

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

IASW
25.04.22

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Assisted Decision Making (Capacity) Act 2015

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



Number 64 of 2015

Assisted Decision-Making (Capacity) Act 2015

Key Reforms



Abolition of adult wardship under the Lunacy Regulation (Ireland) Act 1871



Repeal of the Marriage of Lunatics Act 1811 (commenced 1 February 2021)



Part 6: 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



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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
- 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: Fitzpatrick & Anor -v- K. & Anor, [2008] IEHC 104 (2008) and policy: HSE National Consent Policy, Irish Medical Council Guidelines



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'
- Ethos of 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

- Eligibility and suitability criteria apply
- Must apply the guiding principles and codes of practice

Decision-Making Assistant

(DMA)

- Appointed by the RP to help obtain, explain information, communicate decision
- RP still makes the decision
- Regulations will provide procedural detail

Co-Decision Maker

(CDM)

- Appointed by the relevant person to make specified decisions jointly
- Formally registered with DSS
- Capacity statements required
- CDM reports to the DSS

Decision-Making Representative

(DMR)

- Application to court for declaration, made by any person with bona fide interest in RP
- Court may make decision or appoint a DMR
- Decision-making representation order (DMRO) is limited in time and scope
- DMR may be appointed from DSS panel
- DMRO is registered with DSS
- DMR reports to the DSS

Advance Planning: Enduring Power of Attorney

To allow persons to plan ahead
while they have capacity and to
appoint decision-makers

EPAs under Powers of Attorney Act 1996
are still valid

2015 Act: new reporting requirements



Capacity statements required
from medical and other healthcare professional

New complaints and investigations procedures
Includes complaints concerning 1996 EPA

Advance Planning: Advance Healthcare Directives



A relevant person who has capacity is entitled to refuse treatment for any reason notwithstanding that the decision:

- *appears to be unwise*
 - *not based on sound medical principles*
 - *may result in death*
-
- 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

Advance Healthcare Directives

Distinction
between request
and refusal
of treatment

Where there is
doubt, court may
determine validity
and applicability

Provisions for
protection of
healthcare
professionals from civil
and criminal liability
Existing criminal law
unaffected

Section 85(7)
exception where
directive-maker is
detained under
Mental Health Act
(subject to
amendment)

'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

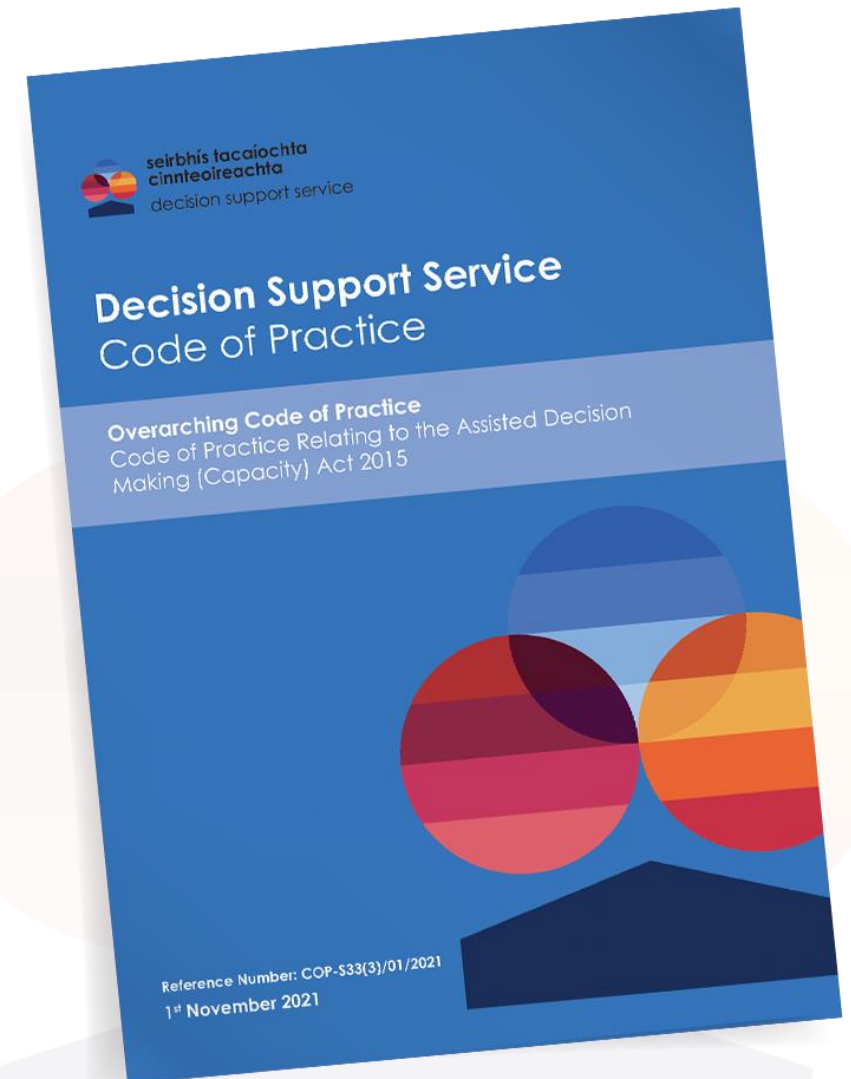
Central Authority
Hague Convention
International Protection of Adults

What is outside the remit of the DSS?



Codes of Practice

- 14 codes of practice, for decision supporters and categories of professionals
- General guidance code on *supporting decision-making* and assessing capacity
- Code for healthcare professionals
- *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 were drafted together with expert writing groups
- Public consultation has taken place
- To be published with consent of the Ministers



Pathway to commencement of DSS

DSS establishment project
working to a time bound,
costed plan.

Design Principles/ vision for service

- person-centred
- digital first approach
- outward-facing accessible service

Communications and
stakeholder engagement
ongoing

External dependencies:

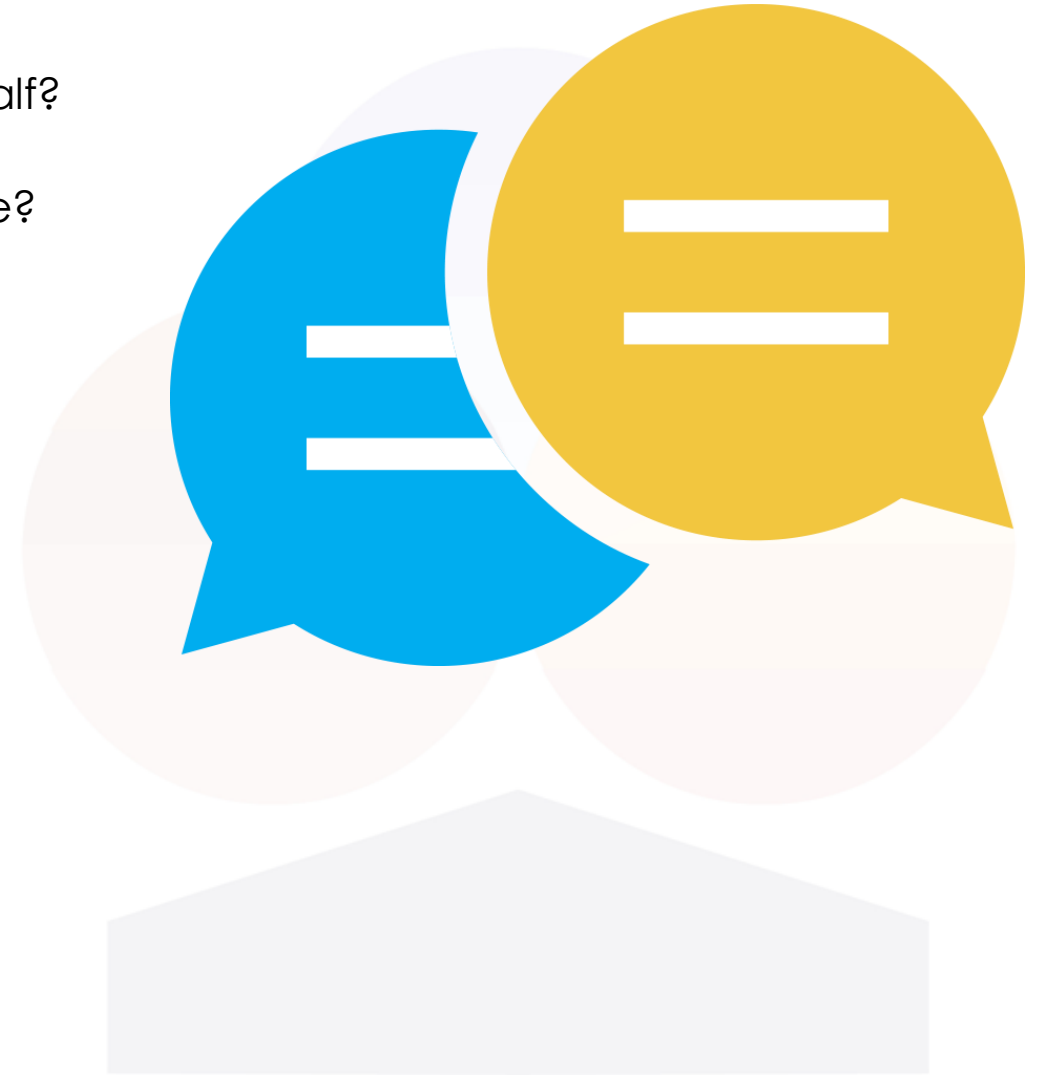
- Assisted Decision-Making (Capacity) (Amendment) Bill
- outstanding regulations
- other stakeholders' preparations

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?
- For current adult wards: do I need to be supported with a review by the wardship court?

How can I find out more?



Thank You



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www.decisionsupportservice.ie

Twitter: @DSS_Ireland

Sign up to our newsletter <https://landing.mailerlite.com/webforms/landing/x8t4e6>

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



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