

# The Assisted Decision-Making (Capacity) Act 2015 & Decision Support Service

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# Assisted Decision Making (Capacity) Act 2015



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**Assisted Decision-Making (Capacity) Act 2015**

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- *An Act to provide for the reform of the law relating to persons who require or may require assistance in exercising their decision-making capacity, whether immediately or in the future.*
- Signed into law 30 December 2015
- New framework applies to adults over 18 years
- Not yet fully commenced
- Anticipated 'go-live' mid-2022

# Key Reforms

- abolition of wards of court system for adults under the Lunacy Regulation (Ireland) Act 1871
- repeal of the Marriage of Lunatics Act 1811 (commenced 1 February 2021)
- current adult wards to transition out of wardship within three years of commencement
- statutory functional test of capacity; time-specific and issue-specific
- new statutory guiding principles
- three-tier framework for support
- new tools for advance planning
- establishment of Decision Support Service

# Statutory functional assessment of capacity

- *A person's capacity shall be assessed on the basis of his or her ability to understand at the time that a decision is to be made, the nature and consequences of the decision in the context of available choices*
- Contrast with 'person of unsound mind' in wardship
- No diagnostic criteria or threshold
- With limited exceptions, the Act is not prescriptive about who may assess capacity
- A person lacks capacity if unable to:
  - understand;
  - retain;
  - weigh up information;
  - communicate a decision, with appropriate assistance if necessary
- Already the standard in common law and policy (HSE National Consent Policy, Irish Medical Council Guidelines)

## Terminology

### ○ Relevant Person (RP)

Section 2:

- a) *a person whose capacity is in question or may shortly be in question in respect of one or more than one matter*
- b) *a person who lacks capacity in respect of one or more than one matter, or*
- c) *a person who falls within paragraphs a) and b) at the same time but in respect of different matters*

### ○ 'Decision supporter'

- Decision-making assistant (DMA)
- Co-decision-maker (CDM)
- Decision-making representative (DMR)
- Attorney appointed under an enduring power of attorney (EPA)
- Designated healthcare representative (DHR) appointed under an advance healthcare directive (AHD).

# Guiding Principles

## Including:

- presumption of capacity; already the standard at common law
- support person to make own decisions as far as possible
- an unwise decision does not mean that the person lacks capacity
- dignity, bodily integrity, privacy, autonomy, right to control over own financial affairs and property
- give effect to will and preferences
- act in good faith and for the benefit of the person
  
- no reference to ‘best interests’
  
- United Nations Convention on Rights of Persons with Disabilities



# Categories of Decisions

## ○ Property and affairs including:

- Custody, control and management of property
- Sale, exchange, mortgage, gift etc. of property
- Acquisition of property
- Carrying on of business
- Discharging debt and liabilities
- Providing for other persons
- Conduct of court proceedings
- Applying for benefits

## ○ Personal Welfare

- Accommodation
- Education and training
- Social services
- Healthcare
- “...other matters relating to the relevant person’s wellbeing”

# New three-tier framework

- Arrangements are supervised by Decision Support Service
- Eligibility and suitability criteria apply
- Must apply the guiding principles

## Decision-Making Assistant (DMA)

- Appointed by the relevant person to help obtain and explain information and communicate a decision
- The relevant person still makes the decision

## Co-Decision Maker (CDM)

- Appointed by the relevant person to make specified decisions jointly
- Capacity statements required from medical and other healthcare professional

## Decision-Making Representative (DMR)

- Application to Circuit Court for declaration on capacity, taken by person with bona fide interest in RP
- Court may make decision itself or appoint a DMR
- Court order sets out decisions that the DMR can take on behalf of the RP
- DMR may be appointed from a DSS panel

# Advance Planning: Enduring Power of Attorney



- subject to new reporting requirements and supervision
- capacity statements required from medical and other healthcare professional
- new complaints and investigations procedures
- Amendments to Act (November 2021) propose to remove **treatment** decisions from scope of EPA

# Advance Planning: Advance Healthcare Directives

- made when the person has capacity
- to enable person to be treated according to will and preferences
- to provide healthcare professionals with information about treatment choices
- may appoint a designated healthcare representative
- refusal of treatment as effective as if made contemporaneously
- may extend to life sustaining treatment
- may not include refusal of basic care
- distinction between request and refusal of treatment
- court may determine validity and applicability



## 'Next of Kin myth'

- Incorrect belief that the next of kin already has a legally recognised role as decision-maker
- 57% of survey respondents believed that next of kin can make healthcare decisions and consent to treatment
- 32% believed that next of kin can access bank accounts and manage assets

- Sage Advocacy, *Next of Kin Survey 2018*

# Decision Support Service

## Functions include:

- promote awareness and confidence in the new framework;
- provide information and guidance to organisations and bodies;
- maintain searchable registers of arrangements;
- supervise decision support arrangements;
- complaints and investigations function;
- support organisational change to promote the exercise of capacity;
- maintain panels of persons to carry out certain roles under the Act;
- publish codes of practice
- Central Authority under the Hague Convention for the International Protection of Adults

## What is outside of the remit of the DSS?

### The DSS will not:

- make decisions for people
- directly appoint decision supporters
- manage people's money and property
- regulate and supervise arrangements outside of the Act
- act as regulator of other professionals
- have responsibility for training and advising other professionals

# Codes of Practice

- General guidance code on *supporting decision-making* and assessing capacity
- Guide for health and social care professionals, including guide on advance healthcare directives
- Section 103 (13) *A person concerned shall have regard to a code of practice when performing any function under the Act in respect of which the code provides guidance*
- Codes have been drafted with together with expert writing groups
- Public consultation process is underway

# Pathway to to commencement of DSS

- Establishment project is underway; timebound, costed plan with 20+ sub-projects
- Design Principles:
  - person-centred
  - digital first approach
  - outward-facing accessible service
- Communications and stakeholder engagement ongoing;
- Preparation for panel recruitment;
- DSS proposed 'go live' date mid-2022, subject to dependencies:
  - Assisted Decision-Making (Capacity) (Amendment) Act
  - regulations to provide for procedural and documentary matters
  - other key stakeholders' preparations

# Preparing for commencement

## Questions to consider:

- Will I need access to the new supports under the Act?
  - At present, are decisions taken by another person on my behalf?
  - Can I make these decisions for myself?
  - Who can help me to make my own decisions as far as possible?
  - Will I require a formal arrangement?
  - How can I engage with the DSS to make an arrangement?
  - Who is available and eligible to assume a role in a formal arrangement?
  - Do I need to consider advance planning by way of an EPA or AHD?
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- How can I find out more?



**Thank You**

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This presentation is intended as an overview of certain parts of the Assisted Decision-Making (Capacity) Act 2015 and related matters and should not be relied on as legal advice or opinion