

A New Model: Pathway to Implementation of the Decision Support Service UCD Centre for Disability Studies 27th August 2018

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Overview

- Concepts of Capacity
- Key reforms under 2015 Act
- New Decision Support Structures
- Advance Planning
- Establishment of DSS / Director's Role
- Pathway to Implementation / Codes of Practice

Assisted Decision-Making (Capacity) Act 2015

Signed into law *30th December 2015; largely not yet commenced*

“An Act to provide for the reform of the law relating to persons who require or may require assistance in exercising their decision-making, whether immediately or in the future”

Abolishes Wards of Court system

Legal Capacity / Decision-Making Capacity

“The loss by an individual of his or her mental capacity does not result in any diminution of his or her personal rights, recognised by the Constitution... The ward is entitled to have all of these rights respected, defended, vindicated and protected from unjust attack and they are in no way lessened or diminished by reason of her incapacity”.

-Hamilton C.J.

In Re a Ward of Court (No.2) 1996 2 IR

Convention on the Rights of Persons with Disabilities (UNCRPD)

- ❑ State parties:
 - undertake to ensure and promote the **full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination** of any kind on the basis of disability (Art. 4);
 - reaffirm that persons with disabilities **have the right to recognition everywhere as persons before the law** (Art 12.1);
 - shall recognise that persons with disabilities **enjoy legal capacity on an equal basis with others in all aspects of life** (Art 12.2);
 - shall ensure that **all measures** that relate to the **exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse** in accordance with international human rights law (Art 12.4)

Assessing Capacity - 'how not to':

Status Approach

- ❖ *'You are someone with an intellectual disability or dementia or a brain injury and therefore, you cannot have capacity'.*

Outcome Approach

- ❖ *'What you want to do is so unwise, so contrary to prudent advice, that you must lack the capacity to decide to do it'.*

Assisted Decision-Making Capacity Act 2015

- ❑ Section 3: Time-specific, Issue-specific test:
 - Understand
 - Retain
 - Weigh Information
 - Communicate decision

- ❑ Fitzpatrick & Anor –v- K. & Anor, [2008] IEHC 104 (2008)

- ❑ HSE: National Consent Policy: “...*cognitive deficits are only relevant if they impact on decision making.*”

- ❑ Contrast ‘all or nothing’ status approach of Wardship
 - Section 2 Lunacy Regulation (Ireland) Act 1871
*“a person of **unsound mind** and incapable of managing himself or her affairs”.*

Incapacity need not have a medical cause

Compare:

- ❑ Mental Capacity Act of 2005 (England and Wales)
 - Section 2.(1) defines incapacity as deriving from '*an impairment or disturbance in the functioning of the mind or the brain*'

Section 8: Guiding Principles for Interveners

- Presumption of Capacity
- Steps must be taken to maximise capacity
- 'Right to be unwise'
- Minimum intervention
- Will and preference

- Not 'Best Interests'

Decisions: section 2

Property and Affairs

- Management of property
- Carrying on of business
- Contracts and court proceedings
- Applications for housing or other benefits

Personal Welfare

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

Informal Decision-making

❑ Compare: Mental Capacity Act of 2005 (England and Wales)

1. If a person (“D”) does an act in connection with the care or treatment of another person (“P”), the act is one to which this section applies if—
 - a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and
 - b) when doing the act, D reasonably believes—
 - i. that P lacks capacity in relation to the matter, and
 - ii. that it will be in P’s best interests for the act to be done.
2. D does not incur any liability in relation to the act that he would not have incurred if P—
 - a) had had capacity to consent in relation to the matter, and
 - b) had consented to D’s doing the act.

❑ No equivalent provision in 2015 Act

Three Tiers of Decision Supporters

Decision-Making Assistant

- Lowest and least formal of the three levels
- Appointed by Person when they consider capacity is or may shortly be called into question
- Decision is still by the appointer

Co-Decision Maker

- Appointed by Person when they consider capacity is or may shortly be called into question
- Make specified decisions jointly with the appointer.
- Section 18(5): 'duty of acquiescence'

Decision-Making Representative

- Appointed by the Circuit Court following an application under Part 5
- Appointment follows on a declaration of incapacity by the Court, only if the Court considers that a Co-Decision Maker will not suffice.
- Substituted decision-making

Procedures and Standards for Decision Supporters

- Eligibility criteria
- Grounds for disqualification
- Nullity
- Procedures for notification/registration
- Performance of functions
- Reporting duties
- Complaints and Investigations

- Criminal sanction:
 - Offences of fraud, coercion, undue influence
 - Ill-treatment or wilful neglect
 - Fines of up to €50,000 and/or 5 years' imprisonment

Advance Planning: Enduring Power of Attorney

- EPAs created under Powers of Attorney Act 1996 remain valid
- EPAs extended: authority to make decisions of a medical nature (previously not included in 'personal care' under 1996 Act)
- Shall not include refusal of life-sustaining treatment
- Restrictions on restraint
- New periodic reporting requirements
- Complaints and Investigations
- Offences of fraud, coercion and undue influence

Advance Planning: Advance Healthcare Directive

☐ Part 8 of 2015 Act/ Minister for Health

Section 83

(1) *The purpose of this Part is to—*

- (a) *enable persons to be treated according to their will and preferences, and*
- (b) *provide healthcare professionals with information about persons in relation to their treatment choices.*

(2) *A relevant person who has attained the age of 18 years and who has capacity is entitled to refuse treatment for any reason (including a reason based on his or her religious beliefs) notwithstanding that the refusal—*

- (a) *appears to be an unwise decision,*
- (b) *appears not to be based on sound medical principles, or (c) may result in his or her death.*

Advance Planning: Advance Healthcare Directive

Section 86 (1)

“A specific refusal of treatment... as effective as if made contemporaneously by the directive-maker when he or she had capacity”

Distinguish refusal of treatment and request for treatment

May apply to life sustaining treatment

May not apply to withdrawal of basic care

Designated Healthcare Representatives

Role of the Courts to decide whether valid and applicable

Section 85 (7)(a): AHD shall be complied with unless treatment is regulated by Part 4 of the Mental Health Act 2001

Decision Support Service

- ❑ Integrated office within the Mental Health Commission
- ❑ Part 9: Director's Functions include:
 - To promote public awareness of the Act and matters relating to the exercise of capacity, including UNCRPD
 - To promote public confidence around new processes
 - To provide information to relevant persons in relation to their options
 - To provide information to decision supporters
 - To supervise compliance by decision supporters
 - To provide information and guidance to organisations and bodies in relation to their interaction with relevant persons and decision supporters
 - To identify and recommend changes in practice to promote the exercise of capacity
 - Duties to report to Minister for Health and Minister for Justice and Equality

Complaints and Investigations

- ❑ **96. (2)** In response to complaint or on own initiative:
 - (a) **summon witnesses** to attend before him or her,
 - (b) **examine on oath** the witnesses attending before him or her,
 - (c) **require** any such witness to **produce** to him or her **any document** in the power or control of the witness,
 - (d) by notice in writing, **require any person** to provide him or her with such **written information** as the Director considers necessary to enable him or her to carry out his or her functions.

- Non-compliance is a summary offence

- ❑ **95. (2)** *The Director shall have all such powers as are necessary or expedient for, or incidental to, the performance of his or her functions*

Pathway to Implementation

- Inter-departmental Steering Group established 2016
- Director recruited and in office since October 2017
- Budget allocated by DJE for 2018
- Business Process Analysis and Project Management in place April 2018
- Regulations to be drafted by DJE and DoH
- Panels to be established:
 - Decision Making Representatives
 - Special Visitors
 - General Visitors
 - Court Friends
- Amendments to the 2015 Act
- Disability (Miscellaneous Provisions) Bill to amend other legislation
- Part 13: Deprivation of Liberty Safeguards/Prohibition of Chemical Restraint
 - A.C. -v- Cork University Hospital & Ors (Hogan J., Court of Appeal 2nd July 2018)

Codes of Practice

Section 103 (13)

“A person concerned shall have regard to a code of practice ... when performing any function under this Act in respect of which the code provides guidance.”

National Disability Authority drafting Non-Healthcare Codes

AHD Multidisciplinary Working Group, appointed by Minister for Health

- Draft Code on how to make an AHD
- Draft Code of Practice for DHRs
- Draft Code of Practice for Health and Social Care Professionals on AHDS

Section 103 (3): consultation process

Approve and publish codes of practice with consent of Ministers

Concluding Comments

Thank You