



# Relate

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New arrangements, procedures and structures under the Assisted Decision-Making (Capacity) Act 2015 are described such as Assisted Decision-Making, Co-Decision-Making, Advance Healthcare Directives, Wards of Court and the Decision Support Service. These changes are not in effect yet as the Act has not been commenced.

The journal of developments in social services, policy and legislation in Ireland

## Assisted Decision-Making (Capacity) Act 2015

The Assisted Decision-Making (Capacity) Act 2015 provides a statutory framework for individuals to make legally-binding agreements to be assisted and supported in making decisions about their welfare and their property and affairs. This assistance and support is particularly required where the person lacks, or may lack, the capacity to make the decision unaided.

A number of new arrangements are covered by the Act, including Assisted Decision-Making and Co-Decision-Making. A process is also set out for the court to appoint a Decision-Making Representative for an individual. Advance Healthcare Directives are introduced into law for the first time.

As well as introducing new decision-making procedures, the Act sets out new arrangements for Wards of Court and for people who wish to make an Enduring Power of Attorney. A Decision Support Service is to be set up within the Mental Health Commission to provide a range of functions in relation to the new arrangements.

The Assisted Decision-Making (Capacity) Act 2015 was enacted on 30 December 2015 and is due to be commenced by Ministerial Order during 2016.

The Minister for Justice and Equality will, in consultation with the Minister for Health, review the functioning of the Act before 2021.

## Capacity

For the purposes of the Act, capacity for decision-making is defined as the ability to understand, at the time the decision is being made, the nature and consequences of the decision in the context of the available choices.

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The Act sets out a functional test for the assessment of a person's capacity. This functional approach to the definition of capacity allows for changes in a person's capacity over time. A person lacks the capacity to make a decision if they are unable:

- 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, or
- To communicate their decision

However, a person should **not** be said to lack capacity if they:

- Require information to be explained to them in a way that is appropriate to their circumstances
- Can only retain the relevant information for a short period of time
- Did lack capacity for a particular decision at one time but may no longer lack capacity to make that decision
- Lack capacity for some decisions but have capacity to make decisions on other matters

## The guiding principles of intervention

In the Act, an "intervention" is defined as any action done or court order made under the Act in respect of someone who may or who does lack capacity – a "relevant person".

The Act sets out guiding principles that are intended to safeguard the autonomy and dignity of the person with impaired capacity. There is a presumption that the person has decision-making capacity unless the contrary is shown. No intervention should take place unless it is necessary and unless all practical steps have been taken – without success – to help the person make the relevant decision themselves.

In addition, any act done or decision made under the Act must be done in a way that minimises restrictions on the person's rights and freedoms of action and gives effect, as much as possible, to the past and present will and preference of the person.

## Types of intervention

To respond to the range of support needs that people may have, the Act provides for three types of decision-making supports. These are:

- Assisted Decision-Making
- Co-Decision-Making
- Decisions by the court or by a Decision-Making Representative appointed by the court

### *Assisted Decision-Making*

Where a person considers that their capacity is in question or may shortly come into question, that person may appoint a Decision-Making Assistant (for example, a family member or carer) to assist them to access information or to understand, make or express decisions about their welfare and property and affairs.

The Decision-Making Assistant will not make the decision on behalf of the person. Any decision that is made will be taken as having been made by the person only. The Assistant should make every effort to ensure the relevant decisions are implemented accordingly.

The appointment of such a Decision-Making Assistant is done by way of a formal Decision-Making Assistance Agreement. The Minister for Justice and Equality will prescribe the formalities involved in making such an Agreement, including the form of notice to be given to the Director of the Decision Support Service.

A Decision-Making Assistance Agreement may be revoked at any time by either party, or changed at any time with the consent of both parties.

A Decision-Making Assistance Agreement will automatically become invalid if the Agreement relates to a decision which is covered by any of the following:

- A Decision-Making Order
- A Decision-Making Representation Order
- A Co-Decision-Making Agreement
- An Advance Healthcare Directive (and the person now lacks capacity)
- An Enduring Power of Attorney made by the person which has entered into force

Anyone can make a complaint to the Director of the Decision Support Service (see page 7) concerning a Decision-Making Assistance Agreement or the performance by a Decision-Making Assistant of their duties under the Agreement.

### *Co-Decision-Making*

Where a person considers that their capacity is in question, or may shortly come into question, that person may appoint someone else to jointly make with them one or more decisions about their welfare and property and affairs.

A suitable Co-Decision-Maker is defined in the Act as a relative or friend with whom the person has a relationship of trust built up over a period of personal contact and that the Co-Decision-Maker is able to perform the duties of the role (see page 3).

The fact that the decision(s) are made jointly by the person and the Co-Decision-Maker is the primary difference between a Co-Decision-Making Agreement and a Decision-Making Assistance Agreement. Under a Decision-Making Assistance Agreement, the decision(s) in question are made by the person only.

The appointment of a Co-Decision-Maker is done in writing in a Co-Decision-Making Agreement. The Agreement must be executed in much the same way as a will – for example, with two witnesses signing the Agreement.

### *The role of a Co-Decision-Maker*

The role of a Co-Decision-Maker is to assist the person to obtain all necessary information regarding the decision or decisions to be made, to explain the nature of any decision(s), including discussing any alternatives and likely outcomes, and to establish the will and preferences of the person as much as possible. The Co-Decision-Maker will make relevant decision(s) jointly with the person, and make reasonable efforts to ensure that the decision(s) are implemented as far as practicable.

A Co-Decision-Maker is entitled to have their expenses reimbursed from the assets of the person where any fair and reasonable costs associated with performing the role are properly vouched. These details must be included in a report submitted to the Director of the Decision Support Service every year (see page 4). A Co-Decision-Maker is not entitled to be paid for the role.

### *Registration of a Co-Decision-Making Agreement*

A Co-Decision-Making Agreement must be registered with the Director of the Decision Support Service (see page 7) within five weeks of signing. The Agreement does not come into force until it is registered.

Once a Co-Decision-Making Agreement is registered, a decision made within the scope of the Agreement cannot be challenged on grounds that the person lacked capacity. On the other hand, any decision specified under the Agreement is invalid if it is not made jointly by the person and the Co-Decision-Maker.

Notice of an application to register a Co-Decision-Making Agreement with the Director of the Decision Support Service must be given to:

- The spouse or civil partner (if any) of the person
- The cohabitant (if any) of the person
- Any children of the person who are at least 18 years old
- Any Decision-Making Assistant for the person
- Any Decision-Making Representative for the person

- Any Attorney for the person
- Any Designated Healthcare Representative for the person
- Any Co-Decision-Maker of the person under another Co-Decision-Making Agreement.

Anyone may object to the registration of a Co-Decision-Making Agreement by lodging their objection with the Director of the Decision Support Service within five weeks of the notice of application being given. Anyone with a legitimate interest may inspect a registered Agreement.

The Director will review each Agreement on the register on the first anniversary of the Agreement and then at intervals of three years. The Co-Decision-Maker must file a report with the Director every year. This report will describe what they have done during the period in relation to their functions as a Co-Decision-Maker including details of all transactions relating to the person's finances which are within the remit of the Co-Decision-Making Agreement. It must also contain details of any costs and expenses paid to and claimed by the Co-Decision-Maker. The report must be approved by the person prior to filing.

The terms of a Co-Decision-Making Agreement may be changed with the consent of both parties and the approval of the Director. A registered Co-Decision-Making Agreement may be revoked at any time, either wholly or in part, by either party. Any revocation must be notified to the Director and the register updated accordingly.

Any Co-Decision-Making Agreement will be invalid if it includes any provision for the disposal of the person's property by way of gift.

The Director of the Decision Support Service must be informed by the Co-Decision-Maker or any other person who becomes aware that the person's capacity has either:

- Deteriorated to such an extent that they lack capacity in respect of the relevant decisions, even with the assistance of a Co-Decision-Maker, or
- Improved to the extent that they have full capacity in respect of the relevant decisions

### *Decision-Making Representative*

The Act provides for intervention by the courts in certain circumstances where it is believed a person lacks capacity to such an extent that they require decisions to be made on their behalf entirely by someone else.

The person can be assisted in the court proceedings by a Court Friend. Where there is no one suitable to act as a Court Friend, the court will ask the Director of the Decision Support Service to appoint a Court Friend from an established panel.

The court will firstly assess the capacity of the person. If it is decided that the person does lack capacity, the court may declare either:

- That the person would lack capacity unless a Co-Decision-Maker is appointed, or
- That the person would lack capacity even if a Co-Decision-Maker was made available

For people who are not able to make decisions even with assistance, the Act provides for the Circuit Court to appoint a Decision-Making Representative.

The court itself may also make any necessary and urgent decisions on behalf of the person.

Where the court appoints a Decision-Making Representative and there is no one suitable willing to act, the court will request the Director of the Decision Support Service to nominate two people from an established panel for consideration by the court.

The Decision-Making Representative will, as far as possible, ascertain the will and preferences of the person. The functions of Decision-Making Representatives are as limited in scope and duration as is reasonably practicable.

Where the court does make an order appointing a Decision-Making Representative, the person may apply at any time to have the decision reviewed. In any event, the court will review any such order within one year or within three years if it is unlikely the person will regain capacity.

Unless otherwise ordered by the court, a Decision-Making Representative will be entitled to reimbursement of reasonable expenses out of the person's assets. Where the Decision-Making Representative appointed is acting within their trade or profession, the court may allow for the Decision-Making Representative to be paid from those assets.

Where a Decision-Making Representative is empowered to make decisions regarding the person's property and affairs, the Decision-Making Representative may not dispose of the property by way of gift unless specifically provided for under the arrangement. Where gifts are specifically provided for, they are limited to those made on customary occasions to people (including the Decision-Making Representative) or charities to whom the person might be expected to make gifts and should be of a reasonable value given the circumstances and means involved.

The Act specifically prohibits Decision-Making Representatives from doing any of the following:

- Preventing a particular person from having contact with the person
- Making any decision on behalf of the person not specified in the order
- Settling any part of the property of the person without the court's approval
- Doing any act which is intended to physically restrain the person unless there are exceptional emergency circumstances and then only to the extent it is proportionate to do so

The Director of the Decision Support Service will maintain a register of Decision-Making Representation Orders. These will be available for inspection by anyone with a legitimate interest in the matter.

Each Decision-Making Representative will have to prepare and file a report on the performance of their duties within 12 months of appointment, and every year after that. The report must include details of costs, expenses and pay claimed. Where a Decision-Making Representative fails to file a report, the court may determine that the Decision-Making Representative should no longer act for the person. Legal aid is available to people making applications to the courts under this part of the Act, subject to certain means restrictions.

Any interested person may make a complaint to the Director of the Decision Support Service regarding a Decision-Making Representative.

## Wards of Court

The Act makes provisions with regard to persons who, before the commencement of the Act, were designated Wards of Court (within the meaning of the Lunacy Regulation (Ireland) Act 1871). When a person is made a Ward of Court, a committee is appointed to control the person's assets on their behalf. The court must be satisfied that the person is of "unsound mind" and incapable of managing their own affairs. In July 2015, there were approximately 2,600 designated Wards of Court in Ireland.

Where a Ward of Court turns 18 years old after the commencement of the Act, the Ward may apply to the court for one of the following declarations:

- That the Ward has capacity
- That the Ward lacks capacity unless a Co-Decision-Maker is appointed
- That the Ward lacks capacity even if a Co-Decision-Maker is appointed

If a Ward is declared to have capacity, they will be immediately discharged from Wardship and their property returned to them.

Where a Ward is declared to lack capacity unless a Co-Decision-Maker is appointed, the court shall discharge the person on registration of a Co-Decision-Making Agreement.

Where the Ward is declared to lack capacity even with the appointment of a Co-Decision-Maker, a Decision-Making Representative will be appointed and the property of the Ward returned to them.

Even without an application being made, all Wardship courts must review their Wardship orders within a set period of time after the commencement of the Act. This period is determined by the date the relevant Ward turns 18 years of age.

The Act will eventually see the end of the Wardships procedure and no new Wardships will be ordered once the Act is commenced. The Act repeals the Lunacy Regulation (Ireland) Act 1871.

## Enduring Powers of Attorney

The Assisted Decision-Making (Capacity) Act 2015 defines an Enduring Power of Attorney as an arrangement whereby a Donor (being the person who may lack capacity in the future) gives a general power to an Attorney (the person providing assistance) to act on their behalf. This may be in respect of all or some of the person's property and affairs, or to do specified things on the person's behalf.

An Enduring Power of Attorney created under the Powers of Attorney Act 1996 will still have effect after the Assisted Decision-Making (Capacity) Act 2015 is commenced. Following commencement of the 2015 Act, however, no new Enduring Power of Attorneys will be created under the 1996 Act.

Under the 2015 Act, an Enduring Power of Attorney does not come into force until the person lacks capacity in relation to one or more of the decisions specified in the Enduring Power of Attorney **and** the instrument creating the Enduring Power of Attorney is registered with the Director of the Decision Support Service.

An Enduring Power of Attorney must be made in writing. Once an Enduring Power of Attorney is signed, the person must give notice of the Enduring Power of Attorney to:

- A spouse or civil partner (if any) of the person
- The cohabitant (if any) of the person

- Any children of the person who are at least 18 years old
- Any Decision-Making Assistant
- Any Co-Decision-Maker for the person
- Any Decision-Making Representative for the person
- Any Designated Healthcare Representative for the person (see below)
- Any other Attorney appointed

The signing of the Enduring Power of Attorney must be witnessed by two witnesses:

- Each of whom is at least 18 years old
- Of which at least one is not an immediate family member of the person or the Attorney, and
- Neither of whom is an employee or agent of the Attorney

If an Attorney believes that the person lacks capacity in respect of one or more decisions specified in the Enduring Power of Attorney, the Attorney must apply to register the instrument with the Director of the Decision Support Service and give the relevant notice.

While an application is pending registration with the Director, an Attorney can take any reasonable actions to maintain the person and prevent any loss of the person's assets. The Attorney must report any such action to the Director.

Anyone with sufficient interest in the welfare of the person may object to the registration of an Enduring Power of Attorney. The objection must be lodged with the Director within five weeks of notice of the Enduring Power of Attorney being given.

On receipt of an application to register an Enduring Power of Attorney, the Director will make all enquiries necessary before registering the Enduring Power of Attorney, including investigating any objections lodged. Where an Enduring Power of Attorney is refused registration by the Director, the Attorney and the person will be notified of the reasons for the refusal and given an opportunity to respond. An Attorney may appeal any such refusal to the courts within 21 days.

Anyone can be appointed as an Attorney provided they are over 18 years old and able to perform the functions of an Attorney as specified in the Enduring Power of Attorney in question.

The Enduring Power of Attorney cannot contain any decision relating to the refusal of life-sustaining treatment, or any item already covered by a pre-existing Advance Healthcare Directive (see page 6).

Where an Attorney is conferred with a general power as to the person's property and affairs, the Attorney may not dispose of the property by way of gift unless specifically provided for under the Enduring Power of Attorney. Where gifts are specifically provided for, they are limited to those made on customary occasions to people (including the Attorney) or charities to whom the person might be expected to make gifts and should be of a reasonable value given the circumstances and means involved.

The Attorney is only entitled to be paid for carrying out their functions under the Enduring Power of Attorney if this is specified in the Enduring Power of Attorney.

### ***Supervision of the Attorney under an Enduring Power of Attorney***

Under the 2015 Act, an Attorney acting under an Enduring Power of Attorney relating to property and affairs must file a report with the Director within three months of the registration of the Enduring Power of Attorney. This report should include a schedule of the person's assets and liabilities, and any projected income and expenditure. After that the Attorney must submit updated reports every year.

## **Advance Healthcare Directive**

The Assisted Decision-Making (Capacity) Act 2015 provides a legislative basis for Advance Healthcare Directives in Ireland. An Advance Healthcare Directive is an advance expression made by a person with capacity which contains their will and preferences concerning medical treatment decisions which may arise if the person were to subsequently lack capacity or be unable to express their preference, for example, while in a coma.

The Advance Healthcare Directive may be a stand-alone directive or the person may appoint a Designated Healthcare Representative to exercise such powers as conferred by the person under the Directive.

### ***Refusal of treatment***

A specific refusal of treatment contained in an Advance Healthcare Directive is as effective as if made at the time by the person with capacity. A person who has capacity and is aged over 18 may refuse treatment for any reason, even if it may result in their death.

A refusal of treatment contained within an Advance Healthcare Directive will be valid provided:

- The person lacks capacity at the time of the treatment
- The treatment is clearly identified in the Advance Healthcare Directive
- The circumstances in which the refusal is to apply are clearly identified in the Directive

An Advance Healthcare Directive may contain a request for specific treatment in specific circumstances but this is not legally binding. Where such treatment is not complied with, the medical professional must record the reasons for the non-compliance and give this to any Designated Healthcare Representative appointed.

An Advance Healthcare Directive must be in writing, signed by both parties to it (if a Designated Healthcare Representative is being appointed) and witnessed by two people. A person who has capacity may alter or revoke their Advance Healthcare Directive at any time, in writing – this must also be witnessed.

An Advance Healthcare Directive will be invalid if the person:

- Did not make the Advance Healthcare Directive voluntarily
- Has acted – with capacity – inconsistently with their Advance Healthcare Directive

The Advance Healthcare Directive will not be applicable where:

- The person still has capacity
- The treatment in question is different from that specified in the Advance Healthcare Directive
- The circumstances in question are different from those specified in the Advance Healthcare Directive

Where a healthcare professional is unsure as to the applicability of an Advance Healthcare Directive, they should consult with the Designated Healthcare Representative, or if no Designated Healthcare Representative has been appointed, with the person's family.

If a person is pregnant but without capacity and her Advance Healthcare Directive specifies the refusal of certain treatment which, if not administered, will adversely affect the unborn child, the healthcare professional may apply to the High Court to determine if the treatment can be administered or not.

The Designated Healthcare Representative will be given one or both of the following powers:

- To advise and interpret the person's will and preferences regarding treatment
- To consent to or refuse treatment, including life-sustaining treatment based on the known will and preferences of the person as set out in their Advance Healthcare Directive

The Designated Healthcare Representative will be supervised by the Director of the Decision Support Service and must keep a written record of all decisions made. A Designated Healthcare Representative may not delegate their powers

to someone else.

The Director can receive complaints from any person about an Advance Healthcare Directive arrangement and the manner in which a Designated Healthcare Representative is carrying out their duties. The Director will investigate complaints and may refer the matter to the court, which can prohibit the Designated Healthcare Representative from acting.

The Minister for Health will review the Part of the Act concerning Advance Healthcare Directives within five years of commencement.

## Ineligible or disqualified people

The following people cannot act as Decision-Making Assistants, Co-Decision-Makers, Decision-Making Representatives, Attorneys acting under an Enduring Power of Attorney or Designated Healthcare Representatives:

- People convicted of an offence in relation to the person or the person's property or the person's child or that child's property, including offences under the Act or offences involving fraud or dishonesty
- People who have been the subject of a safety or barring order in respect of the person
- An undischarged bankrupt or person the subject of a debt settlement arrangement or similar (such a person may act in welfare only arrangements)
- A restricted or disqualified company director (such a person may act in welfare only arrangements)
- The owner or provider of a nursing home, a mental health facility or a residential facility for persons with a disability, unless the person is an immediate family member
- People who have entered their own decision-making arrangement or are without capacity themselves
- People who have previously been in the role and a court found that they should no longer continue in the role for the same person
- People under the age of 18

Further, where the person appointed as Decision-Making Assistant, Co-Decision-Maker, Decision-Making Representative, Attorney, or Designated Healthcare Representative is a spouse or civil partner or cohabitant of the person, that person will automatically become disqualified from acting in the role if:

- The marriage or civil partnership is annulled or dissolved
- A written separation agreement is entered by the parties
- The parties cease to cohabit for a continuous period of 12 months
- The person appointed subsequently meets any of the ineligibility criteria

## The Decision Support Service

The Assisted Decision-Making (Capacity) Act 2015 provides for the appointment of a Director together with support staff to form the Decision Support Service.

This service will be part of the Mental Health Commission, an independent statutory body established in 2002. The Director will have a wide variety of duties, including to:

- Promote public awareness of this Act and matters relating to the exercise of their capacity by people who need or may shortly need assistance in exercising their capacity
- Promote public confidence in the process of dealing with matters which affect people who need or may shortly need assistance in exercising their capacity
- Provide information to people in relation to their options under the Act for exercising their capacity
- Provide information to, and supervise in accordance with the Act, Decision-Making Assistants, Co-Decision-Makers, Decision-Making Representatives, Designated Healthcare Representatives and Attorneys in relation to the performance of their functions
- Identify and make recommendations for change of practices in organisations and bodies in which the practices may prevent a relevant person from exercising their capacity under the Act
- Establish a means by which to disseminate information to members of the public relevant to the performance of the Director's functions and which will assist members of the public to understand the operation of the Act and the Director's role
- Make recommendations to the Minister on any matter relating to the operation of the Act

The Director is also responsible for establishing a panel of suitable people to act as the following:

- Special Visitors/General Visitors – these are medical practitioners or experts with relevant qualifications who will visit with a person who requires assistance in exercising their decision making or with those who are providing such assistance to carry out an assessment of the arrangement on the grounds specified by the Director and afterwards to provide a report to the Director
- Decision-Making Representatives – people capable of being nominated by the courts to assist a person
- Court Friends – people capable of assisting a person who wishes to make an application to the courts

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The Director will also have an investigatory function to address complaints made to the Decision Support Service. Failure to comply with an investigation of the Director or to obstruct such an investigation will be a criminal offence.

## Offences under the Act

A number of criminal offences are introduced by the Act.

It will be an offence to use fraud, coercion or undue influence to force another person to make, vary or revoke a Co-Decision-Making Agreement, Enduring Power of Attorney or Advance Healthcare Directive. This includes situations where a person's access to, or continued stay within, a designated centre such as a nursing home or mental health facility depends on them making, varying or revoking such an arrangement.

A person guilty of such an offence is liable on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months, or both, and on conviction to a fine of up to €50,000 or imprisonment for a term up to five years.

It is also an offence to make a false statement when registering a Co-Decision-Making Agreement or Enduring Power of Attorney. A person guilty of such an offence is liable on summary conviction to a class A fine or imprisonment for a term not exceeding six months, or both, and on conviction to a fine of up to €15,000 or imprisonment for up to two years, or both.

Anyone appointed under one of the arrangements provided for in the Act will be guilty of an offence where they ill-treat or willfully neglect the person. Anyone guilty of such an offence is liable on summary conviction to a class A fine or imprisonment for term not exceeding 12 months, or both, and on conviction to a fine of up to €50,000 or imprisonment for up to five years, or both.

Failure to comply with an investigation of the Director or to obstruct such an investigation is a criminal offence liable on summary conviction to a class A fine.

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