Policy and Principles in the Assisted Decision-Making (Capacity) Act 2015
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IMHLA Annual Conference
UCC
9 April 2016

Presentation Overview

- Traditional Principles
- Challenges to the traditional view
- UN CRPD
- Legislating for Capacity
- Determining Capacity in ADMA 2015
- Guiding Principles in ADMA 2015
Features of the Traditional Approach

Making Decisions

Objective evaluation of best interests by court or experts
No role for the person
Challenges to the Traditional View

- Empirical evidence: range of capacities
- Scandals/abuses
- Greater focus on rights

International Human Rights

- Convention on the Rights of Persons with Disabilities
  - Into Force: 3 May 2008
  - Signatories: 160
  - Ratifications: 162
Art. 12 CRPD

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States 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(4)

States 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 of conflict 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 and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.
Meaning of Art. 12?

“[The functional approach] is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind.”

“...and preferences’ paradigm must replace the ‘best interests’ paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.”

Legislating for Capacity

Law Reform Commission 2003-2006
Heads of Capacity Bill 2008
Assisted Decision-Making (Capacity) Bill: published July 2013
Signed by President: 30 December 2015
Commencement ??
Link to CRPD ratification

Roadmap to Ratification (2015)

Other Legislative change
- Reform of Mental Health Act
- Sexual Offences Bill
- Equality-Disability Misc. Provisions Bill

Proposed Declarations
- Art 12
- Art 14

ADMA in Outline

Key Elements
- Complex: 146 sections
- Extensive provision for Regulations/Codes of Practice
- Developed by National Disability Authority
- Removal of nomenclature of “Best interests”
- Introduction of range of supported decision-making measures
Determining Capacity: The Basics: s. 3

- Functional/Task specific
- Abilities-based
- Additional Protections

The Functional Approach

- Specific assessment
- Time decision to be made
- Nature and consequence of decision
- Context of available choices
Relevant Abilities: s.3(2)
- To understand the information relevant to the decision
- To retain that information long enough to make a voluntary choice
- To use or weigh that information as part of the process of making the decision
- To communicate decision (whether by talking, writing, using sign language, assisted technology or any other means) or, if the implementation of the decision requires the act of a third party, to communicate by any means with that party

Information
- Entitlement to explanation of information in a way appropriate to circumstances: s. 3(3)
- What information?: s. 3(7)
  - Includes information about the reasonably foreseeable consequences of
    - Each of the available choices at the time the decision is made, or
    - Failing to make a decision
Changes from the Common law?

*Fitzpatrick v. K (2008)*

- Variable Standard?
  - Constitutional linkage

- Inclusion of retention
  - Link to ‘voluntary choice’

- No specific requirement to ‘believe’
  - Incorporated into ‘use and weigh’?

- Communication
  - Any means to a third party?

Additional Protections

Fact person unable to retain for a short period does not prevent him/her from being regarded as having capacity: s. 3(4)

Fact person lacks capacity on a particular matter at a particular time does not prevent him/her from being regarded as having capacity at another time: s. 3(5)

Fact person lacks capacity on a particular matter does not prevent him/her from being regarding as having capacity on other matters: s. 3(6)
When is Determination required?

- Statutory requirement:
  - Entry into/variation of Co-decision-making agreement
  - Review of Wards’ capacity (within 3 years)
  - Creation of EPA

- Regulations/Codes?
  - Court power to declare capacity/lack of capacity
    - whether without co-decision-maker/generally

New concept

- Capacity in question or may shortly be in question

- Reliance on person’s own assessment

- Relevant to
  - Decision-making Assistance Agreement
  - Co-Decision-making Agreement
Guiding Principles: s. 8

Apply to all interventions in respect of a ‘relevant person’

Relevant person:
Person whose capacity is in question or may shortly be in question in respect of one or more matters
Person who lacks capacity in respect of one or more matters

Who is an ‘Intervener?’

- The Circuit or High Court
- Decision-making assistant; co-decision-maker; decision-making representative; attorney or designated healthcare representative
- Director of Decision Support Services
- Special Visitor or General Visitor
- Healthcare professional
Wide range of principles

Those are my principles.
If you don't like them I have others.
Groucho Marx

Presumption of Capacity

Presumption that a ‘relevant person’ whose capacity is in question or may shortly be in question has capacity in respect of the matter concerned unless the contrary is shown in accordance with the Act
Requirement for Support

A person whose capacity is in question or may shortly be in question 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 is practicable?

Unwise Decisions

A person whose capacity is in question shall not be considered as unable to make a decision merely by reason of making, having made, or being likely to make, an unwise decision.
Need for Intervention

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

What is ‘necessary’?

Least restrictive alternative

Any intervention must be made in a manner that minimises the restriction of the person's rights and freedom of action.
Respect for Rights

An intervention must have due regard to the need to respect the person’s right to

• Dignity
• Bodily Integrity
• Privacy
• Autonomy
• Control over financial affairs and property

Proportionate

An intervention must be proportionate to the significance and urgency of the matter
Limited Duration

An intervention must be as limited in duration in so far as is practicable after taking into account the particular circumstances of the matter the subject of the intervention.

Obligations in Making the Intervention

Mental Capacity Act 2005

WELCOME BACK

NOW GET BACK TO WORK
Participation

The intervener, in making an intervention must:
Permit, encourage and facilitate, in so far as is practicable, the person to participate, or to improve his or her ability to participate, as fully as possible in the intervention.

Will and preferences

The intervener, in making an intervention must:
Give effect, in so far as is practicable, to the past and present will and preferences of the relevant person, in so far as that will and those preferences are reasonably ascertainable.
**MCA ‘Wishes and feelings’**

- *ITW v Z [2009] EWHC 2525 (Fam)*

Relevant circumstances:
- Degree of P’s incapacity
- Strength and consistency of P’s views
- Possible impact on P of knowledge that her wishes and feelings are not being given effect to
- Extent to which P’s wishes and feelings are rational, sensible, responsible and pragmatically capable of sensible implementation
- Extent to which P’s wishes and feelings can properly be accommodated within the court’s overall assessment of what is in her best interests

*Westminster City Council v Manuela Sykes [2014] EWCOP B9*

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**Beliefs and Values**

The intervener, in making an intervention must:

Take into account the beliefs and values of the person (in particular those expressed in writing), in so far as these are reasonably ascertainable

And

Any other factors which the person would be likely to consider if s/he were able to do so, in so far as these are reasonably ascertainable
Consultation

Who cares what other people think?

Unless s/he **reasonably** considers it is not appropriate or practicable to do so:

The intervener must consider the views of:

Any person named by the person as a person to be consulted on this matter or a similar matter

And

Any decision-making assistant, co-decision-maker, decision-making representative or attorney

Good Faith/Benefit

The intervener, in making an intervention must:

Act at all times in good faith and **for the benefit** of the relevant person
All circumstances

The intervener, in making an intervention must:

Consider all other circumstances of which s/he is aware and which it would be reasonable to regard as relevant

Views of Others

The intervener, in making an intervention may consider the view of:

Any person engaging in caring for the relevant person

Any person who has a bona fide interest in the welfare of the relevant person

Healthcare professionals
Recovery?

In the case of an intervention where the person lacks capacity, regard must be had to:

- The likelihood of recovery of the person’s capacity in respect of the matter
- The urgency of making the intervention prior to the recovery

Information Limits

The intervener, in making an intervention Shall not:

- Attempt to obtain relevant information that is not reasonably required for making a relevant decision
- Use relevant information for a purpose other than in relation to a relevant decision

Must:

- Take reasonable steps to ensure that relevant information is kept secure from unauthorised access, use or disclosure and is safely disposed of when s/he believes it is no longer required

Relevant information = Personal records of RP or other information that the RP is entitled to and is required in relation to relevant decision
Principles into Practice?

- Circuit Court: Need for reporting mechanisms
- HCPs: Need for audit

A video of this talk is available. Follow the links at
www.ucc.ie/law/docs/mentalhealth/conferences/capacity-2016.shtml