Her Majesty's Government what steps they are taking to ensure that operators of online marketplaces take all reasonable steps to mitigate VAT evasion.

The Minister of State, Department for International Development (Lord Bates) (Con): My Lords, the UK is the first country in the world to make online marketplaces jointly and severally liable for VAT fraud committed on their platforms. Since 2016, HMRC has received around 43,500 VAT registration applications from non-EU based online sellers, which compares with 1,650 in 2015.

Lord Leigh of Hurley (Con): This issue is of course important to UK high street retailers which are facing intense competition from Amazon. Does my noble friend the Minister share my concern that HMRC estimates that the loss of VAT through evasion by foreign online supply companies is between £600 million and £900 million? However, despite having the powers to do so, HMRC has not frozen any funds, it has not blocked any listings and it has not seized one item of stock from warehouses where goods from overseas suppliers are stored awaiting dispatch the next day.

Lord Bates: My Lords, I congratulate my noble friend on his commitment and consistency in raising these very important issues which the Government recognise. That is why, for exactly the reasons he has outlined, we were the first country in the world to introduce joint and several liability for market sellers. We have issued more than 3,000 joint and several liability orders since they were introduced and the amount of tax revenue, which is the crucial point raised by my noble friend, is expected to increase to £1 billion over the review period leading up to 2023. However, more needs to be done.

Lord Campbell-Savours (Lab): My Lords, are Ministers seriously considering any Treasury recommendations to increase the VAT threshold and thereby bring a lot more traders under the rules? Would that not increase the tax take substantially?

Lord Bates: There are other ways of approaching the issue, one of which is to crack down on the loopholes. We have introduced successive initiatives and we have spent some £2 billion for HMRC to cut down on evasion. Next April, we will bring in an important measure to address the point made by my noble friend Lord Leigh. It will require that due diligence is carried out on online marketplaces to ensure that people are actually paying the correct amount of tax. Our emphasis and focus is on closing the gap and ensuring that more people pay the tax that is due rather than looking at the rates.

Baroness Kramer (LD): My Lords, despite its expanded powers, HMRC is shockingly poor at collecting VAT from overseas sellers. The number has been 4% of the amount that it is owed, and if I understand the Minister's numbers, it will not even attempt to get the figure up to 10%. As we go through the Brexit process we run the risk that another 27 countries are going to fall into the same overseas sellers category without the single market and the ECJ to ensure that we can collect VAT from entities that are based elsewhere but selling in the UK. What does he anticipate will be the consequence of that?

Lord Bates: We have to recognise that the UK has the largest online marketplace in the EU. We also need to recognise that beyond the EU, this is a global issue. Most of the goods coming in are actually from outside

the EU, and that is why the G20 and OECD base erosion and profit shifting initiatives are so important, as well as moving our tax system on to a digital basis so that we can ensure that digital businesses pay the correct amount of tax due.

Lord Naseby (Con): Does my noble friend not understand that small retailers are now being required to produce their returns online, although that has been temporarily suspended, while in the meantime their main competition is committing evasion on a substantial scale—never mind the fact that business rates are hugely generous for online businesses? Are Her Majesty's Government saying that they are not concerned about the loss of the high street? If they are, is it not time that they showed a little more understanding of what faces our shopkeepers up and down the country?

Lord Bates: We sympathise with those people, which is why we have listened to the calls that have been made. We have introduced pioneering joint and several liability for marketplaces and are introducing a due diligence system. While we are working through the G20 and the OECD, we are looking at initiatives that could be considered to solve the problem, such as split payments to ensure that VAT is automatically paid when someone domiciled in the UK makes a transaction.

Lord McKenzie of Luton (Lab): My Lords, the PAC noted that HMRC does not know how many fulfilment houses, or packaging establishments, there are in the UK and is therefore unable to systematically target VAT fraud. Is that right? If so, what will the Government do about it?

Lord Bates: That is right, which is why we require those establishments to register.

Lord Cormack (Con): My Lords, does my noble friend think that Sir Nicholas Clegg may have some spare time to devote to this?

Lord Bates: I do not know whether he is domiciled in the UK any longer.

Lord Tunnicliffe (Lab): My Lords, is this not a problem of HMRC resources? Is it not very difficult now to reverse the cuts that have been made in HMRC over the years? This is a clear example of loss of revenue to the Exchequer and the damage it does to the high street.

Lord Bates: I do not accept the premise that we are reducing the amount of money going into HMRC. Since 2010, as I said earlier, we have spent some £2 billion on closing that loophole. The increased yields which that has brought into the Exchequer are evidence that it is working.

Offshore Patrol Vessels

Question

2.52 pm

Asked by ***Lord West of Spithead***

To ask Her Majesty's Government when they plan to withdraw from service the Batch 1 River-class offshore patrol vessels HMS "Tyne", "Severn", "Mersey" and "Clyde".

The Minister of State, Ministry of Defence (Earl Howe) (Con): My Lords, our plans to withdraw the Batch 1 River-class offshore patrol vessels from service have yet to be finalised. Our decision will be informed by the outcome of cross-government discussions to determine our requirement for fisheries protection and compliance of patrols in UK waters following our exit from the EU. HMS "Severn" left service in December 2017 and is held alongside pending these deliberations.

Lord West of Spithead (Lab): I thank the Minister for his reply. Yesterday was of course the 213th anniversary of the Battle of Trafalgar—

Noble Lords: Hear, hear.

Lord West of Spithead: A great hurrah! The Secretary of State wrote in a Sunday paper that Nelson would look at the modern Navy with great pride and amazement. I think the amazement would be because he said that the Navy was growing, but it is not. Nelson had 280 frigates and we have 13, so I find that difficult to imagine.

The Minister touched on one area where there is real concern: our exclusive economic zone and territorial seas. We do not have enough assets there. Here is a wonderful opportunity to increase the number of ships available to look after those waters at a very low cost. They could be manned by the RNR and we would achieve something rather than just talking about it. Does he agree?

Earl Howe: I am sure that the noble Lord will acknowledge the extent of the investment devoted to the Royal Navy over the past few years. His point is a good one. The watchword in this context is "flexibility". The programme to replace the Royal Navy's offshore patrol vessels is continuing; the Batch 1 vessels will be replaced by the Batch 2 ships as they enter service. It is important that we keep open the possibility of extending the service of and/or keeping in reserve HMS "Clyde" or HMS "Mersey", for example, to meet any requirements emerging from not only Brexit but other contingencies. That is what we intend to do.

Lord Boyce (CB): If the patrol vessels are to work in the EEZ, which would be highly desirable, there are of course multifarious parties and agencies that also work there—the Navy, the Border Force, customs, Defra, HMRC and so forth. Which government department has the overall lead on such matters as command and control, training and funding for the activities that will be done in the EEZ?

Earl Howe: My Lords, there are two key requirements to ensure the security of our waters. One is that operations need to be intelligence-led, and the other is that they should be well co-ordinated—the noble and gallant Lord makes an excellent point. In the protection of our borders, the capability to detect and deter vessels and aircraft approaching the UK is just one part of a multilayered approach that the Government take in protecting our country. The Ministry of Defence is just one organisation with a role in this. It is important

[Earl Howe]
though to recognise the importance of co-ordination. That is why the permanent Joint Maritime Operations Coordination Centre exists—to deliver a national and international focal point for home waters maritime security and planning. The key is for all agencies to work together in a concerted fashion.

Lord Trefgarne (Con): Is my noble friend aware that I have a special interest in this matter? I think I was the Minister who ordered the original 11 River-class minesweepers, of which now apparently four remain. What has happened to the other seven?

Earl Howe: My Lords, they have been decommissioned. In congratulating my noble friend on the foresight that he showed in commissioning those vessels, I hope he will be reassured by my initial Answer—that we are maintaining flexibility to cope with unforeseen contingencies.

Lord Campbell of Pittenweem (LD): Is this issue part of the defence modernisation programme, which is of course a defence review by another name? The results of that review were promised in June this year. So far, no results have been published. What is the reason for the delay, and when will the results be announced?

Earl Howe: My Lords, the Defence Secretary published a Written Ministerial Statement on 19 July, as the noble Lord will be aware. It set out the headline conclusions of the modernising defence programme. I know that noble Lords were slightly disappointed with that Statement. We had hoped that it would be informative and reassuring—we had certainly intended it to be so. It confirmed the direction of travel; it described the work done to date; it set out some headline conclusions. Strictly speaking, the matter of the offshore patrol vessels is not part of that but, as I have explained, it is important to prepare now for the contingencies that may ensue from Brexit.

Lord Berkeley (Lab): My Lords, how many of these ships will protect our fishing fleet after Brexit at any one time? After all, we are taking back all these waters and presumably clawing back the allocation of catches from the Spanish and everybody else.

Earl Howe: As we speak, the Marine Management Organisation within Defra is making a full assessment of the scale and volume of both sea-based and non-seaboard patrol and surveillance capability required after we leave the EU. This is the key point for us to focus on. The Ministry of Defence and other agencies are tracking this work, but it is important to remember that fisheries protection is multilayered. It is not just the Royal Navy that enforces protection. The Marine Management Organisation relies on a lot of other systems to do that very thing.

Lord Sterling of Plaistow (Con): My Lords, I have just flown in from New York, having attended Trafalgar Night on board the "Queen Elizabeth". It was a most splendid occasion. We entertained the seniors of both the United States Navy and their Marine Corps. They could not have emphasised more their pride in having us as an ally, and everybody in this House can be very proud of the professionalism of all our sailors on board that ship. But when I asked the head of their navy, "Could you remind me how many people you have?", he said, "363,000". What was very clear was that they would like us to have greater capability. Do the Government recognise that, to keep this valuable friendship with the Americans, greater capability must be provided by the Government?

Earl Howe: My Lords, I am sure that my noble friend will know that the national shipbuilding strategy recognises the need for greater volume in the destroyer and frigate force. The Type 31e will enable us to grow the size of the frigate force.

EU Referendum: Conduct

Question

3 pm

Asked by ***Lord Foulkes of Cumnock***

To ask Her Majesty's Government whether they have received reports or information about (1) outside interference, and (2) irregularities, in the conduct of the European Union referendum.

Lord Young of Cookham (Con): My Lords, the Government have not received any reports or information about any successful outside interference in the European Union referendum. We nevertheless remain vigilant and are committed to defending the UK from all forms of malign state interference in UK democratic processes. The Electoral Commission's report on the referendum, published in September 2016, stated that the poll was delivered without any major issues and that there was a clear and timely final result.

Lord Foulkes of Cumnock (Lab): I don't believe it. Everyone knows the irregularities, the fraud and the corruption that took place. The Electoral Commission declared that there was illegal spending by Vote Leave. A whistleblower at Cambridge Analytica showed that Russian money was pumped into the Vote Leave campaign through Aaron Banks and others. This result was obtained by fraud and corruption. The Government have an opportunity to put this right and to satisfy the wishes of at least 700,000 marchers on Saturday by giving the British people the opportunity to decide whether they want to accept the deal, once the terms are known, or to stay in the European Union through a people's vote.

Lord Young of Cookham: My Lords, the Prime Minister has made her position quite clear on a second referendum: she does not want one. The Electoral Commission is investigating whether Mr Banks was the true source of the loans reported by a referendum campaign in his name and whether any individual facilitated a transaction with a non-qualifying person.

But it is important to keep this in perspective. The Atlantic Council and the Oxford Research Institute, both of which have researched this, found that the impact of the Russians on the referendum was at best marginal. One estimate was 0.3% of tweets. I was as disappointed as the noble Lord with the outcome of the referendum, but unlike him I do not believe that it was lost because of what I might call the Zinoviev Twitter.

Lord Tyler (LD): My Lords, this is the Act of Parliament that set out the conditions under which the referendum was fought. This is not a minor matter of rules or regulations; this is the law of the land. Can the noble Lord confirm that the Electoral Commission passed files detailing what had happened in terms of lawbreaking by the leavers during the campaign to the Metropolitan Police several months ago? Can he reassure the House that the police will never halt or delay an investigation because it is claimed that there are political sensitivities?

Lord Young of Cookham: I think it is a malign slur on the police to imply that they would defer to political pressure in that way. It is indeed the case that the responsible person for Vote Leave has been referred to the police, as has Mr Grimes, in relation to false declarations of campaign spending. A number of pro-remain organisations were also fined by the EC for breaking referendum law, including the Liberal Democrats.

Lord Pearson of Rannoch (UKIP): My Lords, will the noble Lord agree that the most irregular aspect of the EU referendum was the £9.5 million the Government spent on a deceitful little brochure which went through every letterbox in the land in an attempt to mislead the British people into voting to stay in the EU?

Lord Young of Cookham: The Government followed the precedent of earlier referendums, including those from the 1970s and 1990s, in distributing a leaflet setting out the Government's view.

Baroness Hayter of Kentish Town (Lab): My Lords, the DCMS Committee in the other place has just published alarming evidence of a so-called "Mainstream Network", which appears to have spent £250,000 to reach 10 million Facebook users, urging them to lobby their MPs to "chuck Chequers". Could the Minister ask the Electoral Commission to investigate this because it could fall into a pre-election period, or get his own department to consider whether, if this is not against the law, some regulation is needed if we are not to have just millionaires putting money into our political system?

Lord Young of Cookham: I understand the concern expressed by the noble Baroness and, indeed, by DCMS. It might be a matter for the Information Commissioner, who has been given new powers under the Data Protection Act, which has recently been passed. She is already investigating the possible misuse of data held by Facebook and used by Cambridge Analytica. We will shortly publish a White Paper on online harm setting out our objective to make the UK the safest place in which to be online.

Lord Grocott (Lab): My Lords—

Lord Dykes (CB): My Lords—

Lord Grocott: We have heard enough from the remain side; let us hear from the other—

Noble Lords: Oh!

Lord Taylor of Holbeach (Con): My Lords, let us hear from the noble Lord, Lord Grocott.

Lord Grocott: I am grateful to the noble Lord. My noble friend Lord Foulkes spoke with passion and eloquence on behalf of the 700,000 people who marched. If I can say a word on behalf of the 17.4 million people who voted leave, it is this: ever since the referendum result was declared—this just another step along the way—there has been an unremitting campaign to try to discredit or, at best, reverse the result of the referendum on numerous different fronts, of which this is just the latest example. Can the Minister put this all in perspective and recognise that the 17.4 million people who voted leave were not all duped by the Russians and were not all ignorant about the issues which were before them? All they asked was this simple request, which we want the Government to get on with: to leave the European Union.

Lord Young of Cookham: The noble Lord will know that after the referendum the relevant legislation was passed through both Houses. Legislation will shortly be introduced, following a successful negotiation with the European Union. I share his wish, as much as anybody else, that this whole matter be brought to a conclusion swiftly and cohesively, and we can then move on to other matters.

Sexual Offences

Private Notice Question

3.08 pm

Asked by ***Lord Morris of Aberavon***

To ask Her Majesty's Government, in the light of the recent prosecutions in Huddersfield, whether there are sufficient resources to investigate the alleged sexual offences in the other towns and cities of the United Kingdom in a timely manner.

Lord Morris of Aberavon (Lab): My Lords, I beg leave to ask a Question of which I have given private notice.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): My Lords, these horrific crimes are sickening and I commend the bravery of victims coming forward and the police for the successful prosecutions so far. The Government have made a commitment to tackle child sexual abuse in all its forms and we have made a significant investment to help transform law enforcement's response.

Lord Morris of Aberavon: My Lords, justice delayed is justice denied and this seems to have happened from Huddersfield to Rochdale, from Halifax to Newcastle, and in many other towns. Criminal law practitioners have sought to maintain the rule of law for victims and perpetrators without fear or favour. Have timely investigation and prosecution been sacrificed in favour of social cohesion? Will the Government invite the inspectors of constabulary and the CPS to analyse and report on the timeliness of the investigations and the prosecutions?

Baroness Williams of Trafford: My Lords, I do not think that what has happened here is political correctness; I think that, given the sheer number of people involved in the types of crimes they committed against some very vulnerable girls, it has taken time to bring this case forward—and, of course, the case was delayed for reasons outside the CPS's control. It is really important, for successful prosecutions to be brought, that full rigour goes into the investigation and subsequent prosecutions.

Lord Kennedy of Southwark (Lab Co-op): My Lords, first, I join the noble Baroness in paying tribute to the police and to the bravery of the victims of these appalling crimes. By coming forward, they have highlighted this evil, had the criminals brought to justice and protected other young girls from becoming victims. Compare that to the irresponsible actions of those who risked collapsing the trial. What work are the Government undertaking to understand the full scope and size of this crime, of these offences, in our country? Without understanding that, it will be very hard to effectively resource both prevention and investigations, and to bring all the perpetrators to justice.

Baroness Williams of Trafford: The noble Lord makes a very good point: unless we can understand the root causes of this, it is very difficult to tackle it. There have been several similar cases of the abuse of children. My right honourable friend the Home Secretary has said:

"I will not let cultural or political sensitivities get in the way of understanding the problem ... I've instructed my officials to explore the … characteristics of these types of gangs and if the evidence suggests that there are cultural factors that may be driving this type of offending, then I will take action".

Lord Paddick (LD): My Lords, according to the *Sunday Times*, the Chancellor of the Exchequer thinks that the police would help their case for more money if they were more responsive to local residents and investigated crimes such as burglary, rather than labour-intensive investigations into historical sexual offences. Does the Minister agree?

Baroness Williams of Trafford: I have to apologise to the noble Lord because, although I read the *Sunday Times*, I did not read that particular article. But nobody can be in any doubt about the commitment of this Government commitment to tackling this type of abuse, and in particular that of my right honourable friend the Home Secretary. Child sexual abuse has been declared a national threat and the Government are investing millions of pounds to enable officers to actively seek out and bring these types of offenders to justice. Last February, the Government published our tackling child sexual exploitation progress report and we have announced a £40 million package of measures to protect children and young people from sexual abuse, exploitation and trafficking, and to crack down on offenders. This has included £7.5 million for a new, ground-breaking centre of expertise that will identify, generate and share high-quality evidence of what works in preventing and tackling child sexual abuse and exploitation. We have put a significant increase in resources into the NCA, leading to a near doubling of the CEOP command's investigative capability, and an additional £20 million has been committed up to 2020 to maintain this. There is a further £20 million of transformation funds going into the regional organised crime units, which do a superb job in bringing to justice perpetrators who target children online.

Lord Blair of Boughton (CB): My Lords, this Question from the noble and learned Lord, Lord Morris, is actually just a provincial equivalent of the discussion we had on the first Oral Question. The simple fact is that the Minister is explaining small penny-packets of money that are being put into a particular problem. My successor but two as commissioner, Cressida Dick, has 20% less money than I had when I left 10 years ago. Will the Minister accept that it is simply impossible for the police service to go on with 20% less money without something giving? Something is already starting to give and the Government must take action.

Baroness Williams of Trafford: I think I have made it clear, in response to both this and the earlier Question, that there are certain types of crime patterns, such as knife and gang crime in London, which are worrying and into which the Government have sought to put specific types of funding, but also that this type of child sexual abuse and exploitation requires a dedicated approach to a specific problem. But I do not resile from the fact—and my right honourable friend the Home Secretary recognises this, as does the Policing Minister—that considering all the things that the police have to do and the strain they are under, they have significant burdens on them. Both my right honourable friend the Home Secretary and the Policing Minister are very aware of this as we go into next year.

Lord Anderson of Swansea (Lab): My Lords, does the Minister agree that the police's resources and priorities should be in part determined by public concern? Is she in any doubt at all that the public are deeply concerned about the exploitation of vulnerable girls by gangs? What role have the police commissioners played in this matter?

Baroness Williams of Trafford: My Lords, this has to be a multiagency approach. It is a job that local government will have across its desk in terms of protecting vulnerable children. The police will have it across their desks. The Department of Health will have it across its desk. It is also the job of education to ensure that girls—predominantly—who may be vulnerable to this sort of exploitation are supported in the communities in which they live. I have outlined the various funding

packages to try to prevent such things happening, but the noble Lord is not wrong when he says that resources need to go into this. Sometimes the public's priorities are not the priorities that the police might seek to invest in, but this is a major national priority.

Lord Wallace of Saltaire (LD): My Lords, the Minister may have read the *Times* report this morning on the county lines abuse of young children in Bradford. I am sure that the Government think that getting at this abuse of children through county lines drug networks is also a priority. The last time I was driven around north Bradford by one of our local councillors, I did not see a single policeman on the streets all afternoon—although I did see three people peddling drugs on the streets as we passed by. Does that not mean that we need larger resources than we have at the moment to cope with the underlying social issues that give rise to this sort of exploitation of children, male and female?

Baroness Williams of Trafford: The noble Lord is absolutely right to bring up the issue of county lines, because that encompasses everything we have been talking about in response to the Question of the noble Baroness, Lady Hussein-Ece, as well as to this one. There is definitely a link between gangs, guns, drugs and exploitation, and at the heart of it—always—is exploited children.

Lord Pearson of Rannoch (UKIP): My Lords, do the Government accept that if we extrapolate nationally the Jay report on Rotherham and other reports from Telford and Oxford, there appear to have been upwards of 250,000 young white girls raped in this century, very largely by Muslim men, usually several times a day for years? What is the Government's answer to the chief constable of Northumbria Police, who has just said that there is every likelihood that these grooming gangs are operating in every one of our major cities? What are the Government doing to prosecute those in authority who turned a blind eye to all this because they were afraid of being called Islamophobic and so on? What are they doing to compensate and help these victims mentally?

Baroness Williams of Trafford: My Lords, I refute the charge that those in authority are turning a blind eye to this. Noble Lords from across the House have outlined various child sexual abuse perpetrations in various parts of the country. One thing we can say above all else is that what these people target is vulnerability. It is not specific to race, creed or colour—it is vulnerability.

Counter-Terrorism and Border Security Bill

Order of Consideration Motion

3.19 pm

Moved by ***Baroness Williams of Trafford***

That the Bill be considered in Committee in the following order: Clauses 1 to 12, Schedule 1, Clauses 13 to 18, Schedule 2, Clauses 19 to 21, Schedule 3, Clause 22, Schedule 4, Clauses 23 to 27, Title.

Motion agreed.

Crime (Overseas Production Orders) Bill [HL]

Report

3.20 pm

Moved by ***Baroness Williams of Trafford***

That the Report be now received.

The Lord Speaker (Lord Fowler): The question is—

Noble Lords: Order!

The Lord Speaker: Sorry, there is this old rule in this House that when the Speaker is up, Members are down. Perhaps that could be remembered. The question is that this Report be now received.

Report received.

Clause 1: Making of overseas production order on application

Amendment 1

Moved by ***Lord Rosser***

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

"(4A) The Secretary of State may not make regulations designating an international agreement under section 52 of the Investigatory Powers Act 2016 (interception in accordance with overseas requests) where that agreement provides for requests to be made by the competent authorities of a country or territory, or of more than one country or territory, in which a person found guilty of a criminal offence may be sentenced to death for the offence under the general criminal law of the country or territory concerned.

(4B) Subsection 4A does not apply if the country or territory has, within the international agreement, given assurances that the death penalty will not be imposed in any case in which or in whose preparation electronic data obtained under this Act has been used."

Lord Rosser (Lab): The Bill is intended to assist in the fight against serious crime, not least terrorism, by making it possible to conclude agreements with other countries that would provide for electronic data in the possession of a service provider, in that other country to the agreement, to be passed to the UK authorities upon that service provider being served with an overseas production order made by a court in this country. Such arrangements would almost certainly have to be reciprocal, so that the authorities in that other country could make an overseas production order or equivalent in respect of the provision of electronic data by a service provider in this country. The necessity for having these provisions in the Bill is that the current procedure for obtaining such data, which is increasingly used in major crimes or in their planning as the technology rapidly develops, is what is known as mutual legal assistance. Under this process, the application for such data must be through the authorities and a court in the country of the service provider from which that

[LORD ROSSER]
data is being sought. If the application is agreed, there is still the process of actually obtaining the data from the service provider.

In reality, obtaining electronic data under the existing mutual legal assistance arrangements can take many months—apparently up to 12—which is not exactly conducive to fighting effectively serious crime and terrorism, with the length of time taken to obtain that data acting either as a disincentive to seeking it at all or it being obtained so late as to seriously negate its relevance and effectiveness. As I understand it, discussions have already taken place between the United Kingdom and the United States of America about concluding reciprocal arrangements for securing electronic data under the Bill's provisions on overseas production orders. Indeed, I think the United States has already passed its necessary legislation to enable such arrangements or agreements to be concluded with the UK. We are not in any way opposed to the introduction of these new arrangements in principle but we have two significant areas of concern, one of which is the implications for the UK's stance on opposition to the death penalty. That is the subject of Amendment 1, which is also in the names of my noble friend Lord Kennedy of Southwark, the noble Lord, Lord Paddick, and the noble Baroness, Lady Hamwee.

An order from this country for an overseas production order applying to a service provider in the USA would, under the Bill, be made in a UK court. The service provider in the USA would, under the terms of the arrangements likely to be concluded, be expected to comply. In fact, as I understand it again, our Government have stated that they will not seek such an order unless they know that the provider would be willing to comply voluntarily.

As understand it again, service providers are likely to be willing to comply because the Bill will provide them with legal protection for releasing such electronic data. Likewise a service provider in this country would, in the normal course of events, be expected to comply with an overseas production order made by a court in another country—such as America, with which it looks as though we are close to concluding an agreement—under the terms of the Bill. I am not sure that there has been an indication from the American authorities that they would seek such an order only if they knew that the relevant service provider over here would comply, so some form of enforcement action could be the result if there was non-compliance.

Our concern in respect of the death penalty, to which this amendment relates, is that in a number of states in the USA it can be handed down as the sentence if a defendant is found guilty of certain serious crimes, including acts of terrorism. In the UK we are opposed to the death penalty—government Ministers have repeatedly stated that—and do not apply it as a sentence. However an overseas production order made by a court in the USA for electronic data from a service provider in this country could result in a situation whereby that electronic data might be significant in or key to enabling a court in America to convict a defendant who could be a citizen of any country, including Britain, of an offence carrying the death penalty as a possible sentence.

There is no issue with an individual being convicted of a serious offence they have committed, not least terrorism, as a result of electronic data obtained from a service provider in the UK and receiving an appropriate sentence, but we have an issue with the provision of such information from this country under the terms of the Bill without an assurance that the death penalty could not be imposed. We cannot as a nation say we are opposed to the death penalty and then sign an agreement with another country, whether the USA or another nation, knowing that a court in that other country could then make an order for a service provider here to provide electronic data which could make the difference between a defendant, perhaps a British citizen, being convicted or not convicted of an offence that led to the death penalty being applied.

This amendment provides that, in any agreement on overseas production orders and the provision of electronic data under the terms of the Bill, assurances must be obtained from the other country concerned that the death penalty will not be applied in respect of any offence for which a defendant has been found guilty and in which the information provided from this country contributed in any way to securing that conviction.

I believe the Government have previously said that there will need to be some form of disputes procedure against an overseas production order made in another country with which we have concluded a reciprocal agreement. However the Government have not been able to say what form that dispute procedure will take, how it will operate or, crucially, on what grounds an overseas production order made in that other country could successfully be challenged. Since the Government have resisted any suggestion of the Bill specifically stating that no reciprocal agreement or arrangement can be made with a country that will not give a cast-iron assurance that any electronic data from this country would not be used to help convict a defendant of an offence for which the death penalty would be applied, it seems extremely unlikely that grounds for a successful objection to an overseas production order under any disputes procedure could be that the data being sought could be used to help secure a conviction that could lead to the death penalty being imposed.

I repeat that the amendment does not preclude a reciprocal agreement being reached with other countries on overseas production orders to secure electronic data in the battle against serious crime, not least terrorism, by improving the prospects of securing convictions and, with them, the prospects of lengthy sentences of imprisonment to reflect the severity of the crime. The amendment seeks to ensure that our policy as a nation of opposing the death penalty is not compromised by service providers here being required by a court in another country with which we have reached an agreement under the terms of the Bill being expected to hand over data when there is no guarantee that that information will not be used to assist in securing a conviction, which could be of a British citizen, for which the death penalty could be applied. We cannot claim that we did not know that that would be the outcome. It will have come about through passing the Bill at the behest of the Government and the Government concluding an international agreement with another country, such as the USA, where the

death penalty can still be applied in some states, without securing an assurance as part of that international agreement that the death penalty will not be applied where data secured under the Bill has played a part in securing that conviction. I beg to move.

3.30 pm

Amendment 2 (to Amendment 1)

Moved by ***Lord Paddick***

2: Clause 1, leave out from beginning to "given" in subsection (4B) and insert—

"(4A) The Secretary of State may not make regulations designating an international co-operation agreement providing for the use of—

(a) section 52 of the Investigatory Powers Act 2016 (interception in accordance with overseas requests), or

(b) any other enactment which provides for the collection of electronic data,

unless the condition in subsection 4B is met.

(4B) The condition is that the states party to or participating in the international co-operation agreement have"

Lord Paddick (LD): My Lords, unusually, I shall be supporting Amendment 1 but I shall also speak to Amendments 2 and 3 in this group. My noble friend Lady Hamwee and I have added our names to Amendment 1 in the names of the noble Lords, Lord Rosser and Lord Kennedy, but we feel that the amendment to Clause 1 as drafted does not go far enough.

Before I come to that, however, I wish to say that I wholeheartedly support what the noble Lord, Lord Rosser, has said about the provisions of the Bill. Bearing in mind that they are likely to be mutual, in that similar provisions would be in a Bill in a country with which we are going to enter into a treaty, it is very important to have a death penalty assurance in that treaty, which is what the amendment seeks to do. In addition to what the noble Lord has said about UK Ministers saying that we in the UK are opposed to the death penalty, Article 2 of the European Convention on Human Rights, together with Protocol 13 to which the UK is a signatory, provides for the total abolition of the death penalty. In early meetings with the Minister, we were led to believe that that death penalty assurance would be part of any treaty. However, we feel we need that reassurance in the Bill.

As I say, we took the unusual step of both supporting and amending the Labour amendment on the basis that we both agree on the principle of Amendment 1—that the Government should not enter into a treaty that would require UK companies to provide electronic data to law enforcement in a country that had the death penalty unless the treaty contained assurances that the death penalty would not be implemented if data provided by UK companies was used. We believe that the prohibition on entering into a treaty with a country that has the death penalty should be broader than just the data covered by Section 52 of the Investigatory Powers Act 2016, which is what Amendment 1 covers, because that provision covers only the interception of communications in the course of transmission—wiretaps, listening in to telephone conversations and that type of electronic data. A British company could hold personal information about an individual that could be crucial in an investigation for an offence that carries the death penalty in the country making the request. Such electronic data would not necessarily be in the course of transmission but held on servers in the UK.

Our Amendment 2 would therefore include,

"any other enactment which provides for the collection of electronic data".

Amendment 3 makes it clear that the prohibition on entering into a treaty would not apply if an assurance had been given that the death penalty would not be imposed whether either intercepted communication or any other kind of electronic data had been provided under the Act. That amendment is consequential on Amendment 2.

We want to ensure that no UK company is complicit in providing electronic data of any kind that could lead to someone being executed. I beg to move.

The Minister of State, Home Office (Baroness Williams of Trafford) (Con): I thank both noble Lords for speaking to their amendments today and express my gratitude to all Members of the House for their contributions both in Committee and today on Report—I think it is the same two noble Lords, but perhaps there are one or two more.

I stress to the House the importance of the UK-US data access agreement. The agreement will allow the UK authorities access to valuable evidence and intelligence directly from US communication service providers. The House should be made aware that the vast majority of CSPs and their data reside in the US, not the UK. The Bill gives our law enforcement a strategic advantage in the fight against the threat we face.

Indeed, in almost every serious criminal investigation, we expect those we investigate to be using services provided by CSPs based in the US. The agreement will make a significant contribution to the detection, investigation, prevention and prosecution of serious crime and terrorism. The Government have been working towards the agreement with the help of US CSPs and the US Government for several years following the recommendation from the then Prime Minister's data envoy Sir Nigel Sheinwald.

All Governments and any future Governments have the duty to put the security of their people first. It will always be in the public interest to ensure that our police and agencies have access to the necessary intelligence and evidence in order to fulfil that duty. Just as it was under the previous Labour Government and as it is today, Ministers must always be mindful of the current threat environment they find themselves in. That is why we believe that better scrutiny of these agreements and accountability for future treaties is the best way to ensure that the Government's principles are tested, rather than prescribing a rigid format for treaties that have not yet even been mooted, let alone being currently under negotiation.

Of course, the Government's objective is to obtain a satisfactory death penalty assurance, but negotiations are ongoing and not yet concluded. Playing the discussions out in public may make it much harder to conclude them effectively.

[Baroness Williams of Trafford]

Let me be clear to the House: there will be an assurance in the agreement. We can expect it to rule out the direct use of information obtained under the agreement as evidence in a prosecution where the death penalty might apply. Parliament will scrutinise the final detail of any agreement and the assurance it contains. We have already tabled an amendment today clarifying that the Constitutional Reform and Governance Act 2010 process will always apply to relevant international agreements, ensuring that Members have two opportunities to scrutinise a treaty.

But I am willing to go further. Noting the concerns that noble Lords have expressed, the Government will commit to bringing forward an amendment in the Commons. Such an amendment would not pre-empt negotiations with the US, or any future agreement with another country, but would instead absolutely guarantee that Parliament has the chance to conduct proper, thorough scrutiny of relevant agreements and death penalty assurances.

The amendment I envisage would ensure that Ministers cannot make regulations to designate any agreement with a country which retains the death penalty for incoming requests without first laying before Parliament the agreement and details of any assurances obtained. There would then be a defined period during which Parliament would have a chance to examine those details, and this could include scrutiny by any relevant committees.

Finally, the Secretary of State would be obliged to consider any recommendations made by a committee in relation to the assurances before laying regulations to designate the agreement. Of course, the regulations themselves would then be subject to the usual process of parliamentary scrutiny, during which time Members of both Houses could consider any recommendations and respond to them.

Ultimately, it is right that Parliament has a say on the difficult decision between not concluding negotiations on agreements and securing the death penalty assurances we would like. Both the amendments tabled by Labour and Liberal Democrat Peers could lead to our being unable to conclude a data access agreement with the US. If we find ourselves in that situation, law enforcement agencies and the UK intelligence community will continue to be denied timely access to valuable evidence and intelligence.

The noble Lord, Lord Paddick, said that Section 52 of the IPA covers only material intercepted in the course of transmission. That is not entirely correct. It can authorise obtaining stored communications as well as intercept. As I said, there is a balance to be struck here. That is why I ask Members not to tie the Government's hands in negotiations. Instead I will commit to amending the Bill in the Commons to ensure that Parliament has ample opportunity to scrutinise any future treaty and, if relevant, its death penalty assurance.

Lord Paddick: My Lords, I am grateful to the Minister. Unless she wishes to contradict me, I think she just said that these treaties are very important to the extent that the British Government are prepared to allow people to be executed on the basis of data provided by British companies to overseas law enforcement. The essence of these amendments is that that should not be allowed and we want that reassurance on the face of the Bill.

Baroness Williams of Trafford: I do contradict the noble Lord. I am asking noble Lords not to tie the Government's hands in negotiation.

Lord Paddick: Forgive me, but I do not see the difference between what I said and what the Minister has just said, unless she wants to clarify further.

We are concerned about this because of the recent case of Kotey and Elsheikh, in which the American authorities asked for information from the British on two people who were part of an ISIS cell. The Home Secretary decided that the information would be provided without a death penalty assurance. We are concerned that what might considered a one-off case which contradicts the British Government's usual global opposition to the death penalty is now going to be enshrined in treaties. I understand what the Minister said about Section 52 of the Investigatory Powers Act, but that is not our understanding and I therefore wish to test the opinion of the House on Amendment 2.

3.41 pm

Division on Amendment 2

Contents 108; Not-Contents 185. [The Tellers for the Contents reported 108 votes; the Clerks recorded 107 names.]

Amendment 2 disagreed.

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3.54 pm

Amendment 3 not moved.

Lord Rosser: I thank the Minister for the Government's response to my amendment—or rather the amendment I have moved; it is not purely my amendment. The Government's argument appears to be based on two or three strands. The first is an inference that another country—realistically, we are talking about the USA—might not be willing to conclude an agreement with us under the Bill, including of course a reciprocal agreement, if this amendment is passed with its provisions for prior assurances on non-application of the death penalty. Why, though, should we not have the assurances that this amendment seeks, when we are talking about information from this country? Why should we have to compromise on our stance of opposition to the death penalty by having to hand over electronic data following an order in a court, or made in a court in another country, which could lead to the death penalty being applied if that information helped in securing a conviction in that other country?

[Lord Rosser]

I notice that the Government said that such information would not be used in evidence. However, information can be of value in securing a conviction without that evidence in itself being produced in evidence, since it may point people in directions which will lead to other evidence being produced which could assist in securing a conviction. It surely is not opposition to the death penalty—and government Ministers keep telling us that we are opposed to it—if you conclude an agreement that you know could allow the death penalty to be applied thanks to our assistance and co-operation over the provision of data. We need the safeguard that the death penalty will not be applied.

The other point is that orders will be made in that other country that the international agreement we conclude with it will expect to be adhered to and data supplied without any ability of a British court or the Government to say no on the ground that the death penalty could be applied. No assurances have been given that that will not be the case. In the absence of any detail about any disputes procedure and the circumstances in which it would operate, we will not be able to stop information being handed over on the ground that it could allow the death penalty to be applied.

In that regard, we do not know how many overseas production orders will be served on service providers in the UK by other countries with which we reach an agreement and where the death penalty could be applied. It could be a considerable number, and the Government cannot deny that. We could, in fact, be assisting in the application of the death penalty on a not infrequent basis.

As I understand it, the Government have now indicated that they will put down an amendment when the Bill reaches the Commons. It appears that that amendment might provide—I am really not sure—for some kind of review of any agreement reached on overseas production orders with another country, the outcome of which would presumably be available to Parliament before Parliament decides whether or not to ratify the agreement. But Parliament will presumably have to say yes or no to the agreement and will not be able to amend it, and neither will there be any requirement on the Government to accept the findings of any prior review or investigation of an agreement with another country reached under the terms of this Bill and, in particular, on any recommendation that an assurance should be sought on the non-application of the death penalty if it applies in the country concerned.

I really do not think that the assurance given and the statement made about the nature of a possible amendment in the Commons meet the provisions of this amendment, which clearly state that, if we are going to conclude such agreements with other countries on overseas production orders, and if it is a country where the death penalty can apply, firm assurances must be sought that, where information is handed over by service providers in this country, it will not be used to secure a conviction that could lead to the death penalty being imposed. I wish to test the opinion of the House.

3.58 pm

Division on Amendment 1

Contents 208; Not-Contents 185. [The Tellers for the Contents reported 208 votes; the Clerks recorded 207 names.]

Amendment 1 agreed.

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4.11 pm

Amendment 4

Moved by ***Baroness Williams of Trafford***

4: Clause 1, page 1, line 21, leave out from "means" to end of line 3 on page 2 and insert "a relevant treaty which—

(a) relates (in whole or in part) to the provision of mutual assistance in connection with the investigation or prosecution of offences, and

(b) is designated by the Secretary of State by regulations.

(5A) For the purposes of subsection (5) a treaty is a relevant treaty if a Minister of the Crown has laid before Parliament a copy of the treaty under section 20(1)(a) of the Constitutional Reform and Governance Act 2010.

("Treaty" and "Minister of the Crown" have the same meaning for the purposes of this section as they have for the purposes of Part 2 of that Act.)"

Baroness Williams of Trafford: My Lords, the Government recognise that, when it comes to agreements for direct access to data, it is unlikely that either the UK or another country would commit to complying with orders that have extraterritorial scope without acknowledging this through a formalised agreement or arrangement. Therefore, in reality, any arrangement we choose to enter into for direct access to data will likely be in the form of a treaty requiring formal ratification before entry into force. It is not the Government's intention to conclude such international arrangements by memoranda of understanding, for example. We do not think that such informal arrangements would afford the appropriate level of certainty that such international arrangements require.

As noble Lords know, treaties that require ratification are subject to formal parliamentary scrutiny in the form of a procedure under Part 2 of the Constitutional Reform and Governance Act 2010—CRaG—which must be followed before the Government can complete the ratification process necessary to bring the agreement into force. The text contained in the Bill introduced to this House was intended to allow the UK to consider other measures, such as EU instruments that do not fulfil the definition of "treaty" under CRaG. However, we have since concluded that it is highly unlikely that the UK, or any other country we enter into agreements with, would accept anything less than a formal treaty. I therefore propose to make an amendment to Clause 1 to make this clear.

The amendment provides that a designated international co-operation arrangement must be a "relevant treaty". It would further provide that a "relevant treaty" is one that has been laid before Parliament under Section 20(1)(a) of CRaG. The effect of the amendment would be to ensure that where the Secretary of State, by way of regulations, wishes to designate an arrangement under the Bill, they can do so only if that arrangement is a treaty that has been laid before Parliament for scrutiny under CRaG. Only treaties that have been laid before Parliament under CRaG can be designated. However, it is still possible for an agreement to be designated before ratification. There may be operational reasons why one would want to designate an agreement before ratification has been finalised. For example, an agreement may come into force on ratification—depending on the terms of the agreement—in which case designating after ratification may be too late and there may be a risk of breach of obligations under the agreement.

The effect of Amendment 5 in the names of the noble Baroness and the noble Lord would preclude any designation of an international co-operation agreement until it has been ratified. Ratification is a process which requires an act—for example, the exchange of diplomatic notes between the parties—which signals in international law the parties' consent to be bound by the agreement. However, the amendment could cause a detrimental effect, as I have explained, where the terms of an agreement require that it comes into force on the day of ratification. The amendment would make it impossible to designate until after the ratification process, which may put the UK in breach of any obligations under the agreement. I should also make clear that even where an agreement is designated after having be laid under CRaG but before it is ratified, an agreement could not come into force until the process of ratification is complete and therefore any requests could not be made until the agreement is entered into force, following ratification. I hope that the noble Baroness will be happy to withdraw Amendment 5. I beg to move.

Amendment 5 (to Amendment 4)

Moved by ***Baroness Hamwee***

5: Clause 1, in subsection (5A), after "2010" insert "and it has been ratified in accordance with that Act"

Baroness Hamwee (LD): My Lords, we welcome the Government's significant movement towards the use of the treaty procedure, which we and, I believe, the Labour Benches argued for at the previous stage. I was concerned that the amendment was incomplete, and the Minister has explained why her amendment refers to "laying" the treaty, but not the other provisions of Section 20 and several subsequent sections of the Constitutional Reform and Governance Act.

As the Minister has told the House, it is quite a complicated and potentially long drawn-out procedure. I accept that, but it is long drawn-out because it is designed to give Parliament a proper opportunity to have input into the final product of the treaty, with various stages for its consideration, ending up in ratification. The Minister, in arguing on the first group of amendments, stressed the importance of the procedure. She has just said that the Government might want to make a designation before ratification. It seems to me that this nullifies the impact of the procedure process, and assumes that Parliament will ratify—in other words, will vote as the Government tell it to, which is precisely the arrangement we do not want in place.

The Minister has, however, just talked about the treaty not coming into force until ratification—she is nodding at that, for which I am grateful. I wonder whether she would be prepared to have a discussion—she has been prepared for lots of discussions on the Bill already, for which we are grateful—about an amendment we might table at Third Reading to tidy this up, encapsulating what she has just said to the House about delaying the process until the parliamentary process has been completed. I had better move this amendment, and then we can debate it.

Baroness Williams of Trafford: My Lords, I am sorry that I have not been very clear. I am very happy, should the noble Baroness wish to withdraw Amendment 5 and accept Amendment 4, to have a discussion before

Third Reading—we have discussed our way through this Bill—but in the meantime I ask her to withdraw Amendment 5.

Baroness Hamwee: Of course I am happy to do that. I am sorry, I thought that was implied. I do not wish any more exercise on noble Lords than we need to have during the course of this afternoon. I look forward to that discussion and I beg leave to withdraw the amendment.

Amendment 5, as an amendment to Amendment 4, withdrawn.

Amendment 4 agreed.

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

Amendment 6

Moved by ***Lord Rosser***

6: Clause 3, page 4, line 21, at end insert—

"(8A) "Journalistic data" means electronic data that—

(a) was created or acquired for the purposes of journalism, and

(b) is stored by or on behalf of a person who created or acquired it for the purposes of journalism.

(8B) Where a person ("R") receives electronic data from another person ("S") and S intends R to use the data for the purposes of journalism, R is to be taken to have acquired the data for those purposes.

(8C) Journalistic data is "confidential journalistic data" if—

(a) it is acquired or created by a person or persons in their capacity as a journalist and is held in confidence, or

(b) it is communications data of a person acting in their capacity as a journalist, or

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

Lord Rosser: The Bill extends the ability of law enforcement agencies through overseas production orders to obtain electronic data held by service providers overseas for the purposes of fighting serious crime, including terrorism. Since the assumption is that an agreement with another country will be reciprocal, the terms of the Bill when implemented will also, in reality, allow law enforcement agencies in that other country with which we have a reciprocal agreement to more easily obtain electronic data held by service providers in this country. But the Bill does not appear to provide adequate safeguards against confidential journalistic material being handed over in a way that results in sources losing their anonymity. We thus appear to have a Bill that potentially compromises the position and values of our free press. If sources of information do not feel that their anonymity will be protected, they are much less likely to provide information to journalists—information that might bring to light corruption, fraud, sexual offences, adverse environmental activity or failings by large organisations or government, for example, that those involved might wish to keep secret.

Clause 12 requires that where an overseas production order is made in respect of confidential journalistic data, it must be made on notice. The agency applying for the overseas production order would have to judge whether the material sought was ordinary or confidential journalistic material, but there is no guarantee under the Bill as it stands that the journalist, or indeed media organisation, will be able to make representations to the court. There is no requirement in the Bill for the journalist or media organisation that acquired the confidential material to be informed. The judge has a discretion to notify the journalist but not a duty. Without a requirement to notify the journalist or media organisation, take representations from them and have regard to what they say, there is no means by which journalists or media organisations can seek to protect their source.

This amendment seeks to address this concern by providing the right of journalists or media organisations to be given notice that an order in respect of confidential material is being sought, and to then be able to make representations to oppose the making of an order involving such journalistic material. It would also provide that the judge must be satisfied that there is a public interest that overwrites the confidentiality of the data sought before an order is made. If the Government have concerns that there might be journalists whom they would not wish to inform of an application for an order, then the advice could be given to the media organisation for whom that journalist worked.

The amendment seeks to ensure the continuation of an important safeguard. I beg to move.

Baroness Hamwee: My Lords, from these Benches we had an amendment in Committee requiring the court to be,

"satisfied that … data … is not confidential journalistic data".

We were concerned that the Government had not consulted the NUJ or other organisations; I wonder whether they have had an opportunity for a discussion since then. The News Media Association certainly made its views clear with its concern about what it described as an artificial distinction between "journalistic material" and "confidential journalistic material" and what might flow from that distinction.

New subsection (8C)(b) proposed in Amendment 6 seems to make all data held by a person acting as a journalist "confidential journalistic data". I see the attraction in that but I wonder whether this is the place to treat material differently from how it is treated elsewhere in UK law—in other words, I wonder about making that provision apply for the purposes of this piece of legislation only, which is a fairly small piece of the jigsaw of legislation that applies to journalism. Can the noble Lord, Lord Rosser, confirm when he winds up whether I have read this correctly: is he eliminating a distinction in this piece of legislation only, and only in the circumstances to which it will apply?

With regard to Amendment 11, we support a requirement to give notice of an application. We had an amendment to that effect in Committee, and we have amendments in the next grouping that are an attempt to respond to the Minister's comments on the issue then.

Baroness Williams of Trafford: My Lords, the Bill provides that journalistic material which is non-confidential can be obtained through an overseas production order without having to give notice. This type of material may, for example, be the manuscript or copy that the journalist is working on. A judge must be satisfied that the material is relevant to a UK investigation and in the UK public interest before he can approve an order to obtain it. The Bill implicitly recognises that a person named in an order may merely store data on behalf of a person, including those who create or acquire it for journalistic purposes. Journalistic material that is already published is unlikely to form part of an application for an overseas production order. That is because this material can already be freely accessed by law enforcement agencies, and there would be no need to compel production of information that was already in the public domain.

However, where information relates to confidential journalistic material—that is, it is created subject to an obligation that it would be held in confidence and that obligation continues to be held, or it is held subject to a restriction on disclosure or obligation of secrecy contained in legislation—that material will be subject to the notice provisions under Clauses 12 and 13. Therefore, if a journalist stores information—whether in their manuscript, copy or otherwise—that relates to or contains such confidential material, that can be sought but only if an application is made "on notice". We expect court rules to set out that such an application cannot be determined by the court in the absence of a respondent unless they have waived the opportunity to attend. That already exists in court rules in relation to domestic production orders if, for example, the police wish to obtain access to a journalist's notebook.

Our objective is to protect legitimate journalism, ensuring that those who may wish to harm us cannot hide behind claims of the data being journalistic to evade investigation or prosecution. Coupled with that, we have been clear that material acquired or created by the journalist to further a criminal purpose is not considered journalistic material. That terminology is borrowed from the Investigatory Powers Act 2016, which sought to ensure that safeguards and protections were targeted at legitimate forms of journalism.

The reason that the Government have carved out material,

"created or acquired with the intention of furthering a criminal purpose",

is to follow the direction that the Investigatory Powers Act identified, which is that safeguards should not exist for those who intend, through media channels, to do us harm, but then seek to hide behind spurious claims of journalism. One example is the media wing of Daesh, which may use an internet blog designed to disseminate harmful information and claim that it was journalistic material and therefore not caught by the provisions. Conversely, if a journalist acquires a leaked document from a source which alludes to criminal conduct, the journalist acquires it for journalistic purposes, not with the intention of themselves furthering a criminal purpose.

4.30 pm

The Government's intention has always been to protect confidential source material which would fall within the definition in Clause 12(4). I think this is helpful and should provide reassurance to noble Lords, as well as the journalist community, that the Government intend to protect this type of information and take the issue of freedom of the press very seriously. There are sufficient safeguards in the Bill to protect particularly sensitive data. I say again that the Bill has sought to reflect existing provisions of PACE. That is why I do not feel that the noble Lord's amendment to Clause 12 adds to the protections already provided for under the current drafting or in court rules.

Clause 12 requires that an application be made on notice if there are reasonable grounds for believing that the material applied for consists of or includes confidential journalistic data. However, as in PACE, the practice and procedure for when courts are permitted to determine applications in the absence of affected persons will be set out in court rules. We expect court rules to include the same provisions as are in place for domestic orders, where there is a presumption that an application will not be determined in the absence of the respondent or another affected person, and therefore notice of any application for an overseas production order should be given to every person who would be affected by a production order.

The presumption is subject to exceptions, which we feel are necessary to ensure that investigations or prosecutions into serious crime are not put at risk if notice is given that could prejudice an investigation, for example, or where the journalists themselves are the subject of the investigation and notice may risk dissipation of relevant data. A person affected by the order therefore has the opportunity to be heard by the court unless the court is satisfied that the applicant cannot identify or contact that person; that it would prejudice the investigation if that person were present; that it would prejudice the investigation to adjourn or postpone the application so as to allow that person to attend; or where that person has waived the opportunity to attend.

By way of example, where an appropriate officer is investigating a serious crime, they may believe that some information in a journalist's copy would be of substantial value to the investigation. Where there are reasonable grounds for believing that the data specified or described in the application includes confidential journalistic data, the respondent to the application—in this case, the service provider—will be given notice under Clause 12. In addition, we expect court rules to include the same requirements as already exist for applications under PACE, with a presumption that notice of any application for an overseas production order will be given to every person who would be affected by a production order, and they will therefore have an opportunity to be heard by the court unless the exemptions apply. In addition, a production order for confidential journalistic material cannot be determined in the absence of the respondent unless that person has waived their right to attend.

I am not persuaded that Amendment 8 is necessary. If the revised Clause 12 were to form part of the Bill, a court would be precluded from making an overseas production order in relation to confidential journalistic material unless the requirements set out there were satisfied. It would not be necessary to say again, in Clause 5, that those requirements must be fulfilled before a judge can specify electronic data that is confidential journalistic data in an order. For that reason, I ask the noble Lord to withdraw his amendment.

Lord Harris of Haringey (Lab): I may have misheard the Minister and therefore misunderstood her argument, but she seemed to be saying at one point that my noble friend's amendments were not necessary because this is already covered under the PACE regulations. Is that the reason for resisting it—it is not necessary because it goes no further—or is she suggesting that there are elements of it which do go further that the Government are resisting? If the latter is the case, perhaps she could indicate to us what has gone further that she does not like. If it is simply that it is not necessary, can she explain why the Government are resisting it?

Baroness Williams of Trafford: I think I have already explained at length why it is not necessary. If Clause 12 were to be amended, a court would not be able to make an overseas production order in relation to confidential journalistic material unless the requirements set out there were satisfied.

Lord Harris of Haringey: So there is no objection to what my noble friend has tabled; the Minister is saying simply that it is not necessary?

Baroness Williams of Trafford: That is what I am saying, yes.

Lord Rosser: The protection of sources in relation to confidential journalistic data is very important to the free press in our country. I pointed out—and, as far as I understand it, this is not being contested by the Government—that there is no requirement in the Bill for the journalist or media organisation which acquired the confidential material to be informed. That seems to be a significant hole in the legislation. Surely in that situation the journalist or media organisation concerned should be able to make representations and to oppose the granting of an order; in other words, their voice should be heard—perhaps, from their point of view, to seek to protect their confidential sources.

I note the Government's argument that this is already provided for in other legislation. I say only that we are dealing with something here which can relate also—under reciprocal arrangements, presumably—to orders made by a court in another country and not only in relation to orders made by a court in this country. In that situation it is absolutely vital, even if the Government believe that the safeguards are already there, that the ability of a journalist or media organisation to be informed of an application for an order, and the chance to appear and make representations in connection with that order, should be repeated in the Bill. I wish to test the opinion of the House.

4.38 pm

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4.50 pm

Clause 5: Contents of order

Amendment 7

Moved by ***Baroness Hamwee***

7: Clause 5, page 6, line 7, leave out "the judge has reasonable grounds for believing"

Baroness Hamwee: My Lords, Amendment 7 is an amendment to Clause 5, which deals with the contents of an order. If my amendment were agreed to, subsection (2) would read:

"The judge must not specify or describe in the order electronic data that … consists of or includes excepted electronic data".

The clause would not include the phrase,

"the judge has reasonable grounds for believing",

includes excepted data. That may sound as if I am dancing on the head of a pin but I think it is quite an important issue. In Committee I explained that I was seeking a formula that was objective. The Minister responded by referring to the phrase "reasonable grounds" being used elsewhere in the Bill. Indeed, the clauses that she mentioned, Clauses 1 and 7, include that phrase but they are not about an order; they are about the basis for making an application, which I suggest is a rather different matter.

I accept that, as she said, the contents of data may not be known until they are produced, but without our amendment, or some such amendment, the judge could make an order that it later turned out did include excepted data. I was looking for an objectively based exception because how otherwise do you appeal? Would you be appealing against the judge's reasonableness? That would not be the same as appealing on the basis that the data was excepted. I would find it very uncomfortable to have to appeal against whether or not a judge was reasonable. What really should be at issue is the character of the data, and we are not satisfied that the Bill really addresses that. I beg to move.

Baroness Williams of Trafford: I thank the noble Baroness for moving her amendment and for raising this point again. Perhaps my response in Committee was not persuasive enough for her.

The Bill has been drafted to include multiple safeguards so that a person is not required to produce excepted electronic data. "Excepted electronic data" means electronic data that is either an item subject to legal privilege or a confidential personal record. The Government do not want to see overseas production orders being used to obtain such information, nor do we expect our officers to target it.

First, Clause 1(3) sets out that an appropriate officer must not apply for an overseas production order in respect of electronic data where that officer has reasonable grounds for believing that it consists of excepted electronic data. Clause 5(2) includes another one of these safeguards: a judge must not specify or describe data in an overseas production order where he or she has reasonable grounds for believing the data sought includes or consists of excepted data. The wording "reasonable grounds for believing" is important given that there is no guarantee, at the time of considering an application, that either the judge or the applicant can be certain if the data sought will, in fact, contain excepted data.

Let me put it in this context: say the email records of criminal X were requested from June in a certain year because law enforcement agencies believed they had been communicating for criminal purposes with someone else. It would be impossible for either the law enforcement agency or the judge to know for certain that within those emails, there also happened to be correspondence between criminal X and their doctor.

I understand that the noble Baroness's concerns in Committee were about the objectivity of the judge in allowing an order including potentially excepted data. The Government believe that the term "reasonable grounds for believing" gets us as close to objectivity as practicable. If a judge has "reasonable grounds for believing" that excepted data is included in the data sought in an application, they will not specify that excepted data when making the order. But if they do not have "reasonable grounds for believing", as long as the other criteria are satisfied, the judge can make the order.

Indeed, should the respondent in receipt of an order know that it includes excepted data, Clause 6(4)(b) ensures that, despite the terms of the order, they are not required to produce that data. The noble Baroness asked in Committee how, if electronic data was within an order, it could be varied or revoked. The fact that the respondent is under no obligation to produce the excepted data removes any need for the respondent to apply to vary or revoke the order. To the extent that the order includes excepted data, it has no effect.

If we return briefly to criminal X, if a judge has allowed an order to be served on a communication service provider where the judge did not know that the emails requested included medical records, but the CSP did, that CSP would not be required to produce those emails. If the CSP provided the emails, knowingly or by accident, the data would then be sifted out by the appropriate body during the sifting exercise. It is therefore reasonable and proportionate for the Bill to retain the term "reasonable grounds for believing", and it is a sensible reflection of what would happen in practice with overseas production orders.

I hope that, with that explanation, the noble Baroness will feel happy to withdraw her amendment.

Baroness Hamwee: My Lords, I am grateful to the Minister. Much of what we said was what we rehearsed in Committee. I have been looking to see whether Clause 6, which deals with the effect of the order, would meet my point. It takes us straight to the provision about the order having effect despite any restriction on the disclosure of information, which we found a difficult provision when we discussed it in Committee.

I will not tax the House by continuing with this at this stage, but I hope that the Minister will understand that I was not simply playing with words; there is real concern that the way that the Bill has been framed raises questions which people may have to grapple with in practice. I hope that they do not have too hard a time. I beg leave to withdraw the amendment.

Amendment 7 withdrawn.

Amendment 8 not moved.

Clause 11: Procedural matters

Amendment 9

Moved by ***Baroness Hamwee***

9: Clause 11, page 9, line 36, leave out "may" and insert "shall"

Baroness Hamwee: My Lords, Amendment 9 is grouped with Amendment 10. I thought that the point about court rules might get a bit lost in the debate on journalistic data, which is why I separated them when we were asked to approve the groupings.

In the context of journalistic data, in Committee the Minister relied heavily on how rules of court would operate. Clause 11 provides that the rules "may" make provision. I appreciate that rules will be made, because that is the way things are, but drafting styles change. I find this quite difficult; I get left behind with what is the up-to-date style. In ordinary speak—and I understand that attempts are being made to make parliamentary drafting as close to that as it can be—"may" is not the same as "must" or "shall". I appreciate that there are differences between "may" and "must" elsewhere in the Bill, for instance in Clauses 8(1) and 8(3).

5 pm

The issue of notice, which has prompted this, is very significant. In Committee, the Minister said that my amendment about requiring notice was unnecessary because court rules give the judge power to consider notice being given. She said:

"Court rules will provide the judge with the ability to require that notice be served on anyone affected by the order"—

I assume she meant the application for the order at that point—

"which is the case at the moment under court rules dealing with domestic production orders".—[*Official Report*, 5/9/18; col. GC 134]

She said something similar today in the discussion on the journalism group. However, given that the Bill starts with a provision for an order to be made on application of which notice need not be given, which will affect third parties, the data subject and journalists in particular, it would be more comfortable and appropriate to have an explicit provision on the face of the Bill. That is what Amendments 9 and 10 would provide. I beg to move.

Baroness Williams of Trafford: My Lords, the noble Baroness has suggested amendments stipulating that court rules must make specific provision for certain things. Amendment 10 prescribes that court rules must be made relating to service of notice on a data controller, a data subject or where the application relates to journalistic data. I hope that I have already set out how we intend rules to include notice provisions in respect of the respondent and anyone else affected by an order. The rules already made by the Criminal Procedure Rule Committee in England and Wales for applications for production orders under Schedule 1 to the Police and Criminal Evidence Act 1984, and under other legislation, already include provision for the service of notice of applications, and additional special requirements where what is sought is the product of journalism. I refer the House to Part 47 of the Criminal Procedure Rules. The Criminal Procedure Rule Committee has already settled draft rules that, if this Bill passes, would be in terms corresponding with those existing rules.

We expect the court rules to include the same provisions as are currently in place for domestic orders. They would provide that a court must not determine any application for an overseas production order in the absence of the respondent, or other person affected, except in the following circumstances. First, the person has at least two days in which to make representations. Secondly, the court is satisfied that the applicant cannot identify or contact the person. Thirdly, the court is satisfied that it would prejudice the investigation if that person were to be present. Fourthly, the court is satisfied that it would prejudice the investigation to adjourn or postpone the application so as to allow the person to attend. Fifthly, the person has waived the opportunity to attend. In the case of an application which would require the production of confidential journalistic material, the court must not determine the application in the absence of the respondent until they have waived the opportunity to attend. I hope that that satisfies the noble Baroness on Amendments 9 and 10.

Baroness Hamwee: My Lords, we have learned about the draft of the new rules and I am grateful for that. It is obviously difficult to take them in simply by listening and not reading them, although I noted the wording that one of the exceptions was that the court was satisfied that the person concerned—I am not sure what the technical term would be—"cannot" contact somebody. That is not the same as "will not" contact: anybody "can" contact someone, so I suspect that there might be a little more reflection on that.

Throughout the Bill's progress, we have been told that the Government "intend" something or "expect" something. There comes a point when one hears that rather too often not to want to see something on the face of the Bill when it is material to the Bill. However, I am glad to have heard that progress has been made with regard to the rules and I beg leave to withdraw the amendment.

Amendment 9 withdrawn.

Amendment 10 not moved.

Clause 12: Notice of application for order: confidential journalistic data

Amendment 11 not moved.

Amendment 12

Moved by ***Lord Paddick***

12: After Clause 16, insert the following new Clause—

"Priority

In the event of any conflict between this Act and the Data Protection Act 2018 ("the DPA") or the General Data Protection Regulation 2018 ("the GDPR"), the provisions of the DPA or the GDPR shall prevail."

Lord Paddick: My Lords, were we to leave the European Union, the EU would examine our data protection regime to satisfy itself that it would be safe for the EU 27 to continue to exchange electronic data with the UK. This continued exchange of data is essential not only for law enforcement and counter-terrorism purposes but for commercial transactions.

The Government have recently passed the Data Protection Act 2018, which not only provides the necessary infrastructure to enable the UK to comply with the general data protection regulation, a piece of EU legislation, but ensures that the UK complies with EU standards of data protection in relation to law enforcement and national security that are not covered by the GDPR. In other words, the UK is ensuring that it complies with all EU data protection standards, so as to guarantee that it will be issued with a certificate of adequacy that will enable continued exchange of electronic data if we leave the EU.

If, as a result of this Bill or the treaties associated with it, UK companies were required to provide law enforcement agencies in other countries with personal data covered by the Data Protection Act and/or GDPR, and those foreign law enforcement agencies' data protection standards were deemed by the EU to be inadequate, there is the potential for the EU to withdraw its adequacy certificate from the UK. Basically, if member states of the EU share data with the UK, and the UK shares that data under this Bill with law enforcement agencies that have inadequate data protection standards, the EU might stop sharing data with the UK. This amendment is designed to ensure that this does not happen. I beg to move.

Lord Kennedy of Southwark (Lab Co-op): My Lords, the noble Lord, Lord Paddick, raised an issue about which Act would take precedence in the event of a conflict between this Bill—when it becomes an Act—and the Data Protection Act 2018. His amendment makes it clear that, in the case of a conflict, the DPA, along with the GDPR, would take precedence. That seems quite sensible: it gives us certainty on the matter, for the reasons outlined by the noble Lord. I support his amendment.

Baroness Williams of Trafford: I thank both noble Lords for their points. There has been nothing in our own domestic law that requires a UK provider to comply with an overseas order. There will therefore be no conflict with domestic law if a CSP decides that complying with a foreign order would put it in breach of its obligations under the GDPR.

The existence of any conflict with UK data protection law does not have the effect of making the order from the other country invalid. Equally, the existence of the order does not compel the UK CSP to ignore its data protection obligations under UK law. It will be for the CSP on which an order is served to reconcile and comply with all legal obligations it is under. It could apply for the variation or revocation of the order, or use the dispute resolution mechanism that we expect all specific international agreements to include. That said, we do not think that this is likely to be necessary in practice. The GDPR contains several "gateways" which permit the cross-border transfer of personal data, including in response to a request or order from overseas law enforcement.

I know the noble Lord's concerns about data protection, and I absolutely sympathise with him. We have discussed this before, and I think that ultimately we all want the same thing: adequate protection for the privacy rights of individuals. I hope that my explanation will satisfy the noble Lord that the Bill does not in any way threaten data protection rights, which are robustly protected by existing legislation. UK CSPs will continue to be bound by the GDPR and the Data Protection Act. Therefore, I hope that the noble Lord will feel happy to withdraw Amendment 12.

Lord Paddick: I am grateful to the Minister. I understand that she has just said that a communications service provider could refuse to comply with an order coming from overseas if the CSP believes that that would bring it into conflict with the GDPR and the Data Protection Act, so I beg leave to withdraw the amendment.

Amendment 12 withdrawn.

Clause 17: Interpretation

Amendment 13

Moved by ***Baroness Williams of Trafford***

13: Clause 17, page 14, line 15, at end insert—

"( ) References in this Act to proceedings relating to an overseas production order include proceedings for the making, variation or revocation of an order under section 8(4) or 13(3) or (4)(b)."

Baroness Williams of Trafford: My Lords, I explained in Committee that Clause 7(1) creates a power for the judge to vary or revoke an overseas production order. Where a non-disclosure requirement is included in an overseas production order—by virtue of Clause 8—Clause 7 will apply so that the non-disclosure requirement can also be varied or revoked by a judge.

However, as I said to the Grand Committee, it is the Government's intention that judges should be able to vary or revoke all orders made under the Bill. As well as overseas production orders, this includes other orders made under provisions in the Bill; for example, an order made under Clause 8(4) which maintains an unexpired non-disclosure requirement when an overseas production order has been revoked. It has also been the intention of government that the procedure and process for varying and revoking an order would be governed by court rules, mirroring current legislation for production orders under the Police and Criminal Evidence Act 1984 or the Terrorism Act 2000.

We gave a commitment in Grand Committee to review whether provisions that can be made in court rules relating to non-disclosure requirements when an overseas production order has been revoked should themselves be capable of being varied or revoked on application. Clause 11 provides that court rules may make provisions in relation to the practice and procedure to be followed when making an overseas production order. But the Government accept that this could give rise to doubt as to whether court rules could make provision in respect of other orders made under the Bill. I have therefore proposed an amendment to Clause 17 that puts beyond doubt that court rules can be made not only in relation to overseas production orders but

[Baroness Williams of Trafford]
in respect of the types of orders made under Clause 8(4) and Clause 13(3) and (4)(b). This will include making provision for the practice and procedure to be followed when applying to vary or revoke such orders.

Noble Lords raised questions in Committee about the process concerning how someone could vary or revoke an order. The future appeals process also arose in the context of notices that could be served on UK companies by another country party to an agreement. While the Bill deals only with outgoing orders—that is, ones issued by a UK court—we have ensured that the remedies available to someone served with a domestic production order are available to a person served with an overseas production order, and we would expect the other country to do the same.

In addition, we envisage a dispute resolution mechanism as part of any agreement we might designate under the Bill, which would allow a service provider concerned about whether the order that was sought complied with the terms of the agreement to raise objections with the authorities of the country concerned. This would allow a UK service provider to raise objections if it believed that a particular order should not have been served under the agreement. At first instance, these objections would be raised with the issuing country. If the service provider was still not satisfied, it could then go to the relevant UK authority. There may be ongoing discussions between the two parties to the agreement, but ultimately it would be a decision for the relevant UK authority to say whether or not the request from the other authority could safely be given effect to. I hope this addresses the concerns raised in Committee.

5.15 pm

Baroness Hamwee: My Lords, I think it must be lucky 13 for the Minister. However, I have a question. It may be that I did not properly follow the latter part of her explanation but I come back to "normal speak". The amendment says that the references,

"include proceedings for the making, variation or revocation of an order".

Is "include" here a synonym for "mean"? Do we read it as "references mean"? I am sorry to throw that at her at this point. Perhaps I should talk inconsequentially for a moment or two until she receives information via semaphore. The term does suggest that something else might be within the references. I think the Minister is about to get a response to that question.

Baroness Williams of Trafford: The answer is yes.

Baroness Hamwee: With the leave of the House, I suggest that the Government return to this tiny thing before the next stage.

Amendment 13 agreed.

5.16 pm

Sitting suspended.

October European Council

Statement

5.30 pm

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

"Mr Speaker, before I turn to the European Council, I am sure the whole House will join me in condemning the killing of Jamal Khashoggi in the strongest possible terms. We must get to the truth of what happened. My right honourable friend the Foreign Secretary will be making a Statement shortly.

At the European Council, in addition to Brexit, there were important discussions on security and migration. First, at last Monday's Foreign Ministers meeting, my right honourable friend the Foreign Secretary and his French counterpart secured agreement on a new EU sanctions regime on the use of chemical weapons. At this Council, I argued, along with Dutch Prime Minister Rutte, that we should also accelerate work on further measures, including sanctions, to respond to and deter cyberattacks. The attempted hacking of the Organisation for the Prohibition of Chemical Weapons in The Hague earlier this year was a stark example of the very real threats we face. We must impose costs on all those who seek to do us harm, regardless of the means they use, and this Council agreed to take that work forward.

Secondly, in marking Anti-Slavery Day, I welcome the continued commitment of all EU leaders in working together to eliminate the barbaric crime of people trafficking. We reaffirmed our shared commitments to doing more to tackle the challenges of migration upstream.

Following the Council, I met Premier Li of China, President Moon of South Korea and Prime Minister Lee of Singapore at the ASEM summit. Since 2010, our trade with Asia has grown by almost 50%—more than with any other continent in the world. I want to develop that even further. Indeed, the ability to develop our own new trade deals is one of the great opportunities of Brexit, so at this summit we discussed how the UK can build the most ambitious economic partnerships with all our Asian partners as we leave the European Union. We also agreed to deepen our co-operation across shared threats to our security.

Turning to Brexit, let me begin with the progress we have made on both the withdrawal agreement and the political declaration on our future relationship. As I reported to the House last Monday, the shape of the deal across the vast majority of the withdrawal agreement is now clear. Since Salzburg, we have agreed the broad scope of provisions that set out the governance and dispute resolution arrangements for our withdrawal agreement. We have developed a protocol relating to the UK sovereign base areas in Cyprus. Following discussions with Spain, and in close co-operation with the Government of Gibraltar, we have also developed a protocol and a set of underlying memoranda relating to Gibraltar, heralding a new era in our relations. We have broad agreement on the structure and scope of

the future relationship, with important progress made on issues such as security, transport and services. This progress in the past three weeks builds on the areas where we have already reached agreement: on citizens' rights, on the financial settlement, on the implementation period, and, in Northern Ireland, on the preservation of particular rights for UK and Irish citizens and the special arrangements between us such as the common travel area, which has existed since before either the UK or Ireland ever became members of the European Economic Community.

Taking all of this together, 95% of the withdrawal agreement and its protocols are now settled. There is one real sticking point left, but it is a considerable one: how we guarantee that, in the unlikely event our future relationship is not in place by the end of the implementation period, there is no return to a hard border between Northern Ireland and Ireland. The commitment to avoiding a hard border is one this House emphatically endorsed and enshrined in law in the withdrawal Act earlier this year. As I set out last week, the original backstop proposal from the EU was one we could not accept, as it would mean creating a customs border down the Irish Sea and breaking up the integrity of our United Kingdom. I do not believe that any UK Prime Minister could ever accept this; I certainly will not.

As I said in my Mansion House speech, we chose to leave and we have a responsibility to help find a solution. So earlier this year, we put forward a counterproposal for a temporary UK-EU joint customs territory for the backstop. In a substantial shift in its position since Salzburg, the EU is now actively working with us on this proposal, but a number of issues remain. The EU argues that it cannot give a legally binding commitment to a UK-wide customs arrangement in the withdrawal agreement, so its original proposal must remain a possibility. Furthermore, people are understandably worried that we could get stuck in a backstop that is designed to be only temporary. There are also concerns that Northern Ireland could be cut off from accessing its most important market—Great Britain.

During last week's Council, I had good discussions with Presidents Juncker, Tusk and Macron, Chancellor Merkel, Taoiseach Varadkar and others about how to break this impasse. I believe there are four steps we need to take. First, we must make the commitment to a temporary UK-EU joint customs territory legally binding, so the Northern Ireland-only proposal is no longer needed. This would protect relations not only north-south but, vitally, east-west. This is critical: the relationship between Northern Ireland and the rest of the UK is an integral strand of the Belfast/Good Friday agreement. To protect that agreement, we need to preserve the totality of relationships it sets out. Nothing we agree with the EU under Article 50 should risk a return to a hard border or threaten the delicate constitutional and political arrangements underpinned by the Belfast/Good Friday agreement.

The second step is to create an option to extend the implementation period as an alternative to the backstop. I have not committed to extending the implementation period. I do not want to extend the implementation period and I do not believe that extending it will be necessary. I see any extension, or being in any form of backstop, as undesirable. By far the best outcome for the UK, Ireland and the EU is that our future relationship is agreed and in place by 1 January 2021. I have every confidence that it will be and the European Union has said that it will show equal commitment to this timetable, but the impasse we are trying to resolve is about the insurance policy if this does not happen.

What I am saying is that if by the end of 2020 our future relationship is not quite ready, the proposal is that the UK would be able to make a sovereign choice between the UK-wide customs backstop and a short extension of the implementation period. There are some limited circumstances in which it could be argued that an extension to the implementation period might be preferable, if we were certain it was only for a short time. For example, a short extension to the implementation period would mean only one set of changes for businesses at the point we move to the future relationship. In any such scenario, we would have to be out of this implementation period well before the end of this Parliament.

The third step is to ensure that were we to need either of these insurance policies—whether the backstop or a short extension to the implementation period—we could not be kept in either arrangement indefinitely. We would not accept a position in which the UK, having negotiated in good faith an agreement which prevents a hard border in Northern Ireland, none the less finds itself locked into an alternative, inferior arrangement against our will.

The fourth step is for the Government to deliver the commitment we have made to ensure full continued access for Northern Ireland's businesses to the whole of the UK internal market. Northern Ireland's businesses rely heavily on trade with their largest market—Great Britain—and we must protect this in any scenario. Let us remember that all of these steps are about insurance policies that no one in the UK or the EU wants or expects to use. So we cannot let this become the barrier to reaching the future partnership we all want to see. We have to explore every possible option to break the impasse, and that is what I am doing.

When I stood in Downing Street and addressed the nation for the first time, I pledged that the Government I lead will not be driven by the interests of the privileged few, but by ordinary working families. That is what guides me every day in these negotiations. Before any decision, I ask: how do I best deliver the Brexit that the British people voted for? How do I best take back control of our money, borders and laws? How do I best protect jobs and make sure nothing gets in the way of our brilliant entrepreneurs and small businesses? And how do I best protect the integrity of our precious United Kingdom and protect the historic progress we have made in Northern Ireland?

If doing those things means I get difficult days in Brussels, then so be it. The Brexit talks are not about my interests; they are about the national interest—and the interests of the whole of our United Kingdom. Serving our national interest will demand that we hold our nerve through these last stages of the negotiations, the hardest part of all. It will mean not giving in to those who want to stop Brexit with a politicians' vote, with politicians telling the people they got it wrong the

[Baroness Evans of Bowes Park]
first time and should try again. And it will mean focusing on the prize that lies before us: the great opportunities that we can open up for our country when we clear these final hurdles in the negotiations. That is what I am working to achieve, and I commend this Statement to the House".

5.40 pm

Baroness Smith of Basildon (Lab): My Lords, first I concur with the comments about the murder of Jamal Khashoggi. It is important that we understand exactly what has happened, and also why the truth is having to be so painfully extracted. This obviously has implications for our future relationship, and the Government will have to be clear at some point about what action they will take.

On the substance of the summit, I am grateful to the noble Baroness for repeating the Statement, although the top lines were already well known following Downing Street's pre-briefing to the press. I can understand why the Prime Minister may have been informed by her Chief Whip that an advance operation was needed before she rose to her feet in Parliament. However, pre-briefing such a significant Statement, purely for the sake of internal party management, goes totally against the procedures that govern this House.

We understand that this is a difficult week for the Prime Minister, and I am sure that I am not alone in the House in being shocked and appalled by comments from—perhaps wisely—unnamed Conservative MPs. They spoke of the PM having to "bring her own noose" and made obscenely offensive comments about knives and stabbing the Prime Minister. Few of us are impressed with the Prime Minister's negotiations, but such comments go way beyond what is reasonable or rational. If bullying in Parliament is to be rooted out, it must apply to everyone. As a House, I am sure we are agreed that we totally condemn such comments and if, as has been reported, the names of those responsible are known to others, they must face the consequences of their unacceptable behaviour.

Before turning to Brexit, I welcome the other conclusions relating to migration, internal security and external relations. It is vital that swift progress is made on illegal migration. We saw tension between member states at the June summit, leading to the important acknowledgement that this is a challenge not just for any single EU country but for Europe as a whole.

Those noble Lords who watched the BBC2 programme "Mediterranean with Simon Reeve" last night will have seen one particular interview with a young migrant who had sought refuge in Europe, but got as far as the Med. I think he said he had known no peace since he was five years old, and he had a level of despair and sadness rarely seen in one so young. Until we have left the EU's institutions, our MEPs and Ministers should continue to offer their expertise and exercise their influence to shape an effective and a compassionate response. [*Interruption*.] I think that was an echo of the need for compassionate and effective response. I hope the Leader of the House will confirm that the UK Government intend to do just that.

On internal security, we welcome the EU leaders' condemnation of the cyberattack carried out against the Organisation for the Prohibition of Chemical Weapons, and their calls to increase resilience against such attacks going forward. The conclusions note the need to prevent and respond effectively to radicalisation and terrorism, with full respect to fundamental rights. With the Counter-Terrorism and Border Security Bill now being considered by your Lordships' House, we all want to ensure that the appropriate balance is struck.

The EU has played a significant role in promoting development in Africa, and it is promising that the conclusions note the importance of maintaining strong levels of co-operation with our African partners. Could the noble Baroness confirm what role, if any, the UK intends to play in the EU Emergency Trust Fund for Africa and other EU development initiatives post Brexit?

With unseasonal warm weather, and alarming weather reports from across the world, we need to ensure that we are vigilant and robust on tackling climate change. Yet, when the President of the United States asserts that global temperatures could simply "change back again", we recognise the challenges to ensure we have a fact-based approach to this issue and not allow some to seek refuge in fake news. I welcome the EU's unequivocal backing of the Intergovernmental Panel on Climate Change's recent special report. I hope that the Government will work closely with EU partners to ensure that December's COP 24 meeting is a success, and that the Prime Minister will continue to press Mr Trump to reverse his decision on the Paris agreement.

This time last week, following Mr Raab's unsuccessful trip to Brussels, the Prime Minister sought to reassure her colleagues, and then the country, stating:

"I do not believe that the UK and the EU are far apart".—[*Official Report*, Commons, 15/10/18; col. 410.]

When I asked whether the Government were confident that sufficient progress had been made to enable an extraordinary summit next month, the noble Baroness the Leader of the House said:

"The Prime Minister is looking to continue negotiations as planned in November".—[*Official Report*, 15/10/18; col. 326.]

And yet, although she got the backing of her Cabinet before leaving for Brussels, the President of the European Parliament expressed dismay that the Prime Minister had failed to offer "anything substantially new" on the unresolved issue of the Northern Ireland backstop.

The result? Having scrapped—at the UK Government's request—their original plans for a detailed discussion on the proposed terms of the future UK-EU relationship, the EU 27 leaders determined that,

"despite intensive negotiations, not enough progress has been achieved".

Today, we are told by the Prime Minister that there is no need to worry. The line is apparently that 95% of the deal is done, so what is the problem? The Prime Minister may claim that she is calm about the state of the negotiations, but the reports of hastily arranged conference calls with her Cabinet indicate otherwise.

Of course we welcome the news that agreement has been reached on the future status of Gibraltar, that there is now a protocol dealing with the UK's military

presence in Cyprus, and that there is an outline agreement on dispute resolution—although, as we all know, this is dependent on the withdrawal agreement. Nevertheless, we welcome the progress. But we are all too familiar with the problems that remain unresolved.

In an attempt to break the impasse, and recognising the amount of work yet to be undertaken, the Prime Minister seemed to accept the principle of a short extension to the transition period, only to row back at the first sign of trouble from Back-Benchers. Now she talks of "an option to extend" rather than taking the common-sense step of negotiating a permanent customs union. Such an arrangement would avoid the need for the so-called backstop and would then help get that deal over the line.

But at each stage of the negotiations we have found the UK lagging behind the agreed timetable, and the Prime Minister seeking to manage internal party-political divisions. The priority for negotiations has to be the interests of the UK, our citizens and our economy, and time is running out. The Leader of the House said last week that noble Lords,

"do not have to stress … the consciousness of the amount of time we have",—[*Official Report*, 15/10/18; col. 326.]

to agree a deal with the EU. But in relation to the border and the backstop, it does have to be stressed. The apparent lack of urgency from the Government should concern us all.

To reassure your Lordships' House that these matters are in hand, can the noble Baroness confirm when she expects the Cabinet to agree—and this is an agreement which lasts longer than the paper it is printed on—a new position in relation to Northern Ireland? How will that position be communicated to parliamentarians who are concerned about the future status of the Belfast agreement, and the need to ensure that there is no hard border? Could she also confirm whether the UK Government will still seek an extraordinary summit in November, even if it is later than originally planned?

Finally, I return to an issue I have raised on a number of occasions, most recently last week. I am grateful to the noble Baroness for her written response since she did not have the answer to hand at the time. But her letter to me, my noble friend Lord Foulkes and the noble Baroness, Lady Smith, of 18 October does not take us any further. She confirms that the citizens' rights section of the withdrawal agreement will,

"protect the ability of UK nationals in the EU … to continue their lives broadly as they do today".

However, my question was specifically about onward movement, which will not now be dealt with in the withdrawal treaty but as part of the future relationship. Could she clarify when the 1 million Brits living in other European countries can expect certainty on their future mobility rights? This is not just about ensuring that our UK citizens do not lose any of the rights that they currently enjoy; it is essential for business planning for those companies that operate across EU borders. They need the certainty that is so sadly lacking on this issue. The Prime Minister referred to the brilliant entrepreneurs and small businesses in her Statement, but it is they that need that certainty. If this forms part of our future relationship will the Government stop blocking the publication of the EU's proposed political declaration?

I hope that the noble Baroness can respond to these questions, but she needs to understand that time is running out and that the nation remains concerned.

Lord Newby (LD): My Lords, I thank the noble Baroness for repeating the Statement. I begin by associating myself with the comments of the noble Baroness, Lady Smith, about the unacceptable use of inflammatory language in the Commons. At this point in our national life, matters are inflammatory enough without use of words such as "knives" and "nooses" about a Prime Minister. I hope that the person who used that terminology is unmasked and suffers the consequences that he or she richly deserves.

Before getting on to Brexit, it is instructive to read how the Government dealt with the two other big issues that faced the summit last week and have faced us subsequently. On the Khashoggi incident, the Government have taken a joint initiative in condemning what has happened and wanting further information with Germany and France—not with President Trump, but Germany and France, our closest allies.

Secondly, when it comes to the question of reining in chemical weapons, the Prime Minister takes credit for the fact that the Foreign Minister has agreed with his French counterpart a new EU sanctions regime. We have had this before. What does the noble Baroness think the future of that sanctions regime and that process of agreeing joint sanctions regimes on such important issues will be after 29 March next year?

We are then told that 95% of the withdrawal agreement and its protocols are now settled. Noble Lords will remember this document produced by the Commission six or seven months ago: the draft withdrawal agreement. The bits in green were agreed. As one flicks through it, one finds page after page of green bits. There were some bits that were not agreed and those have been reduced, but as we know it is not the volume of what has been agreed, but the substance of what has and has not been agreed. The fact that the difficult 5% remains unagreed should give nobody any reassurance that agreement is near.

According to the Prime Minister, four steps are now needed to break the impasse:

"First, we must make the commitment to a temporary UK-EU joint customs territory legally binding".

Before she uttered that sentence, she said, two paragraphs higher up:

"The EU argue that they cannot give a legally binding commitment to a UK-wide customs arrangement in the Withdrawal Agreement".

So what powers of persuasion and legislative sleight of hand or ability does the noble Baroness think the Prime Minister will be able to produce to persuade the EU that something it says is legally impossible is actually the basis of an agreement within the next very short time?

The second step is the option to extend the implementation period. The argument then is that you have two options, one of which the EU says is legally impossible and the other an extension. The UK then says that it wishes to be able to make a sovereign choice between those two. So ultimately it will say to

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the EU, "Thanks very much for agreeing these two things, but actually we've decided we're going to go for X". Why should it agree to that? Why is it our sovereign choice? This flies in the face of negotiations and common sense.

The third thing is to ensure that both or either of those options are not potentially permanent arrangements. This gets us back to the philosophical discussion we had last week about the meaning of "temporary". The Prime Minister says that she wants it to be temporary so that the UK does not find itself,

"locked into an alternative, inferior arrangement against our will".

But the truth is that it is not an inferior arrangement that she is scared of but of being locked into something that a future, non-Tory Government thinks is a superior arrangement and therefore stays in the customs union in perpetuity. She and her colleagues want "temporary" to be defined to mean "before the next general election", which is a novel definition of the word.

The fourth step, to ensure that Northern Ireland has full continued access to the UK internal market, is not a step at all. It is simply a consequence of steps one and two.

In her conclusion, the Prime Minister talks about the challenges ahead. She says that, whatever it means and whatever will happen, we must not give in,

"to those who want to stop Brexit with a politicians vote".

What she means by a politicians' vote is actually a vote by the people to have a say on any deal she reaches. We have this marvellous Alice in Wonderland definition that a vote by the people is a politicians' vote but a vote by the politicians is a people's vote even if, as is now the case, she and the Government Front Bench know that the people say they want such a vote. This is the kind of Alice in Wonderland use of language that surely the Prime Minister will not get away with much longer.

However, we can be reassured that, whatever she says about not having a vote on the outcome, she is planning for it. We know that the Government have been conducting war-games about how any referendum on a Brexit deal can be conducted. They are to be congratulated on that. Could the Leader of the House confirm that the starting point for the timetable against which those war-games are being conducted is the 22 weeks required for a referendum to be held, set out in UCL's Constitution Unit's recent report on the mechanics of such a referendum, not the 12 months recently suggested in your Lordships' House by the noble Lord, Lord Callanan? Could she give an undertaking that the outcome of this planning will be published, just as the various notices have been published against no deal, in the interest of transparency and good government?

The key final point is what the noble Baroness, Lady Smith, said: what happens next? We do not know how a deal can be struck within the Cabinet, but what is the prospect of a November summit? It is probably very small. But, closer to home, what is the prospect of this House discussing the Trade Bill before Christmas? What has happened to the backlog of all the other Brexit legislation, of which there is no sign? What has happened to the 800 statutory instruments—200 of which require affirmative resolutions—that this House has to debate and approve in the next four months? Could the Leader of the House give us some indication of the flow of business and timetable that she believes will now follow?

This Statement, like all the previous ones, has enabled the Prime Minister to survive another day, but when she speaks of difficult days ahead she knows that Brussels is the least of her problems. Her problems are in her own party, and this Statement does nothing to make one think she has a clue how to resolve them.

Baroness Evans of Bowes Park: My Lords, I am grateful to the noble Baroness and the noble Lord for their comments. In particular, I thank them for their strong condemnation of some of the alleged language that was reported in the press about the Prime Minister over the weekend.

In relation to Mr Khashoggi, the House will be aware that there will be a Statement tomorrow so we will be able to set out some further details there. As the Statement in the Commons made clear, we condemn his killing in the strongest possible terms. The Saudi statement leaves a number of questions around his death unanswered—in particular, the claim that he died in a fight simply does not amount to a credible explanation. Perhaps we can go into a bit more detail in the Statement tomorrow about actions going forward.

On the noble Baroness's comments on migration, I confirm that we will, of course, continue to exercise all the influence we can to ensure that migrants are treated fairly and compassionately. She also asked about the COP24 summit in December. I reassure her that we are fully committed to a robust deal on the detailed framework needed to implement the Paris Agreement. As she will be aware, the conference will be focused on the development of a rulebook to support the implementation of the Paris Agreement, which we continue to fully support. The other major outcome will be from the first phase of the agreement's five-year cycle to review global efforts and provide direction for future ambition.

I hope I reassure the noble Baroness and the noble Lord when I say that the Government are working with urgency to address the outstanding issues relating to Northern Ireland. It has been very clear in the Statement that I made this week and last that this is on the top of our agenda—there is no question at all. As my right honourable friend the Secretary of State for Exiting the EU has said:

"The Prime Minister has rightly refused to rule out considering different approaches … as an alternative to the backstop",

in order to make sure we can break this impasse. That is why we are working to create this new option—to extend the implementation period—and working further with the EU on the UK-EU joint customs territory proposals at pace.

Both the noble Lord and the noble Baroness asked about the November summit. That was an idea suggested by the European Council president. We remain committed, as I said last week, to continuing negotiations at pace in November. Donald Tusk, after the Council meeting, said he stood ready to convene an EU Council on

Brexit if further progress was made. We will continue to work with our EU counterparts to make sure that we can achieve that goal.

The noble Lord asked about sanctions. He will be aware, as a result of the sanctions legislation that passed through this House, that we will enact our own sanctions regime when we leave the EU but, for the time that we remain a member, we will continue to encourage European partners to extend their diplomatic capabilities.

In relation to onward movement, I am afraid I can only reiterate what I said in my letter to the noble Baroness: we share her frustration. We have been clear from the start of negotiations that onward movement for UK nationals resident in the EU was a key priority. We raised this with the EU in the first phase of negotiations but they were not ready to discuss the issue and wanted to wait for negotiations on our future relationship. We tried and we have put it forward but we can only negotiate when two parties are negotiating. I share her frustration but I am afraid I cannot go further than what I have said today and what I put in the letter. Of course, I will update the House and the noble Baroness as and when things have moved on.

I am afraid that I will have to disappoint the noble Lord—the Government will not be holding a second referendum. We have been very clear about that. We had a people's vote in 2016—the largest democratic exercise this country has ever had—and we will not frustrate the result of that referendum.

The noble Lord asked about the flow of business in this House. We will continue to work with the usual channels to make sure that this House has the opportunity to scrutinise legislation and SIs as a matter of course. We are very pleased that the work of the sifting committee has already started and I am very grateful to members of the committees for that work. We understand the frustration in this House. We understand that we have to ensure that Parliament has a correct amount of time to look at these issues and we will continue our best endeavours, through the usual channels, to make sure the House has the chance to raise the issues that it wishes to raise.

6.04 pm

Lord Hannay of Chiswick (CB): My Lords, will the Leader of the House reply to two precise questions? On the Irish backstop, the Statement makes it very clear that, in the view of the Government, a possible extension of the transitional period—known in rather Orwellian terms as the implementation phase—would be an alternative to having an insurance backstop. Has there been any indication from any of the 27 member states or the Commission that they could accept that as an alternative—rather than as an addition—to having the backstop which in all their Statements the Government say is necessary?

Secondly, will the progress that has been announced on Gibraltar, the sovereign base areas and dispute settlement relate only to the 19 months of the transitional period and not to those matters being settled in the new relationship? Will she please confirm that that is the case? If so, it is, frankly, a fairly modest step forward—welcome, but modest nevertheless. On dispute settlement, I am sure she would agree that the European Court of Justice will continue to produce rulings throughout the transitional period—that is what is meant by the dispute settlement matter in the transitional period being agreed.

Baroness Evans of Bowes Park: The protocols in relation to Gibraltar and the sovereign base areas will be part of the international treaty which we will sign with the withdrawal agreement and the implementation period. The long-term future relationship will supersede that once we have that partnership, so we will obviously continue those discussions, but it is excellent that we have progressed to this point.

On the noble Lord's first point, I am afraid that I cannot give any further information about the negotiations that are going on. We have been very clear that we are working with the EU to come up with a solution to the Northern Ireland issue and the Prime Minister is clearly in this Statement setting out two options that we are pursuing.

Lord Lamont of Lerwick (Con): My Lords, I welcome the progress that has been made in the talks. I will ask my noble friend about the two options relating to Northern Ireland, referred to by the noble Lord, Lord Hannay. On the question of the temporary UK-EU customs union, how could this be made temporary? Do the Government have in mind an end date which, I understand, was ruled out by Monsieur Barnier? Without an end date, how on earth could this be made temporary? Secondly, on the other option of extending the implementation period, will she say something about the cost? How much would that mean we would have to pay to the EU budget for each year that it was extended? If we are in for a few months only—as I know the Prime Minister hopes we will be—will we pay a full year's subscription or just a proportion?

Baroness Evans of Bowes Park: On my noble friend's second point, the length and cost of any extension will be subject to the negotiations that are going on now on the drawing up of this option. On his first question about the temporary nature of the backstop, the Prime Minister has been absolutely clear: this cannot be a permanent situation. Obviously, a date is one option, but there are other ways in which this may be triggered in order to ensure it is temporary. Again, as we are getting down to the fine detail of these two options, those are the kind of issues that will be discussed and negotiated between ourselves and our EU partners.

Lord Hain (Lab): My Lords, is not the Prime Minister's claim that the deal is 95% done an utter misrepresentation? Is it not the truth that, because of the Brexiteer extremism in her party, by far the biggest issue, as it always has been—the Irish border—is still unresolved? Is it not also the case that her claim is designed to make everybody think that Brexit is done and dusted, when in reality it is merely the terms of divorce? Even if she does achieve a fudged agreement with Brussels soon, that will only be a prelude to years and years of immensely more difficult negotiations on our future trading relationships, in which we will again be asking for the impossible—all the benefits of trading into the

[Lord Hain]
single market and using the customs union, with none of the obligations—with the Irish border still the Achilles heel.

Baroness Evans of Bowes Park: I hope that the noble Lord will be pleased to hear that in fact at the Council there was a lot of good will towards the UK and recognition around the table that in the past weeks there has been huge progress in agreeing the withdrawal agreement. The fact that I have made two Statements in the last two weeks discussing Northern Ireland in some detail shows that we are not hiding the fact that we still have an impasse in this situation. The Statements have been quite clear about that. What we are absolutely committed to, along with our EU partners, and particularly our Irish partners, is finding a way through, because as we said in the Statement this one issue is outstanding. We want a withdrawal agreement and an implementation period and we want a strong and positive relationship going forward. So I can assure the noble Lord that we are not taking things lightly; we are absolutely committed, with our partners, to cracking this very difficult nut, as he rightly says. We will do that and we will get a good deal with the EU, which is what we are intending to do.

Baroness Ludford (LD): My Lords, it is surely not good enough for the Leader of the House to reply to the noble Lord, Lord Hannay, that she cannot answer his question. You do not need to be an insider in the negotiations to realise that it is complete nonsense to say that an extension of the transition period is an alternative to the existence of the backstop, whether it is Northern Ireland-specific or UK-wide. They are apples and pears, very obviously, and I want to press her on this point. It is a longer time, surely, to find a permanent relationship that makes the backstop redundant. Why do the Government continue to create smoke and mirrors, which presumably is for internal consumption in her own party but does not give honest, real explanations?

Secondly, if the Government want the temporary customs arrangement to be written into the withdrawal agreement as legally binding, how is that commensurate with their professed desire to maintain the ability to make a sovereign choice to exit from the temporary customs arrangement? If it is legally binding in the withdrawal agreement, as the Government want, how can you make a sovereign choice to abandon it?

Baroness Evans of Bowes Park: I am afraid that I do not think it is appropriate for me to discuss the details of the negotiation. I am sorry that the noble Baroness disagrees, but we are at a crucial time and I do not think that my making statements from the Dispatch Box about some of these delicate issues will be particularly helpful. We want to achieve a deal, and I hope she understands that and would want to help me ensure that I play my part by not saying things that would get in the way of a good negotiation and a good outcome.

Lord Kerr of Kinlochard (CB): Will the Minister explain how our commitment to maintain full alignment with the rules of the internal market and the customs union, which now or in the future support north/south co-operation, the all-Ireland economy and the protection of the 1998 agreement, can be discharged by a short extension of the implementation period? That is a timeless commitment. Can the Minister quote any precedent for an EU negotiation of a wide-ranging association, including a trade relationship, with any third country that has been completed, ratified and come into force within three years?

Baroness Evans of Bowes Park: I remind noble Lords that we do not intend to use either the backstop option or the implementation period extension. These are insurance policies. We are committed to achieving, and we expect to achieve, our new relationship with the EU by the beginning of January 2021. These are insurance policies, not things we intend to happen. The reason we are confident about achieving a good deal with the EU is that we are in the unique position of starting with the same rules and being in the same place: we are not coming from different situations, as was the case in other deals the EU put together. That is why we are confident, starting from being together, that we can come up with a good deal going forward that works for both of us.

Lord Howell of Guildford (Con): My Lords, as we pray in this House each day for the tranquillity of the realm, would it be worth sending a message to our more excitable and rather impatient Brexiteers, reminding them that it took 10 to 15 years for us to join the European Community, as it was then? We have been working together in a system with them for 46 years and therefore it is pretty likely that it will take a number of years for us to untangle all the arrangements we have made and withdraw in an orderly and sensible way. Is not the word that we really need, and which is missing in a great deal of this discussion at the moment, patience: an understanding that these things, if done properly, need to be handled very carefully and with great patience?

Baroness Evans of Bowes Park: I thank my noble friend and I entirely agree. I am sure that any of us would be grateful for his prayers to support us.

Lord Wigley (PC): My Lords, on Saturday I was among the 700,000 people who marched through London to protest about what is happening and demand a second vote. Alongside me were two people who had voted "out" in the referendum and are now convinced that they were misled. Given that the Government are not prepared to hold a second vote of the people, how are the opinions of those people going to be taken into account?

Baroness Evans of Bowes Park: Of course, I respect the views of the people the noble Lord spoke to, but as I have said and as we have made clear, we had a vote in 2016 in which 17.4 million people voted to leave. We will be respecting that vote. We will be achieving a great deal with our European partners to ensure a strong relationship going forward, but we have had a people's vote and we will now respect their wishes.

Viscount Hailsham (Con): My Lords, may I say to my noble friend that in respect of the meaningful vote that Parliament has been promised, no vote will be meaningful unless it enables the House of Commons

to decide to stay in the European Union on existing terms, or to require the holding of a further referendum on the terms that it identifies. I simply do not agree with the Prime Minister's use of the following phrase: "politicians telling the people that they got it wrong the first time and should try again".
That is not a proper assessment of the people's vote.

Baroness Evans of Bowes Park: As my noble friend will be aware, the vote on the deal will be one for the House of Commons to take, and the Government's commitments are enshrined by law in the withdrawal Act.

Lord Liddle (Lab): Does the noble Baroness agree that the only basis on which the customs union could be temporary as a means of dealing with the Northern Ireland border issue is if the Government succeed in persuading our EU partners that their proposals in the White Paper for a joint customs territory are feasible? Can she report on the progress of those discussions in Brussels? Have not our partners dismissed this proposal as completely unfeasible? Therefore, the Government face a very tough choice in securing the peace in Northern Ireland through a permanent customs union or pursuing what many of us on this side believe is the fantasy of an independent trade policy and a hard Brexit with a hard border.

Baroness Evans of Bowes Park: As the Statement made clear, when we put forward our proposal for a temporary joint customs territory, the EU was initially sceptical, but it is now actively working with us on our proposal. So positions and discussions in negotiations change, and we move forward together. We have been very clear that we are committed to ensuring that our future economic partnership provides a solution to the unique circumstances of Northern Ireland. The circumstances we are talking about are in the unlikely event that we do not reach that agreement and have our new relationship in place by January 2021. That is what we are working towards and what we believe we will be able to achieve.

Lord Campbell of Pittenweem (LD): My Lords, no doubt inadvertently, the Leader did not respond to the final point made by the noble Lord, Lord Hannay. Do the Government accept that during the period of implementation or transition—call it what you will—the United Kingdom will be subject to the jurisdiction of the ECJ and that that jurisdiction will also last for as long as any extension to that period of transition?

Baroness Evans of Bowes Park: Well, yes, because we have already accepted that and been clear about that in relation to the implementation period.

Lord Soley (Lab): In the near future we are likely to have an agreement—good, bad or indifferent, we wait to see. There will then be this implementation period, but I take the same view as that taken by the noble Lord, Lord Howell, I think: there is no way that this complex political and economic arrangement between the UK and the EU is going to be sorted out in just a couple of years. This is going to be work in progress for quite a few years to come, and I still do not understand from the Government the sorts of structures they have in mind to ensure that the UK and the EU stay close together politically and economically, because it is in their interests to do so. Picking up a point made by the noble Lord, Lord Newby, the common security and defence policy will continue; we will have no say on how that is used but we are indicating that our forces will stay involved. I am not asking for an answer to that issue, but there are many issues of that type. I need—and I think the House needs—some idea of the structures we are looking at beyond the implementation period that will allow us to ensure that we have a continuing good agreement. Is it a Joint Committee or is it something bigger?

Baroness Evans of Bowes Park: The noble Lord will be aware that alongside the withdrawal and implementation Act and treaty there will be a future partnership or future framework document setting out where discussions have got to about the future relationship. That will be the first time the noble Lord will see where we have got to in that discussion. That will then be the basis of the negotiation discussions, once we have agreed the withdrawal agreement and implementation period, to take forward that relationship. On the structure and scope of the documents, some of the things we have mentioned that we have started to make good progress on will be obvious from that document. That will then be worked on and will be the basis of the future partnership that we will look to have by 2021.

Lord Wallace of Saltaire (LD): Does the Leader recognise that a prolonged period of uncertainty in which many of the complex details have not been decided will be disastrous for the private and public sectors across this country? I have been briefed in the past week by people from two of Britain's leading universities on the desperate uncertainty they have over future access to European research networks and research funding and visas for foreign academics and their wives and husbands who come to this country, and the likelihood that the Home Office visa system, which is presently close to breaking down, will break down unless this is clarified fairly quickly. If we have an agreement now which is loose and short, these details will remain uncertain. Can we be guaranteed that, before a lot of these things are swept away as we formally leave, there is much more certainty on the detail across different sectors than the Government have yet begun to talk about?

Baroness Evans of Bowes Park: Of course we are mindful of uncertainty, which is why we are working flat out to ensure that we come up with a suitable solution to the Northern Ireland issue, which is the one issue that is still outstanding in relation to the withdrawal agreement and implementation period. The very reason we agreed an implementation period was to give that certainty over two years and to give time for us to ensure that we have the future agreement in place and that we can begin our new relationship in January 2021. That has been at the heart of our approach throughout these negotiations.

Lord Harris of Haringey (Lab): The Lord Privy Seal declined to give us an answer, one way or the other, on whether or not civil servants have been war-gaming arrangements for a future referendum.

[Lord Harris of Haringey]
However, can she tell us—this she should be able to answer—whether she, her officials, the usual channels and the parliamentary authorities in this House have been war-gaming how this House will deal with the flow of legislation and orders that must be put through? Can she give us a categorical assurance that this House will not breach its existing arrangements and Standing Orders—that we will not be required to sit on Fridays and Saturdays to carry through the burden of legislation?

Baroness Evans of Bowes Park: I think I was clear in relation to the second referendum when I said that we will not be having a second referendum and therefore that work is not being done in relation to that. I can certainly assure the noble Lord that we will be working—and have worked—extremely hard with the usual channels to ensure that we give your Lordships the chance to scrutinise legislation. Obviously, changes that need to be made will have to come to the Floor of the House and therefore the House will decide. I am not going to make false promises to the noble Lord about what may or may not be possible. I do not think any of us wants to work 24 hours a day—well, some Members do but others of us would like quite like to have a bit of time outside the House, much as we all enjoy being together. We will do our very best to work within our usual situation, but I am not going to make promises that I cannot keep. What I can say is that this will be discussed fully with the usual channels, and where decisions need the view of the House, the House will have the chance to make up its mind on whether or not it wants to agree with government suggestions.

Mental Capacity (Amendment) Bill [HL]

Committee (3rd Day)

6.25 pm

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

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

Amendment 55

Moved by ***Baroness Barker***

55: Schedule 1, page 14, leave out lines 17 to 32 and insert—

"23(1) An authorisation ceases to have effect—

(a) at the end of the period of 12 months beginning with the day it first had effect,

(b) at the end of such shorter period determined by the responsible body at the time it determines that the conditions for authorisation are met,

(c) on such earlier date than the date given by paragraph (a) as the responsible body may from time to time determine,

(d) if the authorisation is renewed in accordance with paragraph 37, at the end of the renewal period, or

(e) when a suspension comes to an end as described in paragraph 41(2)(b).

(2) An authorisation also ceases to have effect if, at any time, the responsible body believes or ought reasonably to suspect—

(a) that the cared-for person has, or has regained, capacity to consent to the arrangements which are authorised,

(b) that the cared-for person is no longer of unsound mind, or

(c) that the arrangements are no longer necessary and proportionate.

(3) But an authorisation does not cease to have effect for the reason described in sub-paragraph (2)(a) if—

(a) the capacity assessment which was relied on in determining that the condition in paragraph 14(a) is met states—

(i) that the cared-for person's capacity to consent to arrangements is likely to fluctuate, and

(ii) that any periods during which the person is likely to have capacity to consent is likely to last only for a short period of time, and

(b) the responsible body reasonably believes that the gaining or regaining of capacity will last only for a short period of time.

(4) The Secretary of State must by regulations prescribe a definition of "fluctuate" and "short" for the purposes of sub-paragraph (3)(a)(i), (ii), and (b) above.

(5) In a case where—

(a) an authorisation relates to arrangements which provide for the cared-for person to reside in, or to receive care or treatment at, a specified place, and

(b) at any time, the responsible body believes or ought reasonably to suspect that there is a conflicting decision about the cared-for person residing in, or receiving care or treatment at, that place,

the authorisation ceases to have effect in so far as it relates to those arrangements.

(6) There is a conflicting decision for the purposes of sub-paragraph (4)(b) if there is a valid decision of—

(a) a donee of a lasting power of attorney granted by the cared-for person, or

(b) a deputy appointed for the cared-for person by the court,

that the cared-for person should not reside in, or (as the case may be) receive care or treatment at, the specified place.

(7) If at any time an authorisation relates to arrangements which conflict with requirements arising under legislation relating to mental health, the authorisation ceases to have effect in so far as it relates to those arrangements."

Baroness Barker (LD): My Lords, I am glad to be the first speaker on our third day in Committee. We are under some time pressure this evening because of earlier business. But, having spent yet another weekend going through the Bill, trying to understand its full intent, I have to say that it really is a shockingly bad Bill. Therefore, whatever pressure may be brought to bear, we should spend adequate time going through all the amendments before us. I will not speak at great length and I know that other noble Lords will be very disciplined, but there are some very serious issues and the potential for harming some of the most vulnerable people in our society if we get this wrong is great. Therefore, I make no apology for initiating what I hope will be a series of quite searching debates.

Amendments 55, 56 and 58 stand in my name and that of my noble friend Lady Tyler. They deal with one of the most serious issues at the heart of this legislation—although you would not really know that just from reading it—which is the interaction with the Mental Health Act. I do not need to repeat what was said at earlier stages about the interaction of the Mental Capacity Act and the Mental Health Act because there are many people here who understand that and have discussed it as many times as I have. But I will say one thing as a result of contributions made by some noble Lords last week about Sir Simon Wessely's review of the Mental Health Act. People reading the *Hansard* of our debate last week might well have come away with the understanding that, if a person has mental health issues, they are dealt with by the Mental Health Act, and if a person lacks capacity, they are automatically dealt with by the Mental Capacity Act. But that is not true, in two particular ways.

One is that a person may have a mental health condition but may also have a physical condition, and the question is: what happens about their capacity to make that decision? It is not a decision covered by the Mental Health Act, even though they may be residing in a secure unit. Secondly, there are some people who are wrongly detained under the Mental Health Act: increasing numbers of older people with Alzheimer's are wrongly diagnosed and detained. Therefore, as was recognised when the mental capacity legislation was initially developed, it is very important that we get these two pieces of legislation and their interaction right. That will explain to the Minister why, when we had the initial briefing on this from civil servants, some of us were rather astonished that there was no mention of the Mental Health Act at all until we brought it up.

6.30 pm

There has been considerable comment from people within the sector and there remains a big question: why is this legislation being done now? We know that Sir Simon Wessely will report before the end of the year and that the group he is working with intends to come up with recommendations for mental health legislation which will mean that such legislation is likely to apply to far fewer people in future than it does now. If one sits and thinks about that, one will realise that there is an even greater chance that people who lack capacity will not be covered by the correct legislation. I therefore cannot for the life of me see why the Government insist on going ahead, a month or two away from such a significant announcement. My probing amendments are designed to raise those issues. I remain mystified about why we are doing the Bill at the moment. I cannot see that.

I also suggest to the Minister that, in the light of our discussion last week, another issue is germane to this. I thank the noble Baroness, Lady Stedman-Scott, for clarifying that the Bill as it stands means that decisions about somebody's capacity will include risk to others. Under the Mental Capacity Act, best interest decisions are really about the risk to self. It is therefore highly likely, again, that decisions will be made under this legislation which could—and potentially should—be made under the Mental Health Act. It is perhaps the case that this legislation will confuse things and it may well increase the Bournewood gap; it certainly will not decrease it but there is a severe chance that it will increase it. For all those reasons, I believe that the interaction of the Bill with the Mental Health Act really needs some thorough researching and I look forward to some robust answers from the Minister.

The Deputy Chairman of Committees (Lord Faulkner of Worcester) (Lab): I must advise the Committee that if this amendment is agreed to, I cannot call Amendment 56 for reasons of pre-emption.

Baroness Tyler of Enfield (LD): My Lords, I support what my noble friend Lady Barker said about this important set of amendments. Briefly, they look at the interaction between the Mental Capacity Act and the Mental Health Act, which has not been properly thought through at all in how the Bill has been brought forward. The amendments focus in particular on people with fluctuating conditions. We have had a bit of discussion about such people but not nearly enough to understand what the real implications will be for people who may have a severe mental illness that fluctuates. They may have a range of other physical conditions requiring treatment and care. There may be times when they are in a position to give consent to treatment and times when they are not. We really need to think much more about how that is to be dealt with in the new system.

My concern, if I may summarise it, is that this complex interaction between the two Acts will result in a two-tier system, with a considerable imbalance in rights and safeguards between the regimes of the Mental Health Act and the Mental Capacity Act. To pick out one example, I understand that under the Mental Capacity Act everyone is entitled to make a legally binding advance decision to refuse various future medical treatments, but that decision can be overridden under the Mental Health Act in most circumstances. It is complicated. There are people covered by both Acts; it is not a question of having the Mental Health Act and people covered by it over here and having the Mental Capacity Act and people covered by that there.

We really need to think this through and satisfy ourselves that any new system deals with that and, frankly, makes the most of the opportunity to streamline these regimes, in particular to take account of people who are covered by both. I would be particularly pleased if the Minister, in responding, would say something about the needs of people who are severely affected by mental health issues and whose capacity may fluctuate, and about how that has been taken into account in the drafting of the Bill.

Baroness Meacher (CB): My Lords, I feel that I should contribute to this debate although I have no speech prepared because, in the discussion with Sir Simon Wessely that I referred to last week, I challenged him about this issue. I asked what we were doing by debating this Bill before his review came out. He was clear and while I cannot say what he is proposing, maybe I can indicate the sort of areas he is looking at. These may help to illuminate the clear differences in certain ways between the two sets of debates and legislation.

[Baroness Meacher]

For example, he is looking at the role of the Ministry of Justice in relation to people under restriction orders. There are specific mental illness issues in that area. He is looking at how community treatment orders operate—there might be less use of such orders—and how detentions in hospital for people with psychotic illnesses operate, and so on. Those areas are, in general, probably quite distinctive to the Mental Health Act. The bit where I feel there really is a potential overlap is in the area of mental health tribunals, which I will raise when we come on to deprivation of liberty concerns in the context of specific domestic situations. I will have a proposal to make then. I will not go into it here, as it would not be appropriate.

Sir Simon Wessely's position is clear: he feels that the Mental Health Act needs reform and I think he will have very interesting proposals to make about that. We also all agree that the DoLS system needs reform and we are discussing how that should be done. What he is doing and what noble Lords are trying to do here are both quite complex sets of reforms. Sir Simon Wessely's view—I hope that he would agree with me—is that these two sets of reforms need to be in place for quite a period. He talked about a decade, actually. There is also the Northern Ireland situation; there are proposals for some bringing together of these things there. There is of course no Government in Northern Ireland but Sir Simon Wessely wants that Northern Ireland Government to be formed and for them to be the pilot of all this and see how that works over a period of years. We would then come forward with some proposals, as and if appropriate, for bringing these two pieces of legislation together.

I hope that I have represented Sir Simon Wessely properly. It is important for us all to be aware that we do not have the support of the person in charge of the review of the Mental Health Act when we say, "Come on, what are we doing by having this first? Surely it should all be done at once".

Baroness Barker: I want to make it clear to the noble Baroness that I am not talking about bringing these two pieces of legislation together. I know some people have suggested that that should be done, but I am not asking for that. I am simply suggesting that this legislation, which makes a substantial change to what has been the basis of decision-making about best interests on the basis of harm to self, is now going to include harm to others. We were told back in the summer, when the Minister sent us a letter, that the Government were waiting for the outcome of the Mental Health Act review to see what the impact would be. We are now being told, as the noble Baroness, Lady Stedman-Scott, confirmed, that that basis of decision-making is changed by this legislation. It is linked to the necessary and proportionate assessment that people will have to make. I think that is a major change that will perhaps result in the detention of quite a number of people. I do not think it is unreasonable for the Government to wait until Sir Simon Wessely has published his report to ensure that the two pieces of legislation are not drifting further apart.

Baroness Murphy (CB): My Lords, I am the world's greatest pragmatist in this matter. I am very sympathetic to what the noble Baronesses, Lady Barker and Lady Tyler, are saying. This Bill is by no means perfect. It has huge gaps and we would not have started from here, but the reality is that this Bill will be with us for the rest of the autumn and I believe that Sir Simon Wessely's report will be submitted to the Government around 12 December, so it is likely to come before Third Reading and before we finish the Bill. We will be able to see if there are great big gaps. I do not think the two things will overlap very much. We might be helped out, particularly on amendments on advanced directives, and in that context we can perhaps make ourselves closer to what Sir Simon Wessely recommends, but I do not think there is anything to address, except that the current Bill is not working. We have all those people waiting for an assessment who will never be assessed. We need some legislation in place. There is some urgency. I know we would like a perfect Bill, but we are not going to get one. What we need is an implementable Bill which makes assessments doable for people who need them and so that we can get some process in place. The Bill is not perfect. We would not start from here, but we have this Bill and we should continue with it.

Baroness Finlay of Llandaff (CB): I shall continue on the theme that my noble friend Lady Murphy has set out. Last week, I chaired the National Mental Capacity Forum leadership group. One of the people there said that:

"While there was an initial knee-jerk reaction amongst care providers and the local council, if you consider the".

liberty protection safeguards,

"in more detail you quickly come to understand that it is actually quite an innovative solution",

because there is such a backlog and so much difficulty in trying to get anything in place.

I am concerned that we are trying to draw clear lines between different types of illnesses and conditions when it is pretty impossible to do so. There are mental health conditions that impair your capacity, even though you may be compliant with treatment, there are physical illnesses that result in impaired capacity, and there are illnesses—Lewy body dementia is one of them—where part of the illness means that you may be a risk to other people. Huntington's disease is similar and a horrible disease to have. Trying to draw clear lines between those different groups is difficult.

I looked at the amendment and for a definition of "fluctuate" and "short". I tried to think how I would define "fluctuate" or "short" in a clinical context, and I could not because "short" might be short to some people and long to others and fluctuation can be all kinds of directions and with different degrees of severity. The difficulty we are grappling with here is that we are trying to write something in legislation that will be literally black and white: black words on a white page. The people we are dealing with are incredibly individual and have very different needs. That is why, returning to our previous debate, the stress on wishes and feelings and on consulting people who know the person becomes incredibly important. We will go on to talk about ways

that people can call for external scrutiny because, if they care about the person, they need to be able to do that.

6.45 pm

I think I see the intention behind the amendment, but it might become really complex legally and I do not think it would do anything to solve the Bournewood gap. The more you look at the Bournewood gap, the more you see that it should never have happened in the first place, irrespective of the legislation in place. There has been a problem looking at Bournewood and at legislation as a solution. I hope that as a result of the way this Bill is drafted, the patient's wishes and feelings and those making representations on his behalf would have been listened to and should be listened to, and that we will have a mechanism to trigger so that he would not remain detained.

Baroness Barker: I have to disagree with the noble Baroness, Lady Finlay. Mark Neary had to resort to the law, not to a code of practice, to get his son out of a place where he should never have been detained. We need to have further discussions about what needs to be in the Bill and the role of regulation and the code of practice. I think she has a fundamentally wrong take on this. This is about legal protection for very vulnerable people. That sometimes has to be in a brief outline in law. It has to be stated in the Bill that a person has to be spoken to face to face. We can then go on to put a load of stuff in the code of practice about how we do that.

To pick up the point made by the noble Baroness, Lady Murphy, I think this is a terrible Bill containing huge holes and some real problems. If the Government take the tack they took last time, we may be able to improve it substantially, but we are in danger of putting one bureaucracy in place of another bureaucracy, and the only difference between the two is that there are far fewer protections for the most vulnerable people. We would be somewhat negligent to go ahead on that basis. I cannot approach the Bill in that way.

Baroness Thornton (Lab): I thank the noble Baronesses, Lady Barker and Lady Tyler, for tabling this amendment. I agree with the remarks of the noble Baroness, Lady Barker, about the state of the Bill. I am rather—"disappointed" may not be quite the right word—surprised that the noble Baroness, Lady Murphy, who has brought discipline to the House to focus on good legislation and how it should work, is suggesting that we have to have something, so this is it. I really hope that that is not the case and that this Committee will have revealed to the Minister, and particularly to the Bill team, that many elements in the Bill need clarification, need to be changed and can be improved. That is our job, and the noble Baroness, Lady Barker, is highlighting but one of those elements. In fact, the amendment that I am due to talk about next refers to the difficulties that the Bill has brought and the differences between the Mental Health Act and the Mental Capacity Act.

The last month or so has been very revealing. The Bill was sold to us as something really quite simple that was going to streamline things, get rid of the backlog, save some money and so on, and it really needed only one day in Committee. That is certainly how it was sold to me on these Benches and, I am sure, to other people in the House. In fact, what has happened over the last couple of months is that all the stakeholders and people who are writing to us are saying, "No, this will not do. This Bill does not work. It is dangerous and difficult". It needs clarification, and these amendments highlight the areas that need it. We are going to move on to other areas that need clarification and which will certainly need amendment. This is an important and legitimate question to ask about the Bill.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, I thank all noble Lords—I keep saying "noble Lords" but it has really been noble Baronesses, so I will switch my language—who have both tabled amendments in this group and spoken to them.

Before I come to the substance of the amendments, I shall say two things. First, I agree with the noble Baroness, Lady Murphy, that there is an urgency. To use the words of the Local Government Association, "the current system is unable to ensure there is adequate protection for human rights". That is the reality of the situation that we find ourselves in at the moment.

Secondly, views about the perfection or otherwise of the Bill will vary across the House, but I hope that in the two days of Committee prior to this one I was able to demonstrate that the department and Ministers are absolutely committed to improving the Bill in any way that we can during its passage through Parliament, especially in this House where there are so many experts. I really think we have made some progress. I realise that that will not be enough to satisfy everyone and there is clearly much more to come—care home managers are clearly a big area of work that we need to focus on—but we have made some progress. I encourage noble Lords to continue in that mindset because I think we can reach a good outcome that deals with the fact that, as Age UK says, the system leaves,

"many highly vulnerable older people languishing without any legal protection at all",

something none of us can accept. We stand ready to undertake that work, as noble Lords know, and I know they do so too.

I turn to the amendments in this group. Amendment 55, tabled by the noble Baronesses, Lady Barker and Lady Tyler, outlines the circumstances in which an authorisation ceases to have effect, particularly noting that authorisations should end if they conflict with a valid decision of a court-appointed deputy or a donee of a lasting power of attorney. The amendment also states that an authorisation would not cease to have an effect if a person's capacity fluctuated, and would create regulation-making powers to define what constitutes fluctuating capacity.

Section 6(6) of the Mental Capacity Act already provides that action cannot be taken that conflicts with a lasting power of attorney or a deputy's valid decision, and I can confirm that the Bill does not change that. This means that an authorisation can only be given if it is in accordance with a valid decision, so I hope I have provided reassurance on that front.

[LORD O'SHAUGHNESSY]

I can also confirm that if it emerges that an authorisation conflicts with a decision of a donee of a lasting power of attorney or by a court-appointed deputy, a review should be arranged under paragraph 31 of the Schedule. In particular, it will need to be considered if the attorney or deputy has valid and applicable powers to make this decision, and if the deprivation of liberty authorisation continues to be necessary. That means that in the event of such a conflict, the authorisation ceases to have effect. I hope that provides reassurance to the noble Baronesses on that point.

The noble Baroness, Lady Tyler, focused particularly on fluctuating capacity. I agree that an authorisation should not necessarily cease to have effect if a person's capacity fluctuates and there are short periods of lucidity. That is currently the case under the DoLS system and I can confirm that it will continue under the liberty protections safeguards. However, as the noble Baroness, Lady Finlay, brought to life, it is very difficult to define either "fluctuating" or "short", particularly in legislation. For that reason, we do not think regulation-making powers are appropriate; we believe this would be better dealt with through a code of practice, which would allow for more detail and more regular updating but would also allow the use of case studies to bring examples to life. We plan to give much more detailed guidance in the new code of practice, and I reassure noble Lords that we will be working with the sector in order to produce it.

Amendments 56 and 58 from the noble Baronesses, Lady Barker and Lady Tyler, relate to the thorny issue of the interaction between mental health and mental capacity legislation. They would mean that an authorisation had effect in relation to arrangements that were not in accordance with mental health requirements. As noble Lords know, mental health requirements are conditions placed on Mental Health Act patients living in the community. Currently, DoLS authorisations no longer have effect if a person is subject to arrangements or conditions under the Mental Health Act and that authorisation would be in conflict. This means that the terms of a DoLS authorisation cannot conflict with those of, for example, Section 17 leave of absences. The Bill has been drafted to reflect the interaction that currently exists between the Mental Health Act and the Mental Capacity Act.

The review of the Mental Health Act has been mentioned in this debate. The review, chaired by Sir Simon Wessely, has been considering, among other things, the interaction between these two pieces of legislation. I know the noble Baroness, Lady Barker, has sincere concerns about the nature of that interaction and about why we are bringing forward this legislation now. My short answer is that urgent reform is needed for the reasons that we have set out, including the quotes that I have given. The contribution from the noble Baroness, Lady Meacher, was helpful, and I have put in my notes that I need to speak to Sir Simon Wessely myself to understand his perspective. However, if I have understood correctly, regardless of the timing of his report, the process of implementing his proposals will take some time to do properly. In our view, it is not right to wait until that has been perfected before we try to deal with many of the issues under consideration in the Bill in the light of the current inefficiencies of the DoLS system. It is for that reason that we want to push ahead. As I have said, I will take it upon myself to speak to Sir Simon Wessely and get a real understanding of his expectations on timing, and to try to understand from his point of view the scale of the interaction between these two pieces of legislation so that we really know what is at stake.

I think the noble Baroness herself said that the amendments are essentially probing. She will know that the effect of them would be that two authorisations could be live at the same time. I am confident that that is not what she is proposing, not least because it would have the perverse effect of requiring people to be in two places at once, so I know she was using this as an opportunity to discuss this question. As I said, it is important that we move ahead for the reasons that we have discussed, notwithstanding that the Government will of course consider incredibly carefully the findings in Sir Simon Wessely's report and what action is required to implement his recommendations.

On a couple of occasions the noble Baroness, Lady Barker, referred to the consideration of harm to others. I am told that harm to others can be considered under the current DoLS system, so what is proposed is not a change from the current system. However, I will pick that point up with her offline so that we can really get to the bottom of it and ensure complete clarity to a degree that satisfies her. I hope that on that basis, the noble Baroness feels able to withdraw the amendment, and I look forward to discussing more of these issues throughout the evening.

7 pm

Baroness Barker: I thank all noble Lords for taking part in that debate, which was a useful exchange of views and information. The Minister is in some difficulty, because the two organisations that he cited are on record as saying that they do not support the Bill in its current form. I remain of the view that we run the risk of attempting to deal with an underfunded, under-resourced system by putting in place another underfunded, under-resourced system which dilutes the protection of vulnerable people.

Ahead of debates on other groupings, I simply ask how many times the Mental Capacity Act and DoLS codes of practice were changed. How many times were they amended? I do not disagree that a code of practice is a good place in which to put examples; I do not think it is a substitute for having well-drafted legislation and regulations—regulations can often be changed.

I will read *Hansard* with great care, but I reserve the right and hope, with the assistance of the noble Baroness, Lady Browning, who is not in her place but is equally concerned about these matters, to return to the matter. I beg leave to withdraw the amendment.

Amendment 55 withdrawn.

Amendments 56 to 58 not moved.

Amendment 58A

Moved by ***Baroness Thornton***

58A: Schedule 1, page 15, line 12, leave out from "of" to end of line 14 and insert "12 months or less."

Baroness Thornton: The amendment would reduce the maximum time for which an individual can be held in detention without renewal from three years back to 12 months. The Bill would allow responsible bodies to renew an authorisation of deprivation of liberty in some cases for up to three years, while simultaneously reducing the safeguards that a renewal process would require. The amendment would shorten that three-year period to a maximum of 12 months.

Why is that important? Tripling the potential length of an authorisation period to three years creates a stark difference between the Mental Capacity Act and the Mental Health Act, apart from anything else, and moves away from best practice in other countries. Paired with the new LPS renewal process, which weakens safeguards designed to prevent lengthy detentions, a three-year authorisation will be likely to face legal challenge.

At its core, the new LPS system is intended to safeguard vulnerable people who have been deprived of their liberty on mental capacity grounds. The possibility of a three-year period of detention with limited safeguards gets the balance wrong between safeguarding vulnerable individuals and the desire to reduce the bureaucracy of the system.

Strasbourg case law confirms that a lawful deprivation of liberty for the purposes of Article 5(1)(e) of the ECHR must include both "limits in terms of time" and "continuing clinical assessment of the persistence of a disorder warranting detention". Therefore, in order to comply with Article 5, any system must contain, first, a provision for the termination of the authorisation after the maximum time has expired and, secondly, an ability to terminate an authorisation before the time limit has expired if the deprivation of liberty is no longer necessary.

A three-year renewal limit is likely to pose problems for responsible bodies, especially in cases concerning conditions such as learning disabilities, acquired brain injuries and other non-degenerative mental impairments. The courts are likely to intervene to interpret those paragraphs concerning renewals—paragraphs 27(a)(ii), 28(b)(ii) and 29(1)(b)—as narrowly as possible. Capacity assessments are time specific, and a three year-old capacity assessment cannot be relied on as accurate evidence for detention. Therefore, we propose to reduce the three years to 12 months.

It is notable that a 2017 paper comparing mental health legislation in five different jurisdictions—Canada, Australia, Scotland, the Republic of Ireland and England and Wales—states that renewal orders vary in different jurisdictions,

"with the time periods for subsequent orders being longer in duration up to a maximum of 12 months, except in Ontario (3 months) and Victoria (6 months)".

The Law Commission states that a three-year period should be considered only in the context of robust safeguards and constant review. Given the weakening of the safeguards throughout the rest of the Bill, it would be inappropriate to triple the length of time for which an authorisation can last.

In his opening remarks on the Bill, the Minister stated:

"It is essential that the system afford the necessary protections for the most vulnerable people".—[*Official Report*, 16/7/18; col. 1061.]

The Bill as currently drafted would in this respect not deliver that protection. I beg to move.

Baroness Finlay of Llandaff: My Lords, I have three amendments in the group designed to remove any ambiguity about authorisations, in that an authorisation would fall if it partly fell—in other words, if the person's condition had either improved or changed to such an extent that the plan in place was no longer applicable, even in part, that would warrant a complete review. I accept that it would have to be a light-touch revision, because some things might not have changed, but I am not comfortable with simply allowing it to be reviewed and people to say that these parts of the condition no longer apply.

Amendment 58C is to stress the need for evidence to be supplied to support statements. I hope that the Minister will be able to provide me with some assurance. That evidence might come from photographs, video recordings of behaviour or whatever. That may be quite different to the written word. I worry that one person's observed written word may not adequately portray a picture, particularly where the cared-for person has become withdrawn. Someone might interpret that as their being compliant, when actually they may be deeply unhappy. A broader direct recording of the person could be helpful.

I tabled Amendment 62A because I was concerned that the care home manager might be in the process of arranging for adaptations to be made to meet the cared-for person's needs in line with that person's wishes and feelings, and that the Bill's wording does not provide enough flexibility to consider the arrangements to meet the individual's needs.

Lord O'Shaughnessy: I thank the noble Baronesses for tabling their amendments about renewals. I deal first with Amendment 58A, moved by the noble Baroness, Lady Thornton, which, as she said, would have the effect of meaning that authorisations cannot be renewed for longer than 12 months. As she pointed out, this would go against the Law Commission's recommendation, which was that there could be circumstances under which renewals took place for up to three years, particularly following an initial review after up to 12 months and if it was unlikely that there would be a change in the person's condition.

These three-year renewals are in place so that those who are in a stable condition and unlikely to recover are not subjected to annual assessments. The Bill does provide the safeguard—referred to by the noble Baroness—which ensures that an authorisation would need to be reviewed if there is a change. We would also want to make sure that there are appropriate reviews of arrangements when annual reviews under the Care Act take place. It would be up to the responsible body to set review periods. In care home settings, the care home manager must report to the responsible body on any reviews that have been carried out. As the Bill stands, there are significant safeguards to prevent abuse or lack of care of the vulnerable person.

[LORD O'SHAUGHNESSY]

All that being said, I know how strongly noble Lords and stakeholders feel about this issue. The noble Baroness, Lady Thornton, made a valid point about aligning the review process with the terms set out under the Care Act. I would like to give further thought to this, particularly in the context of the discussions which will be taking place about the proper role of the care home manager. There is clear concern about a proper system of oversight and regular review where responsibility has been devolved to the care home manager. If the noble Baroness will allow me, I will follow that up after this debate.

Amendment 58B, tabled by the noble Baroness, Lady Finlay, considers an authorisation ceasing to be renewed if it has lapsed wholly or in part. We will want to give further consideration to that. As discussed earlier in Committee, there are circumstances under which one might be happy for an authorisation to continue after a very minor change. That might be the proper process to align this to, and I want to give further thought to this.

Amendment 58C asks that, when deciding whether to renew authorisations in care home cases, responsible bodies should consider other relevant information, as well as that provided by the care home manager. I can confirm that the Bill does allow responsible bodies to consider information other than that provided by the care home manager. That would, inevitably, be in other formats too. We will set out more detail on that in the code of practice.

Amendment 62A would add the word "arranging" to the scenarios in which the care home manager was required to notify the responsible body that an IMCA should be appointed. The amendment intends to make sure that that happens at the earliest stage, including when the assessments are being arranged. That is what the word "proposing" in the Bill achieves. We are satisfied that the language currently in the Bill means that care home managers would be looking at this issue when they are beginning to propose an authorisation, which is the earliest point at which planning for, arranging or bringing together the assessments would take place. I would be happy to demonstrate what underpins our belief that this is the case. I do understand what the noble Baroness is driving at; it is something which we are trying to achieve.

On that basis, I hope that the noble Baronesses are willing to withdraw or not move their amendments.

Baroness Thornton: I thank the Minister for his answer. I am encouraged that we are going to continue the discussion on this issue. Apart from anything else, I will need quite a lot of convincing that the Bill provides the right kind of protections to allow a period of three years, as currently stated.

On the amendments tabled by the noble Baroness, Lady Finlay, I was reminded when reading the letters the Minister has written to noble Lords, and the record of the previous two days in Committee, that we need to clarify the meaning of "care home manager". Or is it "care manager", an expression which he has also used? I do not want an answer to that now, but I put it on the table as one issue which we need to clarify in our discussions and in the Bill. I beg leave to withdraw the amendment.

Amendment 58A withdrawn.

Amendments 58B to 60 not moved.

Amendment 61

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

61: Schedule 1, page 17, line 23, at end insert—

"(c) for a named person to be in charge of training and revalidation of Approved Mental Capacity Professionals,

(d) for honorary contracts with neighbouring local authorities and health bodies as required."

7.15 pm

Baroness Finlay of Llandaff: My Lords, I do not want to detain the Committee by revisiting too much of our debate on day 2, when the Minister stated that the local authority would decide for itself how to organise and manage how AMCPs will operate. My concern is that they must be trained to a uniformly high standard. Such training should include assessment in all the key domains of responsibility. They should be registered as an AMCP and subject to revalidation over time. These people will, potentially, hold an enormous amount of power over somebody who is vulnerable.

I am also concerned that, unless those professional standards are in place, we will have a problem with quality control. In the event of a concern being raised about an AMCP, it is important that they are formally registered with the local authority. I also raise the question of how they will be indemnified and who will be responsible for their appraisal and supervision. They must have honorary contracts with adjacent local authorities to enable them to act, because some local authorities have relatively confined geographical areas. Given that these should be professionals, they should be listed with their professional body as having specialised training and skills. Another reason for this is my worry that, if they are going to function in hospitals, and unless they have a formal honorary contract from the local authority and are registered, we may end up with a two-tier system between local authorities and hospitals. I am not sure how that is going to work.

Amendment 61A seeks to expand the range of people who can train to become an AMCP. I declare an interest as president of the Chartered Society of Physiotherapy; I was at its annual conference at the weekend. I did not add physiotherapists to the list when I wrote the amendment, because I had not had a chance to consult them. However, it was evident, from many inspirational presentations, that physiotherapists working in head injury, acute trauma and stroke units, and in mental health services, can often be key to rehabilitation and restore people dramatically to a degree of independence that others had not envisaged. They felt very strongly that they did not want to be excluded; they have a lot to offer and are keen to train up, which seems very sensible.

I have also come across a few—not many—doctors who have retired from their main clinical practice but remain on the medical register, still work in some capacity or another, and, in later life, have developed an interest in people with impaired capacity. They have years of experience behind them, particularly in old-age psychiatry and so on, and would like to train as an AMCP. The criteria on which to select people should be their motivation, personal skills and background experience. We should not judge them by their original clinical degree qualification, because that is arbitrary. It does not mean that just because you are a nurse, a clinical psychologist or a social worker you would be perfectly fitted to this role; nor does it follow that because you are a speech and language therapist or a physiotherapist or whatever, you would not be suitable to take on this role and these responsibilities.

I therefore hope that the Minister might be able to expand a little, or perhaps not even discuss it here but think again, on how we will ensure that the people who carry this responsibility are trained to a uniformly high standard, are properly indemnified, can be identified, are able to function properly and can be held to account for the way in which they take decisions and advise. I beg to move.

Baroness Jolly (LD): I would like to add a few more points on training. An awful lot of people in an awful lot of new roles will require training to get whatever system that we are going to end up with up and running at pace. Which organisation will be responsible for setting up the programmes for ensuring the delivery of good-quality training? Who has the responsibility to ensure that nothing is implemented until all the appropriate professionals have received their training? There is nothing worse than determining a date to fire the gun if you discover that all the people who are going to run the system are not yet trained. Can the Minister confirm that all this will start with plenty of time before the rollout of this new system? We expect that training should be effective and ongoing. Who will assess the trainers? What is the process for ensuring quality and a national standard? We may well be able to twist something that currently exists and make it work, but I do not have that knowledge. Can he also confirm that, as part of this training, the rights of the individual will be reinforced? Will the training clarify the role that each of these professionals within this new system is going to have in ensuring that an individual's rights are observed and respected?

Lord Hunt of Kings Heath (Lab): My Lords, I want to follow up the remarks of the noble Baroness, Lady Finlay, by referring to the recent CQC annual report, which had a section on the implementation and practice in relation to DoLS. The report laid out a number of key concerns about care home and hospital providers that are actually using DoLS at the moment in relation to the Act itself. There is a huge variation in practice and this variation is commonly linked with a basic lack of understanding of the law, which is complex and difficult to understand. The report says that the result is that there are unnecessarily restrictive practices that can result in the loss of freedom and, in some cases, the loss of people's human rights. The problems are reinforced by limited staffing levels, a lack of time to complete applications and inadequate staff training.

I am aware, of course, that the intention of this Bill is to streamline some of those procedures, although I think that, because the safeguards have been drastically reduced, we might be landing ourselves in future problems once the courts begin to hear some of the cases that will arise. The point is that it is quite clear that, at the moment, effective training is not taking place among many of the organisations involved in the operation of DoLS. The risk is that the same will happen in relation to the new legislation. We need some guarantees that there are going to be resources and a concerted training programme to ensure that we mitigate that impact.

Baroness Thornton: I will add to the questions that have already been asked of the Minister: who is going to pay for this? Training is very expensive and I was waiting for the noble Baroness, Lady Jolly, to ask that question but she did not, so I am asking it. As I recall from the impact assessment, I am not sure that there is a large sum of money in there for the amount of training that might be necessary to ensure that this Bill is properly enacted.

Lord O'Shaughnessy: I thank the noble Baroness, Lady Finlay, for tabling these amendments and precipitating this discussion. I will move straight on to the substance of the amendments. Amendment 61 provides that local authorities must make arrangements for a named person to be in charge of training and revalidation of approved mental capacity professionals and that local authorities must make arrangements for contracts with neighbouring local authorities and health bodies as required.

On the issue of approvals and training, the Bill is clear that local authorities must approve individuals to become AMCPs, and regulations under paragraph 33 will make provision around training, qualifications and other eligibility criteria. The question of what kind of training there should be and who pays is something that we discussed at some length on the last Committee day. That was more in relation to care home managers, which was primarily the focus of the questions of the noble Lord, Lord Hunt. The same read-across applies to AMCPs as well. On that occasion, I committed to bringing forward more details of what the training would look like. I also confirmed that, in England, Health Education England and ADASS would be responsible for working with Skills for Care, and Social Work England. Those are the bodies that would be responsible for overseeing and designing the training. The noble Baroness, Lady Jolly, asked about the rights of individuals. Of course, that would be the centrepiece of any training programme to make sure that those rights are properly respected.

On the specific question about local authorities naming an individual, I say that the Bill does not prevent them doing so. It is something that they are able to do and, in our view, it does not need to be set out in primary legislation. There is no such requirement for best-interests assessors or approved mental health professionals, I understand, and that has not caused any difficulties in practice. To that extent, we can mimic the arrangements in place there.

[LORD O'SHAUGHNESSY]

Making arrangements with other local authorities is again not precluded by the Bill. Clearly, that is something that local authorities will want to do, depending on the arrangements they have commissioned in care across different authorities. I can confirm that we will provide guidance on this in the code of practice.

Amendment 61A adds to the criteria that must be met for a person to become an AMCP. They must be,

"a registered professional, with a minimum of three years clinical experience".

A list sets out whom that could include; that list has been added to by one tonight, which in some senses exemplifies the nature of the problem. I completely agree with the noble Baroness: we need to set out not only the kind of professionals but the kind of qualifications and experience. There has to be a balance and a mix between all of those. That will be set out in regulations. The noble Baroness, Lady Barker, asked about the proper place to set out the rigidity or robustness, and we believe that the appropriate place would be in regulations, which provide a degree of flexibility that would not apply if we enshrined this in primary legislation. That is why we are proposing the approach of defining the groups that should be acting as AMCPs.

Baroness Barker: How many cases have been taken to the Court of Appeal on the basis of regulations not being observed, as opposed to something in an Act? I do not expect an answer now, but I would like to know.

Lord O'Shaughnessy: I am afraid that I do not know, but I will write to the noble Baroness and circulate the letter to all noble Lords.

To conclude, I hope that I have provided the noble Baroness, Lady Finlay, with the reassurances that she was looking for and that she will be prepared to withdraw her amendment.

7.30 pm

Baroness Finlay of Llandaff: My Lords, I learned some years ago not to have lists in the Bill, and I have fallen over my own list on this amendment. I am most grateful to the Minister for the reassurances that he has given. A lot of work will need to be done so that we make sure that training is there for the right people at the right time, but for now I beg leave to withdraw the amendment.

Amendment 61 withdrawn.

Amendments 61A to 62A not moved.

Amendment 63

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

63: Schedule 1, page 18, line 18, leave out "the manager is of the opinion" and insert "there is reason to believe"

Baroness Finlay of Llandaff: My Lords, in this group of amendments we begin to get into the issue of IMCAs and how that whole system will operate. In Amendment 63 I use the words,

"there is reason to believe",

because I feel strongly that anyone who is concerned about the cared-for person—whether they are family, a friend who knows them well, a care assistant in the care home, if they are in a care home, or somebody who is coming into wherever they are being cared for, such as supported living—must be able to raise them independently, if necessary anonymously, and to request that an IMCA is appointed to go and see what is happening.

In Amendment 64 I removed the word "only" because I was attempting to remove the veto from a care home manager. The potential veto of a care home manager has caused so much concern in debate, and a great deal of anxiety in the briefings that have come through to us. I stress that advocacy—we will come on to that overall—needs careful monitoring, too, and people who act as advocates need support and supervision. Not just anybody can be an advocate, and we have to be careful that we do not exclude family and those who know a person well by having an advocate come in when in fact a family member who has known them for years may be in a much better position.

Also, we have to have a way of screening out advocates who, for whatever reason, may not be the right people to do this at the time. Unfortunately, it is inevitable and part of human nature that people will want to work in a field if they have had some experience of being on the receiving end. But certainly, when you look at bereavement counsellors and so on, they need to have a clear period before they are selected, and they need to be carefully selected and screened, and supervised. We are talking about extremely vulnerable people here, and the last thing we want to do is somehow to open the door to them being vulnerable at somebody else's hands through our best intentions. I beg to move.

Baroness Barker: My Lords, this is again a rather fundamental indicator of some of the things that are badly wrong with the Bill. The words "best interests" appear in it three times, and twice they are used in relation to a care home manager being able to restrict access to advocacy. As the Bill stands, referral to advocacy is controlled by a relevant person, either the responsible body or the care home manager, and an advocate must be appointed if a person has capacity and requests an advocate—that is quite rare, and I have to say that under the Bill it would be something of a miracle, because they do not have the right to information about not only their current circumstances but about other less restrictive options. The Minister's statements on information last week, when he referred to GDPR, were so strange that it has taken me a considerable time to work out that he had completely misunderstood that under the current system people have a right to information. They have the right not to request information but to be provided with information, which this amending Bill severely restricts.

However, the second condition is by far the most worrying. Somebody can request an advocate if the person lacks capacity and the relevant person is,

"satisfied that being represented and supported by an IMCA would be in the … person's best interests".

I invite noble Lords to think what would have happened if those words had been in law during Winterbourne View. That is why I am quite happy to use the word "shocking" about the Bill, as this is unacceptable. My amendments would try to get rid of the abuse of the term "best interests" to limit vulnerable people's access

to support. The Minister knows that under the DoLS system, by and large, if somebody requests an advocate, it is up to the relevant body to try to do their best to find one, or that they find an appropriate person. I refer to the point made by the noble Baroness, Lady Finlay, that under case law at the moment, local authorities have the right to override if an appropriate person is not doing their job properly on behalf of the person. That too will be undermined by the Bill.

The Minister will also know that if somebody has no relatives and nobody else in the world—they are "undefended", to use that rather archaic but useful and clear term—they have an automatic right to advocacy. I know that much will be made of advocacy being expensive, advocates being a resource that is not readily available, and that people who do not need advocacy will be unnecessarily interviewed. I am quite happy to talk at length to the Government about ways in which advocates or advocacy resources could be better used and better targeted—but absolutely not by drawing it like this, putting this sort of hurdle not even in a code of practice but in a Bill.

Baroness Thornton: My Lords, we on these Benches very much agree with the purport of these amendments, which again bring to light some of the ambiguities in the Bill and some of the rights that are not properly respected by it. Over the next period the Minister will not only need to give us a theoretical answer but have to answer things such as the question about Winterbourne View, and look at the hard examples of real experience which some of us have been receiving in our postbags over the last month. We will need to return to this over the next few weeks, and possibly even at the next stage.

Lord O'Shaughnessy: I am grateful to all the noble Baronesses for their amendments and for speaking in the debate on this group. Let me begin with a statement of principle. I accept the challenge from the noble Baroness, Lady Thornton, that we need to move from principles to practicalities, or in our case to the appropriate legislation. There is genuinely no attempt in the Bill to restrict people's access to independent advocacy. As has been clearly voiced, not only in this Chamber but elsewhere, there is a concern that that will be the effect of what is proposed, and that is something that we need to deal with. But let me say at the beginning that that is not the intention. It must be the case that anybody who needs support to navigate these difficult and complex situations must be able to find the right support for them. I will explain why the Bill is as it is in a moment, but let me at least give that statement of principle at the beginning.

I will deal now with the specific amendments in this group. Amendments 63 and 64 aim to ensure that the Bill is robust on the appointment of the IMCA. I completely agree that it is vital that the care home manager notifies the responsible body that an IMCA should be appointed. That is required by the Bill. However, I know that there is great concern about the impartiality of this person and a requirement for strengthening in this regard. It is also our position that a responsible body will be able to appoint an IMCA if there is a request by, for example, a family member or the person themselves, or if there is a disagreement with the notification given by a care home manager. I am considering how we can make the Bill clearer in that regard. As we home in on the issue of the incentives for the care home manager to follow best practice, as we would want, I am aware that we need to do more work on this to get it right.

Lord Hunt of Kings Heath: My Lords, that is a very helpful comment but will the Minister pick up the point that part of the problem is that the care manager is not only the co-ordinator but often the gatekeeper to the protections that noble Lords wish to see included? Take, for instance, the definition of "relevant person". It seems to me, looking at this afresh, that far too much authority is being given to the care home manager in relation not just to co-ordination but to the protections.

Lord O'Shaughnessy: I thank the noble Lord for that intervention. The debate we had last week was very much around the proper role for the care "home" manager—I take on board the rejoinder from the noble Baroness, Lady Thornton, about the specificity of terms. I do not want to rehash that debate, save to say that the care home manager model is the right one going forward, while recognising, as I did last week—here I agree with the noble Lord's point—that there are a lot of concerns about conflicts of interest, training, the degree of responsibility and other things.

In this case, we are talking about notification of the appointment of an IMCA, where there is real concern that there is an element of marking your own homework. That is not what we are trying to achieve: we are trying to achieve the consideration of deprivation of liberty at the earliest possible point in care planning by somebody who is responsible for organising—although in lots of cases not personally delivering—that care. We are trying to deliver a more proportionate system than the one that we know is currently failing. As I committed to in last week's Committee debate, I want to get that right. If we cannot get it right, the risk is that we end up replicating the system that we have now, which would be in nobody's interests. I hope that, by restating that, I have satisfied the noble Lord.

Amendments 68, 71 and 72 relate to the criteria for appointing IMCAs. The Bill currently states that an IMCA should be appointed if a person has capacity to consent to being represented and supported by an IMCA and makes a request to the relevant person, and there is no appropriate person available. It also states that a cared-for person should be supported by an IMCA if the person lacks capacity to consent and being represented by an IMCA is in their best interests and there is no appropriate person in place.

I recognise the concern expressed by the noble Baronesses, Lady Barker and Lady Thornton, about the term "best interests". Let me state again the intention that, in the vast majority of circumstances, we expect it would be in a cared-for person's interests to receive representation and support from an IMCA or appropriate person. However, there may be a small number of circumstances where that is not the case. For example, if a person is adamant that they do not want this sort of representation, and has refused advocacy support in the past, it would not be right to impose such an advocate on them. If we remove the best interests

[LORD O'SHAUGHNESSY]
consideration, we risk a situation where responsible bodies can override the past and present wishes of the person.

7.45 pm

Baroness Barker: I thank the Minister for that explanation. Given that the Bill as drafted is essentially a "get out of jail free" card for bad care home owners, the Government must have a really good evidence base to have come forward with a proposal as sweeping as that. I wonder whether the Minister can share with us the evidence that has led to the Government putting this in the Bill. It really should be quite convincing, given that it has got to this stage. It would be helpful if he would let noble Lords see that evidence.

Lord O'Shaughnessy: I am happy to discuss the issue with all noble Lords, as I have said in the past. I return to where I started: the intention of this approach is to make sure that independent advocacy is not imposed on someone who genuinely does not want it. It is not to provide a "get out of jail free" card for poor care home managers. If that is a concern, I take it very seriously, but it is not the intention of the Bill. However, if it is the case, something needs to be remedied. Let me assure noble Lords that I will make best efforts to do so as we move forward from Committee.

This has been a very useful discussion. In some sense it has provided a degree of continuity from our discussion last week, while moving on to the issue of advocacy, which we will clearly explore further. I hope that, with the reassurances I have given at this stage, the noble Baroness will feel able to withdraw her amendment.

Baroness Finlay of Llandaff: My Lords, this debate has been extremely interesting and, in many ways, gets to the nub of some of our concerns. In looking at the Bill, one thing I have tried to do is to benchmark its procedures to see how they would work. I was involved in prosecuting appalling care in EMI homes. I am trying to see how we could have discovered sooner that there were problems there.

I share the concern about the care home manager having too much power. Having said that, I have found the Minister's answers today reassuring, as they were on the second day in Committee. I suggest, however, that the number of objectors will be very few, because many of these people have such impaired capacity and are not in a position to object—it may be other people who speak up on their behalf.

Baroness Barker: I wonder whether the noble Baroness, Lady Finlay, agrees that, when you watch well-trained advocates at work, you see that they absolutely understand if their presence is upsetting somebody. They are not routinely attempting to force themselves on to people who definitely do not need their help. The question of whether somebody wants their help or not is a more nuanced professional judgment.

Baroness Finlay of Llandaff: I agree with the noble Baroness that when they work well, they can work extremely well. As I said earlier, I would also caution against the family and other people being potentially pushed aside, and people being not adequately supervised or monitored.

We have a great deal to consider outside the Chamber tonight. I am grateful to the Minister for being in listening mode so far. This group of amendments and the next are the ones that we will need to have a big discussion about. In the meantime, I beg leave to withdraw the amendment.

Amendment 63 withdrawn.

Amendment 64 not moved.

Amendment 65

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

65: Schedule 1, page 18, line 33, at end insert "or a person concerned with the welfare of the cared-for person has requested independent support for the cared-for person"

Baroness Finlay of Llandaff: My Lords, I feel that I should apologise for leading on this group of amendments, but it was by chance that my number came up. It was not my choice: I did not ask to lead on it.

The role of Amendment 65, which is the one that I really want to speak to, is to state clearly that we must strengthen the voice of anyone who has any concerns so that they can speak up on behalf of the cared-for person. I note that my noble friend Lady Hollins's Amendment 66 provides powers to the voice of the responsible body and would mean that the responsible body must listen to representations. Amendment 67 strengthens the word "must". There is a great deal in these amendments. I will not take the time of the Committee by speaking to other noble Lords' amendments, other than to say that this group of amendments contains a great deal of rich wisdom. I beg to move.

Baroness Hollins (CB): My Lords, this group of amendments concerns the appointment of an advocate, or appropriate person, to support the cared-for person in exercising their rights. The appointment of an independent mental capacity advocate and the identification of an appropriate person rely on care home managers being able to arrange a capacity assessment and a best-interests decision and on them notifying the responsible body. I noted the Minister's assurance on our last day in Committee that care home managers will not be making an assessment themselves. But how will errors be identified and what will happen if the care home manager gets it wrong? Will the Minister tell the Committee how that will be detected on the basis of a paper-based review by the local authority when the paper has been supplied by the care home manager? The responsible body should not rely simply on what the care home manager thinks.

My Amendment 66 gives the local authority discretion to appoint an appropriate person or IMCA without notification from a care home, with whom there may be a conflict of interest, if the responsible body has reason to believe that such representation and support is needed for the cared-for person. Reasons to believe might include notification by an AMCP or a third party, or local authority social services involved in care planning.

The provision of advocacy can have a transformative effect and be the first time that the cared-for person's views, and those of their family, are forcefully represented to decision makers. A failure to listen to people or to give weight or credence to what they say lies at the heart of many of the tragedies that have shamed social care and health services over recent decades. For that reason, it is vital for people to get the support that they need to express their views and exercise their rights, either through the appointment of an appropriate individual, often a family member, or an independent mental capacity advocate.

As they stand, Clauses 36 and 37 of the Bill are confusing and poorly drafted, with inconsistencies. For example, the Bill states:

"An IMCA should be appointed if the cared-for person … has capacity to consent to being represented and supported by an IMCA, and … makes a request to the relevant person"—

but IMCAs are instructed to support and represent only people who lack capacity. My Amendments 67, 69, 70, 73, and 74 add emphasis and aim to address these inconsistences and ensure that every cared-for person has access to support from either an appropriate person or an IMCA who is both willing and able to help them understand and exercise rights of challenge.

As it is drafted, the Bill leaves open the possibility of circumstances where a person may have neither an IMCA nor an appropriate person and therefore no means of being able to exercise their rights under Article 5(4) of the European Charter of Human Rights. Rulings such as the AJ v A Local Authority judgment, in paragraph 35, stipulate:

"Article 5(4) may not be complied with where access to a court is dependent on the exercise of discretion by a third party, rather than an automatic entitlement … Where a person lacks the capacity to instruct lawyers directly, the safeguards required may include empowering or even requiring some other person to act on that person's behalf".

My amendments therefore remove best interests from the criteria for appointment of a representative, as this should play no role in determining whether people are able to exercise their rights of challenge. Will the Minister explain the basis on which he believes that Part 5 of the Bill as drafted is fully compliant with this ruling and with ECHR Article 5?

I am also concerned about the potential conflict of interest if those responsible for arranging and providing care, such as care home managers, also act as gatekeepers to the person's ability to exercise their right of appeal through best-interest assessments. There should be a clear route for the cared-for person to be able to appeal and to get the support that they need to do this. We know that access to justice is already a serious problem under the current system. The appeal rate is below 1% and cases such as that of Steven Neary and others show how hard it is for families and detained people to challenge public bodies where they object to the arrangements. I understand that the Government estimate that the new arrangements will reduce the appeal rate even further to 0.5%.

My Amendments 76 and 77 recognise the considerable responsibilities being placed on an appropriate person. In some circumstances, an appropriate person such as a family member who knows the person may well be best placed to assist the cared-for person, but may need some assistance. Making sure that an IMCA is involved in these cases would enable them to fulfil this role with support.

Nothing in the Bill details the functions that the IMCA will perform. It would help the Committee if we understood why this has not been addressed. The Law Commission's draft Bill provided powers to strengthen regulation provision—Section 36 of the Mental Capacity Act—around how an IMCA is to discharge the functions of representing or supporting, including challenging decisions and facilitating a person's involvement in relevant decisions. The experience of DoLS over the last nine years has shown us the need for clarity on when the representative—an IMCA or lay person—can or needs to challenge the authorisation.

My Amendment 79 recognises this and reinserts regulation-making powers into the Bill, extending it in the case of an IMCA appointed under the LPS to make provision as to how that advocate is to support the cared-for person, and where relevant the appropriate person, in exercising the right both to make an application to court and to request a review. This provision is necessary to secure a person's rights under Article 5(4).

The Bill recognises that the role that the appropriate person undertakes provides a vital safeguard for the cared-for person for the purposes of Article 5 of the ECHR, but the Bill fails to place a duty on the responsible body to keep under review whether the appropriate person is undertaking their functions. This is an important safeguard under the DoLS, where the relevant person's representative role—essentially an identical role to the appropriate person—has a duty to maintain contact with the cared-for person. My Amendment 80 places a duty on the responsible body to keep under review whether the appropriate person is undertaking their functions and, if they can no longer fulfil them, to appoint another appropriate person or IMCA at that point.

The Minister has given reassurances, a number of times, that issues within the Bill will be addressed through the code of practice. The requirement to act needs to be in the Bill. How it is done and implemented could be set out in the code of practice. I hope that the Minister will accept that these amendments address serious and fundamental issues that need to be resolved within the Bill.

8 pm

Lord Hunt of Kings Heath: My Lords, I shall speak to my Amendment 78, but I should like to say a word in support for the amendments spoken to by the noble Baroness, Lady Hollins, to which I have added my name. These amendments concern the arrangements for the appointment of independent mental capacity advocates and they sensibly seek to ensure that an IMCA must be appointed if the appropriate person would have substantial difficulty helping the cared-for person to understand their rights, involving them in decisions and assisting them to exercise rights of challenge if they wish to do so without the support of an IMCA. I want to make it clear that relevant rights include the right to make an application to the court and the right

[LORD HUNT OF KINGS HEATH]
to request a review of the arrangements. The responsible body must ensure that cases are referred to the court when a cared-for person's right to a court review is engaged.

The concern is that at the moment, referral to advocacy is controlled by the relevant person, who is the responsible body or the care home manager. An advocate must be appointed if the person has capacity and requests an advocate, which is likely to be very rare, or the person lacks capacity and the relevant person is satisfied that being represented and supported by an IMCA would be in the person's best interests. The problem, which we have now debated a number of times, is that the right to advocacy seems to be more limited than under DoLS, and it is at the discretion of the relevant person not to refer if it is not considered to be in the best interests. As has been commented on, there are only three references to best interests in the entire Bill, and two are used at the discretion of the care home manager or the responsible body to actually limit the right to an IMCA. We have to build in some more safeguards, including referral to the Court of Protection. The Joint Committee on Human Rights, which looked at the original Law Commission work, said that the responsible body should be under a clear statutory duty to refer cases where others fail to do so.

I was interested to receive over the weekend an email from the carers for HL in HL v UK ECHR 2004, otherwise known as the Bournewood case. They have always been critical when they observe bad practice and the failure to uphold a person's rights. They say that reading the Mental Capacity (Amendment) Bill and following its passage through the parliamentary process so far has been depressing and leaves them feeling extremely frustrated and angry that the work they started in 1997 and the protections for the person that came about from that work are now being thrown away by this Bill. The lack of any of the protections they argued for individually and collectively, which at least had a fair hearing when they gave oral evidence to the JCHR and, they believe, were mostly reflected in its recent paper, appear to have been completely ignored, as has most of what the JCHR had to say. They say that anything less than the JCHR recommendations, along with nearly all of the proposals from the Law Commission, would be a reduction in the value of a person's individual rights and against the concept of the MCA and even of the existing DoLS.

Interestingly, their acid test is this: if HL against Bournewood happened today under these proposals, would he be any better protected than in 1997 or under DoLS? They say that given the attitude of the professional employed by the hospital managing authority at the time, the Mental Capacity (Amendment) Bill places more control in the hands of those very professionals and shows less consideration of HL and those who were trying to get him out. In its current form, it is a monumental failure. I know that the Minister thinks that this is an exaggeration, but coming from the carers of HL, it suggests that there are real and genuine concerns about where the Government are going. My fear, as I said last week, is that essentially we are seeing a streamlining of the bureaucratic process and many of the safeguards are being reduced. That is why access to the Court of Protection is so important.

Baroness Barker: My Lords, I have tabled one amendment in this group, Amendment 75. I do not wish to rehearse the arguments we had on the previous group but I want to put one question to the Minister. Why in paragraphs 36 and 37 do we suddenly see the term "relevant person" being introduced? It is quite confusing and I shall need to go back and look at *Hansard*. I do not want to make a wrong accusation, but I think there is confusion about the terms "relevant person" and "appropriate person", when in fact they are two completely different things. My understanding is that a "relevant person" is either the responsible body or a care home manager, so why do we not talk about that? If that is what is meant, let us be up-front about it.

Amendment 75 asks why the appropriate person as we know them under the Mental Capacity Act has to have capacity to consent to being supported by an IMCA if the purpose is not just to put another hurdle in the way to make sure that these people—let us bear in mind that they do not have a right to be given information under this Bill—have to make a request of the care manager or the care home manager. The noble Baroness, Lady Thornton, is right to say that the Minister has talked about care home managers and care managers; they are different, but all of them have a potential vested interest in making sure that someone does not have access to an IMCA. That, I think, would be a gross dereliction.

Lord Touhig (Lab): My Lords, these amendments go some way to ensuring that a cared-for person is not left without an independent mental capacity advocate or the support of an appropriate person. Much of the Bill as it stands represents what I think is a real assault on human rights. For heaven's sake, we should be listening to the contributions of the noble Baronesses, Lady Hollins, Lady Barker and Lady Finlay, and that of my noble friend Lord Hunt. He has shared with me the email from the carers of HL and it is very powerful. My father was a miner and he would have said, "This is the experience from the coalface". We can take this as an important contribution to understanding the difficulties that families face when they have to deal with the issues we are discussing.

Amendment 66 would give a local authority discretion to appoint an appropriate person or an independent mental capacity advocate without notification from a care home. Mencap and others have argued most powerfully that this amendment would minimise the risk of conflict of interest. That is important, as we have seen in other debates. It would mean that a care home arrangement could be more easily challenged and subject to scrutiny. Is not challenging and scrutinising what we do every day in this House? We challenge and scrutinise legislation brought forward by the Government; that is our role. Why would we deny that opportunity to the vulnerable people we are talking about in this Bill?

As it stands, the process for deciding whether to appoint an appropriate person or advocate requires a series of capacity assessments and best interest decisions made by the responsible body or the care home manager, even though both convention and domestic law have made it clear that there is no place for best interests in Article 5 appeal rights. Unless we effect change, this Bill will pass into law and we will see a cared-for person without the appropriate support of either an independent mental capacity advocate or an appropriate person—and that at a most crucial time in their life. That cannot be right. Amendments 76 and 77 are important if we are to ensure that the appropriate person gets the support they need for the role they have undertaken. We have had several long and important debates during the passage of the Bill. These amendments are reasonable and surely the Government must now start to listen.

Lord O'Shaughnessy: I thank all noble Lords who have put their names to these amendments and given us the opportunity to carry on what has been a very good discussion so far about the important role of IMCAs and, indeed, appropriate persons as well. I shall deal first with Amendments 65, 66, 67, 69, 70 and 76 as they relate to the circumstances under which a person can request an IMCA and under which an IMCA can be appointed.

As I said in the previous debate, it is our intention not to have any reduction in advocacy or support as a consequence of the Bill. Indeed, it is our position that a responsible body should be able to appoint an IMCA if there is a request by a cared-for person or family member and either a care home manger has not provided notification or the responsible body disagrees with the notification given. As I also said then, I recognise concerns that the circumstances under which an IMCA can be appointed would be narrowed as a consequence of the Bill, which is not something we want to happen. I do not want to rehearse the entire debate we had last time other than to say that it was a good one. I have assured noble Lords about what I want to take away from that, which is to consider the appropriate way in which we can go forward with the role of the care home manager while making sure that all concerns about restrictions to advocacy and so on are adequately put to bed.

I want to make a point on Amendment 75, which falls into this set of amendments, about why the term "relevant person" is used. I am not quite sure why, specifically; rather, I have an idea, but I do not want to get it wrong. It would be safer for me to write to the noble Baroness, Lady Barker, about why that phrase is used and circulate it to noble Lords. Certainly, this is already a complex piece of legislation with lots of terms and jargon; for goodness' sake, let us not increase that, if at all possible.

I want to take up the challenge from the noble Baroness, Lady Barker, on rights to information. During the previous debate, I tried to make it clear that we will set out the right to information but rights to information—not rights to request it—have been strengthened by a variety of legislation, some of which has nothing to do with the care of people lacking capacity. I also said last time that we are reviewing the Bill to see if it needs to be revised to achieve the outcome that the noble Baroness wants. I know that she is concerned about this, but work is under way to try to resolve this issue.

Moving on, we have not previously discussed the term "appropriate person", which relates to Amendments 73, 74, 77 and 80. This is a good opportunity to speak about the important role of the appropriate person in the new model. As noble Lords know, under the DoLS system the relevant person representative—we are getting into difficulties of language—can be a family member, a paid role or even an advocate. That can unnecessarily give rights to two separate advocates. There has been confusion about the purpose of the RPR and how it differs to advocacy. Our intention is that the appropriate person role will be clearer, not least because it is a familiar part of the Care Act, where the appropriate person facilitates the person's involvement in the care process.

Obviously, that person provides a vital safeguard for the cared-for person. They are appointed to represent and support the cared-for person, ensuring that the person's rights are protected and that the person is fully involved in decisions. As I said, that is already established under the Care Act for the purposes of caring. The role of appropriate person can be fulfilled by a family member, someone close to the cared-for person, someone with lasting power of attorney or a volunteer. I know from previous discussions how keen noble Lords are to make sure that the voice of the person is central to discussions about their care and the deprivation of their liberty. Clearly, the appropriate person has an essential role here.

The noble Baroness, Lady Hollins, asked specifically about the question of a right to act. It is all very well appointing somebody—they also have to be willing to be appointed—but when appointing an appropriate person or recognising one, the responsible body has to be confident that the appropriate person is prepared to act. Indeed, that is part of their appropriateness. Otherwise, an IMCA should be appointed. That satisfies the noble Baroness's question at the beginning about an appropriate person being appointed, but not about what happens if they lapse or the process by which they, or their appropriateness, would be reviewed. As it stands, I will need to reflect on that further to explain it to her. The process may well happen through the regular reviews, but I need to take that question away and think about how we provide reassurance that the appropriate person is in a position to act and wants to do so. Clearly, if an appropriate person, not an IMCA, was appointed but not prepared to act, the cared-for person would lapse into a situation where they did not have somebody in their corner, which we are all trying to avoid.

8.15 pm

Amendment 78, tabled by the noble Lord, Lord Hunt, relates to concerns that if a person is not represented and supported by an IMCA, they could be in a position where they object to authorisation but are not able to bring a challenge to the Court of Protection. It is worth saying that representation by an IMCA is one route to take a challenge to the Court of Protection, but it is not the only one. Cared-for persons can bring

[LORD O'SHAUGHNESSY]
challenges themselves, however rare that may be, as can an appropriate person, family members and others. Ultimately, the responsible body would be responsible for ensuring that in such cases, the challenge is brought before the Court of Protection. That is already required by the Human Rights Act and has been confirmed by case law. Again, I would be happy to write to noble Lords to explain the underpinning of our view that this is already protected in law and jurisprudence.

Amendment 79, tabled by the noble Baroness, Lady Hollins, and the noble Lord, Lord Hunt, would give the Secretary of State and Welsh Ministers regulation-making powers regarding the function of IMCAs. Such powers already exist in Section 36 of the Mental Capacity Act, so we do not think that there is a need for subsequent or additional ones.

This has been a long, wide-ranging group of amendments, but it has dealt with the crucial issue of how we support people who lack capacity to make sure that they are properly represented as their situation and care is considered under the liberty protection safeguards scheme. I hope that I have been able to reassure noble Lords either that their concerns are being dealt with in the Bill as it stands or that I recognise that there are other substantive issues that we need to take away and deal with. We need to make sure that there is no withdrawal or reduction in the amount of advocacy and support that is available for people, which, as I stated at the beginning of the last group, is not the intention of this Bill.

I hope, on that basis, that the noble Lord, Lord Touhig, will recognise that the Government intend to work together to make this Bill better. I think we are making some progress in that endeavour, and I am looking forward to working with him and all noble Lords to improve it further. On that basis, I hope that noble Lords will feel able not to press their amendments.

Baroness Finlay of Llandaff: My Lords, this has been a fascinating debate. I listened very carefully to the speech of my noble friend Lady Hollins. Her experience shone through, and there was much wisdom in her comments. I worry that perhaps in this and the previous group of amendments we have not adequately focused on the need to support the cared-for person as much as possible in making their own decisions and in supporting them. I can envisage a situation where the appropriate person has limitations for whatever reason and it would seem very sensible that they were then able to request an IMCA be appointed.

However, just on the other side of it, we must not forget the enormous burden out there already. Only last week I spoke with a brain injury case manager, Dr Mark Holloway, who works with a care home. He said he is currently managing 13 cases of clients with acquired brain injury who are awaiting DoLS approval from the local authority. Despite the efforts of the care home staff and their solicitors, they have not been able to get this through. We must not lose sight of the fact that the current system is, quite frankly, completely failing. He was saying that they have worked very hard to make sure that it is the least restrictive option, but he is concerned at the lack of scrutiny of their decision-making. In their efforts to acquire DoLS authorisations, the care home staff have sought and paid for expert legal advice on multiple occasions to support them constructing clear and evidenced capacity assessments. He stresses the difficulty of assessing capacity in acquired brain injury and the need to assess function: not just what is said but how the person is actually functioning—what is done and the complexity of it.

I hope that we will return to the issues behind this set of amendments, because in a way I do not feel that we have done justice to the subject tonight. It does need a bit more discussion outside this Chamber. I beg leave to withdraw my amendment.

Amendment 65 withdrawn.

Amendments 66 to 80 not moved.

Schedule 1 agreed.

Clause 2: Deprivation of liberty: authorisation of steps necessary for life-sustaining treatment or vital act

Amendments 81 to 82 not moved.

Debate on whether Clause 2 should stand part of the Bill.

Baroness Thornton: My goodness, we are back in the Bill, out of the appendix. I am formally moving that Clause 2 do not stand part. However, I will address my remarks to the two amendments in my name in this group. They concern advance consent. This amendment comes from Clause 6 of the Law Commission's draft Bill, and inserts two new sections into the Mental Capacity Act: advance consent to certain arrangements, and the effects of advance consent. These sections provide for a person to consent in advance to specific arrangements to enable care and treatment that would otherwise amount to a deprivation of liberty.

To give advance consent, the person must have the capacity to consent to specified arrangements being put in place at a later time that otherwise would be considered deprivation of liberty. They must also clearly articulate the arrangement to which they are consenting. Provisions in this amendment relating to advance consent are similar to those relating to advance decisions to refuse treatment which appear in Sections 24 to 26 of the Mental Capacity Act.

I am very grateful to the noble Baroness, Lady Murphy, and my noble friends Lord Touhig and Lord Hunt for supporting this amendment, and I think it is important that we probe this particular issue. On previous Committee days and in discussions with stakeholders, one of the recurring sentiments was that the well-being of the cared-for person should be at the front of this legislation, and it seems that advance consent is definitely a crucial issue in putting the cared-for person at the heart.

Amendment 85 concerns unlawful deprivation of liberty. Again, this amendment comes from Clause 7 of the Law Commission's draft Bill and would insert two new sections into the Mental Capacity Act on unlawful deprivation of liberty and on proceedings and remedies. These sections would provide a route for an individual deprived of their liberty in a private care home or hospital to seek redress where proper

authorisation under this Bill and the Mental Health Act, or an order of court, has not been obtained. This amendment seeks to define the private care provider. Again, we have been concerned about how the Bill will be applied to those in a private care setting or hospital. It seeks to probe how they should be affected by the Bill.

Baroness Murphy: My Lords, Amendment 84, in the name of the noble Baroness, Lady Thornton, is possibly one of the most important amendments we have tabled to the Bill. It has become so much more important over the last 20 or 30 years to try to encourage people to make decisions in advance about what should happen to them and to encourage them to think about what will happen in the event of things going wrong—to think about things such as lasting powers of attorney and advance decisions on mental health services. I understand that Sir Simon Wessely will recommend some changes that are very similar to this to go into the new mental health legislation. It would be good, bearing in mind our previous discussions, if we could feel confident that the same sort of approach was being taken in this Bill.

Advance decision-making in legislation has proved quite difficult to implement, because you have to have a widespread campaign of understanding how people can make these decisions. It also has to have the individual making the decision accept that things will happen to them that they are not expecting, which is sometimes very difficult. That is why it so difficult to get people to sign up to insurance against long-term care; they simply do not believe that it will ever happen to them. It is very difficult to get these bits of legislation implemented and widespread, but we have to start somewhere. This is such an important piece to try to get into a Bill, to start people thinking about their future and what is acceptable. This would be a very important thing for the Bill.

I would also like to see Amendment 85 implemented. It is something that the Law Commission had in originally. I am not quite sure why it came out. It sort of just disappeared in the transcription somewhere. It is an important safeguard. We tend to forget all those Victorian cases a couple of hundred years ago when people were quite regularly held in circumstances against their wishes and unlawfully deprived of their liberty. It is as well to be reminded that it can, and probably does, still happen quite frequently. To have something on the statute book would be helpful, so I support the two amendments.

Baroness Finlay of Llandaff: My Lords, I am afraid I will take a different view. Amendment 84 is potentially incredibly dangerous in the context of the Bill. I can understand why people with a mental health disorder who know exactly what is likely to happen to them when they relapse and know what treatment they do and do not want can make an informed decision based on their previous experience of their illness and episodes. Here, however, we are asking people to provide advance consent to their liberty being deprived in a situation that they do not know about and have not experienced. The evidence from advance care planning—I have a recent paper from Ontario—showed that people's knowledge was very poor. There were decision conflicts and when they were re-interviewed later they had re-evaluated their decisions in the light of further information and as things had moved forwards.

The problem is that the cared-for person's experience of care is based on human interaction. They cannot predict who will be the carer at some point in the future, nor how that interpersonal chemistry will work. I am concerned that there is a real danger that someone could be locked in to having to live with what they said previously. There is a lot of evidence from the world of care planning that people do change their preferences. Indeed, as an illness progresses, they may change them very radically.

8.30 pm

I also have a worry that the concept of advance consent could, inadvertently, build in the danger of a disincentive to healthcare or social care professionals to rethink what is happening to someone because the person consented in advance. Yet rehabilitation efforts can greatly alter outcomes and, if they have consented in advance, there may be no incentive to really look at ways to maximise their capacity and support them in more independent ways of living.

We are on the cusp of new technology coming in to help people who need to have some kind of restrictions. I recently went to a fascinating presentation at the Academy of Medical Sciences about using the equivalent of GPS devices to help people who are inclined to wander and to be able to set off an alarm. I think the way things will move forwards is far greater than we can ever envisage and I have a concern that, if we put advance consent into this, we may inadvertently lead to people being far more restricted and far less empowered than all of our arguments so far have tried to encourage.

Baroness Barker: My Lords, this is a fascinating discussion which will be familiar to the noble Lords who took part in previous legislation on mental capacity and on mental health. The thing I am most heartened by is the prediction made by the noble Baroness, Lady Murphy, of what Sir Simon Wessely might do in his review of the Mental Health Act. Way back when the law was reviewed in 2005—I think it was then but I am hopeless with dates—I was one of a number of Peers who argued the case that people with fluctuating mental health conditions should be able to say, at a point when they had capacity, "At some future point, if I have an episode, it is likely that I may refuse treatment but, right at the moment, now that I am well, I wish to say that I want you to ignore that". That was resolutely turned down by the small bunch of forensic psychiatrists who were behind that change to legislation. So I am glad that the world of mental health is moving to catch up with other parts of medicine, where greater involvement of patients and exercise of patient choice is something to be encouraged and not dismissed.

Many of the arguments that the noble Baroness, Lady Finlay, put forward were arguments which were put up against the original proposals of the Mental Capacity Act. I believe that, were this to be in legislation, we should be able to put a lot of safeguards around it. At this stage, I encourage the Minister to take these proposals and put them into the future discussions that will take place on the Bill.

Baroness Finlay of Llandaff: I do not want to prolong this too much but I will ask the noble Baroness: has she in any way lost confidence in the proposal that she put forward when the Mental Capacity Act was a Bill before us? It was for an advance statement of wishes, which has, when properly used, been a very powerful tool to make sure that somebody is listened to. My concern has been that our discussion to date has been about the wishes and feelings of the person as previously expressed. From the way she was talking, I am concerned that it sounds as if she might have lost confidence in the ability of that—because, as I have said, I have a real concern that tying somebody legally to enforcing something which was said in advance could potentially be really dangerous.

Baroness Barker: No, I have not lost confidence in that; I simply wish to undertake further discussion, given that—I say it again—it looks entirely likely that mental health legislation may be changing. I think, in light of that, that it is a wise discussion to have.

Baroness Murphy: May I just add that I think it is important to read all the amendments of the noble Baroness, Lady Thornton? She provides for any opportunity, any chance, that the individual may indicate that they have changed their mind, at which point those things come to an end, essentially. They have to be quite specific that if there is any doubt in somebody's mind that this is no longer something that can be continued, that there is anxiety about them being implemented, then it comes to an end. So I think those things can be taken care of.

Baroness Hollins: My Lords, these amendments are examples of the long and complicated amendments which I think could end up going wrong, because they are trying to cover quite a lot, which will probably become gold-plated and give rather too much weight to the legal profession. I do not think that what Sir Simon Wessely planned to do is relevant here, because it is not really about mental illness but about dementia. If that is the case, people may not be in a position to change their mind at a later date, so these amendments are very complicated and probably rather unwise.

Lord O'Shaughnessy: I am grateful to the noble Baroness, Lady Thornton, for introducing this clause stand part debate. We had a chat earlier, so I shall not formally respond to her but instead deal with the amendments as laid, if that is all right with everybody. Clearly, these are very important issues that need to be dealt with properly.

Amendment 84 would allow individuals to provide advance consent to arrangements enabling care or treatment that would otherwise amount to a deprivation of liberty. As noble Baronesses have commented, the Law Commission recommended that provision should be made in the Bill to allow this. This would mean saying that cared-for people entering certain settings, such as hospitals and end-of-life care, where the arrangements are predictable and time limited, would not be required to undergo additional assessments if they needed to be deprived of their liberty. In the Government's response to the Law Commission, we agreed that people should have choice and control over future decisions being made on their behalf, but we said that we needed to look at the detail of this specific proposal. I understand that there is enthusiasm among some noble Lords for such a recommendation, particularly, as has been said, as a way of alleviating unnecessary assessments for those in palliative and end-of-life care.

On palliative care, before I get on to more general concerns, I think it is important to note that the Government have issued some guidance about consent in the context of palliative care in the last few weeks of life. I realise that this talks only about one part of the time period that we might be talking about. The guidance says that if an individual has capacity to consent to arrangements for their care at the time of their admission, or at a time before losing capacity, and does consent, this consent would cover the period until their death, hence there is no deprivation of liberty. However, the guidance is also clear that this consent would no longer be valid if significant extra restrictions were put in place, after this point, to which the person had not consented. So there is a situation that pertains to people right at the end of life and provides some opportunity for challenge if restrictions change.

If we extend that time period out, not just to weeks but to months and years, it has been brought to light in this debate that, while there is a desire to make sure that a person's advance consent is taken seriously and given legal force, concerns have also been raised, not least by the noble Baroness, Lady Finlay, about extending the application in such a way that it could actually deprive people of their protections and human rights. These are clearly concerns that we need to take seriously.

Concerns have also been expressed to the department, in engagement with stakeholders, that the inclusion in statute law of advance consent to being deprived of liberty might imply that there is an expectation that people should have an advance statement of wishes in place, and that people may be pressured into making an advance statement. I take the point made by the noble Baroness, Lady Murphy, that in some ways planning for the future may be a good thing but, equally, we do not want to force people to plan for the future when their desire is not to. We protect the right of people to make bad decisions; that is an important part of a person having a sense of agency and autonomy. Concerns have been expressed that that would be put in danger and people would feel pressured to do something that they might not wish to do.

Clearly, the Law Commission made this recommendation with highly laudable aims. However, we have concerns and are not yet convinced of the merits of the amendment. We have tried to deal with some of the issues around integrating planning through the creation of a system based on the production of a care plan. We have talked about the inclusion of a statement of wishes. I would like to know more about the proposal of the noble Baroness, Lady Barker, about advance statements of wishes. I would like to follow that up and understand it a bit better. The process we are envisaging would allow the inclusion of advance decisions to refuse treatment as part of future care planning. That is not affected by what we are

discussing here but that would be allowed. We are not convinced of the merits of the amendment—indeed, we have some concerns about the implications of it—but I would be keen to understand a bit more about previous discussions of this topic and whether there are other ways to provide that sense of agency for the person who will be cared for without producing undue pressure on them or legal force in a way that would go against their interests and, in legal terms, their human rights.

Amendment 85 would create a new civil court remedy against some private care providers, including non-NHS hospitals and private care homes, if they have deprived someone of their liberty unlawfully. Again, this provision was proposed by the Law Commission. However, we do not believe that a new legal remedy is required. There is already an ability to seek damages under the Human Rights Act on the basis of a breach of Article 5 and usually Article 8. This is available in private cases, where a private care provider is depriving a self-funder of their liberty unlawfully. A remedy could be sought against the public authority responsible for the deprivation. Obviously, we need to hold private care providers to the same standards that we hold public care providers to. There are already a number of mechanisms that allow for this, and the law provides for them. There is the criminal offence of false imprisonment, as well as the existing law of false imprisonment for civil claims. So people can already bring legal action against private care providers.

On top of this, the Care Quality Commission in England and the Care Inspectorate Wales would also ensure compliance with the liberty protection safeguards. Clearly, they have a range of enforcement actions available to them that apply to the public and private sector alike. Furthermore, as commissioners, local authorities will—and do—have a role in ensuring that private care providers fulfil their legal duties. The Government believe that sufficient levers are already in place and that the creation of an additional civil route could increase care providers' insurance costs at a time when, as we all know, we are working hard to make sure that there is funding in the system to provide adequate and good-quality social care to everybody who needs it.

I understand and agree with the desire to hold private providers to the same standards that we hold public providers to, but we believe there are existing remedies within the system and there is no need to require or implement new ones. On that basis, I hope the noble Baroness will not move her amendments.

Baroness Thornton: I thank the Minister for that detailed response and the noble Baronesses, Lady Murphy and Lady Barker, for their support. I did not intend to alarm the noble Baroness, Lady Finlay. I thought we might be veering into discussions the House has had on many occasions about advance consent for various things. I do not think we want to go there, but I was beginning to get the feeling of "Doctor knows best" when we were having that discussion.

I am not certain that the care plan works. The Law Commission had very good reasons for putting what are now Amendments 84 and 85 into the draft Bill that it brought forward, which were to do with the fact not that its people are lawyers but that it had consulted very widely with stakeholders and people involved in the care system. These are the conclusions that it came to, so I will read carefully what the Minister has said about this. Maybe we can include these amendments in our discussions and decide whether we need to pursue them further at the next stage of the Bill.

Clause 2 agreed.

8.45 pm

Amendment 83

Moved by ***Baroness Thornton***

83: After Clause 2, insert the following new Clause—

"Restriction on power of attorneys and deputies

After section 29 of the Mental Capacity Act 2005 insert—

"29A Deprivation of liberty

Nothing in this Act authorises a donee of a lasting power of attorney or a deputy to consent on behalf of a person to arrangements which give rise to a deprivation of that person's liberty.""

Baroness Thornton: Amendment 83 concerns the power of attorney and restrictions on it. This amendment comes from Clause 3 of the Law Commission's draft Bill. I said right from the outset that in Committee we would test the Bill against those issues that the Law Commission had decided to put into the draft Bill and ask why they had been dropped. Many of them are absolutely at the heart of the safeguards that are necessary for vulnerable and cared-for people. The amendment would insert a new section into the Mental Capacity Act, which expressly prevents,

"a donee of a lasting power of attorney or a deputy",

appointed by the Court of Protection from consenting on a person's behalf,

"to arrangements which give rise to a deprivation of … liberty".

This is the position in the current law but this statement makes it explicit. I beg to move.

Baroness Finlay of Llandaff: My Lords, I have three amendments in this group, which are there simply because the topic is lasting power of attorney. I do not have an argument with Amendment 83 at all. It is absolutely right that the person's best interests must be considered and that someone cannot just give consent on their behalf.

The amendments that I have tabled are designed to solve three current problems that we have with lasting powers of attorney. The first, Amendment 83ZA, relates to the identity documentation that somebody must produce to show that they are the donee of a lasting power of attorney. These are bulky papers which have to be registered and stamped by the Office of the Public Guardian, and then produced. For many people who are donees, those papers may be at their home; that may be a long way away from wherever the cared-for person—the donor—is. When that donor has lost capacity, the donee can either carry the sheaf of papers around with them all the time or just hope to be going via their home filing cabinet to pick them up before they go to see the person.

[Baroness Finlay of Llandaff]

I hope that we might move toward something a bit more modern in electronic identification—something like the driving licence, which is a small card on which you can have a registration number. You could also have a picture of the donor as well as one of the donee, which would allow a second layer of recognition. That would also, I hope, focus the mind on the fact that the donor must be at the centre of all the decision-making. Its validity could easily be checked against a number, so that if it had been updated—and for some reason the previous form had not been returned—a simple check with the Office of the Public Guardian might verify its status.

Amendment 87G is designed to solve another problem that has been arising: that a person may appoint several people to hold their lasting power of attorney in the event that they lose capacity. However, as time goes on it has happened that they lose confidence in one of those people, for whatever reason. Maybe there is a dispute in the family or they feel that the person is no longer able to take a decision in their best interest, for whatever reason, and they want to revoke having that person as a donee. The problem is that it is quite a complicated process and they have to go back to square one. This amendment is designed to make it much easier for them to state that they no longer want one person listed but they want the others to remain. I have discussed this with the Public Guardian, who sees it as a problem at the moment that the revocation of a donee is difficult.

Amendment 87E arises out of a problem which is also beginning to occur. I should declare an interest here because it is a problem that is close to my heart: a member of my family has severely impaired capacity and her spouse, who is the only person who can act on her behalf, is becoming older. There is concern about what happens if he cannot act on her behalf and take decisions. At the moment, it is only when the donee loses capacity that others can go to the Court of Protection for a court-appointed deputy. The aim of this amendment is to allow the donee to make some provision so that, in the event of their losing capacity—either temporarily if they have a fall with a fracture, a head injury or have pneumonia, or permanently so they become frail and possibly demented—they can make provision ahead of time in the cold light of day. The alternative is the family, with one family member who lacks capacity and the person who was taking care of their affairs now acutely ill and in crisis, having to go to the Court of Protection to get a court-appointed deputy, which can take some time.

I have discussed this with the Court of Protection, which wants to be helpful in moving things forward, and with Alan Eccles, the Public Guardian, who is extremely sympathetic to the problem and can see that people who took out a lasting power of attorney, or prior to that an enduring power of attorney, and never expected to live as long as they have could now find that the donee is at greater risk of becoming frail than they anticipated. Donors are outliving their prognosis not just by months, but by years and possibly decades.

Baroness Watkins of Tavistock (CB): It strikes me that Amendment 87E would apply not only to this Bill but to other Acts. Does it fit here? I understand the principle of what my noble friend is saying.

Baroness Finlay of Llandaff: It could have wide-reaching consequences, but a lot of people who have lost capacity and are in a state of high dependency are already in nursing homes, so they are already being cared for in the system and may be subject to deprivation of liberty. Some of them have long-term continuing funding for their care, but they have been there for a long time and the donee, who is managing all their affairs and advocating on their behalf, is very concerned about their welfare in the event of them failing.

Lord O'Shaughnessy: I am grateful to the noble Baronesses and the noble Lord, Lord Hunt, for tabling amendments in this group. I am very aware of the complexity of this issue. For a lay person such as me, some of the terminology can be confusing. I will do my level best to be as clear as humanly possible, but if I fail in that endeavour I will write to noble Lords and explain better what I am attempting to explain now.

The effect of Amendment 83, as the noble Baroness, Lady Thornton, said, would be to confirm in law that a donee of a lasting power of attorney or a deputy appointed by the Court of Protection was unable to consent on a person's behalf to a deprivation of liberty. If they could provide such consent, the person would not be considered to be deprived of their liberty and no safeguards would need to be provided.

The Law Commission report stated that it was already the position in law that a donee or deputy could not consent to a deprivation of liberty. We confirmed in our response to the Law Commission's report that the Government agreed with its view on the current legal position, and the Bill does not change the current situation. While the Bill creates a duty to consult with any donee of the lasting power of attorney or a deputy, it does not enable a donee or deputy to consent to the deprivation of liberty on behalf of the cared-for person. In other words, under this Bill the cared-for person would still be deprived of their liberty in those circumstances and would still need to be provided with safeguards to satisfy Article 5, which is of course the whole purpose of DoLS and liberty protection safeguards. In that sense the amendment, with which we agree, would serve only to duplicate existing legislation and is not necessary. I hope I have provided an adequate explanation to noble Lords, but obviously I am willing to set out in more detail exactly why we believe the current situation is not changed by the Bill as it stands.

I turn to the amendments in the name of the noble Baroness, Lady Finlay. Amendment 83ZA would require the Office of the Public Guardian to provide documentation, which may be in electronic form, to identify the donor and donee or donees of a lasting power of attorney and to recall the documentation if the donee's power is revoked. As the noble Baroness pointed out, this is designed to make it easier for attorneys to provide proof of the existence of a registered LPA. It is right that there ought to be a robust system of proving that there is a valid power. My understanding is that the Ministry of Justice and the Office of the

Public Guardian are actively considering how to offer a digital means of providing evidence of a valid LPA, and we expect to bring forward proposals in due course. I am happy to pursue that further with colleagues in that department and that office to understand greater details of their plans and to share those with noble Lords if they are forthcoming, which I hope that they will be.

Amendment 87E, in the name of the noble Baroness, Lady Finlay, would allow the donee of a lasting power of attorney to nominate someone to replace them if they were no longer able to fulfil their duties—I think that means if the lasting power of attorney was no longer able to fulfil their duties—while Amendment 87G would allow a replacement attorney to be nominated by the donor at the time of registering the LPA to take over the power if the donor decides to remove the power from the donee.

I do not need to reiterate to noble Lords just how critical it is to get the law and the rules in this area right; as the noble Baroness, Lady Watkins, pointed out, the rules around this would not apply only to this Bill. It is worth pointing out that there is provision in the original Mental Capacity Act to allow a person making a lasting power of attorney to nominate a replacement in the event that their attorney is unable to continue, but I think the point that the noble Baroness, Lady Finlay, was getting at is that there is a slight chicken and egg situation here: at the point where they no longer have capacity but the person whom they have previously appointed is no longer able to fulfil their role or the cared-for person no longer wants them to do so, they cannot go back in a time machine and appoint someone else—in other words, they cannot know what they do not know. I have just made things really clear by getting all Donald Rumsfeld about it all.

Having said all that, I want to consider if there is a way of unlocking that paradox, but clearly the implications of that would go well beyond the remit of what we are discussing here. I do not want to make any promises that it is not in my power to keep. I would appreciate the opportunity to explore this further so that we can consider how to give the donor more opportunities to have a sense of choice and agency as they think ahead to the future. I would have thought that we must be able to provide for that without creating extra complications. I look forward to taking that up with the noble Baroness and other noble Lords who are interested in the topic. On that basis, I hope the noble Baroness will feel able to withdraw her amendment.

Baroness Thornton: I thank the Minister for that detailed answer. As usual, the noble Baroness, Lady Finlay, has raised some interesting challenges. In my family, someone who had enduring power of attorney died at the point they were needed. We were in a ridiculous and complex situation—resolved by good will, but the law did not help us. This is therefore a serious matter.

I understood what the Minister said about the power of attorney, and I will read his response. It sounded to me as though it was probably reasonable, so I beg leave to withdraw the amendment.

Amendment 83 withdrawn.

Amendment 83ZA not moved.

Amendment 83A had been withdrawn from the Marshalled List.

Clause 3: Powers of the court to determine questions

Amendment 83B

Moved by ***Baroness Thornton***

83B: Clause 3, page 3, line 33, at end insert—

"21ZB Presumption of P giving evidence

(1) This section applies where an authorisation under Schedule AA1—

(a) has effect, or

(b) is to have effect from a date specified under paragraph 22 of that Schedule.

(2) P shall be presumed to give evidence in Court of Protection proceedings.

(3) This presumption may be rebutted, having regard to P's rights, including by evidence that P—

(a) is not competent to give sworn evidence; or

(b) does not wish to provide evidence (in whichever form) to the court.

(4) Evidence from P shall be secured in any form that the court and the parties consider appropriate having regard to P's circumstances and may include the following—

(a) sworn evidence given orally in court;

(b) unsworn evidence given orally in court;

(c) unsworn evidence given outside of the court;

(d) a written statement;

(e) pre-recorded evidence.

(5) The appropriate authority may make regulations outlining the measures that will be available to support P to give evidence in proceedings."

9 pm

Baroness Thornton: The Minister will be familiar with this amendment because it stems from Inclusion London, which drafted it. I know that it has written to him about it. It is run and controlled by disabled people, is very concerned about the Bill and wants this issue discussed.

The amendment concerns ensuring the effective participation of P in the Court of Protection proceedings. It gives P the presumed right to give evidence and sets out a number of ways in which that might happen. The organisation has copied me in to a letter to the Minister. It writes that one of the key challenges to date has been securing P's meaningful participation in Court of Protection proceedings, something acknowledged in the 2018 Joint Committee on Human Rights report, *The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards*. Participation is an important issue for a number of reasons, including that it is more likely to place the person at the centre of the decision-making process and may change the outcome of the case. Research suggests that P rarely participates in or gives evidence in proceedings. In the light of the Government's emphasis on providing protection for people who may lack capacity, it is asking us to consider the amendment.

[Baroness Thornton]

This seems a reasonable point, and I shall be interested to hear what the Minister has to say in response. I beg to move.

Baroness Meacher: I will speak to Amendment 87C and apologise to the Committee for being unable to remain in the Chamber earlier—I had two commitments that I had to fulfil. I emphasise that it is a probing amendment; it will certainly need rewriting at Report if we bring something back. I thank Godfred Boahen of BASW, whose briefing was an enormous help in preparing my remarks.

Our aim is to stimulate a debate about the processes to deal with deprivation of liberty issues which arise in domestic settings. There is a case for enhancing the assessment processes in those situations. As it stands, the Bill makes no mention of people in domestic settings where deprivation of liberty is at issue. It is not clear—to me, anyway—what the Government have in mind and I hope that the Minister will be able to clarify the position. The Bill leaves vulnerable individuals in domestic settings where there is an issue of deprivation of liberty with no judicial protection, except through an appeal to the Court of Protection, a process which is onerous, costly, stressful and slow. That also leaves this group of people without access to a mental capacity professional in the event of an objection to the proposed care plan. The amendment assumes that, where a deprivation of liberty arises in a domestic setting, this would be considered, as now, under either the care planning or the safeguarding provisions of the Care Act 2014, but with two important reforms, which I will come to. Thus domestic settings would not come under the processes set out in the Bill.

Before referring to the proposed reforms, I need to clarify the two key processes involved under the Care Act, or the reforms would not make a lot of sense to anybody. First is the prospective model, as proposed by the Law Commission, when a deprivation of liberty is considered during care assessments and planning. The care planning processes apply here. During a Care Act assessment of needs, professionals will ascertain the likely impact of a care plan on the liberty of an individual, whom I will call P. The idea is that, in some cases, the state has prior knowledge that a deprivation of liberty will occur and has therefore taken the necessary steps to authorise it alongside establishing conditions to safeguard P's human rights. This could be achieved through an amendment to the Care Act guidance, not a legislative change.

The great attraction of this approach, as the Law Commission recognised, is that the safeguards are implemented in a way that minimises intrusion into private and family life. The Law Commission argues that:

> "In most cases arrangements could be authorised in an unobtrusive and straightforward manner through a care plan and without a perception of State intrusion into family matters".

In domestic situations and with the involvement of professional local authority employees in organising and undertaking the care planning, only where the care plan is contrary to the wishes of P would the involvement of the mental capacity professional be warranted. At present, the Bill does not make it clear that the MCP would be brought into domestic settings in any circumstances. This is one of the two areas in the Bill that need clarification. I am impressed that the Law Commission thinks that this approach strikes an appropriate balance between the rights of the person to be protected, and the rights to private and family life under Article 8.

The second model for the deprivation of liberty in domestic settings is the retrospective model, where the safeguarding procedures under the Care Act 2014 come into play. Under Section 42(1) of that Act the safeguarding procedures apply to an adult who satisfies three conditions, which I do not need to go into. The safeguarding process involves P from the very beginning. There are certain crucial points about these processes: their desired outcomes should be considered; professionals have to balance P's capacity against their best interests and the public interest; and the safeguarding provisions draw significantly on the best-interests principle of the Mental Capacity Act. If deprivation of liberty is an issue, then the Care Act safeguarding provisions and the Mental Capacity Act best-interests principle can be applied to generate a care plan which safeguards P's interests while providing care and protection.

Within the safeguarding provisions an independent advocate is appointed when appropriate. What is currently lacking is access to a mental capacity professional in the event that P has concerns about or objections to the care plan. An amendment bringing the MCP into safeguarding in domestic settings is needed to align people in such settings with those in others.

My last point relates to the requirement under the European Convention on Human Rights that if P is deprived of their liberty, they must have access to a court. I have already referred to the current arrangement for access to the Court of Protection as the only court route. I urge the Minister to consider seriously the possibility that mental health tribunals could be adapted to become mental health and capacity tribunals to include those in domestic settings where P is objecting to the care plan.

Mental health tribunals already consider whether and how their judgments and the conditions they impose on patients might amount to a deprivation of liberty. Additionally, they have experience of the issues involved in deprivation of liberty considerations in domestic settings. This would not be something outside their competence, and that is very important. It would be too radical to introduce something entirely different. Such tribunals are local and would be speedier, less costly and more accessible for families who are themselves often vulnerable. They are less imposing and therefore less stressful for those involved.

Consider the case brought to my attention recently of an 85 year-old woman looking after her 89 year-old husband, who had severe dementia. She felt she could only cope by keeping her husband in one room. The idea of taking that case to the Court of Protection just feels unreasonable. It certainly needs sorting out in some way, but not that way. In line with the estimated number of appeals to the tribunals, clearly, the number of tribunal members would need to increase. However, as well as having advantages for those involved, this reform would surely be less costly than the current Court of Protection process. I hope

we can have a short but constructive debate today and that the Minister will meet us to discuss the best way forward. It might not be exactly what I have suggested, but we really need to think this through carefully. I beg to move.

Baroness Murphy: My Lords, I support the amendment of my noble friend Lady Meacher, but I will sound a few words of caution. As I understand it, cases in domestic settings are not included under the current DoLS arrangements. However, there have been several cases where Cheshire West has been quoted in instances where domestic settings have been challenged—with, in my view, some ludicrous outcomes. These have put people who were doing their best by their relatives, as they saw it, in the invidious position that they could no longer continue to care.

I have a case that is similar to that of my noble friend Lady Meacher, where a man was looking after his elderly mother at home. She wandered on most nights, and he put some gates at the top of the stairs to stop her falling down the stairs. That allowed him to get a good night's sleep and she did not go downstairs. It is a very difficult issue: there was the question of whether she could have gone over the gates and come to more harm. He was also told by the professional carer who was helping him—from a private care provider—that he could not do this because it was illegal. Under the legislation, it was now not possible for him to do that, nor could he put a lock that she could not undo on the outside door. He would have to accompany her if she wanted to go out and come back. The implication is quite clear: he actually gave up caring for her because, as he said, if he could not look after his mother in his own home, he was not going to be able to have a life that was possible for him to live. I have no doubt in my mind that that elderly woman would have given her last sixpence to stay at home being cared for under her son's restrictions, rather than go into a care home with strangers. She would probably have had her liberty restricted anyway under some new procedures.

We have to come back to this numbers game, because we want a situation where it is only in cases involving people being treated inappropriately, with cruelty and thoughtlessness, where we want to expose something that is just unacceptable. When we are challenging arrangements that would, if they were for a person of a different age, for example a parent protecting a child—when we are putting in the same things because somebody is mentally incapacitated, it is quite wrong.

9.15 pm

There are 2 million people in this country who lack mental capacity. I can speak with authority only on those who are elderly with dementia, but that is perhaps now about 900,000. Of those, 450,000 are in residential care. The rest are at home, mostly cared for by relatives, and sometimes by near neighbours, and so we should be very careful about intruding into arrangements which most people take for granted as being part of their right to assist an elderly relative. It is crucial that we recognise—if you like, it is part of the equalities of older people with mental health problems and dementia—that they should be treated with some respect and should not have some state interference to put in place arrangements which common sense tells you any good family would do.

We must therefore be very specific in view of the fact that these cases are rising, where private and public care providers are telling families what they cannot do. We must guard against this by making it clear in the Bill that it should not apply to domestic settings where normal arrangements are being put in place. We need the sort of arrangements that my noble friend Lady Meacher talked about for those few cases, but we have to restrict it to a few cases under very specific circumstances if we are going to have any domestic arrangements challenged in this way.

Baroness Watkins of Tavistock: My Lords, I support the amendment in the name of my noble friend Lady Meacher and the comments that my noble friend Lady Murphy just made. She said that she can speak only for the 900,000 people in this country with dementia—but that is a high proportion. I want to share with noble Lords that everything she said I agree with, as part of a multidisciplinary team but also because over 20 years ago she was my external examiner for my PhD—and I passed. The subject was about supporting people with dementia in the community, so this is close to both our hearts.

I will add a little to this debate. I support the amendment for two reasons. First, at the very least we need to think again about the Bill's application to individuals in domestic settings; and, secondly, we need to think carefully about how domestic care arrangements can be authorised under a liberty protection safeguard and oversight properly maintained over the period of care—which may be for many years, because I agree that things change over that period. One of the things that can happen is that carers who are very good when you first see them are at the end of their tether three years later and can no longer manage. That is why the Law Commission suggests that the LPS should be integrated into care planning arrangements—but that does require regular review.

It may be feasible to amend the Bill so that the LPS could apply with the safeguarding professions of the Care Act, as my noble friend Lady Meacher has already said. Certainly there is a need to ensure that those who lack capacity are safeguarded when they are being looked after in domestic settings, as, sadly, we know that in a very small minority of cases deprivation of liberty occurs through carers' lack of knowledge of alternative methods to maintain safety, and in even rarer cases in fact becomes a form of abuse. However, the current Bill, if enacted with a zealous approach by professionals, could become a serious intrusion into families' rights to provide individualised, possibly slightly idiosyncratic care for their relative, which may be fully consistent with how both parties wish to behave within the confines of their family unit and own home. I therefore hope that we will be able to work with the Minister, and the Bill team as appropriate, to improve the Bill to better balance the rights of people being cared for by relatives in their own home, without unwarranted intrusion into the way in which families support and care for relatives with limited mental capacity, while ensuring that deprivation of liberty is appropriate to safeguard the individual.

Baroness Barran (Con): My Lords, I thank the noble Baroness, Lady Meacher, for tabling this amendment, which I support. I will keep my remarks very brief and make just two points.

The first point is about the spirit of the amendment. Clearly it aims to avoid broadening the scope of the legislation to apply to people who lack capacity and are living at home but who may need their liberty to be restrained. My comments relate to the 450,000 people mentioned by the noble Baroness, Lady Murphy: those for whom there may be no formal care plan in place. I want to consider how issues relating to safeguarding and deprivation of liberty would be identified; namely, how do we uphold the rights of vulnerable people in those situations?

If we think in practical terms, there are potentially two routes to safeguard those cared-for people: one is the Mental Capacity Act and the other is the Care Act. I strongly agree that the Care Act 2014 is the route that we should go down. In almost every family, there will be multiple health professionals involved, either by going into the home or through appointments. They are equipped to identify both the safeguarding and the deprivation of liberty issues. It is through the Care Act that we can have the most human and proportionate response for those families.

Secondly, I want to deal with the point behind what the noble Baroness, Lady Murphy, alluded to: cases where somebody is being cared for at home but then perhaps their carer has a fall and has to go into hospital, and the cared-for person then briefly goes into a care home and is therefore subject to liberty protection safeguards. What is the status of those safeguards when that person returns home? It would be very helpful if the Minister could clarify that.

As the noble Baroness, Lady Watkins, said, these arrangements might be idiosyncratic, but almost all of us have had experience of them and we value them greatly.

Baroness Barker: My Lords, I want to make a couple of quick points. The noble Baroness, Lady Murphy, is of course right that the whole issue of DoLS and the community is known to be a problem. However, the examples she gave seem to me to be examples of people not understanding the DoLS legislation and applying it wrongly, rather than the legislation necessarily being wrong. It is always important to make the case for the rights of families to reject undue intrusion, but I want to share with her the case of a young man with whom a learning disability organisation was working. The organisation achieved great results and he did really well. Prior to his involvement with the organisation, he would sit all day in a part of the living room that had been bricked off by his parents, with his own chair, his own television and being fed through a hatch. That was in a domestic setting. I need not tell the noble Baroness that we need to be quite careful when drawing up legislation.

It is a great shame that we have been presented yet again with a piece of legislation that came out of nowhere when we could have had a proper consultation. The people who are out working in the field at the moment having to administer DoLS understand many of the problems. They know that issues that arose partially from the application of the Cheshire West ruling and the High Court judgment have caused a problem. But amending a really bad Bill is not the way to deal with this problem.

Baroness Jolly (LD): I want to make a couple of points, but I first draw the attention of noble Lords to my interests in the register relating to learning disability. It is interesting how to read this amendment. I looked at it and thought about individuals in domestic settings, and the charity that I chair does just that. We put four or five individuals into a domestic setting. A proportion of them will have a DoLS. If noble Lords go into the house, it looks just like an ordinary home. Each resident pays rent and would consider it very much their home. Carers offer 24-hour support and locks are well and truly in evidence. Over the weekend, I asked our director of operations what proportion of the people we support were subject to DoLS, and she said thousands. It is just the norm.

I understand that the noble Baroness's intention was to take this into a family setting where there is mum, dad and a child who may well be an adult—certainly, we see parents in their 80s caring for their children with a learning disability who may be in their late 50s or late 60s, and the parents are at their wits' end. All that fits with this amendment so, whatever its merits, the wording needs to change but it is certainly worth pursuing.

Lord O'Shaughnessy: I am grateful to the noble Baronesses for leading this debate. Obviously, the bulk of the debate focused on Amendment 87C, which would exclude people residing in domestic settings, and we have discussed the merits of that approach. The noble Baroness, Lady Meacher, gave a thorough exploration of alternatives to the LPS system in a domestic setting. The noble Baroness, Lady Murphy, gave a passionate defence of the role of families in caring, which was perhaps accentuated by the noble Baroness, Lady Wilkins, talking about the need to avoid overzealous application of any new provision of deprivation of liberty safeguards. My noble friend Lady Barran talked particularly about the group of people who lack a care plan and their interaction with the care system if they go temporarily into a care home. For me, all that brought home that we have further work to do on the appropriate system that applies in a domestic setting, to put it shortly.

It was helpful that the noble Baroness, Lady Barker, told us the story about the vulnerable person. We all agree that something needs to happen in that case to check the actions of the family or help the family to do better. They may just not know what to do or be at their wits' end—who knows? We can imagine how easy it is to fall into those situations not out of intention but out of pressure and circumstance. That debate highlighted how important it is to get that right. I absolutely want to avoid intrusion where it is not necessary, but equally we need to ensure that those people deprived of their liberty receive the proper protections due to them under Article 5 of the ECHR. This is an issue that clearly needs more work. The amendment was not designed to perfect the

solution but rather to start the conversation, and it is absolutely one that we will take through with noble Lords.

I turn briefly to Amendment 83B, moved by the noble Baroness, Lady Thornton, which seeks to introduce a legal presumption that a person should give evidence in all Court of Protection proceedings. Obviously I agree with her about the importance of this issue. She called it a reasonable point and I think it more than reasonable. It is essential that in any court proceedings a person's rights are protected and that the cared-for person has the opportunity to give evidence to the court in any case concerning the deprivation of liberty. I am happy to be able to confirm that this is already reflected in the Court of Protection rules. The court's overriding objective under the rules is to deal with cases justly and at proportionate cost. They expressly include ensuring that the person's interests and position are properly considered and that the parties are on an equal footing. A new set of rules was introduced less than a year ago. They include changes to ensure that a person is able to participate in proceedings. Specifically, rule 1.2 requires the court to consider in every case how best to secure the cared-for person's participation. It sets out a range of options including the cared-for person addressing the court directly, indirectly or with support from a representative, a litigation friend or an accredited legal representative. I hope that that provides the noble Baroness with the clarification that she was looking for and that she will feel able to withdraw her amendment.

9.30 pm

Baroness Meacher: I thank the Minister very genuinely for an encouraging and positive response. I recognise that this matter of deprivation of liberty in domestic settings needs to be addressed and that we need to have a conversation about exactly how it should be done. I also thank my noble friends Lady Murphy and Lady Watkins and the noble Baroness, Lady Barran, for putting their names to my amendment, albeit that it still needs a lot of work. I am grateful for their helpful comments, along with those of the noble Baronesses, Lady Jolly and Lady Barker. I look forward to discussions with the Minister and others.

Baroness Thornton: I thank the Minister for that helpful answer. The grouping is slightly odd, but I am pleased that the noble Baroness, Lady Barran, has joined in; I notice that she has been sitting in her place for the whole of our proceedings. We have had a useful discussion and I beg leave to withdraw the amendment.

Amendment 83B withdrawn.

Clause 3 agreed.

Amendments 84 and 85 not moved.

Amendment 86

Moved by ***Baroness Jolly***

86: After Clause 3, insert the following new Clause—

"Requirements before commencement

(1) Before all provisions of this Act other than those which come into force on its passing can come into force, the requirements under subsection (2) must be met.

(2) The requirements are as follows—

(a) the Secretary of State must publish an updated code of practice giving guidance for decisions made under the Mental Capacity Act 2005, including the provisions of the Mental Capacity Act 2005 that are amended by this Act; and

(b) the Secretary of State must publish a response to the Independent Review of the Mental Health Act, chaired by Professor Sir Simon Wessely.

(3) The Secretary of State must lay a copy of the publications required by subsection (2) before both Houses of Parliament."

Baroness Jolly: My Lords, I shall speak also to Amendments 87, 93 and 94 and address the amendments tabled in the name of my noble friend Lady Tyler and the noble Lord, Lord Touhig. Amendments 93 and 94 are simply enabling provisions.

Amendments 86 and 87 would require that, before the implementation date of this legislation, the Secretary of State should lay before both Houses of Parliament a copy of the updated code of practice giving guidance as well as a response to the review of the Mental Health Act that Sir Simon Wessely is carrying out. We have been half guessing in our discussions what might or might not be in it.

The Bill is not particularly easy to read and it is certainly not a guide for practice, and the ensuing Act will not be easy to read either—unlike the Care Act. The code of practice is absolutely critical to take professionals through what the legislation will entail and what they will have to implement in their practice. To that end, I have a little list. I wonder whether the Minister can indicate or confirm whether these issues will be covered in the code: the basis for detention and when the "necessary and proportionate" test applies; the role of IMCAs and appropriate persons; the professional qualifications and training of those undertaking pre-authorisation reviews; when an AMCP referral should be made; and obligations to provide information to the person and their family about the authorisation. The Minister may not have the answers on his person or from the Dispatch Box right now, but perhaps he could write to me and make that clear.

To make this happen, we would need subsection (2)(a) of the new clause proposed by Amendment 86 and a year's wait. Many noble Lords have spoken both on and off and in Committee about the Mental Health Act. In our previous debate, the noble Baroness, Lady Meacher, referred to the work of Sir Simon in reviewing that Act along with the Act we are trying to amend now. Between them, the two Acts define, among other things, the care and rights of the most vulnerable—those with mental health conditions and those lacking capacity—who are unable to make decisions about their care. Sometimes, but not always, there may be an overlap. It would not be prudent for the Bill to end its passage through Parliament without us learning the findings of the Wessely review and determining whether it is necessary to amend the Bill further—hence the need for subsection (2)(b) of the new clause proposed by Amendment 86. Earlier today, the Minister spoke about pushing ahead. I understand the need for urgency, but I fear that if we pass the Bill in haste, we may end up repenting or regretting at leisure. That is just me being slightly cautious.

[Baroness Jolly]

Amendment 87 calls for the Secretary of State to,

"lay a copy of the report before both Houses".

He or she—who knows who it will be by then—is being asked to look at how the Act is working and whether they are confident that there is an improvement in the process surrounding the deprivation of liberty. We have all discussed this issue; the Minister will have detected the Committee's concern about this area of the Bill. Basically, I am calling for the Secretary of State to report back on the impact of the Act and ensure that the code is well and truly in place before we start to use the Act in earnest.

I added my name in support of my noble friend Lady Tyler's amendment, which seeks to ensure that regulations are scrutinised and debated in both Houses. It would also ensure that consultation takes place outside Parliament, which is critical. It is fine for us to debate these issues here—clearly, some people have more experience and understanding than others—but I get many letters from not just individuals who are, or would be, affected by the Bill but the sector, saying, "Keep the Government's feet to the fire. Make sure we get the very best Bill we can". I do not doubt at all the Minister's intention to achieve that end, but the devil is in the detail and there is a lot of it. We must make sure that we get this right through primary legislation. As I said, there is much expertise but we all welcome the opportunity to look at the detail of regulations, both accompanying primary legislation and in any future proposed changes.

Under DoLS, a number of important things were set out in regulations, particularly: who best interests assessors were and how they were to discharge their duties; the timeframe for carrying out assessments; the type of information that would need to be collected; and details of how disputes might be resolved. As my noble friend Lady Tyler will highlight, this is not just about ensuring that regulations are debated; it is about how those in the sector—families and vulnerable people themselves, I would suggest—are consulted and involved in getting the detail right in both initial regulations and any subsequent changes down the line.

To bring this matter into sharper focus, I wonder if the Minister might be able to confirm what he thinks might go into regulation? I hope he would also confirm that regulations laid accompanying this Bill, and any amendments down the line, are subject to the fullest scrutiny both in this House and in the sector. This will mean a decent time gap will have to be found between the laying of the regulations and the debates in both Houses.

I welcome Amendment 92, in the name of the noble Lord, Lord Touhig, which would see another two independent reports commissioned by the Government. They would be laid within two and four years of implementation, to provide a valuable update as to how implementation was proceeding and highlight areas for improvement. We will need to monitor the implementation of the Act, however it may end up, really closely. We are dealing with the most vulnerable in our society.

These amendments are based on the PIP independent reviews, which have proven successful in highlighting problems. While I am sure many in this House would agree that there are still things to improve in terms of personal independence payments, the oversight provided by the independent reviews has been invaluable in terms of recommending important changes aiding implementation. There are many important issues to review: best interests decisions—ensuring that they are just that, and not based on commercial or other considerations; a monitor of advocacy offered and its uptake; the involvement of P—the cared-for person—and not just professionals, but also those who care for P, and the families of P. I am happy to support those particular amendments, and beg to move.

Lord Hunt of Kings Heath: My Lords, I have three amendments, starting with Amendment 87A. It sets out a number of requirements before the Act can come into force, embracing a set of independent reports that I would like to see commissioned by the Secretary of State. They address work on the rewording of the expression "unsound mind"; the availability of independent advocacy; appeals on behalf of cared-for persons; the availability of legal aid and support for cared-for persons participating in court proceedings; and short and long-term costs for implementing provision bills for local authorities, the courts and the health service. I recognise some of these points have already been discussed, on the second day of Committee in particular, and the Government are bringing forward amendments so the Bill reflects the need to consult the cared-for person. The Minister also agreed to look further at the expression "unsound mind", which many believe is stigmatising and outdated language.

I hope the Government might just go further. This amendment is based on the report of the Joint Committee on Human Rights and reflects some of the issues it would like to see covered in legislation. I will not comment in detail, but I want to come back to the role of the Court of Protection. We discussed this on the second day of our proceedings, and I think the Committee was informed by the view that recourse to the Court of Protection should be avoided wherever possible, because of the stresses and strains involved and the cost. I am certainly conscious that we do not want to create a situation where mental capacity professionals defer their responsibility to the court, and individuals have to undergo court procedures unnecessarily.

According to Dr Lucy Series of the School of Law and Politics at Cardiff University, while the cost and stress of applications to the Court of Protection is undeniable, research by Cardiff has shown that the Government have taken the decision not to reform the Court of Protection, which would make it less costly, less stressful and more like the tribunal approach that many noble Lords would like to see. It is instead being managed by, essentially, restricting access to justice. A week ago, the noble Baroness, Lady Stedman-Scott, said that,

"if a person wants to challenge their authorisation in the Court of Protection they have the right to do so".—[*Official Report*, 15/10/18; col. 371.]

However, the practicalities are that people may experience extreme difficulty initiating a court action without assistance, as will their families. The evidence on this matter was very clear to the House of Lords Select Committee on the Mental Capacity Act and the Law Commission. I hope that the Government will consider it.

9.45 pm

My second amendment, Amendment 87B, concerns the Care Quality Commission's role in relation to the Bill's provisions. I have already referred to the CQC's recent annual report, which has a section on DoLS. It is required reading because it shows some of the issues that have arisen practically on the ground in trying to understand complex legislation and implement it effectively to ensure that people's liberty is protected as much as possible. I do not want to repeat what I said, but it is quite clear that the CQC has a valuable role in monitoring the operation of DoLS and, in future, this amendment Act.

The view I put to the Government is that, because of the frailties in the system that we see, the CQC will need to have a stronger role in monitoring the Bill's operation. Essentially, my amendment is designed to do just that. I understand that it would require a significant increase in CQC activity. I am also advised by the CQC itself that some other legislative changes might be necessary. None the less, although this is a probing amendment, the CQC's role is worth examining and strengthening for these new provisions.

Finally, Amendment 92A is a probing amendment. We have discussed the backlog; I would like to hear from the Government how it will be handled. Am I right in thinking that once you start a process it needs to be completed under existing legislation, even though you might not have got very far with it, or is it assumed that all of those backlogged cases will be transferred over to be dealt with under the new legislation? If that is so, have we really considered the impact, particularly on care home managers, of suddenly being faced with many more cases to be dealt with at the same time as picking up their new responsibilities? There is hard evidence of backlog issues causing systems to break down because the Government assume that bringing in new legislation will deal with the backlog. Notwithstanding that this is a more streamlined process, there is still an awful lot of work to do. I would like to hear a little more on how the Government propose to deal with this without pulling a ton of bricks down on the new system. I hesitate to raise the Child Support Agency, which is the classic example of trying to embrace on day one in a new system all those people who had gone before. The system collapsed. We do not want the same thing to happen here.

Baroness Tyler of Enfield: My Lords, I have two amendments in this group and my name is attached to four others. It is a little unfortunate that we are coming to this important group of amendments, which affect the Bill as a whole—there are some very important implementation issues—quite so late in the day when the appetite for debate is understandably somewhat limited.

My Amendment 88 seeks to do two things. It seeks, first, to enhance scrutiny of regulations in Parliament and, secondly, to ensure proper consultation if the Government seek to amend regulations later on down the line. According to the Explanatory Notes, as drafted the regulations are subject to the negative procedure, except where the Secretary of State wishes to change primary legislation, in which case the affirmative procedure applies. My amendment proposes a different approach, whereby the positive procedure applies in both cases. That would mean that, should the Government wish to amend regulations, such a change would automatically trigger scrutiny in both Houses. Why do I think this is important? Fundamentally, depriving someone of their liberty is a very major and fundamental action which warrants strong safeguards and scrutiny. I think it is absolutely vital that we closely monitor the implementation of this legislation and debate any proposed changes that the Government may wish to introduce.

The second part of my amendment—which I think is equally important—means that, before laying a regulation, the Government must consult with stakeholders on its potential impact. Again, given that this legislation concerns extremely vulnerable people, it is absolutely vital that we get it right—that is both primary legislation and the detail of any regulations. One of the threads throughout our debate in Committee, both today and in our two previous sessions, has been that, while the Law Commission consulted widely on its draft Bill, the Government's Bill, which we are now discussing—and which is very different in a number of important aspects—was introduced with very little consultation with those who work in the sector. It is absolutely vital that we hear from mental health practitioners, legal professionals, charities and those representing vulnerable people.

Amendment 87F is a probing amendment and it is to highlight the current unsatisfactory situation, which I gather is causing real concern to clinicians in relation to when they are obliged to complete court reports requested by the Court of Protection. This issue was drawn to my attention by the Royal College of Psychiatrists and I draw the House's attention to my interests in the register. Currently, Section 49 of the Mental Capacity Act 2005 authorises courts to,

"require a local authority, or an NHS body",

to prepare a report on such matters,

"as the court may direct"—

generally, the relevant person's mental health or mental capacity.

I understand that drafting such a report requires a senior clinician to review previous reports, examine the patient, talk to family members or carers and carry out necessary tests. Notably, it often relates to a patient who has never been under the care of that clinician or even the hospital trust employing them. I have been told that the average time required to complete such a report—although it varies—would be around 10 hours, which does not include the extra time required if the clinician is required to attend court in person to give evidence.

The nub with the concern here, which has been raised by many clinicians, is that an unknown quantity of clinician time is being taken away from front-line patient care. As there is no national data, as I understand, on this, it is unclear how much. Again, as I understand it, CCGs and NHS trusts are not being paid for or equipped for their staff to be required to spend their time in such a way, and the very short timeframe often set by the court can lead to very considerable disruption of clinical priorities and patient appointments being changed at the very last minute.

[Baroness Tyler of Enfield]

I emphasise that I have no problems with the Court of Protection needing reports and expert advice—it is just that the system for getting it does not seem right to me, with the NHS being required to provide these reports in such a way. Frankly, there is cost shunting on to the NHS, but it is also having no regard for the impact on wider patient care. The Minister has said that he will be talking to the MoJ about a number of things. It would be very helpful to hear how the MoJ thinks this system could be better managed so it does not have such a deleterious effect on wider patient care. The purpose of this amendment is to get the Minister to explain and outline the Government's thinking in this area.

Finally, Amendments 86 and 93 require two very crucial documents to be laid before Parliament before the provisions of the Act can come into force: the code of practice and the Government response to the *Independent Review of the Mental Health Act.* It is really where we started off this evening—certainly where I started off was looking at the interaction of those two pieces of legislation.

The one point I will make is that whatever recommendations the Mental Health Act review ends up making, it is clear that as long as we have separate legislation to govern mental illness and mental capacity, we absolutely must consider the interaction between those two frameworks. In terms of implementation, the early introduction of the Bill prevents the review from making suggestions that touch on the scope of the LPSs we are discussing. Therefore, it is crucial that the Government respond to the review's recommendations before the LPSs that we are talking about at the moment can come into force.

Baroness Barran: I am sorry to take noble Lords back a step to Amendment 87D, which is in my name and is really a probing amendment. I thank the noble Baroness, Lady Finlay, for her very warm support—she has unfortunately had to run for a train, but I am grateful to her.

It seemed to me, in thinking about this amendment, that there are a couple of points in the process of authorising liberty protection safeguards where there needs to be real rigour to check that the best interests of the cared-for person lacking capacity are upheld and that the least restrictive option is found in terms of depriving them of their liberty. We spent a lot of valuable time looking at the role of the care home manager in relation to this. The noble Baroness, Lady Hollins, was also alluding in part, in her Amendment 66, to the second actor in this, namely the responsible body. My amendment explores the role of the responsible body.

The first part of the amendment seeks to address the role of the responsible body, which, as I understand it, is effectively a safety net in the process. The aim is to encourage the responsible body to identify cases where it is more likely that those two key considerations have not been upheld. The second part of the amendment sets out a course to follow if that is the case. What I have been trying to imagine is what it is like to be sitting in the responsible body, the local authority or the hospital, with a pile of LPS forms to authorise. How can we keep the person doing that alert and using their discretion appropriately?

In the first part of the amendment, what I am getting at is a way to set clear criteria for the responsible body to follow, such that if the criteria were met it would trigger a review of the applications in more detail. I do not have a definitive list of what those criteria might be but, for example, one might imagine that if the care home in which the cared-for person was going to reside had been rated as inadequate by the CQC, it might be a prompt for a further review, if that care home manager had arranged the assessment.

Other possible criteria might involve what the noble Baroness, Lady Barker, referred to as "unbefriended" people. I am much sure whether this is technically unbefriended, so forgive me, but if someone has no friends or family and a carer has some kind of indirect financial interest in the outcome of the decision, that might be another case of where these criteria might trigger further review. The assumption would be that this amendment would apply whatever the source of funding for the cared-for person. There may be other criteria that would be more helpful, and I am sure that noble Lords who are more experienced in this area than I am will think of what these might be.

In the second part of the amendment, I have simply suggested that, if there is cause to examine an application more closely, it should follow the pathway set out in paragraph 18 of new Schedule AA1. Obviously, if this route is taken, consideration needs to be given to resources, since we do not want to create a conflict of interest for the responsible body—the mirror image of some of the conflicts we have talked about for the care home manager. We certainly want to avoid a situation where there is a financial disincentive to review those cases which genuinely warrant a review.

10 pm

Lord Touhig: My Lords, this group of amendments covers a range of things that need to be done before the commencement of the Act, and steps that should be followed later, as proposed by my Amendment 92. Noble Lords have made powerful arguments in favour of their amendments. In view of the lateness of the hour, I will confine my remarks to Amendment 92, tabled in my name, with the support of the noble Baronesses, Lady Tyler and Lady Jolly.

Amendment 92 would see two independent reports commissioned by the Government to be laid before Parliament within two and four years of the Act becoming law. The reports would provide a valuable update on how implementation was proceeding and would highlight areas for improvement. It has often been said that the Mental Capacity Act is a good piece of legislation that has been poorly implemented. If we want to see this Bill strengthened in all the areas we wish it to be, we will also need to monitor its implementation extremely closely, not least because the legislation affects some of the most vulnerable in our society and concerns their freedoms. Hundreds of thousands of people across England and Wales will be affected.

The amendment is modelled on the independent reviews that have accompanied the introduction of personal independence payments. The proposed report could look at a number of things: first, that decisions on whether someone's liberty is restricted are truly being made in the best interests of the individual and not in the interests of providers or commissioners; secondly, that training is effective and ongoing and reinforces the rights of the individual; thirdly, that families and carers are involved and consulted as appropriate; and, fourthly, that advocacy is available to all who need it and is delivered effectively and impartially. Some very powerful arguments have been made in this short debate. I hope that the Minister will listen and that the Government will respond positively.

Lord O'Shaughnessy: My Lords, I am grateful to all noble Lords who have tabled amendments in this group. We have had a wide-ranging debate on areas where they would like to see various enactments, changes, reports and so on, before commencement and following implementation. I will attempt to deal with them thematically.

Amendment 86 requires that before commencement the Government must publish the code of practice and our response to the Mental Health Act review. Amendments 93 and 94 update Clause 5 to reflect this. I am happy to confirm that the Government will have published both of these before the new system commences.

Amendment 87 requires that the effectiveness of the Act is reviewed and a report laid in Parliament within a year of the Bill coming into force. As the noble Lord, Lord Touhig, just pointed out, Amendment 92 requires the Secretary of State to commission two independent reports on the operation of the new liberty protection safeguards scheme two and four years after the new system comes into force. Again, I am happy to assure noble Lords that the Government routinely conduct post-legislative scrutiny for all new Acts. The relevant guide says that within three to five years of Royal Assent the Government will be required to submit a memorandum to the relevant departmental select committee with a preliminary assessment of how the Act has worked in practice. I am happy to confirm that the Bill will receive such scrutiny and the Health Select Committee will be informed.

Amendment 87A, in the name of the noble Lord, Lord Hunt of Kings Heath, details requirements regarding a number of topics. As he pointed out, a number of these have already been addressed in our debates, including unsound mind, issues around advance consent, the availability of non-means-tested legal aid, and others. We have had a debate on the rules and guidance around IMCAs, which we are clearly going to take forward. He focused on tribunals. The Government are reviewing the courts and tribunals system but that review has not concluded. We are not proposing to change the position on the Court of Protection hearing challenges to liberty protection safeguards in the Bill precisely because there is not yet an opinion or a policy change from the Government with regard to a proposed new system. He also asked about the cost implications, which are outlined in our impact assessment, as he will know.

The noble Lord's second amendment, Amendment 87B, seeks to make the CQC the regulator for the liberty protection safeguards. The Bill allows for bodies to be prescribed to report and monitor the scheme and it is absolutely our intention that the CQC takes on this role in England. It clearly has an important role in oversight of the new system, although we are concerned that his amendment would introduce additional layers of regulation. It should also be pointed out that the CQC is an England-only organisation; in Wales, the overseeing regulators are expected to be Healthcare Inspectorate Wales and Care Inspectorate Wales, which will both take on this role.

Amendment 87D was tabled by my noble friend Lady Barran and the noble Baroness, Lady Finlay. It would require responsible bodies to consider criteria to be published by the Secretary of State around best interests and the least restrictive option before authorisations are approved under the liberty protection safeguards. These are of course absolutely key principles of the Mental Capacity Act, and responsible bodies will have to consider them as part of any authorisation. As I have set out in previous debates, these factors already form part of the necessary and proportionate assessments, as well as other factors such as considering the wishes and feelings of the person. We will explain in the code how this assessment should be carried out and the factors that assessors should have regard to. I am grateful to my noble friend for some suggestions in that regard and I have just confirmed that the code would be published before commencement of the new scheme.

Amendment 87F, in the name of the noble Baroness, Lady Tyler, would remove the power of the Court of Protection to call for reports from local authorities and NHS bodies in cases relating to a cared-for person under the schedule. We think it is important, as I am sure she does, that the Court of Protection has access to such information but I heard the story that she told about an undue burden. I am certainly happy to commit to her that I will speak to colleagues in the Ministry of Justice to see whether there is any way that this process can be improved without removing the ability of the court to access the information it needs to make proper determinations.

Amendment 92A, in the name of the noble Lord, Lord Hunt, seeks to ensure that the liberty protection safeguards do not apply to any existing or pending DoLS authorisations. I can confirm that existing DoLS authorisations can continue until they are due for renewal or review. Clearly, depending on the final outcome of the Bill, the frequency with which those are renewed or reviewed will mean that there will be a steady stream of DoLS authorisations coming under the liberty protection safeguards in future, for those that are rolled over. Careful work will clearly need to be done with the sector to ensure that a tsunami of new authorisations does not happen but allowing for authorisations to continue under the previous system, until they can reach review or renewal, should go some way toward mitigating that risk.

Finally, Amendment 88, tabled by the noble Baroness, Lady Tyler, states that regulations should be subject to the affirmative parliamentary procedure and a consultation requirement. We have of course asked the Delegated Powers and Regulatory Reform Committee for its

[LORD O'SHAUGHNESSY]
opinion on the regulation-making powers within the Bill and it has accepted that the negative procedure provides appropriate parliamentary oversight. As the Committee knows, we go against the DPRRC's recommendations at our peril.

I apologise for detaining the Committee for six or seven minutes but I wanted to be thorough. I hope that I have been able to give the reassurances that noble Lords were looking for about the safeguards that we will put in place before commencement and the reviews of effectiveness to ensure that the system is working as intended. I hope that noble Lords will feel able to withdraw or not move their amendments.

Baroness Jolly: I thank the Minister and others who have spoken on this group. We all want to ensure that the new mental capacity Act—presumably of 2019—works and that the Department of Health and Social Care monitors its implementation. I know that we on these Benches look forward to working with the Minister and others between now and Report to ensure that the Bill is actually fit for purpose. I gently suggest that a longer time gap than is usual between Committee and Report might be needed. I guess that those conversations might need to be held with the usual channels but, in the meantime, I beg leave to withdraw my amendment.

Amendment 86 withdrawn.

Amendments 87 to 87G not moved.

Clause 4: Consequential provision etc

Amendment 88 not moved.

Clause 4 agreed.

Amendment 89

Moved by ***Baroness Thornton***

89: After Clause 4, insert the following new Clause—

"Compatibility with European Convention on Human Rights

So far as it is possible to do so, all provisions under this Act must be read and given effect in a way which is compatible with Article 5 (Right to liberty and security) of the European Convention on Human Rights."

Baroness Thornton: This is the last amendment, and I will be very brief. It is quite appropriate that the last amendment we consider is about Article 5 of the ECHR, which is about the core of the Bill: people's liberty and the deprivation of it. I have four things to say. The reason this amendment is so important is because it addresses the things that we have found lacking in the Bill which we feel need to be addressed. They are: the availability of information; advocacy and the fact that people need to have access to champions; representation; and the conflict of interest that arises when a detainer is required to assess a detainee. Particularly where a financial interest is in play, it is obvious that it has to be addressed if the proposals in the Bill are to be Article 5 compliant, which they need to be. That is the test that we need to apply to the Bill all the way through. I beg to move.

Baroness Barker: My Lords, I am glad that the noble Baroness has given us this opportunity to discuss a really important matter, albeit that it is late at night. I noted what the Minister said at various times throughout the debate about reliance on the code of practice. He will know that, as we have been trying to make clear all the way through the debate on the Bill, if some rights are not statutory rights in the Bill, then compliance is inn question. I rather suspect that the Bill that was presented to us was not compliant. I do not see how a Bill which, on the face of it, would enable somebody to be detained without being met and assessed by a professional person could be compliant.

There are a number of key matters which the Government are, at the moment, talking about putting into the code of practice—perhaps, possibly on a good day, into regulations—but which need to go back into the Bill. If they do not, the responsible body will not have the statutory responsibility to see that they are carried out. They are: the basis for the detention and the necessary and proportionate test and when that test applies; the role of IMCAs and access to appropriate persons; professional qualifications and training for people undertaking those pre-authorisation reviews; where an AMCP referral should be made; and the obligation to provide information to the person and their family about authorisation. All those things are important.

I say from these Benches that if we do not have considerable movement towards putting those things into the Bill, however briefly, the Bill will still be in trouble when we come to Report.

10.15 pm

Lord Touhig: My Lords, I have spoken several times in Committee about my concern that the Bill as it stands is an assault on human rights. I have also mentioned in past debates that I am proud of the reputation of the all-party British delegation to the Parliamentary Assembly of the Council of Europe, so ably led by Sir Roger Gale, which has a proud record of defending human rights in that body. Article 5 of the ECHR protects our right to liberty and security. It focuses on protecting individuals' freedom from unreasonable detention as opposed to protecting personal safety. As a result of Article 5, your Lordships and I have a right to personal freedom. That means we must not be imprisoned or detained without good reason. The Bill before us is about the quality of life, and the care and the respect of some of our most vulnerable fellow citizens. This amendment is about giving our fellow citizens, who may not have the capacity to defend themselves in the way that we take for granted, the same rights that we enjoy.

Lord O'Shaughnessy: My Lords, this is a good way to finish our Committee proceedings. I thank the noble Baroness, Lady Thornton, and the noble Lord, Lord Touhig, for tabling the amendment, and I thank the noble Baroness, Lady Barker, for speaking to it.

Clearly, not only ought it to be the case that the Bill is compliant with Article 5 of the European Convention on Human Rights, but it is also important to make it clear, as I did at the point of the introduction of the Bill, that its provisions are compatible with Article 5. As noble Lords will know, and as becomes painfully clear when you become a Minister and you see your

name on printed Bills giving these kinds of reassurances, that is a process that we need to go through before introducing legislation. Clearly, there are still concerns about whether the Bill can be improved in giving force, as the noble Lord pointed out, to the rights under Article 5. Nevertheless, it is my view that the Bill is compatible with the ECHR.

Furthermore, because of Section 3(1) of the Human Rights Act 1988, primary and subordinate legislation must be read and given effect to in a way that is compatible with convention rights. It is already the case that the Bill must be read and given effect to in a way that is compatible with Article 5. My concern with the approach here is therefore not so much one of repetition but one of partiality because it only talks about Article 5. There is therefore a risk that if we implied that this legislation had only to comply, or had a special duty to comply, with Article 5 of the convention rather than the whole convention, that would not reflect our responsibilities under the Human Rights Act. Indeed, it could downplay critical protections that exist in the ECHR, such as the Article 8 rights to family and private life. So while I understand the motivation behind tabling the amendment and using it as an opportunity to rehearse some of the desire to improve the actions that will safeguard the liberty and security of the person, I do not think it is right to put such a clause in the Bill precisely because the Government have a broad responsibility to ensure not only that the Bill is compliant but that it is read and given effect to in a way that is compatible with all convention rights.

I hope that has provided reassurance to noble Lords that our intention, and indeed our obligation, is to provide not only for those Article 5 rights but for all other rights that apply under the ECHR. I hope the noble Baroness will feel able to withdraw her amendment.

Baroness Thornton: I thank the Minister for that answer, and for his recognition that the reason for tabling the amendment at this point in the Bill was to allow us to say that these were the issues we needed to address, as the noble Baroness, Lady Barker, and my noble friend Lord Touhig outlined. I am pleased that the Minister has acknowledged that. I beg leave to withdraw the amendment.

Amendment 89 withdrawn.

Amendments 90 to 92A not moved.

Schedule 2 agreed.

Clause 5: Extent, commencement and short title

Amendments 93 and 94 not moved.

Clause 5 agreed.

House resumed.

Bill reported without amendment.

House adjourned at 10.20 pm.

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