



The Assisted Decision Making (Capacity) Act 2015

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Background

The Assisted Decision Making (Capacity) Act (ADM Act) was passed by the Oireachtas at the end of 2015. This legislation replaces the 1871 Regulation of Lunacy Act which provides the basis for the current Ward of Court system. There is widespread recognition that the Ward of Court system is outdated and incompatible with modern approaches to disability and human rights.

The ADM Act provides a modern statutory framework to support decision-making by adults who have difficulty in making decisions unaided. The Act is framed to ensure that people who will utilise this legislation will have their human rights upheld. This legislation is an essential part of Ireland's signing up to the United Nations Convention on the Rights of Persons with Disabilities.

The published Act runs to several hundreds of pages. This briefing paper is a summary of the main elements of the Act.

Who will use this legislation?

The main users of the legislation are people with disabilities who have impairments that impact on their ability to make decisions. This includes some people with an acquired brain injury (ABI). It also includes some older people with degenerative cognitive conditions and some people with mental health difficulties or intellectual disabilities.

However, it will also impact on so many others including family members, healthcare

professionals and those who are involved in providing services.

At present, thousands of people in residential centres, hospitals and in their own homes are having decisions about their lives and care made for them, not by them. These included straight forward decisions like what to eat or much more significant ones on what they may spend their money on as well as decisions around healthcare procedures. The ADM Act changes this situation.

What changes in this legislation?

The Act provides the statutory framework on how best to support people who have difficulty in exercising their decision making ability. The key elements of the new framework are the definition of capacity, the guiding principles and the new structures for supported and substitute decision making.

Definition of capacity

Fundamental to this process is the 'capacity' to make decisions. The ADM Act adopts a "functional" approach to the definition of capacity. This approach recognises that capacity can fluctuate and that a person may have the capacity to make certain decisions but not others. Assessment will relate only to a person's capacity in relation to the specific matter for a decision at the time in question. If a person is found to lack capacity in one matter it does not necessarily mean they lack capacity to make decisions on other matters.

According to the ADM Act, a person has capacity to make a particular decision at a particular time if they can

- **understand** the relevant information required to make a decision.
- **weigh** the information (i.e. consider understand the likely consequences of that decision in the context of the information and choices they have at that time.)
- **retain** the information for long enough to make the decision.
- **communicate** the decision (in any way at all).

If any of those 4 elements are absent, the person may be assessed as lacking capacity to make that decision. Nobody can be assessed as lacking capacity unless all practicable efforts have been made to support them to do so. It is also important to note that the obligation to involve a person as much as possible in decisions affecting them does not cease when they are assessed as lacking capacity.

Who will assess capacity?

The functional approach to capacity means that assessing capacity is no longer a medical test.

Medical opinion may be relevant in understanding how a person's condition affects their ability to carry the 4 specified elements of decision-making, but a capacity assessment in a complex case should involve a range of people, in particular those who know a person well and know how they communicate and what kinds of supports might assist them to exercise capacity.

In smaller, day-to-day decisions (for example, what to eat, drink or wear) the person assessing capacity will be the person who is caring for the person when the decision arises or who is presenting them with the decision.

Disputes about capacity will be referred to the Circuit Court which will be entitled to call on relevant experts for assistance.

Guiding Principles

The ADM Act sets out a number of important principles which detail how all decisions and acts relating to a person whose capacity is limited or in question must be carried out.

Presumption of capacity

This means that a person must be presumed to have decision-making capacity unless it is shown that this is not the case.

Right to make unwise decisions

The fact that a decision seems unwise to others does not mean that the person lacks capacity. If they pass the test for capacity, they have the right to make unwise decisions.

Minimum intervention

No intervention will take place unless it is necessary. A person will be treated as unable to make a decision only where all practicable steps to help that person to make a decision have been unsuccessful. Any act done or decision made under the legislation must be done or made in a way which is least restrictive of a person's rights and freedoms.

“Will and preferences”

Any act done or decision made under the Act in support or on behalf of a person with impaired capacity must give effect to the person's **will and preferences**. This is the language of the UN Convention on the Rights of People with Disabilities and marks a significant departure from the current language of “best interests”.

New Structures

The Act replaces the existing Ward of Court system for adults. A range of legal options are

set out to support people in maximising their decision-making ability. The Guiding Principles apply to everyone carrying out a function under any of these options. There are four main decision making options set out in the Act:

1. The assisted decision making option is aimed at the person whose decision making is somewhat impaired but who, with the necessary information and explanation, could exercise decision-making capacity. The person themselves will appoint their **decision-making assistant** who will be supervised by the newly established Office of the Public Guardian (OPG). (The OPG replaces the Wards of Court Office).
2. The co-decision making option relates to people who require a higher degree of support but can still participate in decision-making. It allows a person to appoint a trusted family member or friend as a **co-decision-maker** under an agreement that will be confirmed by the Circuit Court. Any decision covered by the agreement must be agreed to by both the person with limited capacity and their appointee. They will be supervised by the OPG.
3. The third option is the appointment of a **decision-making representative** when 1 or 2 options are not possible. When the person is not able to make a decision even with support the Circuit Court will appoint a decision-making representative who will be accountable to the Court and under the supervision of the OPG.
4. Finally, the Act recognises that there are many informal decisions made daily in relation to a person with limited capacity and where there is no formal decision making agreement drawn up.

What about people who are currently Wards of Court?

People who are current **Wards of Court** will be reviewed within 3 years of the Act but can apply

to be reviewed as soon as the Act comes into force. The Courts will then decide on the capacity of the individual and provide an alternative order in relation to decision-making supports most appropriate to them. Wards who are found to have capacity will be discharged from Wardship.

Why is this legislation important to people with ABI and their families?

For some people with an ABI this legislation significantly alters how they will be able to make decisions about their own lives. Once enforced, there will be steps in place to support people with ABI to exercise their legal capacity on an equal basis with others in all aspects of life. Therefore this new legislation will make a positive contribution to their day-to-day lives. It not only provides safeguards against abuse but is empowering people to be active participants, make choices and live a life of their own choosing. These are all elements that will contribute to the person's successful recovery through rehabilitation. The legislation will in turn have positive impacts on the role of the family and the primary carer in particular. It gives legal recognition to people (mostly family members) who are playing a role in supporting people in their decision making. It also change the nature of relationships with clinicians and healthcare professionals who will be obliged to adhere to the new law.

So what's next?

As of April 2016 the legislation has been enacted but not commenced, meaning that the former system is currently still in force. When the Act is commenced all current Wards of Court will have their situation reviewed by the OPG and have the appropriate arrangement under the 2015 Act put in place. This will take some time and in cases where a review is urgent the OPG should

be notified of the circumstances as soon as possible.



Forms and detailed rules for the various decision-making arrangements have not been finalised and Codes of Practice and guidance for practitioners and the public have not yet been produced.

Further information

<http://www.oireachtas.ie/documents/bills28/acts/2015/a6415.pdf>

About ABI Ireland

ABI Ireland is a dedicated provider of community-based neuro-rehabilitation services for people with an acquired brain injury (ABI) and their families. As a brain injury can affect a person's ability to control their own life and live independently, ABI Ireland works to empower and rebuild lives. ABI Ireland also campaigns, educates and advocates for the rights and needs of this hidden group in society

About ABI Ireland's Policy Briefing Papers

ABI Ireland is committed to providing accurate and up-to-date information to all our stakeholders on current and emerging policies and legislation that impact on the lives of people with ABI and their families. The briefing papers use a summary, easy to read format.

ABI Ireland acknowledges and appreciates the contribution of co-author, Eleanor Edmond, Capacity Training and Consultancy and reviewer, Dr. Brian Waldron, ABI Ireland.

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