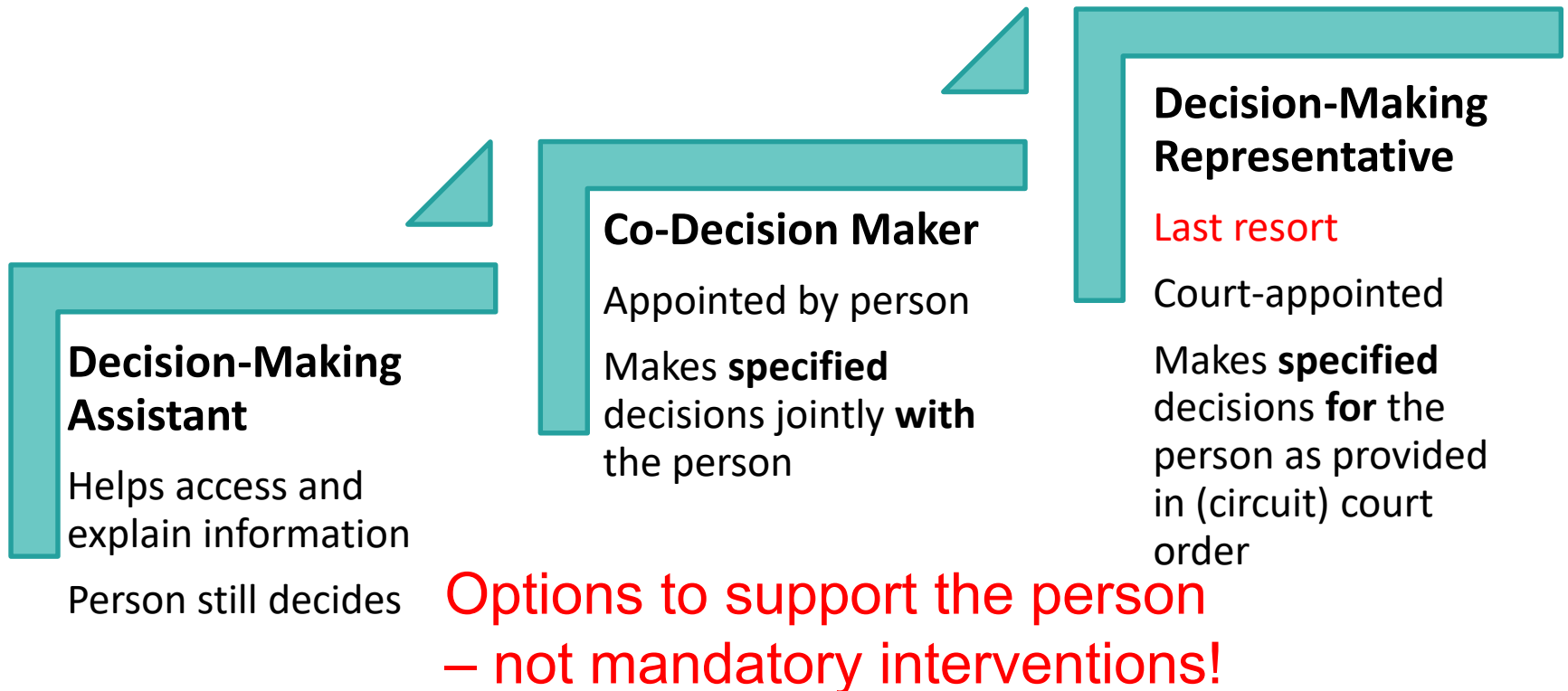


Assisted Decision Making (Capacity) Act 2015 and Update to HSE National Consent Policy

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Assisted Decision Making (Capacity) Act 2015

- Statutory guiding principles and functional test of capacity
- Establishment of Decision Support Service (DSS)
- Statutory basis for advance healthcare directives (AHDs - living wills)
- Abolition of Wardship system & replacement by 3 tier hierarchy



ADM and treatment decisions where capacity is in question or lacking

“Treatment” means an intervention that is or may be done for a therapeutic, preventative, diagnostic, palliative or other purpose related to the physical or mental health of the person, and includes life sustaining treatment

- Decision making assistant - assistant not a decision maker for specified decision(s)
- Co-decision maker
 - Can decide jointly with person if within scope of agreement
 - Even if outside scope, must be consulted unless not appropriate or practicable
- Decision-making representative
 - Can decide on behalf of the person if within scope of agreement
 - Cannot refuse consent to life-sustaining treatment
 - Even if outside scope, must be consulted unless not appropriate or practicable
- Attorney under Enduring Power of Attorney
 - Cannot give or refuse consent to treatment
 - Must be consulted unless not appropriate or practicable
- Advance healthcare directive
 - Legally binding refusal of treatment if valid and applicable – including refusal of life sustaining treatment if explicitly stated
 - Request for treatment must be considered but not legally binding
 - Designated healthcare representative with power to consent/ refuse consent if specified

Guiding Principles when person lacks capacity

- An Intervention MUST be in a manner that
 - Minimises the restriction of relevant person's rights
 - Minimises the restriction of freedom of action
 - Has regard to...dignity, bodily integrity, privacy and autonomy
- Any intervenor MUST
 - Permit, encourage and facilitate the relevant person to participate or to improve his or her ability to participate
 - Give effect, in so far as practicable, to the past and present will and preferences, in so far as reasonably ascertainable
 - Take into account the beliefs and values of the relevant person
 - Take into account any other factors which the person would be likely to consider if able to do so
 - Unless not appropriate or practicable consider view of person named by relevant person to be consulted/ other appointed
 - Act at all times in good faith and for the benefit of the person
- The intervener MAY
 - Consider the views of (a) anyone caring for the relevant person, (b) anyone who has a bona fide interest in the welfare of the relevant person, or (c) healthcare professionals.

- Most treatment decisions are not interventions under the ADM Act (in the absence of an existing support arrangement)
- The Consent Policy takes the position that healthcare professionals should act as if the decisions were interventions under ADM and apply the guiding principles

Myth of 'Next of Kin' Consent

'No other person such as a family member, friend or carer (and no organisation) can give or refuse consent on behalf of an adult who lacks capacity to consent unless they have formal legal authority to do so'. (NCP 2013)

- Nothing new: just states the legal position then and now
- A false belief persists among healthcare staff that consent should be sought from the 'next of kin' in these circumstances. This can give rise to delays in providing appropriate care with the potential for harm to the patient especially in urgent situations.
- A new false belief is that ADM 'abolished' next-of-kin consent: It didn't – it never had legal validity

Why does it matter post-ADM?

- Some decision supporters may – it depends on the arrangement and it's scope - scope have legal authority to give or refuse consent on behalf of an adult who lacks capacity to consent.
 - These arrangements must be respected.
- Even if there is no decision arrangement in place, the views of anyone the person asks to be consulted **MUST** be considered.
 - They are not 'consenting' on behalf of the person though
- The views of others close to the person may be considered.
 - The NCP advises that they should be consulted, especially when the person's will and preference cannot be ascertained

ADM is not a family-excluding law!

If capacity is in question and a person needs a treatment decision, e.g. a procedure?

If there is a support arrangement in place, respect the scope of that arrangement (but many may **not** include healthcare decisions)

Summary

- Consent from the person (assisted if necessary)
- Joint consent of the person and their Co-Decision-Maker (if they have one for healthcare decisions)
- Consent on behalf of the person from a Decision-Making Representative (if they have one for healthcare)
- If the person cannot consent for themselves and there is no relevant decision support arrangement, consider the Guiding Principles including:
 - It is for the overall benefit of the person
 - It is consistent with the person's will and preferences if ascertainable
 - Consider the views of others who must be consulted (anyone named by the person/ decision supporters) or who may be consulted (e.g. others close to and who care about the person) under the Act

If all aligned, proceed with the intervention

When may legal advice / formal support arrangement be needed?

- Not possible to be exhaustive about circumstances in which seeking legal advice would be appropriate and proportionate.
- It may be required if, having exhausted the Guiding Principles pertaining to the presumption of capacity and supporting decision-making:
 - Apparent conflict between past and present will and preferences of person.
 - Choice person is making seem inconsistent with known beliefs and values.
 - The choice the person is making entails a disproportionate risk of significant harm in relation to the possible benefits of that choice.
 - The intervention is a major one and the proposed treatment carries a risk of significant complications which may have life-long adverse or life-limiting consequences for patients.
 - There significant disagreement between those consulted and HCP regarding the person's will and preference or benefit
- If treatment involves possible coercion, detention – High Court

Thank You