

ASSISTED DECISION-MAKING (CAPACITY) ACT 2015 – WHAT TO EXPECT IN PRACTICE

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Association
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Introduction

• Key changes to expect in practice

1. Ward of Court system to be abolished - review of all wards
2. New legal process to deal with decision-making for a relevant person in respect of a relevant decision
3. New - Court process
4. New role and office:
Director of The Decision Support Service
New Panels to be established by the Director
5. New provisions for Enduring Powers of Attorneys
6. New - advance healthcare directives
7. Interaction with the Mental Health Act.
8. New detention provisions

Wards of Court - changes

- *Lunacy Regulations (Ireland) Act 1871* to be replaced by *Assisted Decision-Making (Capacity) Act 2015*
- Review of all Wards under the 1871 Act.
- Main changes:
 - within 3 years of the coming into force of the relevant provisions of the 2015 Act all wards will be discharged from Wardship
- New legal process to deal with decision making for a relevant person
- No more committees for the person and no role of General Solicitor
- Assets of wards which were lodged in court and are held Accountant of the Courts of Justice will be released to the former wards following review.
- Role of the President of the High Court under the 1871 Act will also cease.
- Relevant applications will largely be dealt with by the Specialist Circuit Court Judges.

Review of wards of court

- Mechanism for review of wards (sections 53-57 of the 2015 Act)
- An application is made to the Wardship Court
- **Wardship Court** is the High Court or Circuit Court which exercised its jurisdiction in relation to a ward, and the court which made the order by virtue of which the ward is a ward.
- The application can be made by the ward, a relative or friend of the ward who has had such personal contact with the ward over such period of time that a relationship of trust exists between them, or such other person as appears to the wardship court to have a sufficient interest or expertise in the welfare of ward (S54(1))
- If no application made under S54(1), then there is an automatic review within 3 years by the Wardship Court (S54(2))

Process of Review results in 3 potential declarations (S55)

- Wardship court on an application being made to it shall:
- 55(1) (a) Declare that the ward does not lack capacity
OR
- Make one or more than one of the following declarations:
- 55 (1)(b)(i) That the ward lacks capacity, unless the assistance of a suitable person as a co-decision-maker is made available to him or her, to make one or more than one decision
- 55 (1)(b)(ii) That the wards lacks capacity, even if the assistance of a suitable person as a co-decision-maker were made available to him or her

Process of Review

- **WHERE CAPACITY:**

- Where the wardship court makes a declaration pursuant to 55(1)(a) it shall immediately discharge the ward from wardship and shall order the property to be returned to the former ward and give him or her such direction as it thinks appropriate having regard both to the discharge and the circumstances of the former ward

- **WHERE PERSON REQUIRES A CO-DECISION-MAKER**

- Where the wardship court make a declaration pursuant to 55(1)(b) it shall, on registration of a co-decision-making agreement discharge the ward from wardship and shall order that the property of the former ward be returned to him or her and give such directions as it thinks appropriate having regard to both the discharge and the circumstances of the former ward

Process of Review

- **WHERE NO CAPACITY**

- Where the wardship court makes a declaration that the ward lacks capacity even with the assistance of a co-decision-maker (55 (1)(b)(ii))
- Then it will be necessary for a decision-making representative to be appointed. The decision-making representative is a similar role to that of the current committees
- The wardship court can such orders as it considers appropriate
- Order that the property of the former ward be returned to him or her upon the appointment of a decision-making representative in respect of the former ward
- Pending the making of declarations the jurisdiction of the wardship court shall continue to apply

New legal process to deal with decision-making for a relevant person in respect of relevant decisions

- The ward of court system, results in the automatic removal of legal capacity. It is being replaced with a system whereby a person can be assisted in exercising their decision making capacity.
- **Assisted Decision-Making (Capacity) Act 2015**
- **Section 2** “capacity” means decision-making capacity and shall be construed in accordance with *section 3*;
- Decision-making capacity - making decisions with legal consequences
- **Section 3 (1) Subject to subsections (2) to (6), for the purposes of this Act, a person's capacity shall be assessed on the basis of his or her 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.**
- Legal Capacity is the ability to hold rights and duties and to exercise those rights and duties
- Contrast with cognitive ability/capacity - medical assessment of mental state
- A person is entitled to exercise his or her legal capacity even if he or she may have difficulty making decisions
- 2015 Act sets out the mechanisms as to how a person in such circumstances is enabled to exercise their legal rights

New legal process to deal with decision-making for a relevant person in respect of relevant decisions

- Relevant Person - Section 2
- “relevant person” means—
- (a) a person whose capacity is in question or may shortly be in question in respect of one or more than one matter,
- (b) a person who lacks capacity in respect of one or more than one matter,

New legal process to deal with decision-making for a relevant person in respect of relevant decisions

- Relevant decision – Section 2
- A decision on a matter the subject of a decision-making assistance agreement and which falls within the scope of that agreement
- A decision on a matter the subject of a co-decision-making agreement and which falls within the scope of that agreement
- A decision on a matter the subject of a decision-making order made by a court and which falls within the scope of that order
- A decision on a matter the subject of a decision-making representative order and which falls within the scope of that order
- A decision on a matter the subject of an enduring power of attorney and which falls within the scope of that power and
- A decision made or to be made under an advance healthcare directive (and whether or not there is a designated healthcare representative under the directive) means a decision which falls within the scope of that directive
- Decisions relate to property and affairs, personal welfare and treatment.

New legal process to deal with decision-making for a relevant person in respect of relevant decisions

- When a **person** considers his/her capacity to be in question or may shortly be in question they **may appoint**:
- **Assisted Decision-Making** – Part 3 – Sections 9-15
- Person themselves may appoint a Decision-Making Assistant (Where the relevant person has capacity but needs assistance)
- Assistant appointed in Decision-making assistance agreement – regulations to be drafted regarding agreement being notified to the Director
- **Co-Decision-Making** - Part 4 – Sections 16- 34
- Joint decisions
- Where person considers that their capacity is in question or may shortly be in question they can appoint a person to make joint decisions with them
- Must be in writing – formalities to be observed – must be registered to be in force – application to the director – register maintained by the Director
- **Decision-Making Representative** (court appointment) - (Sections 37 and 38)
- Following Declaration that a Person does not have capacity

Declarations as to capacity that can be made by the Court – Section 37

37. (1) The court, on application to it by a person entitled by virtue of *section 36* to make the application, may make one or both of the following declarations:

(a) a declaration that the relevant person the subject of the application lacks capacity, unless the assistance of a suitable person as a co-decision-maker is made available to him or her, to make one or more than one decision specified in the declaration relating to his or her personal welfare or property and affairs, or both;

(b) a declaration that the relevant person the subject of the application lacks capacity, even if the assistance of a suitable person as a co-decision-maker were made available to him or her, to make one or more than one decision specified in the declaration relating to his or her personal welfare or property and affairs, or both.

New Court Process

- **The Court: Section 2 “court” means Circuit Court;**
- **Section 4 - Circuit Court to have exclusive jurisdiction under this Act except for certain matters reserved for High Court**
- This exclusive jurisdiction is subject to *subsection 4(3) (below), sections 37 (reserves some declarations to the High Court where it is involved S37(4)), 85(6)(b) (where Advance Healthcare Directive may concern the life of the unborn – application must be to the high court) and 89(2) (validity of Advance Healthcare Directive – High Court), Part 6 (review of wards), Part 10 (Detention matters – if the person is a ward, then review by the High Court, otherwise by a Mental Health Tribunal) and 11 (Convention on International Protection of Adults),*
- S4(3)(a) any decision regarding the donation of an organ from a living donor shall, where the donor is a person who lacks capacity, be determined by the High Court, and (b) where an application in connection with the withdrawal of life-sustaining treatment from a person who lacks capacity comes before the courts for adjudication, that application shall be heard by the High Court.

Who may apply to court?

36. (1) Subject to *subsections (2) and (3)*, a relevant person, or any person who has attained the age of 18 years and who has a *bona fide* interest in the welfare of a relevant person, may make an application to the court under this Part.

(2) An application to the court under this Part (other than an application by the relevant person) shall be made on notice to—

(a) the relevant person the subject of the application, and

(b) the persons referred to in *paragraphs (c) to (i) of subsection (4)*

These are the Director, the spouse or civil partner of the relevant person, a decision-making assistant for the relevant person, a co-decision-maker for the relevant person, a decision-making representative for the relevant person, an attorney for the relevant person, a designated healthcare representative for the relevant person, a person specified for that purpose in an existing order of the court under this Part where the application relates to that order.

(3) Subject to *subsection (4)*, an application to the court under this Part shall not be made unless the person making the application has received the consent of the court to the making of the application, which consent may be sought by way of an *ex parte* application.

Consent of the court required to bring applications unless the applications are made by the persons listed above.

Declarations as to capacity that can be made by the Court – Section 37

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(b) a declaration that the relevant person the subject of the application lacks capacity, even if the assistance of a suitable person as a co-decision-maker were made available to him or her, to make one or more than one decision specified in the declaration relating to his or her personal welfare or property and affairs, or both.

Orders that can be made

- Court can make decision on behalf of the relevant person where it is urgent or it is expedient for it to do so – **decision-making order**
- Court can appoint a decision-making representative for the purposes of one or more decisions – **decision-making representative order**
- **Principles apply**
- Court to take into account known will and preferences of the person
- Persevering relationships – compatibility of the person and the decision-making representative
- Where there is no suitable person willing to act as a decision-making representative, the court shall request the Director to nominate 2 or more persons from the panel under s101- **decision-making representative panel**

New role : Director of The Decision Support Service

- **Appointment of Director**
- **S94.** (1) The Mental Health Commission shall appoint a person to be known as the Director of the Decision Support Service to perform the functions conferred on the Director by this Act.
- (2) The Director shall— (a) be appointed by the Mental Health Commission on the recommendation of the Public Appointments Service after a competition has been held(no advertisement yet)
- (b) have the appropriate experience, qualifications, training and expertise to enable him or her to efficiently and effectively perform the functions conferred on him or her.

Functions of the Director

- **95.** (1) The Director shall have, in addition to the functions assigned to him or her by any other provision of this Act, the following functions:
 - (a) to promote public awareness of this Act and matters (including the United Nations Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006) relating to the exercise of their capacity by persons who require or may shortly require assistance in exercising their capacity;
 - (b) to promote public confidence in the process of dealing with matters which affect persons who require or may shortly require assistance in exercising their capacity;
 - (c) to provide information to relevant persons in relation to their options under this Act for exercising their capacity;
 - (d) to provide information to decision-making assistants, co-decision-makers, decision-making representatives, designated healthcare representatives and attorneys in relation to the performance of their functions under this Act;
 - (e) to supervise, in accordance with the provisions of this Act, compliance by decision-making assistants, co-decision-makers, decision-making representatives and attorneys in the performance of their functions under this Act;

Functions of the Director

- (f) to provide information in relation to the management of property and financial affairs to relevant persons and to decision-making assistants, co-decision-makers, decision-making representatives and attorneys;
- (g) to provide information and guidance to organisations and bodies in the State in relation to their interaction with relevant persons;
- (h) to provide information and guidance to organisations and bodies in the State in relation to their interaction with decision-making assistants, co-decision-makers, decision-making representatives, attorneys and designated healthcare representatives;
- (i) to identify and make recommendations for change of practices in organisations and bodies in which the practices may prevent a relevant person from exercising his or her capacity under this Act;
- (j) to establish a website on the internet or provide, or arrange for the provision of, other electronic means by which to disseminate information to members of the public relevant to the performance of the Director's functions and which will, in the opinion of the Director, assist members of the public to understand the operation of this Act and the Director's role in relation thereto;
- (k) to make recommendations to the Minister on any matter relating to the operation of this Act.

Powers

- Director shall have all such powers as are necessary or expedient for, or incidental to, the performance of his or her functions.
- Powers of investigation – section 96
- Director may appoint a person to be a court friend for a relevant person – section 100
- Director can establish panels

Codes of practice – section 103

- The Director may—
 - (a) prepare and publish a code of practice,
 - (b) request another body to prepare a code of practice, or
 - (c) approve of a code of practice prepared by prepared by another body,
- **for the purposes of one or more of the following:**
 - (i) the guidance of persons, including healthcare professionals, assessing whether a person lacks capacity in relation to any matter;
 - (ii) the guidance of decision-making assistants;
 - (iii) the guidance of co-decision-makers;
 - (iv) the guidance of decision-making representatives;
 - (v) the guidance of attorneys;
 - (vi) the guidance of special visitors;
 - (vii) the guidance of general visitors;
 - (viii) the guidance of court friends;
 - (ix) the guidance of healthcare professionals as respects the circumstances in which urgent treatment may be carried out without the consent of a relevant person and what type of treatment may be provided;
 - (x) the guidance of persons acting as advocates on behalf of relevant persons;
 - (xi) the guidance of other persons (including healthcare, social care, legal and financial professionals) acting on behalf of relevant persons;

Panels to be established by the Director - Section 101

- The Director shall establish a panel of suitable persons willing and able to act as—
- (a) decision-making representatives for relevant persons in the circumstances to which *section 38(7)* applies,
- (b) special visitors (medical practitioners and those with expertise in capacity),
- (c) general visitors, (those with expertise to assist the director in supervision of decision-making assistants, representatives and co-decision-makers and attorneys to ensure compliance with their functions) and
- (d) court friends.

Enduring Powers of Attorney

- When a person has capacity may appoint Attorney under an EPA
- *Powers of Attorney Act 1996* remain but with facility for review by Director of Decision Support Service.
- Once 2015 Act comes into operation the creating of EPAs under 1996 Act will cease
- Enduring Powers of Attorney (2015 Act EPAs) all principles and provisions of *Assisted Decision-Making (Capacity) Act* will apply and **will include provisions with for healthcare decisions**

Advance Healthcare Directives – part 8

- Statutory recognition for Advance Healthcare Directives
- Relate to a current wish to a refusal of certain treatment in the future when the person loses capacity
- A directive requesting specific treatment will not be legally binding but may be taken into account
- Certain formalities – in writing, signed, 2 witnesses
- Person appoints a Designated Healthcare Representative
- Advance Healthcare Directives will not apply where a person becomes detained under the Mental Health Act and is being treated under part 4 of the Act.
- Review of the Mental Health Act: review group discussions
AHD to be respected where a person was detained, except in circumstances of a risk to life and this to be revisited

Advance Healthcare Directives - interaction with the MHA 2001

- Minister Lynch - Seanad debate on the ADM Bill on 15 December:
- The other exception is for people who are detained involuntarily. Everyone is covered under this legislation regarding advance health care directives, whether it involves mental health, acquired brain injury, disability and so on....
- The exception of the person who is detained involuntarily will be dealt with in the Mental Health Act. I have had a discussion on this with people in this area whom I trust and who would not be conservative in their thinking. We cannot knowingly put a section into this legislation that contradicts section 4 of the Mental Health Act. However, this will be dealt with in the new Mental Health Bill. When I consulted Professor Brendan Kelly, whom I trust very much on this matter, he agreed that advance health care directives under the Mental Health Act must be legally binding, but in the event of imminent, serious harm or the possibility of such, the consultant would have to overrule that advance health care directive. However, he or she would have to explain the decision before a tribunal or before the courts.

Mental Health Act and Capacity Act generally

- Presumption of capacity applies for all persons
- Assisted Decision-Making (Capacity) Act will apply fully to those being treated in approved centres— capacity and how assessed . Should be consulted for each decision (functional test) .
- **'Voluntary patient'** has the right to consent and refuse treatment in relation to his/her mental health similar to the right to consent and refuse treatment for a physical illness
- **A person who lacks capacity** who has been deemed a 'voluntary' patient should also have the right to consent to and refuse treatment —note the decision of the Supreme Court in EH in 2009 as to a deemed voluntary patient — held that "The terminology adopted in s.2 of the Act of 2001 ascribes a very particular meaning to the term *"voluntary patient"*. It does not describe such a person as one who freely and voluntarily gives consent to an admission order. Instead the express statutory language defines a *"voluntary patient"* as a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order
- **Who then is making the treatment decision for the person lacking capacity**
 - Expert Group Report
 - A rights based approach to be adopted in revised mental health legislation
 - If on admission of a patient, admitting professional of view that person may lack capacity to understand or to give informed consent must refer for formal capacity assessment within 24 hrs

New detention provisions: Detention under MHA if arises in the course of application under Capacity legislation

- Any application to the Circuit or High Court in relation to matters arising under Capacity legislation as to whether a person who lacks capacity is suffering from a mental disorder, the procedures provided for under the Mental Health Act 2001 shall be followed if there is any proposal to detain person — Section 106
- Previous position is that wards excluded from the review provisions of the MHA

Detained wards

- Currently do not come within review provisions of the Mental Health Act
- Where ward is detained in approved centre- Section 107
- Review by wardship court as soon as possible
- If on review person still suffering from mental disorder **wardship court** shall direct detention shall continue for period not exceeding 3months
- If still detained must be reviewed by the wardship court every 6 months
- If wardship court decides no longer suffering from mental disorder shall order the discharge from detention
- There will be no more wards after 3 years – if at that stage, the person is still detained, will likely be reviewed under the MHA
- Review of wards in non-approved centres – Section 108
- Review by wardship court as soon as possible and continuing reviews – what will happen when the person is no longer a ward after 3 years? How will their deprivation of liberty be supervised?

- Thank you
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- April 2016

