



seirbhís tacaíochta
cinnteoireachta
decision support service

Decision Support Service Code of Practice

Code of Practice for Financial Professionals and Financial Service Providers

This Code should be read in conjunction with the Assisted Decision-Making (Capacity) Act 2015. For the avoidance of doubt, in the event of any conflict or inconsistency, the legislative provisions prevail.

Draft

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At the request of Department of Justice and Equality, the National Disability Authority (NDA) drafted 11 non-healthcare codes of practice to support implementation of the Assisted Decision-Making (Capacity) Act 2015. It was agreed that each code would be developed to the stage of a second draft, informed by the NDA's own research and the input of relevant technical experts.

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Introduction and overview

1.1 Purpose of this code of practice

The purpose of this code of practice is to provide guidance on good practice for you as a financial professional or financial service provider on how to engage and interact with, and advise, customers who are relevant persons under the Assisted Decision-Making (Capacity) Act 2015. Good practice includes adhering to the guiding principles within the Act and working with decision supporters and other interveners.

You should also read the code of practice on supporting decision-making and assessing capacity which provides guidance on how the guiding principles may be applied and how to conduct a functional assessment of capacity as well as further information on supporting a relevant person to make a decision. This can be found on the Decision Support Service website www.decisionsupportservice.ie

In addition, you may wish to consult your own professional body for guidance, including relevant codes of conduct and practice directions.

1.2 About the Assisted Decision-Making (Capacity) Act 2015

The Assisted Decision-Making (Capacity) Act 2015 (the Act) was signed into law by the President on 30 December 2015, <and came into force on X date>. It is an important piece of reforming human rights law. The Act repealed two laws about decision-making capacity that had been in place since the 19th century. These are the Marriage of Lunatics Act 1811 (repealed in February 2021) and the Lunacy Regulation (Ireland) Act 1871 (repealed on commencement of the Act).

The Assisted Decision-Making (Capacity) Act 2015 established a modern legal framework to support decision-making by adults who may have difficulty making decisions without help. It includes three types of decision support arrangements for people who currently, or may shortly, face challenges when making certain decisions. It also provides for people who wish to plan for a time in the future when they might lose capacity, through a further two types of decision support arrangements.

Under the Act, a person over the age of 18 is always presumed to have capacity. In a situation where a person's capacity is questioned, capacity is assessed based on their ability to make a specific decision at a specific time. This is called the functional test of capacity. A person is considered to have the capacity to make a decision if they can:

- understand information relevant to the decision,
- remember the information long enough to make a choice,
- use or weigh up the information to make a decision, and
- communicate their decision (this may be with assistance).

The Act includes important safeguards requiring the Director of the Decision Support Service (DSS) to oversee and supervise decision support arrangements. This includes monitoring decision supporters, for example, through general and special visitors and through the review of annual reports that decision supporters are required to provide. The Act also requires the Director to receive and investigate complaints made about decision supporters and decision support arrangements.

1.3 Legal status of this code of practice

This code of practice is one of twelve codes provided for under section 103 of the Act. Section 103(2) establishes that the Director of the DSS may publish codes for the purposes of providing guidance to a broad range of people. Once published, those for whom the code is intended must have regard to its contents while performing any function under the Act to which that code refers, as set out in section 103(13). Section 103(12) of the Act provides for these codes to be admissible in legal proceedings. Under section 103(14), failure to comply with these codes may be taken into account in any civil, criminal or other proceedings before a court, tribunal or other body concerned.

1.4 Terms and language used in this code

As far as possible, Plain English principles have been adhered to in the writing of this code. However, in order to accurately reflect the Act, it has sometimes been necessary to use terms and language that may not be familiar to readers. A full list of these terms can be found in the Glossary.

The term intervention may be interpreted in a narrow way, limited to the actions of people defined in the Act as interveners and only when such actions are specifically identified within the Act as actions to be undertaken when acting as an intervener. Under section 8 of the Act, only these named interveners are obliged to apply the guiding principles (described in section 1.5). However, since this code of practice promotes the adoption of the guiding principles more generally, intervention is used throughout this code in its ordinary, broader sense unless otherwise specified, as any engagement with or action taken in respect of a relevant person in the context of the Act.

Similarly, the term intervene is used in its ordinary sense throughout this code unless otherwise specified. However, the term intervener is limited to its definition under section 2(1) of the Act (as set out in the Glossary).

1.5 Guiding principles

The Act is based on a set of guiding principles that are the foundation for interpreting and administering the Act. There are nine guiding principles in the Act, each of which is summarised below. For further information including how the guiding principles may be applied, please see the code of practice on supporting decision-making and assessing capacity.

- **Presume capacity:** Presume the relevant person has capacity to make a decision on the issue in question at the time the decision needs to be made.

- **Support the relevant person to make decisions:** Support the relevant person as much as possible to make their own decision on the issue in question before considering them unable to make this decision at the time the decision needs to be made.
- **Unwise decisions:** The fact that a decision appears unwise does not mean the person lacks the capacity to make it.
- **Do not intervene unless necessary:** Only intervene in respect of a relevant person where it is necessary to do so having regard to the individual circumstances of the relevant person.
- **Minimal intervention:** Any intervention in respect of a relevant person must:
 - take an approach that minimises restrictions of the person's rights and freedom of action,
 - have due regard for dignity, bodily integrity, privacy, autonomy and control over financial affairs and property,
 - be proportionate to the significance and urgency of the matter on which a decision is to be made, and
 - be as limited in duration as practicable having regard to the individual circumstances of the relevant person.
- **Give effect to will and preferences:** In making an intervention in respect of the relevant person, the intervener must, as far as practicable and ascertainable:
 - permit, encourage and facilitate the relevant person to participate, or to improve his or her ability to participate, as fully as possible in the intervention,
 - give effect to the past and present will and preferences of the relevant person,
 - take into account the beliefs and values of the relevant person, especially those in writing and any other factors which the relevant person would be likely to consider if they were able to do so,
 - consider the views of any person named by the relevant person as someone to be consulted on this or a similar issue, and any decision supporter for the relevant person,
 - act in good faith and for the benefit of the relevant person, and
 - consider all other circumstances of which they are aware, and which would be reasonably regarded as relevant.
- **Consider the views of others:** In making an intervention in respect of the relevant person, the intervener may consider the views of any person engaged in caring for, or with a bona fide interest in the welfare of the relevant person, or healthcare professionals.
- **Consider the urgency of the intervention:** Before making an intervention in respect of the relevant person, consideration should be given to the likelihood of the relevant person regaining capacity to make a decision on the issue in question and the urgency of making the intervention prior to such time as the relevant person may regain capacity.
- **Use of information:** In making an intervention in respect of the relevant person, the intervener must only obtain information that is reasonably required to make a decision on the issue in question; only use this information for the purposes of making that decision; and take reasonable steps to ensure this information is kept secure from unauthorised access, use or disclosure and is safely disposed of when the intervener believes it is no longer required.

1.6 Relevant decisions

The provisions of the Act apply to personal welfare decisions and to property and affairs decisions. Personal welfare decisions include decisions related to the relevant person's health and social care as well as to accommodation, employment, education and social activities. Property and affairs decisions include decisions related to the relevant person's property, business and/or money matters.

1.7 Decision support arrangements

The Act names five decision support arrangements for people with decision-making capacity challenges who may need support to make certain decisions. These arrangements are based on the different levels of support that a person requires to make a specific decision at a specific time.

Under these arrangements, a person can be appointed as a decision supporter. A decision supporter has the authority to help with certain decisions about a person's personal welfare, healthcare, property and money matters. The type of support a decision supporter can provide depends on the decision support arrangement that is put in place.

There are three decision support arrangements for people who currently, or may shortly, face challenges making certain decisions:

- **Decision-making assistance agreement:** A person who requires support to make certain decisions can appoint a decision-making assistant to help them access information, understand their options, and communicate their decisions to others.
- **Co-decision-making agreement:** A person who requires more support than that provided by a decision-making assistance agreement can appoint a co-decision-maker to make certain decisions jointly with them.
- **Decision-making representation order:** If a person is unable to make certain decisions, the court may appoint a decision-making representative to make those decisions on their behalf. The court can also make a decision-making order to make a decision on behalf of the person.

There are two types of arrangements for people who wish to plan for a time in the future when they might lose decision-making capacity:

- **Advance healthcare directive:** A person can set out their wishes regarding healthcare treatment decisions, including treatment refusals, in case they are unable to make those decisions at some time in the future.
- **Enduring power of attorney:** A person can appoint someone (or multiple people) to make certain decisions about their welfare, property and money matters if they are unable to make those decisions for themselves at some time in the future.

The Act recognises that a person's decision support requirements may change over time. This tiered system of decision support arrangements allows for the amendment, cancellation or replacement of one type of arrangement with another, depending on the person's capacity and needs.



Your functions and duties

2.1 Apply the guiding principles

Financial professionals and financial service providers are not interveners as defined under the Act. However, as a financial professional or financial service provider, you may find yourself engaging with and taking action in relation to relevant persons in a range of circumstances. In these circumstances you should apply the guiding principles as set out in section 1.4 above.

2.1.1 Supporting a relevant person to make a decision

A relevant person is presumed to have capacity to make a decision unless the contrary is shown in accordance with the Act. The Act states that a relevant person shall not be considered as unable to make a decision unless all practical steps have been taken to help them to make the decision. Thus, in the first instance you should make every practicable effort to inform and support a relevant person to make the decision in question, even if you have concerns about their capacity to make the decision. How they should be supported practically will differ from person to person and will depend on the decision in question. Considerations include:

- The type of decision to be made
- The complexity of the decision to be made
- The person's individual circumstances, and
- When the decision has to be made.

2.1.2 When should a relevant person's decision-making capacity be assessed?

The need for a valid reason before assessing decision-making capacity follows on from the presumption of capacity under the Act. Before challenging a relevant person's decision-making capacity, you must be able to show that, after providing all practical supports, you still have significant concerns regarding the relevant person's capacity to make a particular decision.

2.1.3 Who assesses the relevant person's decision-making capacity?

The person who assesses a relevant person's decision-making capacity will usually be the person who requires the relevant person to make the decision at the time the decision needs to be made. As a financial professional or financial service provider, you may be the most appropriate person to ascertain whether the relevant person understands the, at the time that a decision is to be made in relation to a financial matter, the nature and consequences of the decision in the context of available choices. Therefore, you may be best placed to assess the capacity of the relevant person in respect of this decision. Further guidance on applying the guiding principles, supporting decision-making, and assessing capacity is available in the code of practice on supporting decision-making and assessing capacity.

2.2 Advising customers as a relevant person under the Act

Your focus should be on the relevant person's capacity to make the financial decision in question, and not on the perceived or actual outcome of the decision that he or she makes.

2.2.1 Suitability of advice or service

It is important to remember that the provisions of this code do not alter the obligations of financial professionals and financial service providers under consumer protection codes. In providing advice or a financial service or selling a financial product, a financial professional or financial service provider must consider whether a specific financial product or service is suitable for their customer.

2.2.2 Nature of financial decision to be made

Different financial products or services require different levels of decision-making capacity. For example, a relevant person may require no support in making decisions around their day-to-day banking but may need support to take out a loan in order to understand the repercussions of failing to make a repayment.

2.2.3 Pre-existing relationship with the relevant person

In providing a financial service or product to a relevant person, you may be interacting with them for the first time or have an ongoing professional relationship with them. For example, staff in a bank may know a relevant person well as a result of the relevant person using their bank branch for a long period. On the other hand, insurance companies and brokers selling different types of insurance may only interact on a once off basis with a relevant person. In either case it is important to remember that assessment of capacity relates only to the decision to be made at this time.

2.2.4 Other considerations

Other issues to be considered may include:

- The relevant person repeatedly makes financial decisions that put him or her at significant risk of harm or exploitation
- The relevant person makes a particular financial decision that is irrational or out of character
- The relevant person seems to be influenced by undue pressure from others
- The relevant person needs more information to help him or her understand the consequences of the financial decision he or she is making
- Circumstances have arisen that may affect the relevant person's capacity to make a particular financial decision.

While none of the above necessarily means that the relevant person lacks capacity to make the financial decision in question, it may mean that the relevant person needs to be supported further in making the decision and may need to be asked if they have a decision-making supporter.

In situations where there is a reasonable belief that the relevant person's financial decision could give rise to the person being at risk of abuse by others, there is an onus on you to treat this as a safeguarding concern. In this case you should contact the local HSE Safeguarding and Protection Team or the Garda Síochána if theft or fraud is suspected.

2.2.5 Advising a customer regarding creating a decision support arrangement

In some situations, it may be appropriate to advise a relevant person about creating a decision support arrangement, if one is not already in place (see Section 3.1). Several options are available, as described in Section 1.7, depending on the relevant person's decision-making capacity.

2.3 Court applications (Part 5 and Part 6)

Part 5 applications are applications to the Circuit Court in respect of relevant persons and related matters. This includes applications for a declaration as to a relevant person's capacity to make a particular decision or decisions. The same provisions and protections in terms of access to the court and to representation apply to a ward whose case is being reviewed by the wardship court under Part 6. The guidance contained in this section of the code in relation to Part 5 applies equally to part 6. As a person who has a bona fide interest in the welfare of a relevant person, you may make an application in respect of a client who is a relevant person. This might occur when, for example, following the procedure set out in the Act, you have a reasonable belief that the relevant person is not capable of making the particular decision and consider that the court should determine the matter. The Act sets out requirements about obtaining the court's consent by way of an ex parte application.

In an application to court (including an ex parte application), and subject to court rules, any applicant is obliged to explain the reasons why the application is being made, in particular:

- The applicant's connection with the relevant person
- The benefit to the relevant person sought to be achieved by the application and
- The reasons why the application is being made, in particular the reason why the benefit to the relevant person sought to be achieved has failed to be achieved in any other appropriate, practical and less intrusive manner taken prior to making the application, and
- the reason why, in the opinion of the applicant, no other appropriate practicable and less intrusive manner to achieve that benefit remains to be taken prior to the making of the application.

This means that it will be necessary to provide evidence to the court about the supports that were given to or tried with the relevant person to enable them to make the decision/s in question.

2.4 Other functions and duties

2.4.1 Acting as a decision-making representative

A financial professional may be appointed by the court to act as a decision-making representative, having been proposed by or on behalf of the relevant person, or having been nominated as a member of the panel of decision-making representatives established by the Director of the DSS. Any financial professional acting in this capacity must have regard to the Act, the code of practice for decision-making representatives and terms of the decision-making representation order under which they are appointed.

2.4.2 Providing an expert report in court

The court may seek any relevant expert report in relation to the relevant person's when deciding an application under Part 5 and these could include a report from a financial professional.



Interacting with decision supporters

A customer may have a decision supporter as a result of having entered into a decision support arrangement under the Act. Where such an arrangement includes financial decisions, it may be necessary for the customer's decision supporter to interact with you.

Further information on decision support arrangements is available in the codes of practice for each of the five decision support arrangement types. These can be found on the Decision Support Service website www.decisionsupportservice.ie

3.1 Ascertaining authority of a decision supporter

You should firstly ascertain the decision support arrangement in place with your customer and then ascertain the level of support the decision supporter is to provide and in relation to which decision(s).

The Act provides for the Director to establish and maintain registers of the following decision support arrangements:

- Co-decision-making agreements
- Decision-making representation orders, and
- Enduring powers of attorney.

Regulations provide for the registers to be searchable by a body or class of persons prescribed by regulation or by a person who has a legitimate interest, on payment of a prescribed fee. The following information is available on the registers:

- Whether a decision support arrangement is in force or whether it has been registered, varied, revoked,
- The type of decision support arrangement that the relevant person has in place
- The identity of the decision supporter
- The scope of the decision supporter's authority. This will depend on the type of decision support arrangement the relevant person has in place, and what decisions are included in that arrangement.

3.1.2 Decision support arrangements not on the register

There is no requirement under the Act to register a decision-making assistance agreement or an advance healthcare directive with the DSS. Regulations provide for the notification of a decision-making assistance agreement to the Director, and you may make enquiries of the DSS. You may also ask the relevant person or their decision supporter for a copy of the agreement or directive.

If a co-decision-making agreement, decision-making representation order or enduring power of attorney does not appear on the Director's registers, it may not yet have come into effect, or it may have been removed from the register. In this case, the person does not have any formal arrangement to provide decision support in relation to the relevant person's decisions. An exception to this is an attorney who is awaiting second-stage activation of the enduring power of attorney in relation to urgent matters may act to maintain the donor or to prevent loss of the donor's assets. It is also possible that a recent decision-making representation order made by the court may not appear on the register as it has not yet been notified by the court to the Director and formally registered.

It is important to note that a decision supporter does not have permission to act in respect of decisions that are not specified in the decision support arrangement. However, the relevant person may indicate that they wish the decision supporter to support them in relation to decisions that are not contained in a decision support arrangement in which case such a request for support should be respected and recorded in writing (a brief note will suffice). The presumption of capacity still applies to those decisions not specified in any decision support arrangements unless the contrary is evident.

3.1.3 Authority of family and/or friends of the relevant person

A family member or friend does not have an automatic or assumed authority to share information and/or make a decision on behalf of another adult who lacks capacity. However, where the relevant person indicates that they wish a family member, friend or advocate to be present, to share information and to be involved in decision-making, and where you are satisfied that there is no undue influence or coercion being exerted on the relevant person, that decision should be respected.

3.2 Interacting with more than one decision supporter

A relevant person may have more than one decision supporter. For example, the relevant person may have a decision-making assistant to assist them in making everyday banking decisions. At the same time, they may have a co-decision-maker to make decision jointly with them about investing money or buying and selling property. In such a situation, you should check both the decision-making assistance agreement and the co-decision-making agreement. These documents will specify which decisions the relevant person has capacity to make with the assistance of their decision-making assistant, and which decisions are to be made jointly with their co-decision-maker.

3.3 Provide information to a decision supporter

This section considers the provision of information to a decision supporter. You should also provide appropriate supports to a relevant person to maximise their capacity to make the decision in question. This may include providing information relevant to the decision in an accessible format and taking account of the circumstances of the relevant person. For further information please see the code of practice on supporting decision-making and assessing capacity,

3.3.1 Enable decision supporters to comply with reporting requirements to the Director

You may be asked to provide information about the relevant person's affairs to co-decision makers, decision-making representatives and attorneys for the purposes of their reporting duties to the Director. If you have not already done so, you can check the authority of the decision supporter as outlined in section 3.1.

A co-decision maker must submit a report to the Director annually. This report will include details about financial transactions that relates to the co-decision-making agreement. Every such report should be approved by the relevant person.

Decision-making representatives and attorneys with authority to make decisions in relation to the relevant person's property and affairs are obliged, within three months of appointment, to submit a schedule of the relevant person's assets and liabilities and a projected statement of the relevant person's income and expenditure to the Director. Following submission of this initial schedule, decision-making representatives and attorneys must submit a report to the Director annually, or more frequently if directed by the court and/or the Director, on the performance of their functions. This requires the decision-making representatives and attorneys to keep proper accounts and financial records in respect of the relevant person's income and expenditure. Decision-making representatives and attorneys must:

- Submit the accounts and records as part of their report to the Director, and
- Make available for inspection by the Director or by a general visitor, at any reasonable time, such accounts and records.

You may be requested by the decision-making representative or attorney to provide information in relation to the relevant person's legal affairs that enables them to comply with their reporting obligations in the manner required.

3.3.2 Assist decision supporters in responding to queries from the Director

As described in section 3.3.1, certain decision supporters are obliged to submit periodic reports to the Director. In the case of a failure to submit a report or the submission of an incomplete report, the Director may raise queries with the decision supporter. In such situations, a decision supporter may request your assistance to deal with the Director's queries. You should obtain a copy of the Director's notification, which will also specify the period for complying with the queries or time for the submission of a complete report.

3.3.3 Provide financial expertise and support to a proposed decision-making representative

Where the person being proposed as the decision-making representative does not have the financial expertise to manage the relevant person's property and affairs, the court will have regard to the financial expertise and support available to a relevant person and/or to the proposed decision-making representative. This could, for example, be a situation where:

- A trusted financial adviser/accountant who has advised the relevant person and who has detailed knowledge of the relevant person's affairs is available to continue giving that advice and support, or
- A financial professional or financial service provider has not previously advised the relevant person but is now asked to provide a service to the decision-making representative.

In both cases above, the court is relying on the financial professional or financial service provider's professional expertise being available in the context of the appointment of the decision-making representative.

Before agreeing to act in such capacity, you should be fully aware of the specific expertise that is required in relation to the relevant person's financial affairs. The relevant person, when they had the capacity, may well have been very skilled in managing a business or complex assets and in a position to know when to obtain expert advice. The financial professional or financial service provider may be assisting a decision-making representative who has minimum financial knowledge.

The court, in making its decision that such expertise is necessary, will have before it details of the size, nature and complexity of the financial affairs and it would be prudent for you to request copies of such financial/valuation statements.

As stated in Section 3.3.1, a decision-making representative who is authorised to make property and affairs decisions is obliged to submit a schedule of the relevant person's assets and liabilities and a projected statement of income and expenditure to the Director and, thereafter, to file a report at least on an annual basis or in such a shorter period as the court directs. Where you are providing financial expertise to a decision-making representative, you should clarify your position with regard to being directly responsible in preparing such reports or acting as auditor of any reports being prepared.

3.3.4 Provide financial expertise and support to a proposed attorney

Where the person being proposed as the attorney does not have the financial expertise to manage the relevant person's property and affairs, the court will have regard to the financial expertise and support available to a relevant person and/or to the proposed attorney

However, if there is doubt about this or if an objection is made to the Director at the time of application for registration of the enduring power of attorney that the expertise which is required to manage the financial affairs is not available, the Director may, having reviewed the application for registration, request the proposed attorney to obtain such expertise. The Director when satisfied, having raised the matter, that such expertise will be available to the attorney, may proceed to register the enduring power of attorney. If the Director is not satisfied, they may refer the matter to the court.

3.3.4 Assist decision supporters in responding to queries from the Director

As described in section 3.3.1, certain decision supporters are obliged to submit periodic reports to the Director. In the case of a failure to submit a report or the submission of an incomplete report, the Director may raise queries with the decision supporter and specify a timeline for such queries to be addressed. This timeline will be set out in the notification to the decision supporter. A decision supporter may seek information or advice about complying with this notification.

3.4 Confidentiality

Having made appropriate enquiries as set out above, it shall not be a breach of the financial professional or financial service provider's duty of confidentiality to engage with a decision supporter in relation to matters/decisions specified in each arrangement. It shall not be a breach of the legal practitioner's duty of confidentiality to permit a court friend or 'another person' within the meaning of section 36(8)(b) of the Act or a special or general visitor to examine and make copies of records in the manner provided for under sections 99 and 100 of the Act.

3.5 Changes in capacity

Where you become aware that the decision-making capacity of a relevant person in respect of whom you are instructed has changed (deteriorated or improved) to an extent that the decision support arrangement in place is no longer appropriate to the relevant person's level of decision-making capacity, you should discuss this issue with the relevant person and if appropriate with the decision supporter. It may also be appropriate to notify the Director of the changed circumstances. Equally, if it becomes apparent that a relevant person's decision supporter no longer has the capacity to support the relevant person and carry out their functions under the decision support arrangement. In this case, it may be appropriate to notify the Director of the changed circumstances. In addition to capacity changes, where you have concerns regarding a decision supporter's ability to meet any other eligibility criteria, you should notify the Director of these concerns.



Interacting with the Director

You may have interaction with the Director of the DSS in respect of a number of the Director's functions under the Act to include the following:

4.1 Complaints about decision supporters

Where you form the view that a relevant person's decision supporter is not performing their functions satisfactorily or is acting beyond the scope of their authority, you may make a complaint to the Director. In the case of concerns relating to safeguarding issues, you should consider whether to contact the local HSE Safeguarding and Protection Team and An Garda Síochána as appropriate if a criminal offence is suspected.

4.2 Carrying out an investigation

When a complaint is made to the Director about the performance of the functions of any decision supporter, the Director may investigate the matter and a financial professional or financial service provider may become involved as a witness. In carrying out an investigation, the Director may summon a witness to attend, examine the witness on oath and require the witness to produce any document over which the witness has control. The Director may also, in carrying out an investigation, by notice in writing, require the witness to provide him or her with such written information as the Director considers necessary. A witness who fails to comply with the requirements of the Director or hinders or obstructs the Director or one of the Director's staff in the performance of their functions shall be guilty of an offence and may receive a fine.

If the Director refers the matter to the court, the court may ask you to provide information about the relevant person's financial affairs.

4.3 Provide information in relation to the management of property and financial affairs

The Director may seek your assistance in carrying out their functions in relation to the management of property and financial affairs. This may include providing information to the Director where the court has conferred on the Director the custody, control and management of some or all of the property of the relevant person because it considers the Director to be the most appropriate person to exercise that power.

4.4 Provide information and guidance to other financial professionals and financial service providers

The Director may seek your assistance to provide information and guidance to other financial professionals and financial service providers interacting with relevant persons.

4.5 Further assistance

The Director may seek the assistance of regulators and legal practitioners in identifying practices and customs which do not assist a relevant person to exercise or maximise their capacity. The Director may also seek assistance in formulating recommendations for changes of practice in relevant organisations and bodies.



Interacting with other persons named in the Act

You may interact with other persons named in the Act in relation to the relevant person. Such persons are outlined below.

5.1 General and special visitors

You may be required to interact with a general visitor or special visitor who has been directed by the Director to examine and take copies of records held in relation to the relevant person to assist with the Director's supervisory and investigative functions. The general visitor or special visitor so appointed is authorised to take up and copy records. You may confirm the validity of the special and general visitor's appointment with the DSS.

You should also ascertain the position regarding the relevant person's consent. A general visitor or special visitor is required to seek the consent of the relevant person prior to obtaining any records in relation to them except in certain circumstances as provided for under section 99.

5.2 Independent advocate

You may also interact with an independent advocate. A relevant person may wish the independent advocate to be present when the relevant person engages with you. Even where the relevant person has a decision supporter, they may still wish to involve an independent advocate. For example, where a relevant person has capacity to make their own decision but has difficulty in communicating that decision to you, it may be appropriate and necessary for an independent advocate to assist the relevant person in understanding the information or to communicate their decision to you. There is a code for independent advocates under the Act.

5.3 Another person or a court friend

A relevant person who is the subject of a Part 5 application to court, and a ward whose case is being reviewed by the wardship court under Part 6 are entitled to representation in court. If the relevant person or ward has not instructed a legal practitioner, and if they do not have a decision supporter in place who is willing to assist them during the hearing, there are two forms of assistance provided for under the Act.

- **Another person:** Under section 36(8), this is a person, who the court is satisfied is suitable, able and willing to assist the relevant person or ward during the court hearing. This other person is able to assist the relevant person or ward in the same manner as a court friend.
- **Court friend:** If the relevant person or ward does not have another such person to assist them, the court may direct the Director to appoint a court friend from a panel. In order to assist the relevant person or ward, the court friend may examine and take copies of certain records.

If the Part 5 application (or Part 6 review in the case of a ward of court) is in relation to the relevant person's capacity to make property and affairs decisions, the court friend or another person assisting the relevant person in court may wish to communicate with you in order to understand the relevant person's affairs.

Where a person presents as another person or a court friend, it will be necessary to verify their authority to take up records and the position regarding the consent of the relevant person. If necessary, you will be able to contact the Decision Support Service in this regard. Once you have verified these matters, you should provide relevant documents within your control.

Glossary

(the) Act

The Assisted Decision-Making (Capacity) Act 2015

Advance healthcare directive

An advance healthcare directive is an advance expression made by a person with decision-making capacity in accordance with the requirements of the Act of the person's will and preferences concerning healthcare treatment decisions that may arise if he or she subsequently lacks decision-making capacity.

Advance healthcare planning

Advance healthcare planning is a process of discussion and reflection about the goals, values, will and preferences for healthcare treatment occurring in the context of an anticipated deterioration in the person's condition. Advance healthcare plans are generally not legally enforceable unless they are in the form of an advance healthcare directive.

Advocate

A person nominated by an individual adult to speak on their behalf and represent their views. Advocacy comes in different forms including informal support and independent advocacy services. Advocacy should always be independent from the service providing care or support.

Another person

A person, whom the court deems suitable, willing and able to assist the relevant person during the course of a Part 5 application hearing and who is chosen by the relevant person to assist him or her during the course of the hearing. Another person could be, for example, a trusted family member or friend or an independent advocate.

Applicability

Applicability refers to whether something applies, in other words, is relevant or appropriate in a particular situation. When used in the context of a decision-support agreement, directive or order, it means checking that the relevant criteria are being met for a specific decision at a specific time.

Assessment of decision-making capacity

An assessment of decision-making capacity is where a person's ability to understand the nature and consequences of a decision to be made by him or her is assessed in accordance with a functional test of capacity.

Attorney (2015 Act)

An attorney is a person appointed by an adult who has decision-making capacity (referred to as a donor), in an enduring power of attorney, to make decisions on behalf of the donor when the donor no longer has the capacity to make those decisions for himself or herself. The enduring power of attorney must be registered with the Director of the Decision Support Service before the attorney has the authority to make relevant decisions on behalf of the donor.

Attorney (1996 Act)

An enduring power of attorney created under the Powers of Attorney Act 1996 will continue to be governed by the rules and regulations provided for in the 1996 Act. On commencement of Part 7 of the 2015 Act, no further enduring powers of attorney can be created under the provisions of the 1996 Act. Part 7 of the Act provides for some oversight of attorneys under the 1996 Act by the Director of the Decision Support Service. The Director can investigate complaints against attorneys under the 1996 Act in a similar manner to an investigation of complaints against attorneys appointed under the 2015 Act.

Autonomy

The right to make decisions and take actions that are in keeping with one's beliefs and values.

Basic care

Basic care includes (but is not limited to) warmth, shelter, oral nutrition, oral hydration and hygiene measures but does not include artificial nutrition or artificial hydration.

Bona fide

Bona fide means acting in good faith.

Capacity

Capacity is understood to refer to decision-making capacity. In this context, capacity means a person's ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by them in the context of the available choices at the time.

Cardiopulmonary resuscitation (CPR)

Cardiopulmonary resuscitation (CPR) is a treatment which attempts to restart a person's heart and maintain breathing where the person's heart or breathing has stopped. Cardiopulmonary resuscitation usually involves chest compressions, ventilation of the lungs, attempted defibrillation with electric shocks and the injection of drugs.

Co-decision-maker

This is a person appointed by a relevant person to jointly make decisions with him or her. This may occur where the relevant person does not have the capacity to make decision(s) even with the aid of a decision-making assistant but does have the capacity to make decision(s) with the help of a co-decision-maker. A co-decision-maker must be appointed in a written and witnessed agreement. The co-decision-making agreement must be registered with the Director of the Decision Support Service in order to bring it into force.

Cohabitant

A cohabitant is one of two adults who live together as a couple in an intimate and committed relationship, and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.

Consent

Consent is the giving of permission or agreement for an intervention (including medical treatment), receipt or use of a service or participation in research following a process of communication in which the person has received sufficient information to enable them to understand the nature, potential risks and benefits of the proposed intervention or service. Consent is a legal requirement at common law and the requirement is supported by the Constitution of Ireland and the European Convention on Human Rights.

Court

The circuit court has general jurisdiction under the Act, apart from certain matters reserved for the high court:

- Any decision regarding the donation of an organ from a living donor where the donor is a person who lacks capacity
- Where an application in connection with the withdrawal of life-sustaining treatment for a person who lacks capacity comes before the courts for adjudication.

Court friend

A person appointed by the Director to assist the relevant person in relation to an application to the circuit court under Part 5 of the Act in respect of which the relevant person is the subject. A court friend is appointed by the Director when no other person is available, willing or suitable to assist the relevant person in relation to a Part 5 application.

Decision-making assistant

A person appointed through a formal decision-making assistance agreement by a relevant person to support him or her in making a decision, for example, by obtaining information or personal records and by ensuring that the relevant person's decisions are implemented. The decision-making assistant will not make the decision on behalf of the person. Decision-making responsibility remains with the relevant person.

Decision-making representation order

A court order appointing a decision-making representative to make one or more decisions for a person who has been declared to lack capacity.

Decision-making representative

A person appointed by the court when the relevant person lacks capacity to make a decision. The scope of a decision-making representative's authority to make decisions depends on the court order, which may include the attachment of conditions relating to the making of decisions by the decision-making representative, or the period of time for which the order is to have effect.

Decision supporter

Someone with legal authority specified in a decision-making support arrangement to support a relevant person to make their own decisions or to make the decisions on their behalf.

Decision Support Service

The Decision Support Service is an office based within the Mental Health Commission established by the Act 2015. See also Director of the Decision Supporter Service.

Designated healthcare representative

A person named by the directive-maker, in his or her advance healthcare directive, to exercise certain powers as set out in the advance healthcare directive.

Directive-maker

The directive-maker is the person who makes the advance healthcare directive.

Director of the Decision Support Service

The role of the Director of the Decision Support Service is to support decision-making by and for adults whose capacity is or may be in question. The statutory functions of the Director, as provided for in Part 9 of the Act, are:

- to provide information in relation to the various decision-making support options under the Act
- to provide guidance and information to organisations in the State in relation to their interaction with people who have decision-making capacity difficulties and those who have been appointed to assist in decision-making
- to identify and make recommendations for changes of practices in organisations where the practices may prevent a person with decision-making capacity difficulties from exercising his or her capacity under the Act
- to supervise and handle complaints about those who are appointed to assist persons in making decisions, decision-making arrangements and any person who used fraud, coercion or undue pressure to induce a person to make, vary or revoke a decision-making arrangement

- to maintain registers of co-decision-making agreements, decision-making representation orders and enduring powers of attorney created under the Act
- to maintain panels of suitable persons to act as decision-making representatives, court friends, general visitors and special visitors
- to approve, draft and consult on codes of practice under the Act
- to act as the central authority for the purposes of the operation of the Hague Convention on the International Protection of Adults.

Donor

The person who creates an enduring power of attorney and who appoints an attorney to make decisions on his or her behalf when the donor no longer has the decision-making capacity to make those decisions.

Do not attempt cardiopulmonary resuscitation order

This is a written order stating that cardiopulmonary resuscitation should not be attempted if a person suffers a cardiac or respiratory arrest.

Enduring power of attorney

This is a legal agreement made in accordance with the requirements of the Act whereby a donor gives authority to an attorney to act on their behalf in the event that the donor lacks decision-making capacity at any time in the future. An enduring power of attorney created under the Powers of Attorney Act 1996 will remain valid after commencement of the 2015 Act. An enduring power of attorney created after commencement of the 2015 Act will be subject to the 2015 Act.

Financial professionals and financial service providers

All persons who provide one or more financial products or services, whether regulated or unregulated including those operating in the State and those outside the State who provide a financial service to consumers in the State.

Functional assessment of decision-making capacity

Assessing decision-making capacity on a functional basis means that the emphasis is on the capacity to make a specific decision, at the time the decision has to be made (issue-specific and time-specific):

- **Issue-specific:** Decision-making capacity is assessed only in relation to the decision in question. A judgement that someone lacks decision-making capacity in relation to one issue does not have a bearing on whether decision-making capacity is present in relation to another issue.
- **Time-specific:** Decision-making capacity is assessed only at the time in question. A judgement that someone lacks decision-making capacity at one time does not have a bearing on whether decision-making capacity in relation to that issue is present at another time.
- Functional decision-making capacity focuses on how a person makes a decision and not the nature or wisdom of that decision.

General practitioner

A medical doctor based in the community who provides initial, on-going and continuous personal medical care, with responsibility for integrating care, treating people with acute, minor or chronic illnesses, and referring those with serious conditions to a hospital when specialist treatment is likely to be necessary and be of benefit.

General visitor

A person appointed by the Director of the Decision Support Service to assist the Director in performing his or her supervisory functions as defined in the Act. A general visitor may be directed by the Director to visit a relevant person, decision-making supporters and any other person who may be able to assist with information, and to submit a report to the Director following such visits. A general visitor may also be directed by the Director to obtain copies of any health, personal welfare or financial records held in relation to a relevant person.

Healthcare professionals

Healthcare professionals refers to the various health and social care staff who support people while they are receiving healthcare treatment. The term covers all health and social care professions whether or not the profession is a designated profession within section 3 of the Health and Social Care Professional Act 2005.

Healthcare treatment

Healthcare 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.

Independent advocate

A person who works with and for a relevant person, around a specific issue or issues which have arisen, where they have difficulty voicing their will and preferences. An Independent Advocate is employed or engaged by an advocacy organisation, is free from conflict of interest and is independent of family and service providers.

Instrument/legal instrument

This is the document in which the decision-support arrangement (such as an enduring power of attorney) is created.

Interveners

The Act provides for legally recognised persons referred to as interveners to support a person to maximise their decision-making capacity. As defined in the Act, an intervener can be:

- The circuit court or high court
- A decision-making assistant, co-decision-maker, decision-making representative, attorney or designated healthcare representative
- The Director of the Decision Support Service
- A special visitor or a general visitor
- A healthcare professional
- Court friend

Intervention

This is any action taken, direction given, or any order made in respect of a relevant person under the Act. The intervention may be made by the courts, by a healthcare professional, or any person under the formal agreements set out in the Act and should reflect the level of support the relevant person requires.

Jointly

When used in reference to decision supporters, this means that all the appointed interveners must work together to make joint relevant decisions and where appropriate each person must sign any relevant documents. A decision made by one person alone will not be valid. A document signed by one person only will not be valid.

Jointly and severally

When used in reference to decision supporters, this means that any one of the appointed interveners may make a relevant decision or where appropriate sign a relevant document. Signatures from other decision supporters are not required to make the document valid.

Key worker

The staff member in the service who carries particular responsibility for the person with a disability, liaises directly with them, coordinates their services and supports, and acts as a resource person.

Legal practitioner

A practicing barrister or a practicing solicitor.

Life-sustaining treatment

This is any clinically appropriate medical treatment, technology, procedure or medication that is administered to forestall the moment of death. These treatments may include, but are not limited to, mechanical ventilation, artificial hydration and nutrition, cardiopulmonary resuscitation (CPR), haemodialysis, chemotherapy, or certain medications including antibiotics although antibiotics are not routinely considered to be life-sustaining treatment.

Multidisciplinary team

A group of healthcare professionals who are members of different disciplines (e.g., psychiatrists, social workers etc.) each of whom provide specific services to the relevant person.

Palliative care

Palliative care aims to improve the quality of life of a person and their family facing the problems associated with life-threatening illness, through the prevention and relief of suffering by means of early identification and assessment and treatment of pain and other problems, physical, psychosocial and spiritual. The aim of palliative care is to enhance quality of life and, wherever possible, to positively influence the course of illness. Palliative care also extends support to families to help them cope with their family member's illness and their own experience of grief and loss.

Palliative care approach

This is the application of palliative care principles by healthcare professionals who do not solely work in specialist palliative care.

Personal welfare decisions

These include decisions concerning accommodation, employment, education, training, social activities, social services, healthcare and well-being.

Presumption of decision-making capacity

This means that it must be presumed that a person has capacity in respect of a specific decision unless otherwise shown. The onus of proving that a person lacks capacity to make a decision is on the person who is questioning a relevant person's ability to make a particular decision.

Property and affairs decisions

These include decisions concerning property (i.e., acquisition, sale, lease and mortgage), business, contracts, debts, taxes, benefits and finances.

Registered medical practitioner

A person who holds a basic medical qualification, and who is registered under section 46, 47, 48, 49 or 50 of the Medical Practitioners Act 2007.

Relevant decision

A decision made, or to be made, which is the subject of a decision-making assistance agreement, co-decision-making agreement, a decision-making order, decision-making representation order, enduring power of attorney or advance healthcare directive.

Relevant person

This is a person:

- whose decision-making capacity is in question or may shortly be in question in respect of one or more matters (i.e., a person who may have difficulty reaching a decision without the support of someone), or
- who lacks decision-making capacity in respect of one or more matters (i.e., a person who may be able to make some decisions but not others), or
- whose decision-making capacity is in question or may shortly be in question in respect of one or more matters and who lacks decision-making capacity at the same time but in respect of different matters (this is a combination of the above).

Revocation

This means the cancellation of a legal document., the act of stating officially that an agreement, right, or legal document is no longer effective.

Special visitor

A person appointed by the Director of the Decision Support Service to assist the Director in carrying out his or her functions. A special visitor may be directed by the Director to visit a relevant person, decision-making supporters and any other person who may be able to provide relevant information and carry out assessments of decision-making capacity in relation to a relevant decision. A special visitor submits a report to the Director following such visits. A special visitor may also be directed by the Director to obtain copies of any health, personal welfare or financial record held in relation to a relevant person.

Suitable person

This refers to the eligibility of a person to become a decision-supporter or other intervener, through meeting the specific criteria set out in the Act.

Supporting decision-making

This refers to any process in which an individual is supported, through whatever means necessary, in making a particular decision.

Trust corporation

A category of companies empowered to undertake trust business, provided certain other conditions are met which are contained in section 30 of the Succession Act 1965. A trust corporation is deemed a person for the purposes of an enduring power of attorney in the Act but may only be given authority in relation to property and affairs decisions.

Unwise decision

This is a decision which may be perceived as being ill-advised or risky. This may reflect a difference in values, goals and preferences between the relevant person and the person interacting with them. The decision may have adverse consequences for the relevant person.

Validity

This is the state of being officially legally binding or acceptable.

Wardship

This was the process whereby an application was made to the court to hold a formal inquiry into the question of a person's decision-making capacity. If, following such an inquiry, a person was declared by the court to be of unsound mind and incapable of managing their personal affairs and property then they were described as a ward of court and the court assumed overall control of the person's affairs and had to make decisions on the person's behalf in their best interests. The wardship process operated under the following legislative provisions: Courts (Supplemental Provisions) Act 1961, section 9; Rules of the Superior Courts, Order 67; Circuit Court Rules, Order 47; and the Lunacy Regulations (Ireland) Act 1871. The Assisted Decision-Making (Capacity) Act 2015 provides for people who were brought into wardship under the above-mentioned legislative provisions to have their capacity by the wardship court and to be assessed and to be provided with supports under the new statutory framework as appropriate.

Witness

A witness is a person who signs one of the following legal instruments: an advance healthcare directive; a co-decision-making agreement; or an enduring power of attorney, in accordance with the requirements of the Act, so as to attest that the instrument was signed by the person making it. Alternatively, a witness could refer to a person whom the Director of the Decision Support Service has called to provide information as part of an investigation.



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