PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

CARE BILL [*LORDS*]

Eighth Sitting

Tuesday 21 January 2014

(Afternoon)

CONTENTS

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Saturday 25 January 2014

STRICT ADHERENCE TO THIS ARRANGEMENT WILL GREATLY FACILITATE THE PROMPT PUBLICATION OF THE BOUND VOLUMES OF PROCEEDINGS IN GENERAL COMMITTEES

The Committee consisted of the following Members:

Chairs: †Hugh Bayley, Andrew Rosindell

† Abrahams, Debbie *(Oldham East and Saddleworth)* (Lab)
† Burstow, Paul *(Sutton and Cheam)* (LD)
† Doyle-Price, Jackie *(Thurrock)* (Con)
† Esterson, Bill *(Sefton Central)* (Lab)
† Griffiths, Andrew *(Burton)* (Con)
† Jones, Andrew *(Harrogate and Knaresborough)* (Con)
† Kendall, Liz *(Leicester West)* (Lab)
† Lamb, Norman *(Minister of State, Department of Health)*
† Lewell-Buck, Mrs Emma *(South Shields)* (Lab)
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
† Morris, Anne Marie *(Newton Abbot)* (Con)
† Morris, David *(Morecambe and Lunesdale)* (Con)
† Morris, Grahame M. *(Easington)* (Lab)
† Munn, Meg *(Sheffield, Heeley)* (Lab/Co-op)
† Newton, Sarah *(Truro and Falmouth)* (Con)
† Penrose, John *(Weston-super-Mare)* (Con)
† Poulter, Dr Daniel *(Parliamentary Under-Secretary of State for Health)*
† Reed, Mr Jamie *(Copeland)* (Lab)
† Shannon, Jim *(Strangford)* (DUP)
† Smith, Nick *(Blaenau Gwent)* (Lab)
† Stephenson, Andrew *(Pendle)* (Con)
† Wheeler, Heather *(South Derbyshire)* (Con)
† Wollaston, Dr Sarah *(Totnes)* (Con)

Fergus Reid, *Committee Clerk*

† attended the Committee

Public Bill Committee

Tuesday 21 January 2014

(Afternoon)

[Hugh Bayley *in the Chair*]

Care Bill [*Lords*]

Clause 42

Enquiry by local authority

Amendment proposed this day: 42, in clause 42, page 38, line 13, at end add 'if the local authority has reason to believe enquiries are being impeded such that it cannot determine whether any action is necessary it shall record whether or not an application for an adult safeguarding access order was considered or made under section [ ].'. —*(Paul Burstow.)*

Question again proposed, That the amendment be made.

2 pm

The Chair: I remind the Committee that with this we are discussing the following:

Amendment 116, in clause 42, page 38, line 14, leave out subsection (3) and insert—

'(3) "Abuse" includes—

(a) physical abuse;

(b) sexual abuse;

(c) psychological abuse;

(d) financial abuse, which includes—

(i) having money or other property stolen;

(ii) being defrauded;

(iii) being put under pressure in relation to money or other property; and

(iv) having money or other property misused;

(e) neglect and acts of omission;

(f) discriminatory abuse; and

(g) other, as guidance may specify.'.

Amendment 117, in clause 42, page 38, line 19, at end add—

'(4) A relevant partner (as identified in section 6(7)) has a duty, where it has reasonable cause to suspect a person is an adult at risk of abuse or neglect, and the adult appears to be within the local authority's area, to inform the local authority of that fact.'.

Amendment 118, in clause 42, page 38, line 19, at end insert—

'(4) In the case of financial abuse, investigation may be instigated following a complaint from a person with power of attorney for an adult having needs for care and support.'.

New clause 3—*Adult safeguarding access order*—

'(1) An authorised officer may apply to a justice of the peace for an order (an adult safeguarding access order) in relation to a person living in any premises within a local authority's area.

(2) The purposes of an adult safeguarding access order are—

(a) to enable the authorised officer and any other person accompanying the officer to speak in private with a person suspected of being an adult at risk of abuse or neglect;

(b) to enable the authorised officer to assess the mental capacity of a person suspected of being an adult at risk of abuse;

(c) to enable the authorised officer to ascertain whether that person is making decisions freely; and

(d) to enable the authorised officer properly to assess whether the person is an adult at risk of abuse or neglect and to make a decision as required by section 41(2) on what, if any, action should be taken.

(3) While an adult safeguarding access order is in force, the authorised officer, a constable and any other specified person accompanying the officer in accordance with the order, may enter the premises specified in the order for the purposes set out in subsection (2).

(4) The justice of the peace may make an adult safeguarding access order if satisfied that—

(a) all reasonable and practicable steps have been taken to obtain access to a person suspected of being an adult at risk of abuse or neglect before seeking an order under this section;

(b) the authorised officer has had regard for the general duty in section 1 (Promoting individual well-being) in making a decision under subsection (1).

(c) the authorised officer has reasonable cause to suspect that a person is an adult who is experiencing or at risk of abuse or neglect;

(d) it is necessary for the authorised officer to gain access to the person in order to make the enquiries needed to inform the decision required by section 41(2) on what, if any, action should be taken;

(e) making an order is necessary in order to fulfil the purposes set out in subsection (2); and

(f) exercising the power of access conferred by the order will not result in the person being at greater risk of abuse or neglect.

(5) An adult safeguarding access order must—

(a) specify the premises to which it relates;

(b) provide that the authorised officer may be accompanied by a constable; and

(c) specify the period for which the order is to be in force.

(6) Other conditions may be attached to an adult safeguarding access order, for example—

(a) specifying restrictions on the time that the power of access conferred by the order may be exercised;

(b) providing for the authorised officer to be accompanied by another specified person; or

(c) requiring notice of the order to be given to the occupier of the premises and to the person suspected of being an adult at risk of abuse.

(7) A constable accompanying the authorised officer may use reasonable force if necessary in order to fulfil the purposes of an adult safeguarding access order set out in subsection (2).

(8) On entering the premises in accordance with an adult safeguarding access order the authorised officer must—

(a) state the object of the visit;

(b) produce evidence of the authorisation to enter the premises; and

(c) provide an explanation to the occupier of the premises of how to complain about how the power of access has been exercised.

(9) In this section "an authorised officer" means a person authorised by a local authority for the purposes of this section, but regulations may set restrictions on the persons or categories of persons who may be authorised.'.

New clause 4—*Duty to report adults at risk of abuse*—

'(1) If a relevant partner of a local authority has reasonable cause to suspect that the local authority would be under a duty to make enquiries under section 42, it must inform the local authority of that fact.

(2) If the person that the relevant partner has reasonable cause to suspect would be the subject of enquiries under section 42 and appears to be within the area of a local authority other than the one of which it is a relevant partner, it must inform that other local authority.

(3) If a local authority has reasonable cause to suspect that a person within its area at any time would be the subject of enquiries under section 42 and is living or proposing to live in the area of another local authority (including a local authority in Wales, Scotland or Northern Ireland), it must inform that other local authority.

(4) In this section "relevant partner", in relation to a local authority, means—

(a) the local policing body and the chief officer of police for a police area any part of which falls within the area of the local authority;

(b) any other local authority with which the authority agrees that it would be appropriate to co-operate under this section;

(c) any provider of probation services that is required by arrangements under section 3(2) of the Offender Management Act 2007 to act as a relevant partner of the authority;

(d) any provider of regulated activities as listed in Schedule 1 to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010;

(e) a local health board for an area any part of which falls within the area of the authority;

(f) an NHS trust providing services in the area of the authority; and

(g) such person, or a person of such description, as regulations may specify.'.

New clause 19—*Corporate responsibility for neglect*—

'(1) This section applies where a person registered under Chapter 2 of Part 1 of the Health and Social Care Act 2008 (a "registered care provider") in respect of the carrying on of a regulated activity (within the meaning of that Part) has reasonable cause to suspect that an adult in their care is experiencing, or is at risk of, abuse and neglect.

(2) The registered care provider must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken in the adult's case and, if so, what and by whom.

(3) Where abuse or neglect is suspected, the registered care provider is responsible for informing the Safeguarding Adults Board in its area and commits an offence if (without reasonable cause) it fails to do so.

(4) A registered care provider is guilty of an offence if the way in which its activities are managed or organised by its board or senior management neglects, or is a substantial element in, the existence and or possibility of abuse or neglect occurring.

(5) A person guilty of an offence under this section is liable on conviction to imprisonment for a term not exceeding five years, or to a fine, the range of which will be specified by regulations, or to both.'.

New clause 22—*Duty of candour*—

'(1) Local authorities must take reasonable steps to create an open and honest culture that enables employees to report reasonable suspicions of abuse and neglect of individuals in the care of the local authority or a provider commissioned by the local authority.

(2) "Reasonable steps" include—

(a) ensuring that staff are aware of and trust processes open to them;

(b) provision of advice about the process;

(c) review of procedures; and

(d) regular communications to staff about the processes.'.

New clause 23—*Offence of abuse of adult in care*—

'Any person who wilfully causes or permits an adult who has care and support needs to suffer physical or mental pain or injury or, having the care or custody of that adult, wilfully causes or permits the person or health of that adult to be injured, including through the neglect of their care and support or health needs, or wilfully causes or permits that person to be placed in a situation that endangers his or her person or health, including mental health, is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both,

(b) on conviction on indictment, to imprisonment for a term not exceeding five years or a fine or both.'.

New clause 24—*Offence of corporate neglect*—

'In section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007, insert—

"1A Corporate neglect

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—

(a) cause a person to suffer abuse or neglect;

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the person who suffers abuse or neglect; and

(c) the offence under this subsection is called corporate neglect.'.

Paul Burstow (Sutton and Cheam) (LD): Welcome to this afternoon's sitting, Mr Bayley. Before we adjourned for Foreign and Commonwealth Office questions, we were debating clause 42. It was a very liberal debate on a very liberal question about when liberty is to be protected and at what point the burden is such that the state should use its power for a good, which is to protect the individual from abuse. I will not dispute by one iota that the Minister has set out serious issues at the heart of the debate. Although I disagree with much of the conclusion, I think the analysis is absolutely right.

The Minister has had a bit of a hard ride—we probed, pushed and prodded—but he has been generous in engaging with the concern that members of the Committee have. I will respond mainly to new clause 3, although I will briefly touch on the others, if I may. The Minister is right to say that the issue is about the balance of risk, but is wrong when he comes down on the side of the status quo of not having a power of entry. I agree with the Minister that we are judging questions of human rights; we will be spending a lot of the rest of today doing just that.

The concept and legal framework of human rights is not only about checking state power—it is not simply a negative thing about stopping things—but about placing upon the state positive obligations, particularly under the European convention on human rights and under the Human Rights Act 1998, to take action to protect people. In other words, the state can use its power for good. That is why we are in this place; we are using the state's power for things that we think are about the common good.

We should take the contribution of the hon. Member for Sheffield, Heeley seriously, given the 20 years of practical social work experience that she draws upon. She talked about creating cultures that are about doing

[Paul Burstow]

the right thing. The Minister agreed and stressed that the law and regulation are not sufficient to get great cultures, and I think that that is absolutely right.

The Minister rightly went on to say that we do need good regulations and law to underpin good culture. For me this is about a human rights-based approach to safeguarding. The Minister talked about the unintended consequences of new clauses. The new clauses and amendments are not only tabled by Members who are not in the Government. As was exposed during our consideration of the new clauses, the drafting of the legislation that set up the Care Quality Commission had within it a flawed clause—a Government clause—so I gently suggest that Governments can err as well, and there can be unintended consequences in the legislation that they put through. That is why I am probing, because this is one of those areas where a reluctance to act, for very good reasons, is wrong.

It is often said that there will not be many cases. It has been suggested that we are talking about extreme cases, but that is not so. We are talking about cases where a third party is preventing access even to determine what the nature of the case is to conduct the clause 42 power. If the power prevents even one tragedy, and one extra day of abuse is reduced, I believe it is worth having. The new clause offers a proportionate mechanism, and the court would have to be satisfied about the application of that when it comes to it.

I am concerned about the consultation that the Minister has prayed in aid in his response. No one could have expected complete unanimity on something as contentious as this, but there was a clear preponderance of views among organisations, many of which represent service users and public bodies such as safeguarding boards, in favour of taking the opportunity to legislate in this area. Indeed, within that was the view of the Equality and Human Rights Commission, which has some locus when it comes to determining issues about the applicability and role of the Human Rights Act. My fear is that when it comes to power of entry, insufficient weight is being given to those without power and those without voice. They are the beneficiaries of the new clause, but they are sitting silently and cannot contribute. Those who can contribute are not beneficiaries.

The Minister of State, Department of Health (Norman Lamb): I put two questions to my right hon. Friend. He says that if the measure saves only one person, it is worth it. Does he accept that, as is recognised in the new clause, in some circumstances the exercise of a power of entry might put someone at risk and result in the sort of retribution outlined in the new clause? Does he also accept that 70% of the individuals who responded to the consultation—I appreciate that a mix of people responded—were against the measure?

Paul Burstow: Let me try quickly to work through those fair points. I believe that primary legislation would contain all the necessary safeguards, because the new clause would explicitly require a court to satisfy itself that the well-being principle had been taken into account in exercising the function. That would include choosing the least restrictive option, ensuring that decisions about an individual are made with regard to their individual circumstances and ensuring that the individual's views, wishes and feelings are taken into account, while also protecting people from abuse and neglect. The Minister is right that those two things have to be constantly weighed against each other, but that is what a court is there for. Clause 1 provides the lens through which the new clause should be seen. I believe that that addresses the concerns expressed by the Minister and by Mind, which is why I added the principle to the new clause.

The Minister referred to the consultation, and mentioned the suggestion that the expert court—the Court of Protection—should exercise jurisdiction in this regard. I have sympathy for that, and there is arguably scope for a different approach in that area. I note that inherent jurisdiction is now being prayed in aid, but paragraph 13 in the consultation document set out a powerful and unequivocal case as to why that was not satisfactory. There was no suggestion that the Government were consulting on that; they declared their view, but they now appear to have set that view aside when it comes to my new clause.

The Minister said that there has been widespread ignorance about existing powers, and he promised to provide in guidance examples of scenarios in which existing laws might be used. It would help me if, before 4 February, when the Committee will vote on the new clauses, he would provide the Committee with a letter setting out the current state of the law, the existing powers, their precise locations and when they have been used. Such information would help us decide whether to vote for or against the new clauses, or not to press them.

Norman Lamb: I am happy to write as my right hon. Friend suggests, setting out what the existing provisions allow for and what the guidance might cover, even if we have not yet issued the guidance, which has to be done jointly with the Association of Directors of Adult Social Services and the Local Government Association. Whatever disagreement we have over the matter, it will be in everyone's interest to have clear practical guidance with case studies to guide practitioners about the powers that they have and how to exercise them.

Paul Burstow: I agree. The Department of Health would be doing everyone a service if it undertook to provide that, and I look forward to seeing it. It also concerns my hon. Friends the Members for Truro and Falmouth and for Totnes, and we will all want to look closely at that information. Scotland has had legislation since 2007 and it has been evaluated. There is no suggestion that that, if anything more stridently drafted piece of legislation has had the unintended consequence and harm that the Minister fears could flow from the new clause. Will he ask his officials to take another look at those evaluations? I dare say that there will be something in there that I have missed and that will be useful to reflect on.

New clause 4 is about partner agencies. I take the Minister's point about safeguarding boards and the provisions in schedule 2 and will leave that matter to rest for now.

On new clause 24, which deals with corporate accountability, the Minister rightly talked about fundamental standards. I wonder whether it would be

proper or possible to consult the Director of Public Prosecutions. I hope that it is possible and that the Minister will do this. It seems to me that, in making sure that we have language that can be used for a prosecution, it might be sensible to consult those who are in the business of doing that all the time for the Government and, indeed, in the public interest. Will the Minister make sure that that it is done to ensure that we get the language absolutely right so that it does not have a coach and horses driven through it by a well paid QC in a court at a later stage? Will the Minister give some indication on that?

Norman Lamb: What I can say is that an exhaustive process is under way between the Care Quality Commission and the Department of Health to ensure that we get this right. There has already been a consultation, and a further process will be under way. The whole intent is to get to the point that deals with my right hon. Friend's concerns.

Paul Burstow: I thank the Minister for that and am reassured. On new clause 3, which deals with wilful neglect, I very much welcome the commitment about consultation. It suggests that this Bill will have sailed and become and Act before that becomes legislation, but I hope there will be a slot, perhaps in the next Session.

These are particularly wicked issues in terms of getting it right and being confident that we are doing so. I hope that, if the Minister's view today prevails, as I suspect it will, he has got it right because the consequences of getting it wrong are absolutely tragic. For that reason, I wait to see the letter about new clause 3 and will be happy to withdraw the amendment.

The Chair: Is it the Committee's pleasure that the amendment be withdrawn?

Hon. Members: Aye.

Liz Kendall (Leicester West) (Lab): Welcome back to the Chair, Mr Bayley. We have had a full debate on these topics, which is absolutely right. I will say a few words about the amendments and new clause 22, and make a couple of comments on new clauses 3 and 19.

2.15 pm

The Bill contains detail on the definition of financial abuse, which is not broad enough to cover all the aspects of abuse that we want to see addressed. The Minister has said that there will be guidance on that.

Norman Lamb *indicated assent.*

Liz Kendall: I can see the Minister nodding. I stress that, if he can make the guidance as full and as flexible as possible, I would be happy not to press amendment 116.

As hon. Members may remember, amendment 118 states that, if someone with the power of attorney suspects that the person for whom they have that power is being abused, the local authority should act on that. We have concerns that data protection might prevent local councils from responding to such concerns. I hope the guidance will consider those data protections laws.

Norman Lamb *indicated assent.*

Liz Kendall: I am disappointed that the Government have spoken against amendment 117, which would place a duty on all relevant partners—such as the police, the NHS and the probation service—if they suspect abuse, as there is such a duty in relation to suspected abuse of children.

Norman Lamb: I confess that I am not an expert on children's legislation, but my officials have considered the matter. The shadow Minister asked whether there is an equivalent measure in children's legislation that requires organisations to report. The answer is no, and the introduction of mandatory reporting is not being considered. I understand that the international evidence is that such action might result in a steep rise in unsubstantiated allegations. That is the advice I have received in response to her question this morning.

Liz Kendall: I am glad that the officials were working so hard during the lunch break.

Meg Munn (Sheffield, Heeley) (Lab/Co-op): For the sake of clarity, I have sought guidance from the children's Minister, the hon. Member for Crewe and Nantwich (Mr Timpson) precisely on whether in law there is currently a requirement to report concerns about children, and I received a letter only yesterday stating that there is a requirement to do so. That is different from a doctrine of mandatory reporting. Clearly we are not here to discuss such things in detail, but the children's Minister is clear that, as it relates to children's services, there are requirements.

Liz Kendall: I am grateful to my hon. Friend for that helpful intervention. There is clearly a difference of opinion between Department of Health civil servants and what the children's Minister has said. If the Minister wishes to clarify that, I would be happy to give way.

Norman Lamb: Given the apparent contradiction, I am happy to write to the hon. Lady after full and proper consultation with our colleagues in the Department for Education.

Liz Kendall: I am glad to hear the Minister say that because it is important. We want the same objective, which is that anyone who has cause to suspect abuse is under a duty to report that suspicion. If there is such a duty in relation to children's services, there should be one in relation to adults. We need greater clarity on that.

I am also disappointed that the Minister does not think a duty of candour is required in law for local authorities, even though a duty of candour is being introduced for NHS bodies, because ultimately it is all about changing the culture.

Norman Lamb: To clarify, I have said that the statutory duty of candour we seek to introduce will apply across health and social care and will apply to local authorities where they are undertaking functions registered with the Care Quality Commission. The duty of candour set out in amendment 117 is not the same as the statutory duty of candour that most people talk about when they refer to such a duty. The statutory duty of candour, as

[Norman Lamb]

commonly understood, involves a criminal offence if there is a failure to be open with people. This amendment is more about just encouraging a culture of openness—which I very much support—but it does not achieve what the statutory duty of candour achieves.

Liz Kendall: Could the Minister specify the precise bit of the Bill that applies the duty of candour equally to councils as to the NHS? Maybe I have misread the Bill, but I would be grateful for clarification.

Norman Lamb: The statutory duty of candour will apply to any organisation that is registered with the Care Quality Commission, in terms of its provision of health or care services. We were clear that it should apply across health and social care, not just within the NHS.

Liz Kendall: I will check when we come to the duty of candour bit of the Bill—part 2—and I may probe a little more when we come to it if I feel that it is not quite as the Minister said. Not that I doubt him for a second.

We took the debate about new clause 3 and the power of entry very seriously. All members of the Committee understood the balance of risk, and we were very aware of the different concerns raised. I particularly listened to what the Minister said about the concerns of mental health charities. However, I agree with the right hon. Member for Sutton and Cheam that the charities' initial concern when the consultation came out was in relation to the Mental Health Act 2007, and people forcing an entry and forcing treatment upon people. I understand mental health charities' concerns about what that would mean for those users. However, the new clause was tightly defined to make it clear that it was not about that. I hear what the Minister says about writing back. I hope that he will write to all members of the Committee about the existing provision in the law. We may wish to return to this matter on Report. We will keep it under review.

My hon. Friend the Member for Blaenau Gwent will speak to new clause 19 in a moment. I absolutely do not doubt the Minister's intent to make sure that private companies and corporations can be prosecuted and held to account. When we were in government, we tried to make a difference on that. The Minister has highlighted a loophole that needs to be closed and that is right. My two concerns are that, first, the CQC has a hell of a lot on its plate. We are about to come to the provider failure regime and market failure regime. The CQC has to do that on top of inspecting all hospitals, all social care providers and all GPs. Is it really going to take forward prosecuting private companies? Should not families or the police be able to do that? Should there not also be the ability not just to fine people, but for individuals to go to jail if they are found to be neglectful?

I do not want to say any more than that this stage, because perhaps the Minister will intervene on my right hon. Friend—my hon. Friend the Member for Blaenau Gwent; I only were he was a "right hon." officially. Those are my remaining concerns. The Government's proposal is some improvement, but I am concerned that it does not go far enough. On that point, you will be glad to hear, Mr Bayley, I will sit down.

The Chair: It is my job to try to permit debate to happen as fully as Committee members want. However, we are in a bit of procedural difficulty now. I put Mr Burstow's motion that amendment 42 be withdrawn to the Committee, because I thought that the group of amendments had been fully debated this morning. It is clear that a number of Committee members want to discuss those amendments further. The neat and tidy way to allow that would be for me to ask the Committee to agree to strike from the record the decision taken on Paul Burstow's amendment, to allow the other matters to be discussed, and then to have him ask leave to withdraw the amendment when the debate on this matter is finished.

The Government and Opposition Whips are happy, therefore, we will treat it as if Mr Burstow had sat down and we had not put the question.

Nick Smith (Blaenau Gwent) (Lab): On new clause 19, first, I thank the Minister for his update on the new strengthened role for the CQC. I hope that that is a success. I understand that it has a lot more to get its teeth into in future, as my hon. Friend said.

Norman Lamb: I am grateful to the hon. Gentleman for giving way before he finishes his first sentence. The CQC clearly has a lot on its plate. However, the power of prosecution, which can be exercised, as opposed to not being exercised in the past because of the problem of having to serve a notice, will aid the CQC in driving up standards. If people understand there is that accountability, that will drive improvements in behaviour.

In response to the shadow Minister's point about a risk that if the responsibility is given to the police they may not, in some way, take it seriously, because they have a lot on their plate as well, it makes sense to give the power to the specialist regulator, to aid them in their duties to drive up standards in social care.

Nick Smith: I hear what the Minister says, but up until now the CQC has done not very well—that is the polite way of putting it—with the responsibilities, albeit that the Minister says that there are good reasons for that. I want the Minister, please, to give further thought to a corporate neglect offence, including the penalty of jail, which would send the strongest possible signal that care providers should focus on high quality care and act as a proper deterrent to poor care.

Norman Lamb: I thank the hon. Gentleman for generously giving way again. I wanted to alert him to the fact that we are also introducing, alongside the power of prosecution, a fit and proper person test, which is also powerful and is needed, so that the director of a company that has completely failed its residents, or a domiciliary care company, for example, can in future face the possibility of the prosecution of the corporate body and of individual directors, if there is culpability, or an unlimited fine. The directors also face risking not being able to work in the sector again, because the CQC will have to be satisfied that those individuals are fit and proper persons. In earlier discussions with me, Opposition Members demanded the introduction of such a test. We are now doing that. I hope that the hon. Gentleman is encouraged by that.

Nick Smith: I am encouraged, because we need to apply belt and braces in instances such as Operation Jasmine in Gwent. I am pleased that the Minister said that. However, having said that, I still think that we need a prison penalty for directors of care companies who do not properly fulfil their duties. I will not push new clause 19 to a vote, but I should be grateful if the Minister gave it further thought to see whether that is possible, because we must hammer home this important issue.

The Chair: I think that we have now completed the debate on this group of amendments and that all Committee members who put their names to the amendments have shown that they have no wish to press those to a vote.

Paul Burstow: I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 42 ordered to stand part of the Bill.

Clause 43 ordered to stand part of the Bill.

Schedule 2

SAFEGUARDING ADULTS BOARDS

2.30 pm

Liz Kendall: I beg to move amendment 119, in schedule 2, page 119, line 24, at end insert—

'(e) The Secretary of State.'.

The Chair: With this, it will be convenient to discuss amendment 120, in schedule 2, page 119, line 24, at end insert—

'(e) The Chief Inspector for Social Care.'.

Liz Kendall: I will keep this short. These two amendments are practical. They are essentially about ensuring that we learn the lessons of any issues, problems or practices that come up on safeguarding vulnerable adults, and that we learn the lessons from councils across the country. They relate to the fact that the new safeguarding boards will all have to produce an annual report. Amendment 119 proposes that those reports be given to the Secretary of State, and amendment 120 that they also be given to the chief inspector for social care. That is because we need to ensure that across the country we draw out any key themes that emerge about types of abuse that are occurring or increasing, or about any problems, in policy and practice, in preventing, tackling or stamping out abuse. Those issues may well include those that we debated earlier to do with the need to gain the power to access people's homes, or to tackle neglect and abuse among care home providers. Different types of abuse are emerging that have not been properly identified.

Obviously, I want to help the Secretary of State, and it would benefit any Secretary of State if he—or she, perhaps, one day. [HON. MEMBERS: "Ah!"] I was thinking of my former boss. It would benefit them if they could look across what is happening in different councils to see if issues were emerging. However, it would also benefit the chief inspector for social care if she—or indeed he, one day—could draw out themes.

I will focus on that point for a moment. As we have already said, the Care Quality Commission's powers and responsibilities regarding monitoring and inspecting how local councils commission services are removed by the Bill. Ministers have said several times, "Ah, but it can still do thematic inspections." If it received all the annual reports from local councils, it would be in the best position to define what those thematic inspections might look at. This is a way of saying, "Let's learn from what is happening across the country. Let's not reinvent the wheel; let's make sure that the Secretary of State and the chief inspector for social care can really look at what is happening across the country, to identify problems that may need to be addressed—in policy, in practice or in the CQC's reviews—and to make sure that we have high-quality care and support, and do everything we can to stamp out abuse and neglect, and prevent it from happening in the first place in all parts of the country." It is a practical suggestion, which I hope the Minister will accept.

Norman Lamb: I thought that the hon. Lady was going to go on a little longer, so I am still eating my Polo. Apologies for that.

The Chair: I strongly approve of people eating York-made produce. Has that given you enough time to chomp it up?

Norman Lamb: I am glad that I have made the Chairman happy. It is all part of the service.

I thank the shadow Minister and her hon. Friends for tabling the amendment. The Bill places a duty on safeguarding adults boards to publish their annual reports, as she mentioned. Those reports will be publicly available to ensure transparency regarding the way that the boards work. That means that the Secretary of State and the chief inspectors, like anyone else, will be able freely to access and review the reports of all safeguarding adults boards. I agree with the shadow Minister that themes may well emerge from analysis of those annual reports. The analysis could be by pressure groups and so on, which could be enormously valuable in putting pressure on the system and demanding change.

Safeguarding adults boards will operate at a local level. We would expect the local healthwatch and health and wellbeing boards to monitor the safeguarding adults boards' progress and report to the Secretary of State if there were particular matters of concern about their operation. That would again put the health and wellbeing boards centre stage in the local health care system. We would also expect them to report to the chief inspector of adult social care if there were particular matters of concern about a board's operation, or about a registered provider of adult social care.

We have always been clear that the role of Government is to provide vision and direction, and to ensure that the legal framework is clear. The law must be proportionate and maximise local flexibility, so that the best decisions can be made and tailored to the needs of each community. I am confident that the Bill creates the right balance between accountability and flexibility, together with openness, so I respectfully ask the shadow Minister to withdraw the amendment. The transparency that we are requiring will enable real concerns to be raised.

Grahame M. Morris (Easington) (Lab): The Minister has explained why the Committee should reject the amendment. Can he advise us on what the Minister at the Department of Health will do with the information collected? Is the intention to analyse that, or have some third party do so, and draw the necessary lessons, or will it be deposited at the Department of Health, to be used as part of the evidence if something goes wrong?

Norman Lamb: It is, of course, the Opposition amendment that seeks to require the supply of the reports up to the national level. The Government are saying that, because there will be that complete transparency, we do not think it necessary to add a requirement for it to be sent up. The great danger, as the hon. Gentleman says, is that it gathers dust on a shelf, or virtual shelf, and that nothing happens. The fact that there is transparency and we now have health and wellbeing boards, due to the work of my right hon. Friend the Member for Sutton and Cheam when he was in this post, enables real issues of concern that arise from the annual reports to be taken up by the chief inspector of social care, or the appropriate person to pursue them.

Bill Esterson (Sefton Central) (Lab): The Minister has started a debate. On safeguarding adults boards, the children's safeguarding boards are to be inspected from November by Ofsted. Does he think there are lessons in the approach being adopted for children, following on from the point about what happens to information collected? Is there a lesson and a parallel around inspection, to avoid the problem he has identified of evidence just sitting on a shelf?

Norman Lamb: In previous discussions, I have tried to make the point that where there is clear evidence of a real problem, the CQC, with local government, can intervene, inspect and report, and it has powers then to take action. We have moved away from the regular annual process that bogged down local government in substantial bureaucracy but may not have achieved the objectives that we seek.

The more targeted work of the CQC may well be more effective, provided that that work is used. I have made it clear that it should be used where there is clear need. I hope that the shadow Minister will agree to withdraw her amendment.

Liz Kendall: I do not think that we want to press the amendments to a vote, but it is important that someone centrally looks across all these themes, issues and concerns about what is happening on the ground to ensure that policy, practice and legislation keep up with the issues raised by safeguarding. I hope that the Secretary of State, the Minister with responsibility for care and, crucially, the chief inspector of adult social care regularly ensure that their teams do that, as that is the way to change the culture proactively and address any problems. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Schedule 2 agreed to.

Clauses 44 to 47 ordered to stand part of the Bill.

Clause 48

PROVISION OF "CARE AND SUPPORT SERVICES"

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

The Chair: An amendment had been tabled to delete the clause, and the proper way to deal with that procedurally is to have a stand part debate. I call the Minister to explain his proposal.

Norman Lamb: I recognise the strength of feeling on this issue. The Human Rights Act 1998 is about the relationship between the state and the individual, and that is why the convention was established. It is a powerful document that sought to protect the individual citizen from the oppressive power of the state, whether that was the national state or the local state, and I strongly sign up to that principle. The Act, however, was not intended to apply to entirely private arrangements, and it requires quite a contortion of the legislation to make it do that. That would involve defining a private care home in Sheringham, Dudley or even Morecambe and Lunesdale—I have completely lost my thread, but it requires the private care home to be defined, in effect, as a public body. This seems a very odd interpretation of what the European convention on human rights was supposed to be about and, indeed, what the Human Rights Act was about, which implemented the convention in the UK.

2.45 pm

If clause 48 became law it would be the first time the Act extended into the purely private sphere, in this case the relationship between an individual and a private care provider. If that principle were established, other interest groups self-evidently could argue that they should also be able to challenge private providers on human rights grounds in other areas, taking us further and further from the purpose of the Act into duplication and overlap with other legislation.

That is not to say in any way that people do not need protection against private providers in all sorts of spheres. Through all the steps we are taking in Government, through the strengthening of the inspection regime, through corporate accountability and a range of other measures, we have sought to strengthen the protection of the citizen against a private provider, but the idea that we apply the Human Rights Act, which is there to protect the citizen against the oppressive state, to the private relationship between a private provider of a care home and the individual citizen, seems somewhat bizarre.

Grahame M. Morris: The Minister is advancing an interesting argument about private provision that is commissioned through a public service, through taxpayers' money. Does he think that principle should also apply to freedom of information, for example, where a private sector or non-public body is providing a service, even though it is to a local authority or an NHS body, with public money?

Norman Lamb: First, I completely agree that if the commissioning of care services in some way potentially infringed the human rights of a citizen and the commissioning was undertaken by a state body—a local authority, NHS England or anyone else—the citizen has rights, because it is their relationship with the state that we would be talking about there. The point I am making is that it would seem bizarre to apply those principles of the protection of the individual against the oppressive state to the relationship between the

individual and a little care home in Lunesdale. On the hon. Gentleman's point about freedom of information, as a general principle I agree in openness. I believe in access to information because I think on the whole it encourages better decision making. The great importance of it is in the public sphere. That is the principle that I essentially follow.

I wholeheartedly support the principles of the Human Rights Act, but clause 48 represents an unprecedented extension to its scope. I urge hon. Members who argue this point to think about the precedent it sets and how it extends the Human Rights Act into every sphere of life in an unusual and extraordinary way. It completely confounds the original purpose of the Bill. An extension to all regulated social care casts doubt about the application of the Human Rights Act to other functions which are considered to be public in nature, but are not expressly designated as such.

The Human Rights Act gives rise to positive obligations on public authorities. Individuals can bring human rights claims against a local authority or the Care Quality Commission when they consider that the organisation has failed in its positive obligation to take reasonable steps to avoid risks of ill-treatment.

Paul Burstow: Obviously the CQC has obligations under the Human Rights Act, so would it be unreasonable of the CQC as part of its licensing ambitions to assert that in all circumstances providers comply with the Human Rights Act?

Norman Lamb: We want to ensure that everything that providers do that is regulated by the CQC meets the highest possible standards. In regulating entirely private providers, which, as I say, simply do not fall within the intent of either the European convention on human rights or the Human Rights Act, the intent is to ensure that the people who use that service are protected in exactly the same way as everyone else.

I ask all hon. Members who are tempted by the clause: do they really think that when people were drafting the European convention on human rights, they were thinking about private relationships between individuals? Of course they were not. We know that. We know what the purpose was; it was an incredibly important purpose, and one that we should respect for what it was. We seek to protect people in private relationships in different ways—absolutely—but not through this route. That would just stretch the legislation beyond its original intent to a most extraordinary extent. That does not mean that someone purchasing a service in the private sector does not have rights and is not protected from abuse or neglect. They are protected and they have rights of legal challenge against the provider through contract, criminal or tort law if an offence has been committed.

Finally, it is worth noting that the Human Rights Act brings the European convention on human rights into domestic law. Clause 48, in going further than the convention, would create confusion. Supporters of the clause have not produced a body of cases where the absence of the provisions in the clause has led to people being denied justice. That suggests that the clause is being proposed, in a sense, as a sticking plaster to deal with other failings of the care system. That is the wrong approach in principle and in practice. I ask those who argue for the clause: did the existence of the Human Rights Act protect individuals from abuse or neglect in Mid Staffordshire hospital? No, it did not. Did it protect any other individual? The right hon. Member for Cynon Valley (Ann Clwyd) has been brilliant in raising concerns about the quality of care in our NHS hospitals. Did the HRA protect any of those people from abuse or neglect? Of course it did not.

Let us focus on effective measures to stop abuse or neglect in the first place, and let us not try to pretend that the clause will achieve something that we all, in our heart of hearts, know that it will not achieve.

Mr Jamie Reed (Copeland) (Lab): I bow to the Minister's legal expertise on these matters. He has made a persuasive case in parts. Given that we are all passionate about achieving, as far as possible, comprehensive integration of care services in the public and private sectors, is he entirely confident, bearing in mind the intention of the drafters of the law in question, that service users in both the private and the public sectors will enjoy precisely the same protection under the law without the clause?

Norman Lamb: Yes, I am. The CQC's new fundamental standards will apply to all organisations registered with the CQC, public or private. The CQC will seek to ensure that all registered providers comply with the aims of the Human Rights Act in how it applies its inspection regime and how it uses its enforcement powers, including prosecution. The risk of prosecution is surely a greater fear than the risk of a claim under the HRA in a civil court.

If asked, "What would the Human Rights Act, if it were applied in the private sphere, give to individuals that is not available through contract law or through raising their concerns with their local authority, adult safeguarding board or the CQC?", I am lost for an answer. It is completely inappropriate.

Paul Burstow: I am listening to the Minister's argument, and I understand his concern about the potential overreach in applying the Human Rights Act, but part of the reason why the Joint Committee made its recommendation and why their Lordships added the clause to the Bill is that there is an ongoing concern about a lack of clarity in care arranged by local authorities following the YL *v.* Birmingham city council case. The law is not clear about whether publicly arranged care is covered by the Human Rights Act. We need to make it clear, but the Minister is saying that it will not be made clear.

Norman Lamb: I understand my right hon. Friend's concern, and we can continue to have that discussion. However, we are talking about a clause that would apply the Human Rights Act to the completely private contract between the care home in Sutton and the individual. Is he really suggesting that the drafters of the European convention had that sort of relationship in mind? Of course they did not. The individual in that care home needs the same protection as anyone else, but they get all the protection in real terms that any other individual who is funded by the state gets. I say in all seriousness that there is a risk that the clause is tokenism, not real protection. We are all concerned about the

[Norman Lamb]

protection of vulnerable individuals, but I do not see what the clause would provide that is not already provided more effectively in other ways.

People and their loved ones want and need the reassurance that they will be treated with dignity, compassion and kindness. What we should be and are doing is concentrating on preventing harm, abuse and neglect from happening in the first place. The clause would not deter those who perpetrate abuse or neglect, or galvanise providers into preventing those things, any more than the deterrents that are already in criminal, contract and tort law.

The director of a care company who is neglectful of their duties and allows a frail, elderly person to suffer as a result will be much more fearful of the potential for prosecution and an unlimited fine than of the possibility of a claim under the Human Rights Act in a civil court. The real difference will be made by the stronger measures the Government are introducing to improve care; the emphasis that the Care Quality Commission is placing on individual experience; the role that clinicians and users play when care homes and other care facilities are inspected; the improvements in commissioning and safe routes for whistleblowers; and the role of the chief inspectors.

Debbie Abrahams (Oldham East and Saddleworth) (Lab): The Minister is making a cogent argument. What are his concerns about the clause standing part of the Bill?

Norman Lamb: My concerns are what I have already said. It would achieve nothing, and I do not like legislating for tokenistic reasons. I believe in the importance of the state in enabling and protecting, so I want to ensure that we use legislation for real purposes, not tokenism. There is an enormous risk that if the clause were allowed to stand part of the Bill it would set an extraordinary precedent in taking the Human Rights Act into every aspect of our lives and diverting the Bill from its original purpose, which is to protect people from the overbearing state.

If the hon. Lady's party returns to Government at some stage, does it really want the added complication of overlapping and confusing legislation in areas where it was never intended to apply? Of course it does not. It wants simplicity, clarity and proper protection for people, which is what this Government seek to achieve.

Significantly, the Bill places adult safeguarding on a statutory basis for the first time with the local authority in a lead role and places beyond doubt that the police and the NHS are key partners in the prevention, detection of and response to abuse. The Bill is designed to strengthen the culture of transparency and accountability in adult safeguarding by requiring community engagement, public reporting, statutory safeguarding adults reviews, and the involvement of local healthwatch organisations. With those things in place, we will have a strong and effective mechanism if something goes wrong.

I understand why people want the clause and support its underlying intent, but it would not deliver what they want. Our method is much more effective and will ensure that protection is in place. Fundamentally, this debate is about the safeguarding of vulnerable people, which is what we are all interested in, but clause 48 would not achieve that and I think we all know it. On that basis, I beg to move that clause 48 does not stand part of the Bill—I think I have put that correctly, Mr Bayley.

3 pm

The Chair: At the end of the debate, I will put the question that the clause stand part of the Bill, so those who are persuaded by the Minister's argument can vote no at that point.

Liz Kendall: I will set out why clause 48 should stand part of the Bill. I listened carefully to the Minister's passionate series of arguments, and I do not doubt for one second that he believes the points he made to be right. He told the Committee last week that he used to be a lawyer, which I did not know, so he will have much more personal experience and understanding of legal issues than me, who only did history at university.

Norman Lamb: Only? Do not denigrate history.

Liz Kendall: I am not denigrating history; I am just saying that I did not do law.

My understanding of why clause 48 is needed is drawn from four sources: a strong, helpful and clear briefing from the Equality and Human Rights Commission; a joint briefing produced by the Law Society, Liberty and a group of care charities that work with older and disabled people, including Age UK, Mind—to which the Minister referred in his comments about power of entry—Scope and Disability Rights UK; the recommendations of the Joint Committee on the draft Care and Support Bill; and a close reading of several excellent contributions made in the other place by extremely eminent and experienced peers, including Lord Low of Dalston, who tabled the clause, Lord Mackay of Clashfern and Lord Hope of Craighead. My comments are inspired by that strong group of people, and I want to explain why they think the clause is needed and to go through why some of the arguments made by the Minister today and the Department of Health previously are incorrect.

All the organisations that I listed believe that clause 48 is needed in order to make it clear in legislation that all providers of social care services regulated by the Care Quality Commission are exercising a public function for the purposes of section 6 of the Human Rights Act. Their reasoning for why the clause should be included relates back, as the right hon. Member for Sutton and Cheam mentioned, to the House of Lords decision in the case of YL *v.* Birmingham city council in 2007.

Norman Lamb: Will the shadow Minister give way?

Liz Kendall: I hope that the Minister will let me proceed with some arguments first. I will give way later.

The Law Lords held that a private care home providing residential care services under contract to a local authority was not performing a public function, so its residents were excluded from protection by the Human Rights Act. In 2008, the Labour Government sought to close the loophole through section 145 of the Health and

Social Care Act 2008 to make sure that people had equal rights, whether they were cared for in a private or not-for-profit care home or in a council or state-funded care home.

However, section 145 of the 2008 Act only partially closed the loophole. First, it only covered people placed in residential care under the National Assistance Act 1948, and therefore continued to leave out people in private or third sector residential homes arranged under section 117 of the Mental Health Act 1983 or sections 4A and 4B of the Mental Capacity Act 2005, and those receiving NHS continuing care. Secondly, the loophole remained open for those with publicly arranged but privately funded home care or domiciliary care services. The Equality and Human Rights Commission is very clear on this point. It states that it has taken advice from senior counsel, and that

"the effect of the YL case is that home care services provided under contract to local authorities are...outside the scope of the HRA."

We have said regularly throughout the progress of the Bill that the key challenge in future is to help more people to stay living healthily and independently in their own home. Around 500,000 older people currently receive home care commissioned by their local authority, and 84% of those people receive care from private or third sector organisations. Because of the loophole, which remains partially open, many users of home care services may be denied direct legal redress against a care provider for any Human Rights Act abuses that arise. This is the context within which we are debating the clause. There are clear gaps in the system, with some people receiving publicly funded care being able to seek redress directly through the provisions of the Human Rights Act, but others, in private or third sector-provided home care, not being able to do so. That is the context, and that is why those organisations, lawyers and legal groups believe the clause is needed.

Norman Lamb: Does the shadow Minister have any idea why the Labour Government limited their action to extend the Human Rights Act to circumstances in which a private care home was being commissioned and funded by a local authority to provide care to someone, but did not extend it, as she now argues we should, to the circumstances of an entirely private arrangement, where no state money is involved, which is covered by the clause? Does she really think that that was in the minds of the drafters of the original European convention, or indeed the Human Rights Act when it came into force in this country?

Liz Kendall: The honest answer is that I do not know why the loophole was not fully closed, not only in relation to the privately funded providers of residential care, but, crucially, to home care services. Perhaps the Minister will explain, but I do not know why that happened at the time. We are talking about two specific aspects of the loophole. One concerns the group of people in residential care who are not covered, and the other concerns those in domiciliary care. I do not know whether officials went through all the papers at the time to find out why that happened. I am explaining the basis of the problem. The point is about people having equal protection and equal redress under the law, whether they are in privately funded, third sector or publicly funded organisations. The care organisations believe that people should have equal rights under law.

Norman Lamb: Could the shadow Minister give any example of a protection that could be provided to someone that they do not already have under existing legislation or as part of the steps we are taking with this Bill?

Liz Kendall: I will explain at the end of my comments why Labour members of the Committee and the organisations I have cited do not believe that this is the solution to the problems of poor quality care and why they believe that the amendment is necessary.

I am sure the Minister has read the House of Lords debates, so he will know of a number of cases involving individuals in care homes. In one case—I am not sure whether it was cited by Lord Low—a woman in a privately funded care home said, I think, that people should have the right to die. The providers of the care home did not like what she had said. The woman had not said that she was going to do it and neither was she encouraging others to do so, but the providers asked her to leave. She had no recourse to that. She was not able to say, "That was my freedom of expression about my view on a particular issue". When this episode was cited in the other place, it was given as an example of why freedom of expression should be there for people under the Human Rights Act. The woman was not able to say that to the private provider and she was told to leave the home.

I will go through some of the arguments that the Government have made against the clause. With respect to the Minister, they have changed slightly over the course of the Bill's progress. The first—I believe this was part of the Department of Health's response to the Joint Committee on the draft Bill—was that the clause was not needed. They said that the providers of publicly arranged home care services should consider themselves already bound by the Human Rights Act.

That argument is slightly different from that made by the Minister, who said that private providers, whether they are home care or residential care services, should not be bound by the Act.

Norman Lamb: Will the shadow Minister give way?

Liz Kendall: If the Minister will bear with me until the end of my point, I will give way. He said that private providers should not be included, but, as I understand it, the Department of Health's response to the draft Committee was that private providers of publicly arranged care, whether they are home or residential services, should consider themselves already bound by the Human Rights Act.

The Equality and Human Rights Commission disagrees with the Government's legal analysis, as does the Joint Committee on the draft Bill, which said that,

"as a result of the decision in the YL case, statutory provision is required to ensure this."

A number of leading peers who spoke in favour of Lord Low's amendments on Report also disagree. Lord Mackay, who, as hon. Members know, is a former Lord Chancellor, said that

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"an amendment was made to the 2008 Act which did not extend to regulated home care services, so there is a gap".

Lord Hope, who, as hon. Members know, is a recently retired deputy president of the Supreme Court, said:

"Comments of the kind that were made, that people should consider themselves bound by a convention right, however well intentioned, do not have the force of the law … they leave the law in a state of uncertainty because they do not have the force of the law, and they have no relevance to a decision that the court would have to take."[*Official Report, House of Lords,* 16 October 2013; Vol. 748, c. 549.]

All these bodies disagree with the Department of Health's first argument, which is that the clause is not needed because private, home and residential care providers should already consider themselves subject to the Human Rights Act

3.15 pm

Norman Lamb: The argument about considering themselves covered relates to providers of publicly-funded, non-residential care. The shadow Minister dealt with this issue earlier in her speech. It does not relate to the argument about the care given by an entirely private provider to an individual who pays for it themselves. The Department has never argued that such providers should consider themselves bound, for the very reasons I have explained. It is completely inappropriate to use the human rights legislation to intervene in entirely private relationships between individuals.

Liz Kendall: Does the Minister think that publicly arranged care services should be subject to the Human Rights Act? There are two different issues: one is that of entirely private care, and the other is that of publicly arranged but privately funded care. The reason why there is such a wealth of support behind clause 48 is that it ensures that publicly arranged but privately funded home and residential care services should come under the Human Rights Act.

Norman Lamb: The individual in those circumstances can, potentially, make a claim against the public body that arranged the service. The public body—the local authority—is covered by the Human Rights Act. That seems to be the appropriate body to which legislative protection should be attached, and not the private contract between two individuals, even if it has been arranged by a public body.

Liz Kendall: Various Members of the House of Lords and the EHCR do not agree with that analysis. Even though the Department of Health asserts that publicly arranged but privately funded providers come under the Human Rights Act, they say that that is not clear from the case of YL *v.* Birmingham city council. They say there is uncertainty in the law because of that decision. There is a gap and that is why it must be covered.

There are two separate issues: one concerns purely privately arranged and purely privately funded care, and the other concerns those who have publicly arranged but privately funded services, which is why many of the organisations believe it is so important. More and more people are likely to have their care publicly arranged because of the increase in the means test, which we discussed earlier. More and more people are likely to have their care publicly arranged even if it is privately funded because of the other changes in the Bill.

Norman Lamb: The shadow Minister is right. That could well be the case. But does she really believe that the Human Rights Act and the convention behind it should apply in those cases that have not been publicly arranged, such as where the hon. Member's mum, of her own volition, goes to a care home and enters a contract for the provision of care? Is she really saying that the Human Rights Act should apply in those private contracts? The Labour Government chose not to do that.

Liz Kendall: I shall say what I suspect many hon. Members would expect me to say, which is to highlight the views of organisations that represent older people. Caroline Abrahams, the charity director of Age UK, says:

"175,000 older people in independent care homes pay for their own care in this country and it is appalling that they are second class citizens when it comes to the legal remedies available to them if they are abused or neglected.

The House of Lords made the right decision when they decided to amend the Care Bill by closing the loophole once and for all".

I want to move on to the third argument against clause 48—the Minister has touched on this—which is that regulating the work of the CQC is a better way to target specific issues of human rights abuses. I understand that the CQC is under a duty to have due regard to protect the human rights of people using care services in performing its functions, which include inspecting all care homes and registered home care providers. However, the question that many organisations are asking is: why should people in publicly arranged but privately funded social care have any fewer rights than those in publicly funded care? They should have a clear and direct legal route and remedies with which to challenge providers, rather than having to wait for a CQC inspection, report, review or action plan.

Norman Lamb: Will the hon. Lady give way?

Liz Kendall: Let me finish this final point about the arguments against the clause. A lot of arguments have been made to say that clause 48 would risk the provisions and the human rights protection extended to other sectors. However, clause 48 is targeted specifically on regulated social care providers. This point was repeatedly made in the House of Lords debate. Lord Low tried to be extremely specific in targeting this clause on social care, so that there was not a risk that it would be extended to all manner of other services.

I have never been in favour of slippery-slope-type arguments. Sometimes it is an easy get-out: "You have done this and it will inevitably lead to x, y, z and so on". The Government are in danger of making that argument. Clause 48 is specifically targeted and focused.

Norman Lamb *rose—*

The Parliamentary Under-Secretary of State for Health (Dr Daniel Poulter) *rose—*

Liz Kendall: I do not know whether to give way to the Health Minister or the care Minister at this stage. I will give it a whirl: Dan first.

Norman Lamb: That is not parliamentary language.

Liz Kendall: I am sorry; Mr Poulter—Dr Poulter.

Dr Poulter: I just wanted to tease out a little what the hon. Lady is saying. Does she not accept that when someone is publicly funded and has a publicly provided service, somewhat less choice may be involved? However, someone who privately funds their own care and chooses to go to a publicly provided service could have recourse to an immediate remedy if they are not happy with that service and choose to move away from it. So there is a clear distinction in the way that the process works. A choice can be made on whether or not to enter into and continue contracts. That is something that I think the hon. Lady has not addressed.

Liz Kendall: I would just say to the Health Minister that it can be very tough for people to leave their own home and go into a care home—whether it is publicly or privately funded. I do not quite get what the Minister is saying. It is not easy just to say, "I don't like what they are doing; I'm moving elsewhere."

Dr Poulter: If it becomes a human rights issue, then of course a person is unhappy with the care being provided. Fundamentally, if they consider it to be a human rights issue—which it could be—they are making a statement that they are unhappy with the care provided. Therefore, they would want to be moved from the home because it is, in theory, breaking their human rights. So I do not think that the hon. Lady's argument stacks up at all.

Liz Kendall: It is not that easy to move in and then move out of a care home. I will say no more than that.

Norman Lamb: The shadow Minister, in what she was reading—I am not sure whether it was a quote or her speech, so forgive me—correctly made the point that individuals must be able to have the right to seek a remedy without having to wait for the Care Quality Commission to act. The point is that they do. This is the really important point. They have rights in contract. Every individual who is in a care home that they pay for privately enters a contract. They have rights under the contract to pursue claims for compensation. Is the hon. Lady aware that the compensation rights under the Human Rights Act 1998 are almost always very limited? So those people have more rights to pursue the very remedy that she is after through the court, either in contract or in tort. I can reassure her over her concern about the lack of a right, because there is one for them to pursue.

Liz Kendall: I am actually making a different point. All the organisations that I have cited are concerned about a matter that they believe is wrong in principle, about people in privately funded homes, including placements that are publicly arranged. I do not think that the Minister has responded to that point. He made a point about privately funded and privately arranged circumstances. However, he has not covered the really important issue of people who have privately funded but publicly arranged home or residential care. There is clearly a loophole in that area that needs to be closed.

This is about people having equal rights under the law, whether they pay privately, or are funded publicly or by the third sector. I am sure that other hon. Members will want to add to the debate, which is a complicated one. I am doing my best to set out the advice that we and many other hon. Members have received in briefings on the different legal issues. In their joint briefing, Age UK, Scope, the Law Society, Liberty and others rightly say:

> "We fully accept that bringing all regulated social care services within the scope of section 6 of the Human Rights Act will not alone solve the problems of undignified care and human rights abuses in care settings."

They are clearly not saying, "This is the solution." That is what the Minister hinted at in his speech. They are explicitly saying that clarity is needed in the direct application of the HRA across all care services to ensure that people's rights are protected.

Norman Lamb: I just want to be clear that we can have the discussion about the hon. Lady's Government's extension of the Human Rights Act to residential settings funded by the state, but not to publicly funded domiciliary care. However, my big worry about the clause is that it goes well beyond that and deals with those entirely private arrangements. That is where I suspect the hon. Lady is with me. When there has been no arrangement, no funding, it is an entirely private arrangement. That is where I suspect that we are in agreement if she is completely honest with herself. I would end by saying—

Liz Kendall: You are not ending; you are intervening.

Norman Lamb: I am ending my intervention by saying that we consider that everyone should be treated as though they were covered, whatever the setting, in terms of the standards that we expect. That is how the CQC exercises its function, so that everyone is treated in exactly the same way. I apologise for the length of my intervention.

The Chair: Order. Interventions should be short. Of course, the Minister will have the right to speak again in the debate when he replies at the end if he so wishes.

Liz Kendall: I was not quite sure what the intervention was. When the Minister replies at the end of the debate, I hope that he will say whether he agrees with the huge weight of evidence that publicly arranged but privately funded care does not come under the Human Rights Act because of this loophole, which many organisations say needs closing. The Minister has not answered that specific point, which I am particularly concerned about.

I am sure that there will be many complicated discussions about this both in Committee and on the Floor of the House. I am not a lawyer of any kind, let alone a human rights lawyer. I simply cite those organisations, Members of the House of Lords, the Equality and Human Rights Commission and others, all of whom disagree with the Minister—passionate, informed, experienced and caring though he is.

3.30 pm

Norman Lamb: Can I quote the shadow Minister in "Focus"?

Liz Kendall: On the LibDemFocus website? No. *[Interruption.]* Perhaps I was slightly over-generous in giving way.

[Liz Kendall]

Those organisations have all disagreed with the Minister's arguments. I am sure that hon. Members will listen more to those voices than to mine. As the debate carries on, I hope that the Minister will come back on the specific, narrow point about publicly arranged, privately funded home care services not coming under the Human Rights Act and on whether he agrees that that loophole needs to be closed. For the record, the Minister cannot use the quote on LibDemFocus.

The Chair: Order. We are not debating political party leaflets. Quite a number of Members are trying to catch my eye. I call Paul Burstow.

Paul Burstow: I echo the comments about the Minister's passion, about him being informed and certainly about him being caring. I hope that I might prevail on him to reflect further as we go into the debate. I want to speak because part of the reason for this debate is that an amendment moved in the other place gave life to a recommendation of the Joint Committee. I feel duty bound—more than duty bound, in fact—to express support for my Committee's recommendation and to explain to the Minister and this Committee why the clause should stand part of the Bill. I want to talk about the points that the Minister made in opening and to say a little about why we are discussing the provision.

The Minister talked about how we should place ourselves into the minds of the convention framers to understand how they saw the world when they drafted the original convention on which our human rights are based. That is difficult to do, but I suspect that the eyes that they were looking through inevitably saw a world rather different from the one that we are in today. In that sense, it is incumbent on legislators to be always mindful of how those universal and fundamental human rights are interpreted in day-to-day life. In that context, there is a case for at least debating this issue, which the state clearly views as something that it has a legitimate interest in regulating—it regulates who provides and how the provision is supplied. It will go further in the future with the fundamental standards.

The state is involved in the private relationships that the Minister talked about. As he asserted, the Care Quality Commission will continue to have duties under the 1998 Act anyway. If a person is lucky enough to cross the threshold of a care home as someone whose case has been arranged by the local authority, when they cross that threshold, their Human Rights Act obligations and ability to seek redress though the Act remain intact. I know that the Minister will come back to me on that point in a minute. A person's obligations and ability to seek redress dissolve if they have arranged the care themselves. That raises questions that I want to put to the Minister in a moment. The Bill moves things on; it evolves the context in which the individual relates to care that the state is funding.

As the Minister said earlier, we need to be careful that there are no unintended consequences in how the law is interpreted. The Human Rights Act is not just about safeguarding. It is not just negative, but contains positive obligations as well. Without the clause, the law, in my mind and in the minds of the Joint Committee and the many organisations that the shadow Minister talked about, is confused. If we return to situation before the clause was added to the Bill—the position extant in the law at the moment—we will have a dog's breakfast, with only parts of the problems fixed. We will have a partial fix of section 145 of the Health and Social Care Act 2008, but it will leave uncovered domiciliary care arranged and paid for by the state and some types of residential and nursing care arranged and paid for by the state. That is an odd, messy set of circumstances.

Dr Poulter: I pay tribute to my right hon. Friend for the excellent work that his Committee did in scrutinising the draft Bill. He has made some excellent points in teasing out the issues, but on the principles of the Human Rights Act and dealing with the overbearing state, does he not agree that while an individual with private funding has the choice of state and private providers, the relationship is different for those who are funded publicly because they have less choice, perhaps only through publicly provided services? The only option being the state is a different set of circumstances from someone who can choose between the private sector and the state.

Paul Burstow: I am grateful for the question, but my answer is no, because, once the legislation is enacted, we will have included a personal budget mechanism and clarified the rights in respect of direct payments. A citizen may, therefore, have a relationship with a local authority, but that local authority gives the money to them to make their own decisions about purchasing care. Indeed, my question to the Minister is: does that person, given the state's money through a state process, still enjoy the protection of the Human Rights Act? Unless we have the clarification that the clause provides, that question may be opened up. That is why it is important. I regret that we do not have the benefit of knowing what the Government intend to put in its place, as in that context we could have made more progress.

Norman Lamb: I understand my right hon. Friend's argument about the mismatch in the law as it stands, with those in care homes being publicly funded being covered but those in domiciliary care that is publicly funded falling outside. We can continue that discussion, but, if he is honest, does he not feel a touch uncomfortable about not those categories but the entirely private arrangement between a citizen in Sutton and a private care home, with no public money or state involvement, being covered by the clause? As my hon. Friend the other Minister—if that is the right way to describe him—said, that individual and family ultimately have the power to move if they feel that their rights are being undermined in some way.

Paul Burstow: The other Minister sounds like a good title for a drama—perhaps we can dwell on that at some point. In answer to the Minister, that invites a question I had in mind to come to later. The Bill provides for an individual citizen to ask the local authority to arrange their care. In those circumstances, the state has taken on a responsibility to arrange the care, so does the Human Rights Act apply? Was that a public function? We need to know, to avoid the potential for confusion and misunderstanding in the future.

There is the scenario where someone has gone to the local authority and registered their interest in being metered towards the cap. We can debate whether "the

cap" is the appropriate name, but that is what we are trying to achieve: a fair allocation of public resources. In that scenario, someone will spend a period of time in a care home not covered by the Human Rights Act, but, when they reach that magic number, the Act will suddenly apply to them. Will they not find that slightly curious and will not the person in the room next to them find it even odder that they have longer to wait?

Norman Lamb: I would be with my right hon. Friend if we were talking about a substantive difference of rights between two individuals in a care home—or in any other setting—with a private citizen having fewer rights than the other individual because of their funding. However, he is enthusiastic about all the steps that this Government are taking through the Bill to improve protection and ensure that everyone has the same level of protection—the measures on the prosecution of corporate providers that fail to provide good standards of care, the rating of care homes, and other powers of the CQC. Does he not think that it all becomes a bit of a meaningless debate when we know that the difference in rights does not exist?

Paul Burstow: Reference has been made to the debate in the other place on the amendment that included the clause in the Bill. Lord Hope of Craighead's first point was that

"Section 6(3)(b) of the Human Rights Act is one of the few provisions in what was an excellently drafted Act which, in my experience, judges have found rather difficult to apply in practice."—[*Official Report, House of Lords,* 16 October 2013; Vol. 748, c. 548.]

For that very reason, it is right that we test the Government's position—to destruction, if necessary—to ensure that when we come out of this Committee, report back to the House, and come out with an Act of Parliament, that Act is not the dog's breakfast that is currently served up to the public, when it comes to understanding when the Human Rights Act applies in care.

I understand the Minister's argument, but I will provide a real-life case where the clause would make a difference. Let us say that a private contract is entered into with a care home, someone moves into that home, and their relatives are rightly persistent in ensuring that their loved one—their mother or father—is receiving the care that they want. In a small minority of cases, the owner gets rather cheesed off with the relative who is pursuing them too vigorously, and decides that the best way to deal with that inconvenience is to ask the resident to move. In those circumstances, as we know, all too often, tenancy rights of residents in care homes are weaker than many other tenancy rights. It is easy for someone to be moved on in those circumstances.

The issue is the difference between a person who is covered by a local authority, for whom there will be additional protections, and an individual who relies on their own contractual arrangements. If they had the benefit of the Human Rights Act's coverage as well, they would have a back-stop protection. That is why I think there is a debate to be had on the subject.

Norman Lamb: Does my right hon. Friend not accept that the example he gave seems to be the only example that is ever given? There does not seem to be any other scenario in which the protection that is described as being of fundamental importance does something that no other provision allows for.

Even when we get to that one example, does my right hon. Friend not accept that there can only be mere speculation on what the outcome might be in a human rights case? There are balancing rights here; there are the rights of other residents, and the rights of the care home owner. Governments have been careful for a reason not to provide security of tenure to a care home resident. No Government have chosen to do that. At best, it is pure speculation. Is that not right?

Paul Burstow: I do not think it is right to say that it is pure speculation. It was an attempt to give life to otherwise abstruse and dry law. Often we are challenged to do that, and that is why I did it.

The Minister's response to the shadow Minister about the role of the fundamental standards and the intention behind them, and how the Human Rights Act will project into the way in which they are drafted, was a helpful reassurance. I thank him for that, and I hope that there will be an opportunity for those of us who feel passionately on the issue to be involved in that, because we want to ensure that the standards are got right.

The Government told the Joint Committee that all providers of publicly arranged care and support, including private and voluntary sector providers, should consider themselves bound by the duty imposed by section 6 of the Human Rights Act. The question for those of us who want to see that work in practice is how the Government intend to proceed to ensure that the gaps that I have been describing—the fact that a wish cannot be checked and challenged in court—are properly addressed. In the debate on 16 October, the former Deputy President of the Supreme Court, Lord Hope, said that he was not persuaded by "well intentioned" words that

"could not be relied on…in a court." —[*Official Report, House of Lords,* 16 October 2013; Vol. 748, c. 549.]

He said that there was therefore a need to legislate in this area.

3.45 pm

Our solution, which may be overly simplistic from the Minister's point of view, is to be clear and say that those who are regulated by the Care Quality Commission should be caught by the definition of a public function for human rights obligations. On the one hand, the Minister is telling us that that will have no effect, but on the other, he is telling us that it will set a huge precedent. If it will have no effect, how can the precedent be big?

Norman Lamb: My right hon. Friend tempts me again, but I will keep my response brief. The point is precisely that the change would have no impact of value in the care settings, for reasons that I explained, and because of the steps that the Government are taking, but at the same time, it would encourage the argument that if the Human Rights Act applies in the entirely private relationship between an individual and a care home or domiciliary care provider, paid for privately, then it can apply in every other sphere of life. That is ridiculous.

Paul Burstow: Again, the former Deputy President of the Supreme Court, who has considered these matters for far longer than any of us has, tried to deal with that concern in the debate, which I am sure the Minister has read:

[Paul Burstow]

"I do not see that there is any real risk that, by dealing with the matter in the targeted way that the amendment of the noble Lord, Lord Low, seeks to do, it will be taken as a signal in the courts that there is some wider reach in Section 6(3)(b) from that which was being discussed in YL."—[*Official Report, House of Lords,* 16 October 2013; Vol. 748, c. 550.]

YL is the case that we have been talking about. I understand the concern, but someone with form in this area who is held in some respect when it comes to interpreting the law seems to offer us a solution.

I have asked three questions. I hope that the Minister will tell us whether the Human Rights Act covers the situations that I set out; that would be useful to know. It would have been better if the Minister, rather than moving that the clause should not stand part of the Bill, had tabled an amendment in lieu of the clause, setting out what the Government intend to do. That is the only way the matter will be resolved in the House of Lords. If it is not resolved, all that will happen is that the House of Lords will put the clause back in. I hope the Minister understands that unless we have clarity about what the Government intend to do, the concerns that my cross-party Committee had will not be addressed, and I suspect that the Lords will keep returning to the matter until they are.

Jim Shannon (Strangford) (DUP): I do not doubt for one second the Minister's sincerity. We are all impressed by his commitment and work. However, these issues have been brought to our attention by a number of organisations—Age UK, Mind, Disability Rights UK, the Alzheimer's Society, and the group that they asked to work on their behalf, the Law Society. I want to build on the issues that the hon. Member for Leicester West and the right hon. Member for Sutton and Cheam raised. Although I will not speak in as much technical detail, I want to ask the Minister questions about what I feel is important.

The decision that private and third sector care home providers will not be directly bound by the Human Rights Act means that thousands of service users have no direct legal remedy that allows them to hold their providers to account for abuse, neglect or undignified treatment. Although the public commissioning service is bound by the Human Rights Act, that is of little practical value to individuals who are at the receiving end of poor or abusive treatment. The Law Society and the other organisations said that the current law does not give them protection. The right hon. Member for Sutton and Cheam and the hon. Member for Leicester West outlined that problem well. The organisations said that statutory provision was required, and they feel that they need to be reassured.

The hon. Member for Leicester West put her case and referred to a number of eminent lawyers; we are all aware of the comments that they made. Indeed, the House of Lords came up with the same assessment on Report: statutory provision is required. Perhaps the Minister will confirm that those people who are eligible for care, but who, owing to means-testing, have to arrange and/or pay for their own care—the self-funders—therefore lack full protection under the HRA.

Norman Lamb: Does the hon. Gentleman not struggle a little with the concept of the private care home in his constituency being regarded under the clause as, in effect, a public body? How would the husband and wife, running that little care home with four residents, feel about being defined as a public body? Does he really think that that was part of the thinking behind the European convention on human rights, and indeed the Human Rights Act, when it was introduced by the previous Government?

Jim Shannon: I understand the point the Minister makes. We are discussing the whys and wherefores and how to take the matter forward. I am not a lawyer; I do not have the legal mind for such matters. Issues are brought to my attention by people who tell me their concerns, and I express those concerns on their behalf. I am duty-bound to do so.

To date, at least for people who are assessed as eligible for care in their own home, the local authority's obligation to arrange care, regardless of the person's resources, provides a degree of protection under the Human Rights Act. The local authority's duties to arrange care are subject to the HRA, even though the provider might not be. The changes to the system for arranging care, to be introduced by the Bill, make the position less clear-cut. People who are entitled to local authority care in their own home, but have to pay for it, may no longer be automatically protected by the Human Rights Act unless they request that the local authority arranges their care. I fear that many will not make a request, as they will not be able to afford to pay for the cost of having the local authority arrange their care, on top of the cost of the care itself.

Some argue, as I think the Minister does, that further legislation is not necessary to protect people's human rights, suggesting instead that regulation can be used to focus on specific issues. It is true that the CQC is under a duty to have due regard to the need to protect the human rights of those using care services when it performs its functions. However, I must respectfully point out that there are people who are vulnerable and outside the law, as we see it at the moment.

I fully accept that bringing all regulated social care services within the scope of the Human Rights Act will not alone solve the problems of undignified care and human rights abuses in care settings. Improved regulation, additional safeguarding legislation and better training must also play their part; I accept that. However, evidence continues to mount that shows that without the direct application of the Human Rights Act and a proactive approach to the promotion and protection of rights, abuse, neglect and undignified treatment are commonplace occurrences. If they continue to be so, we need legislation that addresses that.

Grahame M. Morris: As has been indicated by members of the Committee, there was considerable support for the original clause 48, so I would like to speak against the Minister's proposal to delete the clause. Eminent Lords in the other place introduced this clause into the Bill, and there was cross-party support. The Government now seek to take this clause out of the Bill. As we have heard, the clause clarifies that all social care providers—private as well as local authority—have duties under section 6 of the Human Rights Act. As the right hon. Member for Sutton and Cheam indicated, that approach was recommended by the Joint Committee that scrutinised the draft Care and Support Bill; it felt that that would

provide equal protection for all users of social care, regardless of where that care was provided and who paid for it.

In relation to human rights and social care, the lack of clarity in the scope of the Human Rights Act arose in 2007, following the House of Lords decision. My hon. Friend the Member for Leicester, East—

Liz Kendall: West.

Grahame M. Morris: I apologise. Of course it is; it is far better in the west. She has already spoken about the test case of an 84-year-old woman suffering from Alzheimer's who was placed in a home by Birmingham city council. I am not a lawyer, but I find it difficult to understand how the Law Lords concluded that a private care home providing residential care under contract to a local authority was not performing a public function, so its residents were excluded from protection under the Human Rights Act. It is clear in the Equality and Human Rights Commission's legal analysis, which is based on advice from senior counsel, that as a result of this test case, home care services provided under contract to local authorities are also outside the scope of the Human Rights Act.

As my hon. Friend the Member for Leicester West said, an attempt was made by the previous Labour Government to close some of these loopholes. However, it was unsuccessful. The Minister has asked various Members whether they agree that we should close the loopholes: I think we should. It seems a perverse argument from a Liberal, just looking at the dreadful scandal of Winterbourne View and those extremely disadvantaged people, to say that those who are self-funders—as opposed to those who are funded by the state—should enjoy different protections under the Human Rights Act. The Minister asks what value it is and says—I paraphrase him—that the protection is minimal and there are other areas of redress. I want to come on to that.

There are some advantages here. If we retain clause 48 it will provide people who receive regulated home care—that is domiciliary care—with direct legal redress against their home care provider for any human rights abuses that are the provider's responsibility. The clause would do more—I refer to the point made by the Minister earlier—than just provide a tokenistic legal entitlement that could be enforced in the courts. The point that was made to the Joint Committee—

The Chair: Order. There is a Division in the House and I suspend the Committee's deliberations for 15 minutes.

3.58 pm

Sitting suspended for Divisions in the House.

4.24 pm

On resuming—

Grahame M. Morris: I was trying to put forward a case as to why the Committee should seek to retain clause 48 in the Bill. I was also trying to address some of the issues that the care Minister raised. He suggested that somehow the protections afforded by the Human Rights Act should be understated or not be overvalued. However, there are some positive benefits to extending those protections.

As I was just saying, the clause would do more than provide a legal entitlement that could be enforced in the courts. In the analysis by the Equality and Human Rights Commission, which was commissioned by the Government, clarifying human rights in this way would also encourage providers to build a human rights approach into service delivery, helping to drive up standards in the care sector. That is a very laudable aim; if it is possible, we should use that mechanism.

The commission's inquiry, "Close to home", noted the potential value of the human rights approach to home care services by changing the culture of service delivery and supporting a personalised approach to care, including encouraging service users to complain if necessary, without fear of retribution.

We have been talking about the basis of the Bill, going back to the discussions we had about the power of well-being in clause 1 and how important it is to change the culture of organisations. The clause fits in with that general approach.

Several times the Minister has referred to unintended consequences, but the inquiry heard positive examples of provider organisations that build a human rights approach into their services. Indeed, independent evaluation and research has demonstrated the value of human rights in improving standards and delivering person-centred care.

Earlier in the debate, my hon. Friend the Member for Leicester West produced some figures. The figures for last year showed that 385,000 people aged 65 and over received home care in England, as did 100,000 people aged between 18 and 64. So we are discussing big numbers. Indeed, when we debated earlier clauses, we talked about problems associated with 15-minute visits. Only 9% of contact hours were provided directly by councils with responsibilities for adult social services. The majority of those home care visits were on the basis of an individual contract between the service user and the provider. By contrast, 91% of contact hours were provided by the independent sector, by which I mean both private and voluntary sector providers.

What does that mean? Because of the current loophole in the application of the Human Rights Act, it means that users of home care may be denied direct legal redress against the care provider for any human rights abuses. I have already referred to the EHRC inquiry into older people, and the EHRC mentions this issue in the report it published in November 2011.

The EHRC found evidence of serious systematic threats to the human rights of older people using home care services. Without giving too many examples, it might be instructive for the Minister and the Committee if I mentioned some. The inquiry concluded that about half of older people—remember the number I just quoted, which was about 350,000—were satisfied with the services they received. The EHRC noted that while there was some evidence of good practice by local authorities and other provider organisations, there was also evidence of human rights breaches. There were examples of older people receiving inadequate support with food and drink, leading to severe weight loss and dehydration. That is one of the causes of the increased attendance at accident and emergency units.

Some home care workers had an unfounded belief that health and safety restrictions prevented them from preparing hot meals, which meant their clients were left

[Grahame M. Morris]

to heat up their own meals in the microwave. Although evidence of intentional physical abuse was relatively rare, several instances were reported. Some older people were neglected because care workers had been allocated insufficient time to complete everything that had been laid out in the care plan; that goes back to the point about 15-minute visits.

Problems also arose when workers under pressure carried out their tasks in a distracted and rushed way. A greater impact was reported for those with dementia. Some older people reported a lack of respect for personal privacy when intimate tasks were being carried out; a problem that was compounded by having a high turnover of care workers carrying out this intimate care.

4.30 pm

Some older people had no control over the timing of their visits and there were examples of individuals having to stay in bed for long periods of time in soiled incontinence pads. In contrast to care packages for younger disabled adults, of which there are 100,000 in this category, older people's care rarely includes social activities. The inquiry revealed a pervasive sense of isolation and loneliness among older people, especially those living alone.

In conclusion, it is essential that this clause remains in place to ensure—as I believe many members of the Committee would agree—that all users of regulated social care services, including services commissioned from private and third sector organisations, are protected by the Human Rights Act. The question is how we deliver this. The answer from noble Lords in the other place with a wealth of legal experience referred to by various hon. and right hon. Members, from all parts of the House of Lords, from the Joint Committee on the Care and Support Bill and from the Equality and Human Rights Commission, among others, is to let clause 48 stand part of the Bill.

Norman Lamb: It has been a genuinely thoughtful debate. All those who have spoken agree entirely on what we are trying to achieve: we have been debating the means by which we achieve those objectives.

I will make some quick points, because we have spent a lot of time on this issue. First, I remind hon. Members, and my right hon. Friend the Member for Sutton and Cheam, of Mid-Staffordshire hospital. Did absolute protection under the Human Rights Act stop any abuse or neglect? Absolutely not—it achieved nothing. As I said in my opening speech, it feels as if this is a sticking plaster because of other failures in the care system. I think that the package of measures that we are taking through this Bill and in other routes achieve those real objectives.

Jim Shannon: All hon. Members who have spoken on this matter have put forward representations from individual groups and organisations—the hon. Member for Easington dwelt on that as well. Has the Department had any opportunity to speak to those organisations to assure or convince them or hear their side of the story? They are telling us that they are not satisfied. I wonder whether the Minister has picked up on that himself.

Norman Lamb: As I have said a few times during the debates on this Bill in Committee, there has been the most extraordinary collaboration throughout the preparation of the draft Bill and the debate on it when it was in the other place. The Department's door has been constantly open to any organisation. This and other issues have been debated a lot during this period.

I am with those organisations in what they are seeking to achieve. I genuinely believe that this is ultimately tokenistic because I do not think that it makes a substantive difference to the rights that individuals have. I pointed out earlier the other steps that we are taking. The establishment in statute of adult safeguarding boards, something that has been widely welcomed and supported by the shadow Minister, the new, much tougher CQC inspections with a chief inspector of social care and a chief inspector of hospitals, and the corporate accountability that we are bringing in with the fundamental standards of care, all provide real protection for individuals in a way that I do not think the Human Rights Act would achieve, with the best will in the world.

As an additional assurance, however, I have made clear—and I think this reassured my right hon. Friend the Member for Sutton and Cheam to a degree—that the Care Quality Commission will go about its work with the new fundamental standards, in a sense applying the principles of the Human Rights Act to ensure that everybody gets treated in a way that respects their human rights. That is absolutely what we are all after and that is perhaps an important reassurance.

The shadow Minister expressed the concern that people will want a route to a remedy without having to wait for the Care Quality Commission. People who have private arrangements, who enter a contract with a care provider, have rights under that contract to pursue a remedy without having to rely on the Care Quality Commission to do so. Interestingly, and why there is a sort of balance of rights with the publicly arranged service for an individual, where the local authority funds the care of an individual in a care home, the contract is likely to be between the local authority and the care provider, so that the individual citizen does not, in that circumstance, have rights under a contract. The Human Rights Act could potentially provide some support and protection for that individual, but that is not the case in an entirely private arrangement, because they have rights under the contract which the publicly funded citizen does not have.

Liz Kendall: Can the Minister explain how that is supposed to work for domiciliary care? That is a point that everybody here has raised. The discrepancy is that there is some protection for those in residential care under the Human Rights Act, but not in either publicly arranged or publicly funded home care—domiciliary care—services provided in the third and independent sector.

Norman Lamb: That is where my Department has been clear, and was clear in the other place. Providers should consider themselves to be covered by the Human Rights Act. However, in the legislation passed by the previous Government, I think that in responding to case law they solely addressed publicly arranged funded care in a care home and did not address publicly arranged domiciliary care, which leaves a distinction between the two. The debate will continue on that, but—here I

suspect that in their heart of hearts, a lot of hon. Members are actually with me on this—should the Human Rights Act apply to the entirely private contract between a citizen and Mr and Mrs Smith running a small—

Dr Sarah Wollaston (Totnes) (Con): During his speech, the right hon. Member for Sutton and Cheam raised the issue of what would happen for someone who held a personal budget—in other words, money that was provided by the state but was entirely handled by an individual. It would not be a local authority direct payment, but a personal budget. The point is that this is a legal uncertainty and it would be really helpful to have that point clarified.

Norman Lamb: If a citizen benefits from a direct payment from the local authority, in other words, where the local authority hands over the money to the citizen, and the citizen arranges their care with a care provider—I think that is the circumstance which my hon. Friend describes—

Dr Wollaston: A personal budget.

Norman Lamb: Well, let us be clear about the terminology here. A personal budget in this legislation will be the budget that sets out where the costs are and what care is needed for that individual to meet their needs. The direct payment is where the funding is given to the individual in order to arrange their own care. Where that happens, where the money is in the hands of the individual, they then enter a contract with a care provider—it might be a domiciliary care provider or any other sort of contract, it might be with someone to do their shopping for them. In that circumstance, I think my hon. Friend would agree that the person doing the individual's shopping should not be a public body subject to the Human Rights Act. The recipient of a direct payment who arranges the care for themselves would not be covered by the Human Rights Act. It does not come within the existing change that was introduced by the previous Government that relates directly to people in publicly arranged care in care homes. I hope that is clear.

I would also make the point that the previous Labour Government, in responding to case law, chose to address the circumstance of an individual whose care in a care home was paid for by the state via the local authority. They chose not to address the entirely private contract between my mum and Mr and Mrs Smith running a small care home in Sheringham or wherever it might be. I think in their heart of hearts most Members of the Committee would agree that that simply has never been regarded as coming within the Human Rights Act. Both shadow Ministers wish me to give way.

Liz Kendall: Since the Minister is staring into our hearts and souls and telling us what we really think, I would say that most Members of the Committee would also agree that publicly funded home care provided by private and third sector providers should be covered. There are probably things that in his heart the Minister believes need to be covered. That is a gap that needs to be addressed.

Norman Lamb: I understand the hon. Lady's argument but she has to accept that the clause goes well beyond that and into that entirely private realm. That is where I have a real problem. In terms of the philosophical purpose of the human rights legislation—

Mr Reed: I would like some clarification. Following closely the precedent that the Minister cites regarding the previous Labour Government, will he jog my memory and that of other hon. Members? Is it not the case that with regard to the precedent of human rights law being used to enter into private contracts, that precedent has already been set recently with regard to a homosexual couple who wanted to use a bed-and-breakfast facility? The owners were not prepared to allow them to do so and subsequently that couple sought redress under the Human Rights Act. The Minister's fear regarding creep has already occurred.

Norman Lamb: I am grateful to my officials and my hon. Friend the Member for Weston-super-Mare for reminding me that the protection relied on in that case was the Equality Act 2010, not the Human Rights Act. I come back to the point that I made. We all know that the purpose of the Human Rights Act is the very important one of protecting the citizen against the overbearing state.

Paul Burstow: Will my hon. Friend give way?

Norman Lamb: I was just about to sit down.

Paul Burstow: In that case, I am delighted because I have two questions. The Minister answered one, from my hon. Friend the Member for Totnes, and the answer raised further questions, which I will not ask now but will come back to. It gives rise to the question, does a person who enters into a direct payment agreement do so in the knowledge that they have effectively disapplied themselves from the Human Rights Act? There is an interesting question as to whether a person knows that to be the case, regardless of whether it has an impact in practice.

My first question relates to the situation where a person asks for their care to be arranged by the council but pays for it themselves. Does the act of arranging bring it within the scope of the Act, in the Government's view? The other relates to a person who reaches the cap. Once they are at the cap and the state is paying, am I right to assume that they are then covered?

Norman Lamb: I am looking at my officials as I say this. It seems to me that a person in a care home who reaches the cap and then receives funding from the local authority would be brought within the scope of the extension of the application of the Human Rights Act passed by the previous Government. I am giving a legal view there, but that seems to me to be the case.

4.45 pm

To deal with the other question, what we know is that the extension by the previous Government brought within scope the individual in the care home, publicly arranged and funded, but it did not directly bring within scope the equivalent involving domiciliary care. The Department has made it clear that those providers should regard themselves as covered. That has not been tested in the Court, but that is the issue that remains to be determined.

Finally, I put it to hon. Members that we are dealing with a clause that goes well beyond that and into the entirely private realm. I suspect that most hon. Members,

hand on heart, would think that it does not make sense for the Human Rights Act to apply to those entirely private cases.

The Chair: I think I should put the question at this point. Colleagues persuaded by the Minister's argument should be voting no and those persuaded by the shadow Minister's argument should be voting yes.

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

The Committee divided: Ayes 10, Noes 12.

Division No. 7]

AYES

Abrahams, Debbie	Morris, Grahame M. *(Easington)*
Esterson, Bill	Munn, Meg
Kendall, Liz	Reed, Mr Jamie
Lewell-Buck, Mrs Emma	Shannon, Jim
Malhotra, Seema	Smith, Nick

NOES

Doyle-Price, Jackie	Newton, Sarah
Griffiths, Andrew	Penrose, John
Jones, Andrew	Poulter, Dr Daniel
Lamb, Norman	Stephenson, Andrew
Morris, Anne Marie	Wheeler, Heather
Morris, David	Wollaston, Dr Sarah

Question accordingly negatived.

Clause 48 disagreed to.

Clause 49

TEMPORARY DUTY ON LOCAL AUTHORITY

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

Liz Kendall: We come to yet more important clauses: clauses 49 to 53 are on provider failure and clauses 54 to 58 are on market oversight. I want to make some general comments on the new provider failure regime to be put in place through the Bill. I will come on to our amendments in the next debate, but it is important to have a brief discussion about these clauses.

Hon. Members may be aware that this is the first time that a national regime on provider failure in the care sector has been introduced. It emerged following the collapse of Southern Cross. The right hon. Member for Sutton and Cheam was involved in its development and he will be far more aware of all the details of how that was dealt with.

The Bill rightly seeks to put in place a mechanism to attempt to prevent such large-scale failure happening again and ensure that the local councils who commission and pay for care services, families and users know that there is a proper process in place to ensure that people have continuity of care and are not left high and dry if there is a failure. The amendments aim to ensure that the regime works as effectively as possible. It has an important new role for the Care Quality Commission and some new roles for local councils. I want to ensure that the CQC has all the powers it needs to take on that new role. I thank the Minister for paying attention to that point as his Whip tries to speak to him.

The new failure regime is welcome and necessary because we have seen quite a bit of change over the past eight to 10 years in the care provider market. Some of those changes may have accelerated since the financial crisis and the credit crunch. We have seen quite a lot of consolidation of care home providers into some very large providers. That is partly to try to make economies of scale. There has also been increasing involvement from private equity and venture capital companies with some very complicated financial structures. The real concern among many people, as we saw in the case of Southern Cross, is that while the private equity company made a huge profit, it put in place a flawed financial structure and put some vulnerable elderly people at risk when it failed.

Let me briefly remind the Committee what happened in the case of Southern Cross. When the company collapsed it was the UK's largest private care provider with, I think, 30,000 people receiving care in 750 homes. Many were concentrated in the north and north-east of England. When the company finally collapsed it caused real distress to the residents, their families and many of the staff working in those homes. The collapse of Southern Cross revealed some fundamental flaws in the private equity sale and leaseback model and raised serious questions about whether that kind of financial structure and many other complicated financial structures are too risky for what are essentially care services looking after very vulnerable people.

The American private equity firm Blackstone Capital Partners bought Southern Cross care homes in 2004. The same year it also bought Nursing Home Properties whose business included leasing care homes to providers; Southern Cross was its biggest tenant. Southern Cross then began a period of rapid expansion, buying up lots of homes, then selling them off and leasing them back at high rents. Blackstone certainly thought that this was a good market to be in: the population was ageing; more and more people would need care homes and this sale and leaseback model was a way for it to make a big return on its investment.

In 2006 Blackstone floated Southern Cross on the stock market and sold it for a profit of £500 million, tripling its original investment of £160 million. It also sold Nursing Home Properties to an investment fund, Three Delta. Southern Cross, and Blackstone when it was involved, had assumed that the fees from councils would keep on rising but when council funding started to be squeezed after the credit crunch the company started to get into trouble because it was not getting the fees it expected and the high rents it owed could not be met.

Southern Cross, I should note, was particularly reliant on local government funding. Only 20% of its residents were self-funders compared with a national average of 40%. But there was another issue: its occupancy levels were falling. I understand that that is because the care homes were not as good as some other places, and older people went elsewhere, and also because more people were receiving care in the community and at home—which we all consider a desirable goal. When the company noticed that occupancy levels were falling it did not invest in improving the homes. It may have been more concerned with keeping profits high.

There are still many care providers owned or backed by private equity and other venture capital and parent companies. An investigation by *The Guardian* in November

2011 found that more than 200,000 vulnerable people were being cared for in residential homes, or their own homes, by companies owned or backed by such private equity companies. I do not say that all those residential homes are at risk as Southern Cross was, or that all the complicated financial structures behind the providers are similarly risky. The difficulty is that it is often complicated to see what the deals are, who is involved in them, how they are structured and whether they are really safe and sustainable for the future.

Whatever new regime the Bill establishes, we must make sure that the Care Quality Commission will be fully able to assess the financial structures behind many care providers. I am not sure at the moment that the Bill is strong enough in that respect. We must get the regime right. We know from the latest budget survey of the Association of Directors of Adult Social Services that more than half of directors expect providers in their area to face financial difficulty in the next two years as a result of local authority budget savings. There is nothing new about providers closing and leaving the market; but with a market increasingly consolidating into larger providers with potentially risky financial structures behind them, and while there is also a big squeeze in local authority budgets, we must get the system right. We are here to protect vulnerable elderly and disabled people and their families.

In the Bill, responsibility for financial oversight is given to the Care Quality Commission. The Government consulted on that and put forward two options. One was that the responsibility should be given to Monitor, which currently regulates foundation trusts; the other was that it should go to the CQC. The Government decided it was best to go with the CQC. Perhaps the Minister will say something about that decision. On balance I think that it was probably right.

Essentially, the CQC will have to draw up a list of the most difficult-to-replace providers in England. The criteria that will be used to determine which they are have not yet been specified, but the consultation suggests that they will include how big they are and whether they are concentrated in particular areas or in particular specialist care services.

If it is suspected that a provider may be at risk of failing, the CQC will be able to arrange for an independent person or body to carry out an audit or review of its business activities. If necessary, the provider can be required to come up with an action plan to eliminate the risk of failure, and the CQC can require its co-operation in developing the plan and getting CQC approval. That raises a tricky issue: if the CQC's belief that a provider is at risk of failing becomes public, councils may decide not to send anyone there. Will the Minister comment on whether that will be likely to push a provider towards failure?

Meanwhile, the Bill will put local authorities under a duty to ensure that adults' needs for care and support will continue to be met when a provider regulated by the CQC fails, even if the person in question does not meet the eligibility criteria or is a self-funder.

The CQC's new role is huge and crucial. As I have said many times, it already has a huge amount on its plate, inspecting all hospitals, GPs and social care providers for quality of care. At the moment, the CQC has no expertise in insolvency or in understanding the different, complicated financial structures of some private equity or venture capital companies that back providers. How will it get that expertise? When will it get it by? What resources does it have to buy in expertise and advice? It is extremely difficult for many experts in the City to understand all the different questions and issues.

When the CQC suspects that a provider will fail and puts in an action plan, how will it deal with local councils thinking, "Oh my goodness, do we really want to keep on sending people there?" Would the CQC be likely to precipitate failure? There are questions. I understand from speaking to the CQC that the new chief inspector of social care will put all that in place. The Minister understands that this is a big, complicated, new and different role that the CQC does not have experience of doing. How will it get experience, when will it do it by and what are its resources?

5 pm

I shall turn briefly to the three issues with the new role for local authorities. First of all, the CQC is drawing up what I understand will be called "market stability plans", which are being developed by the Association of Directors of Adult Social Services and the Institute of Public Care. How do we ensure a stable market if we think there is a difficult-to-replace provider? It is important that the CQC works with local councils on developing market stability. What guarantee can the Minister give that it will do so?

Secondly, local authorities need to work proactively to prevent failure in their local markets, not simply prepare contingency plans for when things go wrong. That point relates back to the parts of the Bill about proper diversity of provision. Obviously, we do not want anyone to be at risk of failure. How will local councils make the situation work?

My third point is an issue raised with me by the Local Government Association and ADASS. Everything I have just said is about the big providers, but most experience of local councils is of when smaller providers fail. Local councils need to ensure that they work proactively to prevent such failures. Are the Government considering providing more tools to local councils, so that they can work to prevent problems in the first place? The regime is important for dealing with failure, and we must get that right, but how do we ensure the regime works to prevent the failure in the first place? That is the end of my comments. If the Minister can bear to respond to my questions, I would be grateful.

The Chair: Before the Minister replies, I call Paul Burstow.

Paul Burstow: I am grateful to be called. The shadow Minister asked about the CQC's competence and whether it has the expertise. This is an opportunity for me to put on the record my appreciation of one of the key figures who managed the scenario that unfolded with Southern Cross, and that is David Behan, who at the time was the director general in the Department of Health responsible for adult social care and much more besides. I must say that it was absolutely brilliant how he gripped and managed the issue and advised Ministers at the time. The insight that he gained from the experience of dealing with probably the biggest ever collapse of a care business

[Paul Burstow]

means that we have somebody at the helm of CQC who has an understanding of the issues and knows who to go to for the additional expertise that he needs.

During the period when the Department was trying to manage the Southern Cross situation, we took insolvency advice and advice from those responsible for the banking sector. We sought to ensure that we had as rounded and as full a picture as possible. However, what made me want to get up and say how pleased I am to see these clauses in the Bill is how frustrating it was as a Minister at that time to go to the cupboard and basically find that there were no powers or tools to deal with the unfolding events. All that we had was the credibility of the parties involved, the Department's ability to hold the ring and bring people together and the fact that there was a huge reputational risk at stake for the industry. That held people together and made them act in a way that largely led to the safe and successful winding down of the business and its being passed over to many other people.

I have a couple of questions for the Minister. The shadow Minister was right to make the point about prevention. As I understand it, that is another facet of clause 5: the market-shaping duty. It would be useful if the Minister could say a bit about how it will link with clause 5. Clearly, intelligence will be gathered through the discharge of the duties under clause 5. Will he also say a little about where we are with the work commissioned, if I remember rightly, from Oxford Brookes on supporting local authorities producing market intelligence or market position statements? Such documents are useful in understanding the shape and state of the market. With that, I look forward to his response.

Norman Lamb: I have things coming at me from every direction. I will try to keep this short so that we can complete debate on the clause before we finish. I think that everybody is probably in agreement.

On a point made by the shadow Minister and alluded to by my right hon. Friend the Member for Sutton and Cheam, preventing failure seems to be at the heart of the new provision. The fact that we can now monitor developments much more closely and have intelligence that we did not have in the past gives us the opportunity to prevent failure and to require steps to be taken to avert disaster in a way that has not been possible until now. My right hon. Friend was absolutely right in describing how bare the cupboard was when he was trying to respond to the Southern Cross disaster.

I agree with virtually everything that the shadow Minister said about the behaviour of some people in the sector and the extent to which financial arrangements or structures have been put in place that undermine the sustainability of good-quality care. I should make the point that the Care Quality Commission, in determining whether to register a particular provider, will be able to examine the structures in place to determine whether there is a risk that the sustainability of those arrangements—the rent paid, for example—undermines high-quality care or puts it at risk.

The shadow Minister raised concerns about the Care Quality Commission and whether it will be able to manage the responsibility. I should say, incidentally, that in the meantime, the work is being done informally by the Department. Good arrangements are in place with large care providers to maintain a sort of monitoring exercise to keep an eye on any emerging problems so that action can be taken. When that is enshrined in legislation, we will ensure that the CQC has the funding and the time to recruit the expertise to enable it to carry out its functions. The threshold for entry to these arrangements will be set in regulations and will depend on the difficulty of replacing the service. We will consult on the regulations, and I understand that that will happen in May. There will be a further opportunity to scrutinise the rules and ensure that we get it absolutely right.

The shadow Minister asked why the Care Quality Commission was chosen. I think that aligning financial risk with quality makes the CQC absolutely the right choice. It gives the right body the opportunity to focus on the importance of sustainability, because of its link to high-quality care. The CQC will be able to give the intelligence to the local authorities, where homes might exist under a large and complex care provider, so that the local authority is pre-warned and can take action to prevent disaster from happening in its area.

I think that the provisions will substantially improve the protection that is available.

Nick Smith: Will the Minister give way?

Norman Lamb: I will not, because I am conscious that I want to conclude the debate. I have been as generous as I can in giving way. These provisions offer a substantial advance in the ability to gain intelligence, to monitor and to take action to prevent disaster from happening in the first place.

Question put and agreed to.

Clause 49 accordingly ordered to stand part of the Bill.

The Chair: As per our earlier agreement, we will deal in a single question with clauses 50 to 55, to which no amendments are tabled.

Clauses 50 to 55 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. *—(John Penrose.)*

5.12 pm

Adjourned till Thursday 23 January at half-past Eleven o'clock.

Written evidence to be reported to the House

CB 20 Essex County Council

CB 21 Jon Clift

CB 22 Graham Carey

CB 23 Ian Judson