

# Assisted Decision-Making (Capacity) Act 2015

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## Declaration of Interest

- Nil
- All case vignettes fictional

## Case 1 - Wards of Court

- Continuing care patient in approved centre.
- Longstanding historical ward
- Considerable assets
- How to manage the transition
- Review of all existing wards within 3 years from operation of legislation
- Level of assisted decision making assistance?

## Wards Sections 54/55

- Application by relevant person (the ward, relative or friend or another person who has an interest in the welfare of the ward).
- Application to “wardship court” (High or Circuit Court).
- If have capacity will be discharged & property returned.
- If lack capacity will be discharged & assessed as to what decision-making support necessary:-
  - 1) **Co-decision-Maker** (lacks capacity unless co-decision maker)
  - 2) **Decision-Making Representative** (lacks capacity)
    - On registration/appointment property returned.
- Court will direct DDSS to exercise functions + give directions.
- Current extent of assets?
- Lunacy Regulations (Ireland) Act 1871 will be repealed.
- All wards to be reviewed within 3 years.

## Existing Wards who are detained s107

- Currently do not come within review provisions of MHA 01.
- Where a person who is a ward is detained:
  - Review by wardship court ASAP – relevant person present
  - If on review person still suffering from mental disorder shall direct detention shall continue for period not exceeding 3 months
  - If still detained must be reviewed every 6 months
  - If no longer suffering from mental disorder shall order discharge from detention.

Wardship court will hear evidence from treating consultant psychiatrist & from independent consultant psychiatrist.

Review of wards in approved & non-approved centres.

??? How many individuals subject to wardship defacto detained in approved or non-approved centres?

## Case 2 - No specialist court but specialist judges

- Patient 2. Placement concerns.
- Mild intellectual disability.
- Application for guardian order under Lunacy Regulation (Ireland) Act 1871.
- Circuit Court Judge limited experience of law.
- Court appointed solicitor to investigate placement.
- Judge queried whether patient at risk of being administered ECT if order with placement condition granted!!
- How should the individual be represented in the courts?
- High costs involved. Do the resources exist to deliver advocacy in settings beyond the courts as envisaged by the ADM(C) Act?
- Full extent of legal aid??? Role of Court Friend
- Rules of court.

## Case 3 - Financial Exploitation

- Case 3. Intellectual Disability.
- Considerable assets.
- Previous carer now lacks capacity.
- What level of ADM?
- Regulation of nominated person.
- Responsibilities of financial institutions.
- Procedures for displacement if suspected exploitation.
- Who initiates? HSE Safeguarding Vulnerable Persons at Risk of Abuse Policy
- Is issue of financial abuse fully addressed?

## Case 4 - Difference of Opinion

- Case 4
- Acute in-pt in need of urgent cardiac procedure
- Refusing consent. No previous concerns re capacity.
- Cardiologist – has capacity?
- Psychiatrist – lacks capacity.
- Refer to High Court.
- Cardiac arrest in interim – successfully resuscitated.
- Reassessed by 2<sup>nd</sup> usual psychiatrist – has capacity to consent.
- Now accepting of risks – consents to procedure - recovered
- Urgency of serious medical condition v reasonable delay in Tx

## Case 5 - The unwise decision

- **Capacity v Vulnerabilities**
- **Will & preferences V Best Interests.**
- Eccentric, chaotic , querulant antisocial individual.
- Dysfunctional interaction with all statutory & vol agencies.
- Poor physical health, physically disabled, neglecting self & environment. Refusing all interventions.
- Capacity to make treatment decisions.
- Multiple agencies expressing concern for his welfare + behaviour + “want someone to take responsibility”.
- High risk of serious adverse outcome as a result of his decisions.
- **“Protection Imperative”**

## The unwise decision

- No diagnostic test for capacity.
- Only a functional test.
- Expert evidence important but not conclusive.
- When should professionals be involved?
- Consider evidence from other clinicians, family or friends.
- Beware the “protection imperative” CC v ICIC
- What happens if someone refuses to be assessed?
- How can a finding of lack of capacity be challenged?
- Guidance + Code of Practice critical !!

- Differences in capacity assessments between medics & other health professionals
- How to resolve?
- Role of second opinions
- Case Law evolving: “ I want to die on the floor” CC v. KK (2012) EWHC 2136 (COP)

## Case 6 - Ms Y case

- 02.08.14: Initial application to sedate Ms Y & rehydrate her.
- She is not represented in court.
- High Court grants the order but the Judge requests that Ms Y & the unborn be represented when the case is due back in court on 5<sup>th</sup> August.
- HSE legal team attends High Court.
- Ms Y consents to C-section under GA on 6<sup>th</sup> August.
- Legal actions later dropped by HSE.
- Barrington report into HSE legal process awaited.
- Could case proceed under ADMCA 15?

## Courts Jurisdiction

- Circuit court to have exclusive jurisdiction except in specified matters where High court has jurisdiction:
- Life sustaining treatment
- AHD + pregnancy
- Where High Court is the wardship court
- Hague Convention

## AHDs and Mental Health

- Specific limited circumstances where treatment refusal would not be legally binding, where:
  - Person is the subject of a conditional discharge order under the Criminal law (Insanity) Act 2006.
  - Must comply with refusal of Tx in AHD if not related to amelioration of mental disorder.
  - Provisions do not apply where person's treatment is regulated by Part 4 of MHA 01.

## Resource Implications

- Training + Infrastructure.
- Implementing legislation in practice – quality of education and training.
- Individual & institutional obligations to know & understand the law.
- Service providers ensuring that legal requirements are adhered to & standards are met.
- Changes to existing practices. Greater patient involvement. **Cultural change.**

- Commencement date awaited.
- Rules of court + Codes of Practice
- Deprivation of Liberty not addressed.
- Bournewood gap persists
- No best interests principle? – trend in case law towards will & preferences



Thank You