MEETING OF THE PARLIAMENT

Wednesday 29 March 2000
(*Afternoon*)

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Debates

Scottish Parliament

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[THE PRESIDING OFFICER *opened the meeting at 14:30*]

Time for Reflection

The Presiding Officer (Sir David Steel): We welcome Reverend Dr Kevin Franz, the general secretary of Action of Churches Together in Scotland, to lead our time for reflection today.

Reverend Dr Kevin Franz (Action of Churches Together in Scotland): Travelling through the Scottish Borders in the company of a young German friend helped me see the country afresh. There was so much to take delight in: the landscape of Ettrick and Yarrow valleys, the shape of the hills, the life of the little industrial towns and ancient burghs. In all that, what seemed to him most remarkable was something I had hardly noticed: the old stone bridges that cross the rivers. "This is something," he said, "which our history has not been kind to. Bridges are the casualties in conflict and, in a country that has known much conflict, bridges have had to be rebuilt many times over."

Some time later, travelling to eastern Germany for the first time, I saw that to be true. At a place on the River Elbe, the former border between east and west, an old destroyed bridge could be seen, the arches marching to the water's edge, then abruptly cut off. A new bridge was in the making, but was still tantalisingly incomplete, the spans from east and west not yet meeting. In the meantime, the only way across was by an old battered ferry, with the motto over the wheelhouse, "Gott mit uns"—God with us.

Bridge or ferry—both stand for the possibility of connectedness, the bringing together of two shores, the linking of separated communities or peoples, the way of welcome to the stranger.

It is that same connectedness which underpins the story of Jacob's dream:

> "Jacob set out for Haran. When he reached a certain place he spent the night there for the sun had set. Taking one of the stones to be found there he made it his pillow and lay down where he was. He dreamt: a ladder was there, standing on the ground with its top reaching to heaven, and there were angels of God going up it and coming down".

The story of Jacob's pillow has a particular resonance for Scots. Here it stands for the possibility of connection, the free movement between earth and heaven, the connectedness between things and between people. It marks an end to boundaries, to division and separation. It affirms the hope of building a community within our land that is welcoming to the stranger and which is open to the other and to the different; a hope that requires the energies not only of the Parliament but of the whole people.

The character of that hope is expressed in the words of Robert Crawford's poem, "Scotland":

> "to be miniaturised is not small-minded.
> To love you needs more details than the Book of Kells—
> your harbours, your photography, your democratic intellect
> Still boundless, chip of a nation".

May God make us restless at all that confines and cramps our sense of common belonging, may God grant us skill and patience in building bridges and harbours of hope, and may God grant us generosity in welcoming and receiving from the stranger.

Amen.

Business Motions

The Presiding Officer (Sir David Steel): The first item of business is Parliamentary Bureau motions S1M-714 and S1M-715, both of which set out the timetable for this afternoon's debate.

The Minister for Parliament (Mr Tom McCabe): The first motion sets out a timetable and a structure for this afternoon's debate, and the second allows decision time to take place at 7 pm, with members' business thereafter.

I move,

That the Parliament agrees that the time for consideration of Stage 3 of the Adults with Incapacity (Scotland) Bill be allotted as follows, so that debate on each part of the proceedings, if not previously brought to a conclusion, shall be brought to a conclusion on the expiry of the specified period (calculated from the time when Stage 3 begins)—

Section 1 – up to 1 hour 30 minutes

Section 47 – up to 2 hours 30 minutes

Section 48A – up to 3 hours 15 minutes

Remainder of the Bill – up to 4 hours

Motion to pass the Bill – no later than 4 hours 30 minutes.

Motion agreed to.

Motion moved,

That the Parliament agrees that

(a) the meeting of the Parliament on 29 March 2000 shall continue until 19.00 as permitted under Rule 2.2.4 of the standing orders; and,

(b) the meeting of the Parliament on 29 March 2000 may continue beyond 19.00 in order to consider Members' Business as permitted under Rules 2.2.5 and 2.2.6(c) of the standing orders; and

(c) Decision Time on 29 March 2000 shall begin at 19.00.—[*Mr McCabe.*]

Motion agreed to.

Adults with Incapacity (Scotland) Bill: Stage 3

14:36

The Presiding Officer (Sir David Steel): For the convenience of the chamber, I have arranged that the clocks will be set at zero when we start the debate, so that everybody will be able to see when we reach the time limits that are set out in the motion. I hope that that will be helpful. That means that 1 hour 30 minutes, 2 hours 30 minutes, 3 hours 15 minutes and so on will be displayed on the clocks. There will be the normal speaking time of four minutes, but that will not be shown on the clocks this afternoon.

Before we begin stage 3 proceedings, it might be helpful if I say something about the procedures that will be followed. The first part of the proceedings will deal with amendments to the bill, and the second will be a debate on the question that the bill be passed. For the first part, members should have with them the bill—that is, SP bill 5A as amended at stage 2, not the original bill—the marshalled list, which contains all the amendments that I have selected for debate, and the groupings, which I have agreed.

Amendments have been marshalled in the order in which they relate to the bill, that is, all the sections in order, followed by all the schedules in order. We will start at the top of the marshalled list and work through it in order to the end. I emphasise that it is not permitted to move backwards. Once a certain point in the bill has been passed, we cannot go back to reconsider it.

I will call each amendment in turn, and it is then up to the member who proposes it to move it or not as he or she chooses. Any member can move an amendment if the member who proposed it does not wish to do so. Each amendment is also disposed of in turn. An amendment that has been moved may be withdrawn, but only with the agreement of all members in the chamber. If an amendment is not withdrawn, I will put the question on it, and if any member disagrees to the question, we shall immediately proceed to a division. The electronic system will be used for all divisions, with the usual 30-second time notice.

Although amendments are dealt with in the order of the marshalled list, they are debated in groups, and the debate takes place on the first amendment in the group. If those who have other amendments in the group wish to speak to their amendments, they should at that point press their request-to-speak buttons, so that we have one debate on each group. When later amendments in the group are reached, they should not be debated

again, but they will be either moved formally or not moved, in accordance with the member's wishes.

Finally, in order to avoid unnecessary procedural complexity, I propose to allow amendments that are consecutive on the marshalled list, and which have already been debated, to be moved en bloc. If members are content, I will then put a single question on all the amendments thus moved, but if any member objects I will, of course, be content to put the questions on amendments individually. I hope that that is beautifully clear to everybody.

Michael Russell (South of Scotland) (SNP): It was crystal clear, but I do not wish to curry favour with the chair.

The Minister for Rural Affairs (Ross Finnie): Unlikely.

Michael Russell: Unlikely indeed, Mr Finnie.

Will notice be given of divisions? I understood that notice might be given to allow members to re-enter the chamber.

The Presiding Officer: No, it will not, but the commonsense answer to the question is that divisions are likely to take place in accordance with the timetable that we have just approved. However, it is members' own responsibility to be here. For example, if we finish a group earlier than is laid down in the time limit, the division might come earlier. Members have to accept their own responsibility for being present. I suggest that they be present towards the end of each period of debate.

Michael Russell: I am sorry, Presiding Officer, but I understood that there was to be two minutes' notice of divisions. I think that Parliamentary Bureau members might also have understood that.

The Presiding Officer: Mr McCabe is nodding in agreement with you, which makes me worried, but I was not aware of that.

The Minister for Parliament (Mr Tom McCabe): I agree with Mike Russell, and I remember discussing the matter in the bureau. Given that we have timetabled business in such a structured way, it would be helpful to give members a minute or two if they are somewhere else.

The Presiding Officer: I will tell members what I think would be a sensible compromise. I will allow two minutes for the first amendment in a group, and any sequential amendments will have the normal 30-second voting time. Would that be helpful?

Members: Yes.

The Presiding Officer: That is what we will do.

We are ready to begin stage 3 of the Adults with Incapacity (Scotland) Bill with amendment 127, in the name of Phil Gallie.

Section 1—General principles and fundamental definitions

Phil Gallie (South of Scotland) (Con): Amendment 127 provides a definition of incapacity that is drafted in a way that will not exclude those who could benefit from the provisions of the bill.

Among others, the Law Society of Scotland is concerned that the definition of incapacity, which determines who can access the bill's provisions, will exclude some of those who could benefit from its terms. Given the contents of the bill, it is important that it is all-embracing and that no one feels excluded.

The general principles in section 1 are sufficiently robust to ensure that interventions are not applied inappropriately in individual cases. There are concerns that in a dispute, the bill could be interpreted as excluding some people who are intended to be included, such as those with acquired brain injury.

I recognise that the Millan committee will report in the not-too-distant future and doubtless its report will include a definition of incapacity. However, the bill, if passed, could precede the implementation of any actions arising from the Millan committee's report by a considerable period.

I suggest that ministers would be wise to accept my amendment.

I move amendment 127.

The Deputy Minister for Community Care (Iain Gray): Mr Gallie lodged his amendment during stage 2, when the definition of incapacity was discussed thoroughly by the Justice and Home Affairs Committee. The Executive has not changed its view that we should reject the amendment. I will explain our serious concerns about the proposals that it contains.

Mental disorder is one of the two threshold criteria in the bill for assessing incapacity, the other being inability to communicate because of physical disability. Incapacity must then be assessed in relation to particular acts or decisions. That functional approach is extremely important. The purpose of the two threshold criteria is, as Mr Gallie said, to limit to some extent the group to which the bill applies. There would be grave risks in assessing incapacity without some kind of threshold. It is not the bill's intention to class as incapable people who merely made decisions that others thought were unwise or irrational.

The amendment introduces an alternative threshold criterion of "mental disability", which we consider to be imprecise and unhelpful, as it is

likely to catch too many people within its scope. Mr Gallie said that his was a broader definition—our view is that his definition is too broad.

Mr Gallie's amendment refers to

"impairment or disturbance of mental functioning".

However, that concept is potentially very subjective. There is a danger that those responsible for assessing incapacity would be encouraged to take into account the quality of a person's decision-making process in determining whether they were legally incapable. Such subjective judgment could damage the rights of people whose capacity or incapacity was being considered.

The definition of mental disorder in the bill is drawn from the terminology used in the Mental Health (Scotland) Act 1984. There are considerable advantages in consistency between different pieces of legislation and in familiarity for the medical and legal professionals and others who work with those definitions. During stage 2, we said that we are prepared to review the definition once we have received the Millan committee's recommendations. If necessary, we shall amend the incapacity legislation at that time.

However, we do not think that the definition in the amendment of

"retaining the memory of decisions"

adds anything to the bill. Further explanations will be provided in codes of practice and guidance.

14:45

An incidental effect of the amendment appears to be the fact that it removes the requirement to try to communicate with the adult by whatever means suit them, before deciding that they are incapable. That may not be intentional, but it was considered extremely important by the Justice and Home Affairs Committee at stage 2 and runs counter to the Executive's policy that communication should always be attempted in a way that best helps the adult concerned to express themselves effectively.

If, as Mr Gallie said, the amendment has been prompted by lingering concerns about whether the definition of mental disorder covers all the underlying conditions that should be included, specifically the effects of head injuries or a stroke, our medical and legal advice is that those conditions fall within the definition. That ties in with well-known international medical terminology.

The definition already spells it out that mental disorder is "however caused or manifested." "However caused" is intended to cover whatever physical accident or illness led to the condition causing incapacity.

The Executive acknowledges that the current definition of mental disorder in the Mental Health (Scotland) Act 1984 needs to be reviewed and updated. That is why the committee chaired by Bruce Millan was set up to undertake that work. When it reports, we will have the advantage of the Millan committee's wide public consultation and expertise. We will then be able to maintain the advantages of consistency between incapacity law and mental health law. We will also avoid the likelihood of two changes to the existing definition in quick succession, which would be difficult for both professionals and the public to follow.

The Executive's view is that it would be most unwise to accept this change to the carefully considered definition of incapacity in the bill. I hope that the amendment will be withdrawn.

Roseanna Cunningham (Perth) (SNP): I am grateful to the minister for his comments. When I first examined the amendment, there did not appear to be anything intrinsically wrong with it, although I was not clear as to specifically why the different wording was better than the existing wording.

I think that I recognise the definition in the amendment as coming from the Alliance for the Promotion of the Incapable Adults Bill. I recall that its concern centred on people with a brain injury or other physical impairment, such as a stroke, which would cause them communication difficulties. One of the difficulties that I have when I consider the amendment in relation to the existing definition is how the existing definition does not cover those conditions already. I cannot see in what way it fails to do so.

The deliberations on the bill have been undergone with a recognition that the Millan committee was examining similar issues. The Justice and Home Affairs Committee decided that either we would consider the matter as if there was a blank page and we would invent a definition of some of those matters, or we had to accept that we would work with existing definitions and carry out a review when the Millan committee reported. In the circumstances, the concern is correct that if the amendment is accepted and a definition included in the bill that is different from the definition in the Mental Health (Scotland) Act 1984, we might find that Millan will require further amendment to be made. There is therefore very little to drive this amendment being accepted.

I would be interested to hear Phil Gallie indicate precisely why the wording is better than the existing definition in respect of acquired brain injury or stroke and why we should unilaterally invent a new definition, when we know that the Millan committee will require us to review the situation.

Dr Richard Simpson (Ochil) (Lab): I will speak

against Phil Gallie's amendment and in support of the Executive in two respects.

I firmly believe that two changes in the definition of mental disorder in a short space of time would lead to severe difficulties. In addition, the Millan committee will give us an opportunity to revisit this section and to make appropriate amendments if practice bears out what Phil Gallie is suggesting.

The other important point is that Justice and Home Affairs Committee members and Health and Community Care Committee members will know that I tried hard to insert an amendment in the bill in respect of advocacy, which I regard as important. In fact, advocacy is not prevented by the bill and is still contained in section 1(4)(a) and section 1(6), but Phil Gallie's amendment would remove the part of section 1(6) that deals with making good the deficiency

"by human or mechanical aid".

That would add confusion to the situation, and the one thing that we do not want is any confusion. I support the Executive's position.

Christine Grahame (South of Scotland) (SNP): I, too, will speak against the amendment. I see where Phil Gallie is coming from with regard to brain injury or stroke and varying capacity, but the bill makes it clear that capacity is not an all-or-nothing thing, but can have varying degrees. Section 1(3) states that the

"intervention shall be the least restrictive option in relation to the freedom of the adult",

and section 1(4)(a) refers to

"the present and past wishes and feelings of the adult, so far as they can be ascertained by any means".

Therefore, if the condition of the incapable adult—I use that term broadly—changes, the "present and past wishes" will be ascertained in a different manner. I think that that provides sufficient flexibility.

Phil Gallie might like to take on board the fact that if there were a challenge to capacity at any time, that would be a matter for the courts. The question whether someone has capacity—and the degree of that capacity—is a legal matter.

Further to my first point, the bill is structured to have the flexibility to deal with varying levels of capacity as best as can be ascertained. The amendment confuses the matter.

Gordon Jackson (Glasgow Govan) (Lab): I agree that it would be unwise to accept the amendment at the moment. The whole area surrounding the definition of mental disorder is in a state of flux, and it would be fair to say that psychiatrists and lawyers are not at one on the issue. It is important that Millan deal with that and that the whole problem be sorted out.

When we dealt with the Ruddle legislation, we had this problem and, because it was a matter of urgency, most of us decided to let things go even if we were not 100 per cent happy with them.

It would be unwise at this stage to introduce further definitions; it is to be hoped that when Millan reports, we will have a full debate on the matter, but we certainly should not tackle it in the meantime.

For those reasons, I am at one with those who oppose the amendment.

Euan Robson (Roxburgh and Berwickshire) (LD): In common with previous speakers, I have little sympathy with the amendment. It would be dangerous to try to change the definitions on too many occasions, and this would be a change too far. We should not pre-empt the discussions of the Millan committee. We can return to this point at a later date.

Critical to the debate is the fact that if we passed the amendment, there would be an inconsistency with terms in previous acts of Parliament.

For those reasons primarily, I am not minded to support the amendment.

The Presiding Officer: Does the minister wish to make any further comment?

Iain Gray: No.

Phil Gallie: Gordon Jackson said that we are in a state of flux. That is the basis on which I felt that the amendment was necessary—to try to introduce some stability and to provide precise guidelines for those who will operate under the terms of the bill.

Christine Grahame made the point that, to some extent, capacity is a matter for the courts, but one of the purposes of the bill—as I understand it—is to ensure that incapable adults do not have to go trooping off to the courts on every occasion.

Those are some of the reasons why I lodged the amendment. Having said that, I must say that I take some comfort from the minister's comments on stroke victims, and victims of brain damage. In debates such as this, it is important to get such comments on to the record. As far as I am concerned, the minister has given a commitment, which is on the record. On that basis, I will not press the amendment.

Amendment, by agreement, withdrawn.

The Presiding Officer: We come to amendment 128, also in the name of Phil Gallie.

Phil Gallie: At stage 2 in the Justice and Home Affairs Committee, the minister agreed that the requirement for a definition of intervention was something that the Executive would be prepared

to reconsider.

To my mind, a definition is necessary. The definition suggested in the amendment is capable of sufficiently wide interpretation to cover positive decisions and decisions not to act. Providing a definition will enhance the clarity of the bill and will avoid unnecessary potential litigation.

For the benefit of the chamber, I will leave the minister to explain the contents of the joint letter kindly sent to me by the ministers on the issue. The letter explained the reasons why it was decided not to lodge amendments in line with the discussions in the Justice and Home Affairs Committee. I look forward to the minister's comments. I appreciate the fact that the ministers wrote to me and took the trouble to explain, but I would like them to expand on their comments in the chamber.

I move amendment 128.

The Presiding Officer: I should have said that amendment 128 is grouped with amendments 129 and 145, in the name of Michael Matheson, whom I will call in a moment.

The Deputy Minister for Justice (Angus MacKay): During stage 2, in relation to an earlier version of Mr Gallie's amendment, we considered whether an intervention included an act and an omission. The Executive was pressed to make a commitment to examine the matter and, if possible, to introduce an amendment at stage 3. At the time of that deliberation, I agreed to re-examine the issue and to give it thorough consideration in the round. On that basis, Mr Gallie withdrew his amendment. I made it clear in the stage 2 discussion that I was not making a specific commitment to lodge an amendment.

Our starting point has been the general principles in section 1, which include minimum intervention, least restrictive intervention, consideration of the adult's wishes and consultation with relatives, carers and others. Those principles all come into play as soon as someone contemplates an intervention authorised under the bill.

The special provisions of part 5 are also important in this context. I want to stress that, for the first time, the bill creates a general authority to treat people who are incapable, which is intended to ensure that such people receive appropriate medical treatment. At present, there is limited authority to treat adults who cannot consent. The bill also creates for the first time a right of proxies to be consulted about such treatment and a right for anyone with an interest in the personal welfare of the adult to challenge that treatment in court.

It is necessary to separate what is expected of private individuals who take on the responsibility of being proxy decision makers from what is expected of professionals or office holders. I want to reassure members that stringent safeguards already exist, precisely to protect the public from omissions by professionals.

In particular, if a doctor fails to provide proper medical care, he or she may be disciplined or struck off the relevant health board list. He or she may also be referred to the General Medical Council, which may decide to deregister them. The normal criminal and civil law sanctions also apply. Ordinary individuals are not under any general duty to act. However, the position changes as soon as a medical practitioner takes over the care of a patient. A medical practitioner is bound by his or her professional duty of care.

It is already clear that an intervention can encompass a positive and a negative act. Decisions in relation to medical treatment begin to be taken as soon as a doctor has certified incapacity, before treating an adult with incapacity. They include decisions on basic care, nutrition and hydration and changes in the level of treatment. Decisions to commence or terminate treatment or to change the treatment being administered count as interventions.

15:00

There will, of course, be situations in which the best treatment will be to take no action—for example the medication might produce harmful side effects. That is justified under section 1(2). The question is not whether such decisions constitute intervention but whether they can be challenged. Under the bill, the decisions of a medical practitioner are open to scrutiny in four ways. First, they are subject to the general principles and requirements in section 1, which are minimum intervention, least restrictive intervention and consultation. Those are reinforced by the provisions for consultation with proxies at section 47.

Secondly, section 47 allows a proposed treatment decision to be challenged in the Court of Session, not only by a proxy, but by any person who has an interest in the personal welfare of the adult. That also applies to interventions.

Thirdly, under section 48A, any decision taken by a medical practitioner other than a decision to which section 47 applies may be appealed to the sheriff by any person who has an interest in the personal welfare of the adult. That could include a decision not to administer treatment.

Finally, the offence provisions in section 74 would leave anybody, including a medical practitioner, liable to prosecution for failure to act. In light of the existing provisions and the existing legal framework for medical practice, the

Executive believes that it is unnecessary to attempt to find a definition of what constitutes an intervention for the purposes of either part 1 or part 5.

I would now like to consider amendment 145, lodged by Michael Matheson. Section 44 is meant to be permissive. It gives a general authority to treat where none previously existed. The only authority in relation to medical treatment that is conferred by section 44 is to do that which will "safeguard or promote" health. It gives no authority to do anything that would damage health. That includes, for example, failure to hydrate or provide nutrition where that would promote or safeguard the health of the adult. Section 44(2) already adequately achieves what I believe to be the right result. It enables a doctor to give medical treatment including

"any procedure or treatment that is designed to safeguard or promote physical or mental health."

That is what I would expect a medical practitioner to do—I hope that members will also accept that the bill deals with those matters properly. On that basis, I hope that neither Phil Gallie nor Michael Matheson will wish to press their amendments to a vote.

The Presiding Officer: I invite Michael Matheson to speak to, but not to move, amendments 129 and 145.

Michael Matheson (Central Scotland) (SNP): I am disappointed that the minister has asked me not to press my amendment, because he has not yet heard what I have to say.

Amendment 129 seeks to do the same thing as amendment 128, but my amendment is more concise. [*Laughter.*] I never said it was better—only more concise.

Amendment 145 is intended to deal with the medical part of the bill and to ensure that the benefit of medical treatment is assessed by focusing on whether such treatment will either safeguard or promote the adult's physical and mental health. At it stands, the bill would allow for benefit to be interpreted for use in deciding whether it is in the patient's interest to continue with treatment.

It is important to emphasise that the amendment does not seek to change the present position regarding clinicians' decisions on those who are terminally ill. If it is not appropriate to intervene with aggressive treatment in the end stages of such a person's life, that should not take place.

There are three basic reasons why I think amendment 145 is necessary: first, because of the term "benefit", which is used in the bill; secondly, because of the British Medical Association's current guidelines; thirdly, because of relevant common law. Given that the bill does not define benefit, present common law could be used to define it. That might apply to the Law Hospital NHS Trust decision, which redefined feeding and hydration by artificial means as medical treatment. It redefined benefit to include an assessment of the benefit of continued existence of the patient, rather than strictly treatment itself. The judgment concluded that a doctor did not have a duty to give assisted feeding and hydration to a patient whose continued existence was considered by

"a large responsible body of medical opinion"

not to be of benefit.

It is here that the British Medical Association guidelines come into play. Last year, the BMA issued guidance on withdrawing and withholding treatment in which it indicated that, in line with the Law hospital decision, patients with advanced dementia and stroke may fall into the same category as those involved in the Law hospital case. In effect, the guidelines allow a doctor to withdraw treatment by means of artificial nutrition and hydration from an incapable adult because he does not consider it to be of benefit to that patient. The decision by the doctor and the proxy as to whether such treatment is of benefit is essentially subjective.

We have taken independent counsel advice on this matter. Two senior counsel have given their independent view. They have highlighted that the benefit test is entirely subjective. Due to the lack of a definition of benefit in the bill, a court or doctor will have to use the subjective test: the Law hospital decision. There is no other definition of benefit for them to refer to.

One senior counsel, who specialises in human rights legislation, is particularly concerned that because of a lack of definition in the bill, the bill could contravene article 2(1) of the European convention on human rights, which states:

"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally".

Article 15(2) of the convention provides that there shall be no derogation of rights under article 2 except in respect of deaths resulting from an act of war. Fortunately, we are not in that position. Overall, the opinions of the two senior independent counsel highlight the need for the bill to be amended to address those specific concerns. There is a need for a positive definition of benefit, which should ensure that the physical well-being of an adult is safeguarded and promoted.

This is a matter of conscience; it is a matter over which all parties should respect their members. Parties should give their members the right to vote with their conscience, as opposed to with any form

of whip.

Tricia Marwick (Mid Scotland and Fife) (SNP): When I spoke in the stage 1 debate in December, the areas I drew attention to are those that are the subject of Michael Matheson's amendments. At that time, the Minister for Justice undertook to consider those matters and said that he would take steps to allay the concerns that had been expressed by many individuals and organisations. The fact that those concerns have not been allayed causes me great disquiet. Like Michael Matheson, I urge members of the Parliament to vote as their conscience tells them.

I accept that it is not and never has been the Executive's intention that the bill should allow euthanasia, but I do not believe that the Executive has moved sufficiently to convince genuine and sincere people that euthanasia will not be possible if the bill is passed without amendment.

The main problem, as Michael Matheson says, is that benefit is not defined. In the absence of a definition in the bill, it is likely that the meaning given in the Law hospital judgment, that the continued existence of a patient with persistent vegetative state "was not a benefit", will prevail. That wording was also used by the BMA in its recent guidance, in which it advised doctors that "treatment", including nutrition and hydration, may not benefit patients with advanced dementia and stroke. The BMA guidance goes far beyond the Law hospital judgment, which concentrated on the very few patients with PVS.

During evidence-taking sessions held by the Justice and Home Affairs Committee at stage 1, I was struck by the fact that the BMA's evidence about current practice flew in the face of the guidance given by the Lord Advocate following the Law hospital judgment. It is worth repeating Lord Hardie's statement at that time. He said that he

"would not authorise prosecutions of qualified medical practitioners who, acting in good faith and with the authority of the Court of Session, withdraw life-sustaining treatment from a patient with PVS, which results in the patient's death".

In evidence to the Justice and Home Affairs Committee, the BMA representatives said that it was not necessary to go to court to get permission for cessation of treatment for every case of PVS. At the moment, the law and the practice are not the same. An examination of the bill's guiding principles and common law makes it clear that, if the bill were enacted in its present form, it would be almost impossible successfully to prosecute a proxy or doctor who caused the death of a person with incapacity by withholding or refusing treatment.

I am not a vitalist. I do not believe that doctors should strive to keep alive every patient no matter what, but I cannot accept death being caused by withdrawing nutrition and hydration. I cannot accept circumstances that would allow people to die from starvation. The Executive has claimed from the outset that the bill will not permit euthanasia. My concern is that the bill, if not amended, will not prevent it from happening.

We will have a lot of important debates in this chamber, but I truly believe that none will be more important than this. This is not a party political issue; it is a moral issue, an ethical issue and one that we must get right. I urge members to support amendment 145.

Donald Gorrie (Central Scotland) (LD): I do not know about other party groups, but the Liberal Democrats have a free vote on this issue. I would like one of the ministers to explain to me something that I have not yet grasped, despite the kind briefing that we were given. Angus MacKay said—if I heard him correctly—that intervention covers inaction as well as action. If that is the case, why not say so in the bill? In the case of benefit, why not identify and clarify exactly what is meant by that word?

We are told that defining those terms would, in some strange way, subvert the Scottish legal system—that the Law hospital judgment would be undermined and everything would collapse in a heap. I honestly need to be persuaded of that. As a simple person, I feel that the Executive should simplify the terms used in the bill. We should not have a bill about important issues and not identify specifically what the terms mean. As we discovered during the dispute over section 2A, the same words can mean different things to different people.

Surely the bill should identify exactly what is meant. I cannot understand the argument to the contrary and I do not believe the assurances from the legal fraternity that definitions would somehow destroy the whole legal system. I am open to persuasion. That is an invitation.

Mr Duncan Hamilton (Highlands and Islands) (SNP): Many of the points that I wanted to make have been covered by Donald Gorrie. Every member who has considered the issues surrounding the bill will admit that it is a complicated and technical area of legislation. We must remember that the purpose of legislation is to make things as clear as possible, not to create artificial complexity where it does not need to exist.

I reiterate what Donald Gorrie said. If, as the minister says, intervention can be a positive or negative act, I can conceive no reason why that cannot be said explicitly in the bill. The minister said that it is not so much about definitions as about the capacity to challenge, but given that the

capacity to challenge is predicated on the definition, I cannot understand why the two cannot be seen together. I would have thought that giving people the widest possible opportunity to be part of what is often a painful process would make a lot of sense, given the consensual and sensitive nature of the debate.

The whole idea of amendment 145 is to tighten up the definition from the common law position. Specifically excluding any possible misinterpretation strikes me as a sensible and realistic proposition. I do not know what the Executive would lose by showing a little understanding and sensitivity on this issue. We should make the bill clear and put to rest a lot of the fears that exist in the community. If that can be done on a consensual, cross-party basis, the minister should consider that option long and hard.

15:15

Ben Wallace (North-East Scotland) (Con): At the heart of this bill is the principle of benefiting the adult who is deemed incapable. What is wrong with defining with crystal clarity what is of benefit to the patient in such an event? Without benefit being defined, there is a grey area or gap between the cessation of medical treatment—when nothing further can be done—and the continuation of treatment for the sake of the comfort of the individual who is deemed incapable. There is nothing wrong in saying clearly how benefit should be defined. I urge all members to support the amendments that have been lodged by Phil Gallie and Michael Matheson.

Brian Adam (North-East Scotland) (SNP): It is very difficult to find something fresh to say.

The Presiding Officer: Speaking is not compulsory.

Brian Adam: I know that, but I will endeavour to have the minister respond and give us reasons for not supporting the amendments. The weight of evidence and advice that is being received from outwith the Parliament suggests that there are genuine concerns. There appear to be no technical reasons why benefit, or intervention, cannot be defined in the bill. I have heard no argument that has persuaded me that the amendments would make the case more difficult for individuals or doctors. I am willing to listen to why the minister has not been persuaded by the case for including definitions of those words.

I am delighted that we can have this debate, in which matters are genuinely open to debate and we can make real choices. The people who cannot make choices are those with incapacity. We are passing responsibility for those choices on to their medical advisers and the proxies who are looking after their interests. In their interests, the clearer the definitions are, the better. We should not start off with legislation that is seen to offer passive euthanasia.

Mr Michael McMahon (Hamilton North and Bellshill) (Lab): I have not a speech, but a question for the minister. It has been suggested that this is a technical area. Can definitions be promoted that do not fall within the bill, in the form of guidance or a management executive letter? Is it possible for the minister to confirm today that a mail document will be published that will contain the definition, or an explanation of the bill, in relation to the British Medical Association guidelines?

Christine Grahame: Just to show that there is no whip, I want to speak in support of amendment 129 and against amendment 145.

In the evidence that was given by Sheila McLean, it was apparent that an act could be a commission or an omission, in professional terms. Amendment 129 clarifies the situation, but amendment 145 is unnecessary. Section 1(2) states:

"There shall be no intervention . . . unless . . . the intervention will benefit the adult".

Section 44(2) relates to the definition of medical treatment, which the minister has referred to as including hydration and nutrition by artificial means. The definition of medical treatment is:

"any procedure or treatment designed to safeguard or promote physical or mental health."

The bill says what Michael Matheson is trying to add to it—that intervention, by definition, must be of benefit, and that benefit must be the promotion of the physical or mental health of an adult. Therefore, I do not think that amendment 145 is necessary.

Angus MacKay: Many points have been raised in the discussion, and I will try to deal with some, if not all, of them.

Duncan Hamilton suggested that the Executive, or the minister, should try to approach this issue with understanding and sensitivity. We have tried to approach this and other issues with understanding and sensitivity at every stage.

Today, we are deliberating on the bill as amended by the Justice and Home Affairs Committee. In coming to decisions on the amendments that were lodged at an earlier stage, that committee took the view that the bill as it now stands amended is appropriate. I would like to draw members' attention to that fact—the views expressed in the bill represent views that are broader than just those of me and my fellow ministers.

Michael McMahon mentioned guidance. I would

like to put on record the fact that comprehensive guidance on the bill will go to the NHS and to health professionals. In it, we will take the opportunity to spell out categorically the intentions of ministers, of the Executive and of Parliament in passing the bill. I hope that that will help to bolster members' confidence that we are absolutely clear about what a benefit is and is not.

Benefit is defined in section 1(2) and has to be read in conjunction with section 44. Christine Grahame touched on that. Section 44 says that the individual who is appointed has the

"authority to do what is reasonable in the circumstances, in relation to the medical treatment, to safeguard or promote the physical or mental health of the adult."

I do not take that—and I do not think that any reasonable person could take that—to mean death. Read in conjunction with the definition of benefit, it leaves no ambiguity whatsoever about the positive nature of any intervention or act by the appointed proxy. I have dealt with benefit as far as is possible.

An attempt to define an intervention as an omission, in addition to its other definitions, has been mentioned. The Executive's view—I think this was recognised by members of the Justice and Home Affairs Committee—is that any attempt at definition of intervention as an omission would be so broad that almost anything that might be described as an omission might be pursuable as an omission, to the extent that the phrase would lose all meaning. Could a failure to purchase clothing that the individual would normally have liked to wear be construed as an omission? Could an omission be defined as a broad range of other omissions?

I am going to extremes, but we have to be clear and we are trying—as has been acknowledged—to avoid imprecision. We are empowering individuals to intervene positively. We are giving the power to treat. We are not attempting to specify, for every circumstance, the appropriate course of action. It is critical that we bear in mind the fact that, because of section 74, ill-treatment of an adult would be prosecutable and, because of section 48, a range of individuals would have a right of appeal to the courts to ensure that the best interests of the adult with incapacity were protected. Those best interests include not only medical treatment as traditionally recognised, but nutrition and hydration. Safeguards, as Christine Grahame has agreed, are fully in place.

I ask members to bear those points in mind before voting.

Phil Gallie: I would like to identify with many of Michael Matheson's comments. He suggested that his amendment is much more concise than mine; I suggest that mine is much more detailed and informative. I would also say that my introductory comments on the issues were much more concise than his; nevertheless, Michael's contribution was extremely interesting and important, and I congratulate him on it. He tended to concentrate on the medical issues.

Amendment 128 covers not only the welfare attorney, but the continuing attorney's involvement. It is important that there should be some kind of direction in cases in which individuals could deliberately neglect a person in their care. I recognise that the great majority of carers want to help, which is why they have been appointed as continuing attorneys or welfare attorneys.

We must guard against minority abuse. That is why I believe it is necessary to build in the positive and negative elements. Donald Gorrie was right when he asked why, if in ministers' minds intervention is defined both negatively and positively, that definition was not included in the bill. The minister wrote to me and said that an intervention must involve some action that affects the adult. That suggests that the minister is thinking in terms of positive action.

The minister's comments about the Justice and Home Affairs Committee's position were unfair. That committee made it clear to the minister that it expected him to go away and think again as it had some reservations on the issue. To his credit, the minister went away and considered the issue again. However, the minister's statement that the Justice and Home Affairs Committee was relaxed about the situation is far from the truth.

We have heard many speeches in favour of amendments 128, 129 and 145. Having listened to them, I would not wish to withdraw amendment 128 at this point.

The Deputy Presiding Officer (Patricia Ferguson): The question is, that amendment 128 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: In that case, there will be a division. Rather than allowing two minutes in which members can come to the chamber, I propose that we have a two-minute division, during which members already in the chamber can vote and members not in the chamber can come in to vote.

FOR

Aitken, Bill (Glasgow) (Con)
Davidson, Mr David (North-East Scotland) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Fergusson, Alex (South of Scotland) (Con)
Gallie, Phil (South of Scotland) (Con)
Goldie, Miss Annabel (West of Scotland) (Con)
Gorrie, Donald (Central Scotland) (LD)
Harding, Mr Keith (Mid Scotland and Fife) (Con)

Johnston, Nick (Mid Scotland and Fife) (Con)
Johnstone, Alex (North-East Scotland) (Con)
McGrigor, Mr Jamie (Highlands and Islands) (Con)
McIntosh, Mrs Lyndsay (Central Scotland) (Con)
McLetchie, David (Lothians) (Con)
Monteith, Mr Brian (Mid Scotland and Fife) (Con)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Tosh, Mr Murray (South of Scotland) (Con)
Wallace, Ben (North-East Scotland) (Con)
Young, John (West of Scotland) (Con)

AGAINST

Adam, Brian (North-East Scotland) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Campbell, Colin (West of Scotland) (SNP)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Dewar, Donald (Glasgow Anniesland) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Finnie, Ross (West of Scotland) (LD)
Galbraith, Mr Sam (Strathkelvin and Bearsden) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (Edinburgh Pentlands) (Lab)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
Home Robertson, Mr John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Jenkins, Ian (Tweeddale, Ettrick and Lauderdale) (LD)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
MacAskill, Mr Kenny (Lothians) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
MacDonald, Ms Margo (Lothians) (SNP)
Macintosh, Mr Kenneth (Eastwood) (Lab)
MacKay, Angus (Edinburgh South) (Lab)
MacLean, Kate (Dundee West) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
McAllion, Mr John (Dundee East) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McConnell, Mr Jack (Motherwell and Wishaw) (Lab)
McGugan, Irene (North-East Scotland) (SNP)
McLeod, Fiona (West of Scotland) (SNP)
McMahon, Mr Michael (Hamilton North and Bellshill) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Paterson, Mr Gil (Central Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Quinan, Mr Lloyd (West of Scotland) (SNP)
Radcliffe, Nora (Gordon) (LD)
Robison, Shona (North-East Scotland) (SNP)
Robson, Euan (Roxburgh and Berwickshire) (LD)
Russell, Michael (South of Scotland) (SNP)
Salmond, Mr Alex (Banff and Buchan) (SNP)
Simpson, Dr Richard (Ochil) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North-East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow) (SNP)
Swinney, Mr John (North Tayside) (SNP)
Thomson, Elaine (Aberdeen North) (Lab)
Ullrich, Kay (West of Scotland) (SNP)
Watson, Mike (Glasgow Cathcart) (Lab)
Welsh, Mr Andrew (Angus) (SNP)
White, Ms Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)

ABSTENTIONS

Wilson, Andrew (Central Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 19, Against 78, Abstentions 1.

Amendment 128 disagreed to.

Amendment 129 moved—[Michael Matheson].

The Deputy Presiding Officer: The question is, that amendment 129 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)
Campbell, Colin (West of Scotland) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Davidson, Mr David (North-East Scotland) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Elder, Dorothy-Grace (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Fergusson, Alex (South of Scotland) (Con)
Gallie, Phil (South of Scotland) (Con)
Gibson, Mr Kenneth (Glasgow) (SNP)
Goldie, Miss Annabel (West of Scotland) (Con)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
Harding, Mr Keith (Mid Scotland and Fife) (Con)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Johnston, Nick (Mid Scotland and Fife) (Con)
Johnstone, Alex (North-East Scotland) (Con)
MacAskill, Mr Kenny (Lothians) (SNP)
MacDonald, Ms Margo (Lothians) (SNP)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Matheson, Michael (Central Scotland) (SNP)
McGrigor, Mr Jamie (Highlands and Islands) (Con)
McGugan, Irene (North-East Scotland) (SNP)
McIntosh, Mrs Lyndsay (Central Scotland) (Con)
McLetchie, David (Lothians) (Con)
Monteith, Mr Brian (Mid Scotland and Fife) (Con)
Munro, Mr John (Ross, Skye and Inverness West) (LD)

Neil, Alex (Central Scotland) (SNP)
Paterson, Mr Gil (Central Scotland) (SNP)
Quinan, Mr Lloyd (West of Scotland) (SNP)
Robison, Shona (North-East Scotland) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Mr Alex (Banff and Buchan) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Sheridan, Tommy (Glasgow) (SSP)
Sturgeon, Nicola (Glasgow) (SNP)
Swinney, Mr John (North Tayside) (SNP)
Tosh, Mr Murray (South of Scotland) (Con)
Ullrich, Kay (West of Scotland) (SNP)
Wallace, Ben (North-East Scotland) (Con)
Welsh, Mr Andrew (Angus) (SNP)
White, Ms Sandra (Glasgow) (SNP)
Wilson, Andrew (Central Scotland) (SNP)
Young, John (West of Scotland) (Con)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Dewar, Donald (Glasgow Anniesland) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Finnie, Ross (West of Scotland) (LD)
Galbraith, Mr Sam (Strathkelvin and Bearsden) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (Edinburgh Pentlands) (Lab)
Home Robertson, Mr John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Jenkins, Ian (Tweeddale, Ettrick and Lauderdale) (LD)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
MacKay, Angus (Edinburgh South) (Lab)
MacLean, Kate (Dundee West) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAllion, Mr John (Dundee East) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McConnell, Mr Jack (Motherwell and Wishaw) (Lab)
McLeod, Fiona (West of Scotland) (SNP)
McMahon, Mr Michael (Hamilton North and Bellshill) (Lab)
McNeil, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan (Roxburgh and Berwickshire) (LD)
Rumbles, Mr Mike (West Aberdeenshire and Kincardine) (LD)
Simpson, Dr Richard (Ochil) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North-East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Thomson, Elaine (Aberdeen North) (Lab)
Watson, Mike (Glasgow Cathcart) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

The Deputy Presiding Officer: The result of the division is: For 49, Against 57, Abstentions 0.

Amendment 129 disagreed to.

Section 2—Applications and other proceedings and appeals

15:30

The Deputy Presiding Officer: We now come to amendment 114, in the name of Mr Jim Wallace, which is grouped with amendments 3, 5, 8, 11, 14, 17, 24, 25, 77 to 88, 158 and 89 to 102.

Angus MacKay: The amendments are all technical; they are consequential on the inclusion in the bill of schedule 2A, which contains provisions on jurisdiction and private international law. The schedule was agreed at stage 2 on the completion of work of the Hague Convention on the International Protection of Adults. The convention was concluded in October 1999.

The first amendments in the group, up to amendment 17 and including amendment 25, involve jurisdictional arrangements that are now dealt with in schedule 2A. The later amendments in the group apply to the schedule itself, and mainly align the wording more completely with the meaning and effect of the text of the convention.

Amendment 100 amends the procedure for bringing into effect certain provisions on judicial co-operation under the convention, which can be done only after ratification of the convention in Scotland. That follows helpful comments by the Subordinate Legislation Committee about the method of making the subordinate legislation. We have also taken the opportunity to include the formal title of the convention, which is now dated 13 January 2000, when it was signed by the Netherlands.

I move amendment 114.

Roseanna Cunningham: It is clear to all members that the amendments are fairly technical. It is also fair to say that some aspects of the amendments reflect issues that were raised during stage 2 at meetings of the Justice and Home Affairs Committee, where questions were asked about the bill's compliance with the Hague convention. As convener of the Justice and Home Affairs Committee, I should say that that shows that the Parliament's committee system is capable of raising issues that might not have been at the forefront of even the ministers' minds. I

congratulate the minister on lodging these amendments, to which I think he will find little objection.

Phil Gallie: I have a query about amendment 25, which amends section 24 by leaving out the phrase "habitually resident in Scotland". As the bill affects residents of Scotland, why is it important to leave out that phrase?

Euan Robson: I simply want to record the support of Liberal Democrat members for the amendments and to echo the words of the convener of the Justice and Home Affairs Committee that these matters were first raised in that committee. I am glad that the minister has taken on board the points that the committee made.

The Deputy Presiding Officer: Do you wish to reply, minister?

Angus MacKay: I was not able to hear everything that Euan Robson said, so I do not know whether he posed a question.

Mrs Lyndsay McIntosh (Central Scotland) (Con): He congratulated the committee.

Angus MacKay: I want to reply to that—I thank him very much.

I hope that the answer to Mr Gallie's question is inside the envelope that I have just been handed—this is a bit like the Oscars. The answer is commendably brief. In relation to amendment 25, it is covered in schedule 2A. I hope that that makes sense to Mr Gallie.

Phil Gallie: It would make sense if the minister gave me the page number.

The Deputy Presiding Officer: I am sure that the minister will assist you with that.

Amendment 114 agreed to.

Section 4—The Public Guardian and his functions

The Deputy Presiding Officer: We now come to amendment 2, which is grouped with amendments 4, 7, 9, 10, 13, 15, 16, 18, 35 to 38, 40 to 42 and 72.

Angus MacKay: The amendments improve consistency in the drafting of the bill. They all affect the form of words that is used when referring to people who are authorised under intervention orders. They will amend the bill to ensure that people are referred to simply as "authorised" rather than "appointed" to carry out an order or "authorised to act" under an order, and that people are authorised "under" rather than "by" orders. The changes have no policy implications.

I move amendment 2.

Amendment 2 agreed to.

Amendments 3 to 5 moved—[Angus MacKay]—and agreed to.

Section 6—Expenses in court proceedings

The Deputy Presiding Officer: We now come to amendment 115, which is grouped with amendments 116 and 154.

Angus MacKay: These three Executive amendments have been prompted by an amendment that was lodged by Phil Gallie at stage 2. As I understand it, he wished to ensure that the courts should not make an award of the expenses of a public authority against an adult with incapacity where the authority is a party to the proceedings to represent the public interest rather than to protect the interests of the adult. That amendment would have required the local authority, public guardian and Mental Welfare Commission to meet their own costs whenever they were involved in a public interest case.

We had a helpful Justice and Home Affairs Committee meeting in which we clarified the Executive's view that the general public interest ground for award of expenses should be retained in section 6 to safeguard the public purse. For example, public authorities might be involved in cases that examine how the legislation is to be interpreted. Expenses could justifiably be awarded against the third party whose actions had given rise to the need for proceedings or against a public authority that became involved.

The Executive agreed that it was difficult to envisage any circumstances in which expenses should be awarded against the adult in public interest cases and we undertook to consider the matter further. We have identified one possible—although admittedly rather unlikely—set of circumstances in which expenses might be so awarded. That should be the case where the adult who is involved has not acted in good faith or has behaved unreasonably in relation to the proceedings. Although such cases are likely to be rare, they may arise.

The amendments remove the option of awarding expenses against the adult in public interest cases, but leave in place the possibility of such an award against any person whose actions have resulted in the proceedings or have affected the conduct of the proceedings. The Executive considers that that would cover the example of the vexatious adult that I mentioned. For consistency, it should apply to all awards of expenses under section 6, and not just to awards in public interest cases.

The Executive also wishes to amend the reference in section 6 to the adult's estate. That was used in the Scottish Law Commission's draft

bill, which covered only proceedings in which the public guardian became a party. The adult's property and financial affairs would have been the only subject of proceedings. However, as section 6 now includes proceedings in which the adult's welfare may be the only issue and the adult may be capable of managing their financial affairs, we wish to refer to awards of expenses against the adult rather than to awards against their estate.

I move amendment 115.

Phil Gallie: I thank the minister for acting positively on this issue, about which I, with other members of the Justice and Home Affairs Committee, felt strongly. The minister has responded as we wanted, particularly in amendment 115.

When I read amendment 154, I was a little concerned that the minister was reinjecting the philosophy of the original section 6 back into the bill. However, today he has said that he is seeking to take account of the actions of a very small minority—something that I referred to in an earlier debate. It is responsible of this chamber to be aware of the abusive actions that a minority may take. I only wish that the minister had taken account of that point in the previous debate—however, I am not allowed to go back to that. I thank the minister for taking my point on board.

Amendment 115 agreed to.

Amendments 116 and 154 moved—[Angus MacKay]—and agreed to.

Section 7—Functions of the Mental Welfare Commission

Iain Gray: Amendment 6 is a technical amendment to clarify that the Mental Welfare Commission has a duty under the bill to investigate complaints only where the local authority, which is the primary complaints body, has not done so satisfactorily or has failed altogether to conduct an investigation. I understand that the commission is happy with the amendment.

I move amendment 6.

Amendment 6 agreed to.

Amendments 7 to 11 moved-—[Angus MacKay]—and agreed to.

Section 8—Functions of local authorities

The Deputy Presiding Officer: I call the minister to move amendment 12, which is grouped with amendment 133.

Iain Gray: Amendment 12 is a technical change to ensure consistent references in part 1 of the bill to matters on which local authorities, the public guardian and the Mental Welfare Commission are required to liaise under the bill. Amendment 133 clarifies the power of a local authority to investigate, as a matter of urgency, circumstances in which the personal welfare of an adult may be at risk. There is a need to do that explicitly in section 8 to make it clear that the functions of local authorities in this regard apply to adults who are present in the local authority's area. The general definition of local authority in section 76 includes only the authority where the adult resides.

I move amendment 12.

Roseanna Cunningham: The SNP has no objection to these amendments. However, I would like the minister to clarify what resources local authorities will receive to carry out the functions to which he has referred. Has any assessment been made of the extent to which that function will put pressure on local authority resources? If so, what has it shown? If a local authority found that resourcing was a problem, how would that be solved?

15:45

Iain Gray: The extent of the consideration of the financial implications for resourcing is contained in the financial memorandum. There is considerable work to be done on regulations and guidelines, but we must consider how to ensure that resources are available for local authorities to meet the needs.

Amendment 12 agreed to.

Amendments 13 to 15, 133, 16 and 17 moved—[Angus MacKay]—and agreed to.

Section 11—Codes of Practice

Amendment 18 moved—[Angus MacKay]—and agreed to.

Roseanna Cunningham: On a point of order, Presiding Officer. This arises out of my experience of voting on amendments in the Justice and Home Affairs Committee. There have been two occasions today when amendments have been taken out of numerical order—we took amendment 133 just now and we voted on amendment 154 earlier. However, an earlier group included amendment 145, which we did not vote on because we would eventually reach it according to numerical order. We seem to have confused the system. We appear to be taking amendments out of numerical order, notwithstanding the earlier decision.

The Deputy Presiding Officer: We are following the marshalled list, rather than the strict numerical order of the amendments, both for votes and for debates.

Section 13—Creation of continuing power of attorney

The Deputy Presiding Officer: We now come to amendment 19, which is grouped with amendments 20 to 22.

Angus MacKay: Amendments 19, 20 and 21 improve provision made at stage 2 to ensure that the solicitor or member of a prescribed class who certifies that the granter of a power of authority is capable is not the same person to whom the power is granted. That will help to ensure that there is no conflict of interest for the person who advises a client on granting a power of attorney.

I move amendment 19.

Amendment 19 agreed to.

Amendment 20 moved—[Angus MacKay]—and agreed to.

Section 14—Creation and exercise of welfare power of attorney

Amendments 21 and 22 moved—[Angus MacKay]—and agreed to.

Section 18—Powers of the sheriff

Angus MacKay: Amendment 23 is a technical amendment to ensure that the provision for notifying the Mental Welfare Commission is consistent with the rest of the bill. It does that by removing the superfluous word "also". It has no policy implications.

I move amendment 23.

Amendment 23 agreed to.

Section 23—Determination of applicable law

Amendment 24 moved—[Angus MacKay]—and agreed to.

Section 24—Authority to intromit with funds

Amendment 25 moved—[Angus MacKay]—and agreed to.

Section 25—Application for authority to intromit

Angus MacKay: Amendment 26 ensures that an application for access to the account or funds of an adult with incapacity, under part 3 of the bill, may not be countersigned by a person living with the applicant or with the adult. Such a person might have a conflict of interest and hence might not provide the impartial support required for the application.

I move amendment 26.

Amendment 26 agreed to.

The Deputy Presiding Officer: Amendment 27 is grouped with amendments 118 and 73.

Angus MacKay: These are minor technical amendments to the way in which incapacity is referred to in the bill. They remove out-of-date terminology in the bill, which now refers simply to "adults"—meaning "adults with incapacity"—rather than to "incapable adults". The amendments update the definition of "incapacity" used in section 25, in line with the definition used elsewhere in the bill.

I move amendment 27.

Amendment 27 agreed to.

Section 31—Joint accounts

Angus MacKay: Amendment 28 is also a technical amendment. It reinserts words that were mistakenly removed by one of the stage 2 Executive amendments to the definition of incapacity in the bill. Section 31 does not make sense without this amendment.

I move amendment 28.

Amendment 28 agreed to.

Section 35—Residents whose affairs may be managed

Phil Gallie: Amendment 136 would ensure that an adult's right to manage his or her affairs cannot be interfered with unless there is a certificate granted by a medical practitioner approved under section 20 of the Mental Health (Scotland) Act 1984 to the effect that the adult is incapable.

I emphasise that the amendment refers to the section that deals with residential establishments. It is an extremely serious step to remove an adult's right to manage his or her affairs. I have no fears about the way in which people who run residential establishments operate in the majority of cases. However, I am thinking about the minority of cases. The bill seems to create a situation in which irresponsible residential establishment operators and perhaps an irresponsible general practitioner could come together and work against the interests of the adult with incapacity.

The section represents a major step and I believe that there should be some form of guarantee. That guarantee comes by insisting that the medical practitioner who classifies incapacity is approved under section 20 of the Mental Health (Scotland) Act 1984. The amendment is simple and precautionary; the minister could well accept it, and I ask him to do so.

I move amendment 136.

Iain Gray: The Executive's intention is that the

arrangements for assessing incapacity should be appropriate both to the setting in which an adult with incapacity lives and to the reason for the assessment. In general, the doctor in charge of the adult's care is the one who should assess incapacity. He or she is the person most likely to be available and to be aware of the adult's condition and medical history.

Mr Gallie's amendment seeks, in fact, to require a specialist psychiatrist to be found to examine and certify incapacity in the case of an adult resident in an authorised care establishment. The Executive can see no good reason to impose such a procedure for the management of funds of adults residing in care establishments.

Although Mr Gallie presented the procedure as simple, in some remote areas it would be extremely impractical to find a psychiatrist to carry out that task. To introduce a requirement under section 35 for such a specialist would be entirely inconsistent with part 3, where there is no such requirement, although the amount of funds that may be managed under part 3 could be greater. I hope that members will acknowledge that the amendment is neither necessary nor sensible, although I recognise the intention behind it. The bill as it stands makes consistent and workable arrangements for certification and assessment with safeguards.

Mr Gallie rightly draws attention to potential abuses by a small minority, but I remind members that section 35(6) provides safeguards to ensure that there is no conflict of interest for certifying medical practitioners. That subsection requires that the certifying medical practitioner must not be related to the resident adult or any managers of the establishment, nor may he have a financial interest in the authorised establishment. Given that safeguards already exist in the bill, I hope that for the sake of consistency Mr Gallie will withdraw amendment 136.

Roseanna Cunningham: My questions are for the minister, because on the face of it Phil Gallie's amendment is not hugely controversial, particularly as we have already had debates about keeping the bill in line with the Mental Health (Scotland) Act 1984 on other matters. The minister may be correct, but I am curious about what he said. Does he have the figures for the number of approved medical practitioners under the act? How is approval obtained? Is it extremely difficult to get, or is it relatively straightforward? Would it create a big obstacle in future if more medical practitioners were to apply for such approval?

Dr Simpson: Apart from its inconsistency with part 3, to which the minister has already drawn attention, the amendment is impractical. Psychiatrists are already under considerable pressure; if they were required to be in attendance every time incapacity had to be certified, that would make life extremely difficult.

Under the terms of clinical governance, which cover all general practitioners, GPs will need to feel comfortable issuing a certificate. If they felt that their knowledge was insufficient, which is what Mr Gallie is in part suggesting, they would pass the matter to a colleague with greater experience. The amendment would make the situation impractical, so I hope that Mr Gallie will withdraw it.

The Deputy Presiding Officer: Does the minister wish to respond?

Iain Gray: Yes. On Roseanna Cunningham's point, it will come as no surprise that I cannot provide the number of certified psychiatrists. However, as Dr Simpson said, because of the number of available psychiatrists, there are already pressures and practical difficulties in, for example, carrying out sectioning under the Mental Health (Scotland) Act 1984. There is discussion about whether the new mental health legislation will have to take cognisance of that—we know that there are practical problems already. On the other side of the coin, some procedures under the Mental Health (Scotland) Act 1984 do not require the participation of such authorised medical practitioners; even within the terms of the act, that is not a requirement in every instance.

Mr Gallie rightly referred to the seriousness of this provision in connection to the management of financial resources. However, for consistency's sake, we should consider the certification of incapacity in, for example, an emergency situation under part 5. Surely that is also a most serious decision, yet there is no suggestion that a certified psychiatrist should be available to certify incapacity before a medical practitioner could provide required treatment. If the amendment was agreed to, the inconsistency would be significant.

16:00

Phil Gallie: I accept the argument on inconsistency. As always, I bow to Richard Simpson's knowledge—he is certainly the expert in the chamber on that issue.

While I do not want to be emotive or to provoke sensationalism in the chamber, all members are well aware of general practitioners—and, to an extent, people who work in residential homes—who have performed extremely irresponsibly in the past. I accept that they form a very small minority and I accept the minister's comments. I recognise the inconsistencies that would be introduced were my amendment to be accepted. On that basis, I will not move the amendment.

The Deputy Presiding Officer: Mr Gallie, you

already moved the amendment. You must seek agreement to withdraw it.

Phil Gallie: I will do so.

Amendment, by agreement, withdrawn.

Section 41A—Resident ceasing to be resident of authorised establishment

Iain Gray: Amendment 29 makes a small change to the procedures to be followed where an adult who is no longer incapable leaves an authorised care establishment. In such circumstances, sections 41 and 41A provide for a statement of the adult's financial affairs to be made and for the transfer to someone else of the management of those affairs. Where the adult is no longer incapable, provision is made for the statement and transfer to be made to the adult directly.

Where the adult has not moved into another establishment or into local authority care, the supervisory body and the local authority will be notified of the move. As drafted, that provision applies even when the adult is no longer incapable. The Executive considers that there is no good reason for a capable adult to be tracked in that way and the amendment removes that requirement.

I move amendment 29.

Roseanna Cunningham: I do not wish to speak in opposition to the amendment; rather, I wish to raise a question. Is there a potential knock-on effect on the local authority, because it is not notified? Might a local authority think that it should check up on a situation, if it has no information to the contrary? Has that aspect been considered?

Iain Gray: I will consider Roseanna Cunningham's point, but the more important consideration is that a report on the movements of someone who is no longer incapable should not be required, as such reports are not required for Roseanna Cunningham or myself. However, we should consider that point when drawing up guidelines for local authorities.

Amendment 29 agreed to.

Section 47—Medical treatment where guardian etc has been appointed

The Deputy Presiding Officer: Before we debate amendments 138 and 139, I should point out that, if either amendment is agreed to, amendments 140 and 141 cannot be called. Amendment 138 is grouped with amendments 139, 140 and 141.

Phil Gallie: Amendment 138 will cause some emotion. I lodged the amendment principally because of representations made by a number of individuals and carers groups, who suggested that the current drafting of the bill negates the wishes of an adult with incapacity in nominating the welfare attorney. Indeed, the viability of the sheriff appointing the welfare attorney to look after the welfare of the individual adult with incapacity is called into question.

At present, medical practitioners are charged with putting to the fore the safeguarding and promotion of the physical and mental health of their patients, which is fundamental. However, it still leaves carers feeling that some level of responsibility has been removed from them and given to people who do not understand the inner wishes of the adult with incapacity to the same extent. I recognise that there are two sides to the argument; I feel that there is no perfect solution. Somewhere along the line, either the role of the carers or the protection that the ministers wish to give will be brought into question.

I query whether section 47, as currently drafted, might contravene the European convention on human rights. I recognise that the minister and his team have put much time and effort into redrafting section 47. It now bears little resemblance to the original and takes account, to a large extent, of discussions in the Justice and Home Affairs Committee at stage 2 and representations made by members who expressed concern on the issue when the bill was debated in the chamber at stage 1.

Given the shambles that currently surrounds the ECHR, I seek the minister's assurance that there will not be confusion and long drawn out legal procedures in relation to this life and death issue. I ask him to consider amendment 138, although I recognise that it does not offer the perfect solution.

I move amendment 138.

Iain Gray: This group of amendments revisits the comprehensive debate in the Justice and Home Affairs Committee at stage 2, concerning the right—or otherwise—of a proxy decision maker to refuse consent for medical treatment to be given to an adult with incapacity. That debate followed the comprehensive stage 1 led by that committee.

This debate provides an opportunity to address the issues again, as well as enabling the Executive, through amendments 140 and 141, to demonstrate still further its determination to ensure that the rights of proxies are given due place and that we have a framework that works well, as it is impossible—as Phil Gallie rightly said—to find a perfect solution that will please all those with an interest in the matter.

I expect disagreements between a proxy and a doctor over medical treatment to be few and far between. In most cases, disagreement will be

resolved quickly by amicable discussion. Doctors will have careful regard to objections that proxies raise and most proxies will be ready to be convinced of the need for treatment if there is such a need. When such agreement is not quickly reached, the involvement of a second doctor might well help the parties to reach a shared decision. I will take this chance to point out that, at stage 2, the Executive accepted amendments—particularly from Dr Simpson—that ensure that the second doctor is independent both of the first medical practitioner and of the health board. They will be appointed from a panel by the Mental Welfare Commission for Scotland.

However, our efforts today should not be aimed at establishing the primacy of one group or the other—proxy or medical practitioner—but rather at doing our best to establish a framework in which the best decision for promoting the health of the adult can be made. The framework that we painstakingly reached at stage 2 is the right one on which to build. That framework stresses consultation, discussion and the involvement of independent opinions. It allows either party to call the decision of the other into question and it opens the appeal route to both parties and to any other person who has an interest in the personal welfare of the adult. Importantly, it allows a challenge where the nominated doctor says that the treatment should not be given. It is a framework of openness and reflection; it stands in contrast to the assertion of the right of one party or the other to what would effectively be a veto. Above all, the framework puts the rights and the safeguarding of the adult with incapacity at the centre, where they properly should be.

In practice, there are relatively few circumstances in which serious disputes could be imagined. The first, and most unlikely, of those is that a proxy and doctor could collude for their respective interests to withhold treatment from an incapable adult, with the intention of causing or hastening death. Unlike the amendments lodged by Mr Gallie and Mr Chisholm, section 47 as it stands permits anyone who has an interest in the personal welfare of the adult to challenge the decision in the Court of Session.

The second circumstance would arise if a hospital doctor believed to be necessary a treatment that the carer feared might have unwanted side effects and therefore opposed. Amendments 138 and 139 would force both parties into an unpleasant confrontation in court if the matter could not be resolved by discussion. Section 47 sets in train a mechanism for resolving the disagreement by involving an independent medical practitioner, nominated by the Mental Welfare Commission. It is not enough to say, as Mr Gallie's and Mr Chisholm's amendments do, that the proxy must give reasons for refusing consent. Who is to say whether the reason is a good one? What sanction exists if the proxy simply fails to give a reason? The amendments stay silent on those questions.

Section 47 also gives a voice to relatives who hold no official appointment, by allowing an appeal to any person who has an interest in the personal welfare of the adult. At stage 2, however, the Justice and Home Affairs Committee considered that we should bring in greater lay representation, and the Executive amendments would enable proxies, in cases where they so desired, to bring a lay opinion into the process. That is the purpose of amendments 140 and 141. The person could be a lay person, or the adult's general practitioner, or someone from a voluntary organisation that had an interest.

We believe strongly that section 47, as it stands, is a way of moving forward—from the debate that tries to suggest that either proxies or doctors always know best—to a framework that allows the best solution to emerge for the adult with incapacity. We hope that it commends itself to the chamber today.

Malcolm Chisholm (Edinburgh North and Leith) (Lab): Amendment 139 is similar to Phil Gallie's amendment, and even more similar to the Executive's original position when the bill was published. Today, I am trying to drag the Executive back to that original, correct position, which was that a welfare attorney or guardian ought to be able to refuse medical treatment and that it would be up to the doctor to challenge that in court if necessary.

Iain Gray implied that such cases would not end up in court, but they are still as likely to end up in court. Section 47 as it stands means that a proxy's view can be overridden by a second medical opinion and, therefore, that the proxy would have to go to court, which would be far more difficult for the proxy to achieve.

The rationale behind the Executive's change was concern about euthanasia. That was illogical from the Executive's point of view, and entirely irrelevant from the point of view of those who were concerned about euthanasia. The change was illogical for the Executive, because it has said—and I accept its assurances—that we need have no grounds for concern about euthanasia. It is entirely illogical to say that there are no grounds for concern, but then to change section 47 on the grounds of those unfounded concerns.

The change was irrelevant from the point of view of those who are concerned about euthanasia, because it is not the change that they wanted. They want safeguards in the bill; I understand and respect that view. They did not want the change that the Executive made to section 47. That was

made absolutely clear by the Scottish Council on Human Bioethics, which has perhaps been the leading campaigner on the euthanasia issue.

I remind members that the Justice and Home Affairs Committee, in its pre-legislative report, did not recommend the change to section 47. My amendment is supported—members have all had letters to this effect—by the Alliance for the Promotion of the Incapable Adults Bill, which has worked with the Executive on this process over the past few years. It is supported by Enable, by the Scottish Association for Mental Health, by Alzheimer Scotland—Action on Dementia, by Parent Pressure, and by every carers group that I have spoken to in Scotland about the issue. It is also supported by the Scottish Law Society; I hope to have time to quote its views about the matter in relation to the European convention on human rights. On what grounds can a listening Parliament override those views?

16:15

I ask members to put themselves in that position. They should imagine appointing their wife, husband or partner as their welfare attorney, because they know that they are in the early stages of Alzheimer's. In that situation, the person who has been appointed—their nearest and dearest—will no longer have the right to say no on their behalf to medical treatment. That is the situation for us, but think of the situation for someone who, unlike members of the Scottish Parliament, has severe learning difficulties. The Health and Community Care Committee was very moved and influenced by the evidence of parents of adults with severe learning difficulties.

I want to quote once again what one mother said at the committee. It is only a brief paragraph:

"It seems strange to me that I have been entrusted with looking after Kimberly on a daily basis for 28 years—bathing, lifting, feeding and medicating her and deciding when a doctor should be called—yet I would have no say when it comes to medication or surgery. The power will be handed over to a doctor who might never have met her. In 28 years, I have seen the often devastating effect of drugs on my daughter. I am the person closest to her in the world; the one who recognises her every change of expression and every sound of pain or pleasure. Doctors do not live with the side effects of powerful drugs—carers and their patients do."—[*Official Report, Health and Community Care Committee*, 26 January 2000; c 540.]

Alzheimer Scotland made precisely the same point about the side effects of powerful drugs. As the carers, they want to be able to say no.

Contrary to what Iain Gray said, this is a matter of the rights and the interests of adults with incapacity. Remember that guardians are appointed by the court and that welfare attorneys would be appointed by people like ourselves before they became incapable. We are not talking about just any carer in Scotland; we are talking about people who have been appointed either by an adult when capable or by the court. Remember also that the powers of welfare attorneys or guardians can be withdrawn by the court if there are any problems.

I hope that I have time to refer to the European convention on human rights, which, I believe, is an important aspect of the bill.

The Deputy Presiding Officer: Will you wind up, please?

Malcolm Chisholm: It is all very well for the Executive to say that the ECHR is not relevant, but when the Law Society of Scotland quotes two grounds for concern under the ECHR, it is our duty to sit up and pay attention. I will cite only one of those grounds for concern, as time is running out, but the second relates to the independence of the second medical opinion—the Law Society of Scotland is not assured by what the minister said. However, the more fundamental point in relation to human rights is this:

"To allow doctors to override the proper role of the court as proposed in the Executive amendment would be contrary to the European Convention on Human Rights. It has recently been conceded that it is a clear breach of the Convention for a minister to alter a sentence imposed by a court. Likewise, it would be a breach to empower doctors to override powers conferred by the court, or to override powers granted by the patient other than upon application to the court."

Let us consider that not only in terms of the European convention on human rights.

The Deputy Presiding Officer: Come to a close, please.

Malcolm Chisholm: We are asking that proxies, who may be on low incomes—many of them are, because they look after adults with incapacity—should have to go to court. Remember not only the distress, but the expense of having to go to court, which was pointed out by the British Medical Association in its submission.

The vast majority of people who have followed the issue in Scotland—all the groups that I mentioned, as well as campaigners on euthanasia—are opposed to the Executive's new section. We should go back to a position where it is the medical person who has to go to court.

My final words on the matter are from the BMA, which said at the Justice and Home Affairs Committee, although we might not have expected it to:

"we are happy with the subsection, which gives doctors the opportunity to apply to the Court of Session to overrule the decision of the proxy."—[*Official Report, Justice and Home Affairs Committee*, 17 November 1999; c 378.]

The Deputy Presiding Officer: Members

should try to limit their speeches to four minutes.

Michael Matheson: I will be brief.

Malcolm Chisholm makes a strong case for amendment 139, as he did when he moved his amendment on the same issue at the Justice and Home Affairs Committee. This is a classic example of the balance going too far in the direction of the professional and moving away from being in favour of the carer or person who has hands-on experience of dealing with an individual who is incapacitated.

It is to be regretted that the issue has become entangled in the debate on euthanasia, an argument that was deployed by the Executive when the issue came before the Justice and Home Affairs Committee. To some extent, that is a red herring, to say the least. It is time to change the balance back in favour of those who are responsible for caring for individuals with incapacity. They know what the caring needs of that individual are and know what that individual would or would not like to see done.

It is important that we begin to realise that professionals do not always know better than carers—if any person knows what an individual requires or what treatment they should receive, it is the carer. Carers provide care 365 days a year, 24 hours a day.

Should Malcolm Chisholm's amendment fall, the Scottish National party will support amendments 140 and 141. We will do so because those amendments would extend consultation to proxies so that their views are noted.

Mrs Margaret Smith (Edinburgh West) (LD): All members would like, I am sure, to pay tribute to the excellent work that has been done by the Justice and Home Affairs Committee throughout the passage of a complex bill. Members of the Health and Community Care Committee also had a part to play in the bill's passage—the committee presented a report at stage 1. That committee also took evidence at stage 2. That would not usually happen because the Health and Community Care Committee is a secondary committee. However, the committee decided to take evidence and—as members will see from the bill—there was a complete turnaround in the Executive's position on section 47. Notwithstanding anything else that I will say, the Executive should take it on board that when it does a U-turn, much of the consultation that has been done must be done again. There will be people who were originally happy with the Executive's position who will come back to say that they are not happy with it now.

The Health and Community Care Committee took evidence on section 47 at stage 2. As Malcolm Chisholm said, we heard some powerful arguments and evidence, especially from Parent Pressure. Throughout consideration of the bill, there has been a great deal of concern about section 47. What will happen when the medical professionals and proxies or carers do not agree? I agree with the minister—most of the time, care teams and proxies will agree on medical care, but we must legislate for the occasions when they do not.

The Executive has already taken on board some concerns, as is shown by the amended bill. It has assured us that a second medical opinion will be available—an opinion that has some independence, because it will come from a list that will be drawn up by the Mental Welfare Commission. That body has a statutory duty of care for those with mental disabilities and to ensure that both medical practitioners and proxies have a right of appeal to the Court of Session. Carers and proxies have rights to appeal to the courts and their right to be consulted is enshrined in the bill.

The second amendment that the Executive has accepted not only gives carers and proxies the right to be consulted, but gives them the right to consult a second lay person. That is because at the stage 2 debate in the Justice and Home Affairs Committee—despite the fact that the Executive had taken on board Richard Simpson's amendment—members of that committee and the Health and Community Care Committee felt that the bill did not go far enough in trying to get a balanced approach.

What we have now—as a result of further amendment by the Executive—is the facility for a second lay opinion to be sought by carers and proxies. As the minister said, that might be the opinion of a representative of a voluntary organisation or of an advocate; it might be the opinion of a trusted local health or social care practitioner such as the local GP; or it might be the opinion of anther family member. The change provides an extra voice for the carer and for the individual with incapacity. It would be useful if the minister clarified how it will be decided whether it is "reasonable and practicable" to consult a second person.

However, I support the two Executive amendments and I ask members to do the same.

Dr Simpson: Throughout stage 2, there have been attempts to ensure that the bill takes account of and promotes best practice. As many members have said, we do not expect the carer and the doctor to disagree in the majority of cases; it is likely to be the minority of cases.

The problem all along with section 47 has been that it has tried to cover all situations in which treatment is proposed, from the acute to the long term, and from the severest incapacity to the

mildest or most circumscribed. The original proposal, to which Malcolm Chisholm would have us return, is that the proxy should have primacy. In the event of the carer refusing treatment, the doctor would have to go to court.

As was discussed at length in the Justice and Home Affairs Committee, primacy without a duty of care was not thought to be reasonable, yet the imposition of a duty of care on the proxy was also thought not to be appropriate or reasonable. The duty of care, therefore, lies with the doctor and not with the carer.

However, the amendments propose that a simple statement of the reason for refusal should suffice. As the minister said, there is no judgment about that statement.

In my opinion, the most powerful evidence that was received by the Justice and Home Affairs Committee was that of Professor McLean, who cogently referred to research in the United States on the opinions of carers in respect of those for whom they were acting as proxy. It was a theoretical piece of research but, nevertheless, it is highly credible. Interestingly, it found that the carer was able to judge what the adult's view would have been only by chance—in other words, on 50 per cent of occasions. The same applied to the doctor.

We are dealing with a very human situation, in which two people are trying to reach a decision that is in the best interests of—and, in section 1(2), must benefit—the adult. It is a situation in which the doctor and the carer are in disagreement over the proposed treatment. The amendments that have so far been accepted indicate that an independent medical opinion will be sought. The Health and Community Care Committee felt that, even with independent medical opinion, two medical opinions were not enough. It felt that it might be perceived that there was a degree of collusion or that it might be perceived that a scientific medical approach was being taken, which did not take into account the human, caring situation that was described to us with great passion by Parent Pressure.

Amendments 140 and 141 allow an additional lay opinion to be obtained. It is possible that a doctor might dismiss the opinion of one carer. A doctor who dismisses two lay opinions may now be in considerable trouble in court if either of those lay people decides to go to court.

What the Executive is proposing, in amendments 140 and 141, is to empower the carer to appoint that second lay opinion. They will be able to choose from a wide array of individuals: perhaps another relative, someone from a voluntary organisation—Dorothy-Grace Elder made a point about involving voluntary organisations—a health visitor or a general practitioner. It does not specify who should be chosen in those circumstances.

Amendments 140 and 141 continue to promote good practice because they broaden the decision out from one in which—as Phil Gallie mentioned—there is the possibility of collusion. In practice, looking after incapable adults at the severe end of the problem is no longer done by a single person; it is done by a team.

Amendments 140 and 141 promote good practice and promote the involvement of a second tier of individuals, so that a collective decision can be reached. I believe that those amendments meet the concerns that were expressed by witnesses to the Justice and Home Affairs Committee and the Health and Community Care Committee.

I commend amendments 140 and 141 to Parliament, and suggest that amendments 138 and 139 be rejected.

16:30

Ben Wallace: At stage 1, there was considerable concern, particularly among members of the Health and Community Care Committee, about the imbalance between carers being able to override decisions made by clinicians and the Executive's clear statement that it opposes the bill allowing any form of euthanasia. Ministers promised to go away and consider those concerns and have brought the bill back as it is now amended—which, I am afraid, reverses the situation, so that the clinician can now override the carer.

Serving on the Health and Community Care Committee and hearing some of the emotive submissions that Malcolm Chisholm quoted made me shift from my original position of thinking that the clinician or GP should have the last say. Richard Simpson did some pioneering work in the committee and worked hard to achieve a balance between the carer and the clinician, which must be the best relationship. It should not be a case of doctor knows best, but we should attempt to prevent situations in which a carer who does not know his or her ward can use the rather loose provisions of section 73, which concerns liability, to get away with blaming the doctor for a bad diagnosis.

I would have supported amendments 138 and 139, proposed by Phil Gallie and Malcolm Chisholm, had section 73 been tightened up. Representations were made by Mary Kearns of the Scottish Council on Human Bioethics and by other members to the effect that if a carer is able to overrule a clinician there should be more responsibility on that carer so that the decision is

on his or her head.

Unfortunately, the Executive and members of other committees did not take that suggestion forward, so I now find myself having to choose between two possible situations. If a clinician had to go to the Court of Session, a hard-working GP might have little time to spare and could decide to take the easy way out and not bother to pursue a decision. On the other hand, if a carer had to go to the Court of Session, they might not have the time or money to do so and would not be familiar with its procedures. Given those alternatives, I decided to support the bill as it stands. A number of safeguards have been included to try to shift the balance somewhat towards consulting the carer for a second opinion. I therefore urge members not to support amendments 138 and 139 and join Richard Simpson in asking the chamber to support amendments 140 and 141.

Gordon Jackson: I agree with Ben Wallace. Phil Gallie said that there are two sides to the argument and that there is no perfect solution. I could not agree more.

Members of the Justice and Home Affairs Committee have wrestled with this issue long and hard, and we are conscious of both Phil Gallie's argument and Malcolm Chisholm's. The difficulty is that the bill is meant to cater for, help and guard every incapable adult. There are certain incapable adults whose parents have sent us letters. They have looked after their children since they were small and obviously resent the change that is proposed.

Those incapable adults are loved, cherished, cared for and wanted, but there are other incapable adults in society. There are old people who suffer from dementia, have had a stroke or are just very old. Whether we like it or not, they may not be quite so loved, cherished and wanted. We were very concerned about those people when we supported the change. Ben Wallace has hinted at the possibility of such an old person—

Malcolm Chisholm: Will Mr Jackson give way?

Gordon Jackson: Certainly.

Malcolm Chisholm: Having read the Justice and Home Affairs Committee report that was presented to Parliament for the stage 1 debate, I am rather concerned. That report stated quite clearly that the committee was not persuaded of the need to make the change that has been made. Can Gordon Jackson clarify what he just said?

Gordon Jackson: Absolutely. We wrestled long and hard with this. We all changed our position and thought in one way about it and then in another. I see members of the committee nodding in agreement. We did not come to our conclusions lightly. As Ben Wallace said, we eventually thought of an elderly person for whom the doctor appropriately thinks that something might be done, but whose carer—for whatever motive—says no to that. In that situation, the doctor who requires to go to court does nothing.

Many people—not just those who are deeply concerned about passive euthanasia, but a broad medical opinion—expressed the fear that doctors who are under pressure and face funding restraints will simply let the matter go, and let the elderly person not have the treatment. We therefore recommended a change to the bill.

Malcolm Chisholm: Will Gordon Jackson give way again?

Gordon Jackson: I think that I should finish.

Malcolm Chisholm: This is a serious point.

Gordon Jackson: It is a serious issue. I shall give way.

Malcolm Chisholm: Gordon Jackson appears to be saying that the Justice and Home Affairs Committee's report recommended a change to section 47. I have read the committee's report. It admits that the argument is complex, but its conclusion is that, on balance, the committee supports section 47 as it was originally formulated. That is an important piece of evidence for this debate.

Gordon Jackson: However, after that report was produced we received representations, which demonstrates that we did not come to our conclusions lightly. We attended the stage 2 debate on the matter and considered it in great detail. That is on the record. We came to what is at least my considered opinion—that there are people who need the protection that the change establishes. The change means that the doctor will not be able to hide behind a proxy who says no to treatment.

We were also conscious that there is another side to the story. We were concerned that carers would be downclassed, and that changes were therefore necessary. Richard Simpson suggested some, and two further amendments that we will deal with today propose similar changes. It is unfair and inaccurate to suggest—as Malcolm Chisholm's quotation does—that carers would be told that they have no say. That is far from the truth. They will have a great deal of say. They will be able to represent their views, have an independent second medical opinion, and—according to the new amendments—have a further lay opinion taken into account.

Finally, carers—who, as Malcolm Chisholm says, care more than anyone for their own incapable adults—will be able to take the matter to court. There will then be protection for the incapable adult for whom those who have

approached Malcolm Chisholm care deeply. However, at the same time there should be changes to the bill for the benefit of the old incapable adults who need care as well. This bill, as it stands, is not a perfect solution, but, as well as it can, it squares that circle. It is a bill for all incapable adults, and Ben Wallace takes the right approach. For that reason, amendments 138 and 139 should not be accepted.

Christine Grahame: I endorse everything Gordon Jackson and Dr Richard Simpson have said. We considered the matter long and hard. I know what the stage 1 report says, but subsequent evidence was taken. In the interests of the welfare attorney, I now support section 47 as it stands, supplemented by the Executive amendments, and I oppose amendments 138 and 139.

It must be extremely difficult for a welfare attorney who has spent years looking after somebody to be put in a crisis in which they are asked to make life and death decisions. The bill assists the welfare attorney when there is a conflict of opinion. The person who loves somebody dearly may or may not be thinking clearly at the time, and they may need help. It is important that an independent arbiter from the Mental Welfare Commission should be made available to assist the welfare attorney in their decisions. The arbiter would not be in the same position as the capable adult.

In her evidence, Sheila McLean said that capable adults can make daft decisions about their health—we make them all the time. However, when a person is a proxy, he or she is acting in good faith for the incapable adult, and that is a terrible weight on his or her shoulders. That is also why I think written reasons for not agreeing to treatment or otherwise are a very bad idea. What is the point in them? The presumption is that the person is acting in good faith. The reasons may be wrong, but they are good faith reasons.

Section 47 strengthens the position of the welfare attorney. I have come to that decision after taking a long hard look at it and the evidence that we have received. I support what Gordon Jackson, Richard Simpson and Ben Wallace have said.

Mr John McAllion (Dundee East) (Lab): The issues in this debate turn on very fine points of argument. They are neither black nor white, nor are they easy. They are not at all easy for members who were not part of the earlier process in different committees, but our vote at the end of the debate will count just as much as anyone else's. We have a responsibility to address the complex issues.

I do not accept the argument, which the minister used, that this amended section will be used only very rarely and that amicable discussions will usually lead to a consensus between the carer and medical practitioners. It is not possible to legislate on the basis that legislation will be used only occasionally. If it will be used, and it is bad, it should not exist.

Is the amended section, proposed by the Executive, the better option; or is the original section, also as proposed by the Executive, the better option? Malcolm Chisholm presented a powerful argument that the intention of the original section 47 made it the better option.

I take Gordon Jackson's point about the elderly and frail person, who has perhaps suffered a stroke, who has a relative or carer who may not always have their interests at heart and who may take a decision to refuse consent and that the doctor, under pressure, may decide to accept that decision. However, that is to take a bleak view of carers and an even bleaker view of medical practitioners. Richard Simpson was right: medical practitioners have a duty of care. They cannot shrug their shoulders and say, "Let that elderly person die," just because the relative wants the person to die and to inherit the estate. That is not the way in which we should consider human nature.

Iain Gray: Does Mr McAllion accept that there is an inconsistency in his argument? He argues that we should not legislate in proportion to what may be a relatively small number of cases and that the points made by another member should not be considered because they would apply to only a small proportion of cases.

Mr McAllion: If I am inconsistent, I am inconsistent. The minister was also arguing to legislate for a small minority.

We have to get the balance right. I do not think that we should pass laws on the basis of what a small bad minority might get up to—unless in doing so we do not injure the rights of the majority of people who are genuine carers and who look after their relatives. That is what concerns me about the Executive's proposals. I do not know whether the real argument behind this has something to do with euthanasia; all I know is that I accepted the Executive's assurances in the earlier debates this afternoon, and voted against amendments 128 and 129 because I thought that there was no possibility of euthanasia. I assumed that euthanasia had nothing to do with this argument at all.

The original section 47 put the carer in the driving seat; the amended section 47 will put the medical establishment in the driving seat. Which of the two is the more likely to go to court? In my view, the medical establishment is far more likely to go to court than the carer. I accept the

argument that says that carers care more about the adult with incapacity—that is true—but carers do not always find it easy to go to court, especially if they come from a low-income background, and even more if they have problems gaining access to legal aid. I do not think that we should put obstacles in the way of carers who are genuinely concerned about the person they have looked after all their lives and feel that the medical establishment may be taking decisions that they, as carers, do not agree with.

Christine Grahame: The last thing anyone in such circumstances wants to do is go to court to battle it out. That is why I think the solution is to have an independent arbiter, sent by the Mental Welfare Commission. That would provide a better, faster and kinder route to resolving conflicts.

Mr McAllion: From the carer's perspective, that would be a better solution only if the independent arbiter sided with the carer. If the independent arbiter sided with the establishment against the carer, the carer would have no option but to go to court.

We can all see both sides of this difficult argument. All I am saying is that I am not convinced that the changes that have been proposed by the Executive to section 47 are in the interests of carers or of the adults with incapacity. Malcolm Chisholm is right, and his amendment deserves support.

Donald Gorrie: I argue that Malcolm Chisholm's amendment has the weight of logic and the other side does not.

We are empowering a person—a welfare attorney or whatever we want to call them—to conduct the affairs of someone who is not capable of conducting his or her own affairs. That responsibility should apply across the board: the person should not control only the cheque book, the mortgage and so on, but should be able to make decisions about medical issues. That is the logical conclusion of the argument.

While we are fit and keen, of course, we make our own medical decisions. Four years ago, the national health service kindly gave me two new hips. The surgeon asked me if I wanted them both at once or one at a time and set out the arguments for and against each option. I made my choice based on those arguments. If a person is incapable, the person who is looking after them should make similar choices. That is only logical. If I get so confused at this sort of debate in the future that the establishment manages to get me declared an incapable adult, I would rather medical decisions were made on my behalf by my wife than by some doctors, much as I respect my general practitioner.

16:45

Iain Gray: Will Mr Gorrie accept that the logic that he describes is the principle from which we begin? However, we recognise that safeguards must be attached to the powers. For example, we limit the amount of financial resources a proxy can use in certain circumstances. That also breaks the logic that Mr Gorrie described, but I did not hear him oppose those safeguards.

Donald Gorrie: There is a difference between safeguards that relate to someone's money and safeguards that relate to their health. Decisions must be made about medical treatment, but money can be dealt with differently. Ultimately, however, the bill appoints someone to look after somebody else's affairs and I believe that that responsibility should go across the board. For that reason, I will support Malcolm Chisholm's amendment.

Iain Gray: These issues are important and complex. In discussing them, we have to consider the bill as a whole, not one part of the bill in isolation from the others and we have to consider the bill as it is now, not as it was. It has been argued that those who fear that the bill will allow euthanasia have no interest in the change that it proposes, but they have an interest in safeguards against euthanasia and in a reassurance that the bill will not allow euthanasia.

Given that the Executive is not in favour of the kind of explicit prohibition that we will debate later, it is important to recognise that section 47 as it stands, and as it would be improved by the Executive amendments, is part of a structure of safeguards and provides assurance that the bill would not allow the hastening or causing of death of any adult with incapacity.

Malcolm Chisholm said that we must consider the extent to which this is a listening Parliament if we support the Executive's view. This is a listening Parliament and it has powerful committees—the Justice and Home Affairs Committee and the Health and Community Care Committee—that have discussed and debated the bill at length at every stage. We should recognise that fact. Malcolm Chisholm should be careful about saying that his colleagues are misrepresenting what happened in other committees.

The Health and Community Care Committee heard evidence from Parent Pressure. Members will have read that evidence and letters from that group. Indeed, I met Parent Pressure and heard its evidence. Everyone was moved by it. However, the Health and Community Care Committee was not persuaded by Mr Chisholm's argument.

Malcolm Chisholm: Does the minister accept that two positions were put at the Health and Community Care Committee? The first is my

position. The second position, that the second opinion should not be a medical opinion but an independent non-medical opinion, has never been moved. The Health and Community Care Committee said that if that position was not accepted—and it was never moved, because the second opinion is now a medical opinion—the committee would accept my position instead of the minister's position.

Dr Simpson: On a point of information, Presiding Officer, that is not correct. Our initial position was to have a second tier of opinion, which would be lay and medical opinion. When both positions were proposed to the MWC—making clear that both positions would have true independence to provide the balance that the sections are seeking—the commission said that it was not keen to promote a cadre of lay people to provide that second opinion. As a result, we moved to the present position in which the carer is now empowered to appoint that second opinion, which is a very important and positive move.

Iain Gray: I thank Dr Simpson for his helpful intervention. Although it would be a mistake to turn this debate into an argument about what did or did not happen, I should say that sometimes we can be careful or careless about interpreting events that have brought us to our present position.

Let us return to the primary concern of today's debate, which is the rights of the adult with incapacity. We should not lose sight of the fact that the bill gives rights to proxies and other people for the first time; it does not take them away.

Trish Godman (West Renfrewshire) (Lab): Given that, in the final analysis, carers can go to court, will the minister assure us that they will be treated well by the Legal Aid Board?

The Deputy Presiding Officer: Minister, I must ask you to wind up on this point.

Iain Gray: I have taken a considerable number of interventions, Presiding Officer, and must respond to certain points.

On Trish Godman's point, normal legal aid rules would apply in such cases. The adult with capacity, not the carer, would be means-tested for legal aid support.

These rights for proxies and carers are not trivial. Michael Matheson said that doctors must note the views of the proxy and the independent appointee. No—doctors must do much more than that. They must consider those views in the full knowledge that such consideration might have to be proven in the Court of Session, because it is a requirement of the bill.

We are accused of making proxies go to court. The truth is that proxies will have to go court, whoever takes the decision. Is Mr Chisholm saying that if doctors go to court, proxies will not have to go to court to defend their case? Of course they will.

Malcolm Chisholm: Will the minister give way?

Iain Gray: No, I am sorry; I am winding up.

The balanced framework that we have constructed makes going to court less likely, which seems preferable. However, we should remember that the adult with incapacity is at the centre of this issue. If a dispute over what is best for the adult cannot be resolved, who is more likely to say that the person is so important and the decision matters so much that it should go all the way to the Court of Session? Is it the doctor who cares for them, or the proxy who loves them? Every member who has spoken in the debate knows the answer to that question: it is a balance, and we must strike it.

Phil Gallie: This has been an excellent debate in which all sides of the argument have been covered. I must compliment Malcolm Chisholm on his explanation of the situation experienced by many carers. They have given almost all their lives to look after a son or daughter, and have given up opportunities to care for individuals in their families. They are extremely moved by this situation. They know that the interest of the adult with incapacity lies best with them. However, as Gordon Jackson pointed out in his very reasonable speech, not everybody receives such love and respect—that is very sad—and we must remember the interests of those people as well as the interests of carers and those whom carers seek to protect and cherish.

Trish Godman and John McAllion made a valuable point: if carers are obliged to go to the Court of Session, who picks up the bill? There should be some assurance from the Executive—it is probably not within Iain Gray's responsibility to give it—that carers going to the Court of Session would be treated sympathetically. Such an assurance would be a comfort to all. It is one thing for a doctor or a health authority to troop off to the Court of Session, but it is quite another for individuals to do that. Frequently, as I have said, those people have given up much to look after those whom they cherish most.

I accept that the argument about euthanasia is not really part of this debate, but it would be more comforting if amendment 1, in the name of Lyndsay McIntosh, were dealt with and accepted. That would remove many of the fears about giving carers full responsibility.

I believe that implications arise from the European convention of human rights, but I pass that matter back to ministers, whose duty it is to ensure that the ECHR does not have an adverse

impact on the Parliament or the bill.

Executive amendments 140 and 141 improve the situation and will certainly receive support from Conservative members. Having heard the arguments today, and recognising that there will be other opportunities for the Parliament to vote on the issue, I ask to withdraw amendment 138.

Amendment, by agreement, withdrawn.

Amendment 139 moved—[Malcolm Chisholm].

The Deputy Presiding Officer: The question is, that amendment 139 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division. As this is the first vote on this section, the voting period will be two minutes.

FOR

Adam, Brian (North-East Scotland) (SNP)
Campbell, Colin (West of Scotland) (SNP)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Cunningham, Roseanna (Perth) (SNP)
Elder, Dorothy-Grace (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Gibson, Mr Kenneth (Glasgow) (SNP)
Gorrie, Donald (Central Scotland) (LD)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
Harper, Robin (Lothians) (Green)
Ingram, Mr Adam (South of Scotland) (SNP)
MacAskill, Mr Kenny (Lothians) (SNP)
MacDonald, Ms Margo (Lothians) (SNP)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Matheson, Michael (Central Scotland) (SNP)
McAllion, Mr John (Dundee East) (Lab)
McGugan, Irene (North-East Scotland) (SNP)
McLeod, Fiona (West of Scotland) (SNP)
Munro, Mr John (Ross, Skye and Inverness West) (LD)
Quinan, Mr Lloyd (West of Scotland) (SNP)
Robison, Shona (North-East Scotland) (SNP)
Rumbles, Mr Mike (West Aberdeenshire and Kincardine) (LD)
Russell, Michael (South of Scotland) (SNP)
Sheridan, Tommy (Glasgow) (SSP)
Sturgeon, Nicola (Glasgow) (SNP)
Swinney, Mr John (North Tayside) (SNP)
Ullrich, Kay (West of Scotland) (SNP)
Welsh, Mr Andrew (Angus) (SNP)
White, Ms Sandra (Glasgow) (SNP)
Wilson, Andrew (Central Scotland) (SNP)

AGAINST

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Davidson, Mr David (North-East Scotland) (Con)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Dewar, Donald (Glasgow Anniesland) (Lab)
Douglas-Hamilton, Lord James (Lothians) (Con)
Eadie, Helen (Dunfermline East) (Lab)
Fergusson, Alex (South of Scotland) (Con)
Finnie, Ross (West of Scotland) (LD)
Galbraith, Mr Sam (Strathkelvin and Bearsden) (Lab)
Gallie, Phil (South of Scotland) (Con)
Gillon, Karen (Clydesdale) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (Edinburgh Pentlands) (Lab)
Harding, Mr Keith (Mid Scotland and Fife) (Con)
Home Robertson, Mr John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Hyslop, Fiona (Lothians) (SNP)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Jenkins, Ian (Tweeddale, Ettrick and Lauderdale) (LD)
Johnston, Nick (Mid Scotland and Fife) (Con)
Johnstone, Alex (North-East Scotland) (Con)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
MacKay, Angus (Edinburgh South) (Lab)
MacLean, Kate (Dundee West) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McConnell, Mr Jack (Motherwell and Wishaw) (Lab)
McGrigor, Mr Jamie (Highlands and Islands) (Con)
McIntosh, Mrs Lyndsay (Central Scotland) (Con)
McLeish, Henry (Central Fife) (Lab)
McLetchie, David (Lothians) (Con)
McMahon, Mr Michael (Hamilton North and Bellshill) (Lab)
McNeil, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Monteith, Mr Brian (Mid Scotland and Fife) (Con)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Paterson, Mr Gil (Central Scotland) (SNP)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan (Roxburgh and Berwickshire) (LD)
Salmond, Mr Alex (Banff and Buchan) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Ochil) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North-East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Thomson, Elaine (Aberdeen North) (Lab)
Tosh, Mr Murray (South of Scotland) (Con)
Wallace, Ben (North-East Scotland) (Con)
Watson, Mike (Glasgow Cathcart) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Young, John (West of Scotland) (Con)

17:00

The Deputy Presiding Officer: The result of

the division is: For 32, Against 78, Abstentions 0.

Amendment 139 disagreed to.

Amendments 140 and 141 moved—[Iain Gray]—and agreed to.

Section 48—Authority for research

The Deputy Presiding Officer: I call the minister to speak to and move amendment 142, which is grouped with amendment 30.

Iain Gray: Amendment 30 is a technical amendment that clarifies that the ethics committee may take into account matters other than those prescribed by the regulations when ethically appraising protocols. During the stage 2 debate, I undertook to consider a point made by Christine Grahame about the intended meaning of section 48(3A). For the avoidance of doubt, amendment 142 seeks slightly to amend the wording of that subsection to ensure that our intention is very clear that research that does not meet the "real and direct benefit" test should be subject to the conditions set out in subsections (1) and (2).

I move amendment 142.

Amendment 142 agreed to.

Amendment 30 moved—[Iain Gray]—and agreed to.

Section 48A—Appeal against decision as to medical treatment

The Deputy Presiding Officer (Mr George Reid): I call Phil Gallie to move amendment 143, which is grouped with amendments 144 and 155.

Phil Gallie: I no longer wish to move amendment 143, because it is consequential on amendment 138, which has been withdrawn. Amendment 144 is a technical amendment to assist the minister. It recognises the appeal procedures and the need for consistency within the bill. I refer the minister to section 12 and to line 30 on page 10 of the bill. The amendment seeks to introduce into the text of the bill the fact that the sheriff principal should be included in the appeal procedures.

The Deputy Presiding Officer: Mr Gallie, will you clarify whether you are moving that amendment?

Phil Gallie: I move amendment 144.

Iain Gray: I am grateful to Mr Gallie for agreeing to withdraw his first amendment and for setting out the reasons for his second. That amendment seeks to amend the new general appeal provision in section 48A, which was added at stage 2 as a catch-all measure to provide an appeal facility to the sheriff and thence to the Court of Session in relation to decisions on medical treatment. As Mr Gallie has pointed out, amendment 144 seeks to widen the appeal provisions in section 48A. It contemplates decisions taken by a sheriff being appealed to the sheriff principal.

However, part 5 of the bill, to which the amendment refers, does not envisage that a sheriff will take decisions on medical treatment. Were that to occur, there is provision elsewhere in the bill to meet it. For example, appeals against decisions of the sheriff on incapacity are provided for in section 12. Moreover, section 2(6) provides a general appeal provision in circumstances where there is no specific appeal power.

Against that background, I turn to Executive amendment 155. Section 48A provides that an appeal can be made to the Court of Session with the leave of the sheriff principal. That is in line with appeal provisions elsewhere in the bill. However, in this case, there is no right of appeal to the sheriff principal and it is considered unnecessary for the sheriff principal to be involved in determining whether there should be an appeal to the Court of Session. The decision on leave to appeal to the Court of Session should rest with the sheriff. Our amendment provides a process that is both quicker and cheaper.

I hope that members will accept that amendment 155 is reasonable and is designed to streamline the appeal provision. I invite Mr Gallie to withdraw amendment 144, too, on the basis that section 48A, subject to further amendment, provides the correct procedure for appeals.

Phil Gallie: The minister used the magic words "quicker and cheaper". One of the purposes of the bill is to streamline and reduce costs for adults with incapacity. If we are reducing the bureaucratic chain and the minister assures me that there is no need to include the sheriff principal, amendment 155 will be universally welcomed, particularly if it speeds up the process and reduces costs.

Amendment 143 not moved.

Amendment 144, by agreement, withdrawn.

Amendment 155 moved—[Iain Gray]—and agreed to.

After section 48A

Mrs McIntosh: It seems to have taken a very long time to reach amendment 1, so I shall be brief.

I support the objectives of the bill. It is fitting that one of the first pieces of planned legislation should help the more vulnerable members of society and the real heroes and heroines—their carers. I recognise that the Executive has made several significant moves throughout stage 2 in an effort to improve the bill. That is what good legislation should be all about. The Justice and Home Affairs

Committee has also played its part.

Members may be aware that, at stage 2, attempts were made to amend the bill to put an end to any argument or suspicion regarding passive or back-door euthanasia. I was concerned by the guidance of the BMA ethics committee, which stated that assisted feeding and hydration could be withdrawn from patients with dementia, stroke and "other serious conditions" who were not otherwise dying. Such an action would result in dehydration and death—that is not a pleasant death, if there is such a thing.

Fears about passive or back-door euthanasia were expressed long before I lodged my amendment. To each and every constituent who has contacted me, I have passed on Mr Gray's assurance that it was not the intention of the Executive to open the door to euthanasia and I have applauded the good intent behind the bill. I am sure that the minister will vouch for the fact that that has been my position for some time.

The purpose of my amendment is to allay fears that have been expressed to me and to many others, despite the reassurances of the Executive. I know that the Executive believes my amendment to be unnecessary and that there are sufficient protections and remedies in the current legislation. I have promoted that position as well.

However, a significant number of people are not reassured. To those people, I gave an undertaking to lodge an amendment. The amendment takes nothing away from the bill. It costs nothing and gives everything, in terms of security and clarification.

We have a credibility gap—not for the first time, nor, I suspect, for the last time. I ask ministers and other members of the Parliament to plug that credibility gap and agree to this amendment, so that we can all pass the bill with confidence.

I move amendment 1.

Iain Gray: As Mrs McIntosh says, this amendment covers ground that was rehearsed at stage 1 and covered fully at stage 2. It reiterates the concerns of those people who fear that the bill opens the way to what they have called passive euthanasia.

As we made clear at stage 2, nothing could be further from the truth. We have no plans to change the law on euthanasia and we repudiate calls to legalise euthanasia. An act of euthanasia, in which the injuries were not self-inflicted, would be regarded as the deliberate killing of another; it would be dealt with in Scots law under the criminal law of homicide. Nothing in the bill changes that position.

Any health professional, like any other individual, who acted by any means—whether by withholding treatment or by denying basic care, such as food and drink—with euthanasia as the objective would be open to prosecution under the criminal law. That is the general position, which the bill does not alter. That will be made clear in the code of practice, which will be issued under the forthcoming act, and in guidance to health care professionals.

I appreciate the concerns that Mrs McIntosh has expressed and relayed, and I would like to clear up what the bill does and does not do in that respect. The bill enables doctors to give desirable medical treatment to adults who, for one reason or another, are unable to give consent without fear of legal challenge. It does not make any provision to harm adults with incapacity.

For a start, section 1 sets out the general principles of the bill, requiring all interventions in the affairs of an adult with incapacity under the bill to benefit the adult. As we discussed earlier this afternoon, section 1 reinforces that concept by requiring any intervention also to be the least restrictive option in relation to the freedom of the adult. Self-evidently, to cause or to hasten death would be the most restrictive option with regard to the adult's freedom. It would not be in any sense allowed.

David McLetchie (Lothians) (Con): The minister referred to the general law of the land. Is Mrs McIntosh's amendment declaratory of what is already the general law of the land, or does it conflict with it? If it is simply declaratory of what is already the position, why does not the Executive accept the amendment to reassure the people who have made representations to this Parliament?

Iain Gray: I believe that Mrs McIntosh's amendment is both unnecessary and flawed. In view of the time that I have, I will demonstrate now that it is unnecessary and hope later to be able to demonstrate why I believe it to be flawed.

The general principles of the bill must always be read with the other parts of the bill, particularly section 44, which has already been discussed. That section authorises doctors only

"to do what is reasonable in the circumstances, in relation to the medical treatment, to safeguard or promote the physical or mental health of the adult."

The most frequent criticism of that section has been that it will allow patients to be starved or dehydrated, for whatever reason. The people who make that criticism do so in the face of the facts. The fact is that section 44 cannot be read as allowing any such thing. Section 47, which has just been debated, provides that

"any person having an interest in the personal welfare of the adult"

can challenge a treatment decision in court. Even if a welfare attorney or guardian were to behave completely unscrupulously, they would have to contend with the possibility of a challenge from others.

Section 74 provides an additional safeguard. It makes it an offence for any person exercising welfare powers for an adult under the bill—which could include doctors or proxies—to ill treat or wilfully neglect that person.

17:15

I should also make it clear that the bill does not detract in any way from a doctor's ethical, professional and common law duties to care for his patients. The safeguards are stringent. They ensure that any treatment given to an adult with incapacity will keep that adult as well as they can be, and will offer hope for improvement where possible. Nothing in the bill authorises the withdrawal of nutrition and hydration, whether given artificially or by conventional means. Nothing will permit a patient to be denied basic care, starved, dehydrated or otherwise mistreated. We have undertaken that the code of practice issued under the bill, and the guidance to help professionals, will rehearse those points and the ones that I made at stage 2.

Michael Matheson: The amendment is similar to one that I put forward several weeks ago at the Justice and Home Affairs Committee during stage 2. This afternoon, Lyndsay McIntosh has articulated many of the arguments from that discussion. There are continuing concerns about aspects of the bill. Although it does not spell out that euthanasia will be legalised, the combination of the interpretation of the bill and the interpretation of the common law could allow passive euthanasia.

The Executive has advanced no compelling argument for not including in the bill a clear statement of what the bill is not intended to do. Such a statement would provide the clear safeguard that people have been asking for. The amendment would serve that purpose. The Executive should be willing to accept that point; I hoped that it would accept it at the Justice and Home Affairs Committee.

As the amendment concerns a matter of conscience, our parliamentary group will be extending a free vote to all SNP members on the issue.

Euan Robson: The amendment is undesirable. Sections 1, 44 and 74 address the situation adequately, as has been spelt out time and again, particularly in committee. In addition, this afternoon the minister made clear the Executive's position. My understanding is that legal cases can refer to ministerial statements, such as in the case of Pepper v Hart. That adds an extra dimension to the assurances that have been given, so the amendment is unnecessary.

Mrs McIntosh: If the situation is so clear, why are people still writing in with their concerns? Why is there a credibility gap between what is intended by the bill and people's fears?

Euan Robson: Another reason I cannot vote for the amendment is that in some respects it is not competent. It introduces terms that are not defined anywhere in the bill, such as "basic care". Even death is not defined in the bill, and it would need to be. Not only would the amendment add text in the wrong place in the bill; it would have other implications. The terms that are used in the bill are not replicated in the amendment, as was debated in the Justice and Home Affairs Committee. Not only does the bill already address the concerns, but the amendment is technically defective.

Ben Wallace: Is the member saying that, because the amendment mentions care, the term cannot be used elsewhere in the bill? It is mentioned throughout the bill without being defined. He is ruling out the amendment as technically flawed because it uses words that are undefined. That is not logical.

Amendment 145, on which we will vote next, defines benefit. The Executive argued against that amendment, so I can see no reason why it should not support this amendment, which clarifies and backs up its clearly stated position that the bill is not about euthanasia or living wills. The minister said that the amendment is flawed, but I have not heard him specify how it is flawed.

Iain Gray: In the interests of clarity and given that we are discussing undefined terms, perhaps Ben Wallace can define surgical procedure, which the amendment refers to.

Ben Wallace: The amendment refers to "surgical treatment", not to surgical procedure. I am sure that what is meant by "surgical treatment" is quite clear, and that the definition of "surgical treatment" contained in other legislation can be adapted to this bill. The minister's Liberal Democrat colleague, Euan Robson, said that death is not defined in the bill. I am sure that the minister will be able to redefine death later. [*Laughter.*]

Dr Simpson: I hear some slight laughter rippling around the chamber on the point about the definition of death. If people had agonised, as many doctors have done, over what constitutes brain death, they would understand that it requires a precise definition. To some extent, the definition of vegetative state, which is not an easy matter, lies at the heart of the bill. The fact that the terms in the amendment are not found elsewhere in the

bill is a serious point—it is why the amendment is flawed.

Ben Wallace: Why has the Executive not defined death elsewhere in the bill?

Dr Simpson: Because it is not necessary to do so in this bill.

Ben Wallace: Amendment 1 is clear in its intentions and backs up the Executive's statement that this bill is not about euthanasia.

Section 1, which relates to the general principles of the bill, talks about safeguards and the motives of a carer or practitioner who wishes to make an intervention on an incapable adult. The amendment highlights, or protects, the right motive.

However, section 1(4)(a) refers to

"the present and past wishes and feelings of the adult".

That could involve a living will. In my view, the amendment to section 48A reiterates the general principles and blocks back-door euthanasia or living wills.

Pauline McNeill (Glasgow Kelvin) (Lab): I start by answering Lyndsay McIntosh's question on why so many people are still writing to her. I am also concerned about that, but, in my view, some people have been misled one way or another about the bill. I received calls yesterday from many people who asked me to vote against the euthanasia bill, and I am sure that other MSPs also received such calls. I am concerned that some parties involved in the debate have projected the bill as being primarily concerned with euthanasia. That is why I oppose amendment 1.

When I first saw the text of the amendment in the Justice and Home Affairs Committee, I had some sympathy with what it was trying to achieve—I think that all members of the committee did. A majority of MSPs wants to close down all avenues to euthanasia, both passive and constructive. That is my position and I know that it is also the position of the Executive.

However, one cannot take one section of any piece of legislation in isolation—one has to consider what the whole bill is trying to achieve. My reason for opposing the amendment is that the bill's main objective is to benefit the adult with incapacity. We should concentrate on that point.

I will not give ground. The bill is not about euthanasia, but to support amendment 1 is to give ground to the lobby that says that it is. It is crucial that members understand that point.

I listened to Iain Gray make strong statements about the Executive's view of euthanasia to the Justice and Home Affairs Committee, in response to points made by Lyndsay McIntosh and Michael Matheson. We have heard about the safeguards, which I think were formulated as a response to some of the points made by different organisations. Although there has been a fine balancing act on a number of controversial matters, I believe that sufficient safeguards have been put in place. It is important to note that one such safeguard has been to give power to a wide group of people to challenge medical treatment decisions.

We have heard about the principles in section 1. It is important to examine the beginning of the bill to see what its principles are. Moreover, section 74 makes it a criminal offence to ill treat an adult. It is important to consider all those provisions.

Lyndsay McIntosh said that some people's fears had not been allayed. We should nail that this afternoon—people's fears will not be allayed if people continue to say that the bill is about passive and constructive euthanasia. If we were debating euthanasia, I would demand from my party the right to vote according to conscience, but we are legislating about adults with incapacity. This is not a matter of conscience. I stand by my party's decision on that.

Christine Grahame: I will be brief, because I agree with almost everything that Pauline McNeill has said.

I am not attributing this to Lyndsay McIntosh, but there has been mischief in the press portrayals of the bill as some kind of licence to kill. The bill is excellent in many ways. There are difficult sections, which have been dealt with at length. I thank Malcolm Chisholm for his comments at the recent council on aging, when he mentioned the endeavours of the Justice and Home Affairs Committee to deal with complex issues.

I do not think that the amendment is necessary. The principles of the bill are to act to the benefit of the incapable adult. Section 44 states that

"'medical treatment' includes any procedure or treatment designed to safeguard or promote physical or mental health."

That is the test.

There is also a duty of care on the medical practitioners to follow the Hippocratic oath and act in the best interest of their patients. We should emphasise that. The amendment would be a hostage to fortune and a sop to those who are misrepresenting the purpose of the bill.

Gordon Jackson: I had been content not to speak, because I agree with the minister—as the bill will not allow anyone to do what is illegal now, the amendment is unnecessary.

However, I was struck by David McLetchie's question on whether the amendment was

declaratory of the present law. That is a clever question, because it sums up the agenda behind the amendment. In my judgment, the amendment is proposed not because the bill is flawed but because some people object to the common law as it is. They object to the Law hospital case, which I judge the amendment to be a roundabout way of attacking. I am told that that is not the case and that it would not influence such a situation, but I take that with a large pinch of salt. If there is another case like the Law hospital one, the amendment would be prayed in aid not as being declaratory of the present law but as seeking to change it. It is not for me to judge whether that would work, but it could certainly be tried.

We must understand the agenda behind the amendment; it is to undermine current common law. This bill is not about that; it is about a different matter. In the context of the bill, the amendment is unnecessary.

Dorothy-Grace Elder (Glasgow) (SNP): I make a plea for absolute clarity, which the amendment provides.

We must bear in mind the fact that the bill, which we will pass—or not—today, will last not for months but for years, perhaps for decades. We are committing future generations to this legislation, which is about the most vulnerable members of our society.

Everyone of some experience in life knows that one should avoid going to law—to civil law especially—as much as possible because of the cost and the strain. Civil law has been adequately described by a judge in England as open to everyone in the same way as the Ritz hotel is open to everyone. Dickens said that the law is a beast, which feeds on human misery. As a result of the decisions that are about to be made, there could be much human misery in the years and months ahead, after the bill becomes an act.

We must think of the circumstances under which decisions will be made, perhaps in a great hurry. We must think of the act being referred to not in pleasant circumstances, but in fraught ones, perhaps in the back office of a hospital.

It cannot be spelled out clearly enough that the protection of human life—exceedingly vulnerable human life—must come first. The amendment does that and I support it.

17:30

Iain Gray: I tried earlier to demonstrate that amendment 1 was unnecessary. Mr McLetchie's question was interesting, and I bow to his knowledge of the law, but today we are making legislation, and if the amendment says something that is already the case, and we accept that that is the case, at the very least the amendment creates duplication, and duplication within legislation makes for bad law.

David McLetchie: The minister must be aware that many principles of the common law are subsequently codified into statute, so there is nothing unusual about putting statutory declaration to the principles of the common law of Scotland. That has been going on for centuries.

Iain Gray: If the amendment is an attempt to change the common law position, that was an interesting confession indeed, in the terms of this debate.

The amendment is not only unnecessary, but unwise. It is flawed on three counts. First, it uses terms that are not defined in the bill; we have debated that already. In spite of the levity with which that point was treated by at least one member, it is crucial. That is a serious flaw.

Secondly, the amendment seeks to introduce a prohibition, but fails to do so because it does not stipulate a sanction. The amendment says nothing about what the action or sanction should be if someone chooses to ignore the terms of the amendment.

Thirdly—the greatest flaw, as pointed out by Gordon Jackson—the amendment is unwise because it would certainly encroach on common law judgments similar to the Law hospital judgment. From the beginning, we have taken the view that we will not, at the moment, legislate for those PVS cases. We will allow case law to be built up and allow the Court of Session to deal with it. The bill is separate from common law and does not encroach on it. In spite of the attempt in the amendment to avoid that, it is our view that the amendment would encroach on such judgments.

If the purpose of the amendment is clarity, it is severely flawed. It will fail in its purpose and create confusion, whether by intent or by accident; I do not judge. The clarity lies in the assurance that nothing in the bill allows the hastening or causing of the death of an adult with incapacity.

Mrs McIntosh: I can tell that Iain Gray will not be swayed, but I am grateful for the news that the Labour party has been whipped on the issue.

I never intended, as Christine Grahame knows, that the amendment should fuel the passive euthanasia debate. My intent from the outset has been to put an end to that argument.

I would have used that same argument if Gordon Jackson had asked me the intention behind my lodging the amendment. Instead, he has presumed that certain things lie behind my intent. I resent that; it was unkind and uncalled for. Gordon Jackson seems unwilling to acknowledge that this is an emotive issue.

Gordon Jackson: It is possible that Lyndsay McIntosh acted in good faith, but that others had another idea. I accept her good faith, but I think that another agenda lies behind the amendment none the less.

Mrs McIntosh: I accept Gordon Jackson's apology; it was very gracious of him to make it at this stage.

I understand that the minister will not be moved on the issue. As I stated at the outset, the amendment is an attempt to clarify the situation and to ensure that putting good legislation in place is as easy as possible. The minister is not minded to accept the amendment. I am sorry that that is his position.

The Deputy Presiding Officer: The question is, that amendment 1 be agreed to. Are we all agreed?

Members: No.

The Deputy Presiding Officer: There will be a division. The voting time will run for two minutes.

FOR

Adam, Brian (North-East Scotland) (SNP)
Aitken, Bill (Glasgow) (Con)
Campbell, Colin (West of Scotland) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Davidson, Mr David (North-East Scotland) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Elder, Dorothy-Grace (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Fergusson, Alex (South of Scotland) (Con)
Gallie, Phil (South of Scotland) (Con)
Gibson, Mr Kenneth (Glasgow) (SNP)
Goldie, Miss Annabel (West of Scotland) (Con)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
Harding, Mr Keith (Mid Scotland and Fife) (Con)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Johnston, Nick (Mid Scotland and Fife) (Con)
Johnstone, Alex (North-East Scotland) (Con)
Matheson, Michael (Central Scotland) (SNP)
McGrigor, Mr Jamie (Highlands and Islands) (Con)
McGugan, Irene (North-East Scotland) (SNP)
McIntosh, Mrs Lyndsay (Central Scotland) (Con)
McLetchie, David (Lothians) (Con)
Monteith, Mr Brian (Mid Scotland and Fife) (Con)
Munro, Mr John (Ross, Skye and Inverness West) (LD)
Neil, Alex (Central Scotland) (SNP)
Paterson, Mr Gil (Central Scotland) (SNP)
Quinan, Mr Lloyd (West of Scotland) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Mr Alex (Banff and Buchan) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Sturgeon, Nicola (Glasgow) (SNP)
Swinney, Mr John (North Tayside) (SNP)
Tosh, Mr Murray (South of Scotland) (Con)
Ullrich, Kay (West of Scotland) (SNP)
Wallace, Ben (North-East Scotland) (Con)
Welsh, Mr Andrew (Angus) (SNP)
Wilson, Andrew (Central Scotland) (SNP)
Young, John (West of Scotland) (Con)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Dewar, Donald (Glasgow Anniesland) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Finnie, Ross (West of Scotland) (LD)
Galbraith, Mr Sam (Strathkelvin and Bearsden) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (Edinburgh Pentlands) (Lab)
Harper, Robin (Lothians) (Green)
Home Robertson, Mr John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Jenkins, Ian (Tweeddale, Ettrick and Lauderdale) (LD)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
MacAskill, Mr Kenny (Lothians) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
MacDonald, Ms Margo (Lothians) (SNP)
Macintosh, Mr Kenneth (Eastwood) (Lab)
MacKay, Angus (Edinburgh South) (Lab)
MacLean, Kate (Dundee West) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAllion, Mr John (Dundee East) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McConnell, Mr Jack (Motherwell and Wishaw) (Lab)
McLeish, Henry (Central Fife) (Lab)
McLeod, Fiona (West of Scotland) (SNP)
McMahon, Mr Michael (Hamilton North and Bellshill) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan (Roxburgh and Berwickshire) (LD)
Rumbles, Mr Mike (West Aberdeenshire and Kincardine) (LD)
Simpson, Dr Richard (Ochil) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North-East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Thomson, Elaine (Aberdeen North) (Lab)
Watson, Mike (Glasgow Cathcart) (Lab)
White, Ms Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)

ABSTENTIONS

Marwick, Tricia (Mid Scotland and Fife) (SNP)
Robison, Shona (North-East Scotland) (SNP)

The Deputy Presiding Officer: The result of the division is: For 42, Against 62, Abstentions 2.

Amendment 1 disagreed to.

Amendment 145 moved—[Michael Matheson].

The Deputy Presiding Officer: The question is, that amendment 145 be agreed to. Are we all agreed?

Members: No.

The Deputy Presiding Officer: There will be a division. There will be 30 seconds' voting time.

FOR

Adam, Brian (North-East Scotland) (SNP)
Aitken, Bill (Glasgow) (Con)
Campbell, Colin (West of Scotland) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Davidson, Mr David (North-East Scotland) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Elder, Dorothy-Grace (Glasgow) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Fergusson, Alex (South of Scotland) (Con)
Gallie, Phil (South of Scotland) (Con)
Gibson, Mr Kenneth (Glasgow) (SNP)
Goldie, Miss Annabel (West of Scotland) (Con)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
Harding, Mr Keith (Mid Scotland and Fife) (Con)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Jenkins, Ian (Tweeddale, Ettrick and Lauderdale) (LD)
Johnston, Nick (Mid Scotland and Fife) (Con)
Johnstone, Alex (North-East Scotland) (Con)
MacAskill, Mr Kenny (Lothians) (SNP)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Matheson, Michael (Central Scotland) (SNP)
McGugan, Irene (North-East Scotland) (SNP)
McIntosh, Mrs Lyndsay (Central Scotland) (Con)
McLetchie, David (Lothians) (Con)
Monteith, Mr Brian (Mid Scotland and Fife) (Con)
Munro, Mr John (Ross, Skye and Inverness West) (LD)
Neil, Alex (Central Scotland) (SNP)
Paterson, Mr Gil (Central Scotland) (SNP)
Quinan, Mr Lloyd (West of Scotland) (SNP)
Robison, Shona (North-East Scotland) (SNP)
Russell, Michael (South of Scotland) (SNP)
Salmond, Mr Alex (Banff and Buchan) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Sturgeon, Nicola (Glasgow) (SNP)
Swinney, Mr John (North Tayside) (SNP)
Tosh, Mr Murray (South of Scotland) (Con)
Ullrich, Kay (West of Scotland) (SNP)
Wallace, Ben (North-East Scotland) (Con)
Welsh, Mr Andrew (Angus) (SNP)
White, Ms Sandra (Glasgow) (SNP)
Wilson, Andrew (Central Scotland) (SNP)
Young, John (West of Scotland) (Con)

AGAINST

Alexander, Ms Wendy (Paisley North) (Lab)
Baillie, Jackie (Dumbarton) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Dewar, Donald (Glasgow Anniesland) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Finnie, Ross (West of Scotland) (LD)
Galbraith, Mr Sam (Strathkelvin and Bearsden) (Lab)
Gillon, Karen (Clydesdale) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Grahame, Christine (South of Scotland) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (Edinburgh Pentlands) (Lab)
Home Robertson, Mr John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
MacKay, Angus (Edinburgh South) (Lab)
MacLean, Kate (Dundee West) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
McAllion, Mr John (Dundee East) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McConnell, Mr Jack (Motherwell and Wishaw) (Lab)
McLeish, Henry (Central Fife) (Lab)
McLeod, Fiona (West of Scotland) (SNP)
McMahon, Mr Michael (Hamilton North and Bellshill) (Lab)
McNeil, Mr Duncan (Greenock and Inverclyde) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan (Roxburgh and Berwickshire) (LD)
Rumbles, Mr Mike (West Aberdeenshire and Kincardine) (LD)
Simpson, Dr Richard (Ochil) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North-East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Thomson, Elaine (Aberdeen North) (Lab)
Watson, Mike (Glasgow Cathcart) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

The Deputy Presiding Officer: The result of the division is: For 46, Against 57, Abstentions 0.

Amendment 145 disagreed to.

Section 49—Intervention orders

The Deputy Presiding Officer: We now come to amendment 31, which is grouped with amendments 43, 59 to 63, 119, 64 and 65.

Angus MacKay: Amendments 31, 43 and 63 provide that when a sheriff is considering an application for an intervention or guardianship order, he or she should be informed of any previous orders under the bill. At present, particularly if the previous order was made in a different sheriffdom, the sheriff would have no way of knowing for certain whether another order had been made by another sheriff.

Other amendments in the group are technical amendments, to improve clarity and protection for the adult with incapacity.

I move amendment 31.

Amendment 31 agreed to.

Amendment 118 moved—[Angus MacKay]—and agreed to.

The Deputy Presiding Officer: We now come to amendment 32, with which we will also debate amendments 33, 44, 45, 49, 50, 52, 53, 56, 57, 58, 66 and 67.

Angus MacKay: The amendments make part 6 of the bill consistent in requiring caution, or insurance against liability, to be found—in almost all circumstances—by financial guardians and people authorised under intervention orders relating to property or financial affairs. Caution is a valuable safeguard for an adult with incapacity. It provides the possibility of recompense in cases of the mishandling of their affairs.

At stage 2, Gordon Jackson raised the possibility that caution might not be available to a particular individual and that that would prevent their appointment as guardian, although they were suitable in every other respect. The Executive accepts that that could occur and agrees that it should be open to a sheriff to appoint somebody who was unable to obtain caution, if the sheriff considered that the person was otherwise suitable for appointment. The amendments give sheriffs such discretion in those limited circumstances.

I move amendment 32.

Amendment 32 agreed to

Amendment 33 moved—[Angus MacKay]—and agreed to.

The Deputy Presiding Officer: We now come to amendment 34, which we will debate with amendments 39 and 71.

Angus MacKay: The amendments mainly extend and improve the protection for third parties that was inserted in the bill at stage 2. Those are third parties who—in good faith—enter transactions with, sell to or buy heritable property from a person who is authorised by a guardianship order or an intervention order under the bill. They should not be subject to less protection than if they had dealt with a person acting on his or her own behalf. Part of the protection was inserted at stage 2, and the amendments complete that process. Amendment 39 also clarifies that somebody acting under a welfare intervention order may do so whether or not the incapable adult is in Scotland.

I move amendment 34.

Amendment 34 agreed to.

Amendments 35 to 40 moved—[Angus MacKay]—and agreed to.

Section 49A—Records: intervention orders

Amendment 41 moved—[Angus MacKay]—and agreed to.

Section 50A—Registration of intervention order relating to heritable property

Amendment 42 moved—[Angus MacKay]—and agreed to.

Section 52—Disposal of application

Amendments 43 to 45 moved—[Angus MacKay]—and agreed to.

The Deputy Presiding Officer: We now come to amendment 46, which we will debate with amendments 47, 48, 51, 55 and 68.

Angus MacKay: These are minor amendments to part 6. Amendment 46 corrects an erroneous reference to an intervention order—the reference should be to a guardianship order.

Amendments 47 and 48 clarify that a local authority may be appointed as a joint guardian and that it has a duty not only to apply for an initial intervention or guardianship order, but to renew a guardianship order.

Amendments 55 and 68 respond to an amendment that was lodged by Michael Matheson at stage 2. They ensure that where the chief social work officer of the local authority has been appointed as an adult's welfare guardian, notification of the name of the officer responsible for carrying out the functions and duties of guardian will be given within seven working days. In the debate on Michael Matheson's amendment, it was pointed out by Gordon Jackson that the seven-day limit that was originally proposed might be impracticable—for example, when public holidays fall in the period. The Executive has consulted the Association of Directors of Social Work and has agreed with that association that seven working days is an appropriate and manageable period.

I move amendment 46.

Donald Gorrie: Will the minister give members an assurance that his amendments address the points that were raised in a letter from the Convention of Scottish Local Authorities and the Association of Directors of Social Work? In that letter, the point was made that many incapable adults have no relatives or other people in their lives who might be suitable carers or guardians, and that many have no financial or other resources. That is an issue which local authorities must deal with and I am not sure that the

amendments as lodged cover those valid points.

17:45

Michael Matheson: In relation to amendment 55, I welcome the fact that the minister has taken on board the issues raised at the time when I lodged my amendment in the Justice and Home Affairs Committee. At that time, I sought a time scale of seven days. I would not wish to put my ex-colleagues under such pressure, so seven working days is more appropriate.

Angus MacKay: I appreciate Michael Matheson's comments.

On Donald Gorrie's comments: as was mentioned earlier by my colleague, Iain Gray, financial matters in relation to the bill would be covered by the financial memorandum. I see Donald Gorrie nodding, which I assume means that that is the point that he is raising, in relation to COSLA.

Amendment 46 agreed to.

Section 53—Who may be appointed as guardian

Amendment 47 moved—[Angus MacKay]—and agreed to.

Section 54—Renewal of guardianship order by sheriff

Amendment 48 moved—[Angus MacKay]—and agreed to.

Section 55—Registration of guardianship order relating to heritable property

Amendment 49 moved—[Angus MacKay]—and agreed to.

Section 56—Joint guardians

Amendment 50 moved—[Angus MacKay]—and agreed to.

Section 57—Substitute guardian

Amendments 51 to 53 moved—[Angus MacKay]—and agreed to.

Section 58—Functions and duties of guardian

Angus MacKay: The bill already provides for a guardian to be granted the power to pursue or defend an action of divorce or separation on behalf of the adult with incapacity. The Executive is grateful to Phil Gallie for drawing our attention to the omission of a power to pursue an action of declarator of nullity of marriage under this section.

General powers under section 58 could have been considered to include powers in relation to nullity. However, on reflection we agree with Mr Gallie that nullity should be considered alongside divorce and separation, as it is such a sensitive matter. The amendment therefore allows a sheriff the discretion to authorise a guardian to pursue an action for nullity. It clarifies that the court's express sanction is required before a guardian may act in that area.

I move amendment 54.

The Deputy Presiding Officer: I call Mr Gallie, whose light has gone on and off. Does he wish to contribute?

Phil Gallie: I wish to thank the minister. It shows that the committee system does work on occasion: he listened and he acted. I am glad to have been of assistance on this occasion.

Amendment 54 agreed to.

Amendment 55 moved—[Angus MacKay]—and agreed to.

Section 64—Replacement or removal of guardian or recall of guardianship by sheriff

Amendments 56 to 58 moved—[Angus MacKay]—and agreed to.

Section 66—Recall of powers of guardianship

Amendments 59 to 62 moved—[Angus MacKay]—and agreed to.

Section 67—Variation of guardianship order

Amendments 63, 119 and 64 to 66 moved—[Angus MacKay]—and agreed to.

Section 68—Resignation of guardian

Amendment 67 moved—[Angus MacKay]—and agreed to.

Section 69—Change of habitual residence

Amendment 68 moved—[Angus MacKay]—and agreed to.

Section 71—Amendment of registration under section 55 on events affecting guardianship or death of adult

The Deputy Presiding Officer: We now come to amendment 69, which is grouped with amendment 70.

Angus MacKay: These are minor technical amendments. Amendment 69 removes an incorrect cross-reference to welfare guardians from section 71, which covers only guardians with financial powers. Amendment 70 clarifies what is to be registered in the Land Register under section 71.

I move amendment 69.

Amendment 69 agreed to.

Amendment 70 moved—[Angus MacKay]—and agreed to.

After section 71

Amendment 71 moved—[Angus MacKay]—and agreed to.

Section 73—Limitation of liability

Amendment 72 moved—[Angus MacKay]—and agreed to.

Section 74A—Application to guardians appointed under Criminal Procedure (Scotland) Act 1995

The Deputy Presiding Officer: We now come to amendment 150, which is grouped with amendments 151, 120 to 123, 152, 76, 124, 153, 125 and 126.

Angus MacKay: This group of Executive amendments follows amendments, considered by the Justice and Home Affairs Committee at stage 2, to provisions of the Criminal Procedure (Scotland) Act 1995 for the appointment of a guardian.

In a small number of cases, the criminal courts may find that a person acquitted of an offence on the grounds of insanity, or convicted but suffering from a mental disorder, should have a welfare guardian appointed to them on grounds similar to those considered by the civil courts for the appointment of a guardian under the bill. We want to ensure that the criminal court has the same evidence in front of it as the civil court would under the bill when it considers guardianship in those circumstances.

The same incapacity test and requirement to consider the least restrictive intervention should apply, as should the other general principles under the bill. Once an order has been made by the criminal court, the adult under guardianship and the guardian or intervener should be treated in exactly the same way as if the appointment had been made by the civil court. That emphasises the fact that orders made under those provisions by the criminal courts are not to be considered as a punishment, but may simply be an appropriate way of dealing with an adult with incapacity who has come before the court.

The Executive amendments make the necessary changes to the bill in its references to the Criminal Procedure (Scotland) Act 1995 in such a way that the revised sections of the 1995 act are as self-contained and easy to follow as possible. That is why amendment 153, for instance, inserts completely new subsections in the 1995 act, rather than making a large number of smaller amendments to that act's provisions.

I move amendment 150.

Amendment 150 agreed to.

Amendments 151, 120 to 123 and 152 moved—[Angus MacKay]—and agreed to.

Section 75—Regulations

The Deputy Presiding Officer: We now come to amendment 156, which is grouped with amendment 157.

Angus MacKay: These two Executive amendments relate to the powers in the bill to make regulations and commencement orders. The amendment to the regulation-making power in section 75 is a standard provision in primary legislation. The amendment to section 78 will allow commencement orders to include transitional provisions where necessary. Such transitional arrangements will be in addition to those already in the bill at paragraph 6A of schedule 3. Where new transitional provisions are to be made as part of a commencement order, we are providing that the order will be subject to the negative procedure so that it can be debated by the Parliament.

I move amendment 156.

Amendment 156 agreed to.

Section 76—Interpretation

Amendment 73 moved—[Angus MacKay]—and agreed to.

The Deputy Presiding Officer: We now come to amendment 74, which is grouped with amendment 75.

Angus MacKay: These Executive amendments honour the commitment made by Jim Wallace in the stage 1 debate on 9 December 1999 to amend the bill to allow an adult's same-sex partner to be treated as their nearest relative under the bill. The nearest relative is important in the bill, along with others close to the adult, as that person is likely to have close knowledge of the adult and to be able to provide information that will help proxy decision makers and the statutory authorities to reach good decisions for the adult's benefit.

The bill adopts the definition of nearest relative in the Mental Health (Scotland) Act 1984. That definition contains a hierarchy of relatives, with the spouse being given highest priority, followed by parents, children, siblings and others. A person living with the adult as husband or wife for at least six months may take the place of the adult's spouse if the adult has no husband or wife or if the marriage has ended. It is the Executive's policy

that, where an adult with incapacity is in a stable relationship with a same-sex partner, that person should be regarded as their nearest relative under the bill. We wish to treat same-sex partners in the same way as opposite-sex partners in a similar stable relationship.

We do not want to discriminate against same-sex partnerships. However, it is not the Executive's policy to equate cohabitation with marriage. Jim Wallace indicated that in his statement on family law on 20 January.

The Justice and Home Affairs Committee conducted a helpful and carefully considered debate on 8 February, on the way in which the bill should be amended in line with the Executive's policy. Concern was expressed at that time by members of the Equal Opportunities Committee, that the proposed Executive amendment was discriminatory. It was not intended to be so. Since then, we have reconsidered the way in which the bill might be amended and have discussed the terms of amendment 75 with the Equal Opportunities Committee, to ensure that that committee's equality test has been passed. I am pleased to say that the terms of amendment 75 have been widely approved, and I hope that members will agree to them today.

I move amendment 74.

Phil Gallie: I thank the minister. Perhaps people expect me to be slightly controversial on this issue, but I do not intend to be. However, I have one concern about the kind of relationship that puts the affairs of an individual with incapacity into the hands of someone who, for all one knows, might have been in contact with that individual for a period of as little as six months. It seems to me that that six-month period is rather short. I put down a marker that that causes us some concern, and I ask the minister to reconsider the issue.

Roseanna Cunningham: It is worth putting on record some points about the issue. It was interesting to listen to Phil Gallie, in respect of the concern that he has. If people listened carefully to him, they will realise that his concern may apply to all relationships of only six months. In fairness to him, people should not jump to what might otherwise be an obvious conclusion.

These are amendments to section 76, which is the interpretation section. As it stands, it would effectively exclude same-sex partners completely, regardless of the length of their relationship. At stage 1, the Justice and Home Affairs Committee agreed unanimously—across all parties—that section 76 required to be changed, as it simply did not reflect the reality of modern society. We included that clear recommendation in our stage 1 report. At stage 2, both the Executive and Nora Radcliffe, from the Equal Opportunities Committee, lodged amendments to try to achieve the aim on which we had all agreed. After debate, both the Executive amendment and Nora Radcliffe's amendment were withdrawn, and the Executive undertook to lodge a revised amendment.

That could be held up as an ideal example of what can happen at stage 2. Here was a situation in which, in effect, both sides were agreed on the principle that we were trying to achieve, and in which there was real debate about the best wording of any potential amendment, to satisfy that principle. Both sides were prepared to admit that the wording of the amendments was not quite right, and to return with a slightly different wording to try to realise the principle. That shows how, at stage 2, even when there is broad agreement on an issue, there are still aspects that need to be dealt with if a committee is doing its work correctly.

Via that procedure, we now have what is probably the best possible compromise amendment to realise the principle effectively. We are putting same-sex partners in the same position as unmarried heterosexual partners. The bill will apply the same test to both categories of relationship, but will not enter the minefield of deciding whether there should be equivalence between married and unmarried relationships. There are issues that might be considered in another place, concerning whether six months is an appropriate length of time for any of those relationships. However, the key objective is to introduce an aspect of equality into the bill, and I hope that individual members will express their opinions on that aspect today.

Ben Wallace: I would like to speak briefly in support of Phil Gallie. I have no problem in recognising and giving equal status in the bill to same-sex partners. Caring for someone has no barriers.

However, I would like to ask the Executive—as Phil Gallie has done—to reconsider whether six months is long enough for a relationship to be considered strong and stable. Like Roseanna Cunningham, I agree with the fundamental principle behind the provision, and I welcome its being put into the bill for all relationships. My only concern is over the time limit.

18:00

Angus MacKay: I am grateful to Roseanna Cunningham, and to Ben Wallace for his comments on the mature and sensible way in which the committee has moved on this subject. I hope that the amendment will be endorsed.

To try to allay the fears expressed by Phil Gallie and echoed by Ben Wallace, I would point out that the bill provides a range of safeguards for different

circumstances. If a near relative, or someone with a close personal interest in an adult, has a concern about any proxy who may take upon themselves the affairs of the adult, he or she will have opportunities under the bill to challenge the position of the proxy and to look for redress elsewhere—whether the adult's partner is of the same sex or not. If the relationship was of only six months or slightly more, and that was felt to be insufficient to judge whether the partner had the affairs of the adult genuinely at heart, the bill provides mechanisms using which a concerned relative or close personal friend can raise that concern.

Phil Gallie: I appreciate what the minister is saying, but there are individuals who have no close relatives and who are left alone—although they may have social work support. Does the minister feel that they are catered for by the bill?

Angus MacKay: Yes. The safeguards that are built into the bill provide a proper mechanism—using the courts and the medical advisers—to ensure that the interests of the adult can be tested at any stage by any individual who has a personal interest in the adult and who is concerned that the interests of the adult be properly served.

Amendment 74 agreed to.

Amendment 75 moved—[Angus MacKay]—and agreed to.

Section 77—Continuation of existing powers, minor and consequential amendments and repeals

Amendment 76 moved—[Angus MacKay]—and agreed to.

Section 78—Citation and commencement

Amendment 157 moved—[Angus MacKay]—and agreed to.

Schedule 2A

JURISDICTION AND PRIVATE INTERNATIONAL LAW

Amendments 77 to 88, 158 and 89 to 102 moved—[Angus MacKay]—and agreed to.

Schedule 3

CONTINUATION OF EXISTING CURATORS, TUTORS, GUARDIANS AND ATTORNEYS UNDER THIS ACT

The Deputy Presiding Officer: We now move to amendment 103, which is grouped with amendments 104 to 110.

Angus MacKay: These amendments are largely technical. I could attempt to explain them in detail if members wish, but time is drawing on and I imagine that people will be grateful if I confine myself to brief remarks. [MEMBERS: "Hear, hear."] I thought I heard a "no" there, but I must have been mistaken.

Amendments 103 and 107 provide for the conversion into guardians of curators who were appointed to adults when they were still children, in cases when the person has a continuing incapacity. Amendments 104 and 105 exempt attorneys who were appointed before the bill came into force from the requirement for continuing and welfare attorneys to keep records. Amendment 106 is technical and consequential upon changes made to part 4 during stage 2. Amendment 108 is a technical change to correct a cross-reference in schedule 3. Amendments 109 and 110 are technical amendments to transitional arrangements for the access to funds scheme in part 3.

I move amendment 103.

Amendment 103 agreed to.

Amendments 104 to 110 moved—[Angus MacKay]—and agreed to.

Schedule 5

MINOR AND CONSEQUENTIAL AMENDMENTS

The Deputy Presiding Officer: We now come to amendment 111, which is grouped with amendments 112 and 113.

Iain Gray: Amendments 111 and 112 are minor technical amendments. Amendment 111 is a change to the Land Registration (Scotland) Act 1979, consequential on third-party protection in the bill. Amendment 112 removes an incorrect line of text from the consequential amendments to the Mental Health (Scotland) Act 1984.

The substantive amendment, amendment 113, is, as was intimated during the stage 2 debate, a further change that is required to the Legal Aid (Scotland) Act 1986. It ensures that, subject to the usual statutory tests, legal aid will be available not only to a person with an interest in the personal welfare of the adult with incapacity but to a person with an interest in the adult's property or financial affairs.

Stage 2 amendments to the appeals provisions of part 5 require a further change to the 1986 act. Decisions about medical treatment may now be appealed by anyone who has an interest in the adult's welfare. The amendment ensures that, subject to the usual statutory tests, legal aid will be available not only to a person claiming an interest in the affairs of an adult with incapacity but, where appropriate, to a person having an interest in those affairs.

I move amendment 111.

Amendment 111 agreed to.

Amendments 112, 113, 124, 153 and 125 moved—[Angus MacKay]—and agreed to.

Schedule 6

REPEALS

Amendment 126 moved—[Angus MacKay]—and agreed to.

The Deputy Presiding Officer: That concludes consideration of amendments to the bill.

The Minister for Parliament (Mr Tom McCabe): I seek the Parliament's permission to move a motion without notice.

The Presiding Officer (Sir David Steel): Do we agree to take a motion without notice?

Members *indicated agreement.*

Motion moved,

That the Parliament now consider the motion to pass the bill.—[*Mr McCabe.*]

Motion agreed to.

Adults with Incapacity (Scotland) Bill

18:09

The Deputy Minister for Justice (Angus MacKay): Jim Wallace, the minister in charge of the bill, has a prior engagement today in Holland and I shall therefore speak to the motion that the bill be passed.

The bill will serve the people of Scotland well. It provides reform that is long overdue. It might have waited years to go through the UK Parliament. The Scottish Parliament has completed the process within a year.

Many individuals and organisations have made valuable contributions to the bill. The Scottish Law Commission started the task in 1991 and we owe it our thanks. I also thank the Justice and Home Affairs Committee, which has worked hard to get the detail of the bill right. It distinguishes itself every time it meets to consider legislation in the Parliament. Members of that committee and the Health and Community Care Committee have lodged thoughtful amendments and have challenged the Executive to achieve the best possible legislation. The bill has, as a result, been substantially improved.

Other organisations have contributed significantly by examining the issues, briefing members of all parties and helping with the preparation of amendments. I genuinely believe that we have worked hard in partnership in committees and in the chamber, and I am confident that we now have a bill of which the whole Parliament—notwithstanding individual debates—can justifiably be proud.

It is estimated that, at any time, 100,000 people in Scotland are affected by incapacity; the families and the people who look after them are also directly affected. This bill is about protecting, in one logical and principled piece of legislation, the rights and interests of people who lack the capacity to make decisions themselves.

The bill is broad and flexible. It provides for an elderly person whose spouse lacks capacity and who needs access to their joint bank account. It will help parents and relatives of a young adult with a learning disability who wish to make good life decisions on that adult's behalf. Any one of us will be able to appoint attorneys to look after our welfare and financial affairs if we lose capacity in the future.

Part 5 has, rightly, been extensively debated in and outside the Parliament. It clarifies the law for medical treatment for adults with incapacity by

establishing a general authority for doctors to provide treatment to those who are unable to give consent. That will help adults with incapacity to receive appropriate treatment in the broadest sense and will rightly put them on an equal footing with others who are incapable of consenting.

As has been said today, the Executive believes that the various rights and safeguards incorporated in part 5, as well as those in the rest of the bill and in common law, provide a secure framework to protect adults with incapacity and ensure appropriate roles in their treatment for everyone involved, whether professionals or relatives and carers.

The bill strikes a balance between enabling and protecting; it is about the freedom of individuals and the role of statutory authorities, general principles and detailed statutory requirements. The bill creates genuinely user-friendly systems with rigorous safeguards to protect people who are among the least able and the most vulnerable in society.

The bill—perhaps more than other issues that have been recently reported—is an example of the real good that the Scottish Parliament can do; it moves this area of the law into the 21st century and makes a substantial and real difference to every family in Scotland.

I move,

That the Parliament agrees that the Adults with Incapacity (Scotland) Bill be passed.

18:13

Roseanna Cunningham (Perth) (SNP): I thank the minister for his kind comments about the Justice and Home Affairs Committee. I want to join him in thanking the members of the committee for their work and for surviving the endurance test that they have been put through to get us to this stage. The Deputy Minister for Justice, the Deputy Minister for Community Care and the Executive team have also been part of those long proceedings and we all appreciate their work, particularly at stage 2.

We had some careful debates during stage 2, because we were well aware of its controversial aspects and everyone was concerned that our debates—no matter our personal opinions about various amendments—should be conducted in a logical, sane and coherent way. Notwithstanding some of the more alarmist coverage that I occasionally read in the press, I think that we achieved that aim. However, I should say that such coverage was most unhelpful in our attempts to have a sensible debate on these matters.

I also want to thank the committee clerk and the clerking team, who worked flat out for the committee and made things a great deal easier at stage 2 than they would otherwise have been. Every one of us owes them a great debt and we are extremely lucky to have such good clerks working in the Parliament. I note that they were here throughout this afternoon's proceedings, and I suspect that the Presiding Officer and his deputies will have been as grateful for their assistance as I have been over the past months.

I will briefly address the bill in general. I reiterate what I said in the stage 1 debate: had the election outcome in May been other than what it was, the Parliament would still have been debating this bill now because it was also part of the SNP's manifesto. I suspect that any bill that we had introduced would have been in much the same terms as this one, so it is evident that there is support across the chamber for this item of the Executive's programme.

Everybody recognised that there was a clear need for reform. Because of the controversies that have arisen over certain aspects of this bill, there has been a tendency to overlook the difficulties that people have faced until now. It would have been helpful if those difficulties had also received coverage. A large and increasing number of people have to deal with a member of their family who will now be described as incapable, and currently encounter problems in doing so. This bill will make it considerably easier for them to deal with members of their family who are incapable.

Equally, who can decide what about medical treatment of an incapable adult is highly uncertain at present. Doctors can feel unprotected, even when they make relatively minor or routine decisions about treatment, or may feel that they have to delay necessary treatment until some kind of authority has been given. We should be clear that the bill clarifies the legal justification for administering medical treatment that might otherwise be regarded as common assault—that is the kind of thing that we tend to forget.

Although I may wish that certain amendments had been carried, I know that even organisations that have concerns that have not been met have not asked us to vote against the bill. That is a measure of what the bill achieves in its totality.

I have one question for the Executive—I do not know whether the Deputy Minister for Community Care plans to make one of the winding-up speeches. I think that some time ago the Executive stated its intention to create a Scottish commission for the regulation of care, as recommended in the white paper "Aiming for Excellence". Measures to create such a commission have not been included in the bill. If the Executive still intends to introduce such a commission later, when is that likely to happen? The minister could perhaps say a few words about

that because it may have some bearing on what we have been debating.

I thank the Deputy Minister for Justice, everybody who has been involved with the bill and everybody in this chamber. We have managed to get through a long and arduous process relatively unscathed and I think that the Parliament can be proud of itself.

18:18

Phil Gallie (South of Scotland) (Con): I thank Roseanna Cunningham for not describing me as bizarre at any point in this debate—that is probably a first. I will not use this speech to thank everybody; instead I will pass out some congratulations. It is fitting that Angus MacKay and Iain Gray are here to see this bill being passed—I presume—by the Parliament. They deserve genuine congratulations. Congratulations are also in order to Roseanna Cunningham and my colleagues on the Justice and Home Affairs Committee, as well as to the many organisations that have promoted this bill over a long time. In particular, the bill has been dear to the hearts of the members of the Alliance for the Promotion of the Incapable Adults Bill.

Before the Scottish parliamentary elections, all of us were lobbied for the implementation of such a bill; the Parliament has certainly delivered. I recall attending, immediately after the election, a meeting of the Troon carers forum at which the bill was firmly in people's minds. Carers forums across the country have shown interest in the bill and will feel some cause for celebration today.

With the greatest respect to members, I look back to my former colleagues, who served with me in Westminster until 1997. Michael Forsyth and his colleagues in the Scottish Office at that time set the hare running on this bill. There are people to be congratulated across the political spectrum.

I recognise that one or two organisations, such as Advocacy 2000, had some reservations about adult with incapacity choice. I hope that they will feel reasonably happy with the outcome of today's debate. At times, there has been a lot of contention and anxiety surrounding words such as ventilation, nutrition and hydration, but overall this bill is about duty of care. Time and again, ministers have emphasised that the bill is about safeguarding and promoting the interests of adults with incapacity. I believe that everyone will welcome that.

There are one or two concerns. I mentioned one, relating to six-month partnerships. Another—I make no apology for raising it again—relates to the financial support to carers who are or feel obliged to go to the Court of Session. I would like ministers to keep that in their minds and to take it back to their colleagues.

I am sad that amendment 1, in the name of Lyndsay McIntosh, was not accepted. I think that its effect on the bill would have been harmless, but that it would have dealt with many concerns—perhaps myths or wrong perceptions—in the country. I have listened very carefully to what ministers have said today and I accept their assurance that euthanasia is not induced in any way by this bill. However, I suspect that some of my colleagues may feel that that is not quite the case and regret the failure to accept Lyndsay McIntosh's amendment. Personally, I wish the bill fair weather when it comes to a vote—although each member from the Conservative party will make up their own mind on the merits or otherwise of the bill.

18:22

Euan Robson (Roxburgh and Berwickshire) (LD): I do not intend to repeat much of what has been said—especially the minister's masterly summary of the bill's provisions. I confirm that the Liberal Democrats support the bill, which was promised in our manifesto.

I would like to add to the tributes to the convener of the Justice and Home Affairs Committee, to the clerks and to the ministers who appeared before the committee. They took us through difficult areas that were completely new to some of us, and did so in a careful and co-ordinated fashion. I would also like to pay tribute to the witnesses, who gave their evidence with considerable clarity.

Last summer, the Justice and Home Affairs Committee, meeting informally, first heard from Adrian Ward, the spokesperson for the Alliance for the Promotion of the Incapable Adults Bill, who gave an eloquent and enthusiastic welcome to the then draft bill. Over the months, we have improved that bill. It has been thoroughly debated and the amendments that were made today have made it better still. Mr Ward told us that he first suggested the need for a bill such as this way back in 1986. We should record our thanks to the Scottish Law Commission for its consultation in 1991, which led to a final report in 1995. We would have been poorer without that work and might have had to do more than we have.

As has been said already, it is a tribute to the devolution settlement that this Parliament has brought the bill to this stage. The reforms are long overdue and 100,000 people in Scotland and their carers are directly affected. The bill will constitute one, updated, codified piece of legislation for the welfare of adults with incapacity. I commend it to the chamber.

The Deputy Presiding Officer (Patricia Ferguson): Two back-bench members have

indicated that they wish to speak before the minister winds up.

18:24

Christine Grahame (South of Scotland) (SNP): I will be very brief. This has been a learning curve, particularly in relation to the interaction between the committees and the Executive. I am delighted by how much the Executive took on board and the extent to which it accepted cross-party amendments in the Justice and Home Affairs Committee. The incorporation of international law—the Hague convention—puts Scotland ahead of Westminster, which cannot be bad.

18:25

Dr Richard Simpson (Ochil) (Lab): This bill is the first measure that clearly and directly affects the citizens of Scotland. Some people may be disappointed that the passionately held views that were expressed to the committees did not meet with agreement in the chamber, but the advance in the protection for adults with incapacity is undoubtedly substantial. The role of carers, family and proxies in treatment decisions has been clarified and the bill promotes good practice, which is what all our laws must do.

We have worked out a procedure involving a wide range of individuals and organisations. It would not have been possible to do that a year ago under the Westminster legislative process. The interaction between members in the committee and the chamber and civic Scotland will ensure that our laws stand the test of time. Whether the bill will last as long as the act that we repealed in schedule 6—the Curators Act 1585—remains to be seen. Nevertheless, we have created a new procedure, we have tested it and it has worked well.

The only cautionary note that I would sound is that if it had not been for the ability of the Health and Community Care Committee to take further evidence following the major change at stage 1, there might have been some feeling that carers had not had the opportunity to express their views fully. The way in which the Health and Community Care Committee and the Justice and Home Affairs Committee have worked together is another parliamentary innovation. I am sure that that will continue. The bill represents a major advance in the protection of adults with incapacity.

The Minister for Parliament (Mr Tom McCabe): I seek the Parliament's permission to move a motion without notice.

The Presiding Officer: Do we agree to take a motion without notice?

Members *indicated agreement.*

Motion moved,

That the Parliament bring decision time forward to immediately after the minister's winding-up speech and proceed with decision time and members' business immediately thereafter.—[*Mr McCabe.*]

Motion agreed to.

18:27

The Deputy Minister for Community Care (Iain Gray): I will be brief, too, but I want to step into this orgy of thanking, which Mr Gallie took a little further than I was entirely comfortable with.

We have heard how the new Parliament has been able to legislate more quickly and in greater volume. I want to mention the group of people who have suffered more than everyone else for that—the civil servants of the Scottish Executive. Angus MacKay and I would particularly like to put on record our thanks to the bill team—my 11 other brains. That is a joke that the Justice and Home Affairs Committee will appreciate.

I want to address some of the points that have been raised. The Executive intends to bring the provisions for attorneys and access to accounts and funds into force in April 2001. Part 5 will come into effect in the summer of 2001. As Roseanna Cunningham said, provisions on care establishments will follow in the context of our proposals for the new Scottish commission for the regulation of care, which will take over the supervisory role referred to in part 4. Our target for putting in place the commission is April 2001. However, that will depend on the legislation needed to set it up. Intervention orders and guardianship will come into effect in April 2002.

The Adults with Incapacity (Scotland) Bill is the first large bill on a major policy area to be passed by the Scottish Parliament. As Christine Grahame said, it will put Scotland alongside the best systems of law in the world on this subject. If the Parliament were to vote against the bill today, it would put back by years—as Dr Simpson mentioned, hundreds of years—any reform of the law protecting one of the most vulnerable groups in Scotland. That would disappoint all those people who have campaigned for change, including more than 1,000 concerned citizens who, over the past nine months, have written to us in support of the bill.

Defeating the bill would serve no one's ends; if we pass it, history will show that this Parliament, in its first major policy legislation, is serving the interests not of the powerful, not of the vociferous, not of the partisan, but of those who, up to now, have been voiceless and vulnerable. We can all—every one of us—be proud of that, and I commend

the bill to the chamber.

Subordinate Legislation

Motion moved,

That the Parliament agrees that the draft Housing Support Grant (Scotland) Order 2000 be approved.—[*Mr McCabe.*]

Decision Time

18:32

The Deputy Presiding Officer (Patricia Ferguson): There are two questions to be put as a result of today's business.

The first question is, that motion S1M-693, in the name of Angus MacKay, which seeks agreement that the Adults with Incapacity (Scotland) Bill be passed, be agreed to.

Motion agreed to.

That the Parliament agrees that the Adults with Incapacity (Scotland) Bill be passed.

[*Applause.*]

The Deputy Presiding Officer: The second question is, that motion S1M-712, in the name of Mr Tom McCabe, seeking approval of the draft Housing Support Grant (Scotland) Order 2000, be agreed to.

Motion agreed to.

That the Parliament agrees that the draft Housing Support Grant (Scotland) Order 2000 be approved.

Argyll Forest Park

The Deputy Presiding Officer (Mr George Reid): The final item of business today is a members' business debate on motion S1M-650, in the name of George Lyon, on national park status for Argyll forest park. The debate will be concluded, without any question being put, after 30 minutes.

Motion debated,

That the Parliament supports the inclusion of Argyll Forest Park within the boundaries of the first new National Park in Scotland (Loch Lomond and Trossachs); notes the real benefits that will flow to the Cowal economy from increased tourism and leisure and, most importantly, recognises the huge impact the National Park would have in rebranding the Cowal peninsula for the 21st century.

18:33

George Lyon (Argyll and Bute) (LD): I first say a big thank you to Tom McCabe for moving the motion that allowed us to bring the previous debate to a speedy conclusion and to bring members' business forward.

I should stress how important the issue that we are debating is for those of my constituents living in the Cowal peninsula. The inclusion of Argyll forest park in the first national park in Scotland would do a lot to bring prosperity there.

Historically, as many members know, Dunoon and the Cowal peninsula were thriving tourist areas. Thousands travelled doon the watter during the Glasgow fair, Greenock fair and Paisley fortnight to bring prosperity and an economic boom to the town of Dunoon. Unfortunately, those heydays are long since past, and there has been a significant decline in tourism since the peak years of the 1950s, 1960s and 1970s.

Cowal has undergone a massive restructuring since those times, not only in terms of the tourism industry, but especially when the American base closed in the early 1990s. Another recent blow to the local economy was when Forest Enterprise decided to end its involvement at the Kilmun depot, with the loss of up to 12 jobs.

In advice published for ministers in February 1999, Scottish Natural Heritage designated the Argyll forest park area as having the potential for secondary consideration for inclusion in the new Loch Lomond and the Trossachs national park.

I argue that there is a strong case for including Argyll forest park in the Loch Lomond and the Trossachs national park, the first national park for Scotland. The first argument is the environmental case. The area's heritage value is already widely acknowledged; indeed, Argyll forest park was one

of the first forest parks. The area is already managed for visitors and nature conservation and could easily be integrated into a national park.

The area has the potential to accommodate more visitors and more tourism. If realised, that would allow Argyll forest park to take pressure off other areas, such as Loch Lomond, by opening up Dunoon and allowing it to be the new gateway to the south-west end of the new national park.

There is also a strong economic case, which surpasses the environmental case. Much-needed investment would be brought to the area. Forest Enterprise estimates that the investment that would flow from the inclusion of Argyll forest park in the national park could be up to £2 million. That would be a significant economic boost to the area. It would secure jobs and create new jobs; it would reverse the cutbacks that have been caused by Forest Enterprise pulling out of the area. It would also encourage a dramatic increase in tourism, which we would all support.

Most important, the inclusion of Cowal in the Loch Lomond and the Trossachs national park would rebrand the Cowal peninsula as a gateway to the south-west end of the park. It would remove for ever the old image of the cheap and cheerful, doon the watter destination that characterises the Dunoon area. It would go a long way towards selling the area. The area would benefit from inclusion in the national park not only because of the investment that would flow from that, but because it would present the area to the Scottish and UK populations as an important destination for environmental tourism.

The campaign to include Argyll forest park in the first Scottish national park is supported by all bodies and, I hope, all parties in this chamber. I ask the minister to support the campaign to ensure that it comes to a successful conclusion.

18:38

Mr Duncan Hamilton (Highlands and Islands) (SNP): I, too, echo the welcome for Mr McCabe's motion. The prospect of listening to the debate until 7.30 pm would have been too much for any of us, however eloquent the speakers.

The SNP supports the motion. That will come as no surprise. The motion is a staging post in a campaign that has included parliamentary questions to the First Minister and, towards the beginning of the session, a motion about the need to regenerate the Cowal economy.

I will focus on one or two specific points on which I would welcome the minister's reassurance. At the launch of the National Parks (Scotland) Bill, the Minister for Transport and the Environment, Sarah Boyack, said that she was keen to learn from past experience and from successes and failures around the world. I would like two commitments on the boundary—their theme is mistakes to avoid.

The first commitment concerns the suggestion that the boundary should be porous. It has been suggested that some of the functions of the national park should be expanded into the Cowal area, but that the full status and benefits should not be. Some people have promoted that idea, but it should not be pursued. I hope that the minister can give me a commitment on that.

Secondly, I draw the minister's attention to what happened in the lake district, where the national park's original boundaries were far too tight—people have been arguing for nearly 50 years to change them. At the beginning of the designation stage, the wrong decision was made and an over-restrictive policy was imposed. The motion gives us the opportunity to establish at the outset the right boundaries to encourage development.

As Mr Lyon said, there is an environmental aspect to the establishment of national parks, which no one would deny—the bill is clear on that point. The prospect of national parks in Scotland can only benefit the environment.

However, it is important that the bill should strike a balance and take account of the economic impact of national parks. Unemployment is exceptionally low in the lake district, where 58 per cent of the population are employed in industries related to tourism and the national park. That shows the massive economic spin-off that national park status can give to an area; it is the sort of example that we should push for in Cowal. A national park can address both environmental protection and economic development; we have an opportunity to drive forward that approach in Cowal.

It is important to consider the wider context of this debate. We have had several debates on the area, but questions remain. What form will the new transportation links take? We are still waiting for the report on ferry services on the Clyde to be published; we should consider the proposed option of fast ferries.

We would like some joined-up thinking on the need to regenerate the Cowal peninsula. There is momentum in the community on all sides—from Forest Enterprise, Argyll and Bute Council and all political parties—to ensure that regeneration takes place. The Executive must listen to the people of Cowal, who want to be included in the national park boundaries. If the minister gives us a commitment on that point, he will give the area an enormous boost and the chamber would thank him for doing so from the bottom of its heart.

18:41

Mr Jamie McGrigor (Highlands and Islands) (Con): I look forward to the debate on national parks, but Scottish Conservatives would like more information on the effects of a national park on those living in the area and on their livelihoods and pursuits. We need to know about the schemes that are likely to be implemented and from where the funding will come before we commit ourselves to the idea.

If the new Loch Lomond national park goes ahead, it is vital that it includes the Argyll forest park, which is undoubtedly the jewel in the crown of the area. Just the other morning, on a glorious, dead still spring day, I drove up the west side of Loch Eck. What I saw made me stop the car, leap out and reach for the camera. The steep mountains on the far side were reflected so perfectly in the mirror-calm water of this deep, narrow loch that it was impossible to tell the difference between the reality and the reflection. People can keep their Great Lakes and their Grand Canyon—as far as I am concerned, there is nowhere like Argyll.

Argyll forest park was the first forest park in Great Britain; it was established in 1935 by Sir John Stirling-Maxwell.

Loch Eck and Loch Lomond have the same ecosystem, which is unique in Britain. They are like peas in a pod—one bigger, one smaller—except, in my opinion, Loch Eck is the greater beauty. To leave that area out of the national park would lessen the impact of the combined area and would diminish the park as a whole.

Argyll forest park and Queen Elizabeth forest park are owned by the state and are under the same management. It would be tragedy if the southern end of that coherent entity were to be sold off because it did not have park protection. The area will, I hope, benefit from £1 million of extra investment—what a boost that will give south Argyll, which is reeling from the effects of agricultural recession and dwindling tourism, mainly due to high fuel prices. New investment would be a shot in the arm for local industry.

Some months ago, I spoke in the debate secured by Duncan Hamilton on Dunoon and the Cowal peninsula. The Argyll forest park would be accessed at the southern end, through Dunoon. As I have said before, Dunoon should be seen as one of the main gateways to the Highlands, reached by an efficient ferry service from Gourock. Imagine the value to Dunoon of so many extra visitors. Such a step would also relieve the traffic pressures on the A82 at Balloch and Loch Lomondside, and make a new, magical journey for the traveller who wants to smell the tangle of the isles.

We are talking about opening up a golden opportunity for this beautiful area of Scotland to become firmly established for centuries as one of Scotland's wonders. It would surely be blinkered thinking to allow that opportunity to slide because of short-sighted cost implications. We have a genuine chance to change the course of the region's history, to reverse decline, to combine environmental protection with economic growth and to bring an area that has become a backwater back into the main stream.

18:45

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): I congratulate George Lyon on introducing this debate, which is about how the boundaries of national parks, if we are to have them in Scotland, are to be determined. That question has vexed the minds of many people—in most cases the proponents of national parks—for many decades. The topic will always be controversial and difficult. It cannot be otherwise, because so many parts of Scotland are of outstanding beauty and great conservation value.

I feel that the approach that was suggested by my friend Duncan Hamilton is correct. We want to be inclusive and draw the boundaries on a wide focus, rather than on a narrow one. The boundary should not be Ben Lomond—it should include the communities that live in, work in and know the area. If the people of the Cowal peninsula wish to be included in a national park, that wish must be taken seriously.

I am concerned about the structure and several aspects of the National Parks (Scotland) Bill. Without going into the detail—today is not the appropriate time to do so—I would say that the most serious message that I wish to convey to the minister is that, for national parks to succeed, they must have the support of the people who live within their boundaries.

My concern is that the bill, as drafted, does not anticipate the difficulties that I believe are foreseeable, especially the need to promote the interests of the economy and of the social communities of the people within the park. Section 8(5) contains the Sandford principle, which prefers the conservation interests over the social and economic ones. How do we define conflict? Is it when the Royal Society for the Protection of Birds puts in an objection to a proposal? If so, in Cairngorm, which is to be the second designated national park, we would not have had a funicular railway. That would have disgruntled the 95 per cent of the local people who supported it in a local referendum in the *Strathspey & Badenoch Herald*.

Much more work must be done if local support is not to be jeopardised. If the social and economic

needs of the local people are promoted and recognised, I think that there will be support for national parks both within Loch Lomond and the Trossachs and Cowal, if it be so renamed, and within Cairngorm. The jury is still out.

As a member who has made a submission in the consultation process, I know that there is concern in my constituency that the consultation may not take seriously the criticisms that have been made. For local support to exist, the membership of the national park authority must be different from what is proposed. There are grave concerns about the fact that, under schedule 1 to the bill, the Government has the power to nominate or to veto nominations. The authority should be locally controlled and nationally advised. The bill provides for no role for community councils, although the consultation paper seems to. That has caused great concern among community councils in my constituency and I would be surprised if that were not also the case in Argyll and Stirling.

I must inject one note of conflict into the debate. I cannot agree with Jamie McGrigor that Argyll is the most beautiful place in Scotland. Without doubt my constituency far exceeds Argyll, estimable though its qualities are. As Inverness East, Nairn and Lochaber has the highest mountain, the deepest loch and the friendliest people, that cannot be a controversial proposition.

18:49

Rhoda Grant (Highlands and Islands) (Lab): I congratulate George Lyon on securing the debate. I have just one or two comments to make.

The Cowal peninsula's need for investment is a long-standing problem; the area's inclusion within the national park boundary would bring that investment.

Fergus Ewing spoke about the consultation process. There has been almost universal agreement that Cairngorm and Loch Lomond be considered as national parks, but the local people at Cowal have not been consulted properly; we must start that process now to be in time for the secondary legislation.

Bringing the Cowal peninsula within the national park boundary would certainly put the focus on transport links, such as new ferries. If those ferries were to be used to bring people into the park, it would be up to the park board to develop them with local authorities.

I do not want to interfere in the argument between Fergus Ewing and Jamie McGrigor about which is the nicer place—Inverness East, Nairn and Lochaber or Argyll and Bute—because I might lose out.

Mr McGrigor: I just want to point out to Fergus that Loch Mhor is the deepest loch.

Fergus Ewing: Loch Mhor is in my constituency.

Mr McGrigor: Is it? Oh. I beg your pardon.

Rhoda Grant: I am not sure whether Loch Mhor has its own monster; we will wait and see.

Many members would argue for their area, but all the Highlands and Islands are extremely beautiful.

18:51

The Deputy Minister for Highlands and Islands and Gaelic (Mr Alasdair Morrison): I welcome the debate, which was instigated by George Lyon, and I am generally pleased to note the evident support for national parks.

My friend George Lyon suggested that—given that he would have missed his tea and would be late for his supper—I sum up by simply getting to my feet and saying, "Presiding Officer, yes."

George Lyon: I will accept what the minister just said. [*Laughter.*]

Mr Morrison: No; I will respond to the points that have been raised.

The Executive is committed to setting up Scotland's first national park in Loch Lomond and the Trossachs by summer 2000. To that end, we introduced the enabling bill to Parliament the day before yesterday. The bill will provide a framework for all national parks, and each national park will be set up by means of a designation order. The bill was amended in light of the comments that were received during the consultation process that ended on 3 March. We received more than 330 responses, the great majority of which were in favour, in principle, of national parks. We have made all those responses available to anyone who wants to see them; copies have been placed in the Scottish Parliament information centre and the Scottish Executive library. We are grateful to all those who responded and who made a real contribution to the bill.

Today's debate has been about whether Argyll forest will be part of the first national park. The creation of individual national parks will come through individual designation orders, as I said. Those designation orders will specify boundaries, some powers for national parks and the membership and make-up of each national park authority. All those issues will be fully consulted on with all those who have an interest. That process is set out in some detail in the bill. I hope that that reassures my friends on the SNP benches.

The bill provides for certain criteria to be met in setting up a national park. First, the area should

be of outstanding national importance because of its natural heritage or the combination of its natural and cultural heritage. Secondly, the natural resources of the area should have a distinctive character and a coherent identity. Thirdly, designation of the area as a national park should meet the special needs of the area and be the best means of ensuring that the aims of the park are met in a collective way. Lastly, there should be a full and open consultative process, involving local communities, before any designation order is produced.

I do not want to pre-empt decisions, as they will depend on views that are expressed during consultation before the designation order is made. The important point is that no decisions have yet been made. There is an open and consultative process, which must be followed and which will involve those affected. Parliament will have the final say.

A number of members raised the point that the Cowal area would benefit from national park status. I agree that there is great potential for any area that is designated as a national park. Last month, we launched our new strategy for Scottish tourism, to lead our tourism industry into a new phase of modernisation and expansion. Our strategy is informed by the most wide-ranging tourism consultation exercise that has ever been undertaken in Scotland.

It is unsurprising that many respondents mentioned the importance of the environment and sustainability. Our unspoilt natural environment is one of our key strengths; visitors mention that strength time and again as a reason for visiting Scotland and, of course, for returning.

Mr Hamilton: I have had time to reflect on what the minister has just said about consultation. If consultation with the people of Cowal proceeds and the people are substantially in favour of moving the boundary to include the area, can the minister imagine a situation in which that area would not be incorporated within the boundary?

Mr Morrison: I can reassure Duncan Hamilton that consultation will be extensive. As I have said, no decisions have yet been taken and Parliament will have the final say.

It is crucial that, in developing the tourism industry further, we do nothing to harm the natural environment, which is our No 1 tourism resource. I do not want to intervene in the battle between Jamie McGrigor and Fergus Ewing about which are the second and third best constituencies but, as every discerning tourist knows, all roads and ferries lead to the western isles.

Throughout Scotland, a wide range of initiatives are under way and will continue. They are improving the environment and enhancing appreciation of our countryside and towns. The national park initiative for the Loch Lomond and the Trossachs area has the potential to increase tourism and spend in the area, while protecting the natural environment.

The intention of the national parks plan is to provide for a balanced approach to the four aims and to integrate rural development, while ensuring proper protection of the natural and cultural heritage. A strong national park plan will be crucial in bringing about an integrated approach that involves all relevant players.

As George Lyon has intimated, Cowal is an important gateway for the development of the local tourism industries. Steps are already being taken to ensure that Cowal benefits from those tourism opportunities. Argyll and the Islands Enterprise is working on a number of local measures to enhance the area's potential. Those include the planned appointment of a town centre manager in Dunoon and various projects delivered through Cowal Enterprise Trust for environmental enhancement.

Argyll forest park and the Loch Lomond and the Trossachs national park are exciting developments for the area and offer potential for the balanced development of new merchandising and tourism opportunities, such as the development of eco-tourism package holidays and new retail outlets.

Additional tourism potential for the Cowal economy is an extremely welcome development. However, it is important to acknowledge that the local economy has made considerable strides in the past few years in the wake of the departure of the United States Navy from the Holy loch in the early 1990s.

Tourism is not the only industry; there are many industries in the designated area, all of which will contribute to its success. Local communities and businesses have an important role in integrating the objectives of social and economic development with the objectives of the sustainable use of natural resources and the protection of the natural and cultural environment.

Since the departure of the Americans, the economy of Cowal has greatly diversified and modernised. New opportunities are being seized in areas such as call centres, database management and research and development. Dunoon is making remarkable strides in the whole field of information and communications technology and we are now witnessing the successful expansion of key players in IT, which have chosen Cowal as their base. Those private sector investors have recognised what the peninsula has to offer in terms of a loyal and skilled work force and an enviable quality of life.

Scotland's rural communities are among those that have the most to gain from the effective roll-out of information and communications technology, the proper training of potential beneficiaries and, above all, the encouragement of a culture that grasps what technology can offer as it continues to gather momentum.

That is all happening in Cowal. Stable population trends, employment levels and ferry carryings are all indicators of a positive economic performance in Cowal. The opportunities afforded by the Argyll forest park and the Loch Lomond and the Trossachs national park provide additional prospects for economic growth in the area.

The decision on the boundaries of the first national park in Scotland will be made on the basis of the criteria in the enabling bill and the outcome of the consultation provided for in that bill.

Meeting closed at 18:59.

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