

Assisted Decision Making (Capacity) Act 2015

Shaun O'Keeffe

ADM: What's Been Happening?

No big bang!

- Good everyday clinical practice looks the same before and after ADM
- Nothing on registers
- Few new advance healthcare directives
- A lot of queries
- A lot of myths



Some ADM myths and misconceptions

- ADM relevant to detention/ deprivation of liberty
- We must use the new tiers of support when someone has difficulty making decisions
- Undue concern re capacity / capacity assessments
- ADM abolished 'next of kin' consent
- Advance healthcare directives now the mandatory approach to DNACPR decisions – NO: complementary to usual advance care planning

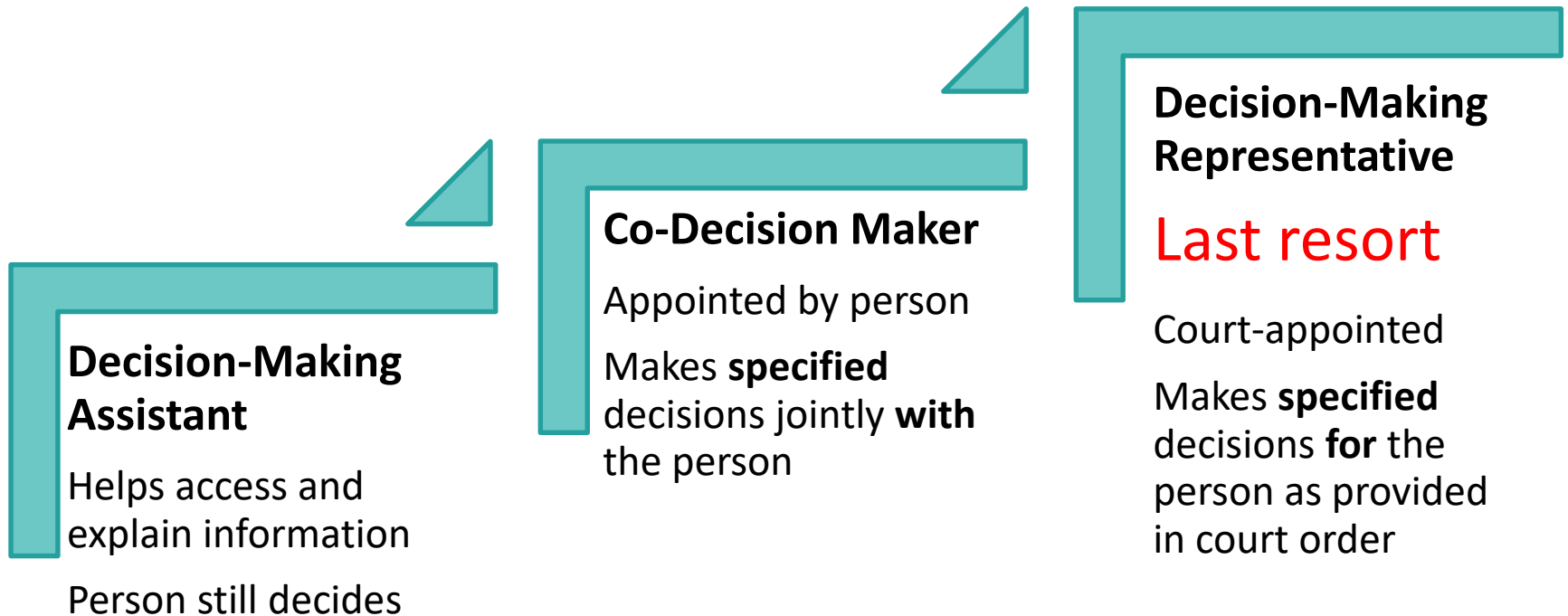
Detention of a Person Contrary to their Wishes

- Fundamental constitutional principle that no citizen may be deprived of personal liberty except in accordance with the law.
- Someone who says that they wish to leave a healthcare facility and is prevented or not facilitated is being deprived of liberty even if staff act with good intentions, judge the person lacks capacity and believe detention in their person's best interests.
- The doctrine of necessity can justify only a short period of detention before arranging for necessary assessments of decision-making capacity and urgent court application.

If deprivation of liberty is sought...

- Previously Wardship application – ceased on April 26th
- Issue **NOT** dealt with in ADM Act
 - ADM is not an ‘easier, quicker’ way of detaining people
 - Decision-Making Representatives, Attorneys do not have powers of detention
- What to do?
 - Interim: Applications under “inherent jurisdiction” to High Court.
 - HSE Consent Policy 2022 has section dealing with “AC case” implications
 - Long-term: New liberty safeguards legislation planned.

Abolition of Wardship system & replacement 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: they are legal **MUSTs** when interacting with those whose capacity is in question or lacking
 - Must be no intervention unless it is necessary to do so in individual circumstances of person
 - Intervention must minimise restriction of rights/ freedom of action
 - Intervener 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 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 or trigger 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

Capacity assessment (“statements 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. (Often GP in the past)
 - Co-Decision Making Agreement
 - Only relevant if there is a relative or friend in a pre-existing relationship of trust willing and able to take on the role
 - Decision Making Representation Orders
 - HSE Solicitor (and ultimately courts) will decide which professional has the necessary expertise to provide a report regarding capacity in a specific case

Capacity assessment - procedure

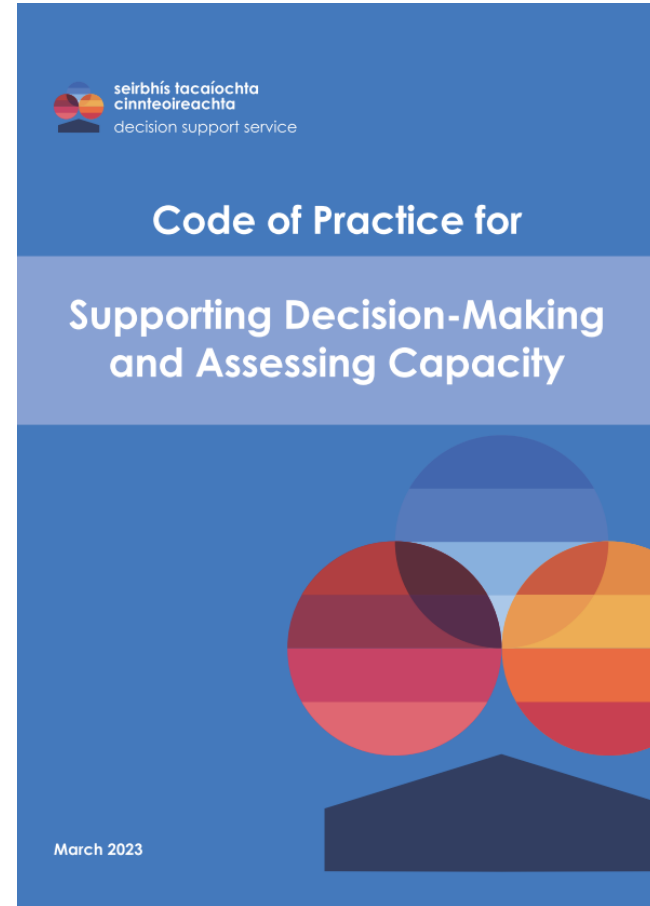
1. Prepare for the assessment

- Ensure an assessment is needed
- Understand the decision(s) to be made
- Understand any support needs of the person
- Prepare questions and lines of enquiry
- Ensuring the relevant person is prepared for the assessment
- **Seek person's consent to assess capacity**
- Choose an appropriate time and place

2. Undertake the four-part assessment

3. Manage the outcome of the assessment

- Consider the findings of the capacity assessment
- Make a determination
- Tell person the outcome of the assessment
- Document the assessment



“If someone lacks capacity and needs a procedure?”

- **No other person such as a family member, “next of kin”, friend or carer and no organisation can give or refuse consent to a health or social care service on behalf of an adult person who lacks capacity to consent unless they have specific legal authority to do so. (HSE Consent Policy 6.3.1)**
- Just states what was always the legal position – nothing to do with ADM

“But who's going to consent/sign the form?”

- Prior to ADM, HSE consent policy is to proceed on ‘best interests’ grounds after discussion with the person, those close to person and if no controversy/disagreement.

Post- ADM?

- 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 close to the person

Summary

- 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 benefit of the person
 - It is consistent with / not contrary to the person's ascertainable will and preferences
 - It is consistent with the views of other who must or who may be consulted

Conclusion

- 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

Thank you