Webinar series
Assisted Decision-Making (Capacity) Act 2015 Commencement and Implementation

Webinar 3: Positive Risk taking and 'unwise' decisions (27/4/22)

This is a transcript of the Q&A in the chat function at the live event, wherein panellists responded to questions from attendees.

Can't detain a person against their will long term. What is considered short term? Days - weeks?

In AC v CUH, the Supreme Court said that two weeks would generally be too long

Currently case law has established there's no right to detain under the law save criminal & infection control. Doctrine of necessity will only cover circa two weeks for DoL. Even to explore available community supports for a person lacking capacity and unable to look after themselves would take much longer than this. What guidance currently exists for providers to avoid potential litigation pending DoH advice.
We are waiting for further guidance from the Department on this - so I'm afraid we can't provide guidance until there is greater clarity from the Department of Health.

Regarding modified meals recommended by SALT and a person with a profound Intellectual disability, who by his demeanour and presentation is demonstrating his lack of consent but he is unable to articulate his wishes. How can he be supported to fulfil his wishes?
This is of course a challenge, someone with a significant is so reliant on the people who know them best - the family/staff member advocate - people who know them so well and appreciates their likes and dislikes - do we know they like what they are eating? Is there care being taken in the presentation of the modified meals?

Is there a legal basis under the Act for e.g. medical social workers to carry out a 'competency' assessment if they have 'very good reason' to suspect this is an issue - are they not obliged to assume capacity unless a court has determined otherwise in this specific context?
Presumption of capacity is open to rebuttal. Capacity assessment under ADM is very formal process - national consent policy notes these as will codes of practice - with view to possible use of one of the supports including decision making representative from Circuit Court. Social works are one of the prescribed classes who can do assessments.

What if the person has a potentially terminal illness that they are refusing to have surgery and they are in their own home at risk of dying and refusing to go to hospital?

It's very much within the person's right to refuse treatment, no matter what the outcome. However it's usually not a once-off conversation, it's important to give someone all the information they need to make a decision and also to offer them an opportunity to ask questions, not just when they are given the information but after a few days as well.

What if the unwise medical decision would definitely lead to a person dying?

Ultimately if someone has capacity they can make an unwise decision that can lead to death

Of course there is a legal right to detain under specific criteria under the Mental Health Act. This will be an area of great interest when the ADM Act is commenced.
Yes - it is the situations where the MHA does not apply (because criteria are not met) that are creating the challenging situation (legally)

Can efforts be made to make his home safe before he is discharged by OT assessment etc.? This case would fall under physical & sensory disability service in the community. Unless he has a clinical need Public health nurse is limited here.
Yes absolutely, if OT is available and Brian is open to it, they could play an important role in helping support Brian to live his live his way

For Ciarán's Case Study: His actions are posing a risk to others. If detention was not the right course of action (e.g. he was already living in a residential service), are there grounds for professionals involved to intervene in Ciarán's life in order to mitigate the risk if the least restrictive interventions continue to restrict Ciarán's life e.g. that he has increased support/supervision of his use of fires / when cooking; that professionals remove flammable materials etc.? If so, what would be the legal basis for this intervention if this was against Ciarán's stated choices / will & preference?
There are a number of issues here. Detention under the MHA is for a treatable psychiatric disorder and in this case, even if Ciaran was in residential care, he can only be detained to an approved centre under MHA. If he doesn't have a treatable mental health disorder, then the issue arises not just of risk to himself, but to others. In this case there is a provision for a detention order as Theresa outlined. This would not be under MHA. Other options include the criminal justice route but in my experience, this would be a very rare route in those with moderate cognitive impairment

Delighted to hear Niamh mention family members, but will it be possible to share the patient's information (documented risks in this case) with family members under GDPR without the patient's consent?
It is not possible to share information with family without the patient's consent - on commencement of the Act the person may have a decision making assistant/co-decision maker or decision making representative for health care matters in place.

Are there any templates for decision making in positive risk taking to show the process that has been taken to reach the risk assessment.
Please have a look at the Decision Making flow chart (which is just one example) on the HIQA website - Go to hiqa.ie and type 'Human Rights' into the search box, this will bring you to the guidance on a Human Rights-Based Approach in Health and Social Care Services, as well as a link to the decision making flow chart and other associated information.

What about scenarios when family members are making decisions on the client's behalf that are 'unwise'? E.g. client is main carer and does not want to use recommended equipment with the client, e.g. a hoist when it would be safer.
Webinar 5 in this series is on the topic of 'The Rights of the person and the role of families'. This will take place on 1st June. Please email adm@hse.ie to join our mailing list for more information.

Dear All. I work as part of a support team with adults in the community with a man with mild ID with capacity who wants to make himself intentionally homeless by giving up his apartment. However he presents after a number of weeks looking for it back or expecting an alternative from services which is not an option. A transfer is also not an option at the moment as no alternative is available but has been requested. All info has been explained but evidence of his behaviour suggests that he will be on the street but will then want his apartment back. We always support any decisions by explaining all the information but have concerns based on his on-going behaviour that the consequence of this choice will not be real until he is on the street. He would be vulnerable on a safety level and has no family to go to and is quite restricted in the community due to his presenting behaviours over the years. The focus will then be on disability services and not his right to make an unwise choice.
If you think an independent advocate might support the person and their voice in this process please feel free to contact the National Advocacy Service on 0818 073000

Niamh mentioned about a decision making tool available on the HIQA website - can more information on this be shared please? Thanks
This is the one I was referring to https://www.hiqa.ie/sites/default/files/2019-11/Decision-Flow-Chart.pdf