

UCD Centre for Disability Studies

Assisted Decision-Making (Capacity) Act 2015

Overview

- Human Rights Obligations
- *Assisted Decision-Making (Capacity) Act 2015*
 - Who is the legislation for
 - Capacity and how it is to be construed
 - Overarching Guiding Principles
 - Decision Support Arrangements
- Discussion

Human Rights Obligations

- Constitution of Ireland
 - Voice of the Person must be heard (AC case Supreme Court Oct 2019)
- The European Convention on Human Rights
 - European Convention on Human Rights Act 2003
- UN Convention on the Rights of Persons with Disabilities 2006
(signed by Ireland in 2007, ratified 2018)
- Council of Europe *Recommendation on Principles concerning Powers of Attorney and Advance Directives for Incapacity* September (2009)
- Council of Europe *Recommendation on the Promotion of Human Rights of Older Persons* (2014)

UN Convention on the Rights of Persons with Disabilities 2006

- 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)
- State Parties recognise that all persons **are equal** before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law (Art 5)
- State Parties shall recognise that persons with disabilities **enjoy legal capacity** on an equal basis with others in all aspects of life (Art 12.2)
- State Parties shall take appropriate measures to provide access by persons with disabilities **to the support they may require** in exercising their legal capacity (Art 12.3)

UN Convention on the Rights of Persons with Disabilities 2006

State Parties 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. Such safeguards shall ensure that measures relating to the exercise of legal capacity –

- respect the rights, will and preferences of the person,
- are free from conflicts of interest and undue influence,
- are proportional and tailored to the person's circumstances,
- apply for the shortest time possible and
- are subject to regular review by a competent, independent authority or judicial body.

The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests. (Art 12.4)

Assisted Decision-Making (Capacity) Act 2015

- Enacted in December 2015 signed by President on 30 December 2015
 - 12 Parts 146 Sections
 - Commencement Orders October 2016
 - Establishment of Office of Director Decision Support Service (Director appointed in October 2017)
 - Establishment of multi-disciplinary group to draft Code on Advance Healthcare Directives
 - Codes and practice guidelines drafted by NDA and HSE
 - Regulations
 - Rules of Court

Further legislation:

- Amendments to 2015 Act – by end of 2019
- Protection of Liberty Safeguards – Q1 2020

Preliminary Comments

- Assisted Decision-Making (Capacity) Act 2015
 - Has very wide application
 - Applies to all people, organisations, businesses
 - Directly or indirectly affects all of us in our personal and professional lives
- What is it all about
 - Respecting each person as an individual with personal rights
 - It is person centred not organisation centred

Regulations/Codes of Practice for Professionals/Service Providers

- Assisted Decision-Making (Capacity) Act 2015
 - Is primary legislation and takes precedence over regulations (secondary legislation)
 - Existing professional regulations will require amendment and updating
 - All Policies must comply with the provisions of the Act
- ‘Best Interests’ no longer appropriate
 - Will and preference dominant focus
 - Autonomy and self-determination

Who is the ADM(C)legislation for?

Relevant person

- A person whose **decision-making capacity** is in question or may shortly be in question in respect of one or more than one matter
- A person who **lacks capacity** in respect of one or more than one matter
- A person whose capacity is in question or may shortly be in question in respect of one or more than one matter and who lacks capacity in respect of one or more than one matter **at the same time** but in respect of **different matters**

Capacity to make Decisions

Presumption of Capacity

- Common law principle now enshrined in legislation to state:
 - *It shall be presumed that a person has capacity in respect of the matter concerned unless the contrary is shown in accordance with the provisions of the Act*
- Onus/Burden of proof of lack of decision-making capacity lies with person who is alleging lack of capacity
- Applies to all regardless of physical or mental health/disability/age

Definition of Capacity/Functional Capacity

Act provides:

- A person's decision-making capacity is to be construed functionally
- **Capacity** - ability to understand **at a time** a decision has to be made, the nature and consequences of **the decision** to be made by a person **in the context of available choices at that time**

Decision-Making Capacity is a Legal Test

Legal Test: Decision-making capacity = Not mental capacity

- **It is the ability to make a decision**
- **Right to consent and to refuse**

Medical Test: Mental capacity = Medical assessment of mental state /diagnostic test

- **Used to determine appropriate treatment/care**

(Direct communication with and support for the relevant person is necessary in order to fully comply with the legislation)

Lack of Capacity

- **A person lacks of capacity to make a decision if he or she is unable to –**
 - Understand the information relevant to decision
 - Retain that information **long enough to make a voluntary choice**
 - Use or weigh that information as part of the process of making the decision or
 - Communicate decision by any means (including sign language/assistive technology) or if the implementation of the decision requires the act of a third party

If a person cannot undertake any one of these four aspects of the decision-making process, then he or she is unable to make a decision.

Support must be given to maximise decision-making

- **Capacity** – Person is not to be regarded as unable to understand **information relevant to a decision** if they are able to understand an explanation of it given **in a manner appropriate to his/her circumstances** (clear language, visual aids or any other means)
- The fact that a person is able to retain **information relevant to a decision** for a short period only does not prevent him/her from being regarded as having capacity to make the decision
(**Prompts may be necessary to assist**)
- Obligation to support a relevant person

What information?

- **Relevant information:** includes information that the person is entitled to and that is or are required in relation to the making of a **decision**
- **Information relevant to decision includes** information about the reasonably foreseeable consequences (**individual circumstances**)
 - of each of the available choices at the time the decision is made
 - or failing to make the decision

(Consequences may be different for different people)
- Information must be given in a manner appropriate to the person's circumstances – accessibility

Assessing Capacity

- The fact that a person lacks capacity in respect of a decision on a particular matter **at a particular time** does not prevent him/her from being regarded as having capacity to make decisions on the same matter **at another time (Time specific)**
- The fact that a person lacks capacity of a decision **on a particular matter** does not prevent him/her from being regarded as having capacity to make decisions **on other matters (Issue specific)**

(When there are doubts about capacity, assessment should be done at highest level of functioning and only if it is necessary.)

Support must be given to the person to maximise their decision-making ability before assessing his or her capacity)

When is capacity assessed?

Who assesses it?

- **When:** In line with functional assessment – time specific, issue specific and **only when it is necessary** to assess after all supports have been given
- **Who:**
 - **Will depend on particular decision to be made**
 - **Generally it will be the person who needs the decision to be made**
 - Financial transaction – *financial service provider*
 - Legal transaction - Transferring Property, EPA, Will - *solicitor*
 - Tax returns – *Accountant*
 - Consent to medical treatment – *healthcare professional*
 - Day to day – *carer*



Guiding Principles

Guiding Principles

- It shall be presumed that the relevant person has capacity in respect of the matter unless the contrary is shown
 - Should not assume that a person lacks capacity because they have a medical condition or disability or because of old age
- Relevant person shall not be considered as unable to make a decision **unless all practicable steps have been taken, without success, to help him or her to do so**

(What information is required, how is it to be presented/communicated)

Guiding Principles

- A relevant person shall not be considered an unable to make a decision in respect of a matter concerned merely by reason of making, having made, or being likely to make an **unwise decision**

Everyone has their own values, beliefs and preferences which may not be the same as those of other people and they cannot be treated as lacking capacity for that reason

- There shall be no intervention unless it is necessary to do so having regard to the individual circumstances of relevant person

Guiding Principles

- Have due regard to the need to respect the right of the relevant person to dignity, bodily integrity, privacy, autonomy and control over his/her financial affairs and property

Guiding Principles

- Permit, encourage and facilitate the relevant person to **participate** or to improve his or her ability to participate, as fully as possible in the intervention
- Give effect, in so far as practicable, to the past and present **will and preferences**, in so far as are reasonably ascertainable ('Will and preferences' not 'best interests')
- Take into account:
 - the **beliefs and values** of the relevant person
 - Take into account any other factors which the person would be likely to consider if able to do so

Guiding Principles

- Unless inappropriate/impracticable to do so, **consider the views of:**
 - Any person named by the relevant person to be consulted
 - Any nominated decision-maker
- **Act at all times in good faith and for the benefit of the relevant person**
- Consider all other circumstances of which he or she is aware and which it would be reasonable to regard as relevant



Decision Support Arrangements

Decision-Making Mechanisms

- Planning in Advance (person with capacity)
 - **Advance Healthcare Directive (AHD)**
 - **Enduring Power of Attorney (EPA) (to include some healthcare decisions)**
- When capacity is in question or may shortly be in question
 - **Decision-Making Assistance Agreement (DMAA)** (person makes decision)
 - **Co-Decision-Making Agreement (CDMA)** (decision made jointly)
- When person lacks capacity to make a decision (court application)
 - **Decision-Making Representation Order** (court or another person makes decision)

Functions of Decision-Making Assistant

- Assist the appointer (relevant person) to obtain appointer's relevant information (required in relation to a relevant decision)
- [Assist] the appointer by explaining relevant information and considerations relating to a relevant decision
- Ascertain the will and preference of the appointer on a matter the subject or to be the subject of a relevant decision and assist the appointer to communicate them
- **Assist** the appointer to make and express a relevant decision
- Endeavour to ensure that the appointer's relevant decisions are implemented
- **NB: Relevant person is still making decision**

Functions of a Co-Decision-Maker

- Advise - by explaining **relevant information** and considerations relating to a **relevant decision**
 - Ascertain the **will + preference** of the appointer on a matter the subject of or to be the subject of a **relevant decision** + assist the appointer with communicating the appointer's will and preference
 - Assist the appointer to obtain appointer's relevant information
 - Discuss the known alternatives and likely outcomes
 - **Make a relevant decision jointly with appointer**
 - Make reasonable efforts to ensure that a relevant decision is implemented as far as practicable
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- **NB: Relevant person is still making decision**

Conclusion –

- Need to respect each person as an individual human being with their own individual rights
- Support must be given to a person to enable him or her to exercise his or her rights
- Requirement that personal autonomy and right to self-determination be respected
- Requirement that each person's capacity to make decisions be maximised
- While an important obligation is placed on all of us to respect a person's rights there is also an obligation to have appropriate safeguards to prevent abuse

Thank You



Discussion