Mental Capacity Act 2005

DSAPB Joint Agency Agreement

DOCUMENT CONTROL

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Glossary of Terms

DSAPB – Doncaster Safeguarding Adults Partnership Board

EPA – Enduring Power of Attorney

IMCA – Independent Mental Capacity Advocate

LPA – Lasting Power of Attorney

MCA – Mental Capacity Act 2005

1. Introduction

1.1 The Mental Capacity Act 2005, covering England and Wales, provides a statutory framework for people who lack capacity to make decisions for themselves, or who have capacity and want to make preparations for a time when they may lack capacity in the future. It sets out who can take decisions, in which situations, and how they should go about this.

1.2 The legal framework provided by the Mental Capacity Act 2005 (MCA) is supported by a Code of Practice which provides guidance and information about how the Act works in practice.

1.3 The MCA Code of Practice has statutory force, which means that certain categories of people have a legal duty to have regard to it when working with or caring for adults who may lack capacity to make decisions for themselves. That means they must be aware of the MCA Code of Practice when acting or making decisions on behalf of someone who lacks capacity to make a decision for themselves, and they should be able to explain how they have had regard to the Code when acting or making decisions.

1.4 The categories of people that are required to have regard to the MCA Code of Practice include anyone who is:

- an attorney under a Lasting Power of Attorney (LPA)
- a deputy appointed by the new Court of Protection
- acting as an Independent Mental Capacity Advocate (IMCA)
- carrying out research approved in accordance with the Act
- acting in a professional capacity for, or in relation to, a person who lacks capacity
- being paid for acts for or in relation to a person who lacks capacity

1.5 The last two categories cover a wide range of people. People acting in a professional capacity may include:

- a variety of healthcare staff (doctors, dentists, nurses, therapists, radiologists, paramedics etc)
- social care staff (social workers, care managers, etc)
- others who may occasionally be involved in the care of people who lack capacity to make the decision in question, such as ambulance crew, housing workers, or police officers.

1.6 People who are being paid for acts for or in relation to a person who lacks capacity may include:

- care assistants in a care home
- care workers providing domiciliary care services, and
- others who have been contracted to provide a service to people who lack capacity to consent to that service.

2. Purpose of the agreement

2.1 This document is intended to outline Doncaster Safeguarding Adult Partnership Boards (DSAPB) approach to issues (including recording) within the Mental Capacity Act 2005, that require consistent local application, definition or intent. It does not seek to replace the Mental Capacity Act 2005 Code of Practice which staff will still be required to have regard to, or other related policies and procedures such as the Safeguarding Adults Procedures for South Yorkshire. Each agency will need to ensure existing policies and procedures are compliant in line with the Act and will need to consider their own requirements for any additional more detailed guidance for staff. This document does **not** cover the process for the Deprivation of Liberty Safeguards (DoLS).

2.2 All professional staff have a statutory duty to be aware of and Act in accordance with the MCA Code of Practice.

2.3 All professional staff should ensure they access and follow their local policies and procedures in relation to the Mental Capacity Act 2005.

3. Key Principles

3.1 All agencies in Doncaster Safeguarding Adults Partnership Board are committed to and have agreed to adopt the Acts five key principles:

1.) A person must be assumed to have capacity unless it is established that they lack capacity.

2.) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

3.) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

4.) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

5.) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

(MCA Code of Practice, 2005)

4. Staff this Agreement applies to

4.1 This agreement applies to all DSAPB agencies who work with adults or a person (aged 16 or over) in Doncaster who may lack capacity in relation to specific decisions.

5. Service User Groups this Agreement may affect

5.1 DSAPB are clear that a person should not be labelled 'incapable' as an automatic result of a particular impairment or disturbance of mind.

The following examples are given for individuals whose ability to make a particular decision **may** be affected;

- conditions associated with some forms of mental illness
- dementia
- significant learning disabilities
- the long-term effects of brain damage
- physical or medical conditions that cause confusion, drowsiness or loss of consciousness
- delirium
- concussion following a head injury, and
- the symptoms of alcohol or drug use

This list is not exhaustive.

6. Assessing Capacity

6.1 The DSAPB agree that assessing capacity correctly is vitally important in supporting people to have choice and control over their lives. Someone who is assessed as lacking capacity may be denied their right to make a specific decision. Equally, if a person lacks capacity to make specific decisions, that person may make decisions that could put them at risk or that they do not understand.

6.2 The starting point must always be to assume that a person has capacity to make a specific decision. Some people may need help to be able to make, or communicate a decision but this does not necessarily mean that they lack the capacity to do so. A person may lack capacity to make a decision about one issue but not about others therefore any assessment of capacity should be decision specific at the time the decision needs to be made. **(Principle 1)**

6.3 Where there are concerns around a persons' mental capacity to make a specific decision agencies will undertake a mental capacity assessment where appropriate using the two stage test as defined within the Mental Capacity Act 2005 and Code of Practice.

6.4 Consent

A person who is assessed as lacking capacity cannot consent to a particular decision or treatment. Consent is defined as the voluntary and continuing permission of the person to the intervention in question, based on an adequate knowledge of the purpose, nature, likely effects and risks of that intervention, including the likelihood of its success and any alternatives to it. Permission given under any unfair or undue pressure is not consent.

6.5 Who Assesses Capacity?

The person who assesses an individual's capacity to make a decision will usually be the person who is directly concerned with the individual at the time the decision needs to be made. For most day-to-day decisions, this will be the person caring for them at that time and the assessment is likely to be relatively informal.

6.6 Complex Decisions

6.6.1 More complex decisions are likely to need more formal assessments incorporating professional opinion or advice, for example from a social worker proposing a care plan or a health professional giving medical treatment.

6.6.2 The following factors may indicate the need for involvement of a more experienced or specialist professional ie. General Practitioner, Nurse or Social Worker:

- The decision that needs to be made is complicated or has serious consequences for the person
- An assessor concludes a person lacks capacity, and the person challenges the findings
- Family members, carers and /or professionals disagree about a person's capacity
- There is a conflict of interest between the assessor and the person being assessed
- The person being assessed is expressing different views to different people – they may be trying to please everyone or telling people what they think they want to hear
- Somebody might challenge the persons capacity to make the decision – either at the time of the decision or later ie. a family member might challenge a will after a person has died on the basis that the person lacked capacity when they made the will.
- Somebody has been accused of abusing a vulnerable adult who may lack capacity to make decisions that protect them.
- A person repeatedly makes decisions that put them at risk or could result in suffering or damage.

6.7 Recording Assessments

6.7.1 DSAPB are committed to ensuring there is a consistent approach to assessment and recording of mental capacity and will incorporate this requirement into all assessment processes.

6.7.2 In addition each agency will ensure that their own documentation and assessment tools are in line with the principles of the Mental Capacity Act 2005.

6.7.3 Staff should routinely consider mental capacity issues as part of their assessment and where there is evidence of impaired decision-making note the specified areas affected.

6.7.4 The Code of Practice states that;
*"where assessments of capacity relate to **day-to-day** decisions and caring actions no formal assessment procedures or recorded documentation will be required".* However as the gravity of decision increases so does the need for clear documentation and *"it is a matter of good practice that proper assessment is made and the findings of that assessment are recorded in the professional records." (MCA Code of Practice, 2005)*

In Doncaster the local **MCA Form 1** is available for agencies to use for assessing capacity in relation to significant decisions in line with best practice.

6.7.5 More detailed good practice guidance for completing and recording mental capacity assessments can be found in the Code of Practice.

7. Making Decisions

7.1 Helping People to Make Their Own Decisions

Although it can sometimes be time consuming to do so, DSAPB stakeholders are committed to ensuring that practitioners take all practicable steps **(Principle 2)** to help someone make their own decisions, before they can be regarded as unable to make a decision. Different circumstances will surround each decision but the support offered might include:

- Ensuring that the person has all the relevant information needed to make the decision including where there are alternative options.
- Exploring all potential communication methods, verbal and non verbal.
- Arranging visits when people are at their best ensuring the person feels at ease.
- Consulting with others who may be able to support understanding e.g. a relative, friend or advocate.

7.2 DSAPB are also committed to ensuring that practitioners do not treat people as unable to make a decision merely because he makes an unwise decision. Consideration should be given to a series of unwise decisions or actions taken by the individual out of character which may have safeguarding implications. **(Principle 3)**

7.3 Making Decisions for People who Lack Capacity (Best Interests)

Making decisions for people who have been assessed as lacking capacity is an important part of care planning. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests. **(Principle 4)** The person making the decision will be known as the '**decision maker'**.

7.4 The purpose of the 'best interests' principle is to ensure that when decisions are taken or acts done for those lacking capacity, the outcome is the best one available for the person concerned. Decision makers will need to weigh up a number of factors in order to determine what decision or course of action is in the person's best interests. This should be done in a way that is proportionate to the decision being made. The MCA does not define **'best interests**' but sets out a checklist that must be considered when making decisions for a person who has been assessed as lacking capacity.

7.5 DSAPB have agreed that all staff will adhere to the best interest checklist as detailed in the Mental Capacity Act 2005 and Code of Practice.

7.6 Types of Decision and Decision Makers

DSAPB acknowledge that there will be different levels of decision making however each agency will need to develop a working protocol that identifies the nature of decisions they take, and the staff groups who are most likely to make such decisions. The levels indicated relate to the level of training likely to be most appropriate for staff involved in each type of decision. This should be detailed in the respective agencies Workforce, Training and Development Strategies.

7.7 Circumstances where there are multiple Decision Makers

In complex cases the code states "*there are times when a joint decision might be made by a number of people ie. in the context of a multi-disciplinary discussion involving different healthcare and social care staff. Sometimes the decisions will be made as a team of healthcare or social care staff as a whole. At other times, the decision will be made by a specific individual within the team. A different member of the team may then implement that decision, based on what the team has worked out to be in the person's best interests*". *(MCA Code of Practice, 2005)*

7.8 In all cases before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action. **(Principle 5)**

7.9 **Recording Decisions**

7.9.1 It is important that decision makers keep as true record of the decisions they make on behalf of people who lack capacity in order to demonstrate the process and rationale used to determine what is in the persons best interests,

7.9.2 DSAPB are committed to ensuring that there is a consistent approach to recording of best interests decisions. Any staff involved in the care of a person who lacks capacity should make sure a record is kept of the process of working out the best interests of that person for each relevant decision, setting out:

- how the decision about the person's best interests was reached
- what the reasons for reaching the decision were
- who was consulted to help work out best interests, and
- what particular factors were taken into account.

7.9.3 In Doncaster the local **MCA forms 2 and 3** are available for agencies to use for recording significant or complex best interest decisions.

8. Independent Mental Capacity Advocate Service

8.1 Social Care and Health professionals have a Statutory duty to make referral to the Independent Mental Capacity Advocate (IMCA) Service which was introduced to help support particularly vulnerable people, who lack the capacity to make important decisions about serious medical treatment and changes of accommodation **and** who have no family or friends other than paid care workers whom it would be appropriate to consult about these decisions. The role of the IMCA is to work with and support people who lack capacity, and represent their views to the decision maker.

8.2 In carrying out their role IMCA`s have a right to:

- Meet the person who lacks capacity in private
- Examine and take copies of, any records which the person holding the record thinks is relevant to making the best interests decision

8.3 However information holders, when releasing information should be sure that they are acting lawfully and that they can justify its release.

8.4 If a person who lacks capacity has nobody to represent them or no-one who it is appropriate to consult, an IMCA **must** be instructed in prescribed circumstances. The prescribed circumstances are:

- providing, withholding or stopping serious medical treatment
- moving a person into long-term care in hospital or a care home, or
- moving the person to a different hospital or care home.

8.5 The only exception to this can be in situations where an urgent decision is needed. Further details on the situations where there is a duty to instruct an IMCA are given in the Mental Capacity Act 2005 and Code of Practice.

8.6 An IMCA **may** be involved where it is felt the person would benefit in the case of:-

- Safeguarding Adults Proceedings as detailed in the SCIE guidance Use of IMCAs in Safeguarding cases which has been recognised as good practice. In Safeguarding Adult cases (and no other cases), access to IMCAs is not restricted to people who have no-one else to support or represent them. People who lack capacity who have family and friends can still have an IMCA to support them in the Safeguarding Adult procedures. There is duty on the safeguarding manager to consider use of an IMCA on a case by case basis.

- A care review if a change of accommodation is being considered. If an IMCA has been involved in a change of accommodation decision one should also be instructed in relation to any reviews of the decision.

8.7 The IMCA will:

- be independent of the person making the decision
- provide support for the person who lacks capacity
- represent the person without capacity in discussions to work out whether the proposed decision is in the person's best interests
- provide information to help work out what is in the person's best interests

9. Ill treatment and wilful neglect

9.1 The MCA introduced two new criminal offences: ill treatment and wilful neglect of a person who lacks capacity to make relevant decisions (Section 44). The offences may apply to:

- anyone caring for a person who lacks capacity – this includes family carers, healthcare and social care staff in hospital or care homes and those providing care in a person's home
- an attorney appointed under an LPA or an EPA, or a deputy appointed for the person by the court.

9.2 These people may be guilty of an offence if they ill-treat or wilfully neglect the person they care for or represent. Penalties will range from a fine to a sentence of imprisonment of up to five years – or both.

9.3 Ill treatment and neglect are separate offences. For a person to be found guilty of ill treatment, they must either:

- have deliberately ill-treated the person, or
- be reckless in the way they were ill-treating the person or not.

9.4 It does not matter whether the behaviour was likely to cause, or actually caused, harm or damage to the victim's health. The meaning of 'wilful neglect' varies depending on the circumstances, but it usually means that a person has deliberately failed to carry out an act they knew they had a duty to do.

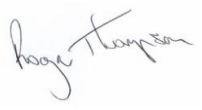
9.5 Consideration of these offences will be given on a case by case basis as part of the Safeguarding Adults procedures and by the Criminal Justice agencies.

9.6 Partner agencies of the DSAPB should make staff aware of the introduction of these offences.

10. Parties to the Doncaster Joint Agency Agreement

This is an agreement between the DSAPB and its partner agencies as detailed below;

Doncaster Safeguarding Adults Partnership Board

Signed:  Designation: DSAPB Independent Chair Date: 16.9.13

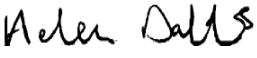
Doncaster Metropolitan Borough Council

Signed:  Designation: Director of Adults and Communities. Date 15.10.13

NHS Doncaster Clinical Commissioning Group

Signed:  Designation: Chief Nurse Date: 16.9.13

Rotherham Doncaster and South Humber NHS Foundation Trust

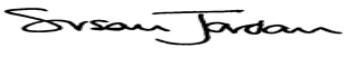
Signed:  Designation: Deputy Chief Executive Date: 27/03/2014

Doncaster and Bassetlaw Hospitals NHS Foundation Trust

Signed:  Designation Acting: Director of Nursing, Midwifery and Quality

Date: 22.04.14

St Leger Homes

Signed:  Designation: Chief Executive Date: 03.02.14

South Yorkshire Fire & Rescue

Signed:  Designation Safeguarding Officer…… Date …15.9.13……