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GENERAL COMMITTEES

Public Bill Committee

MENTAL CAPACITY (AMENDMENT) BILL [*LORDS*]

Third Sitting

Thursday 17 January 2019

(Morning)

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Monday 21 January 2019

The Committee consisted of the following Members:

Chairs: Mark Pritchard, † Ian Austin

† Afolami, Bim *(Hitchin and Harpenden)* (Con)
† Chalk, Alex *(Cheltenham)* (Con)
† Cunningham, Alex *(Stockton North)* (Lab)
† Debbonaire, Thangam *(Bristol West)* (Lab)
† Dhesi, Mr Tanmanjeet Singh *(Slough)* (Lab)
† Dinenage, Caroline *(Minister for Care)*
† Keeley, Barbara *(Worsley and Eccles South)* (Lab)
† McCabe, Steve *(Birmingham, Selly Oak)* (Lab)
† Moore, Damien *(Southport)* (Con)
† Morris, James *(Halesowen and Rowley Regis)* (Con)
† Morton, Wendy *(Aldridge-Brownhills)* (Con)
† Norris, Alex *(Nottingham North)* (Lab/Co-op)
† O'Brien, Neil *(Harborough)* (Con)
† Sherriff, Paula *(Dewsbury)* (Lab)
† Syms, Sir Robert *(Poole)* (Con)
† Whately, Helen *(Faversham and Mid Kent)* (Con)
† Williams, Dr Paul *(Stockton South)* (Lab)

Adam Mellows-Facer, *Committee Clerk*

† attended the Committee

Public Bill Committee

Thursday 17 January 2019

(Morning)

[Ian Austin *in the Chair*]

Mental Capacity (Amendment) Bill [*Lords*]

11.30 am

The Chair: Welcome back, everyone. I remind everyone to turn their phones to silent. The selection list for today's sitting is available in the room. Amendments on similar issues have been grouped together for debate, regardless of where they appear in the Bill. Decisions on amendments take place not in the order amendments are debated but in the order they appear on the amendment paper, which corresponds to the part of the Bill that each amendment affects.

Schedule 1

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

Barbara Keeley (Worsley and Eccles South) (Lab): I beg to move amendment 30, in schedule 1, page 12, line 29, at end insert new sub-paragraph—

> "(da) in the case of a cared-for person aged 16 or 17 (unless that person is subject to a care order under section 31 of the Children Act 1989 or an interim care order under section 38 of that Act) the responsible body is satisfied that no person with parental responsibility objects to the arrangements,".

This amendment makes provision enabling parents to object to care arrangements that give rise to their child's deprivation of liberty.

It is a pleasure to see you in the Chair again, Mr Austin; you are working very hard on the Bill, as indeed we all are. Amendment 30 follows on from amendment 38, which would extend pre-authorisation reviews to 16 and 17-year-olds. Amendment 30 would provide that, where there is a person with parental responsibility for the cared-for person, an authorisation may be made only if the person with parental responsibility does not object to that authorisation. We believe that would ensure the Bill does not create a situation where the responsible body is able to override the wishes of 16 and 17-year-olds' parents to deprive them of their liberty.

I appreciate that case law in this area is not abundant, but one relevant case in point is Y *v.* Barking and Dagenham, which I mentioned when we debated amendments regarding the role of care home managers. Despite agreeing to Y's placement, his parents became concerned about the standard of care he was receiving. The local authority deprivation of liberty safeguards application made no mention of the concerns they had raised. Subsequently, the parents withdrew their consent for Y to remain at the care home.

Around the time Y's deprivation of liberty was granted, a member of staff at the care home was reported as having assaulted Y. That was raised with the local authority, but Y's parents were not informed. The local authority then applied for a care order for Y, and the social worker reviewing the request dismissed the parents' concerns. When the case eventually went to court, the local authority admitted that it had dismissed the parents' concerns without proper investigation.

I believe parental objection is an important principle, which is currently missing from the Bill in relation to deprivation of liberty for 16 and 17-year-olds. Its omission means that the Bill is out of step with the Children Act 1989 and there may be conflict between the two. In particular, there is a lack of reference in the Bill to the role of parents in making decisions about the placement of their child. As I just described, in Y *v.* Barking and Dagenham, Y's parents withdrew their consent for Y's placement in the care home in which he was residing. Under section 20 of the Children Act, parents can object to their child's placement and remove their child from that placement. In paragraph 20 of proposed new schedule AA1, the Bill provides that certain people must be consulted, but the main purpose of consultation set out in paragraph 20(2) is to ascertain the cared-for person's wishes or feelings about the arrangement. That does not address parents' views about the arrangements for their child.

Without our amendment, the liberty protection safeguards provisions would allow a local authority to make arrangements that deprive young people of their liberty without the agreement of their parents. Further, it would allow the local authority to do so without needing to obtain a court order. That is not the case under the Children Act, so there is clearly a conflict, which we must address. I see the amendment as by no means contentious. It is very much in the spirit of what has been suggested to widen the scope of liberty protection safeguards to 16 and 17-year-olds, including the extension of pre-authorisation reviews by approved mental capacity professionals. It is a key component of the Children Act, as it should be of the Bill.

Alex Cunningham (Stockton North) (Lab): It is a pleasure to serve under your chairmanship again, Mr Austin. As I said in a previous sitting, children and young people have always been my focus in politics, and the measures that impact 16 and 17-year-olds are some of the most important in the Bill.

As my hon. Friend the Member for Worsley and Eccles South said, amendment 30 would make provision to enable the parents of a 16 or 17-year-old to object to care arrangements that gave rise to deprivation of their liberty. Not unlike in many other parts of the Bill, there is a severe lack of clarity about the role of parents. We must make that clearer. The law regarding young people is already very complex, and the Bill just seems to add to that complexity. There is real concern out there in the community about the lack of recognition of parental rights under the LPS system.

Parents fall within the group of people to be consulted about the young person's views of the care arrangements, but there is no acknowledgement at all that parents have the right to make decisions about the young person's placement. That seems to me to undermine the Children Act 1989, which provides for parents being able to object to the young person's placement and to remove their child. Does the Minister agree that there is such a conflict? If authorities want to overrule parental wishes about the care of their child, they must go through the legal and court proceedings to do so.

Mr Tanmanjeet Singh Dhesi (Slough) (Lab): As well as being against the 1989 Act, does my hon. Friend agree with me that it is common sense for parents to be at the heart of any DoLS? It is not good to be sidelining them on what is, in effect, the issue of the health and wellbeing of their children.

Alex Cunningham: That is very much the case. I always try to place myself into such a situation. I am at the grandfather stage of life now, and I think about how that would affect the children of my children, or other parts of my family who have children. I would most certainly want them to be at the centre of it—I would probably try to interfere a bit myself as well.

The Children Act, however, provides protection—it is a real safeguard—and yet the Bill is not at all clear about how it will sit with that existing legislation. Surely, as my hon. Friend the Member for Worsley and Eccles South suggested, parents must be consulted and have that ability to make decisions about their child, even if they are 16 or 17. We must ensure that such safeguards are enhanced, not watered down or in conflict with each other.

The Royal College of Psychiatrists has highlighted to me that encompassing 16 and 17-year-olds in the Bill can be positive where they lack capacity to make their own decisions, but that must be authorised by an appropriate safeguarding system. The RCP shares my belief that a parent or legal guardian with capacity to make the decision should be able to authorise the required deprivation of liberty.

Many social workers and other professionals in the field have made submissions. There is a strong consensus that additional safeguards should be available where objection is made by a person with parental responsibility. The Mencap submission, too, welcomes the inclusion of 16 and 17-year-olds in the Bill, but it also expressed concern that we might be reducing protections and eroding parental rights. Mencap has asked the Government to conduct further public consultation on the measures for 16 and 17-year-olds to understand the implications fully.

Does the Minister believe that the Government have consulted properly on the issue of 16 and 17-year-olds? Clearly, the organisations with an interest in such matters do not think so. Will she commit to undertake a rapid consultation exercise ahead of Report, in the hope that we in Committee can be reassured about parental rights and the very necessary protections for young people?

Mencap highlighted the particular uncertainty about how the new system works alongside existing legislation. I have already talked about that, but a complex web of legislation and guidance relates to those young people who might fall under the LPS system, including looked-after children. My hon. Friend, however, has already spoken about that. It is essential for the Minister to provide clarity in such areas, preferably now but certainly before Report.

In closing, I will make a general point about involving parents in all manner of processes in the health and social care world. For them to be excluded from the process, denied the right to report or told simply that the authorities know best must be an exception. It is not always the case that the authorities know best. At times, I have a tremendous caseload of parents coming to talk to me about issues affecting their children and how they feel excluded.

I put it to the Minister, if a child affected in a particular case was one whom she knew personally, one whose parents she has had contact with, would she be content for them not to have every possible access to information or not to be consulted at every stage? I remind her that a child is being deprived of liberty—this is an opportunity to lock a child up, basically. We need to understand and empathise with parents in their desire to be consulted in the decision-making process, and I believe that the amendment would go a long way to ensuring that that actually happened.

Alex Norris (Nottingham North) (Lab/Co-op): It is a pleasure to see you again in the Chair, Mr Austin.

It is important to reflect at this point that the purpose of this legislation is to take an existing cumbersome system and to try to make one that works, but of course we are putting a new focus on 16 and 17-year-olds while we do that. So it is important that we have good consideration about how we can do it in the safest way, and in the way that best reflects the needs of the individual and of their family in general.

We will all be aware that social media can skew our view of these things, but the very high-profile cases on social media of young people who are in the settings that we are talking about today, and just how difficult that is for the parents and those young people themselves, mean that we should take every step we can to make what is an exceptionally difficult situation as best as it can be for those parents.

This issue came up in one of our previous discussions—it was raised by the hon. Member for Halesowen and Rowley Regis—when we were talking about access for parents as a matter of course, which I think we will come back to when we consider a later amendment. The idea was discussed that we would not want to put something in the Bill that would give access to a child to someone who was not supposed to be given access at that point.

I reflected on that point, because it is obviously very important, but I do not think that it actually applies in this situation. I was using, as an analogous case, the idea of a parent's right to have input into their children's education. If that parent is subject to a non-molestation order, that right falls away, so I do not think that there is anything that we would put in this Bill that would supersede that.

In a similar vein, my hon. Friend the Member for Stockton North used the phrase "with capacity", regarding the parents being involved. Again, therefore, nothing that we are doing here would supersede the fact that if that parent was not able—

James Morris (Halesowen and Rowley Regis) (Con): The hon. Gentleman is making some serious points, but I just want to probe one of them. If we are seeking to protect the best interests of a child, there may frequently be circumstances in which those best interests are not necessarily served by having parental involvement, because of the complexity of a particular case or the psychiatric condition of a particular child, and somehow that needs to be reflected.

Alex Norris: I thank the hon. Gentleman for that intervention, because that point is really important. It is perfectly conceivable that the heart might override the head and parents might be so desperate to keep their family together—which we can all relate to—that they might make decisions that are not the best decisions.

Again, however, that would mean entry into a pre-existing legislative space, in the sense that if a parent were acting negligently, we already have a series of protections for a child in that case. So, if we have what we are talking about today in law and then we have a case of the kind that the hon. Gentleman and I are both talking about, that would tip into a negligence situation, and therefore I think the matter would still be unresolvable in the best interests of the child. So I do not think that anything that we are suggesting here in this amendment would disqualify any of that.

I think the amendment is proportionate: it would just give that extra layer of protection. We understand that the cohort that we are talking about are particularly vulnerable; we understand the impact that this change would also have on parents; and we understand that fundamentally parents will want the best for their children. However, we also understand fundamentally that if a bad decision were being made by a parent, there are other sources to make sure that a young person's needs are being met.

Actually, when we add all that together, I think the amendment would put in significant safeguards and important protections for both young people and their parents, but without creating a situation where we might unknowingly create some risk and perhaps do some harm.

The Minister for Care (Caroline Dinenage): As ever, it is a great pleasure to serve under your chairmanship, Mr Austin.

I thank Opposition Members for initiating a discussion on this really important matter. Parents, or those with parental responsibility, have a vital role in caring for their children—of course they do—especially when the child lacks mental capacity. We would fully expect that the responsible body took every opportunity to consult parents with regard to their views about arrangements, where it was appropriate to do so as part of the consultation process, and we will make that clear at every stage in the regulations.

However, as the hon. Member for Nottingham North and my hon. Friend the Member for Halesowen and Rowley Regis have said, we have to allow for the very rare occasions on which parents may not have the best interests of their children at heart. That is why we have to be careful about adding this provision to the Bill.

11.45 am

Helen Whately (Faversham and Mid Kent) (Con): My hon. Friend might be coming to exactly this point but, having been involved in some of the conversations about the review of the Mental Health Act 1983, I know that lots of concern was expressed about families feeling that they were not involved enough in the care of their relatives and in decisions about them being detained, for instance. I am keen for her to reassure us that parents will not be overlooked and will be involved, so long as they are acting in the best interests of their child.

Caroline Dinenage: Absolutely; we completely agree that objections raised by parents about the arrangements should be considered with the utmost care and attention. That is why we have already built those safeguards into the authorisation process. The Bill states that an approved mental capacity professional must conduct the pre-authorisation reviews where it is reasonable to believe that the person objects to the arrangements, and it clarifies that an objection can be raised on a person's behalf by someone interested in their welfare. For the vast majority of 16 and 17-year-olds, of course, that would include their parents. In those cases we would expect an approved mental capacity professional to consider the objection carefully, meet both the person and their parents, and establish how they feel.

I understand the concerns of the hon. Member for Worsley and Eccles South about how the legislation relates to the Children Act 1989. I can confirm that the advice I have been given is that nothing in the Bill conflicts with that Act, or indeed with any other existing legislation. The hon. Lady may also be aware that the role of parental consent in the deprivation of liberty is currently being considered by the Supreme Court, and of course the Government will closely consider the implications of that judgment when it is handed down. The hon. Member for Stockton North spoke about the consultation on this issue, which of course was part of the Law Commission's recommendations on the inclusion of 16 and 17-year-olds, and all the aspects of that. They spent three years working on those recommendations and consulted widely with stakeholders, including children's charities, third-sector organisations, social workers and education providers.

Our view on the amendment is clear. Although almost all parents have their child's best interests at the heart of everything they do, a tiny minority do not—maybe for good reasons; maybe for reasons of heart over head, as one Member has said today—and those are the children we have to protect. Parents should be at the heart of the process and they must be consulted where appropriate, but the person whose wishes and feelings must be at the dead centre of that process is the individual whose mental capacity is deemed not to be there. I hope that I have been able to provide clarification. On that basis, I ask the hon. Member for Worsley and Eccles South to withdraw the amendment.

Barbara Keeley: As I said earlier, it is welcome that the Bill expands eligibility to 16 and 17-year-olds, because it prevents them from slipping through the gaps that the Bill would otherwise create. However, I persist in the view that there are issues with the way the Bill interacts with the Children Act 1989. The difference is that under section 20 of that Act, parents can object to their child's placement and can also remove their child from that placement.

I gave an example—the case of Y *v.* Barking and Dagenham—in which parental objections were overlooked by the responsible body. The key point is that there are many other such cases, as I am sure the Minister knows—she probably hears about them even more often than I do. That was a recent case, but it resulted in significant harm. That young person, still a child, was kept in a care home and deprived of his liberty for two years. He was restrained 199 times. He was assaulted by somebody in the care home, but the social worker only listened to

opinions from the care home. The amendment is a safeguard, and it is vital that we put it into the Bill to prevent similar cases being enabled by the Bill. I put it to the Minister that she will be enabling more such cases if she does not include this provision on parental objections.

Caroline Dinenage: Can I just challenge that? Under the existing Mental Capacity Act 2005 there is recourse to the Court of Protection for the parents. Their views have to be taken into consideration, but if they feel in any way, shape or form that the best interests of their child are not being followed, they have that recourse to the law, and the amendment of the Act does not change that.

Barbara Keeley: Indeed, and we will be talking more about the Court of Protection, which is of course an important safeguard. However, parents should not have to have recourse to the court just to express objections and get them listened to. The Court of Protection is a good safeguard, but recourse to the law involves expert advice and all kinds of things. I shall discuss that in relation to a later amendment, but for ordinary people it is a serious matter to take on.

Sometimes the Minister encounters, as I do, parents who are confident enough to challenge things, go to the media and make a stir, but I have just given a strong example where a young person was kept in appalling conditions and was hurt and damaged. Such cases affect a young person's ability to live in a home or community situation and should be avoided. Two years of detention in an unsuitable home, assault, and being restrained 199 times will surely lead to traumatic stress. That is why I think that the amendment is important, and why we will press it to a vote.

Question put, That the amendment be made.

The Committee divided: Ayes 8, Noes 9.

Division No. 4]

AYES

Cunningham, Alex	McCabe, Steve
Debbonaire, Thangam	Norris, Alex
Dhesi, Mr Tanmanjeet Singh	Sherriff, Paula
Keeley, Barbara	Williams, Dr Paul

NOES

Afolami, Bim	Morton, Wendy
Chalk, Alex	O'Brien, Neil
Dinenage, Caroline	Syms, Sir Robert
Moore, Damien	Whately, Helen
Morris, James	

Question accordingly negatived.

Steve McCabe (Birmingham, Selly Oak) (Lab): I beg to move amendment 51, in schedule 1, page 12, line 40, at end insert—

"(h) the cared for person has access to an Approved Mental Capacity Professional".

This amendment is designed to probe that the responsible body could not authorise arrangements for the deprivation of liberty under Clause 15 if the cared for person does not have access to reasonable support and consideration by an Approved Mental Capacity Professional.

It is good to see you in the Chair once again, Mr Austin. I share with my hon. Friend the Member for Worsley and Eccles South a grave concern about the care home arrangements in the Bill generally. Earlier in the week she made a persuasive case for the Minister to look again at the whole set of arrangements. I continue to worry that there is a potential conflict in the way they will operate, which may not be in the best interests of the people whose interests should be at the front of our minds.

I hope that I shall be able to explain my reason for tabling the amendment sufficiently well to persuade the Minister at least to consider my concerns. Paragraph 15 of the new schedule AA1 that schedule 1 would insert into the 2005 Act requires a number of conditions to be satisfied, including with reference to the

"determinations required by paragraphs 18 and 19".

However, under proposed new paragraph 18, the assessment

"must be carried out by a person who appears"—

they need only appear—

"to the relevant person to have appropriate experience and knowledge."

I do not quite know how that would be determined if it were challenged in a legal setting, but I would have thought that those who are giving that responsibility would want a little more assurance than the mere appearance of appropriate experience.

Dr Paul Williams (Stockton South) (Lab): Are experience and knowledge enough without having the skills?

Steve McCabe: I defer to my hon. Friend's much greater expertise in the area, but my gut instinct is to say, "Absolutely not." I would have thought that skills were an essential third part of the equation.

The person need only appear to have the appropriate knowledge. Proposed new paragraph 15 also requires that appropriate consultation be carried out and so forth, but it reads to me like a checklist. The Minister made it clear to the Committee on Tuesday that she does not want a checklist or tick-box approach to assessment or to decisions to restrict a person's liberty—the fact that she is absolutely against such an approach was probably one of the most reassuring things that we heard from her. However, we also heard that the Law Society has expressed concern about the relatively limited situations in which a cared-for person has access to an approved mental capacity professional; it recommends that having that access should be the default position in the majority of cases.

I concede that my amendment is very poorly drafted. The Minister will have no difficulty in pointing out its deficiencies in that respect; I am sure that the people who advise and assist her could do a vastly superior job of drafting it. However, the key issue that I am trying to raise relates to the anxiety of my hon. Friend the Member for Worsley and Eccles South that a cosy or somewhat collusive arrangement could develop if the care home manager has too much influence over who is engaged to carry out these activities. Before the responsible body authorises the arrangements, I want it to be completely satisfied that all the conditions have been fully complied with and that the vulnerable person has had access to an appropriate AMCP.

I am prepared to accept that there may well be circumstances—the Minister drew on the experience of her relative, who has sadly passed away—in which access to an approved mental capacity professional does not

[Steve McCabe]

necessarily require extensive involvement. For example, if there is already an abundance of information and evidence to support the decision, it seems a pointless exercise to engage someone in an extensive role. I assume that is part of the thinking behind the Minister's efforts to streamline the process. I would be the first to concede that point, but we need to be absolutely sure that the person who is engaged has the appropriate experience, knowledge and—as my hon. Friend the Member for Stockton South says—skills. That is surely key to being able to determine whether any of those conditions are appropriately met, other than simply through a checklist or tick-box system.

12 noon

Alex Cunningham: Age UK agrees with my hon. Friend's point and proposes an extension to it, through the involvement of an AMCP every time a family member objects, or if the cared-for person has no family members to object on their behalf. Does he agree with that position?

Steve McCabe: Absolutely; I agree entirely. That makes more sense than the way I have been saying it.

I accept that the amendment is clumsy and not well drafted, but I hope that it is clear that, more than anything, we need to hear—all the better if it happens before our proceedings conclude—and then see in black and white a cast-iron guarantee that the arrangements will not be used in a way that ends up being detrimental to the interests of the person about whom we should be most concerned. That is the purpose of the amendment. We can have some confidence that all those conditions have been appropriately and properly satisfied only if we have confidence that a professional with the appropriate experience, knowledge and skills, who is valiantly independent and capable of looking at it in the round, has been a key component of that decision.

Barbara Keeley: I thank my hon. Friend for moving the amendment. The Committee has already considered the principles that he has discussed, but I am glad to have the opportunity to return to them, because the role of the AMCP is a big part of the schedule, which I am sure we will come back to.

The aim of the amendment is to ensure that all people subject to the liberty protection safeguards have their case considered by an approved mental capacity professional. On Tuesday morning I discussed a range of cases where we thought that it was crucial that the approved mental capacity professional should review the case. I was talking about specific cases, but an AMCP review would be beneficial in all cases, because it would bring independent scrutiny from a professional with experience in such matters. We will talk about the issue of skills shortly, which comes into it as well.

An AMCP review can only be a good thing. It would ensure that even lower risk cases than the ones I spoke about were properly scrutinised, so that cared-for people would be at less risk of being inappropriately deprived of their liberty. That is what it is all about, really; that is what we on the Opposition side are doing. I am sure that we and the Government are of one mind on the important role that approved mental capacity professionals can play, which is why we will support Government amendment 9 when it is put to the Committee, and why I hope that they will support our amendments 37, 38 and 39.

Alex Cunningham: I hope that my hon. Friend agrees that my hon. Friend the Member for Birmingham, Selly Oak does himself down, because this is a good amendment. He is actually doing the Minister a favour, because we have talked about resources, and if we agree to the amendment there will be less associated cost. If we get the assessment right first time, it will not be laid open to challenge or repetition, and the system will be more efficient in the longer term.

Barbara Keeley: Yes, I agree that my hon. Friend the Member for Birmingham, Selly Oak should not run down his amendment, because it has provoked a useful debate. The purpose of the amendment is to expand the number of people who receive an AMCP review. It goes further than the amendments that I tabled, but we support it in principle, and I hope the Minister will consider it carefully.

Caroline Dinenage: I thank the honourable—I seem to be test-driving someone else's teeth today, Mr Austin. I thank the hon. Member for Birmingham, Selly Oak for raising the issue and facilitating an important discussion. I have absolutely no doubt of his dedication and good intentions in the matter. I wish to offer him some reassurance, because the Bill already requires that an approved mental capacity professional carries out the pre-authorisation review where an objection has been raised. In such cases, authorisation cannot be granted unless the pre-approved mental capacity professional is 100% satisfied that the authorisation conditions are met. Amendment 9 would strengthen this provision, as the hon. Member for Worsley and Eccles South mentioned.

Should an approved mental capacity professional not complete the pre-authorisation review, it would be completed by someone who is not involved

"in the day-to-day care of the cared-for person…in providing any treatment to the cared-for person, or…who has a prescribed connection with a care home."

We believe that this would ensure that the pre-authorisation reviewer is sufficiently independent. We expect that the review would be completed by professionals such as social workers, nurses or physicians. The hon. Member for Birmingham, Selly Oak talked about the use of the term "appropriate experience", which is set out very clearly in extensive case law.

Steve McCabe: I am grateful to the Minister for that. Why does the wording suggest that the person should "appear" to have the appropriate experience? That does not sound quite as precise to me. Perhaps I am having difficulty comprehending this, but "appears" seems to suggest that there is an element of doubt or vagueness about the situation.

Caroline Dinenage: The hon. Gentleman is questioning aspects of legal terminology, on which I am not a huge expert. I am happy to get back to him on that in due course.

The hon. Gentleman referred to my personal family experience. I shall not share my life story, but my uncle's situation is only the most recent experience that I have

had of the whole system. I have far more than one family experience of this, which is why I am very keen to ensure that the Bill not only offers as much protection as it can, but works effectively and is as streamlined as possible. I have seen the effects of the delays not only in my constituency office, but in my personal life.

We have to be super careful not to denigrate in any way our care home staff, which I have spoken about before. So many of them work with great professional integrity. We have to be super careful about saying that a care home cannot be trusted not to interfere in the way the judgment is made. Clause 21 sets out clearly that the review would have to be completed by somebody who is not involved

"in the day-to-day care of the cared-for person…in providing any treatment to the cared-for person, or…who has a prescribed connection with a care home."

The amendment would move away from having a targeted system, which allows authorisations to be in place more quickly, and would effectively recreate the current DoLS system. We cannot allow that to happen.

The hon. Gentleman talked about detriment to the interests of the individual. At the moment, the biggest detriment to the interests of 125,000 individuals is that they are sitting on a backlog. Some 48,000 have been sitting there for more than a year, which I am sure is not his intention. I cannot support the amendment and I ask him to withdraw it.

Steve McCabe: I am prepared to concede that the Minister has offered some reassurance—as a doubting Thomas, I would like an awful lot more. To be terribly honest, I am not that convinced. "Appear" is not a technical legal term; it is a description of the professional who would review a cared-for person's situation for determination. Clause 18 sets out that the

"assessment must be carried out by a person who appears to the relevant person to have appropriate experience and knowledge."

There is nothing too technical or legal about that. I say as gently as possible that if I were the Minister, I might go back to my officials and have another conversation about that in order to establish exactly why that wording has been chosen.

The Minister knows the Opposition's view. She knows the view of quite a number of important organisations that are involved in this work day in, day out. It is probably better if I agree to withdraw the amendment now and take it on trust that the Minister will look further at our concerns. I therefore beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Paula Sherriff (Dewsbury) (Lab): I beg to move amendment 32, in schedule 1, page 13, line 46, at end insert—

"(aa) a determination made on an assessment in respect of the cared-for person as to whether the person's capacity is likely to fluctuate, and".

This amendment requires that an assessment of whether a person's capacity is likely to fluctuate is included within the initial capacity and medical assessments, and therefore seeks to ensure that fluctuating capacity is reflected in the care plan of the cared-for person.

The Chair: With this it will be convenient to discuss the following:

Amendment 31, in schedule 1, page 13, leave out lines 47 and 48 and insert—

"(b) a determination made on an assessment by a registered medical practitioner in respect of the cared-for person that the person has a mental disorder."

This amendment would require the medical assessment to be carried out by a registered medical practitioner.

Amendment 33, in schedule 1, page 14, line 2, after "appropriate" insert "skills,".

This amendment would require the person carrying out a medical or capacity assessment to have the appropriate skills to do so, as well as the appropriate experience and knowledge.

Paula Sherriff: It is a particular honour to speak for the very first time from the Front Bench in a Bill Committee under your chairmanship, Mr Austin. I will speak to the amendments and ask some questions of the Minister about the parts of schedule 1 to which they relate.

Amendment 32 relates to people who may have fluctuating capacity to consent and would require an assessment of whether a person's capacity is likely to fluctuate to be included within the initial capacity and medical assessments. It therefore seeks to ensure that fluctuating capacity is reflected in the care plan of the cared-for person. It is our intention that the assessor must state whether the capacity of the person is likely to fluctuate and, if so, the likely duration of any period during which the person is likely to have capacity to consent to those arrangements.

This group of people were mentioned at length in the Law Commission's draft Bill, but are conspicuous by their absence from the Government's proposals. The Law Commission identified this point as a significant weakness in the DoLS system, as fluctuating capacity is dealt with entirely within the code of practice rather than in the legislation. I hope the Minister can explain why the Government's Bill differs from the Law Commission's proposals in this regard.

When the Law Commission launched its consultation, despite not specifically seeking views on fluctuating capacity, it was clear that it was a major concern for practitioners. One psychiatrist told it that

"the 'black and white' nature of the Mental Capacity Act's approach to capacity fails to reflect the reality and complexity of fluctuating capacity."

The Law Commission found that when it comes to fluctuating capacity, there is a disconnection between legislation and practice. That applies generally in relation to the Mental Capacity Act 2005, but raises specific issues when it comes to deprivation of liberty. There is little consistency in how different care settings treat fluctuating capacity. The Law Commission visited one care home where everyone with fluctuating capacity was deemed not to have capacity at any point, which meant that they received safeguards, but even on good days they were not able to make their own decisions. At another care home, everyone with fluctuating capacity was deemed to have capacity at all times. Although that gave them greater autonomy, it also meant that they did not have the safeguards that the Mental Capacity Act provides for.

The Bill does not change the status quo. It requires a binary decision to be made—either the person has capacity or they do not. The Law Commission found it unacceptable for the legislative framework to simply

[Paula Sherriff]

ignore fluctuating capacity, as it exposes health and social care professionals and those authorising a deprivation of liberty to significant legal risk. I hope the Minister will give the Committee her own assessment. Does she accept the Law Commission's warnings on that risk? Will she explain why the Government have not adopted those proposals?

The amendment would introduce a degree of nuance and reduce that risk. Requiring fluctuating capacity to be considered and recorded lays the foundation for authorisations that vary based on changes in somebody's capacity. Inclusion also has other benefits, which the Law Commission raised and which the amendment would reinstitute. Inclusion provides access to important legal rights, such as rights to representation and support by an advocate or another appropriate person. We will return to that point in the discussion on amendment 45, where we will set out what it means in more detail, but I hope that the principle will receive the Government's consideration and support.

This group of amendments and the section of the Bill they seek to amend may seem technical, but they go to the heart of one of the most serious issues that we as parliamentarians ever consider: the circumstances under which the citizens we represent can be denied the liberty that it is our historic role to safeguard. I hope that the Minister will address our points and, if she accepts the principles behind it, accept the amendment.

12.15 pm

Dr Williams: It is a pleasure to serve under your chairmanship, Mr Austin, for the first time. I will add a few words on fluctuating capacity to those of my hon. Friend. Everyone in the room knows that mental capacity can fluctuate. In this case, we are talking about the capacity to decide whether someone consents to deprivation of their liberty.

James Morris: This group of amendments raises some important issues. I want to probe one point: from a diagnostic point of view, establishing whether somebody has a fluctuating capacity is not a trivial issue. That may mean either that the type of professional who can make that diagnosis is unavailable, or that a different process to establish whether there is a fluctuating capacity issue is required. My point is that the intervention into the process that the amendments would require is not trivial.

Dr Williams: The hon. Gentleman is right: it is a significant intervention that may well require not only a person with significant skills, knowledge and experience, but a series of different assessments over time to make the judgment.

Mr Dhesi: As the hon. Member for Halesowen and Rowley Regis just pointed out, a medical practitioner who can diagnose whether somebody has fluctuating capacity may be unavailable, in which case we should definitely not disregard the Law Commission's advice. Otherwise, we open ourselves to legal challenge and other things. In the long run that would be to the detriment of not only the cared-for person but the system itself in terms of extra costs and distress.

Dr Williams: I thank my hon. Friend for referring to the Law Commission's recommendations.

I am sure that the Government will argue that the substance of the amendment will be reflected in the code of practice, but it is so important and so fundamental that it needs to be reflected in the Bill. Obviously, somebody may well have the capacity to consent to different decisions. Capacity is not just assessed over a period of time; assessments depend on the decision that somebody is going to make. Somebody may well have the capacity to decide whether they want tea or coffee, but may not have the capacity to decide all the time whether they consent to their deprivation of liberty.

Anyone who has ever spent any time with somebody who has capacity issues—we are usually talking about people who have a dementia, as the majority of people who have fluctuating capacity, though not all, have a dementia—will know that people have good and bad days. Sometimes people have good and bad hours. It is common for someone to say, "She was bright and sharp this morning," or, "He's not quite himself tonight."

Acute illness can affect capacity, but so can sleep, stress and nutrition. The very nature of memory issues means that people fluctuate in and out of having capacity sometimes. In the same way, many physical issues have a fluctuating nature. People with arthritis have good and bad hours, and good and bad days. Rheumatoid arthritis is typically worse in the mornings.

The amendment is fundamental because the assessments of capacity that are made as part of the authorised deprivation conditions are likely to determine the length of the liberty protection safeguard. At the least, they may be one of the important determinants of the length of the safeguard—possibly the most important. In deciding how long the safeguards should apply, it is imperative to know whether someone has fluctuating capacity. As I have indicated, that might require more than one assessment of capacity.

Helen Whately: I spoke about my concerns about fluctuating capacity on Second Reading. The hon. Gentleman just mentioned that in these discussions, we usually think about someone with dementia, but it has been flagged to me that sometimes the Mental Capacity Act has been used to detain people who have other serious mental health conditions—not necessarily just dementia. Those conditions very much fluctuate, too. It is important that the Bill addresses the fluctuating capacity of people with serious mental illness if they might be detained under the Bill. I am keen for the Minister to respond on that point.

Dr Williams: The hon. Lady's words are wise. The fact that people's capacity is likely to fluctuate makes them uniquely vulnerable to the wrong decisions being made about them.

My assessment is that it is better to err on the side of caution. People with fluctuating capacity are likely to need regular review. The liberty protection safeguards are likely to be put in place for shorter periods. Unless that assessment of fluctuating capacity is mandatory and put front and centre of the decision-making process about the length of the safeguard, there is a risk that the wrong decisions will be made. For that reason, I support amendment 32 as a fundamental requirement to assess whether the cared-for person's capacity is likely to fluctuate.

Alex Norris: It is a pleasure to follow my hon. Friends the Members for Dewsbury and for Stockton South, who made compelling arguments that I hope to add to a little.

On fluctuation, by definition we are talking about some of the most challenged individuals in society. As a result, their medication needs could be significant, and the nature of their challenges can change over time. It is not only conceivable but probable that those individuals' needs may vary. Therefore, the protections we need to give them may have to be slightly flexible.

Behind the Cheshire West case and the television documentaries that make us all throw our hands up in the air and think, "Goodness me, how awful", is the idea that none of us thinks that someone whose liberty needs to be taken away for their own protection should ever be put away and forgotten about. None of us wants that at all. That is in keeping with the theme of wiring into the Bill the understanding that we are talking about human beings, and that things change and their conditions change, as they do with us all. Therefore, we may need to change the way they are looked after and supported.

I reflect on the point the hon. Member for Halesowen and Rowley Regis put so well; on Tuesday I was wringing my hands about my past anxieties about the lack of assessing capacity. I then put my name to an amendment that asks for greater specialism among those assessors as people who could pick up something that, as the hon. Gentleman said, was not trivial. I understand his view but do not completely share it. We want to include in the Bill the possibility that an individual's needs may fluctuate—not how those needs will fluctuate. It would not necessarily mean that all the assessors have to have the ability to make that judgment. If the assessment says, "There is a reasonable chance that this individual's needs may fluctuate," that puts a "So what?" test on the responsible body, which may say, "Okay. We may therefore need to call in someone who has that specialism at an appropriate moment." That could be covered in the code of practice. I do not think that test puts an unreasonable or unnecessary burden on the assessing capacity, which is finite.

I support the point that my hon. Friend the Member for Dewsbury made. Most of this discussion has been framed around the idea that some people are deprived of their liberty because they are deemed not to have the capacity to look after themselves, but because their needs fluctuate, that may not have needed to happen. As my hon. Friend said, there is another cohort of people who are assessed not to have fallen into a deprivation situation, but that might not be safe for them either. It is important that we bring that into the discussion. This is not just about people who are deprived of their liberty when that may not need to be the case; it is also about people who, the vast majority of the time, are not in those circumstances, but in a conceivable situation relating to their personal health challenges, may need to be deprived of their liberty. That is a really important point.

Amendments 31 and 33 get to the nub of what we have been talking about for the past two and a half sittings. What are we trying to do with assessment? If the Bill tilts towards moving assessment away from local authority-hosted social work into care settings, with the people who are around the individual the most and have great familiarity with them, the Opposition have expressed some discomfort about that. Nobody is arguing for perfunctory or tick-box assessments—hon. Members on both sides of the Committee have been clear about that. With amendment 33, we want to put on the face of the Bill a requirement that the people who carry out assessments have the right qualifications—I hope that will apply to pre-authorisation assessments, too—so we have the confidence to say to people, after this Bill has wended its way through Parliament, that we have not created a system that has moved away from skilled assessment, which is expensive, finite and a challenge in this country, towards unskilled assessment because it is easier or cheaper. Nobody wants that; I certainly do not. By putting that on the face of the Bill, we can give comfort to the people who observe our proceedings and those who will engage with us during the Bill's progress that we are not seeking to do that.

Mr Dhesi: My hon. Friend is making a very powerful case. As a former trustee of Alzheimer's & Dementia Support Services, which dealt with people with very serious vulnerabilities, I can attest to the fact that amendments 31 and 33 are entirely sensible and should be incorporated in the Bill. Not having a registered medical practitioner undertaking these assessments, especially when we are dealing with very vulnerable individuals, would be detrimental to the entire process.

Alex Norris: I appreciate that intervention. One of my favourite things about being in this place—certainly in Bill Committees, out of the white heat of the Chamber—is that we learn a lot that we did not know about people's knowledge and expertise, whether it is personal experience, professional experience or experience from their spare time. It helps us all. That contribution adds to the debate, and I greatly appreciate it.

These amendments will help to give confidence that what we are all trying to achieve here will be achieved in the Bill. I would expect it to be enhanced by the code of practice, but in law and in statute, in the Bill, we in this place will have made a clear commitment about what sort of legislation we want. In that spirit, I commend the amendments to the Committee.

12.30 pm

Alex Cunningham: As colleagues may remember, on Tuesday I mentioned my past as a journalist, public relations manager and communications manager—something, I have found out, that I share with you, Mr Austin.

The Chair: Indeed.

Alex Cunningham: I still consider it to be an honourable profession.

The Chair: A noble profession.

Alex Cunningham: A noble profession. We have brought tremendous expertise to this place as a result.

The Chair: Yours probably more than mine.

Alex Cunningham: I have no experience, however, as a health or medical practitioner, so I bow to my next-door neighbour in the north-east of England, my hon. Friend the Member for Stockton South, who is a medical

[Alex Cunningham]

doctor and knows about these things—probably a lot of things that I will never have any understanding of myself. However, I do not need to be a medical expert to know that if I were to suffer a heart attack, a cardiologist would be involved in my treatment and care. I hope my hon. Friend will nod his head to say I am right.

Dr Williams *indicated assent.*

Alex Cunningham: He does. I know that if I were to develop cancer, oncologists would be involved. I know that medical experts should be and are involved with that level of illness, which requires ongoing treatment and observation. They are the experts, and they know the field; we have to trust what they say and follow their instructions on what is best to do. It just strikes me as ludicrous that anybody could disagree with the notion that people carrying out medical and capability assessments must have the skills to do so. We have already seen in our country in recent years the terrible mess that is the various capability assessments for employment and support allowance, personal independence payments and, lately, the discredited universal credit system.

Dr Williams: I wondered whether to refer to the work capability assessments, but it is certainly true that in my experience as both a medic and a Member of Parliament, people have often described the inadequacy of the assessments, particularly when their conditions fluctuate, and how they are often judged on the day rather than anyone really listening to what their condition is like. One of the things that that greater level of skill, experience and knowledge brings is the ability to take a step back and ask the right questions about things such as fluctuation.

Alex Cunningham: Indeed; that applies to this Bill as well. We are dealing with the most serious issue possible—the right of the authorities to deprive someone of their liberty—so we must get it right. We have seen failure time and again in the areas I mentioned. When people with inadequate knowledge carry out assessments of various things, they get it very badly wrong, and the client ends up winning their appeal. More than half of them, in some cases, win their appeals, but only after many weeks and even months, so they are often left without the support they need.

I wonder what happens in this sort of situation, when we are dealing with the deprivation of people's liberty. We cannot allow those types of failure to be repeated in the system set up under the Bill, because the consequences are so far-reaching. It is taking somebody's liberty away. It will not just be a decision to deprive people of their welfare benefits; it will actually take away their freedom.

I agree with my colleagues who have spoken in the debate that assessments should be undertaken by people who have the knowledge, skills and experience and hold the appropriate professional registration. If we do not put that into the Bill, the Bill will simply not be strong enough. It is far too important to be in the follow-up code of practice. We have heard a lot about the code of practice, but of course we have not seen anything that is in it. It is far more important than that. We must ensure that there is a sufficient level of scrutiny within the legislation.

I wonder what the Minister would tell Dr Haider Malik, a consultant psychiatrist who provided written evidence to the Committee. He said:

"In current Bill there is complete oversight of mental health assessor's role. Though DoLS is considered complicated and bureaucratic piece of legislation but in my view Liberty Protection Safeguarding…would fail the stress test."

The evidence we have received from a number of stakeholders is very clear. There is a clear demand out there, from people who know what they are talking about, for us to ensure that those carrying out the assessments are qualified to do so. Anything short of that is a betrayal not just of the individual, because it could lead to them wrongly losing their freedom, but of our duty to legislate to protect them.

Paula Sherriff: I will move on to amendment 31, which addresses who should be able to carry out medical assessments.

As hon. Members know, one of the three criteria for authorising the deprivation of liberty is that the cared-for person has a mental disorder. On the face of it, that is one of the most straightforward provisions in the Bill. However, the only provision for who should carry out the assessment is contained in paragraph 18(2), which states that the assessor must appear

"to the relevant person to have appropriate experience and knowledge."

I am sure that I am not the only person present who is somewhat unclear about what constitutes the appropriate experience and knowledge.

Unlike other areas of the Bill, the assessment of a mental disorder is not wholly subjective; it is a medical assessment made under the Mental Health Act 1983. If someone wants to detain someone else for assessment under that Act, they need the recommendation of not one but two registered medical practitioners, yet under the Bill, it may be possible for a mental disorder to be diagnosed without the input of a medical practitioner.

Amendment 31 has been supported by the Royal College of Psychiatrists, which is concerned about the potential impact of assessments made by people who are not registered medical practitioners. One of its concerns is that the Bill says that the person commissioning the assessment has to decide whether the person carrying out the assessment has the relevant skills and experience, which could lead to a significant watering down of the levels of protection if we do not clearly state who can carry out such assessments. Furthermore, it has raised the possibility of misdiagnosis where a different disorder presents as a mental disorder, which would lead to the person being wrongly deprived of their liberty under the Bill.

The amendment also brings the Bill into line with the principles laid out by the European Court of Human Rights in relation to the diagnosis of a mental disorder. In Winterwerp *v.* the Netherlands in 1979, the European Court ruled that article 5 requires:

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

Given that requirement for objective medical evidence, the Bill needs to guarantee that only a registered medical practitioner with appropriate training has the power to determine whether someone has a mental disorder. Anything else would risk creating legal issues, as people will challenge what constitutes objective medical evidence.

I hesitate to wake up Conservative Members by pushing a point about Europe, but the Minister will know that the Secretary of State has signed a statement on the front of the Bill to say that, in his view, its provisions are compatible with the convention rights. Can the Minister therefore confirm that the Government have considered that legal point and tell us with total confidence that the Bill meets the requirements for objective medical evidence without setting the requirement that a registered medical practitioner provide it? The requirement need not be excessively burdensome on the medical profession, as the Bill already makes provision for previous assessments to be used for certifying that somebody has a mental disorder.

The Royal College of Psychiatrists has helpfully supplied some examples of where there is a clear requirement for a registered medical professional to carry out the medical assessment, which I hope the Committee will find helpful in clarifying why we have tabled amendment 31. The first case relates to an 80-year-old woman, who has been settled in a care home for a year. Suddenly, without any obvious cause, she becomes agitated and distressed and tries to leave the care home. It would not be unreasonable for a lay person to conclude that she is no longer happy with the arrangements that are in place and needs an LPS to be granted.

In fact, the reason for the woman's agitation is that she has developed a urinary infection, which has caused her to develop delirium. Once that is diagnosed and treated, she regains capacity and no longer needs an LPS. Delirium is not only easily missed, but life threatening. By having the involvement of a registered medical professional, it is much more likely that delirium will be correctly diagnosed.

In a second example, a wealthy man in a nursing home has met a younger woman via the internet. She has offered to move him out of the home and look after him in exchange for payment. The nursing home and social services feel that an LPS should be used to keep him in the nursing home, despite his wanting to leave. Following a detailed examination of his mental state, there is no evidence to suggest that he has a mental disorder. That example shows that it is important for an experienced medical professional to conduct a full and thorough assessment, rather than assuming that someone has a mental disorder purely because they engage in activity that others might see as reckless or unwise.

The third and final example relates to a woman living in a care home. She has been becoming more confused over time, and it is now thought that an LPS is needed. However, increased confusion is secondary to a recently commenced combination of medication. Once that is identified and her medication regime is changed, her confusion settles. After that, she is happy to remain in the home. In that case, it was important to have a medical professional with experience of analysing the impact of medication to assess the case. That meant that the changes in her mental state could be correctly ascribed to a mix of medicines that is not working, rather than a mental disorder.

All those examples illustrate cases in which the medical assessment needed to be carried out by a registered medical professional. Indeed, without the input of medical professionals at that point, it is possible that people would be not only wrongly deprived of their liberty, but subjected to totally inappropriate treatment regimes.

So far, the Government have said only that the code of practice will set out the requirements for the assessor under the new LPS scheme. I hope that the Minister will guarantee to the Committee that the code of practice will match the requirements of amendment 31 for an assessment by a registered medical practitioner. As my hon. Friend the Member for Worsley and Eccles South said, a code of practice does not carry the full weight of law. If this provision will be contained in the code of practice anyway, I see no reason to resist our amendment, which would give it that weight in the Bill. The Minister in the Lords suggested that the assessor will be a physician, but there has been no further clarification of that. I make it clear that the amendment is not merely probing; it is an amendment that needs absolute clarity.

The requirement for the assessment to be carried out by a medical practitioner is a vital safeguard. It helps to align our laws with the established position of the European Court. As such, that requirement must be included in the Bill, not shoehorned into a code of practice that we have not yet seen and that is to be published later.

Amendment 33 focuses on the skills of the people carrying out the medical and capacity assessments. The amendment goes slightly further than the Bill, which focuses only on experience and knowledge. In a number of places, that might make a difference, but it does so most clearly in relation to people with communication difficulties. The Royal College of Speech and Language Therapists stated:

> "A person with a communication need may be at risk of being labelled as 'lacking mental capacity' if people mistake their communication problems for a lack of capacity."

That could lead to people being deprived of their liberty under the Act when, in reality, they have the capacity to consent or not to consent to the arrangements.

One example of how that can look in practice involves speech and language therapists. In one case, a speech and language therapist used an inclusive communication approach to support a young man who had had a traumatic brain injury to understand a complex ophthalmic surgical procedure. He was then able to demonstrate that he could understand and consider the pros and cons of surgery, enabling him to make his own decision. Without that input, he would likely have been deemed to be lacking capacity and the best interests process would have been implemented.

In short, amendment 33 is about ensuring that we do not assume that people lack the capacity to make decisions purely because they might struggle to make themselves understood. Our amendment would ensure that whoever carries out the assessments has the appropriate skills to communicate with the cared-for person. What those skills include might of course vary from person to person. For example, if someone is non-verbal, it might well be that an assessor who can use Makaton is needed to ensure that their capacity can be considered adequately.

Will the Minister confirm that for a small number of people who have been deprived of their liberty, the main reason given was a hearing impairment? I do not think that any of us in Committee would be happy if it turned out that the person who ruled on capacity in those cases did not have the skills needed to communicate with someone who cannot hear.

The Minister in the House of Lords made assurances that the code of practice would set out the skills expected of assessors. Will the Minister for Care expand on that

[Paula Sherriff]

assurance and guarantee to the Committee that she will address communication specifically? None the less, at the risk of repeating myself, a code of practice simply does not carry the same weight as a provision of the Bill. It is absolutely unimaginable that somebody should be able to make a decision on a cared-for person's capacity if they are unable to communicate with them properly. Amendment 33 would simply ensure that they could communicate with them.

12.45 pm

Caroline Dinenage: I start by welcoming the fact that we have just heard from the hon. Member for Dewsbury for the first time. It is a great pleasure to hear from her, not least because I can pronounce her constituency far better than Worsley and Eccles South.

I thank hon. Members for tabling the amendments, which I will take in the order in which the hon. Member for Dewsbury presented them. Amendment 32 would place the consideration of fluctuating capacity in the Bill. I agree that the likelihood of capacity to fluctuate should be very carefully assessed under the Mental Capacity Act. Fluctuating capacity should be considered in the authorisation, in the length of the authorisation and in the frequency of reviews. I am very tempted by the amendment, but the problem is, then what? It puts the provision in the Bill, but it does not describe what happens then. To my mind, that opens a whole can of worms.

As my hon. Friend the Member for Halesowen and Rowley Regis said, fluctuating capacity is incredibly complex to diagnose. It is a fact-specific matter that deserves great in-depth and detailed guidance. As such, I do not think it can be considered satisfactorily in one line in the Bill.

Dr Williams: I think there is an acknowledgment that whether or not someone has fluctuating capacity needs to be assessed. What is wrong with putting that in the Bill and then dealing with the complexity and the nuance and the "then what?" in the code of practice?

Caroline Dinenage: As I say, I am tempted by what hon. Members have said, so I will take this point away and look at it, but we have to consider this matter very carefully. We have to consider whether there are appropriate protections already in the Bill. That point relates to what I spoke quite a lot about on Tuesday—we have to be really careful about the unintended consequences of putting too much in the Bill, because if we then leave something out, we may create the sort of legal loopholes that caused so many problems with the previous DoLS legislation.

Helen Whately: The Minister is discussing whether there is already the necessary content in the legislation. Is she referring to the Act that we are amending or the Bill that we are discussing? It might be helpful to clarify.

Caroline Dinenage: Both, really. For example, the Bill lays out how every authorisation has a programme of reviews—if there is a change in the circumstances meaning that authorisation conditions are no longer met, the authorisation is no longer valid, and a review is triggered by reasonable request or significant changes in a person's circumstances—so it is well within the scope of the Bill to address people with fluctuating capacity and to make sure that there is the necessary capacity.

The other issue that I have to take into consideration is that in a case regarding a patient known as CDM, fluctuating capacity has been considered by the Court of Protection, and that is currently being appealed. We are awaiting that decision, which will give useful guidance on how care workers should assess those with fluctuating capacity. That is something we will want to reflect on.

The hon. Member for Dewsbury spoke about the Law Commission and asked why we have differed a little bit from what it recommended. It is simple. The Law Commission had anticipated an entirely separate scheme for fluctuating capacity, adding a hugely complex dimension to this whole piece of work. Under its recommendations, people with fluctuating capacity would be dealt with in a separate authorisation process not directly linked to the main scheme. That is why there is a bit of confusion there.

There will be an awful lot of detail on this matter in the code of practice, which we consider the most appropriate form of guidance, given the level of detail it will require—this is a very serious matter. That will continue the practice under the current deprivation of liberty safeguards system, where the code of practice addresses fluctuating capacity. As I say, the Bill talks about regular assessment, including a limit of a year in the first instance—that is the maximum. The assessments can be set at very short-frequency time periods in order to deal with somebody who might have fluctuating capacity. Statutory guidance will include cases where a person with fluctuating capacity meets or does not meet the authorisation condition of lacking capacity to consent to arrangements, and will cover whether the authorisation continues in force or ceases to have effect.

Amendments 31 and 33 seek to ensure that medical assessments are completed by a registered medical practitioner. I completely agree that the person who conducts the medical assessment must of course be suitably competent, but the Bill already states that a person carrying out a medical capacity assessment must have "appropriate experience and knowledge". We expect capacity assessments to be completed by a registered professional such as a nurse, social worker or occupational therapist, and medical assessments must be completed by physicians, such as family GPs and other doctors. However, we have to take into consideration that objective medical evidence does not require a registered doctor in all cases. Case law confirms that it can also include psychologists, for example, as was confirmed by the Law Commission.

In addition, to show the complexity of the issue, registered medical practitioners can include doctors who do not currently have a licence to practise. I know the hon. Member for Stockton South will be aware of that, given his knowledge and profession, but we need to consider carefully the law of unintended consequences when thinking about putting that in the Bill. We could be opening up a whole unwanted can of worms. We need to consider carefully whether we allow that particular group to give medical evidence.

It should also be noted that case law on article 5 of the European convention on human rights already requires that a deprivation of liberty must be based on objective medical expertise. The focus is therefore on competence

at every stage rather than on qualifications. We are making it clear that all appropriate medical professionals should be included, which includes the speech and language therapists in the case that the hon. Member for Dewsbury spoke about.

I hope I have provided confirmation that medical and capacity assessments will be completed by somebody with the appropriate experience and knowledge to do the job, and that they will have the competence required to make a reliable assessment. I hope that I have provided Members with the reassurance they need to not press the amendments.

Paula Sherriff: I am grateful the Minister has agreed to have another look at the requests we have made today, but, in summary, medical and capacity assessments are a fundamental part of the proposed LPS system. They play a crucial role in preventing people from being wrongly deprived of their liberty. I have given examples today of where it is particularly important that the medical assessment is carried out by a registered medical practitioner. The European Court of Human Rights has held that deprivation of liberty on the grounds of unsound mind is permissible only on the basis of objective medical evidence. We need a guarantee in the Bill that medical assessments will be carried out by registered medical practitioners, otherwise we cannot ensure the Bill is fully compliant with European law.

I thank my hon. Friends for their contributions, including my hon. Friend the Member for Stockton South, particularly for his valuable medical experience on this issue, and my hon. Friends the Members for Stockton North and for Nottingham North.

The Law Commission wrote at length on the importance of considering fluctuating conditions. The amendment would ensure that an assessment has to be made of whether a person's capacity will fluctuate. Without our amendment on fluctuating conditions, we might end up in a situation where anyone with fluctuating capacity is subject to different restrictions, depending on how a particular care setting treats them.

Finally, amendment 33 provides for capacity assessors to have the skills appropriate to carry out an assessment. That is especially important for people who have communication issues, as I outlined earlier. The Minister in the House of Lords said that skills will be covered in the code of practice, but we still have not seen the code. We need assurances in the Bill to ensure that people are not deprived of their liberty simply because an assessor could not understand them.

Question put, That the amendment be made.

The Committee divided: Ayes 8, Noes 9.

Division No. 5]

AYES

Cunningham, Alex	McCabe, Steve
Debbonaire, Thangam	Norris, Alex
Dhesi, Mr Tanmanjeet Singh	Sherriff, Paula
Keeley, Barbara	Williams, Dr Paul

NOES

Afolami, Bim	Morton, Wendy
Chalk, Alex	O'Brien, Neil
Dinenage, Caroline	Syms, Sir Robert
Moore, Damien	Whately, Helen
Morris, James	

Question accordingly negatived.

Amendment proposed: 31, in schedule 1, page 13, leave out lines 47 and 48 and insert—

"(b) a determination made on an assessment by a registered medical practitioner in respect of the cared-for person that the person has a mental disorder."—*(Paula Sherriff.)*

This amendment would require the medical assessment to be carried out by a registered medical practitioner.

Question put, that the amendment be made.

The Committee divided: Ayes 8, Noes 9.

Division No. 6]

AYES

Cunningham, Alex	McCabe, Steve
Debbonaire, Thangam	Norris, Alex
Dhesi, Mr Tanmanjeet Singh	Sherriff, Paula
Keeley, Barbara	Williams, Dr Paul

NOES

Afolami, Bim	Morton, Wendy
Chalk, Alex	O'Brien, Neil
Dinenage, Caroline	Syms, Sir Robert
Moore, Damien	Whately, Helen
Morris, James	

Question accordingly negatived.

Amendment proposed: 33, in schedule 1, page 14, line 2, after "appropriate" insert "skills,".—*(Paula Sherriff.)*

This amendment would require the person carrying out a medical or capacity assessment to have the appropriate skills to do so, as well as the appropriate experience and knowledge.

Question put, that the amendment be made.

The Committee divided: Ayes 8, Noes 9.

Division No. 7]

AYES

Cunningham, Alex	McCabe, Steve
Debbonaire, Thangam	Norris, Alex
Dhesi, Mr Tanmanjeet Singh	Sherriff, Paula
Keeley, Barbara	Williams, Dr Paul

NOES

Afolami, Bim	Morton, Wendy
Chalk, Alex	O'Brien, Neil
Dinenage, Caroline	Syms, Sir Robert
Moore, Damien	Whately, Helen
Morris, James	

Question accordingly negatived.

Ordered, That further consideration be now adjourned.—*(Wendy Morton.)*

12.57 pm

Adjourned till this day at Two o'clock.