

## [Proposed changes to the Mental Capacity Act 2005 Code of Practice and implementation of the Liberty Protection Safeguards](#)

*Section 2 covers chapters 3, 7, 10, 21 to 22, and 24 of the MCA Code of Practice. These chapters exist in the current MCA Code, but in the proposed new draft, include updates to the existing Code guidance and new guidance relating to the LPS.*

*Section 2 of the consultation document includes chapter-specific questions (1 to 3) about the new LPS guidance, which can be found throughout the section. These questions largely focus on the policy decisions that have been made during the development of the Code. Not all Code chapters have a corresponding question. The responses to these questions will be of particular interest to the Department of Health and Social Care (DHSC).*

*At the end of Section 2, there are also a set of broader questions (4 to 7) on the proposed updates to the existing guidance in the current Code. These questions relate to all the proposed updates to the existing guidance in the current Code listed in Section 1 and Section 2, so please consider all updates when answering. In the main, questions 4 to 7 do not relate to the LPS. The responses to these questions will be of particular interest to the Ministry of Justice (MoJ).*

**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**

*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 (these documents will not yet include guidance specifically relevant to the LPS).*

*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. The LPS also interacts with other legislation, such as the Social Services and Well-being (Wales) Act 2014. It is important that decision makers understand these interactions.*

**2. 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?**

**Strongly agree**

**Somewhat agree**

**Neither agree nor disagree**

**Somewhat disagree**

**Strongly disagree**

**Please explain your answer if you wish.**

*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.*

**3. 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 if you wish.**

*Questions 4 to 7 relate to the proposed updates to the existing guidance in the current MCA Code. These questions relate to **all** the proposed updates to the existing Code guidance listed in Section 1 and Section 2 of the consultation document, so please consider **all** updates when answering. In the main, these questions do not relate to the LPS. There are also further questions on the whole Code in Section 5 of the consultation document.*

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

**Yes**

**No**

If you responded No, please specify the relevant paragraph and what you think it should say.

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.

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

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 on this.

*Section 3 of the consultation document covers chapters 12 to 20 of the Code. These chapters do **not** exist in the current MCA Code, and offer new guidance about the LPS in the new, proposed MCA Code.*

*Section 3 of the consultation document includes chapter-specific questions (8 to 16) about the new LPS guidance, which can be found throughout the section. These questions largely focus on the policy decisions that have been made during the development of the Code. Not all Code chapters have a corresponding question. The responses to these questions will be of particular interest to DHSC.*

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 if you wish.**

This is not clear enough and will lead to different people interpreting the code differently. It can be difficult to determine when someone may be deprived of their liberty in settings such as hospices. It has been stated before that palliative care is a 'special case' and therefore there should be clear and specific guidance provided on deprivation of liberty in the context of palliative care. To help to address this, experts should be brought together to give examples in palliative care of what constitutes a deprivation of liberty.

*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.*

**9. Do you think the timeframes set out in the Code are:**

**Too long**

**About right**

**Too short**

**Please explain your answer if you wish.**

**10. 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 if you wish.**

**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 if you wish.**

**The government has decided not to implement the role of the care home manager in the LPS, having heard a range of concerns raised by stakeholders about this role.**

**12. 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**

*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).*

*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.*

**13. 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 if you wish.**

*To ensure the independence of AMCPs, the Code provides a suggested model for a central AMCP team.*

**14. 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.**

*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.*

**15. 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 has been relied upon.**

**I disagree with the code.**

**Please explain your answer if you wish.**

*In order to provide reassurance that the LPS are being operated correctly, it is important for there to be an effective mechanism for monitoring the use of the safeguards.*

*The main aspect of state oversight under LPS will be provided by Responsible Bodies who will have responsibility to scrutinise and authorise deprivations of liberty. However, international human rights law (the Optional Protocol to the Convention on Torture) requires there to be further independent oversight of how the scheme is operating.*

*To meet these obligations in England, the proposed monitoring and reporting design places a duty on the Care Quality Commission (CQC) and Office for Standards in Education, Children's Services and Skills (Ofsted) to monitor and report on the operation of LPS for adults and young people deprived of liberty in any setting. CQC will be responsible for those over the age of 18, whilst Ofsted will be responsible for those aged 16 and 17 years old.*

*The LPS regulations and chapter 20 of the Code together set out the statutory duties and overarching design for LPS monitoring and reporting. As the bodies responsible for*

*monitoring LPS in the regulations, CQC and Ofsted will be expected to plan for and implement this design in practice.*

**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 if you wish.**

*Section 4 of the consultation document covers the LPS regulations and includes questions (17 to 19) about them. The responses to these questions will be of particular interest to DHSC.*

**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**

**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.**

**18. 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 if you wish.**

*These regulations amend the regulations for IMCAs who act under the MCA. They provide the provisions for appointing and the functions of IMCAs under the LPS.*

*IMCAs are given functions under the LPS, for example, to represent and support the person to participate in the process, ascertain their wishes and feelings, and make representations to the Responsible Body on the person's behalf. In some circumstances, IMCAs will also support the person's Appropriate Person to represent and support the person. IMCAs are also given functions to support the person, or their Appropriate Person, once an authorisation is in place and where appropriate to challenge the authorisation.*

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

**Yes No**

*Section 5 of the consultation document covers the entire MCA Code and documents and questions (20 to 25) related to the implementation of the LPS. The responses to these questions will be of particular interest to both DHSC and MoJ.*

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

*For example:*

- *It will be especially important that chapter 3 (How should people be helped to make their own decisions?), chapter 15 (What is the role of the Appropriate Person?), and chapter 17 (What is the LPS consultation?) of the Code are understood by the person and their family and friends to ensure they remain at the centre of the decision-making process.*
- *Chapter 3 (How should people be helped to make their own decisions?), chapter 10 (What is the Independent Medical Capacity Advocate service?), chapter 13 (What is the overall LPS process?), chapter 16 (What are the assessments and determinations for the LPS?), chapter 17 (What is the LPS consultation?), and chapter 18 (What is the role of the Approved Mental Capacity Professional?) will be of particular importance to practitioners and people involved in the person's care.*
- *16 and 17 year olds, and their parents and carers, will need to understand the guidance in chapter 13 (What is the overall LPS process?) and chapter 21 (How does the Act apply to children and young people?).*
- *Responsible bodies, including local authorities, NHS trusts and clinical commissioning groups, will need to understand the principles of the MCA outlined in chapter 2 (What are the statutory principles and how should they be applied?), as the principles of the MCA are integrated throughout the LPS. They will also need to in particular understand the guidance in chapter 7 (What is the role of the Court of Protection?), chapter 10 (What is the Independent Medical Capacity Advocate*



*service?), chapter 13 (What is the overall LPS process?), chapter 14 (What is the role of the Responsible Body?), chapter 16 (What are the assessments and determinations for the LPS?), and chapter 24 (What are the best ways to settle disagreements and disputes about issues covered in the Act?).*

**20. From your perspective, 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).**

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

- *Chapter 2 – application of the MCA principles by emergency services.*
- *Chapter 3 – best practices for keeping the person at the centre of the LPS decision-making process.*
- *Chapters 4 and 5 – assessing capacity and/or best interests decisions in the context of culturally sensitive decision-making.*
- *Chapter 7 – a court makes a decision around a person’s online contact or use of social media.*
- *Chapter 8 – gift-giving under an Lasting Power of Attorney on behalf of a donor who lacks the relevant capacity, demonstrating the more complicated considerations of taking into account the donor’s circumstances, their wishes and whether the gift is considered appropriate under the MCA.*
- *All guidance relevant to the LPS (Chapters found in Section 2 and Section 3)*

**21. 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**

In some of the scenarios it would be useful if it could be explained what happened in the end. For example with the Ms M (p.21) and Mr R (p.22) scenarios the code does not say what actions were taken after the decisions about capacity were made, and what the consequences of these decisions were.

*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.*

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

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

*Please explain your answer and provide feedback on the Impact Assessment for the LPS, including on its assumptions, coverage and conclusions if you wish.*

*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.*

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

**Yes No**

**Please explain your answer if you wish.**

*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.*

**24. Does the Training Framework cover the right learning outcomes?**

**Yes No**

**Please explain your answer if you wish.**

*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.*

*The Data Set has been developed via extensive stakeholder engagement and should capture data required to monitor and oversee the operation of the LPS at a national level and does not preclude local systems capturing additional data for local use.*

**25. 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 if you wish.**