HOUSE OF LORDS

Terminally Ill Adults (End of Life) Bill Committee

Corrected oral evidence

Wednesday 5 November 2025

11.35 am

Watch the meeting

Members present: Lord Hope of Craighead (The Chair); Baroness Berger; Baroness Berridge; Baroness Finlay of Llandaff; Lord Goddard of Stockport; Lord Goodman of Wycombe; Baroness Hayter of Kentish Town; Lord Markham; The Lord Bishop of Newcastle; Lord Patel; Baroness Scotland of Asthal; Baroness Smith of Newnham; Lord Winston.

Evidence Session No. 11 Heard in Public Questions 137 - 147

Witnesses

I: Professor Alex Ruck Keene KC, Professor of Practice, King's College London; Kirsty Stuart, Chair, Mental Health and Disability Law Committee, The Law Society; Sir Nicholas Mostyn KC, Former High Court Judge; Sir Max Hill KC; Professor Charles Foster, barrister and fellow, Exeter College Oxford.

Examination of witnesses

Professor Alex Ruck Keene, Kirsty Stuart, Sir Nicholas Mostyn, Sir Max Hill and Professor Charles Foster.

Q137 **The Chair:** Welcome to this, the 11th session of our inquiry into the Terminally Ill Adults (End of Life) Bill. We are joined at this session by Kirsty Stuart, Professor Alex Ruck Keene KC, Sir Nicholas Mostyn, Sir Max Hill KC and Professor Charles Foster. You are all extremely welcome, and we look forward very much to your evidence. We would be grateful if, as I call upon you one by one, you would introduce yourselves and very briefly say anything in addition to the written material that you have already provided to us, for which we are very grateful. These proceedings are being broadcast, and a transcript will be prepared that will be shown to you later on. You should be careful to check it to see that it is accurate. First of all, may I call upon you, Kirsty Stuart, to introduce yourself? Thank you very much.

Kirsty Stuart: Thank you, Chair. Thank you to the committee for inviting the Law Society to give evidence this morning. I am here as a representative of the Law Society, to put forward our views on the Bill. I am the chair of the mental health and disability law committee, and a member of the Law Society's assisted dying working group. In a personal capacity, I am a principal associate at Weightmans solicitors. I work for NHS trusts and ICBs, as well as independent care providers, on all matters of healthcare and regulatory, including Court of Protection, the Mental Capacity Act and the Mental Health Act.

I would like to stress that the Law Society does not take a position on the principle of assisted dying and is neutral on whether Parliament should pass the legislation. Our role for this Bill, as it is for every Bill, is to ensure that the measures respect access to justice and the rule of law, and that the Bill is accessible for those who wish to use it. Our briefing note, which all members of the committee have received, sets out areas where we think the Bill needs to be amended in order to achieve this.

I will address these as we move through questioning, but our three main concerns with the Bill as currently drafted are in relation to the assessment of capacity, the safeguards in the Bill, including the definition of key terms such as pressure, and the amount of detail currently left to be covered in regulations and other guidance that have not yet been produced. In addition, we are keen to understand more about the role that lawyers will play within the assisted dying process, including the availability of legal aid and mechanisms for independent monitoring and potential review of the legislation. We also suggest that Parliament should consider the implications of the Bill's interaction with similar legislation passing through the Scottish Parliament. Thank you.

Professor Alex Ruck Keene: I should make one tiny correction: I am an honorary KC, not a working KC. I am a practising barrister. I appeared in the last substantive challenge to the Suicide Act, in Section 2(1), and in all bar one of the cases involving the Mental Capacity Act before the

Supreme Court. I am a Professor of Practice at King's College London, where I teach Law at the End of Life, on the Medical Ethics and Law programme. I have been involved in law reform. I was at the Law Commission working on the changes to the Mental Capacity Act proposed at that time. I was also the legal adviser to the Mental Health Act review. I sit on the BMA Medical Ethics Committee, and I have been involved with medical bodies, such as the Royal College of Physicians, in drafting clinical guidance.

I need to say that everything I say is in my personal capacity, from a personal perspective, but it is a personal perspective informed by thinking about and working in the courts and alongside health and social care professionals in applying law at the interface of life and death. It is from that perspective, I give my evidence.

I set out in my written evidence some observations that I hope might help direct considerations towards the necessity of this law. I am absolutely neutral as to the necessity of this law, but I do plead that you consider it carefully, in particular the necessity of legislating for what the Government have estimated to be a maximum of 7,558 applicants for, and 4,599 recipients of, assistance.

The Chair: I am going to have to stop you there, because we really have questions here.

Sir Nicholas Mostyn: I was appointed a High Court judge in 2010, and I sat in that court and in the Court of Protection frequently. I retired prematurely in 2023 following receipt of a diagnosis of Parkinson's disease. I am sure I do not need to explain what that is to you.

Sir Max Hill: Good morning. I was, until two years ago, the Director of Public Prosecutions, serving from 2018, and I had personal responsibility for charging decisions under the current law represented by the Suicide Act of 1961.

I would say very briefly that that law, in my strong view, is unsatisfactory in many respects. I mention only four, in the interests of time. First, investigation under the current law only begins after death occurs. Secondly, the key witness is not available—QED. Thirdly, life partners, lifelong partners, are kept in limbo for many months, a year or longer, waiting to see whether they will be taken to court. Fourthly, compassion has no place in the current law.

Therefore, I would suggest it is quite wrong to leave things as they are. There must be a change. This Bill represents it. The content of the Bill contains many safeguards that are simply not present at the moment. If I have a single concern, it would be that undue complexity might undermine the main purpose, which is to support the terminally ill during the final months of their life.

Professor Charles Foster: I am a practising barrister. I have been involved in a number of the tranches of litigation in relation to assisted

dying of all sorts, and I am an academic lawyer at the University of Oxford. You have my written submission, so I am not going to repeat myself.

I have one general point. This is a Bill that is framed in terms of respect for autonomy, and, of course, respect for autonomy is vital. I am concerned that this is a Bill which, in fact, does exactly the opposite. The Bill purports to take into account relevant factors, but, in fact, it specifically excludes a satisfactory inquiry into issues highly pertinent to decisions to seek assisted dying, such as mental illness, lack of access or delayed access to therapy or palliative care, financial hardship, inadequate care or housing or whatever.

The Chair: Can I stop you there, because I am sure we will open up to this in questions, if you will forgive me?

Q138 **Baroness Scotland of Asthal:** Can I start with Professor Keene and ask you a very blunt question? Do you think the Bill, as it is currently framed, is fit for purpose?

Professor Alex Ruck Keene: No, I do not think it is fit for purpose. Sorry, that was a blunt question and a blunt answer.

Baroness Scotland of Asthal: If we look at the issues that are of particular concern, am I right in saying that it is about the clarity and specificity that we need in order to do this safely, because many of the drafters have said the safeguards are real? Would you agree with that assessment: that the safeguards are sufficient?

Professor Alex Ruck Keene: It is a very big question. I am not sure I am really, within the limits of my time, going to be able to give a very good answer. Could I just focus on one aspect in particular? It is about capacity, not least because I know that there has possibly been a degree of misunderstanding about what I and members of the Complex Life and Death Decisions Group have said about capacity. People have got the impression we are saying, "Don't use capacity as a test". We are not saying that. We are recognising that the idea that someone needs to be able to make their own decision is really important, but what we are saying is that you cannot simply do, "Read across. See the Mental Capacity Act".

I will give two very short, quick examples of why that just does not work. It means, at the end of the day—and I suspect Sir Nicholas may well talk in due course about how many assessments one has to go through—if there is doubt as to the person's capacity, as a matter of law that person has to be found to have capacity to make the decision to seek to end their own life. That just simply, to me, does not work.

The other aspect is, if you simply read across the Mental Capacity Act, there is a duty on all the people carrying out the assessments to seek to support the person to have capacity to end their own life. Those are principles that work absolutely fine in the broader canvas of the Mental Capacity Act. One thing I really plead is to please remember the broader

canvas on which we are operating. What you need is a piece of legislation, or a test, which works within the framework of the policy of this Bill. We have tried to suggest some amendments to try to target that.

That is just one example. I have set out in other areas quite a few other amendments where we are trying to say, on a good faith basis, "We understand the policy of the Bill to be this. This is how it could be made to work".

Baroness Scotland of Asthal: Just coming now to the panel, because there has been a lot of concern, there is an acceptance that this is not a judicial panel. Am I right in saying that, for instance—Sir Nicholas would know this very well, in terms of the court process—you have evidence that can be interrogated from a multiplicity of different sources, tested, and then, if necessary, an appeal? Is the process that is being adopted in the Bill with the panel a sufficiently rigorous investigative process to deliver the same sort of result?

Professor Alex Ruck Keene: This is one of the areas where we are really suffering from the fact that this is a Private Member's Bill. This is not in any way, shape, or form an attack on the good faith of the people bringing it forward, but this is where we have had policy evolving as drafting evolves, so we have not had the chance to take a step back and say, "What is it that we need if we are going to have a third tier of scrutiny?" It seems to be assumed that is what we need. If we took a step back, we might think about that in a whole range of creative ways, but so far, it is been, "Well, it is not a judge, because that won't work. Therefore, it is a panel, which is multidisciplinary assessment". That is not multidisciplinary assessment as it is conventionally understood.

Does the panel have too much complexity for very straightforward cases? Arguably. Does it have too few powers to deal with more difficult cases? Undoubtedly. For instance, it does not have the power to call for evidence from a local authority or an NHS body. We have got a system that is—I am trying to think of the right frame—neither fish nor fowl. I would really hope it would be possible, if it is considered to be important, to have a third tier of scrutiny, that someone could take a step back and say, "What does that actually look like? What does it need to do?", form that policy, and then draft, rather than—and I apologise if this sounds crude—doing it on the fly.

Baroness Scotland of Asthal: I just want to think about the system that we have now. Sir Max Hill has talked about the system. At the moment, the prosecutions are subject to the DPP's guidelines. Of those prosecutions—we have had 199—only 10 have gone ahead. I think about 133, applying the guidelines, have not proceeded with anyone being prosecuted. That is correct, because of the way in which the guidelines have been set out. I want to ask specifically, for those cases where the DPP has decided that there has been a reason to prosecute, i.e. families have tried to kill the individual, how we, under this new process, intend to deal with those cases.

Sir Max Hill: In my time, 27 of these cases crossed my desk personally, because, as I said, it was my personal responsibility to decide whether to authorise charge or not. I authorised charge in a single case, and that was a case of a teenager actively encouraging another teenager to bring her own life to an end, a case that resulted in a guilty plea and a term of imprisonment. In all of the other cases, I determined, usually on the basis of evidence, but sometimes on the basis of public interest, applying the code for prosecutors, that a prosecution was not necessary.

I was very conscious, however, of the many gaps in those evidence-stage test cases that were presented by an investigation that commenced only ex post facto. I would say in relation both to the cases that came across my desk and the many that did not, I simply do not know what I did not know at the time. That is something that is a feature of the current law.

We have, for example, an offence of coercion and control, and have since 2015. We have the encouragement or assisting suicide offence, which we have had since 1961, but we badly lack some real insight into what is happening behind closed doors. We know on occasions that trips are taken to Dignitas in Switzerland. We know much less about what is happening when the curtains are closed at home and a person's life comes to an end.

This Bill, in my view—I am not a proponent originally of it, but I support it—brings all of that into the open. Let me rephrase that: it gives a much better chance for us interceding effectively in cases where something may have gone wrong, whereas I sat at my desk for five years wondering how many more of these cases there could have been, which I would have been able to consider but for lack of investigation because of time and the unavailability of evidence.

Q139 **Baroness Hayter of Kentish Town:** Sir Nicholas, I am one of your fans from *Movers and Shakers*. Luckily, you are not dying, but you are the nearest we have got to a patient here. We have not been able to hear, actually, from anybody who is terminally ill and wanting this, though we have had lots of representations. I am not putting you as a dying man, but you are obviously closest to a patient. I am interested in your response to what Sir Max said; I think he said that it was already looking at the maybe undue complexity and where we have got to. We have just heard the idea of a third level of checks. I just wonder, if you were in the position of wanting this, how you respond to what Sir Max has said: that this just may be now getting too complex?

Sir Nicholas Mostyn: In order to reach the destination, if I were to apply, the condition having taken its fatal hold of me, as I am expecting it will, there have to be 12 separate steps taken by me or on my behalf, six separate documents prepared, a formal legal hearing, a written judgment, and six independent experts, writing on four separate occasions, must be satisfied that what I am doing is voluntary. I have tried to work out how long this will take, being fully experienced in the delays in the legal process. Bearing in mind I have to be within six months of death, I have calculated it would take six months. I thought it

was lucky it did not take seven months, because I would not have reached the destination by the time I died. It is overly complex, but it is better than the existing law.

I really do say a vote against this Bill is a vote in favour of the existing law. You could hardly make up a law as malign as the existing law. I have a right to kill myself, but I must do so entirely alone without any assistance. If somebody helps me they probably will not be prosecuted if they do not know what they are doing, but they probably will be prosecuted if they do know what they are doing. You could not really make it up.

Baroness Hayter of Kentish Town: Sir Max and Sir Nicholas, can I ask about the move from a single judge to a panel? How do you feel about that and the role of what will be quite a senior ex-lawyer or ex-judge on that panel?

Sir Max Hill: We might have slightly differing views on this. We just discussed it before.

Baroness Hayter of Kentish Town: That is allowed.

Sir Max Hill: It is perfectly allowed. Alex used a phrase—I am not blaming him for this—that judges were proposed and then would not work. I would say they would work perfectly well. As originally framed, the proposal for there to be judicial scrutiny was perfectly presentable and workable. We place our trust in judges, whether sitting singly or in groups, to make all manner of decisions, including life and death decisions, currently. I thought that there was great power in a proposal that the sitting judiciary should do this.

The reason that it was amended, in my view, is not because judges could not do it, but because of workload concerns—

Sir Nicholas Mostyn: Resources.

Sir Max Hill: —and resources, which I absolutely respect. That is why the system, as now proposed, has moved to those who have held judicial office, or who hold part-time judicial office, or are very senior practitioners in their own right, and then alongside that, a notion of some essential supporting skills—social work, psychiatric, psychological perhaps—alongside that. What I would suggest, and I have said before, is that there was nothing wrong with the original model. It would have worked but for resources. What we have in the Bill now is even stronger than that. That is why I ultimately commend it.

Baroness Hayter of Kentish Town: Sir Nicholas, did you want to add to that?

Sir Nicholas Mostyn: No, I do not.

Baroness Hayter of Kentish Town: The other issue about it that has been brought up, because it does affect the panel, is about capacity. I

gather that if there is any query about capacity, the panel must refer to a specialist. What would be the role of the legal person on that panel?

Sir Nicholas Mostyn: The judicial figure is the one in the middle, who is a King's Counsel. Suppose there is an issue about capacity. It is going to be decided exactly as we had to do routinely sitting in the Court of Protection. We have to decide it, but you can only make a decision about that on evidence. Baroness Scotland said that it is been agreed that it is not a judicial hearing. I thought, "Something has obviously happened since I last gave evidence", because I cannot see how a determination of capacity could be other than in a quasi-judicial process.

Baroness Hayter of Kentish Town: And the MCA works.

Sir Nicholas Mostyn: One does it well enough under the MCA.

Sir Max Hill: I will just say briefly that the Mental Capacity Act is something that I think that draftspeople were highly conscious of in drafting here. It contains very well-worked principles in relation to capacity, the ability to understand, to retain, to discuss and to act on information. I would be concerned if that was then over-complicated when we have primary legislation that deals with mental capacity.

As to the need to ensure that appropriate clinical and other medical professional skills are brought to bear, I drew a parallel a long time ago with the Mental Health Act, in which a judge sitting in a criminal court, before he or she imposes a hospital order, as opposed to a prison sentence, will need to hear from Section 12 of the Mental Health Act 1983 approved doctors.

There is a parallel here, which I would expect, under the Bill as drafted, would be picked up by the first or second medical professional who is designated to provide material to the panel. He or she, in the event that there is any issue about capacity, which is sometimes extremely obvious, sometimes less so, will have the ability, as they do now within a clinical hospital setting, to call upon colleagues to assist. If not, that can be asked for by the judicial panel who will simply say to the relevant doctors, "Have you considered this, and in what way did you consider it? Is this one of those obvious cases in which capacity is met, or is there more to it, in which case we need to hear more?"

Q140 **Baroness Berger:** I have two questions. My first, please, is to Kirsty Stuart. The Law Society, in your briefing, has called for clarification on a number of aspects of the new panel process. You have also asked for clarification about when panel hearings should be held in private, and also about the options for raising concerns or challenging a panel decision, particularly in the context of the availability of legal aid. This committee has received clear confirmation from the Bill sponsors that neither the commissioner nor the panel is acting in a judicial capacity. On that basis, does that change your view about how important the issues that you have raised are and whether they still need addressing?

Kirsty Stuart: The Law Society's position on this issue is that it is a very complex piece of legislation. It requires individuals to have advice and support. Actually, we do support legal aid being put in place, and non-means-tested legal aid, so that individuals can get that independent advice around these points. I think the ways that the panels are suggested and made up does sound like a very difficult system for some individuals to navigate, and it is not clear how their participation would otherwise be supported or proposed, particularly if they have diagnoses outside of the reason why they are perhaps using that process. We do continue to support that and think that it is vital.

Baroness Berger: Was there anything specifically on the other points around the panels being held in private. Is that something that you still think is of concern?

Kirsty Stuart: It is. What is unclear at the moment is where the panels will be held and how people would know about them, and obviously the consideration as to whether the panels are private or public, and then where the powers would come from potentially to restrict the information and then being able to be made public, akin to where you might have it in other court settings. Those are the things that we are really concerned about. That needs to be clarified, and there needs to be further information provided around that.

Sir Nicholas Mostyn: What does not acting in a judicial capacity mean? Is a coroner acting in a judicial capacity? Is an inspector at a planning inquiry acting in a judicial capacity? When you say you have been assured it is not acting in a judicial capacity, what does it mean?

Baroness Berger: That is not for me to answer; it is for the Bill sponsors to answer. If I can ask my second question to Professor Foster, you will be aware that the House of Lords Constitution Committee has done a report on the assisted dying Bill. It has noted that there has been significantly less deliberation, assessment and scrutiny of this Bill in comparison with equivalent government Bills. It has also said that this was "especially concerning given the subject matter of this Bill".

In its report it highlighted, in particular, significant debate over whether this Bill is compatible with Article 2 of the European Convention on Human Rights, and has stated that the House may wish to consider any possible implications for human rights law. I would be very keen to understand from you what your views are of the key implications for human rights law.

Professor Charles Foster: Article 2 of the convention imposes an obligation on contracting states to protect human life, broadly. You will know the terms of it. My own view is that, that being an absolute article, unqualified as a number of other convention articles are, legislation of this sort falls foul of it. I have to say that those arguments have not had an easy ride in the Strasbourg court.

My main concern in relation to the Human Rights Act is whether Article 14 of the convention would have the effect of allowing the worrying stuff in this Bill to metastasise outside the ambit of the Bill. At the moment, the Bill purports to restrict its application to people with a six-month prognosis if they have a terminal disease. One can well see a powerful argument, under Article14 , from people who have other disabilities, diseases and compromises that do not qualify, that they should have the benefits, if they are benefits, under the Bill too. Philip Murray in Cambridge has written very persuasively about this. It would seem to me that it will ultimately prove impossible to restrict the ambit of this Act in the way that the sponsors say that it can be restricted. Accordingly, Article 14 could make a nonsense of lots of the safeguards that are built into the Act.

Baroness Berger: Just as an extension of that, as the Bill is drafted, currently there is no requirement for families and partners to be informed of a loved one's request for an assisted death, or indeed of the panel decision to grant the application. We have heard in other evidence sessions before this committee that, conceivably, someone could be informed after the act has taken place. I wonder what your view is about whether the Bill properly takes the role and rights of family members and loved ones into account.

Professor Charles Foster: My opening remarks said that autonomy, vital though it is, has to be considered in the context of the nexus of relationships in which we all exist. One of those crucial nexuses, if that is the right plural, is the nexus of the family. In the real world, outside committee rooms like this, decisions about how we exercise our autonomy are made in the context of our relationality. We discuss with our relatives what should happen. It would surely be downright obscene if the first time that somebody knew that a family member had been granted a request for assisted dying was when they were asked to go to the mortuary to view the body.

It would seem to me crucial that, if the panel is to mean anything, there should be a requirement that the immediate family of the applicant are told. They should be invited to comment. There should be a requirement to question them. Of course there are issues here about medical confidentiality, but they are issues that occur in many medical contexts. The public interest in disclosure plainly, in situations like this, in my view, outweighs the public interest in non-disclosure. Should families and other stakeholders be involved? Plainly, in my view, they should.

Q141 **Lord Markham:** Sir Max, I am aware that you are one of three former DPPs who have written in favour of the Bill. The fourth, of course, is the current Prime Minister. It seems that there is a consensus that the current legal set-up is not adequate on it all, and that there is the risk of abuse. Quoting you, it is that currently the curtains are often closed on the dying process, for want of a better word. We even heard that 34 people per week have domestic-abuse-related suicides. Obviously what the Bill is trying to do is get the balance right, versus the status quo in

terms of increasing the safeguards over those that are currently in place, while presenting safe choices for people who do want to end their life. I am interested in your opinion on whether the Bill has that balance right.

Sir Max Hill: The 1961 Act is not to be repealed if this Bill is passed, and so, as a prosecutor, it is important to state that, if you like, a naked and unsupported act of encouragement or assistance that falls outside the scheme represented by this Bill would still represent an offence under the 1961 Act. That is important to bear in mind. That, if you like, is an additional safeguard to all of those that are contained within the Bill.

The other thing that I would say is that this Bill is not, as it were, a rush to legislate on a first global effort in relation to this. On the contrary, this has been advanced cautiously over a long period of time and many iterations in front of Parliament, which members know about and I do not, or I know less. We are following a sequence of models in many places around the world. I think 31 or so models already exist, including a number of states within the USA, which is in double figures. This does not replicate any of them, pure and simple. It stands alone. It has learnt the lessons from all of those jurisdictions. It is, in my view, in its current form, more powerful than any of them.

I would add, going back to the previous question, that no challenge under Article 2 or even Article 3 of the ECHR has substantially succeeded in relation to any of the other models that are already extant around the world. Yes, there have been efforts. Of course, lawyers may make an effort in relation to this. That is perfectly standard, but I do not see the prospect of it succeeding. I certainly do not see that the scheme under this Act would represent cruel or unjust treatment or punishment under Article 3 of the ECHR, provided the scheme is followed in the way that is very carefully set out.

To pick up on your question, we should not forget that the 1961 Act is still there. It is part of the package of legislative responses, which are quite properly in place there to capture when a death occurs in the wrong circumstances, but to facilitate it in this very small number of instances where it is appropriate and with prior careful scrutiny.

Lord Markham: Sir Nicholas, in terms of the panels, as you are the former High Court judge, my understanding is two things. One is that the panels are an extra layer that actually does not exist anywhere else, I believe, around the world, so that is an added layer of protection. I believe the panels are actually able to call additional evidence and witnesses if there are concerns, in terms of the comment made about them being neither fish nor fowl.

Sir Nicholas Mostyn: It has to hear two of them orally.

Lord Markham: Yes, exactly. To the comment that they are neither fish nor fowl, I do not know which is more fowl or fish, but they can call evidence to absolutely get a lot more of whatever they require. Is that correct?

Sir Nicholas Mostyn: They can. They can summon further evidence. That looks like a judicial power to me.

Lord Markham: Professor Ruck Keene, you mentioned your concerns about the Mental Capacity Act. I am aware of a large number of psychiatrists who believe that they are perfectly capable under the Mental Capacity Act to make assessments of their patients, and whether they do have capacity to do it. Do you accept their professional judgment, as the clinician in charge of that patient relationship, that they are able to make that judgment?

Professor Alex Ruck Keene: We need to be careful to differentiate two different things. At the moment, no psychiatrist is carrying out this capacity assessment. They just could not, as a matter of law. We need to distinguish. Are psychiatrists able to carry out capacity assessments? Yes. Are they able to always do that perfectly? No. We have an absolute load of evidence that that does not always happen. The National Institute for Health and Care Research is funding research into why people do not get capacity assessments right. The Mental Capacity Act came in in October 2007, and we still do not get it right the whole time. I am not questioning their professional judgment; I am just saying that we know it does not always happen correctly. I spend an awful lot of my time training psychiatrists to try to help them get it right. In fact, I am going to have to run from here to go and train psychiatrists to get it right. I do this day in, day out.

That is one aspect, but the other aspect is we are asking them to do something completely different. The point I am trying to make is that, if you simply say, "Apply the MCA. Apply the principle of presumption of capacity. Support the person to have capacity to decide their own life", I anticipate, if you asked very many psychiatrists, they would go, "How am I supposed to think about that?" That is for a very specific reason. For psychiatrists, most of the time, their job is to secure life. Their job is suicide prevention.

We need to know—and one of my real concerns is—how this Bill sits in the wider landscape of the law. I need to be able to tell, because I am going to be one of the people writing the books here and giving the training. I need to be able to say, with absolute crystal clarity, to a psychiatrist, "This is the point where you are not in the suicide prevention zone, and if you do not do all steps necessary to try to secure this person's life, you could be prosecuted or you could be charged in various different ways or be civilly liable". I need to be able to say, with crystal clarity, "You're no longer in that zone; you're now in the zone of the Terminally Ill Adults (End of Life) Bill".

Lord Markham: Is there not a key difference here, though? This person unfortunately already is dying, so that is a critical difference from the example that you put out there.

Professor Alex Ruck Keene: I am talking about capacity here. We need to know the point at which you are moving from one zone to another.

This Bill is authorising movement into a different zone, and a set of tools to say, "If you apply the tools in this zone, you are doing it properly". My simple point is please, please, please—you are Parliament. Sorry, I hate to lecture you, but your job is to see this in the wider landscape of the law. You need to be able to explain to people how this securing of autonomy—it is massively important and I understand where it comes from—fits with all the other obligations that are imposed by the law on people doing caring professions? That is a very simple plea, and that is what I am asking you today.

Lord Markham: I appreciate that. Thank you.

Q142 **Baroness Berridge:** I have got three individual questions. First, to Mr Ruck Keene, in the Commons in your written evidence you lifted into the oral evidence this quote: "if the oversight panel, whether that be a judge or a panel, cannot decline to approve an application if it considers that the reason the individual is seeking assistance in dying is because of service provision failures by the statutory bodies responsible for meeting their health and social care needs". If a homeless person who is terminally ill is in front of the panel, is that the kind of case you are meaning where statutory provision has failed for them, or if the panel know someone is just lonely? Is that the kind of case you are meaning by that evidence that you wanted to emphasise in oral evidence in the Commons?

Professor Alex Ruck Keene: It is very important to understand this. The model enshrined in this Bill is about autonomy. When you are in that model, we look in a very procedural way to tick off a very procedural version of autonomy. Do you have capacity? Tick. Are you under obvious coercion or pressure? No. Tick. The sponsors of the Bill are very clear that we do not want to get into investigating with other people, or the reasons why, because this is about autonomy.

My point that I made previously, and the point I would repeat, is that, if the panel is being asked to sign off on very procedural autonomy, we have a situation. My suggested solution—because I have tried to help draft amendments to enact the policy of the Bill in a way I would perceive as working—is that, if that is considered to be the procedural version of autonomy and where we are operating, the panel cannot say no. The panel should then record and notify relevant people of, "The reason we think this person is asking is because of service provision failures", because that will then allow us, at the five-year mark of the review, to be able to go, "It looks like X per cent of these applications are coming in because of palliative care failures".

We can then have the discussion, which at the moment is impossible to have, because we are stuck in this total logic loop of people who are concerned about the Bill saying, "Increase palliative care". People who really want the Bill are saying, "That is never going to get us anywhere, because it will never increase". We do not have that. That one change does not muck around with the policy of the Bill, which is, "This is a very

procedural narrow version of autonomy", but allows you and your colleagues, in due course, to take a considered decision based on data.

Baroness Berridge: Sir Max, could you turn to Clause 34 of the Bill? The criminal law is of course the highest safeguard that we have in relation to protecting the vulnerable. As of yesterday, the committee has contradictory evidence, and we are trying to assist our colleagues and Committee of the whole House. Lord Falconer clearly said to us in his evidence that this is a strict liability offence under Clause 34, and he said—I am quoting directly—"The offence is completed when there is pressure". The Government Minister, in her letter received yesterday, says, "These terms", meaning "coercion", "dishonesty" and "pressure", "therefore indicate that the offences are not strict liability offences". Either Lord Falconer has got the law wrong or the Minister has got the law wrong. Who is correct?

Sir Max Hill: They are both correct for different reasons. That is the answer I would give, knowing that probably one of them is in the room sitting behind me, and I have just seen the letter from the other, but that is a serious answer. Coercion is a freestanding offence, and I would understand anything Lord Falconer has said to be in that context. As I mentioned earlier, since 2015, we have had a freestanding criminal offence of coercion and control. In the context of domestic abuse, one might now find a charge sheet or an indictment in court containing multiple pieces of evidence, as it were, of the breakdown of a toxic relationship—the assault, the criminal damage, even the burglary, and coercion and control. It is freestanding and it sits alongside other criminality. That is how I would take it Lord Falconer meant it.

What Minister Sackman is saying in her letter, which I have just seen but I agree with, is that there must, however, be a context in which the coercion occurs and, without importing into Clause 34 some additional mental element, which we sometimes see in criminal statutes, it is quite plain that the activity of an individual that captures Section 34—namely, pressure, coercion or dishonesty—does require, borrowing the Minister's words in her letter, purposeful action. It is not just in the ether. It must be an activity, with or without dishonesty, that is connected to encouragement to a person to end their life at one of the two levels of varying severity that are enshrined within Section 34. To that extent, the Minister is right to say it is not strict liability. It is committed in circumstances that are clear in Clause 34 but that must be tethered to the activity in question.

Baroness Berridge: Can I just put to you that, if you re-read the transcript, Lord Falconer was asked questions in relation to pressure, not coercion or dishonesty, which do contain other contexts in our law. This is the first time that we are using pressure alone as an offence, and he said that it was strict liability. Do you accept that it would be better to be clear about the mental element of these offences relating to pressure on the face of the Bill?

Sir Max Hill: I am not sure that I do accept, I am afraid, that any amendment is necessary because, under 34(1), the word "pressure" is immediately followed by the words "induces another person to make a first or second declaration". That is the statutory context that is proposed. It is, to use my earlier word, tethered to inducement. Now, in terms of whether this is the final wording that meets approval, I allow a conversation about how we look at that, but I think that Lord Falconer's words are perfectly understandable in the context of what Section 34 contains, and cognisant of the fact that we have a separate offence that has been on the statute book since 2015.

I am afraid the short answer is that I do not think that we need to over-complicate that, because, in my view, it will be perfectly well understood, let us say by a police investigator or by a medical professional or a member of a panel, as to what this clause is driving at. It either applies in the context of inducement, in which case it is caught by 34, or it does not.

Baroness Berridge: Yes, the inducement is of the victim. Thank you for your answer. If I turn now to the Law Society, we are talking about this word "pressure". Now, you have laid amendments, or suggested an amendment, in relation to defining the word "pressure". As you understand it in the Bill, could the word "pressure" include pressure from the internet, pressure from video games, pressure from TikTok videos of that ilk, as well as you are wanting to define pressure as conduct other than coercion?

Kirsty Stuart: I think it is really difficult because there is not a definition at the moment in terms of pressure. Certainly, what we would be saying is that we think that it should be much clearer in the Bill. We also do think that there needs to be some guidance about it in the code of practice, but Ultimately, what is really important is to have it publicly consulted on and published before the Bill takes effect, so that it is really clear, with clear examples of what that would mean, because it is really difficult as a principle.

Baroness Berridge: You have a specialism in children's work. We have had evidence from the medical examiner that the first call could be about relatives knowing that a call is coming to inform them that a relative has died by way of assisted suicide. In the Bill, as I understand it, there is no requirement for anyone to give that information to the panel. Are you concerned that the Bill, as drafted, could result in a call being made to a child as next of kin?

Kirsty Stuart: I do not think that is something that we have necessarily considered in terms of our briefings to date. I think I would probably turn to others to see if they have a view in terms of that, if that is all right.

Baroness Berridge: That is fine. Thank you.

Q143 **Lord Winston:** I will be brief. I think, on reflection, that I would like to ask Sir Nicholas Mostyn this question. You are a person with great care

with words. We have just been in a session this morning where assisted dying has been absolutely asserted that it is not a treatment—that it is not, in fact, a medical situation, effectively. Do you think that assisted dying, on the contrary, is a treatment? It is a treatment when we, as medical practitioners, have failed to do everything else we can do for the patient.

Sir Nicholas Mostyn: Is it a medical treatment? It is a good question. I think it probably is not a medical treatment. I think medical treatments, by definition, have to be intended to try to preserve life. I think that, in making the decision to seek assistance, as I expect I will, I do not think that that decision, if it were implemented under the terms of this Bill, would amount to a medical treatment.

Lord Winston: Is, therefore, the giving of a drug to a person who is requesting assisted dying a treatment or not?

Sir Nicholas Mostyn: I can see where your questions are going. You are not going to get me to say that what the doctors would be doing would be contrary to the Hippocratic oath, contrary to their duties as doctors.

Lord Winston: We do not keep that any more.

Sir Nicholas Mostyn: Do we not? The fact is that, if it were assistance given by a doctor to enable me to have a dignified ending in the presence, perhaps, of my loved ones, as opposed to a squalid one, alone in a hotel room, or in Switzerland, to characterise that as a medical treatment would be false, but what the doctors do to enable that would be made lawful by this Bill, so it would be lawful.

I do not think I need to discuss whether it is consistent with the moral obligations of a doctor or not, but it would be made lawful. I would not have any moral qualms if I were a doctor assisting somebody, if this Bill were passed, but I do not argue the point from that point of view. I am putting my arguments forward from a very personal point of view, as I am sure you will understand.

Lord Winston: So am I. Thank you very much indeed.

Q144 **Lord Goodman of Wycombe:** I would like to ask all or any of the witnesses a question that arises from the Attorney-General's Bingham lecture earlier this year on the rule of law. Questioned about it by the Constitution Committee in relation to the use of delegated powers in September, he said, "You should not take powers because you have not worked out the policy yet".

I am sure we can agree that the relationship between VAD services and the NHS is a central policy issue that arises from this Bill. I am sure we can also agree that we do not know what that relationship will be, because it is specified in the Bill that the decision will be made by means of a delegated power. Is this not an instance of what the Attorney-General was complaining about—namely, taking powers because you

have not worked out the policy yet, and on a central policy issue to boot?

Professor Charles Foster: I would say it is a very clear example. The degree of delegation exemplified by Clause 39 is extraordinary, and it is the delegation not just of matters of procedure or practice but matters that go to principle.

Clause 39(1) deals with the assessment of whether a person has a clear and settled intention to end their own life. Such an assessment would, if it is a proper assessment, include consideration of the question of a psychiatrist's role in investigating suicidal ideation and investigating other things that might have contributed to the decision to seek assisted dying. Those are matters that go well beyond the usual ambit of matters that are contained in codes of practice in comparable legislation, and there are many other examples in this Bill.

Sir Max Hill: I would be more cautious about that and I am not so sure that, when read together, the clauses in the Bill in toto represent some unwarranted delegation of powers, and that is because, to take the example just given, 39(1) must be read alongside, for example, Clause 8(8), which is the first declaration clause, as everybody knows, where the question of pressure, the question of coercion, the matter that the codes of practice would go to, is there and enshrined as part of the process as a matter of primary legislation.

Sir Nicholas Mostyn: The substantive criteria are in the primary legislation.

Sir Max Hill: Exactly, so that is not a delegation.

Sir Nicholas Mostyn: The detail should be in the secondary legislation, and substantive powers in the primary. I agree with that as a principle.

Lord Goodman of Wycombe: In relation to the NHS and VAD services, this will be a matter to be decided by the Secretary of State by regulation.

Professor Alex Ruck Keene: Can I make one observation?

Lord Goodman of Wycombe: Yes, by all means.

Professor Alex Ruck Keene: I really wish we were doing this in Jersey. They have published 200 pages of instructions to parliamentary counsel, or their equivalent to parliamentary counsel, explaining a cross-governmental approach. We just do not have that here. For instance, this Bill cannot be factored into the NHS's 10-year plan, but you are operating in the zone that this is the Bill that you have before you, and you have, if I may respectfully say so, a remarkably difficult decision to take about whether the best way forward is to leave many matters that require very considerable public consultation to regulations, really blowing through the normal idea of Henry VIII legislation, or do you say, "We are, in the very limited amount of time we now have left in terms of this Bill having parliamentary life, going to try to work up the policy such

that we can put it on the face of the Bill"? I do not envy you your position at all.

For what it is worth, it seems to me remarkably challenging to say that how this operates should be done by way of regulations. It seems to me that, for instance, amendments put forward by Baroness Cass, in terms of thinking about specialised commissioning and matters like that, might be the best way forward in relation to that particular mess. Sorry, I should not have said that word—that particular complexity. It is really a very tricky situation in which you find yourself, and it is very tricky for people who support, and it is very tricky for people who find it challenging.

Q145 **Baroness Finlay of Llandaff:** If I can just go back for a moment, we were told by the Ministry of Justice last week—this was in response to a question about judicial powers—"You are absolutely right", referring to the panel, "that it is not a judicial body. It is not a tribunal. It is not adjudicating in that sense". We have had very different views coming from Minister Sackman when she gave evidence to us. Can I just ask about the panels, though, and why you feel that it is okay and justifiable to have no appeal mechanism against granting eligibility to assisted death by a panel? There is only an appeal if the person is turned down, and I am concerned as to if other evidence then comes forward immediately after the—

Sir Nicholas Mostyn: It would be judicially reviewable though, would it not?

Baroness Finlay of Llandaff: Who would bring forward the judicial review?

Sir Nicholas Mostyn: The person who is complaining that the decision was unlawful.

Baroness Finlay of Llandaff: Supposing that is a care assistant or somebody who is on benefits—a family member who has no money—then would they have support to bring forward a judicial review, and could they do it in the time before the person was given lethal drugs?

Sir Nicholas Mostyn: I have no idea, but, when I sat in the Administrative Court—I did half my work in the Administrative Court—there were many applications made by litigants in person.

Baroness Finlay of Llandaff: Should we require that that ability is written into the Bill—

Sir Nicholas Mostyn: There is no need to.

Baroness Finlay of Llandaff: —and financial support for whoever might bring it forward? I think the public generally—and I am not a lawyer—view judicial review as a really difficult process, but also, from the way the Bill is written, I had understood, perhaps wrongly, that the person who brings forward a judicial review is the person concerned with the

issue. Can a relative or a carer bring it forward?

Sir Nicholas Mostyn: They would have to show they had standing.

Baroness Finlay of Llandaff: As a relative. How long would that take?

Sir Nicholas Mostyn: If you put it in the immediates list, it could be put before a judge within 24 hours. I used to do immediates where the events in question happened the day before.

Baroness Finlay of Llandaff: You would advise that, if a care assistant or somebody else overheard conversations that were worrying and suggestive of coercion or undue influence, that would be their route. Perhaps that should be incorporated into the training of all healthcare professionals so they know, if they have additional information—

Sir Nicholas Mostyn: I am not giving any advice at all.

Baroness Finlay of Llandaff: It is important. If I might then move to healthcare professionals and Sir Max Hill, you have pointed out that the 1961 Act stays in place. What is the position of a doctor, in Liverpool or Southampton or the borders, who is looking after a patient who has come from the Isle of Man, Jersey or Scotland, where they have different legislation, and has a prognosis of probably about a year, at a best guess, and that person wishes transport to be arranged for them to return back to their place of domicile to have their assisted death?

We have heard from the Ministry of Justice that they would be in breach of the law because they would not be complying with the England and Wales law and, therefore, they would be in breach in relation to 1961. What would your attitude be as director of public prosecutions, and what guidance should be given to all of the doctors in those places? There are large numbers of patients who go to Liverpool or Southampton from these other jurisdictions.

Sir Max Hill: If you are operating as a medical or other professional within the legal jurisdiction of England and Wales, the guidance should be obey the law of England and Wales, and it is as simple as that. This is a jurisdictional matter. There are many examples, even within the jurisdictions within our territorial waters, for example, where lawful chastisement differs as a matter of law between England and Wales as we speak, where the question of the age of criminal responsibility differs between England and Scotland as we speak. Whether it is a healthcare professional or anybody else, or a normal citizen, the guidance is simply to obey the law of the country in which you are acting, taking decisions and the rest of it. I think, I am afraid to say, that it is as simple as that.

Baroness Finlay of Llandaff: The guidance to the doctors needs to be clear. Can I just ask about the proxy as written in the Bill? There is no mention of anyone holding lasting power of attorney for health and welfare decisions even at a higher level, so should the proxy be the person who has been given lasting power of attorney on behalf of the person rather than the way it is written in the Bill at the moment, which

does, at first sight, I would have to say, look fairly simplistic, and it seems to completely bypass the provisions we have in the Mental Capacity Act?

Sir Max Hill: If I answer that from the perspective of capacity, that is personal, as I have always understood it, to the individual whose life and end of life is under consideration. An LPA is neither here nor there, frankly, within this proposed statutory model, so it would not be the case, let me be clear, where a son or a daughter who holds one of either of the lasting powers of attorney over financial provision or health care would be able to act as a proxy for their mother or father. All of the focus, as is clear within the clauses of the Bill, must be on the individual themselves, and that means, I am afraid, that, if you have an individual who is terminally ill, is within what is assessed to be the last six months of their life but then loses capacity, then they will lose the ability to engage with this model. That is one of the safeguards.

Baroness Finlay of Llandaff: If I can pick up on your word "capacity" and ask Professor Ruck Keene, I think that you have suggested that there should be detailed records in the case notes, similar to those required in the Mental Health Act, whereas this does not require the doctor, who might see the patient in secret, behind closed doors, with nobody else present, to explain why they feel the person has capacity or not. At the moment, it looks to me—and perhaps I am being simplistic—that it could just be a tick box exercise, and there is no requirement to undertake the assessment as laid out further down in the Mental Capacity Act, but that would not apply in this situation, from the way Clause 3 is written.

Professor Alex Ruck Keene: I think there are multiple complexities here. As members know, there is the process of assessing, which is the thinking, and then there is the determination, which is the writing up. Can I just make one observation about the assessing? Normally, in a complex capacity assessment, you would be wanting to obtain information from as many people as possible. It would be very odd to carry out a capacity assessment in relation to refusal of medical treatment without getting relevant information from family members, say, as to whether this decision is consistent with the person's previous existence, as it were.

The model in this Bill—and it is really important to understand where this is coming from, and this is not a criticism; it is just a fact—is a very narrow view of autonomy, which then tracks with it; it is nobody else's business. Capacity assessors under this Bill are being required to do something qualitatively different in terms of the process of thinking, because they are being told not to go and talk to anyone else because it is nobody's business. That is a choice, which is enshrined in this Bill. That is a choice. Please can you grapple with it head on?

In terms of then writing it up, of course we will have a Code of Practice that will have emphasis on how it is written up. Can I make one small observation about the code of practice? I do not understand why the codes of practice here do not carry the same sanctions as the Code of

Practice of the Mental Capacity Act. In terms of the code of practice of the Mental Capacity Act, if you do not comply with it, a court or tribunal can take that into account. This is serious stuff, and a lot is riding on the code of practice. In the context of writing up determinations, an awful lot is going to be riding on it. I just do not understand why there is not a sanction for doing it. I have tried to suggest, in good faith, how we can make this thing work on its own terms. One of the ways is to make the code of practice have the teeth it is said to have.

The Chair: Baroness Finlay, forgive me. We are running out of time. I would like Baroness Hayter to come in.

Q146 **Baroness Hayter of Kentish Town:** I just would like particularly Sir Max to respond to something that Professor Foster said. I think he was suggesting that the family must be involved. I have to say that I dealt with the death of a friend of mine and, long after she was dead, two cousins appeared, and they were her next of kin. She had not seen them for 15 years, so I do wonder whether it is mandating that.

More than that, I am concerned about where the agency of the dying person is. Should they not be the centre of that? I am really interested in Sir Max's response, because he is one person who has handled these cases. He has had to do more difficult things than I have ever had to deal with. I think you said 27 cases across your desk. How were you able to, at that stage, define who was family and define who should be listened to and thought for? This is not clear. Not everyone has a family. How did you deal with that in terms of who to hear from?

Sir Max Hill: I could only, under the 1961 Act, deal with what was presented to me that came from the police investigation, and then its review by those within the Crown Prosecution Service. I can tell you, in a straight answer to that question, that I looked every time for material that would satisfy me that what had happened was not as the result of any encouragement or assistance that contravened the 1961 Act. I can think of examples where there were close family members who were literally by the bedside when life came to an end, and other cases where it was not necessarily close family members; it might have been medical professionals. I can think of examples of that. There were others, again, where at the last, if I can use that phrase, it was the dying person alone, self-administering.

There were many imperfections. There were many instances where I wished that I had more. Frankly, I wished that I had the rigour that this Bill presents in terms of first and second declarations and the processes that will be undertaken while the dying person is still alive, but that is, essentially, what I looked for.

To take the context of your question—the other half of your question—of course, it does follow, whether through disinheritance or anything else, that an individual may make a decision that others close to them would disagree with during life, and even including the end of their life. Ultimately, that is their decision to make. There are multiple safeguards

here that ensure that the wrong sort of pressure is not brought to bear. I suspect that, in the majority of cases, going back to those that I have considered, what we will see will be family members frankly pleading for the dying person not to do this. You will see evidence, as I did, of loving, lifelong partners who want every last day, no matter how bad the conditions may be.

That is completely understandable, and I am absolutely an advocate for increased resourcing for palliative care, let me say, and I do not think that that sits in opposition to this Bill. The two go hand in hand, but there are situations where an individual of full mental capacity, in their dying months, genuinely and truly feels, usually despite the impact of their loved ones, that they want to take control over their last weeks and days, and that is what this facilitates.

Q147 **Baroness Berridge:** I am going to return to Sir Max and Sir Nick. We were told by the Ministry of Justice Minister just last week, "You are absolutely right that it is not a judicial body. It is not a tribunal. It is not adjudicating in that sense". Are you saying to us that the Minister is wrong in saying that the panel is not a judicial body?

Sir Max Hill: I am certainly not. I am not saying that. I think what we have been discussing before, if I may, is the susceptibility of public officials' decision-making to judicial review. It is clear that judicial review, I agree, does apply under the provisions of this Bill. That does not necessitate the panel being a judicial body. The judicial review mechanism still applies, notwithstanding that.

Baroness Berridge: Thank you. Sir Nick, do you think the Minister has got it wrong when she described that this was not a judicial body?

Sir Nicholas Mostyn: I would describe it as a body acting judicially. I cannot remember who it was who said it: if it walks like a duck and it looks like a duck and it quacks like a duck, it probably is a duck. The fact is it is making a decision of enormous importance: whether to grant the certificate of eligibility. It has to hear oral evidence from two witnesses. It can summon other oral evidence. It has to give a judgment in writing, and it can decide whether or not to hold its proceedings in private.

Baroness Berridge: But it does not have any right of appeal for a family member, does it? That is not a judicial situation, is it?

Sir Nicholas Mostyn: In a planning inquiry, the objectors have no right of appeal at all, but it is still a judicial process.

The Chair: On that note, thank you very much indeed. I will have to bring this session to an end. We are extremely grateful to all of you, and thank you very much for coming. Can I remind you that the evidence has been taken down and will be recorded? Would you be very kind to check the transcript to be sure that the evidence that you have given is correctly recorded? Thank you very much indeed, and good afternoon.