



**The Royal College of Speech and Language Therapists
The Mental Capacity (Amendment) Bill [HL]
House of Commons Second Reading
December 2018**

1. Executive summary

- 1.1. Assessors often do **not recognise or know how to support communication** difficultiesⁱ. 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.
- 1.2. Assessors **too infrequently seek professional support** from speech and language therapists to assist in capacity assessments of individuals with communication difficultiesⁱⁱ.
- 1.3. A person with a specific speech or language problem may be able to make some decisions if information is presented in a way that they can understand. With **appropriate communication support** a person may have capacity to make a decision.
- 1.4. There is a **predicted shortfall in the number of available Approved Mental Capacity Professionals**. The range of professionals who can undertake this role must be expanded.
- 1.5. In **Northern Ireland**, The Mental Capacity (Northern Ireland) Act 2016 requires that help and **support must be given to enable people to communicate their decision** and that there will be legal consequences if this support is not given.

2. RCSLT CALLS

- 2.1. All assessors carrying out capacity assessments should receive **training** from a speech and language therapist in communication to ensure that they are able to understand and use the most appropriate method of communication with the individual.
- 2.2. We recommend the guidance from the Mental Capacity Act Code of Practice (2007)ⁱⁱⁱ (*to seek professional support from a speech and language therapist to support capacity assessment of individuals with communication difficulties*) is **defined in law**. Speech and language therapists report that their advice is rarely sought. In cases where the individual has a significant communication need, the **support from a speech and language therapist must be sought** to aid decisions around capacity and consent.
- 2.3. **Speech and language therapists** should be added to the list of professionals for the Approved Mental Capacity Professionals role.

3. The context of speech, language and communication needs

- 3.1. Speech and language therapists have an integral role to play in supported decision-making in the Mental Capacity Act. As part of their daily role speech and language therapists work with a wide range people 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. All of these can have a significant impact on an individual’s understanding, expression and thinking skills.
- 3.2. A specific speech or language impairment does **not** mean that the person with that need lacks capacity to make a decision. A person with a communication difficulty may have capacity to make decisions, but **not the means to demonstrate it if their needs are left unsupported**.

- 3.3. Someone with a communication difficulty **may also have cognitive difficulties** due to the nature of their condition (e.g. dementia). These cognitive difficulties may mean the person lacks the capacity to make certain decisions or needs support to make certain decisions.
- 3.4. Speech and language therapists **reduce the risk of people with communication needs being wrongly deemed as lacking capacity** and, in some extreme cases, being deprived of their liberty by supporting them to communicate more effectively.
- 3.5. Speech and language therapists support their clients to **achieve their communication potential and to facilitate their decision-making** in their day-to-day life, supporting decisions around complex medical care and support or litigation.
- 3.6. Speech and language therapists **support other professionals** in their assessment of a person's decision making capacity and they support the person in understanding and communicating information.

4. Assumption of capacity

- 4.1. This Bill rests on the decision-maker's belief that someone does or does not have the capacity to consent. **People with communication needs are particularly vulnerable.**
- 4.2. The RCSLT is concerned that health and social care professionals who are **unaware of the impact of communication difficulty** may assume that someone lacks capacity to consent or to make decisions due to their communication difficulty, when in fact with the correct support the individual could fully participate in decisions about their lives.
- 4.3. It should be recognised that people with complex communication needs in **receipt of the correct communication support** may be perfectly capable of exercising choice and making decisions.
- 4.4. We recommend that all assessors carrying out capacity assessments receive **training** from a speech and language therapist in communication, to ensure that they are able to understand and use the most appropriate mode and level of communication with the individuals.
- 4.5. Research has demonstrated that **communication training can improve the communication of groups of health professionals**. A research study^{iv} found that assessors of mental capacity who were trained in facilitative and supportive communication techniques were able to assess decision-making capacity more accurately.

5. Approved Mental Capacity Professional

- 5.1. Schedule 1 Part 4 of the Bill makes provision for the introduction of **Approved Mental Capacity Professionals**. This role is replacing the Best Interest Assessors Role under the Mental Capacity Act.
- 5.2. Before a responsible body can authorise any arrangements, it must carry out a pre-authorisation review to determine if it is reasonable for it to conclude that the authorisation conditions are met. If the person is objecting to the arrangements, an **Approved Mental Capacity Professional must carry out the pre-authorisation review** and determine if the authorisation conditions are met.
- 5.3. The Bill and the explanatory notes do **not** detail which professionals could act in this new role. Paragraph 33 enables the Secretary of State to introduce **future regulations** to prescribe the criteria for approval as an Approved Mental Capacity Professional which includes "*criteria relating to qualification, training or experience*".
- 5.4. The Department of Health and Social Care have produced a memo to the Delegated Powers and Regulatory Reform Committee^v. This document states "*the Department to adopt a similar approach to prescribing criteria for approval as an AMCP as adopted in the existing regulations to best interest assessors*". **Therefore the assumption is that in England, to become an Approved Mental Capacity Professional, the person will need to be one of a few qualifying professionals who can be best interest assessors** as defined in the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008.
- 5.5. **The RCSLT challenges this on two points.** Firstly, in the Full Economic Assessment a **significant shortfall** has been identified in the number of available Approved Mental Capacity Professionals.

If this demand cannot be met by the current health and social care professionals who undertake this role then the range of professionals who can undertake this role must be expanded.

- 5.6. Secondly, we argue that the **capacity assessment must be carried out by a person with appropriate expertise in communication**. Decision making capacity assessments rest on an individual's ability to understand, retain information, weigh up the issue and express themselves. As communication is central to this, **speech and language therapists should be added to the list of professionals who can be considered as an Approved Mental Capacity Professional**. While we welcome the Government's references to the role of speech and language therapists during the Bill's passage in the House of Lords, we believe it is necessary for the law to be amended for them to be able to become an Approved Mental Capacity Professional.
- 5.7. Speech and language therapists have unique professional skills in supporting communication and work with clients to empower them to participate as fully as possible in decision-making and in expressing their will and preferences where able.
- 5.8. Speech and language therapists are registered practitioners with the Health and Care Professions Council.

6. Professional support from speech and language therapists

- 6.1. The Mental Capacity Act Code of Practice (2007)^{vi} **recommends seeking the professional opinion of a speech and language therapist** to support capacity assessment of individuals with communication difficulties. However there is wide variation across England and Wales in terms of how involved speech and language therapists are in the assessment of mental capacity: from no involvement at all; to providing recommendations to the decision maker on how best to communicate with a patient during the assessment but not being involved in the assessment of mental capacity; to facilitating and using advanced supported conversation strategies to support that patient's understanding and expression during the assessment.
- 6.2. **We recommend that this Code of Practice is defined in law**. In cases where the individual has a significant communication difficulty, support from a speech and language therapist must be sought to aid decisions around capacity and consent.

7. Here is an example of how speech and language therapists work with clients who may lack capacity

A speech and language therapist used an inclusive communication approach to support a young man who 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 this input, he would likely have been deemed as lacking capacity, and the 'best interests' process would have been implemented.

8. Examples of how speech and language therapists can make a difference

In England, speech and language therapists have been involved in providing support to people falling under the mental capacity legislation in the following ways.

- Acting as an assessor in examining the decision-making capacity of people with communication needs
- Providing training for staff regarding the communication abilities of clients and how to best engage and interact with them to determine their wishes and feelings
- Providing training to staff on the role of speech and language therapists and how they can help in capacity assessments
- Providing training and support to help staff plan and carry out assessments
- Developing guidance for other speech and language therapists to support them in capacity assessments and support hospital decision-making

- Developing guidance and resources for health professionals to facilitate capacity assessments for people with communication needs
- A speech and language therapist developed a tool to support multidisciplinary hospital staff to carry out mental capacity assessments and identify and meet the needs of people with communication difficulties during the process. This was funded by a NIHR clinical doctoral research fellowship.

For more information please contact the Royal College of Speech and Language Therapists, Derek Munn, derek.munn@rcslt.org

References

ⁱ Hemsley & Balandin (2014)

ⁱⁱ Jayes, Palmer & Enderby (2016)

ⁱⁱⁱ Department of Constitutional Affairs (2007). *Mental Capacity Act Code of Practice*. London. www.legislation.gov.uk/ukpga/2005/9/pdfs/ukpgacop_20050009_en.pdf

^{iv} Communication Aid to Capacity Evaluation: a communicatively accessible tool for healthcare professionals, Carling-Rowland, 2014

^v <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0117/18117-DPM.pdf>

^{vi} *Mental Capacity Act Code of Practice*. London, Department of Constitutional Affairs (2007). www.legislation.gov.uk/ukpga/2005/9/pdfs/ukpgacop_20050009_en.pdf