

The Assisted Decision Making (Capacity) Act 2015: Key Reforms and Implications for Prison/Detention Setting

Irish Penal Reform Trust
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Assisted Decision-Making (Capacity) Act 2015

“An Act to provide for the reform of the law relating to persons who require or may require assistance in exercising their decision-making capacity, whether immediately or in the future”

- Signed into law 30th December 2015; not yet fully commenced



United Nations Convention on the Rights of Persons with Disabilities

Article 1 Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Article 12.2 Equal recognition before the law

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

-Ratified by Ireland 2018



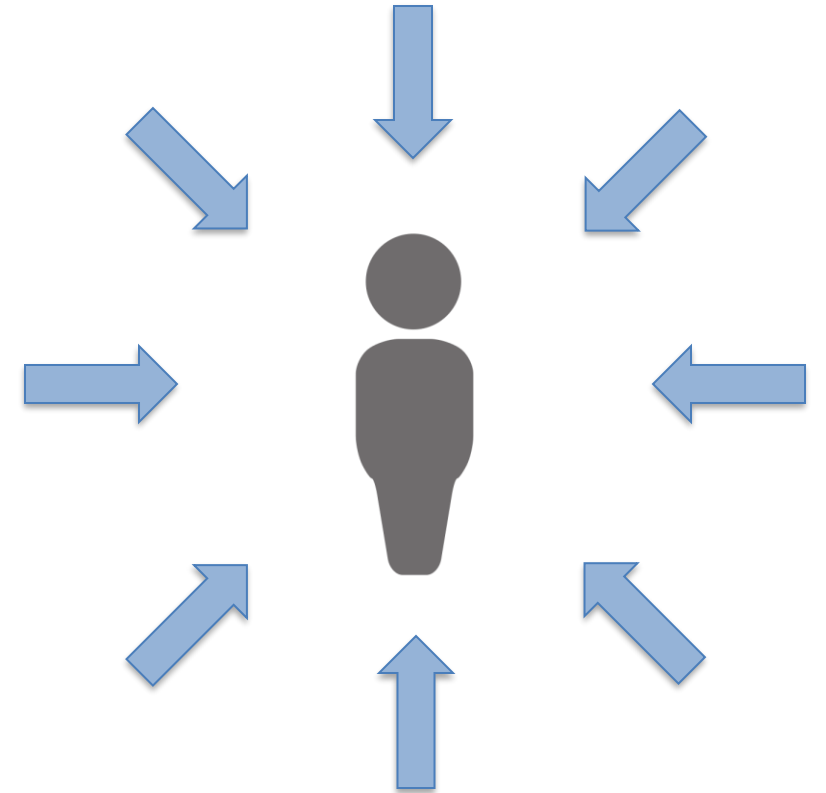
Key Reforms

- Statutory functional assessment of capacity
- Guiding principles for interveners
- New three-tier decision support framework
- Enhanced tools for advance planning
- Establishment of Decision Support Service
- Abolition of wardship under Lunacy Regulation (Ireland) Act 1871
- Review of all current adult wards within three years

- Act specifies some limited areas of non-applicability
- No specific provision to exclude the application of the Act to any prisoner who is a 'relevant person'

The 'Relevant Person' in the Assisted Decision-Making (Capacity) Act 2015

- a person whose **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, or
- a person may fall into both categories at the same time but in respect of different matters



Functional Assessment of Decision-Making Capacity

- No medical or diagnostic criteria
- Time-specific and issue-specific:
 - *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 his or her decision in the context of the available choices*
- Contrast status approach under wardship:
 - *'A person of unsound mind'*
- A person lacks capacity if he or she is unable to:
 - understand relevant information
 - retain information long enough to make a voluntary choice
 - use or weigh up information
 - communicate decision
- Functional assessment already applies at common law:
 - Fitzpatrick & Anor –v- K. & Anor, [2008] IEHC 104 (2008)
- Communication* includes:
 - talking
 - writing
 - sign language
 - assistive technology
- A person is not to be regarded as unable to understand information relevant to a decision if he or she can understand an explanation appropriate to his or her circumstances (whether using clear language, visual aids or any other means)*

Categories of Decisions

❑ Property and Affairs, including:

- Custody, control and management of property
- Carrying on of business
- Discharging debt and liabilities
- Providing for other persons
- Conduct of court proceedings
- Applying for benefits



❑ Personal Welfare:

- Accommodation
- Education and training
- Social services
- Healthcare
- “...other matters relating to the relevant person’s wellbeing”



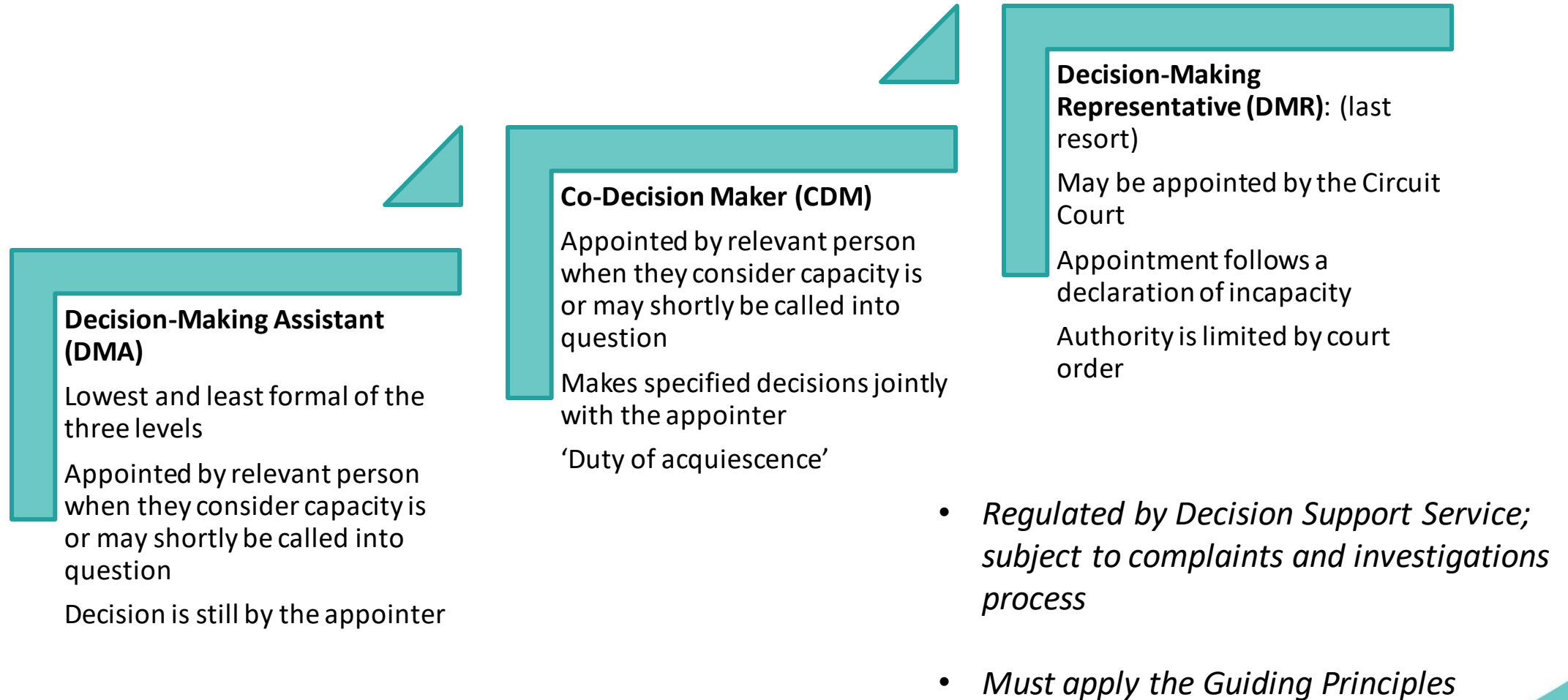
Recent caselaw: capacity and consent in prison

- ❑ Governor of X Prison -v- P. Mc.D. [2015] IEHC 259
 - Prisoner had freely made a choice to continue hunger strike and refuse treatment
 - State should respect personal autonomy and right of self-determination
 - Prison entitled to give effect to the prisoner's wishes not to be fed and to refuse medical treatment

Contrast:

- ❑ A.B.-v- C.D. [2016] IEHC 541
 - High Court did not make a finding on capacity to refuse medical treatment
 - Prisoner not entitled to refuse treatment if this would put his life at risk and thereby frustrate the order of the sentencing court
 - *“His rights to autonomy, privacy and bodily integrity are qualified by his status as a prisoner”*

Tiered framework of ‘Decision Supporters’



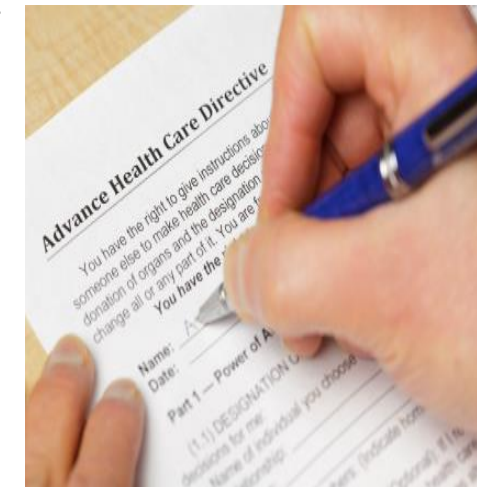
Advance Planning : Enduring Powers of Attorney (EPA)



- EPAs extended: can be authorised to make healthcare decisions (not included in ‘personal care’ under Powers of Attorney Act 1996)
- Subject to new reporting requirements
- Subject to complaints and investigations procedures

Advance Planning : Advance Healthcare Directive (AHD)

- An adult who has capacity is entitled to refuse medical treatment, notwithstanding that refusal is**
 - **unwise**
 - **not based on sound medical principles**
 - **may result in death**
- Purpose of AHD
 - to enable persons to be treated according to their will and preferences
 - to provide healthcare professionals with information about treatment choices
- Distinguishes between refusing and requesting treatment
- Directive-maker may appoint a designated healthcare representative
- Exception: AHD **not** binding
 - If directive-maker is detained under the Mental Health Act 2001 or conditionally discharged under the Criminal Law (Insanity) Act 2006, then AHD is not binding if it relates to refusal of treatment for mental disorder
- ADMC Bill 2019 removes this exception in relation to the 2001 Act but retains and extends the exception in relation to the 2006 Act



Guiding Principles for Interveners

- Presumption of capacity: already applies at common law;
- A relevant person shall not be considered unable to make a decision unless all practicable steps have been taken;
- A relevant person shall not be considered unable to make a decision merely because the decision is unwise
- Minimal restriction of rights and freedoms;
- Respect for dignity, bodily integrity, privacy and autonomy;
- Permit, encourage, facilitate the relevant person to participate;
- Give effect to past and present will and preferences
- Act in good faith and for the benefit of the relevant person
- No reference to ‘Best Interests’**

Decision Support Service

- ❑ Integrated office within the Mental Health Commission
- ❑ Director's duties include:
 - To promote public awareness and confidence
 - To register and supervise decision support arrangements
 - To provide information and guidance to organisations and bodies in relation to their interaction with relevant persons and decision supporters
 - To identify and make recommendations for changes of practices in organisations which may prevent a relevant person from exercising capacity
 - To investigate complaints
- ❑ Director will publish codes of practice, including:
 - guidance on assessing capacity and supporting decision-making
 - guidance for health and social care
 - public consultation will take place prior to publication



Concluding Comments

Thank You

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