

## The Assisted Decision Making (Capacity) Act 2015

1. Signed by President on December 30<sup>th</sup> 2015.
2. Will only come into operation on a phased basis.
3. Aims to assist relevant persons to make decisions with an assistant or substitute decision maker.
4. A relevant person includes:
  - a) A person whose decision making capacity is in question or may shortly be in question;
  - b) A person who lacks capacity in respect of one or more than one matter.

## APPLICABLE TEST

1. Does the relevant person have decision making capacity?
2. The test is not a question of mental capacity.
3. A person's capacity is to be construed functionally.
4. Assessment is based on the ability of the relevant person to make a decision:
  - a) At a specific time, and;
  - b) On a specific issue at that time.

## **A person lacks capacity if he or she is unable:**

- A) To understand the information relevant to the decision,
- B) To retain that information long enough to make a voluntary choice,
- C) To use or weigh that information as part of the process of making the decision, or
- D) To communicate his or her decision by any means:

NOTE: The principles under the Act relating to the assessment of capacity are binding since December 30<sup>th</sup> 2015.

## Interveners

Specific individuals (called “interveners”) can support a relevant person while enabling those persons to have their wishes followed.

Interveners can assist in decision making regarding a relevant person’s relevant welfare (which includes healthcare) or property and affairs, or both.

Interveners will be supervised by the Decision Support Service, which will have a Director and staff.

## Types of Intervenor

1. Decision making assistant.
2. Co-decision maker.
3. Decision-making representative
4. Attorney under Enduring Power of Attorney
5. Healthcare representative under advance healthcare directives.

## Decision-Making Assistant

1. Appointed by legal agreement recorded in Decision Support Service.
2. The relevant person appoints an assistant who is a trusted person, such as a relative, friend or carer.
3. All decisions are made by the relevant person.
4. The assistant must ascertain the will and preferences of the relevant person, having helped him/her to understand all the relevant issues.
5. Assistant must ensure the will and preferences of the relevant person are followed.
6. Assistants are supervised by Decision Support Service.

## Co-Decision Making

1. Appointed by legal agreement recorded in Decision Support Service.
2. Normally a trusted relative or friend.
3. Makes decisions jointly with the relevant person on issues specified in agreement
4. Director must be satisfied agreement reflects will and preferences of the relevant person.
5. Supervised by Decision Support Service.

## Decision-Making Representative

1. Appointed by Circuit Court where relevant person is unable to appoint another Intervener.
2. Court can impose conditions and specify issues covered in legal agreement
3. Court must be satisfied the Representative is a suitable person.
4. Court can appoint Representative from panel maintained by Decision Support Service.
5. Annual reports by Representative to Decision Support Service.

## Suitability of Decision Making Representatives

When considering the suitability of a person to be a decision-making representative for a relevant person, the Court shall have regard to the following:

- (a) the known will and preferences of the relevant person;
- (b) the desirability of preserving existing relationships within the family of the relevant person;
- (c) the relationship (if any) between the relevant person and the proposed representative;
- (d) the compatibility of the proposed representative and the relevant person;
- (e) whether the proposed representative will be able to perform the functions to be vested in him or her;
- (f) any conflict of interest.

## Attorney under Enduring Power of Attorney

1. Personal welfare includes healthcare
2. Guiding principles under the Act must be followed.
3. Attorney must be a suitable person.
4. Registration commences when Donor lacks capacity in relation to one or more relevant decisions.
5. Reports by Attorney to Director:
  - a) Statements of assets within 3 months of registration;
  - b) Full report of all activities within 12 months;
  - c) Annual report thereafter.
6. Objections can be made by a person with sufficient interest.

## Designated Healthcare Representative

1. The 2015 Act makes provision for 2 types of Advance Healthcare Directive (AHD) made by an individual (“Directive Maker”):
  - a) An advance expression in writing regarding treatment decisions to be made if that individual subsequently lacks capacity; or
  - b) The appointment of a designated Healthcare Representative to make such treatment decisions for the individual.
  
2. A Directive Maker may in his/her AHD authorise representative to:
  - a) Advise and interpret the person’s will and preferences regarding treatment;
  - b) Consent to or refuse treatment up to and including life-sustaining treatment, based on the will and preferences of the Decision-Maker.

## Director of Decision Support Service

1. Employed by Mental Health Commission.
2. Will supervise Interveners.
3. Will promote public awareness.
4. Will provide advice and guidance
5. Will deal with complaints
6. Will issue Codes of Practice.
7. Will establish a website.
8. Can make recommendations to the Minister.

## Court Applications

1. Will determine capacity of a relevant person.
2. Will adjudicate on a proposed intervention, where necessary.
3. Can make interim orders.
4. Can review capacity orders at regular intervals.
5. Can request relevant reports.
6. Provision for legal aid.

## Wards of Court

1. Will be reviewed by Court and brought under jurisdiction of the 2015 Act, within 3 years, of commencement of legislation.
2. Court will make the following orders:
  - a) That Ward has capacity or,
  - b) Appoint co-decision making assistant or a decision making representative.
3. All assets of former Ward will be transferred back into name of that person.