



The Assisted Decision-Making (Capacity) Act 2015

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Introduction

The Assisted Decision-Making (Capacity) Act 2015 (“the Act”) was enacted on 30 December 2015 and is due to be commenced by Ministerial Order during 2016. The Act substantially reforms the law in relation to decision-making capacity in Ireland, through the introduction of a functional test for capacity, together with various types of interventions for persons whose capacity is or may shortly be in question; the replacement of the current wards of court system; the establishment of the Decision Support Service; the reformation of the law in relation to enduring powers of attorney; and the introduction of a statutory framework for advance healthcare directives, among other matters.

Capacity

The Act gives statutory force to the presumption of capacity that has long existed in Ireland at common law but has frequently been

disregarded in practice. Pursuant to s3(1) of the Act, a person’s capacity is to be assessed on a functional basis, i.e. the person’s ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time. Therefore, the functional test for capacity is both issue specific and time specific. Section 3(2) elaborates and provides that a person lacks capacity to make a decision if he or she is unable to:

- › understand the information relevant to the 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 the decision.

Importantly, a person should not be said to lack capacity if he or she can retain the information relevant to a decision for only a short period of time or has capacity to make some decisions but lacks capacity to make others.

Types of Decision-Making Intervention

The legislation establishes a framework for various types of intervention that may take place in respect of a “relevant person”. A “relevant person” is defined in the Act as being a person:

- › whose capacity is in question or may shortly be in question in respect of one or more than one matter,
- › who lacks capacity in respect of one or more than one matter or
- › whose capacity is in question or may shortly be in question or who lacks capacity at the same time but in respect of different matters.¹

The type of intervention to be availed of will depend on the level of capacity of the relevant person. The three types of intervention are:

- › assisted decision-making,
- › co-decision-making and
- › court-appointed decision-making representative.

Assisted decision-making

Where a person considers that their capacity is in question or may shortly be in question, that person can enter into a decision-making assistance agreement whereby they appoint another person to assist them in making one or more decisions in relation to their personal welfare or property and affairs or both.² The Minister for Justice and Equality is due to make Regulations prescribing the form of decision-making assistance agreements and the formalities for the execution, variation and revocation of same.

The functions of a decision-making assistant include assisting the appointer by obtaining information relevant to the decision, explaining such information to the appointer, assisting the

appointer to make and express a relevant decision and endeavouring to ensure that the appointer’s decisions are implemented. Any decision taken by the appointer with the assistance of a decision-making assistant is deemed to be taken by the appointer only.

The execution, variation or revocation of a decision-making assistance agreement must be notified to the Director of the Decision Support Service and such other persons as are specified in the Act.³

Co-decision-making

Where a person considers that their capacity is in question or may shortly be in question, that person may appoint another person (such as a relative or a person with whom a relationship of trust exists) to jointly make one or more decisions with them in relation to their personal welfare or property and affairs or both. The appointment of a co-decision-maker must be done in writing through a co-decision-making agreement (the form of which is to be prescribed in Regulations by the Minister for Justice and Equality) and must be signed by the appointer, the co-decision-maker and two witnesses.⁴

The functions of a co-decision-maker include assisting the appointer to obtain relevant information, explaining such information to the appointer, discussing the alternatives and likely outcome of a relevant decision, making the relevant decision jointly with the appointer and making reasonable efforts to ensure that the appointer’s decisions are implemented.⁵ The principal difference between the decision-making assistance procedure and the co-decision-making procedure is that decisions taken by the appointer with a co-decision-maker are deemed to be taken jointly by the parties.

A co-decision-making agreement will not take effect until such time as it is registered with the Director of the Decision Support Service, which must be done within five weeks of the execution of the agreement. The Act also requires notice of an application to register a co-decision-making agreement to be given to a number of parties, to include the appointer’s spouse/civil partner/cohabitant and any children aged 18 years or older.

¹ Section 2 Assisted Decision-Making (Capacity) Act 2015.

² Section 10(t) Assisted Decision-Making (Capacity) Act 2015.

³ Section 10(4)(g) Assisted Decision-Making (Capacity) Act 2015.

⁴ Section 17 Assisted Decision-Making (Capacity) Act 2015.

⁵ Section 19 Assisted Decision-Making (Capacity) Act 2015.

A register of co-decision-making agreements will be established and made available for public inspection and may be made available for inspection by members of the public in certain circumstances. The Director of the Decision Support Service will review each co-decision-making agreement on the first anniversary of the agreement and thereafter at intervals of three years.

A co-decision-making agreement can be varied where both parties consent and the approval of the Director has been obtained. Either party may revoke a co-decision-making agreement at any time. A revocation must be notified to the Director, in order that the register may be updated.

Decision-making representative

Where a person lacks capacity to such an extent that they are unable to make decisions on their own behalf even with the assistance of a decision-making assistant or a co-decision-maker, the court may intervene and make one of the following orders:

- › an order making the relevant decision on behalf of the person if the court is of the view that the matter is urgent or

- › an order appointing a suitable person(s) to be a decision-making representative for the relevant person for the purpose of making one or more decisions on behalf of the relevant person in relation to their personal welfare or property and affairs or both.⁶

Before making any order, the court is obliged to have regard to the terms of any advance healthcare directive or enduring power of attorney that the person has put in place.

The Act provides that the powers of a decision-making representative are to be as limited in scope and duration as is necessary in the circumstances. In exercising his or her functions, the decision-making representative is obliged, as far as possible, to ascertain the will and preferences of the relevant person.

Each decision-making representative is obliged to file a report with the Director of the Decision Support Service annually.⁷ The Act further provides that the court shall review any orders made as regards capacity within one year of such order, or within three years where it is unlikely that the person will regain capacity.

Decision-making interventions at a glance

Table 1: Comparison of features of the three decision-making interventions

	Decision-making assistant	Co-decision-maker	Decision-making representative
Appointed by	Appointer (person whose capacity is/may be in question)	Appointer (person whose capacity is/may be in question)	Court
Appointed through	Decision-making assistance agreement	Co-decision-making agreement	Court order
Decisions made	By the appointer alone (with the assistance of the decision-making assistant)	Jointly by the appointer and the co-decision-maker	By the decision-making representative alone

Guiding Principles

Section 8 of the Act sets out a number of guiding principles to apply in the case of any intervention. The guiding principles seek to protect the rights and dignity of a relevant person. They also seek to limit the nature and scope of any intervention, so that it would cause minimal infringement on the rights and freedom of action of a relevant person.

Director of Decision Support Service

The Act provides that the Mental Health Commission shall appoint a person to act as the Director of the Decision Support Service⁸ (“the Director”). The role of the Director is varied and includes promoting public awareness of the Act; providing information to relevant persons regarding their choices for exercising their capacity under the Act; and supervising decision-making

⁶ Section 38 Assisted Decision-Making (Capacity) Act 2015.

⁷ Section 46 Assisted Decision-Making (Capacity) Act 2015.

⁸ Section 94 Assisted Decision-Making (Capacity) Act 2015.

assistants, co-decision-makers, decision-making representatives and attorneys in the performance of their functions. The Director is afforded broad investigative powers under the Act, which will allow him or her to investigate fully any complaint received in respect of the actions of a supporting decision-maker.

Wards of Court

Part 6 of the Act makes provision for a review of all existing wards of court within at least three years from the date of commencement of the Act. Alternatively, the ward himself or herself or a person having a sufficient interest in a ward's welfare may apply to the court for a declaration to be made in respect of the ward's capacity.

After an assessment, if the court finds that the ward does not lack capacity, the ward shall immediately be discharged from wardship. If the court makes a declaration that the ward lacks capacity, it shall appoint either a co-decision-maker or a decision-making representative, depending on the extent to which the ward lacks capacity.

Planning for Incapacity

It is advisable for persons to plan ahead for the possibility that they will at some point in the future lack capacity to make decisions on their own behalf. This could be done by implementing an enduring power of attorney (EPA) or an advance healthcare directive (AHD), whereby the person nominates somebody to take decisions on their behalf and in which the wishes of the person are clearly outlined.

Enduring powers of attorney

Part 7 of the Act deals with EPAs, which allow a person (the donor) to appoint somebody to act as their attorney and to take decisions on their behalf in relation to their personal welfare or property and affairs or both, in the event that the donor should lack capacity in the future.

Once this part of the Act is commenced, all EPAs must be created in accordance with the formalities under the Act and no new EPAs can be created under the Powers of Attorney Act 1996 ("the 1996

Act"). However, EPAs that were previously created under the 1996 Act will continue to have legal effect.

The Act makes a number of changes to the rules regarding EPAs. For example, EPAs created under the 1996 Act require a statement by a single medical practitioner certifying that the donor had capacity to make the EPA at the time of execution. EPAs created under the new Act will require two medical statements – one by a registered medical practitioner and one by a healthcare professional (such as a social worker, language therapist etc.) – certifying as to the capacity of the donor. Two witnesses to the

execution of an EPA will be required under the new Act, in contrast to a single witness under the 1996 Act.

One of the seminal changes to the law regarding EPAs introduced by the Act is the obligation on attorneys acting under an EPA that is registered with the Director to report first to the Director within three months of the registration of the EPA (registration occurs only when the donor has been certified as having lost capacity) and then at annual intervals. The report must include a schedule of the donor's assets and liabilities and projected income and expenditure.⁹

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Advance healthcare directives

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AHDs may also contain requests for specific treatment. Requests for treatment are not legally binding but should be taken into consideration by the healthcare professional. Where a request for medical treatment is refused, the healthcare professional should record the reasons for non-compliance.

In addition to making an AHD in writing, a person may appoint an individual as their “designated healthcare representative” to exercise powers contained in the AHD, including the power to advise and interpret the person’s will and preferences regarding treatment and the power to consent to or refuse treatment (including life-sustaining treatment) on behalf of the person.

Conclusion

The Act introduces welcome changes in the law on capacity in Ireland, particularly through the introduction of various

decision-making interventions that seek to safeguard the rights of persons whose capacity is in question and the abolition of the outdated wards of court system.

Although the Act was signed into law at the end of 2015, there are a number of steps that must be taken before it is commenced, such as the establishment of the office of the Decision Support Service and the publishing of codes of practice. It is anticipated that the Act will be commenced by the end of 2016.

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