What will the Assisted Decision Making (Capacity) Act 2015 mean for practice?

Shaun O'Keeffe

Co-Chair HSE ADM Implementation Steering Group

Co-Chair HSE National Consent Policy

If deprivation of liberty is sought…

- Currently: Wardship application
- Wardship will cease on commencement
- Issue not dealt with in ADM Act
- Solutions
  - HSE Consent Policy 2022 has section dealing with "AC case" implications
  - Interim: on commencement, make applications under "**inherent jurisdiction**" of the High Court – Court will issue guidance on procedures.
  - Long-term: Protection of liberty safeguards (PoLS) legislation planned.

ADM(C) 2015 and the HSE

General Principles	Very important
	Not that new
Advance Directives	Somewhat important
	Somewhat new
The rest	Mainly new
	Not that important for many
	You may meet new ‘supporters’

What are we hearing?

"This is all new and worrying"

- *We will need to identify everyone who lacks capacity*
- *I will need to perform capacity assessments but I don't know how*
- *I'll need special training*
- *Big workload: we'll need more staff*
- *What about professional indemnity?*
- *Do we have to go to court if someone lacks capacity and needs an operation?*
- *I'm a member of the 'prescribed classes' under the Act: extra responsibilities and work but no extra pay?*

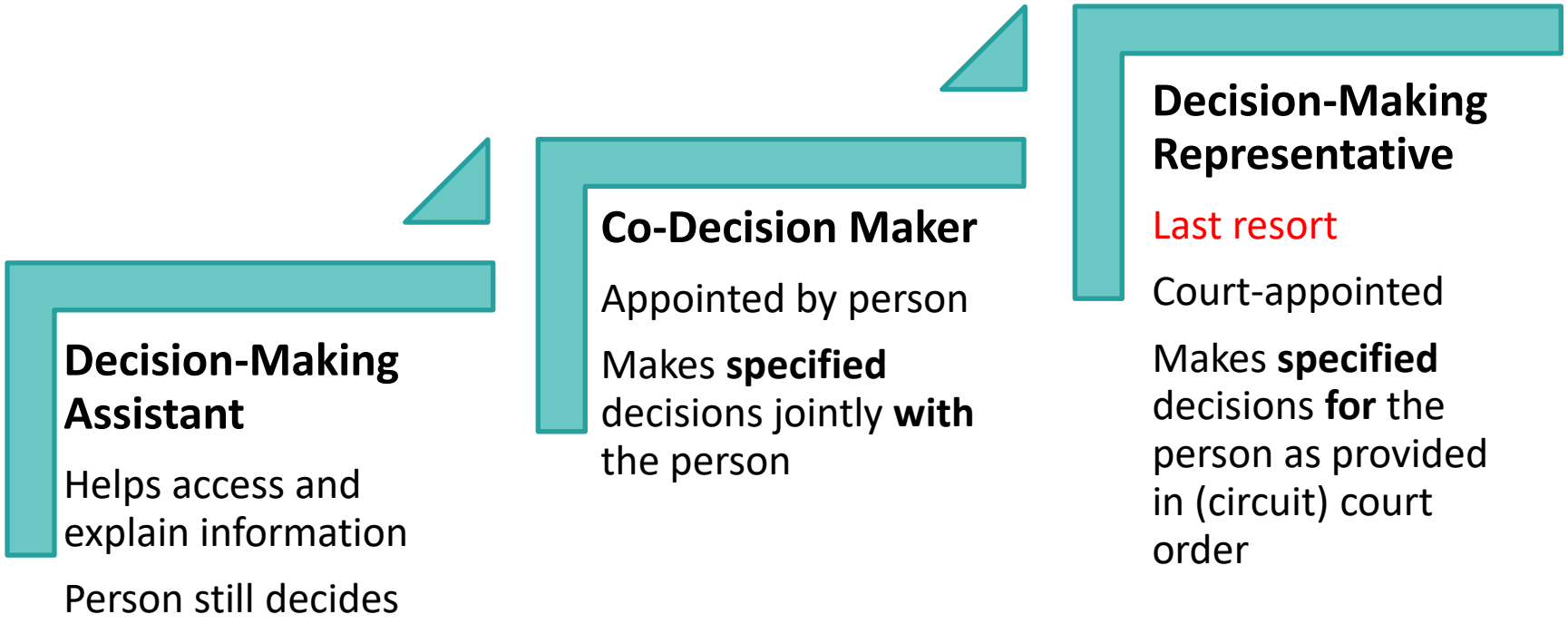
Steady on!!

- *It's all new*
- *Frenzy of capacity assessments, must hunt down incapacity, must use new tiers of support if we find incapacity*
- *We'll need more staff for all these assessments*
- *I'll need special training*

- Functional approach to capacity already applies in common law and HSE policy
- NOT required under Act:
  - ADM (Capacity) Act not Capacity (ADM) Act - think support, assistance rather than capacity
  - No intervention unless necessary (not 'if we find incapacity we must do something')
  - New tiers of support are problem-solving tools, not mandatory interventions
- Don't do them unnecessarily
- There are webinars, additional HSE guidance and additional training for specific groups

I'm a member of the 'prescribed classes'

- Nurses/midwives, psychologists, SLTs, OTs and social workers.
- Assessment if capacity for co-decision-making agreement and enduring powers of attorney can be carried out by either a doctor **or** one of the prescribed classes of professionals
- Decision making representative orders? Probably if Courts agree



- Expert working group on prescribed classes of professionals in ADM.

Prediction: HSE staff will be enabled to assess capacity as per 2015 Act for those "in receipt of HSE services" but individual practitioners will not be obliged to perform such assessments.

- Special training need? Yes
  - Enduring Powers of Attorney: Mostly made in community: P sees Solicitor who seeks capacity report, mostly from GPs. Unclear if will change much in practice?
  - Co-Decision Making Agreement: Key provision – extends autonomy of those who have some or partial capacity

"Do we have to go to court if someone lacks capacity and needs an operation?"

- **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

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

- Realisation that NOK "consent" was never a valid concept has been triggering Wardship applications in some specialties & areas if, say, operation needed

- Myth that ADM now means that family views don't count anymore

Post- ADM?

- Our advice:
  - 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
  - The 3 new tiers that replace wardship are **options** to support the person – **not mandatory interventions**
- Risks:
  - Anxiety/ misunderstanding of principles of Act will lead to unnecessary capacity assessments, requests for legal advice & last resort of Circuit Court orders will become the first resort
  - There is nothing in the Act/Codes to prevent staff from doing this **BUT** it will cause chaos and delay
- Mitigating the risks: HSE ADM Transitional Oversight Group
  - Modelled on vaccine consent group
  - Provide answers to FAQs as they arise
  - Try to prevent different regions/bodies taking different approaches, seeking legal advice, going to court & clogging up the courts unnecessarily

Advance Healthcare Directives

- An advance expression of will and preferences made voluntarily by an adult with capacity …..concerning treatment decisions that may arise in the event that the person subsequently loses capacity

- In 'writing' (includes voice/video recording) – formalities: signed, witnessed

- Can refuse treatment (any - including artificial nutrition and hydration – but not 'basic care') even if that refusal seems unwise, not based on sound medical principles or may result in death

- Refusal of life-sustaining treatment must be confirmed by explicit statement that the AHD is to apply to that treatment even if his or her life is at risk.

- Can name a designated healthcare representative with powers to interpret their wishes regarding treatments +/- to consent to or to refuse treatment.

Some questions/concerns re AHDs

- *"Will there be a standard form"*? Yes - **BUT** not a single 'mandatory' form.

- *"What if a professional disagrees with a valid and applicable refusal of treatment"*? Potential civil/criminal liability - a conscientious objection "cannot lead to the restriction of the rights and freedoms of another person" (ECHR)

- *"Will there be a searchable register of AHDs"*? Eventually - **BUT** not at the start
  - *"What if I didn't know there was one or it can't be found in an emergency"*? No liability if you are unaware of existence and contents at the time
  - Onus is on the directive maker to disseminate & tell others of their AHD

- "*Our DNAR policy is that decisions must be recorded on Form X – until then an AHD refusing CPR doesn't matter*". **NO.** The AHD is a legal document. Your DNAR policy adjusts to AHDs – not the other way around!

- *"Will all DNAR decisions now need an AHD"*? **NO.** 'Ordinary' advance care planning will continue – complementary approaches to end of life planning

What will change on April 26th?

- The big bang? **NO**. Not too much!

- Good everyday clinical practice will look the same before and after ADM

- There will be no support arrangements in place immediately – they will gradually arise over time

- There will be few AHDs immediately. With time, maybe 10-20% of population may have

Thank you