



Proposed changes to the Mental Capacity Act 2005 Code of Practice and implementation of the Liberty Protection Safeguards, 2022

Department of Health and Social Care – consultation

About The Royal College of Speech and Language Therapists

The Royal College of Speech and Language Therapists (RCSLT) is the professional body for speech and language therapists across the United Kingdom. The RCSLT currently has over 20,000 SLT members, including student members. We promote excellence in practice and influence health, education, employment, social care and justice policies.

Consultation questions

Questions from Section 2 of the consultation document: ‘Proposed updates to existing chapters that now include LPS guidance in the Code’

LPS: the Court of Protection

1. The Code states that applications to consider deprivation of liberty cases, only, should not generally be made to the Court.

To what extent do you agree or disagree with the following statement? ‘Responsible Bodies should not be routinely making applications to the Court, once LPS is implemented’

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Your Answer:

No answer

LPS: 16 and 17 year olds

2. Many 16 and 17 year olds who will be subject to an LPS authorisation will have complex special educational needs or complex additional learning needs and will therefore also have an Education, Health and Care (EHC) plan, in England, or Individual Development Plan (IDP), in Wales.

Practitioners and decision makers involved in the LPS process will need to understand how the LPS interacts with the special educational, health and care provision set out in the person’s EHC plan, or additional learning provision set out in the person’s IDP. Further information on EHC plans and IDPs can be found in the SEND Code of Practice or the ALN Code.

For children who are looked after or otherwise supported by the local authority through children’s services and subject to LPS arrangements in England, the LPS also interacts with the Children Act 1989.

How clear is the guidance in the Code at explaining the interaction between the LPS and other relevant legislation and planning for 16 and 17 year olds?

- Very clear
- Somewhat clear
- Neither clear nor unclear

- **Somewhat unclear**
- Very unclear

Please explain your answer:

The RCSLT is concerned that this offers potential for conflict due to the uncertainty around what triggers professional decision making regarding which legal framework applies. These are the sections which are unclear:

- p396 – In the purple box, the section referring to whether or not the MCA or parental consent should apply in the case of a 16/17-year-old raises uncertainty.
- P398 - The Code states “Professionals can therefore choose which regime to apply but should be clear as to which one they are using”.
- P400-The Code says “... professionals may, where circumstances indicate that it is appropriate to do so, choose to seek consent from those with parental responsibility rather than relying on the best interest provisions within the MCA set out in chapter 5”.

Understanding why a particular legislative route has been chosen (LPS vs the use of the Children’s Act vs use of the Mental Health Act) highlights the need to provide:

1. information on how professionals could / should make that distinction especially when the optimal legislative route remains unclear.
2. evidence for a particular approach that takes the nature of the decision, young person’s wishes, presentation and/or vulnerability and views of parental and other key other stakeholders into account.
3. Case studies or visual support aids to aid decision making.
4. Examples explaining the potential risks of taking the ‘wrong’ legislative route.

Page 405/406 – The need to consider the young person’s Education, Health and Care and Support Plans in England, or Individual Development Plans in Wales, and consult with relevant professionals involved in their care and support, when considering use and review of LPS, is helpful.

Speech and language therapists have highlighted concerns that there is minimal preparation for the new changes for 16-year-olds. We recommend that education regarding legal frameworks, responsibility and rights is shared with paediatric services and current MCA teams.

LPS: settling disagreements and disputes

3. Anyone, including the person, can challenge the proposed or authorised arrangements at any stage of the LPS process (including via the Court of Protection and via the Responsible Body). This is an important safeguard in the LPS process.

How clear is the guidance in Chapter 24 at explaining how challenges relating to the LPS can be made, including deciding when to make an application to the Court?

- Very clear
- **Somewhat clear**
- Neither clear nor unclear
- Somewhat unclear
- Very unclear

Please explain your answer:

Paragraph 24.17 (page 464 to 466) - Some of the sections are long and complex, such as the

guidance explaining how and why challenges can be made. To make it more accessible, more visual aids could be used.

Paragraph 24.43-24.46 (page 471) – the RCSLT is concerned that in the section talking about a person being unable to communicate their wishes and feelings, there is not mention of specialist support from a speech and language therapist. The RCSLT recommend adding this provision.

Evidence shows that too professional support is obtained infrequently from speech and language therapists is obtained to help capacity assessments of individuals with communication difficulties (Jayes, Palmer & Enderby, 2016). Adding this provision would ensure that people with communication difficulties are helped by a speech and language therapist to communicate and express their wishes.

Questions on all the proposed updates to the existing guidance in the current MCA Code

4. Are the principles of the MCA fully explained in the revised Code?

- Yes
- **No**

If you responded No, please explain:

Chapter 3 - The reference to “helping individuals to communicate” needs to be strengthened. RCSLT recommend that this is expanded to “helping people to understand information and communicate”. This would help to ensure that information is also presented in an accessible way.

The text has a lot of information, which is difficult to process. To make it more accessible, more visual aids could be used.

The RCSLT recommend that more case studies are introduced focusing on cognitive and communication support for:

- Principle 2 – the impact of urgency and risk on the amount of support
- Principle 5 - where a less restrictive option is not possible

5. Do any of the updates to the existing guidance in the Code, as listed in Section 1 and Section 2 of the consultation document, require further expansion or revision?

- **Yes**
- No

If you responded yes please specify the relevant paragraph and what you think it should say:

Paragraph 4-6 (page 44) and paragraph 2016 (page 21) and the summary box on page 42 and paragraph 4.8 (page 45) – There is a lack of clarity within the Code on what is a “proper reason”. The RCSLT would like to see further clarification and explanation on this.

6. Have there been any significant developments in case law or practice which the revised Code does not address but which you feel it needs to?

- Yes
- **No**

If you responded yes please specify the relevant paragraph and what you think needs to be added:

No answer

7. Do you have any other comments on the proposed updates to the existing Code guidance?

- Yes
- **No**

If you responded yes please specify the paragraph which your comments relate to and your views:
No answer

Questions from Section 3 of the consultation document: 'The new chapters which contain LPS guidance in the Code'

LPS: deprivation of liberty

8. How clear is the guidance in chapter 12 at explaining the meaning of a deprivation of liberty for practitioners?

- Very clear
- **Somewhat clear**
- Neither clear nor unclear
- Somewhat unclear
- Very unclear

Please explain your answer:

The non-fixed definition of duration may mean that there will be a lack of clarity over implementation, due to subjective and differing interpretations. However, the guidance is comprehensive in laying out the parameters to consider when deciding if a deprivation of liberty is occurring.

The RCSLT is concerned that the examples relating to the acute setting are very limited. When clinical / medical staff lack understanding of communication and its impact they often decide that the person lacks the capacity to consent to a procedure or operation. We recommend adding more acute-based case studies.

The RCSLT recommends adding a case study about capacity underpinning eating and drinking at risk. We would be happy to write one for you.

LPS: timeframes in the LPS process

9. The Code sets expectations about how long key LPS processes should take to complete. Specifically, it states that the LPS authorisation should be completed within 21 days and that Responsible Bodies have five days to acknowledge an external referral.

Do you think the timeframes set out in the Code are:

- Too long
- **About right**
- Too short

Please explain your answer:

It is difficult to be prescriptive about the timeframe, as the time from triggering the initial process to a decision being made depends on the complexity of determining capacity of the person involved.

For the protection of the individual, shorter timeframes might be more appropriate, however this could be unrealistic, given resource constraints. NHS staff demands and pressures can have a knock-on effect.

For people who cannot 'vocalise' objections or who have limited friends, family or advocacy support, the RCSLT recommend additional support is put in place to ensure every attempt is made to explore their wishes and views. We would also like to see every effort made to support someone's communication and for this to be documented.

Paragraph 19.16 and paragraph 6.65 - The RCSLT welcome more information to explain urgent cases where the timeframe does not have to be followed. We would also welcome clarity about the consequences for the individual and the responsible body if it is not possible to adhere to this timeframe.

LPS: Interface with other health and care planning

10. The Code aims to support health and social care workers to integrate the LPS process into other health and care assessments and planning, as far as possible. How clear is the guidance in chapter 13 at explaining the interface between the LPS and other health and care assessments and planning?

- Very clear
- Somewhat clear
- Neither clear nor unclear
- Somewhat unclear
- Very unclear

Please explain your answer:
No answer

LPS: authorisations, reviews and renewals

11. Is the guidance in chapter 13 on the authorisation, reviews and renewals processes clear?

- Very clear
- Somewhat clear
- Neither clear nor unclear
- **Somewhat unclear**
- Very unclear

Please explain your answer:

There is a vast quantity of information about the different roles, processes and triggers of different actions to consider. To make this more accessible, the RCSLT recommend that the information is presented differently. Additional illustrations, such as flow diagrams or text in bullet points, would help interpretation and application.

LPS: the care home manager role

12. The government has decided not to implement the role of the care home manager (outlined above) in the LPS, having heard a range of concerns raised by stakeholders about this role. Do you agree that the care home manager role should not be implemented?

- **Yes, I agree that it should not be implemented**
- No, I disagree

LPS: assessments and determinations

13. The Code sets out that previous and equivalent assessments can be used in the LPS process if it is reasonable to do so. This will help streamline the process and reduce the potential 'assessment burden' on the person when suitable assessments already exist. Previous assessments are assessments carried out for an earlier LPS authorisation. Equivalent assessments are assessments carried out for any other purpose (for example, for a care plan). 42 In cases where the person already has a previous or equivalent capacity or medical assessment, these may be used for the purposes of the LPS if it is reasonable to rely on it. However, a previous or equivalent assessment cannot be used for a necessary and proportionate assessment and determination.

How clear is the guidance in chapter 16 at explaining the use of previous and equivalent assessments for the purposes of the LPS?

- Very clear
- Somewhat clear
- Neither clear nor unclear
- **Somewhat unclear**
- Very unclear

Please explain your answer:

The RCSLT is unclear if a previous DoLS Assessment would be considered valid. We are uncertain why a previous assessment would not be a requisite consideration. We welcome further information about this from the DHSC.

LPS: Approved Mental Capacity Practitioners (AMCPs)

14. To ensure the independence of AMCPs, the Code provides a suggested model for a central AMCP team. Do you have any suggestions for how the model, as set out in chapter 18 of the Code, could be improved?

- **Yes**
- No

If you selected Yes please provide suggestions for how this model could be improved.

As the list of eligible Approved Mental Capacity Practitioners (AMCPs) has extended to speech and language therapists, this will need to be widely promoted. The RCSLT would be happy to work with the DHSC and LA to promote the role of AMCPs to speech and language therapists. We currently have over 20,000 members, who might be interested in this role.

The RCSLT is delighted that speech and language therapists has been recognised and named under the AMCP regulations. The RCSLT have long called for this extension.

Speech and language therapists have a crucial role to play given their specialist knowledge and expertise in speech, language and communication, and the impact difficulties with communication can have on perceptions of an individual's mental capacity.

Paragraph 18.2 - The RCSLT would like clarity if a professional, not employed by a Responsible Body, for example a speech and language therapist employed by a third sector organisation or in independent or private practice, can become an AMCP.

Paragraph 18.8 – NHS bodies need information to highlight the extension of AMCPs to speech and language therapists. This will help with putting forward the right professionals and in sufficient numbers.

Paragraph 18.11 - The RCSLT seek clarity if an AMCP will be matched to work with a young person or an older adult depending on their skills and experience, or if the expectation is that an AMCP can work with anyone regardless of age. It is unclear if there are any matching criteria to identify who an AMCP will work with.

Paragraph 18.12 – The RCSLT is concerned that an AMCP can be allocated a case referred by the Responsible Body they are employed by, which could pose a conflict of interest.

Paragraph 18.14 – the model mentions the independence of the AMCP, but not the skills. There is no discussion of how AMCPs are matched to a client. Many AMCPs will work with a wide range of adults/older adults for whom mental capacity assessments are necessary, as they may lack capacity. These include people with dementia, traumatic brain injury, aphasia due to a stroke, learning disabilities and people living with progressive conditions such as motor neurone disease. However many of these professionals will not work with young people and may not understand their behavioural and communication needs.

Paragraph 18.15 – The RCSLT is delighted that the professionals able to become AMCPs has been extended to speech and language therapists. We have long called for this extension and worked closely with the DHSC to make this a reality.

Paragraph 18.18 – It is essential that all Approved Mental Capacity Professionals receive training in speech, language and communication needs.

Mental capacity assessors do not recognise or know how to support communication difficulties (Hemsley & Balandin, 2014). A person with a communication difficulty is at risk of being labelled as “lacking mental capacity” if the assessor mistakes their communication problems for a lack of capacity to make a decision. Evidence shows that assessors of mental capacity who are trained in facilitative and supportive communication techniques are better able to assess decision-making capacity more accurately (Carling-Rowland, 2014).

The RCSLT recommend that initial and ongoing training for all AMCPs must include:

1. The impact of speech, language and communication needs on mental capacity.
2. The impact of speech, language and communication needs on an individual’s ability to demonstrate whether or not they have mental capacity.
3. how to support an individual with supported decision-making, including seeking the advice of a speech and language therapist in the mental capacity assessment.

As AMCPs will now work with young people over 16, we recommend that training in how communication impacts behaviour, understanding and capacity in young people is added.

Paragraph 18.36 - There is no mention of supporting communication as part of the decision making process, and how behaviour can mask communication. The RCSLT recommend that this is added.

Paragraph 18.43 – as expressed above the RCSLT is concerned about conflicts of interest where an AMCP works for their own employer. We recommend adding information to help AMCPs better

understand conflicts of interest and where they could reasonable accept a case involving their employer.

Paragraph 18.46 - The safeguarding role of AMCPs, speaks to the need for AMCPs to better understand communication and behaviour. For people with limited communication, the AMCP will need to be skilled in communication to be able to interact with them.

Paragraph 18.55 - The RCSLT is disappointed that the list of examples to encourage participation does not include seeking input from a speech and language therapist.

There is a risk of someone with communication needs being wrongly deemed as lacking capacity and, in some extreme cases, being deprived of their liberty. Improving communication support can help a person to express their wishes and preferences. It will help prevent incorrect decisions of capacity. We recommend that seeking support and input from a speech and language therapist is added.

LPS: section 4B

15. If the required conditions are met, as explained in the Code, then the decision maker has the legal basis to take steps which deprive a person of their liberty in exceptional circumstances to provide life-sustaining treatment or a vital act. Section 4B is not a 'continuous' power, and only applies to those specific steps.

The Code sets out that the decision maker should inform the Responsible Body when section 4B is relied upon for the first time. It also provides guidance on when it may be appropriate for the decision maker to inform the Responsible Body about subsequent instances of the power being relied upon. For example, if the decision maker relies on the power a significant number of times within a short period.

Do you agree with the position set out in the Code, or do you think Responsible Bodies should be notified every time section 4B is relied upon?

- I agree that beyond the initial application of section 4B, decision makers should not have to notify the Responsible Body each time section 4B is been relied upon.
- I disagree with the Code.

Please explain your answer:

No answer

LPS: monitoring and reporting on the operation of the LPS

16. To what extent will chapter 20 and the Monitoring and Reporting regulations deliver effective oversight of the LPS?

- Fully effective oversight of the LPS
- Somewhat effective oversight of the LPS
- **Neither effective nor ineffective oversight of the LPS**
- Somewhat ineffective oversight of the LPS
- Fully ineffective oversight of the LPS

Please explain your answer:

The reporting responsibilities are unclear in paediatric respite for 16- and 17-year-olds and in monitoring the LPS in someone's home.

The oversight of the LPS depends on the training and experience of the person or people

representing the monitoring body and carrying out the auditing and evaluating. We would welcome further details about this.

Questions from Section 4 of the consultation document: 'The LPS regulations'

LPS: AMCP training regulations

17. The purpose of the AMCP regulations is to ensure that there are an adequate number of trained AMCPs with the required skills and knowledge to carry out this role. Will the AMCP regulations achieve this?

- Yes
- No

Please explain your answer:

The RCSLT is delighted that speech and language therapists has been recognised and named under the AMCP regulations. The RCSLT have long called for this extension.

Speech and language therapists have a crucial role to play given their specialist knowledge and expertise in speech, language and communication, and the impact difficulties with communication can have on perceptions of an individual's mental capacity.

Extending the range of professionals able to train as Approved Mental Capacity Professionals helps to address the Government's significant shortfall in the number of professionals currently available to be Approved Mental Capacity Professionals.

The RCSLT would be happy to support local authorities and the DHSC to promote this new role of AMCPs to speech and language therapists. We currently have over 20,000 members, who might be interested in this role.

LPS: assessments, determinations, and pre-authorisation reviews regulations

18. The Code and the LPS regulations outline which professionals can carry out each of the three assessments and determinations under the LPS. It also outlines the requirements these professionals have to meet. The professionals who can compete a capacity or necessary and proportionate assessment and determination are:

- a medical practitioner
- a nurse
- an occupational therapist
- a social worker
- a psychologist
- a speech and language therapist

Medical assessments and determinations may only be carried out by a registered medical practitioner (including GPs and psychiatrists) or a registered psychologist who meets the conditions of these regulations.

Do the assessments, determinations, and pre-authorisation reviews regulations enable the right professionals to carry out assessments and determinations?

- Yes

- No

Please explain your answer:

Yes.

The RCSLT is delighted that speech and language therapist has been recognised and named under the AMCP regulations.

Speech and language therapists have a crucial role to play given their specialist knowledge and expertise in speech, language and communication, and the impact difficulties with communication can have on perceptions of an individual's mental capacity.

LPS: Independent Mental Capacity Advocates (IMCA) regulations

19. Do the IMCA regulations allow for IMCAs to carry out their full functions effectively under the LPS?

- Yes
- No

Please explain your answer:

No answer

Questions from Section 5 of the consultation document: 'Putting the Code into practice and implementing the LPS'

LPS: putting the Code into practice

20. The Code will be an important resource that will be used by many different groups of people to understand the LPS process.

How clear is the LPS guidance in the Code and is there anything that you feel is missing? Please reference specific groups of people and chapters in your response. (Do not include information in your response that could be used to identify you, such as names).

Your answer:

The Code will be an important resource for allied health professionals such as speech and language therapists and occupational therapists. We are pleased that some of the scenarios highlight their vital contribution to determining mental capacity.

The RCSLT is concerned that the Code of Practice is long and uses technical language, long complex sentences and some formats that make it difficult to process the information. The RCSLT recommend more digestible summary formats could be introduced. These would be of benefit to professionals, such as speech and language therapists and occupational therapists, as well as families who might need to use it.

We also recommend that more visual aids and case studies are used to make the information simpler to follow and apply.

Scenarios in the code

21. We would be grateful for suggestions and drafts of **new scenarios** on the following topics, based on your own experience of best practice.

Is there any part of the Code where an existing scenario requires updating or a new scenario or best practice example is required altogether to help illustrate the policy?

- **Yes**
- **No**

If you responded Yes please provide examples:

1. The RCSLT recommend adding a case study to underpin the risks of assuming understanding/communication.
2. The RCSLT recommend adding a case study about capacity underpinning eating and drinking at risk.
3. The RCSLT recommend adding more acute-based case studies.
4. The RCSLT recommend adding a case study focused on how the capacity assessment was completed and how determinations and the actual process undertaken.

We would be happy to provide the above for you.

LPS: Impact Assessment

22. The Impact Assessment constitutes the government's assessment of the costs and benefits of the LPS, including the Code and regulations, as proposed for consultation. Please provide feedback on the Impact Assessment for the LPS, including on its assumptions, coverage and conclusions.

Do you agree with the estimated impact of the LPS, as set out in the Assessment?

- Fully agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Fully disagree

Please explain your answer and provide feedback on the Impact Assessment for the LPS, including on its assumptions, coverage and conclusions:

Not answered

LPS: Workforce Strategy

23. The Workforce Strategy aims to support local, regional and national employers with their preparation for implementing the LPS in England. It offers advice on the workforce planning that will need to take place and the learning, development and training that is being made available ahead of implementation. *Please see the Workforce Strategy for help answering this question*.

Will the Workforce and Training Strategy help your organisation prepare for the implementation of the LPS?

- **Yes**
- **No**

Please explain your answer:

The RCSLT would like clarity if a professional not employed by either a Responsible Body, for example a speech and language therapist employed by a third sector organisation or in independent or private practice, can become an AMCP.

We welcome the intention to train all NHS staff in LPS awareness and preparation.

Page 6 – There is too little mention of allied health professionals across the competency groups. Competency workforce groups B to D need to consider allied health professionals such as speech and language therapists and occupational therapists, not just nurses and doctors, who will need to prepare for the implementation of LPS. The RCSLT recommend adding in allied health professionals to the workforce groups.

Page 8 - In workforce mapping and planning, consideration needs to be given to the pressures that NHS staff face and their availability to train to become AMCPs.

LPS: Training Framework

24. The Training Framework describes the core skills and knowledge relevant to the LPS workforce and presents learning outcomes for each workforce competency group across five subject areas.

* Please see the Training Framework for help answering this question*.

Does the Training Framework cover the right learning outcomes?

- Yes
- **No**

Please explain your answer if you wish:

The RCSLT has identified quite a few gaps in the training framework. We recommend adding the following learning outcomes:

Group A

Section: 2A3,4,5,6

Add: Recognise the role that speech, language and communication needs play in supported decision making.

Add: understand that with communication support such as speech and language therapy people may be able to make their own decisions.

Section: 2A10

Add: understand that a wide range of conditions with complex communication and cognitive needs, may concern decisions regarding mental capacity.

Add: Be aware that communication restricts understanding and expression; people will need support to share their wishes and feelings.

Group B

Section: 3B8

Add: be aware that communication underpins someone's ability to take part in decision making.

Add: understand the impact of speech, language and communication needs on capacity and decision making.

Add: Be aware of how to support communication needs and better decision making.

Add: Be aware that communication needs can impact on an individual's ability to demonstrate if

they have capacity.

Section: 5B3

Add: Be aware of how communication impacts behaviour, understanding and capacity in young people.

Group C

Section: 1C8:

Add: understand how to communicate with a person in their preferred method.

Section: 2C1

Add: recognise that communication difficulties can be confused for a lack of capacity; understand how to facilitate and support communication.

Section: 2C5

Add: Be aware that communication difficulties restrict understanding and expression; be able to use communication support techniques to understand the person's wishes and feelings.

ADD: document communication support techniques you used to ascertain the person's wishes and feeling.

Section: 3C14

Add: provide all information in an accessible format for the person, in line with the NHS Accessible Information Standards.

Section: 3C17

Add: Know when and how to refer to a speech and language therapist; and how this is evidenced in a capacity assessment.

One of the most crucial training outcomes is that each workforce group understands the impact of communication on capacity. Decisions regarding mental capacity often concern people with complex communication and cognitive needs, such as people living with dementia, traumatic brain injury, aphasia due to a stroke, learning disabilities or progressive conditions. All of these can have a significant impact on an individual's understanding and being understood.

Those carrying out assessments must understand communication needs and have training to have these skills. Too often assessors do not recognise or understand communication difficulties. Training would support high quality assessments and decisions.

Failure to capture these means the skills of the assessors will not improve and people with communication difficulties are at risk of being wrongly deemed as lacking capacity and, in some extreme cases, being deprived of their liberty.

LPS: National Minimum Data Set

25. Responsible Bodies will need to notify the Care Quality Commission and Ofsted of LPS referrals and authorisations in their area in order to enable them to monitor and report on the scheme. NHSD will need this data to publish Official Statistics for the LPS. The LPS National Minimum Data Set will provide a standardised data set to ensure consistent and quality submission of this data.

* Please see the LPS National Minimum Data Set for help answering this question*.

Are there further data items needed in the National Minimum Data Set to provide effective oversight of the LPS?

- Yes
- No

Please explain your answer:

No answer

END -