



## **IMO Submission to the Decision Support Service on the Draft Code of Practice on Supporting Decision Making and Assessing Capacity.**

**7<sup>th</sup> January 2022**

The Irish Medical Organisation (IMO) is the trade union and representative body for all doctors in Ireland. Please find below the IMO's initial comments in relation to the Draft Code of Practice on Supporting Decision Making and Assessing Capacity.

### **Chapter 1 – Introduction and overview**

**Co-decision-making agreement:** A person who requires more support than that provided by a decision-making assistance agreement can appoint a co-decision-maker to make certain decisions jointly with them.

This would appear to be a “medical” power of attorney in disguise and the process for appointing is vague. More detailed Guidance is required.

### **Chapter 4 - Capacity**

#### **4.4.1 Capacity assessment in respect of making or varying a co-decision-making agreement or enduring power of attorney**

A capacity assessment is required as part of the process for making, varying or revoking a co-decision-making agreement or enduring power of attorney. The assessment of capacity must be undertaken by a doctor and separately by another healthcare professional. As part of the capacity assessment, the doctor or other healthcare professional will assess whether the relevant person has the capacity to enter into or vary the decision support arrangement. This includes capacity to understand the effect of entering into the arrangement and other options available to them. Where they are satisfied that the person has capacity, the doctor or other healthcare professional will produce a statement of capacity.

As part of the process for making, varying or revoking a co-decision-making agreement or enduring power of attorney, an assessment of capacity must be undertaken by a doctor and separately by another healthcare professional. Both the doctor and the other healthcare professionals should have

specific training in the assessment of capacity. (It should be noted that the definition of a healthcare professional is broad and not limited to regulated healthcare professionals). Both must assess the capacity of the relevant person to enter into or vary the decision support arrangement and both must produce a statement of capacity. However in the likely event of a difference in opinion between the medical professional and another healthcare professional the Guidance is poor.

#### **4.5.2 Capacity assessments where a decision needs to be made**

For all other capacity assessments, no specific person or professional is required to undertake the assessment. Because it is not a medical assessment, it is not a requirement that the person undertaking the assessment be a doctor or healthcare professional. ... The appropriate person to undertake the capacity assessment should be considered on a case-by-case basis in the context of the decision that needs to be made. It may be appropriate in some circumstances to undertake a capacity assessment at the same time as a medical or other healthcare assessment is being undertaken.

Assessment of capacity in patients with declining cognitive impairment is time consuming and may vary from day to day.

While GPs endeavour to provide the most appropriate care to patients based on clinical evidence and best practice, the current GMS contract does not provide for regular assessment of capacity.

## **Chapter 5 - Process for assessing capacity**

### **Section 5.3.2**

#### **The outcome of the assessment is unclear**

If there are still doubts about a relevant person's capacity after an assessment, the person assessing capacity may consider obtaining a second opinion about the relevant person's capacity...

The language is vague and open to misinterpretation, It is unclear, in this instance from whom a second opinion should be sought. It is likely that if a medical condition has triggered the doubt about a relevant person's capacity that a second opinion will be sought from a medical practitioner. Again capacity assessments of individual's with declining cognitive impairment can be time consuming and regular assessments of capacity are not provided for under the GMS contract.

## **Final Remarks**

It is likely that a range of scenarios may arise which are not provided for under the Draft Codes of Practice, It will be important that the Act and the Codes of Practice are regularly reviewed to ensure that medical professionals are not held liable for any unforeseen circumstances that may arise.

Training for all healthcare staff in assessing capacity is vital- as the issues are complex and precise, with a huge potential for miscommunication and a difficult situation could rapidly arise through no real mal-intent on anybody's part. In particular, training should reach new overseas-trained NCHDS and locum doctors arriving into Ireland.