Assisted Decision Making (Capacity) Act 2015

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Some ADM myths and misconceptions

- ADM relevant to detention/ deprivation of liberty
- It is essential to identify lack of capacity by doing capacity assessments
- It is essential to use the new tiers of support when someone has difficulty making decisions/ lacks decision making capacity
- ADM abolished ‘next of kin’ consent
- Advance healthcare directives now the mandatory approach to DNACPR decisions

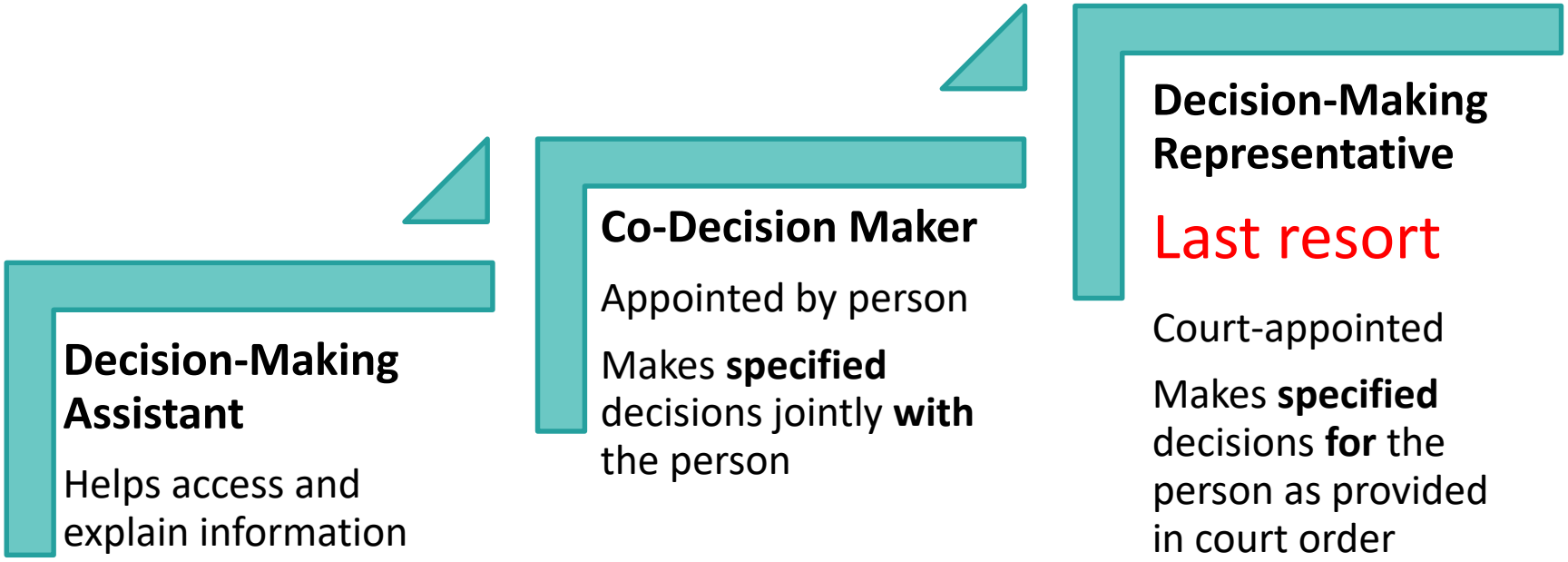
If deprivation of liberty is sought…

- Wardship applications ceased on April 26th

- Issue **NOT** dealt with in ADM Act
  - ADM is not an 'easier, quicker' way of detaining people
  - Decision supporters do not have powers of detention/ coercion

- What to do?
  - Long-term: New liberty safeguards legislation planned.
  - Interim: Applications under "inherent jurisdiction" of High Court.

Wardship replaced by 3 tier hierarchy



The new 3 tiers are options to support the person.
They are problem-solving tools
They are not mandatory interventions!

Guiding Principles

- Using a new tiers of support is NOT mandatory.
- Applying the Guiding Principles IS mandatory:
  - Must be no intervention unless it is necessary to do so…
  - Intervention must minimise restriction of rights/ freedom of action
  - Intervener (includes healthcare workers) must:
    - Help person to participate in an intervention
    - Give effect, so far as practicable, to the past and present will and preferences, in so far as reasonably ascertainable
    - Take into account beliefs and values of person
    - Unless not appropriate or practicable consider view of anyone the person wants consulted / decision supporters
    - Act at all times in good faith and for the benefit of the person

Capacity Assessment ADM Myths!

- *We need to identify everyone who lacks capacity, so I now need to do capacity assessments.*
  - Only if there is a good reason for assessment. (Presumption of capacity is not overturned by dementia, disability, mental illness, etc or merely by making what others consider an unwise decision). AND
  - An intervention would be reasonable and proportionate and the least restrictive option. (Not 'if we find incapacity we must do something').
- *I want a 'capacity assessment tool'*
  - There is guidance but not a 'tick box' tool or MOCA equivalent
- *If I make a finding of lack of capacity, I have new powers to do things or to make someone accept my recommendations*
  - ADM is not about coercion, detention
- *If I'm worried about a decision someone is making, they've got to convince me they have capacity to make it before they can be allowed to make the decision.*
  - The person doesn't have to prove anything! Nobody ever has to prove they have capacity: the onus is on the person challenging capacity

“Statements/reports of capacity” under Act

- Who can perform assessments under Act?
  - Doctor OR member of ‘prescribed classes’ of professionals (nurses, midwives, SLTs, OTs, social workers).
- When are they needed?
  - Enduring Powers of Attorney
    - Person’s solicitor decides who to ask.
  - Co-Decision Making Agreement
    - Must be a relative or friend in a pre-existing relationship of trust willing and able to take on the role
  - Decision Making Representatives (DMRs)
    - Circuit Court “Part 5” application process
    - Required instead of care representative when ancillary state support (the ”loan”) us sought under NHSS

Early experiences

- Courts will not make a DMRO if a lower tier of support would suffice, e.g. a co-decision making agreement.
- Assessment involves a conversation with the person on their terms – not a rigid structure
- The decisions to be assessed (and scope of the orders sought) should not too vague or too broad.
- Capacity reports are not a check-box exercise
- Reports should detail the supports provided and reflect the will and preference of the person. Direct quotes are often helpful

"If capacity is in question and person needs a procedure?"

- If there is a support arrangement in place, respect the scope of that arrangement (but many may **not** include healthcare decisions)
- Proceed if intervention is consistent with will and preference of person, for the benefit of person and after considering views of those who must be consulted (anyone named by the person/ decision supporters) or who may be consulted (e.g. others close to and who care about the person)

Summary

- Consent from the person (assisted if necessary)
- Joint consent of the person and their Co-Decision-Maker
- Consent on behalf of the person from a Decision-Making Representative
- If the person cannot consent for themselves and there is no relevant decision support arrangement, consider the Guiding Principles including:
  - It is for the overall benefit of the person
  - It is consistent with the person's will and preferences if ascertainable
  - Consider the views of other who must or who may be consulted under the Act

ADM: Since Commencement?

No big bang!

- Good everyday clinical practice looks the same before and after ADM
- A lot of queries & myths
- Think of the Guiding Principles rather than capacity assessments, court applications
- Seek help from the DSS and the HSE ADM Transitional Oversight Group in the first instance
- We're all still learning!

Thank you