

“Getting ready for commencement of the Assisted Decision-Making (Capacity) Act 2015” Webinar 21st March 2023

Q&A Transcript

1. How does this act affect enduring power of attorney?

If you already have made an Enduring Power of Attorney (under the Powers of Attorney Act 1996) then you can keep that arrangement and it will continue to be valid. The only change is that the Decision Support Service will be able to investigate complaints about an attorney under the 1996 Act. If you wish to make an enduring power of attorney following commencement of the 2015 Act, you will only be able do so under the new law.

2. Is the decision-making representative issue specific or assigned then for future decisions?

Decision-making representative order may be made with respect to specific decision or decisions - very much depends on the court - which decides what decisions should be covered.

3. As a doctor, will there be a charge to access the register?

Practical details, including fees arrangements, are included in the DSS-HSE register searches project and information will follow.

4. Are there e-learning modules available and where can I find them please?

There are a number of e-learning programmes available to all staff on HSeLand. The Assisted Decision-Making Capacity Act 2015 - Guidance for Healthcare Workers programme contains 3 modules: Guiding Principle, Working with Decision Supporters appointed under the 2015 Act and Advance Healthcare Directives.

There are also 3 modules on Supporting Decision-Making in Health and Social Care and an e-learning programme to support the National Consent policy which is very relevant to the Act.

5. Is there a likelihood that if a decision support arrangement has gone wrong that in an acute hospital service the patient may experience a delayed discharge or transfer to another level of care as a result?

This will depend on whether the discharge or transfer is in scope of the decision-making arrangement in question. There are options under the Act where decisions are required if a decision supporter has been temporarily suspended.

6. How can I get a copy of the supporting decision-making and assessing capacity booklet?

This is a Code of Practice from the Decision Support Service and will be published and available on www.decisionsupportservice.ie imminently.

7. Will the training for capacity be available to those working outside of the HSE?

The training for those prescribed by regulations to make statements of capacity will be available on the Decision Support Service Website: www.decisionsupportservice.ie.

8. Will current applications in progress for ward of court be processed or are they void now with this new Act?

Applications received up to the 25th of April will be processed unless they are withdrawn. When the application goes to Court there is an option under the transitional arrangements to have a decision supporter.

9. Where will we be able to find further information on the training to undertake capacity assessments?

Updates on the training for Part 4 and Part 7 capacity assessments will be available on the Decision Support Service website.

10. Any examples from the healthcare setting?

Professor Shaun O'Keeffe will give examples in his presentation. You can also find case studies on previous webinars which are available on www.assisteddecisionmaking.ie.

11. Can you please list the professionals other than medics that will be trained in capacity assessments?

For the HSE-DSS training on undertaking functional assessments of capacity in order to produce a capacity statement for a Part 4 (co-decision-making agreement) or a Part 7 (enduring power of attorney) application, the training is aimed at registered medical practitioners, nurses, midwives, social workers, occupational therapists, speech and language therapists and psychologists as prescribed by the regulations.

12. Legally where does the capacity assessor stand if their decision is questioned in a court of law. How are they protected?

This will be addressed in the proposed training module. Briefly, the Decision Support Service may receive objections to registration and complaints that relate to capacity and in some circumstances, these may be referred to the court for resolution. The decision support arrangement is what is before the court, the assessor is not the subject of the court referral. The court may make a finding in relation to the arrangement and whether it should be registered/remain on the register.

13. What Lead time is expected for a decision-making representative to be registered in the court from start to finish?

We don't know. It will depend on how much the court are used - so if there are many applications to court, this will inevitably slow down the process.

14. Is there a sunset clause in respect of lunacy act or will it always be on the statute books?

The 1871 Act will be repealed on commencement of Assisted Decision Making (Capacity) Act.

15. Will there be a cost associated with registering a decision support arrangement with the Decision Support Service?

Yes, some admin fees apply, and the Act permits a waiver of these fees for applicants of limited means. Fees are to be approved by the Minister shortly and further information will be available from the Decision Support Service.

16. Where can I sign up for more information about the Assisted Decision-Making?

If you contact us on adm@hse.ie we can add you to our mailing list.

17. Have communications gone to the Wards of Court as well as their Committees from the Wards of Courts Office?

Yes, an easy read leaflet issued in January and February to nursing homes and residential centres. This leaflet is also being sent directly to wards of court who reside in private residences by case officers assigned to the person.

18. How will Advance Healthcare Directives be accessible to medical/health care professionals in situations where the relevant person may be unable to communicate that they have a Advance Healthcare Directive in place?

Directive makers are advised that they must bring their Advance Healthcare Directive to the attention of medical/healthcare professionals. It is planned that there will be Register but for now, it is up to the directive maker to put in place the steps to ensure that their Advance Healthcare Directive is made known to the medical/health professional.

19. Will an existing Ward of Court Committee of the General Solicitors Office be maintained following review, or will there be a new equivalent if deemed necessary?

When a person is discharged from wardship the role of the committee also ends at that time. The General Solicitor will no longer be involved. If the committee is a family member or friend, they may be nominated by the relevant person to act as a decision-making assistant or co-decision-maker. If a decision-making representative is required, the court may appoint the former committee in this role.

20. Will clinicians in acute settings including dentists cease asking service providers and families to sign consent for procedures for people whose capacity is in question? Can the relevant person be supported with will and preference and presumption of capacity to agree to procedures without recourse for non-life-threatening procedures?

They should cease this (they should in fact have done so long ago). Yes - the aim is entirely to support the relevant person without recourse to decision-making representative - except if this is absolutely necessary.

21. Will there be training for Functional Assessments for decision-making assistant and co-decision-making agreements?

A functional assessment of capacity for a decision-making assistant agreement (DMA) is not required as the person has capacity but needs support.

A person requires an assessment of capacity to put in place a co-decision-making arrangement. Training for these assessors will be available through the Decision Support Service on www.decisionsupportservice.ie.

The HSE have produced a number of resources on supporting decision-making and assessing capacity, these are available on www.assisteddecisionmaking.ie.

22. Who should sign a patient's consent if they lack capacity?

The consent form should not be signed, it should be noted in the record that the patient is unable to give consent and the steps taken to provide care that is in accordance with will and preference etc.

23. What constitutes "basic care"?

"Basic care" includes hygiene measures, and food and/or liquids by mouth. However, artificial nutrition such as feeding by tube or giving fluid through a drip are treatment decisions and not basic care.

24. Is the HSE creating a functional capacity assessment form to support staff in documenting the outcome of the assessment?

The HSE National Consent Policy 2022 provides guidance on how to document a functional assessment of decision-making capacity. The Code of Practice on supporting decision-making and assessing capacity will be published in the coming weeks.

25. Who appoints the decision-making assistant or the co-decision-maker?

For these lower tier supports, appointment is by the person who considers that their capacity is or may shortly be in question. They choose someone they know in a relationship of trust to be their decision-making assistant or the co-decision-maker.

26. Would the information and topics discussed here be same as in HSELand?

The e-learning programmes are on HSELand. The webinars and other resources are available on www.assisteddecisionmaking.ie. You can email adm@hse.ie to join our mailing list. Also, if you would like to access further information www.decisionsupportservice.ie.

27. Can a Relevant Person seek decision support themselves, for example if they don't have close family that might have a 'relevant interest'?

Yes, they can contact the Decision Support Service and we can supply information about their options.

28. If the individual doesn't have capacity to appoint a decision-making assistant or co-decision-maker who then decides?

A person can only appoint a decision-making assistant or a co-decision-maker if they have decision making capacity to do so.

29. Do you need to be a clinical professional to undertake assessments? Can anyone attend the ADM training?

The legislation specifies the professionals who can undertake capacity statements for Co-decision Making agreements and Enduring Powers of Attorney as follows: Nurses, Midwives, Speech and Language Therapists, Psychologists, Social Workers, Occupational Therapists and Registered Medical Practitioners.

30. Can the prescribed person to perform the capacity assessment be a professional advocate?

For the purposes of formal capacity statements in relation to Part 4 (co-decision-making agreements) or Part 7 (enduring power of attorney) these can be supplied only by medical practitioners and other prescribed classes of healthcare professionals named in regulation. In more general terms the Act is not restrictive or exhaustive about who may assess if capacity needs to be assessed, noting that this is not the first step.

31. How will the transition of the wards of court be phased? i.e. what criteria will be used?

The transition of wardship was addressed in Alice's presentation which will be available after the event. Please also see a longer webinar on the wardship transition which is available on www.assisteddecisionmaking.ie.

32. Does the prescribed person have to be registered with a regulatory body? Or can they be trained?

The legislation specifies the professionals who can undertake capacity statements for Co-decision Making agreements and Enduring Powers of Attorney as follows: Nurses, Midwives, Speech and Language Therapists, Psychologists, Social Workers, Occupational Therapists and Registered Medical Practitioners. The regulations when published will state whether or not they will need to be registered. Training to develop the statements of capacity will be available on the Decision Support Service website.

33. Where a client is resident in another jurisdiction in receipt of care as services were not available in this jurisdiction and expresses a will to return to this country, what will the applicability of the Act be in those cases?

A ward of court who is receiving treatment in another jurisdiction will be assessed for discharge and discharged from wardship. It is not possible to provide further information as that would be dependent on the individual circumstances of the person.

34. Can you explain the concept for 'unwise decisions' and how we should manage them in healthcare? How do we manage families who believe they have the 'right' to make decisions for another person?

An 'unwise' decision is one that we, as healthcare professionals, may not agree with but nonetheless the person understands the decision they have made and the consequences of it. It does take time to work with families on this and involved them in decision-making, if possible. Keeping a record of any conversations with families and the service user is very important.

35. How will the new legislation affect our Do not attempt resus/resuscitation documentation? When someone is admitted, do we hold off until we speak with the Decision Support Service?

No need to hold off-supporting a decision. A Do Not Attempt Resuscitation decision is good clinical practice and should be documented in the notes. It will take time for Decision Support Service to have documentation available in relation to Advance Healthcare Directives.

36. Does the person need to apply for discharge from ward of court or will the process be automatic?

An application for discharge will need to be made to the court. There is information about this on the Courts Service website at www.courts.ie.

37. Will people in wardship have their discharge led by their ward of court appointed Solicitor?

Applications can be made by the solicitor representing the person or a new solicitor can be appointed to bring the application, this might be relevant where a former solicitor has not had involvement for a number of years.

38. Does the Advance Healthcare Directive have to be signed/ witnessed to be valid?

Subject to sections 84 and 85 of the Act, the directive has to be signed and witnessed. There are provisions for voice and video recording and the directive-maker who is unable to sign.

39. Can someone explain a little bit about what will happen with care representatives under the Fair Deal when the Act commences?

Care representative applications will continue if they have been started before commencement. Care representative applications will cease to be accepted through the Circuit Court after the 26th of April 2023. Thereafter no further applications can be made for a Care representative after the 26th of April. An application for a decision-making representation order will have to be made through the Circuit Court.

40. Where does a health care professional go if they have concerns that a current wardship is not functioning to ensure the individuals will and preferences are being implemented?

You can contact the wards of court office at wards@courts.ie and set out your concerns.

41. Is the legal aid cost neutral?

Legal Aid is a means tested application, where a person meets the criteria, legal aid will be granted. More information is available from the Legal Aid Board.

42. What if someone is a decision support but is not acting in a vulnerable person's best interests?

Best interests are not mentioned at all in the Act. Any decision supporter must apply the guiding principles and the code of practice and act within the limits of the particular arrangement. If they are not, then a complaint may be escalated to the Decision Support Service.

43. Can social workers complete capacity assessments under the Act?

Social workers are a prescribed class of professional under the Assisted Decision-Making (Capacity) Act 2015 so they can undertake assessments of capacity for Enduring Powers of Attorney and co-decision-making agreements.

44. If someone is currently Ward of Court, will a new assessment be made and what if their capacity has improved?

All existing wards of court will have their capacity reviewed when a discharge application is received by the Wards of Court Office. If their capacity has improved the tier of decision support will reflect their level of capacity at the time of assessment.

45. Are there any case study examples available?

There are a number of case studies examined in the webinars available here

<https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/assisted-decision-making-capacity-act/webinars/series-2022.html>.