

Liberty Protection Safeguards (LPS)

Best Interests Assessors Information Sheet

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- **April 2022:** The Mental Capacity (Amendment) Act 2019 which creates the Liberty Protection Safeguards received Royal Assent on 16th May 2019. However, LPS has been delayed and is now unlikely to start until April 2024.
- To download the Bill and other documents go to: <https://services.parliament.uk/Bills/2017-19/mentalcapacityamendment.html>
- A series of resources, short film and LPS training courses (hosted by Edge or delivered in-house) are available from www.edgetraining.org.uk or email admin@edgetraining.org.uk for details.
- This information sheet and a series of others on LPS can be downloaded from: <https://www.bookswise.org.uk/lps>
- A new edition of the Deprivation of Liberty Safeguards Handbook (Second Edition) is out now. It is essential reading for BIAs and provides the most up to date guide to the current law and guidance plus record keeping tips.

This information sheet is designed for DoLS Best Interests Assessors (BIAs). It aims to explain how their role and function changes under LPS. We have been asked questions about this by numerous BIAs around the country during the training we deliver on LPS and via our website. We will update this sheet as new information becomes available.

Overview

The role of the BIA is deleted under the Liberty Protection Safeguards. A new role has been created entitled Approved Mental Capacity Professional (AMCP). Under DoLS, the BIA carries out a series of detailed assessments for every person as part of the standard authorisation process. Under LPS, assessments will be undertaken by other staff (social workers, nurses etc) and the AMCP will read and review these LPS assessments completed by others, this is called the pre-authorisation review. Whereas at present, DoLS signatories only read assessments, an AMCP will (if practical and appropriate) meet the person and speak to others interested in their welfare. The **draft** Code of Practice to the Mental Capacity Act (para 18.52) states: '*It would be rare for the AMCP not to meet with the person.*' AMCPs will not be required for all pre-authorisation reviews (see below for further details).

The Act, Regulations and Code of Practice

The Act: The main law on LPS is now complete. This creates the role of the AMCP and also states when an AMCP is required and the basics of their role (see below).

Regulations: Draft regulations were published in March 2022. They provide detail on the qualification and training needed to become an AMCP and the ability of existing BIAs to become AMCPs. They also provide detail on the process to become approved by local authorities.

Code of Practice: The **draft** Code was published in March 2022 and provides some practical detail on the role of the AMCP in Chapter 18. It should be noted however that the Code cannot do more than the law or regulations allow. For example, the Code cannot say that all LPS cases should be seen by an AMCP as this would be beyond what the law states. Whilst it is statutory guidance, it may be overridden by a judge.

Key points in the Draft Code of Practice about the AMCP role:

- The Code suggests there should be AMCP teams set up to receive referrals from Responsible Bodies. Plus an out of hours emergency duty AMCP team. They can refuse referrals if they do not believe the person meets the criteria.
- AMCPs can make recommendations and attach conditions
- AMCPs may be asked to complete the draft authorisation record for the Responsible Body
- AMCPs could give the final authorisation (as well as undertaking the pre-authorisation review)
- AMCPs are not an assessor and they do not have authority to instruct assessors
- Where assessments are inadequate or missing, the AMCP should request them and refuse to accept the referral if they are not received. **Note:** this contradicts the 2022 draft Impact Assessment, published at the same time which states at para 23.78: '*If the AMCP is not satisfied with existing assessments, they can choose to do their own.*'

What happens to existing BIAs when LPS starts

All existing BIAs will be able to undertake a shorter course to convert from being a BIA to an AMCP. The government expects that 90% of AMCPs will be ‘converted’ from existing BIAs. The 2022 Draft Impact Assessment says at paragraph 23.51 that it is expected the training will last between 8-16 hours and so the government training budget is based on the midpoint of 12 hours. The course will need to be available well before LPS starts to enable sufficient numbers of BIAs to be converted to AMCPs. The government plans to fund conversion courses for only 1,043 BIAs to become AMCPs (see para 23.52 DHSC Impact Assessment) and fund training for 116 brand new AMCPs (see para 23.49) for England and Wales. These courses cannot begin until the final Code of Practice and regulations are published. We doubt that 1,159 will be enough AMCPs for local authorities in England and Wales. Especially in light of the fact that these AMCPs will be covering post authorisation reviews as well as pre-authorisation reviews.

When do AMCPs get involved?

1. Pre-authorisation reviews: When the assessments have been completed for an LPS the responsible body (local authority, NHS Trust, CCG or Health board) must arrange for a pre-authorisation review of them. This must in all cases be completed by someone not involved in the person’s day to day care or treatment. The pre-authorisation review can be carried out by anyone the responsible body considers appropriate however an AMCP must do it in the following cases (Schedule 1, Part 2, Para 21(2) Mental Capacity (Amendment) Act 2019)

‘The review must be by an Approved Mental Capacity Professional if—

- (a) *the arrangements provide for the cared-for person to reside in a particular place, and it is reasonable to believe that the cared-for person does not wish to reside in that place,*
- (b) *the arrangements provide for the cared-for person to receive care or treatment at a particular place, and it is reasonable to believe that the cared-for person does not wish to receive care or treatment at that place,*
- (c) *the arrangements provide for the cared-for person to receive care or treatment mainly in an independent hospital, or*
- (d) *the case is referred by the responsible body to an Approved Mental Capacity Professional and that person accepts the referral.’* (for example: complex cases or particular restrictions present or family concerns)

Note: In determining that a person does not wish to reside or receive care or treatment, the Responsible Body must consider the views of anyone engaged in caring for the person or interested in their welfare about the wishes of the cared for person that are brought to the Responsible Body’s attention.

2. Reviews: after an LPS is authorised it can be reviewed later and AMCPs can be involved in some of these reviews.

What does an AMCP do?

The role of the AMCP carrying out a pre-authorisation review is stated in the Mental Capacity (Amendment) Act 2019 (Schedule 1, Part 2, Para 22) as follows:

‘(1) If the review is by an Approved Mental Capacity Professional, the Approved Mental Capacity Professional must—

- (a) *review the information on which the responsible body relies, and*
- (b) *determine whether the authorisation conditions are met.*

(2) Before making the determination the Approved Mental Capacity Professional must—

- (a) *meet with the cared-for person, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so, and*
- (b) *consult any other person listed in paragraph 20(2), or take any other action, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so.’*

Statutory regulations or the Code of Practice should clarify what the term ‘any other action’ could include in practice or which situations it may be deemed not appropriate and practicable to meet the person or consult others.

Qualification for new AMCPs

According to the draft regulations that were published in March 2022, an AMCP will be a social worker, first level nurse, a practitioner psychologist, speech and language therapist, or an occupational therapist with two years post registration experience and must complete an AMCP (or BIA to AMCP conversion) course. An AMCP must complete a further 18 hours of training every year (unless they qualify for an exemption ie due to ill-health).

I am a qualified BIA but do not practice. In future, can I be a non-practicing AMCP?

AMCPs will have to maintain their practice and if they do not continue to practice as an AMCP to a sufficient standard, the local authority must end their approval. Final approval to act as an AMCP will be with local authorities in England (not CCGs or NHS Trusts) who must be satisfied the person has the skills necessary for the role. There are separate (draft) regulations for Wales.

Independent BIAs

A large number of BIAs are currently independent and not directly employed by local authorities but commissioned by them. LPS does not exclude AMCPs being independent (to a degree). They do not have to be employed by the local authority approving them or any of the responsible bodies. In addition, they could act as an AMCP for another local authority (with permission from their approving local authority). However, they will have to be approved by a single local authority (although this approval can be transferred to another local authority).

Workload for AMCPs

The question of workload for AMCPs is more challenging to answer. A simple response is that given AMCPs will only see a certain percentage of LPS cases rather than all cases (like BIAs do under DoLS) there will be less work for AMCPs and so a reduced demand for them. However, a number of factors mean the demand for AMCPs may be greater.

1. The DHSC estimates there will be 279,000 new LPS applications per year. This appears to be a conservative estimate given LPS will include all community cases and those aged 16-17 years that are deprived of their liberty. For example, it is unclear how many older people living in their own homes lack mental capacity and meet the *acid test*.
2. The DHSC estimate for people that would be entitled to an AMCP review is 26%. This may be an underestimate as an LPS authorisation (as with DoLS) is supposed to be arranged prior to a deprivation of liberty starting and therefore, could be when a person is first admitted to a care home and therefore, the 'objection' rate may be higher, leading to an increased demand for AMCPs.
3. LPS requires all private hospital cases to be seen by an AMCP.
4. LPS includes a general discretionary provision so that a responsible body can request an AMCP to be involved in any case. According to the **draft** Code of Practice to the Mental Capacity Act, this could include complex cases, high levels of restrictions or a case which is 'borderline' between the Mental Health Act and Liberty Protection Safeguards.
5. In addition, it may be that responsible bodies use AMCPs for LPS assessments in some cases (such as out of area or complex cases) because they have the skills and knowledge to ensure a robust assessment. In such cases the AMCP would not be acting as an AMCP and would be undertaking the role of an assessor. They would not be able to carry out the pre-authorisation review.
6. Some responsible bodies, in particular CCGs, may also decide to use AMCPs for LPS assessments as they are do not have available staff to undertake the work required.

Currently under DoLS, some Supervisory Bodies only use in-house BIAs whereas others use lots of independent BIAs (or agencies). Although the draft regulations don't prevent this, even if not employed by the local authority, an AMCP would still need to be approved by a single local authority. The Draft Code says 'AMCPs will normally be employed by a Responsible Body (local authority, NHS hospital trust, local health board or CCG). Regardless of their employer, all AMCPs must be approved by a local authority.'

Questions

- **Is the Edge LPS course obligatory or just for information purposes?**
Edge run full and half day introductory courses on LPS (currently online only). The courses are open to any organisation or staff group to attend and are designed to provide a detailed analysis of LPS based on the legislation. The Code will not be incorporated until it is final. Although it is not obligatory for BIAs or any other group to attend, it has provided much needed introductory awareness so organisations are properly informed to prepare for LPS.
- **What happens if it is over 12 months since my last BIA legal update?**
The current law requires BIAs to have undertaken further training related to the BIA role in the 12 months prior to undertaking an assessment. So if more than 12 months have lapsed since your last training course, you cannot

practice. The full day LPS course run by Edge does not count as a BIA legal update/refresher. Edge runs monthly BIA refresher courses.

- **What is the point of doing a BIA legal update/refresher when the course will change to AMCP under LPS?**
If you want to continue to work as a BIA you must have had further training in the last 12 months in relation to the role. If you don't want to be able to continue as a BIA you don't have to attend a BIA legal update. All BIAs who wish to practice must follow the existing training requirements for BIAs.
- **I have not practiced or attended a BIA legal update for three years – do I have to requalify from scratch?**
No – you can attend a one-day BIA legal refresher/update and potentially practice again. If you have not practiced for some time, we recommend you attend the necessary BIA legal update/refresher plus our BIA report writing course and do some additional reading/study. Training courses are only one element and the DoLS Code says the Supervisory Body must be satisfied that the BIA “*..has the skills necessary to obtain, evaluate and analyse complex evidence and differing views and to weigh them appropriately in decision-making.*”