

# Preparations for commencement of the Assisted Decision-Making (Capacity) Act 2015 – Considerations for Mental Health Services Webinar

9<sup>th</sup> November 2022

## Questions and Answers Transcript

**1. What are the nature of the delays passing the bill through the Seanad?**

The legislative process is very lengthy and with competing pieces of legislation it means that Bills can be delayed. The draft Bill was only published last December and so it has actually moved quite quickly compared to other pieces of legislation. The Government brought forward a number of amendments at Seanad Second Stage and so discussions have been lengthier at Report Stage.

**2. Is the ward of court system to be applied until 2023?**

On commencement of the Assisted Decision-Making (Capacity) Act 2015 no new applications for adults will be admitted into wardship. Existing adult wards will be reviewed. This process will be phased over three years from the commencement date. We are hosting a specific webinar on the transition from wardship on the 1st December 2022. For further details please email [adm@hse.ie](mailto:adm@hse.ie)

**3. If a person is admitted under BOTH 3(1)(a) and (b) of the Mental Health Act, will their Advance Healthcare Directive be applicable?**

This is not clearly stated under the amendment - however, it is likely that the fact that a person is admitted under section 3(1)(a) will prevent the applicability of the Advance Healthcare Directive in respect of the refusal of mental health treatments.

**4. Does this change mean that if a person has an Advance Healthcare Directive saying that they don't want a particular treatment for their mental health condition then this has to be complied with?**

Yes - if the Advance Healthcare Directive is valid and applicable in accordance with the requirements in Part. 8 of the Assisted Decision-Making (Capacity) Act.

**5. What is the process by which an individual can nominate and or withdraw nomination of a decision supporter. Must the person be deemed to be competent before making these changes?**

**6. There are different levels of support. The appointment of a first-tier decision-making assistant or mid-tier co-decision-maker is made by the relevant person. There is also provision for the variation and revocation of these arrangements. There is no requirement for a capacity statement in relation to a decision-making assistance agreement. A capacity statement is required as part of the application to register a co-decision-making agreement. Detailed information is available on the Decision Support Service website [www.decisionsupportservice.ie](http://www.decisionsupportservice.ie) Is there a specific professional on a mental health team that must undertake the functional assessment? Is it a team decision or a consultant psychiatrist?**

There is no team member specified. It is hoped that the team member who is most familiar with the patient and with the decision at issue will make the assessment. That might be the consultant psychiatrist but might not.

**7. How is the Decision-Making Assistant appointed?**

A Decision-Making Assistant is appointed by the person - further regulations setting out the formalities will be published on this, and information is also available on the Decision Support Service website ([www.decisionsupportservice.ie](http://www.decisionsupportservice.ie)).

**8. If a person is admitted under section 3(1)B1+2 and deteriorates what will happen?**

It is our understanding that if Section 3(1)(a) forms any part of the basis for admission, an Advance Healthcare Directive for mental healthcare is inoperative. So, care can be provided as normal under the Mental Health Act 2001.

**9. Can an Advance Healthcare Directive direct no admission to hospital under section 1 (b)?**

Advance Healthcare Directives only relate to treatment - not to admission.

**10. What if the Decision-Making Assistant/ Co-Decision-Maker or Decision-Making Representative (remembering the wishes of the person before capacity was an issue) shares a treatment view that is different from the consultant psychiatrist? Which treatment directive is followed?**

The will and preferences of the person should be followed. The Assisted Decision-Making (Capacity) Act 2015 gives effect to those human rights.

**11. Could you specify in an Advance Healthcare Directive you want no treatment of any kind?**

One of the requirements under Part 8 of the Assisted Decision-Making (Capacity) Act 2015 is that the Advance Healthcare Directive must apply in the circumstances in question. This makes it difficult to see that an 'all circumstances' Advance Healthcare Directive would be considered to be valid and applicable. Further guidance on this will be provided in the Advance Healthcare Directive Code of Practice, which will be published by the Decision Support Service. The 2015 Act also states that Advance Healthcare Directive is not applicable to refusal of basic care (section 85(4)(b))

**12. Does the Assisted Decision-Making (Capacity) Act 2015 with Enduring Power of Attorney?**

Enduring Powers of Attorney under the 1996 Act will continue to exist but as and from commencement of the 2015 Act, Enduring Powers of Attorney will require to be made under the 2015 Act. Enduring Powers of Attorney executed under the 2015 Act are subject to the 2015 Act and so the Enduring Power of Attorney is registered with and supervised by the Decision Support Service. This will all be set out in the Code of Practice.

**13. How does this Act protect a person's human right to protection from the torture and indignity of acute untreated mental illness if they satisfy s3(1)(b) of the Mental Health Act but have an Advance Healthcare Directive refusing all mental health treatment? Does the State not have a positive obligation under ECHR to prevent citizens experiencing torture (Article 3 ECHR) and to safeguard a citizen's right to dignity (Article 8 ECHR), in addition to safeguarding their CRPD Article 25 right to health?**

The Act facilitates and supports the person's capacity, which is consistent with most rights obligations. An Advance Healthcare Directive cannot refuse 'all treatment'; it needs to be specific about circumstances and specific treatments to be refused. An Advance Healthcare Directive refusing all treatment would not be sufficiently specific. Also, if refusals in an Advance Healthcare Directive might result in the death of the person, the Advance Healthcare Directive can be overruled unless the person has

specified in advance that the refusal is to be carried to the point of dying. But, yes, the Act does not completely protect against the 'indignity of untreated mental illness'. If we expected any Act do so this, I think it would be the Mental Health Act 2001 - and (unlike some other countries) our 2001 Act does not include a right to mental healthcare. Perhaps it should?

- 14. In drawing up policy documents, can you advise if the term 'specified person' (a family relative who a healthcare service user wishes to accompany them to medical appointments, assist with information exchange and care planning) is appropriate. If this is the preference of the service user who does not lack functional capacity, use of the term decision-making supporter, may not be appropriate?**

Outside of the Act, a person may of course continue to draw on their usual supports. It may be confusing to refer to these as decision supporters, which is a term we use to mean the formal framework supports under the Act.

- 15. Can family members be a decision supporter/alternate decision maker? What if there is concern that the family member may benefit from a financial decision?**

Yes, a family member can be a decision supporter but there are checks in place to ensure that issues of concern can be addressed e.g., in the form of an objection. With a Decision-Making Representative, the court appoints the person and will need to satisfy itself on all relevant issues, the decision supporter can be appointed to deal with certain specific issues and not others.

- 16. What happens in the meanwhile if a decision supporter is under investigation, but they are not yet suspended in relation to the care and treatment decisions for the person they are assigned to?**

In most instances the person should be making their own decisions - it is hoped that most people won't require Decision-Making Representatives and that they can be supported to make their own decisions with the lower levels of support. In the case of a complaint, the Amendment Bill introduces a provision that allows the Decision Support Service to apply to court to suspend a decision supporter on a temporary basis pending investigation to prevent harm.

- 17. In the case of an individual's Advance Healthcare Directive, if there is no central register, how is it ensured that mental health staff know of the existence of that individual person's Advance Healthcare Directive?**

It is the responsibility of the directive-maker to bring the existence of the Advance Healthcare Directive to healthcare professionals.

- 18. Will there be a mechanism to alter the basis of detention from 3(1) B to 3(1) A where a patient deteriorates at present the original detention basis remains?**

There is no such basis at present under the Mental Health Act 2001 or in the proposed changes to it. Just to add, it is expected that this would be done in the usual way i.e. at time of renewal of the order or by the mental health team when affirming the order.

- 19. If someone is detained on treatment grounds, and they lack capacity, but object to treatment, are you obliged to seek a Decision-Making Representative or can treatment be given under the Mental Health Act?**

Treatment can be given under the Mental Health Act in the normal fashion in this circumstance. The 2015 Act does not change that, but it provides an opportunity to also make an application under the 2015 Act to access decision-making supports. Section 36 of the 2015 Act says applications "may" be made to the Circuit Court

under the 2015 Act - and it is encouraged that would happen. But if it does not, and in the meantime if it is started, treatment can be provided in the normal fashion under the 2001 Act.

**20. Will the slides from today be available to us?**

The recording of the webinar, the slides and the Q&A will be available on the Mental Health Hub on HSELand and on [www.assisteddecisionmaking.ie](http://www.assisteddecisionmaking.ie).

**21. How does the Decision-Making Assistant and Co-Decision-Maker differ from or perhaps work with an advocate especially for people with disabilities, some of whom have an advocate from the National Disability Advocacy Service?**

Advocacy is hugely important and informal supports and advocacy will be needed for people. Decision-Making Assistants and Co-Decision-Makers have their specific functions as set out in the Act and in their individual decision-making assistance agreements and co-decision-making agreements.

**22. Is there a role for the three levels of decision supports as part of mental health tribunals?**

Nothing specific is provided for in either Act. We will watch and see how that unfolds.

**23. Where can I find more information about the implications of the Assisted Decision-Making (Capacity) Act 2015 for current wards of court and the process of wardship ending?**

We will be hosting a webinar on 1st December from 12:30pm- 1:45pm on the transition from wardship to the Assisted Decision-Making (Capacity) Act 2015. You can register for the webinar at [https://us06web.zoom.us/webinar/register/WN\\_4pAeaV\\_jTWq9sUtos9xrwQ](https://us06web.zoom.us/webinar/register/WN_4pAeaV_jTWq9sUtos9xrwQ). If you have specific questions you wish answered please email them in advance to [adm@hse.ie](mailto:adm@hse.ie).

**24. In the Home Support Reform Unit (Department of Health - DoH) we are developing regulations for providers of home support services and including a definition of decision supporters. Is there a contact person / email that we can send this onto to ensure we are correct in our interpretation?**

This would be a matter for you and the DOH. The Decision Support Service may be able to provide information and guidance.

**25. How is capacity to make an Advance Healthcare Directive assessed, if at all, at the time of making it?**

The 2015 Act does not require an assessment of capacity to make an Advance Healthcare Directive, but it must be witnessed.

**26. The two Acts have different guiding principles at present; Mental Health Act underpinned by best interests, Assisted Decision-Making (Capacity) Act underpinned by will and preference. Is there a commencement date for the Mental Health Act (Amendment) Act 2018 relating to the removal of best interests from the Mental Health Act or will that be deferred until the fully amended Mental Health Act is commenced?**

It is our understanding that the 2018 Act, which is not commenced, will now form part of the overall revision of the Mental Health Act 2001. We're hoping that the reform of the Mental Health Act 2001 will be prioritised in 2023.

**27. If a person is in the community and would like an assessment for the capacity statement required to have a Co-Decision-Maker registered (e.g. for financial decisions or medical decisions), is there a referral pathway for GPs or other healthcare professionals?**

The person's first port of call will most likely be to their GP for a consultation. The ICGP is also providing education about the 2015 Act.

**28. Could you please clarify any changes to the Enduring Power of Attorney procedure?**

Information is on the Decision Support Service website. A 1996 Enduring Power of Attorney remains valid. After commencement any new Ensuring Powers of Attorney are created under the 2015 Act. A 2015 Act Enduring Power of Attorney will be registered with and performance supervised by the Decision support Service.

**29. A small percent of those patients who are involuntarily admitted, never regain full insight, while they can comply with treatment when an inpatient, they do not do so on discharge based on past admissions and discharges. How can we protect their rights to treatment to a life lived with dignity? And protect their family and neighbours from inappropriate behaviour and risk?**

Neither the 2001 Act nor, in my view, the 2015 Act address this issue fully. There is no provision for treatment without consent in the community in either Act. I imagine policy might address this better, but there is no clear answer in either Act. A similar question was asked earlier so just to note again that the person's right to dignity is linked to their rights to make decisions and have those decisions respected. During the pre-legislative scrutiny process in the Oireachtas a witness said that the duty of care does not equate to the right to impose care.

**30. Any sign of Deprivation of Liberty Safeguards or how the Assisted Decision-Making (Capacity) Act will handle this aspect of capacity?**

Work is underway in the Department of Health on Deprivation of Liberty Safeguards. These will not be ready when the Assisted Decision-Making (Capacity) Act will be commenced.

**31. Does the involuntary criteria Section 3 as stands under the 2001 Mental Health Act need to change to comply with the Assisted Decision-Making (Capacity) Act. In Mental Health Act in England and Wales involuntary criteria has not changed since 1983?**

The criteria will change in the revision of the 2001 and will be compliant with the 2015 Act.

**32. As the Assisted Decision-Making (Capacity) Act does not currently have Deprivation of Liberty safeguards, how will nursing home staff manage when a person with severe dementia who lacks decision-making capacity insists on leaving the nursing home? Presumably the doctrine of necessity applies in the immediate term, but will this then require an application to the High Court in relation to deprivation of liberty?**

See question 30 in relation to the development of Protection of Liberty Safeguards. The Assisted Decision-Making (Capacity) (Amendment) Bill states that the inherent jurisdiction of the High Court is retained. In the meantime, the current, unsatisfactory situation still applies.

**33. Does the Act include a list of conditions or circumstances that would call a person's capacity into question and lead to a capacity assessment?**

No. The Decision Support Service code on assessing capacity and supporting decisions will help.