

Decision-making and Consent

Assisted Decision-making

What is Assisted Decision-Making?

This is when a person whose capacity to make a decision is in question can appoint a person to assist, co-decide or has somebody appointed to represent them for the purpose of making a decision.

What is the Assisted Decision-Making (Capacity) Act?

The Act creates a new system to support people to make decisions and when fully commenced will repeal the Lunacy Act of 1871. (The Ward of Court System). The Act allows for several new support structures as well as Advance Healthcare Directives and changes to the Power of Attorney system.

A new office called the Decision Support Service (DSS) is established and will be run by the Director of the DSS. This office is a new department within the Mental Health Commission. The Director will have a role in public awareness, information, and guidance, developing codes of practice, advising state bodies, making investigations, and keeping records and reports.

Who does the Assisted Decision-Making Act Affect?

The provisions of the new Act are not limited to people with a disability or impairment but applies to any person whose decision-making capacity is in 'question'. Anybody may need to use the provisions of the Act at one time or another.

What is Capacity?

The Act defines Capacity as 'decision-making capacity' and it is the ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time.

If I lack capacity, what does that mean?

A person cannot lack capacity as a decision maker. A person may lack capacity to make a particular decision at a particular time or their capacity may be in doubt. This capacity may be regained at a different time and for a different decision.

Why might my capacity be 'in question'?

Everyone is to be presumed to be able to make all decisions unless the contrary is shown. A functional test can be used to assess a person's capacity to make a decision and this means that the person has the ability to understand the nature and consequences of the decision in the context of the available choices at that time.

How is capacity decided?

A person can be said to lack capacity to make a decision if they are not able to

- understand the information relevant to the decision,
- retain that information long enough to make a voluntary choice,
- use or weigh that information as part of the process of making the decision,
- communicate his or her decision in whatever way they communicate (not only verbally).

Communication includes talking, writing, using sign language, assistive technology, or any other means and information relevant to the decision must be given in a way the person can understand e.g. using clear language, visual aids etc.

What decisions are covered?

Most decisions are covered and fall under the Act including financial or medical decisions. Decisions relating to marriage or divorce, adoption, jury membership and sexual relationships are covered by different laws.

Does the Act apply to children?

No. The Act only applies to people over 18. Parents or guardians remain as decisions makers for children unless they are a Ward of Court. If a person requires decision-making support when they reach 18 they will need to avail of one of the new structures or their family may need to apply to court.

What new decision-making supports does the Act create?

The Act creates decision-making assistance, co-decision-making and decision-making representation. These are explained below.

Who can be a decision-making support?

People can choose and register their assistants and co-decision-makers and a person must apply to court to be a decision-making representative.

Owners or registered providers or an employee or agent of designated centre or mental health facility in which the person resides cannot be named as assistants, co-decision makers or decision-making representatives.

What is decision-making assistance?

A person whose capacity is in question or will shortly be in question chooses another person to assist them to make decisions. A decision-making agreement is drawn up to say what decisions are involved. The decisions can be property or personal welfare or both. A person can have more than one decision-making assistant to act jointly or separately or jointly on some matters. The assistant will assist the person making the decision to get the information needed to make the decision, explain the information to the person and to get the person's will and preference in relation to the decision. The assistant will also communicate the decision if necessary and follow upon the decision to ensure it is implemented.

What is co-decision-making?

A person chooses a person to jointly make one or more decision on personal welfare or property and affairs. The person should be a relative or friend of the appointer who has had such personal contact over such period of time that a relationship of trust exists between them. The co-decision-maker will get the information needed to make a decision, advise on decisions, and make decisions together with the appointer based on their will and preferences. The co-decision maker will help the person express a decision and ensure that the decisions are implemented.

What is decision-making representation?

Someone wishing to be a representative must apply to court for decision-making powers. A representative will only be appointed if an assistant or co-decision maker is not suitable or available. The court will consider the will and preferences of the

individual, family structures and the suitability of the applicant. The role of the decision-making representative is to take decisions on personal welfare or property and affairs. The representative must make decisions based on the will and preferences of the person. The representative must send reports into the Director of the DSS and keep accounts and records.

What is an Advance Healthcare Directive (AHD)?

This allows a person with capacity to write down their preference around healthcare treatment in case they lack capacity in the future. A valid AHD will not be invalidated even if it appears unwise or will result in death. Refusal of treatment will be complied with provided that the person had capacity at the time it was written, and the AHD is clear. Requests for treatment are not legally binding but must be considered. AHD's are not applicable to mental health treatments.

What is a Power of Attorney?

A power of attorney is where a person gives another person(s) power to make decisions relating to personal welfare or property affairs, or both. An enduring power of attorney is designed to take effect at a future time when the person lacks capacity.

What about 'informal decision-making'?

There is no scope for 'informal decision-making'. Individuals should make their own decisions and if support is needed then one of the structures utilised.

What is the Lunacy Act?

The Lunacy Act allows for Wards of Court, a system where people with intellectual disability, dementia, brain injury or mental illness can find their civil rights restricted if they are found not capable of managing their own affairs.

What happens to people who are currently Wards of Court?

When the Capacity Act comes into effect and the Lunacy Act is repealed, all orders made under it remain in place for a time. This means that people who are Ward of Court will remain Ward of Court but must be reviewed within 3 years of the Act commencing. After this review former Wards must either resume their own affairs or move to one of the support structures. A Ward can apply for a review as can a

relative or a person with interest in the Ward's welfare. There will still be a Wards of Court system for minors (those under 18) but there will be no new adult Wards of Court once the Act commences.

Information correct as of January 2016; the information contained is a summary and subject to change.