



seirbhís tacaíochta  
cinnteoireachta  
decision support service

# Decision Support Service Code of Practice

## Code of Practice on Supporting Decision-making and Assessing Capacity

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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# 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 in supporting people with decision-making capacity challenges to make certain decisions. Good practice includes adhering to the guiding principles within the Assisted Decision-Making (Capacity) Act 2015 and understanding the process for assessing functional capacity. This code of practice is for anyone who engages with a person with decision-making capacity challenges in a professional capacity and/or as a decision supporter.

## 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 The Act repealed two laws about decision-making capacity that had been in place since the 19th century. These are the Marriage of Lunatics Act 1811 (repealed in February 2021) and the Lunacy Regulation (Ireland) Act 1871 (repealed on commencement of the Act).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.

#### 1.4.1 Supporting decision-making

Supporting decision-making can include but is not limited to specific decision support arrangements. The processes whereby a person who is experiencing decision-making capacity challenges is given the support they need to participate in decision-making as fully as possible (whether or not they have a decision support arrangement in place) are explored in chapter 3.

#### 1.4.2 Assessing capacity

Assessing capacity is about determining a person's ability to make a specific decision at a specific time. The assessment must take into account any factors that may be affecting the person's capacity at the time of the assessment. Depending on the context of the assessment, the capacity assessment may also consider the supports available to the person to make a specific decision. Chapter 4 further describes capacity including situations when a capacity assessment may be required while chapter 5 presents a framework for conducting the capacity assessment.

#### 1.4.3 Intervention

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 and chapter 2). 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. Chapter 2 provides further information including how the guiding principles may be applied in practice.

- **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. These are defined in the Act. 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, court proceedings 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. 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.



## Guiding principles

Section 8 of the Act sets out important guiding principles. This chapter considers each guiding principle, what it means in practice and examples of the guiding principles in action.

### 2.1 Who is a relevant person in the guiding principles?

The first three guiding principles in the Act (described in sections 2.3 to 2.5 below) are principles to be adopted when assessing capacity. For the purposes of applying all nine guiding principles, a relevant person is:

- (a) A person whose decision-making capacity is in question or may shortly be in question in respect of one or more matter.

For the purposes of applying guiding principles the last six guiding principles in the Act (described in sections 2.6 to 2.11 below), a relevant person may additionally be:

- (b) A person who lacks capacity in respect of one or more than one matter, or
- (c) A person who falls within (a) and (b) at the same time but in respect of different matters.

### 2.2 When and by whom should the guiding principles be followed?

Everyone engaging with a relevant person in relation to decision-making should follow good practice in applying and promoting these guiding principles. Those defined as interveners under section 2(1) of the Act must apply these principles before and during an intervention undertaken in respect of a relevant person.

### 2.3 Presume capacity

**Section 8(2): It shall be presumed that a relevant person has capacity in respect of the matter concerned unless the contrary is shown in accordance with the provisions of this Act.**

The starting presumption is that the relevant person you are interacting with has capacity to make their own decisions. The presumption of capacity prevails unless the contrary is shown, even if you have concerns about the relevant person's capacity to make a particular decision. You must not presume that the relevant person lacks capacity to make a decision solely because of, for example, their age, appearance, medical or psychosocial condition, communication difficulties or other such matters. It is the responsibility of the person calling the relevant person's decision-making capacity

into doubt to prove that they lack capacity to make a specific decision; It is not the responsibility of the relevant person to prove that they have capacity to do so. Even where it has been confirmed that the relevant person lacks capacity to make a specific decision (e.g., in relation to the sale of a house), this does not mean that the relevant person lacks capacity to make a different decision (e.g., setting up a direct debit). If you have concerns about a relevant person's capacity to make a particular decision, you will need to have clear reasons and evidence that the person is unable to make the decision.

### Scenario 1: Presume capacity

Prior to performing gall bladder surgery on Mr Browne, the surgeon, Ms Young must obtain his informed consent. Ms Young speaks clearly and directly with Mr Browne, using plain language to explain the potential benefits and risks of the surgery, checking his understanding as she goes along, and leaving plenty of opportunity for questions and answers. A medical student, noting that Mr Browne has a diagnosis of early onset Alzheimer's disease, asks Ms Young whether it is necessary to perform cognitive testing and a formal assessment of capacity on Mr Browne. Ms Young explains that her starting position is to presume that Mr Browne has the capacity to decide, and this will only change if Mr Browne has obvious difficulties in understanding the information she provides and/or in making a decision. She explains that any errors on brief cognitive tests, such as failure to identify the year, have no relevance to the specific decision he faces regarding consenting to surgery.

*This vignette demonstrates how Mr Browne was presumed to have capacity in respect of the matter concerned (consenting to surgery) as no evidence was shown to the contrary.'*

## 2.4 Support a relevant person to make a decision

**Section 8(3): A relevant person shall not be considered as unable to make a decision in respect of the matter concerned unless all practicable steps have been taken, without success, to help him or her to do so.**

Some people may need help to be able to make a decision or to communicate their decision. This does not mean that they lack capacity to make the particular decision.

You have a duty to make every effort to encourage and support the relevant person to make the decision themselves, even if you have concerns about the relevant person's capacity to make the decision. Supporting the relevant person to make a decision may require you to provide certain information about the decision to them in a different way. Further information on supporting decision-making is set out in chapter 3 of this code of practice.

### Scenario 2: Support a relevant person to make a decision

Mr Murphy has speech aphasia as a result of a stroke, which means that he has difficulty in communicating with others, in particular others who do not know him. Prior to his stroke, he was assessed as having a housing need by his local authority. He recently received a letter from the housing section of his local authority requesting him to attend an appointment to discuss an offer of housing. At the appointment, the housing officer, Mrs O'Brien, explains the two housing options on offer to Mr Murphy and asks for his views. Mr Murphy tries to communicate what he thinks but the housing officer does not understand what he is saying. She tells Mr Murphy that she is not clear about what he is trying to communicate to her but that her colleague, Mr Shaw, who is more experienced in communicating with people with speech difficulties, may be able to assist. Mr. Shaw presents the two housing options to Mr Murphy, outlining them both in a clear way and listing pros and cons of each. He also ensures that all questions to Mr Murphy allow yes/no answers. Based on this approach, Mr Murphy is able to decide which housing option he prefers and communicate it to Mr Shaw and Mrs O'Brien.

*This vignette demonstrates how staff were able to recognise a need for support to enable Mr Murphy to make a decision and took appropriate actions to provide that support.*

## 2.5 Unwise decisions

**Section 8(4): A relevant person shall not be considered as unable to make a decision in respect of the matter concerned merely by reason of making, having made, or being likely to make, an unwise decision.**

Everybody has their own values, beliefs, will and preferences and a relevant person must not be assumed to lack capacity to make a decision just because other people think that their decision is unwise. What is considered an unwise decision may reflect differences in values, goals and preferences between the relevant person and those interacting with them. The fact that someone makes or is likely to make an unwise decision:

- is not evidence that the relevant person lacks capacity to make that decision.
- is not an adequate reason to challenge someone's capacity to make that decision.
- does not automatically trigger an assessment of his or her decision-making capacity.

There is no such thing as a risk-free environment. You must presume the relevant person has the capacity to weigh up options and make a decision to take certain risks. You must respect the will, preferences, beliefs and values of a relevant person, and not seek to impose your own values or attitudes on a relevant person. If you are concerned about what you regard to be an unwise decision, you must balance the perceived risks associated with the decision against respecting the relevant person's right to make it. There may be cause for concern if the relevant person:

- repeatedly makes unwise decisions that put them at significant risk of harm.
- makes a particular unwise decision that is not aligned with their known will and preference
- has developed a condition that may be affecting their capacity to make a particular decision and the decision is not aligned with their known will and preference.

While this does not necessarily mean that the relevant person lacks capacity to make the decision, it should be investigated further. If you are concerned about a certain decision, you should first support the relevant person by making sure they have all the relevant and appropriate information they need to understand the options and risks in order to make the decision. Further details on supporting the relevant person with relevant and appropriate information can be found in section 2.4 and in chapter 3

Where the relevant person does not understand such information, consideration should be given as to whether an assessment of his or her capacity to make the decision in question is needed. Chapter 4 of this code provides guidance on the functional approach to assessing decision-making capacity.

If there is a reasonable belief that the relevant person's decision could give rise to him or her being at risk of abuse by others or is being made as a result of undue influence, you must treat it as a safeguarding issue and contact the relevant authorities.

### Scenario 3 – Unwise decision

Mike is a young man with autism and a mild intellectual disability. He recently received money for his birthday and decided to spend it on signing up to four music and film streaming websites. Each website has a monthly membership fee of €10. Mike's mother, Fiona, believes that Mike does not understand what a monthly subscription entails. She asks Mike for his passwords to the four websites, telling him that she is going to cancel his subscriptions. He refuses, stating that it is his money and he can spend it in whatever way he wants. Fiona explains that he will have to pay the €40 every month out of his Disability Allowance. Mike says that he understands this and has decided to offset the cost by cutting out his twice monthly cinema trips. Fiona accepts that even though she thinks it is an unwise decision, Mike has the capacity to make his own decision in this case.

*This vignette demonstrates how Mike's mother was able to recognise that while she considered Mike's decision to be unwise, he was capable of making the decision.*

## 2.6 Do not intervene unless necessary

**Section 8(5): There shall be no intervention in respect of a relevant person unless it is necessary to do so having regard to the individual circumstances of the relevant person.**

An intervention (as described in section 1.4.3) should only be made in respect of a relevant person in certain circumstances. If the relevant person has capacity to make the decision unaided, an intervention is not necessary and must not be made. When considering whether an intervention is necessary, you must examine whether:

- There is a decision that needs to be made in relation to the relevant person's property and affairs, or personal welfare
- The relevant person requires any support to make this decision
- All practical supports have been given as outlined in section 2.4, where a decision needs to be made and the relevant person requires support to do so.

If the relevant person is still unable to make the decision in question, you must consider what intervention would be the least intrusive and would best support the relevant person. This is further described in section 2.7. Before making an intervention in respect of a relevant person, you must ensure you have evidence of why it was necessary for the intervention to be made.

### Scenario 4: Do not intervene unless necessary

Mrs Ryan is a 76-year-old widow living in a nursing home. When she went into the nursing home, she asked her daughter Claire to check her bank statements sent to her home address. Claire recently noticed that sums of money amounting to €5,000 had been withdrawn from her mother's personal account over the past two months using her debit card. When Claire asked her mother about the withdrawals, Mrs Ryan said she had given her debit card to her son Pat, who withdrew money for her when she wanted to pay for services or give gifts in cash. Since her mother had initiated this arrangement and was able to confirm she wished it to continue, Claire was satisfied that no intervention was necessary at this time. However, it prompted a further discussion on the issue of advance planning resulting in Mrs Ryan agreeing to draw up an Enduring Power of Attorney, to be registered should the need arise in the future.

*This vignette highlights the importance of not intervening unless necessary. In this case, while the relevant person did not require decision-making support, it served as a trigger for advance planning.*



## 2.7 Minimal intervention

### Section 8(6): An intervention in respect of a relevant person shall

- (a) be made in a manner that minimises
  - (i) the restriction of the relevant person's rights, and
  - (ii) the restriction of the relevant person's freedom of action,
- (b) have due regard to the need to respect the right of the relevant person to dignity, bodily integrity, privacy, autonomy and control over his or her financial affairs and property,
- (c) be proportionate to the significance and urgency of the matter the subject of the intervention, and
- (d) be as limited in duration in so far as is practicable after taking into account the particular circumstances of the matter the subject of the intervention.

This guiding principle is made up of several elements described below. The term intervention is used in the context described in section 1.4.3.

#### 2.7.1 Minimise the restriction of a relevant person's rights and freedom of action

A relevant person's rights and freedom of action refer to their entitlement to choose actions that impact their lives such as, for example, the right to decide where to live, who to live with and whether to travel abroad.

Before making an intervention, you must always consider if you can do something else that would interfere less with the relevant person's rights and/or freedom of action. This includes considering whether there is a need to act or make a decision at all.

#### 2.7.2 Respect the rights to dignity, bodily integrity, privacy, autonomy and control over financial affairs and property

An intervention in respect of a relevant person must be made in a way that minimises restriction of a relevant person's rights to dignity, bodily integrity, privacy, autonomy and control over his or her financial affairs and property. These rights are described below.

- **Dignity:** This is the right to be treated with respect, courtesy, and consideration. In respecting the relevant person's right to dignity, you must not ignore the relevant person, assume that he or she cannot communicate, or treat him or her any differently to how you would treat a person whose capacity is not in question.
- **Bodily integrity:** This is the right of the relevant person not to have their body or person interfered with without their consent or, if appropriate, that of their decision supporter.
- **Privacy:** This is the right to respect for private and family life, home, and correspondence. Section 2.11 provides further guidance on how you should obtain, use, store and dispose of information when making an intervention in relation to a relevant person.
- **Autonomy:** This is the right to make decisions, according to personal values, beliefs, will and preferences. The relevant person's right to make decisions that affect them



should be respected when making an intervention. The relevant person's ability to gain, retain and regain autonomy can be supported and developed in various ways, depending on their individual circumstances.

- **Control over financial affairs and property:** This is the right to exercise autonomy over financial affairs and property. You should support the relevant person to manage his or her financial affairs and property as far as possible. Where an intervention is required in relation to them, the will and preferences of the relevant person must be taken into account.

### 2.7.3 Be proportionate to the significance and urgency of the matter

This requires that any intervention made in relation to a relevant person must be proportionate to the significance and urgency of the decision that needs to be made. The personal circumstances of the relevant person should first be looked at and taken into consideration, in deciding what intervention to make. You must consider all of the potential actions that could be taken and consider the likely outcomes of each option. You must tailor the intervention to the situation and the relevant person's individual circumstances.

### 2.7.4 Be as limited in duration as is possible

Any intervention made in relation to a relevant person should only last for as long as it is needed, taking into account the personal circumstances of the relevant person and the decision that needs to be made. This means an intervention should not last longer than the decision that needs to be made. An ongoing intervention should not be made in respect of a one-off decision. If the relevant person gains or regains capacity in respect of a certain matter, no further intervention should be made. Any intervention in respect of a relevant person must be made in a way that respects and minimises restriction of a relevant person's rights and freedom of action. It should also be proportionate and limited in duration.

### Scenario 5: Minimal intervention

When Alan was first diagnosed with dementia several years ago, he made an Enduring Power of Attorney (EPA), naming his grandson, Richard, as his Attorney for property and affairs decisions. The EPA has not been registered as Alan is confident that he is still able to make his own financial decisions. Recently, Alan has started making mistakes when paying his bills. He paid less than half of what he was billed for by his electricity provider when paying his bill online. He has not paid his television and gas bills for the past six months. While Richard is concerned that if the bills are not paid, Alan's gas and electricity will be cut off, he also wishes to respect Alan's autonomy and dignity. He speaks to Alan about the situation who admits that, over the past six months, he has been finding that paying bills online is becoming difficult for him to understand and that he feels his dementia is getting worse. Richard provides Alan with information about his different options. He tells Alan that the most restrictive option is to register his EPA which would give Richard authority to make property and affairs decision on Alan's behalf. Other options would allow Alan to retain control over his finances and make his own decisions, with Richard's support. For now, Alan gives permission to Richard to contact Alan's utility providers and request that they send bills at separate times of the month.

Richard also creates a chart to hang in Alan's kitchen, which uses distinct colours and pegs so Alan can keep track of his bills. Alan tells Richard that he would prefer to pay his bills in the post office, but he has no way of getting there. Richard offers to pay them on Alan's behalf but sensing that Alan would like to preserve his privacy around money issues, he offers to drive Alan to the post office when he needs to go. Alan and Richard decide to see if this approach works and if after an agreed period, Alan is still finding it difficult to manage paying his bills, they will look at other options.

*This vignette demonstrates that, even if some level of intervention is necessary, all the available alternatives should be looked at in the first instance and the least restrictive option that achieves the intended outcome should be chosen. The intervention should also respect the relevant person's rights to autonomy, dignity, privacy, and control over his or her finances.*

### 2.8 Give effect to will and preferences

#### **Section 8(7): The intervener, in making an intervention in respect of a relevant person, shall -**

- (a) permit, encourage and facilitate, is so far as is practicable, the relevant person to participate, or to improve his or her ability to participate, as fully as possible, in the intervention,
  - (b) give effect, is so far as is practicable, to the past and present will and preferences of the relevant person, in so far as that will and those preferences are reasonably ascertainable,
- take into account -
- (c) the beliefs and values of the relevant person (in particular those expressed by writing), in so far as those beliefs and values are reasonably ascertainable, and
  - (d) any other factors which the relevant person would be likely to consider if he or she were able to do so, in so far as those other factors are reasonably ascertainable,
  - (e) unless the intervener reasonably considers that it is not appropriate or practicable to do so, consider the views of -
    - (i) any person named by the relevant person as a person to be consulted on the matter concerned or any similar matter, and
    - (ii) any decision-making assistant, co-decision-maker, decision-making representative, or attorney for the relevant person
  - (f) act at all times in good faith and for the benefit of the relevant person, and
  - (g) consider all other circumstances of which he or she is aware and which it would be reasonable to regard as relevant.

This guiding principle is made up of several parts containing specific requirements for making an intervention.

### 2.8.1 Permit, encourage and facilitate the relevant person to participate

This requires that where an action is being taken you must encourage and support the relevant person in participating to the fullest possible extent. Even where a decision is made on behalf of the relevant person you should seek to facilitate the relevant person to participate as much as possible.

### 2.8.2 Give effect to past and present will and preferences

When making an intervention you are required to give effect to the past and present will and preferences of the relevant person. All efforts must be made to find out the will and preferences of the relevant person in relation to the specific decision to be made. The relevant person's will and preferences must drive decisions that they are supported in making, and that others may make on their behalf. This means you must consider all relevant information that can be reasonably accessed in the time available to make the decision. If the present will and preferences of the relevant person cannot be ascertained after all practicable efforts have been made, their past will and preferences should be considered. This requires a consideration of information about the relevant person's past choices in similar circumstances, or past expressions of preferences for similar matters. You should seek information from the relevant person's family members, carers and other significant people in their life, as appropriate. There will be situations where ascertaining the relevant person's will and preferences will be challenging. This could be the case, for example, where the relevant person has a severe intellectual disability or is non-verbal. In situations where you have difficulty in establishing the will and preferences of the relevant person, you should try to find other ways to establish them. It could mean involving an independent advocate, a family member or friend to help the relevant person articulate their will and preferences. Those who know the relevant person best may be able to help with communication or interpret signs that show the relevant person's will and preferences. There will be situations, however, where, even after significant efforts have been made, it is not practicable to establish the will and preferences of the relevant person. In those situations, the best interpretation of will and preferences of the relevant person should be made.

### 2.8.3 Consider the beliefs and values of the relevant person and other factors

Every effort must be made to understand what the relevant person's own approach would be to the decision to be made if they had the capacity to make the decision in question. You must use all means practicable to establish the relevant person's beliefs and values relevant to the decision and take them into account. Particular significance should be given to any beliefs or values expressed in writing by the relevant person. You should consider whether there are any other factors the relevant person would be likely to consider if he or she were making the decision or acting for themselves. Other factors could include the impact of the decision on other people or the impact of the decision on the relevant person's finances. Where, after using all practical means to try to establish the relevant person's beliefs and values, you still cannot establish them, you should follow the same approach outlined under section 2.8.4 by asking others who know the relevant person.

### 2.8.4 Consider the views of others

When taking an action, unless you consider it is not appropriate or practical to do so, you must consider the views of other people. This is set out further under section 2.9.

### 2.8.5 Act in good faith and for the benefit of the relevant person

When making an intervention, you must always act in good faith and for the benefit of the relevant person. There will be situations where, even after significant efforts have been made, it is not practicable to fully establish the will, preferences, beliefs, and values of the relevant person, even after the views of others have been sought. In those situations, you must act in good faith in making the best interpretation of will and preferences of the relevant person. You must make an intervention that best aligns to the relevant person's will and preference and most benefits the relevant person.

### 2.8.6 Consider all other relevant circumstances

Other relevant circumstances to consider in making an intervention will vary based on the specific nature of the decision to be made and the personal circumstances of the relevant person. When making an intervention, you must make a record of any other potentially relevant circumstances for the specific decision and how they were taken in consideration. For example, in relation to a decision about where a relevant person would live and their ongoing care needs after a serious accident, you would need to consider what accommodation and care options would be possible for the relevant person and the pros and cons of each. A relevant consideration would be any financial compensation that the relevant person received towards his or her future care needs as a result of the accident.

### Scenario 6: Taking will and preferences into account

Annie is an elderly lady with middle stage dementia whose husband and carer Dan has become ill due to the stress of caring for his wife. Despite this, Dan is insisting that Annie be kept at home as he believes that it is his duty to care for Annie. Worried about the adverse effect on their father's health and his refusal to allow carers into their house, their adult children Paul and John explain to Dan that Annie's own will and preferences must be considered. However, they are unable to ascertain what their mother's preferred approach would be despite several attempts to discuss various options with her. With Dan's agreement, they ask Annie's oldest friend, Claire, if Annie had ever spoken with her about this issue. Claire tells Dan, Paul and John that she and Annie had discussed this topic fully when Annie had been diagnosed. She said that Annie had told her that, while her preference would be to be cared for at home, she did not want this to be at the expense of Dan's health. Annie had told Claire that she would much rather share their house with carers or live elsewhere and have Dan come to visit her, rather than have him become ill from the stress of caring for her on his own. When Dan hears this, he agrees to allow carers to come to the house. He also agrees to start looking at nursing homes in case Annie might have to go to one in the future.

*This vignette highlights how the will and preferences of the relevant person can be ascertained from a third party when the relevant person cannot express these themselves, and how this can inform a decision regarding an intervention.*

## 2.9 Consider the views of others

### Section 8 (8) The intervener, in making an intervention in respect of a relevant person, may consider the views of:

- (a) any person engaged in caring for the relevant person,
- (b) any person who has a bona fide interest in the welfare of the person, or
- (c) healthcare professionals.

In making an intervention in relation to the relevant person, the views of the following people may be considered:

- A carer for the relevant person.
- A person who has a genuine interest in the welfare of the relevant person.
- Healthcare professionals.

Those who know the relevant person are often able to help ascertain the relevant person's will and preference, beliefs and values. They may also have views on whether they think the proposed intervention is necessary, whether it is likely to support the relevant person and whether there are any less restrictive options.

A group of family members, friends, carers or others providing day-to-day support to the relevant person is often referred to as a support network. Given the important information about the relevant person that this support network can offer, particularly where the relevant person cannot express their own will, preferences, beliefs and values, you should take care and time, where possible, to seek to identify and contact appropriate persons. Where family members have had no involvement with the relevant person for some time, a trusted friend or adviser with regular personal interactions with the relevant person may be better placed to be asked about his or her will and preferences, beliefs and values. While a family member, friend or other trusted person can support the relevant person informally or be part of the relevant person's support network, they have no authority to make any decisions for the relevant person unless they have specific legal authority to do so under a decision support arrangement.

## 2.10 Consider the urgency of the intervention

### Section 8(9): In the case of an intervention in respect of a person who lacks capacity, regard shall be had to:

- (a) The likelihood of the recovery of the relevant person's capacity in respect of the matter concerned, and
- (b) The urgency of making the intervention prior to such recovery.

When making an intervention, you must be aware that a relevant person can regain or increase capacity to make a decision, and that many decisions do not need to be taken urgently. Before making an intervention in respect of the relevant person, you should consider the following circumstances.

### 2.10.1 Circumstances where the relevant person may regain capacity

You must consider whether the relevant person's lack of capacity to make the decision is temporary and if, in time, they might be able to make the decision. You must consider whether the relevant person's capacity may be affected by a medical condition that could change or improve or is episodic in nature. It may be the case that the relevant person will need some type of support to make the decision. If the intervener allows them time to put such support in place, they may regain sufficient capacity to make the decision.

### 2.10.2 Circumstances where the intervention can be delayed

You must decide whether the intervention must be made urgently or whether it can be delayed until the relevant person can make the decision or be supported to make it. While some interventions, such as in the case of a medical emergency, may be necessary and urgent and the option of waiting for the relevant person to regain capacity to make the decision is not possible, other interventions may be less urgent. In some circumstances, this will give the relevant person the time to regain capacity to make the decision or be supported to make the decision.

## 2.11 Use of Information

### Section 8(10): The intervener, in making the intervention in respect of a relevant person:

- (a) shall not attempt to obtain relevant information that is not reasonably required for making a relevant decision,
- (b) shall not use relevant information for a purpose other than in relation to a relevant decision, and
- (c) shall take reasonable steps to ensure the relevant information:
  - (i) is kept secure from unauthorised access, use or disclosure, and
  - (ii) is safely disposed of when he or she believes it is no longer required

When making an intervention, including making a decision on behalf of the relevant person, you may need to obtain and use certain information. You must determine what information is relevant to the decision. This includes information that may be required to comply with the guiding principles, for example, to establish the relevant person's will, preference, values and beliefs and to seek the views of others. In doing this, you must:



- Only obtain relevant information that is reasonably required for making the specific decision.
- Not obtain information that relates to a different decision, unless it would be likely to provide relevant information on the relevant person's will, preference, values and beliefs.
- Not use the information you collect for a purpose other than in relation to the specific decision you got it for.
- Take reasonable steps to ensure the information you collect is kept safe and secure at all times.
- Make sure the information you collect is securely disposed of when it is no longer required, either to support decision-making, or to demonstrate your compliance with the guiding principles or other codes of practice.
- Ensure that the relevant person's information is treated in a confidential manner.

You are also required to comply with the General Data Protection Regulation (GDPR) and the Data Protection Act 2018. If you identify a potential concern through the collection of information, this guiding principle does not prevent you from using the information to report a potential offence to An Garda Síochána or to report a potential safeguarding concern or a potential breach of the Act to the Director.

### Scenario 7: How a relevant person's information should be handled

Joan has a brain injury due to an accident and is recovering at home. Her doctors believe that she will make a full recovery in time. Currently, she finds it difficult to obtain and understand information in relation to some decisions that need to be made to keep her hairdressing business running smoothly. She is also finding it challenging to implement some decisions. To assist her in making and implementing those decisions, she appoints her sister Kate to act as her decision-making assistant for some property and affairs decisions. Joan knows that her annual tax return is due. She usually completes this online but is now concerned that she won't be able to do so and asks Kate to assist her. With Joan's permission, Kate locates all the relevant accounting files in Joan's filing cabinet. She also accesses the tax return Joan made online last year. Using all this information, she assists Joan in making her tax return. Joan is nervous about entering figures online at first but is reassured when Kate takes her through the process step-by-step and explains and provides her with all the information she needs. Once the tax return is completed, Kate returns Joan's files to her filing cabinet. She destroys the copy of the tax return she had printed. Kate knows that her role was to assist Joan in understanding information and endeavouring to implement her decision. Now that the decision is implemented, Kate understands that her having a copy of Joan's tax return for last year is no longer required.

*This vignette shows how an intervener should handle a relevant person's information. They should use the information only for the intervention to be made and should not use the information to make other interventions. They should store the information carefully and dispose of it safely when the information is no longer required to make the intervention. The intervener must always respect the privacy of the relevant person and treat any information they are entrusted with in a confidential manner.*

### 2.12 Retaining evidence to demonstrate that guiding principles have been followed

It is good practice for **everyone** engaging with a relevant person in relation to decision-making to retain evidence that demonstrates how you followed the guiding principles. This could include:

- Making a written record of the relevant person's will and preference in relation to specific decisions and the methods you used to ascertain them.
- Making a written record of people you contacted and the views they expressed as well as reasons explaining any decision to not consult a person named by the relevant person, or a decision supporter.

Where such records are documented will depend on the particular circumstances under which you are following the guiding principles.

Since those referred to as **interveners** under section 2(1) of the Act are required to apply the guiding principles before and during an intervention undertaken in respect of a relevant person, such people may be required to show how they complied with one or more guiding principles.





## Supporting decision-making

Supporting decision-making is about supporting the relevant person to make their own decision, as far as possible, and in doing so, safeguarding their autonomy. Supporting a person to make a decision means giving them the tools they need to make the decision for themselves or to participate in the decision-making process to the fullest extent possible.

Where the relevant person is unable to make the decision independently, supported decision-making can be incorporated into joint and substitute decision-making, giving effect to the relevant person's will and preferences as well as to their values and beliefs.

Supporting decision-making incorporates the following key elements:

- Understanding the decision-specific support needs of the relevant person
- Providing relevant and appropriate information
- Communicating in a way that is most appropriate to the relevant person's needs
- Considering external factors such as location, timing, relevant conditions and/or difficulties that may be affecting the relevant person

### 3.1 Understand the decision support needs of the relevant person

A wide range of people will have different conditions that may impact on their capacity to make certain decisions in their lives. How they should be supported in practice will differ from person to person depending on their specific requirements. One person may be able to make 'everyday' decisions in his or her life, such as what to wear, what to eat, where to go and who to see without the need for decision-making support but may need a decision-making support arrangement in relation to more complex decisions such as how to manage money, the sale or purchase of a house, or what type of mobile phone contract to enter into. A relevant person's need for support may decrease over time in relation to some decisions as they gain experience and confidence. It may, however, increase in relation to other more complex decisions.

In general, the level and type of support a relevant person needs will be determined by a number of factors including:

- the type of decision to be made,
- the complexity of the decision to be made,
- the relevant person's individual circumstances, and
- when the decision needs to be made.

### 3.2 Provide relevant and appropriate information

When a relevant person wants to make a decision, or a decision needs to be made in relation to them, you must ensure they have all the relevant and appropriate information to support them to make the decision. This means ensuring that they have the right kind of information that is provided to them in the right way, in line with their specific needs.

This is in keeping with guiding principle 2 which advises that a relevant person must not be considered as unable to make a decision unless all practical steps have been taken to help him or her to make the decision. This means you have a duty to make every effort to encourage and support the relevant person to make the decision themselves, even if you have concerns about the relevant person's capacity to make the decision.

You must make a record of the information and support you provide to the relevant person. You may be required to show you were acting in compliance with this guiding principle.

#### 3.2.1 Relevant information

You must provide the relevant person with all of the relevant information they need to make the decision. This includes information about choices and options available to them and potential consequences if they do not make a decision.

Information must be provided in a way that does not put undue pressure on the relevant person to decide one way or the other about the decision to be made. You must set your personal preferences aside and support the relevant person in an objective way.

#### 3.2.2 Appropriate information

You must explain or present the information in a way that the relevant person can understand. This means the information is presented in a clear way, avoiding jargon and technical concepts.

Where appropriate, you must provide the information in an Easy-to-Read version, using pictures, using signs such as Lámh or Irish Sign Language, or an electronic communication device.

### 3.3 Communicate in an appropriate way for the person's needs

In all cases, it is important to find the most effective way of communicating with the relevant person. Good communication is essential for explaining relevant information in an appropriate way and for ensuring that the steps being taken meet the relevant person's needs.

Appropriate communication to support decision making must be tailored to the relevant person's needs, personality and level of understanding. The relevant person must be supported to communicate his or her decision in a way relevant to their circumstances. This can include, total communication, augmented or alternative communication, and non-verbal communication, such as gestures and actions.

### 3.3.1 What you say

- Use concrete examples relevant to the decision such as analogy and storytelling.
- Set out the options and choices in a balanced way, without giving one option special emphasis.
- Set out the risks and benefits of each option.
- Describe any foreseeable consequences of each option, and of not making any decision at all.

### 3.3.2 What you don't say

- Avoid technical terminology and jargon and abstract concepts.
- Be aware that many people have difficulty with numerical terms.
- Do not put undue pressure on the relevant person to decide one way or the other about the decision to be made.

### 3.3.3 How you say it

- Use plain, clear and concise language.
- Break down information into smaller points.
- Speak slowly and at an appropriate volume.
- Pause regularly to check the relevant person's understanding.
- Repeat information and reiterate key points.
- Involve other professionals with relevant expertise where necessary and where possible, such as a speech and language therapist.
- Involve a trusted relative, friend or advocate who could be contacted with the relevant person's agreement to ask about the best way to communicate with the relevant person.

## 3.4 Create the right environment

In order to support the relevant person to make a certain decision, you must ensure he or she has been given enough time and space to make the decision and to consider all information and options available.

You must find out whether there are particular times of the day when the relevant person's understanding is better than other times. The relevant person's level of alertness at a particular time of day may be influenced by many factors, such as the side effects of medication or memory loss.

You must find out whether there is a particular place where the relevant person feels more at ease and relaxed. You should choose the location where the relevant person is least distracted and more easily able to concentrate.

### 3.5 Build decision-making capacity where appropriate

Some people may need to be supported to learn to make a decision for themselves where they have never done it before. For example, some people with an intellectual disability who have lived in residential services for most of their lives, or are living at home with parents, may have made few decisions for themselves. Supporting a relevant person includes developing his or her confidence to make certain decisions, as a lack of confidence can get in the way of decision-making.

Supporting a relevant person involves building capacity in steps or stages so that they take an increasing number of decisions for themselves. What supports a relevant person requires will depend on his or her personal circumstances and individual needs. It involves getting to know the relevant person and understanding how they communicate,

You should consider whether there are any other factors the relevant person would be likely to consider if he or she were making the decision or acting for themselves. Other factors could include the impact of the decision on other people or the impact of the decision on the relevant person's finances.

# Capacity

## 4.1 What is capacity?

Throughout this code and all codes of practice under the Act, capacity refers to decision-making capacity. A person with capacity has the ability to understand, at the time that a decision is to be made by him or her, the nature and consequences of that decision in the context of the available choices at that time. They are able to retain information pertaining to the decision until the decision has been made, are capable of weighing up information relevant to the decision and can communicate their decision.

Different decisions require different levels of decision-making capacity, depending on the complexity of the decision to be made as well as the urgency of the decision. Capacity is best understood as a spectrum ranging from full to impaired to absent and may vary depending on the issue and/or context. Capacity can also be short-term/temporary or long-term/permanent. These elements of capacity are further described below.

Capacity is **issue specific**. This means that the relevant person's capacity only relates to the decision to be made. For example, a person may have the capacity to consent to a decision about a diagnostic procedure but may lack capacity to make a decision about major surgery.

Capacity is **context specific**. This means that the relevant person's capacity only relates to the conditions or circumstances in which the decision is to be made. Some circumstances may be adjustable to better support a person's decision-making capacity.

Capacity is **time specific**. This means that the relevant person's capacity to make a decision should be assessed at the time the decision has to be made. A person's capacity to make a decision can fluctuate. A relevant person may lack the capacity to make the decision in question at one time of the day but may have the capacity to make the same decision a few hours later. A person's capacity may also change over a longer period of time, due to a condition, treatment or medication, an illness, accident or injury, or due to ageing.

## 4.2 What is a capacity assessment?

Capacity is assessed functionally. This means a capacity assessment must consider a person's ability to make a specific decision at a specific time.

The assessment must take into account any factors that may be affecting the person's capacity at the time of the assessment. Depending on the context of the assessment, the capacity assessment may also consider the supports available to the person to make a specific decision. For example, a capacity assessment in respect of a co-decision-making agreement includes an assessment of the relevant person's capacity to make decisions jointly with the support of a co-decision-maker.

A capacity assessment is a functional assessment and not a medical assessment. This means that general standardised or 'blanket' assessments of a relevant person's cognition or intelligence must not be used to determine capacity. However, a current medical condition, treatment, or medication may be a relevant factor affecting a relevant person's capacity at the time of the assessment.

A capacity assessment is concerned with the relevant person's ability to make a specific decision at a specific time. It is not concerned with the decision itself or with the perceived or actual outcome of the decision made. A decision that is perceived by others to be irrational or unwise, does not in and of itself mean the person lacks capacity to make that decision.

The person undertaking the capacity assessment should follow the guiding principles and the guidance in this code of practice. The person assessing capacity must at all times have regard to the fact that the relevant person is presumed to have capacity, unless or until it has been determined otherwise.

While the process for assessing capacity applies to all decisions that fall within the scope of the Act, both large and small, the nature of the assessment and the recording of it should be proportionate to the complexity and significance of the specific decision.

### 4.3 Triggers for assessing capacity

When there is a decision that needs to be made and there is a question as to whether the relevant person has capacity to make that decision, the relevant person is presumed to have capacity unless or until there has been a determination otherwise. As such, a sufficient reason or cause for concern must exist in order to undertake a capacity assessment. This is often referred to as the trigger for assessing capacity.

A trigger for assessing capacity may differ depending on the significance of the decision and the level of risk to the relevant person. The following factors should be considered in determining whether a sufficient trigger exists and therefore whether a capacity assessment is necessary:

- There is an event or circumstance that places the person or others at risk. This may include, but does not require, a condition, illness or treatment,
- A decision needs to be made,
- Other, less intrusive measures, including supporting the relevant person to make their own decision, have been considered, but have failed or are not appropriate, and
- The risk to the person or others means intervention is appropriate and proportionate.

Circumstances affecting the relevant person's capacity could relate to cognitive decline, dementia, mental illness, accident or injury. Other circumstances may include profound grief or stress, or severe physical illness associated with pain, insomnia or emotional distress.

Certain circumstances may also affect the relevant person's ability to communicate a decision. The inability to communicate may be a trigger for a capacity assessment, but only after all supports are offered to the relevant person, including assistive technologies where required.

It is not a requirement to identify a cause or reason for a change in the relevant person's capacity. However, it may be useful to determine whether the change is likely to be temporary or longer lasting.

A common trigger for assessing capacity may be where a person with a severe condition or disability affecting their capacity is nearing their 18th birthday. Many decisions including those relating to a financial allowance, care and treatment and living arrangements may need to be reviewed when a person becomes an adult and a parent or caregiver is no longer legally authorised to make decisions on the person's behalf.

A number of factors about the specific decision that needs to be made may cause the person's capacity to be questioned. These include where the decision entails a significant risk or long-lasting consequences. These may also include where the decision that the relevant person is proposing to make goes against reasonable advice, without justification.

Capacity may also be questioned where the relevant person is unable to make a decision at all, despite being provided with all the relevant information and the appropriate support, and it is necessary that a decision be made, for example, about residential care.

### **4.4 Circumstances in which a capacity assessment may be needed**

A capacity assessment may be needed due to a range of factors or conditions, described below.

#### **4.4.1 Capacity assessment in respect of making or varying a co-decision-making agreement or enduring power of attorney**

A capacity assessment is required as part of the process for making, varying or revoking a co-decision-making agreement or enduring power of attorney. The assessment of capacity must be undertaken by a doctor and separately by another healthcare professional. As part of the capacity assessment, the doctor or other healthcare professional will assess whether the relevant person has the capacity to enter into or vary the decision support arrangement. This includes capacity to understand the effect of entering into the arrangement and other options available to them. Where they are satisfied that the person has capacity, the doctor or other healthcare professional will produce a statement of capacity.



For a co-decision-making agreement, the doctor and other healthcare professional will also assess whether the relevant person has the capacity to make the decisions included within the co-decision-making agreement with the support of the proposed co-decision-maker. This may require an assessment of the relevant person alone, as well as an assessment together with the co-decision-maker.

### **4.4.2 Capacity assessment in respect of registering an enduring power of attorney**

A capacity assessment is required as part of the process for registering an enduring power of attorney. This assessment is undertaken at the point of need, when the attorney named in the enduring power of attorney thinks the relevant person may have lost capacity in respect of one or more decisions in the enduring power of attorney. The assessment of capacity must be undertaken by a doctor and separately by another healthcare professional.

As part of the capacity assessment, the doctor or other healthcare professional will assess whether the relevant person lacks capacity in respect of one or more decisions in the enduring power of attorney. Where possible, this assessment should be undertaken by the same doctor and healthcare professional who assessed the person when the enduring power of attorney was made.

Where they are satisfied the person lacks capacity in respect of one or more decisions in the enduring power of attorney, the doctor or other healthcare professional will produce a statement of incapacity.

### **4.4.3 Capacity assessment following supervision**

The Director of the Decision Support Service will supervise decision supporters in the performance of their functions. This will be through the scrutiny of periodic reports, through consideration of complaints and concerns, and by appointing general visitors who will visit relevant persons and decision supporters.

If a concern arises in relation to the relevant person's capacity during supervision, the Director may send a special visitor to assess the relevant person. A concern may arise that a relevant person:

- lacks capacity to make certain decisions which are subject to a decision support arrangement, even with the assistance of a decision supporter,
- lacks capacity in relation to certain decisions which are outside the scope of a current decision support arrangement, or does not have a decision support arrangement in place, or
- has capacity and does not need a decision supporter.

A special visitor is a person with specific expertise in assessment capacity and matters relating to capacity. A special visitor will only be sent to visit a person where it is determined to be necessary and proportionate in the specific circumstance.



### 4.4.4 Court directed capacity assessment

The court may direct a capacity assessment to be undertaken in consideration of an application for a declaration of capacity, or an application to review a declaration of capacity. In requesting a capacity assessment, the court may also request a medical report, a report from a healthcare professional, or a report from any other relevant experts, to assist it in making a decision.

### 4.4.5 Capacity assessment where a decision needs to be made

In all other circumstances, a capacity assessment is likely to occur when there is a decision that needs to be made and there is a question as to whether the relevant person has capacity to make that decision.

## 4.5 Who should assess capacity?

This depends on the reason why the capacity assessment is being undertaken as described below.

### 4.5.1 Capacity assessments relating to a decision support arrangement

Specific persons are designated as the capacity assessors for the assessments described in section 4.3. Capacity assessments to support making, varying and revoking a co-decision-making agreement and enduring power of attorney, as well as assessments to support the registration of an enduring power of attorney, must be undertaken by a doctor and another healthcare professional.

Where an instruction from the Director of the Decision Supporter Service includes the need for a capacity assessment as part of supervision or the investigation of a complaint regarding a decision support arrangement, then a special visitor would carry out the visit and conduct the assessment.

### 4.5.2 Capacity assessments where a decision needs to be made

For all other capacity assessments, no specific person or professional is required to undertake the assessment. Because it is not a medical assessment, it is not a requirement that the person undertaking the assessment be a doctor or healthcare professional. The most appropriate person to assess capacity will often be the person with the best understanding of the specific decision that needs to be made. This includes an understanding of the choices available to the relevant person, the likely consequences of each option, and the consequences of taking no action. It is usually the person who is most directly concerned with the relevant person in regard to the decision that needs to be made. This may be a solicitor, bank official, social housing agent, or care provider, among others. The appropriate person to undertake the capacity assessment should be considered on a case-by-case basis in the context of the decision that needs to be made. It may be appropriate in some circumstances to undertake a capacity assessment at the same time as a medical or other healthcare assessment is being undertaken. This may include situations where the relevant person has a new or temporary condition that appears to affect their capacity, where the decision that needs to be made is a major decision with potentially long-lasting impacts.

Some examples of who might be involved in assessing a relevant person's capacity in different circumstances include:

- Legal practitioners might assess whether a relevant person has capacity to give instructions or whether they have the capacity to enter into a sale and purchase agreement.
- Bank officials might assess whether a relevant person is capable of making a specific decision about the management of their finances
- Doctors or healthcare professionals might assess a relevant person's capacity to decide whether to go ahead with a treatment prior to accepting on the person's consent.
- Community nurses might assess whether a relevant person can consent to getting an injection or having a bandage changed.
- Service providers, social workers, family members or carers might assess whether a relevant person has the capacity to make the personal decisions necessary to live in their own home.



# Process for assessing capacity

Each capacity assessment must be specific to the context of the relevant person and the specific decision(s) that need to be made. There is a three-stage process for assessing capacity, each of which is set out in more detail in this chapter.

## 5.1 Prepare for the assessment

Before undertaking a capacity assessment with the relevant person, the person assessing capacity must take prepare for the assessment by considering a number of factors described in the following sub-sections.

### 5.1.1 Ensure an assessment is needed

The person assessing capacity must be informed of the reason for the capacity assessment and any events that lead to the request for the capacity assessment. In some situations, the person undertaking the assessment may be the person that identified the need.

### 5.1.2 Understand the decision(s) to be made

The person assessing capacity must have a clear understanding of the decision or decisions to be made, as well as options available to the relevant person in their particular context. The person assessing capacity should consider what information would be needed for anyone making a similar decision. If the specific decision to be made is not clearly defined and understood before the assessment, the assessment will not be valid. The person assessing capacity must obtain sufficient information about the relevant person's personal circumstances to enable an assessment of the relevant person's understanding of the choices available to them and the effects of certain decisions. However, the person assessing capacity should only obtain enough information as is necessary and relevant to the decision in question, to prepare for the assessment.

### 5.1.3 Understand any support needs of the person

The person assessing capacity should consider whether the person has any specific difficulties which may be impacting their capacity, in particular communication difficulties. The person assessing capacity must ensure they are able to tailor their communication in a way appropriate to the needs of the person or are able to access necessary supports, including specialist supports. Particular considerations may need to be made and supports put in place for a relevant person with specific neurological conditions, dementia, intellectual disability, mental illness, severe stroke, or alcohol or substance related brain injury. This may include considerations around the environment for the assessment, timing of the assessment and requirements for follow up, or periodic review. Consideration must be given to any other conditions, including medical conditions that may affect the relevant person's ability to engage and participate in

the capacity assessment. This may include fatigue, decreased concentration, poor hearing, diminished eyesight, stress and anxiety. Consideration should also be given to any other factors that may influence the relevant person's capacity; these may include, for example, if they are tired, upset or under pressure.

### 5.1.4 Prepare questions and lines of enquiry

The person assessing capacity should prepare questions and lines of enquiry about the decision to be made that will allow them to consider the four elements of functional capacity assessment. Questions should be made as simple as possible, taking into account the needs of the person. Questions should be in plain English, making use of a mixture of open, closed and 'yes' or 'no' questions where possible. Multi-part questions should be avoided and instead the person assessing capacity should ask follow-up questions where necessary. The person assessing capacity must ask enough questions to make an assessment about each element of functional capacity. However, this does not mean the assessment has to follow a formal or rigid structure. Where possible, the person assessing capacity should attempt to have a discussion with the relevant person about the decision and should take adequate time to build trust and rapport. The length and structure of the assessment should be proportionate to the decision that needs to be made.

Examples of the types of questions that may be useful include:

- Questions about the relevant person's understanding of basic facts about the decision and options available to them.
- Questions about the relevant person's will and preference, values and beliefs in relation to the decision and options available.
- Questions about the relevant person's understanding of their own context and circumstances.
- Questions about the relevant person's ability to weigh up advantages and disadvantages of options available to them.
- Questions about the relevant person's ability to give effect to certain decisions, including how to access supports and services where needed.
- Questions about the relevant person's awareness of their own needs and unmet needs and any concerns that may have been raised.
- Questions about the relevant person's awareness of risk, including in relation to their safety

### 5.1.5 Ensuring the relevant person is prepared for the assessment

Before beginning an assessment, the person assessing capacity must communicate to the relevant person what they are doing and why. The aim should be to get the relevant person to participate willingly in the capacity assessment process.

The following information should be communicated to the relevant person:

- There is concern about their capacity to make a specific decision
- There is a possibility of risk or harm to themselves or others if they make a decision without capacity to do so
- A description of what is involved in the capacity assessment process
- Why it is beneficial for them to participate in the process
- That the outcome of the capacity assessment will either be:
  - The relevant person has capacity to make the decision in question
  - The relevant person lacks capacity to make the decision in question at this time

The person assessing capacity should meet with the relevant person and explain the purpose and nature of the assessment and the significance of a finding of incapacity in the specific context. The person assessing capacity must ensure the relevant person has been provided with relevant information relating to the decision in a form and language appropriate to their needs.

This may include information on:

- The decision or decisions and why they need to be made
- Different choices available to them in relation to the decision
- The likely effects of making the decision
- The likely effects of not making the decision
- Other choices or options available to them.

The relevant person should also be given information on the supports available to them during the assessment. The relevant person must have adequate time to process and consider information relevant to the decision. This is particularly important where a relevant person may be required to consider information for the first time or make a decision that was previously made by a spouse or parent.

### 5.1.6 Consent to assess capacity

The person assessing capacity must seek the consent of the relevant person to undertake the capacity assessment. The person assessing capacity must explain that the relevant person has a right to refuse to undergo the assessment or may stop at any stage.

If the person refuses to consent to the capacity assessment, or is not able to consent, the person assessing capacity should make a record of their interactions with the relevant person and follow the process set out below.

### 5.1.7 Refusal or inability to consent to a capacity assessment

If the person assessing capacity determines that the relevant person is not capable of consenting to the assessment, they must determine whether to conduct or continue the assessment. The person assessing capacity must act in good faith and determine whether the assessment is likely to be for the benefit of the relevant person.

Relevant considerations will include the purpose of the capacity assessment, the seriousness of the decision that needs to be made, and likely consequences of delaying the assessment.

If the relevant person refuses to undergo a capacity assessment or refuses to engage in some or all aspects of a capacity assessment, the person assessing capacity should try to establish the reasons for this and identify what can be done to help the relevant person to participate fully. It is important that the concerns of the relevant person are heard and carefully considered. Steps to follow include:

- Giving a sensitive and careful explanation of the reason for the assessment should be given
- Making the relevant person aware that they will have the opportunity to dispute the outcome of the assessment if they disagree
- Informing the relevant person of the potential consequences of refusing the assessment
- Depending on the circumstances, providing support from someone close to the relevant person or an independent advocate
- Whenever possible, allowing the relevant person time to consider the matter by deferring the functional assessment
- Reassuring the relevant person that every effort will be made to facilitate and support them in making their own decision and that one of the reasons for the assessment is to identify the best way to do

Taking these steps may address concerns that the relevant person has regarding the assessment. However, there may still be situations where a relevant person still does not consent to having his or her capacity functionally assessed. The person assessing capacity should not persist in trying to assess the relevant person but should document the refusal and the actions taken in trying to facilitate the assessment.

Where the relevant person refuses to consent to the assessment this refusal should not automatically lead to a conclusion that the relevant person lacks capacity. However, where a capacity assessment is considered necessary and the relevant person is unable or unwilling to participate, an application to court may be needed for a determination as to the relevant person's capacity.

### 5.1.8 Choose an appropriate time and place

The person assessing capacity must consider the appropriate time and place for the interview. They must ensure that enough time is available for the interview to be conducted at an easy pace and that the place chosen for the interview is comfortable, private and free from unnecessary distractions. Where possible, interviewing later in the day should be avoided, particularly if the relevant person is likely to be affected by fatigue.

### 5.2 Undertake the four-part assessment

The person assessing capacity must ensure that the relevant person has the supports or services that were identified as necessary to participate in the assessment. The person assessing capacity must also ensure the relevant person has received sufficient information about the decision and choices available to them, in a language and format appropriate to their needs.

To begin the assessment, the person assessing capacity should explain the reason for the assessment and provide information about how the assessment will take place. This includes an indication of the different matters that will be discussed, the number of questions that will be asked and the length of time the assessment is expected to take.

The person assessing capacity must ask simple questions, using a mixture of open ended, closed questions and yes/no questions where possible. One decision or idea should be discussed at a time, giving the relevant person plenty of time to consider each question and respond.

It is a matter of judgment as to whether an immediate family member or friend should be present for the assessment. If the relevant person is accompanied by a family member or friend, it will be necessary to consider conducting at least part of the interview privately, especially if there are reasonable grounds for suspecting undue influence or coercion.

The person assessing capacity must ensure the relevant person is given the time and space to respond to questions and that answers are not being provided on their behalf.

When assessing a person's capacity to make a specific decision, the person assessing capacity must consider whether the relevant person is able to:

- **understand** information and facts relevant to the decision
- **retain** that information long enough to make a voluntary choice
- **use** or weigh-up that information as part of the process of making the decision
- **communicate** the decision

Each element must be assessed and documented. A relevant person lacks capacity to make a decision if they fail to meet one or more of the elements. Guidance on assessing each element is set out below.



### 5.2.1 Assess the relevant person's understanding of information

The person assessing capacity must determine whether the relevant person understands information relevant to the decision that needs to be made. This includes a consideration of whether they know what the decision is, why it is important for them, why it needs to be made now, the alternative options available and the option to make no decision at all. The relevant person's understanding of the decision includes an understanding of the reasonably foreseeable consequences of the choices available to them, including the consequences of doing nothing. All of the information relevant to the decision must be provided to the relevant person at the beginning of the assessment, unless it is apparent that it has been clearly explained to them recently. The relevant person must be given all the necessary information and options so that their capacity to weigh up those options can be fairly assessed. The person assessing capacity must determine if the relevant person has an understanding of key facts and different options available to them as well as their context. The level of understanding required must not be set too high. It is not necessary that the relevant person has the ability to understand every element of the decision and options available to them.

#### **Example of understanding information relating to a decision about property and affairs**

The person assessing capacity should consider the relevant person's usual role in relation to their property and finances. This includes whether such decisions had previously been made by a spouse, family member or other trusted person. The person assessing capacity should consider whether this is a decision where the relevant person could learn to understand information relevant to the decision if given the necessary support. Where the decision in question relates to day-to-day management of finances, a basic awareness of own circumstances may be sufficient as well as a basic understanding of banking or other relevant processes. It is acceptable for a person to have an approximate understanding of their major income, debts, expenditure, assets and liabilities. The person assessing capacity should assess any major discrepancies between the relevant person's understanding and awareness of their property and affairs and available records or information from relevant third parties.

#### **Example of understanding information relating to a decision about personal welfare**

The person assessing capacity should assess the relevant person's understanding and awareness of their current living arrangements, health and social activities, as well as the relevant person's understanding of informal and formal supports and services they are in receipt of, as relevant to the decision in question. The person assessing capacity should assess major discrepancies between the relevant person's understanding, for example of their daily routine, living arrangements and care needs, and available records or information from relevant third parties.

### 5.2.2 Assess the relevant person's ability to retain information

The person assessing capacity must determine whether the relevant person is able to retain enough information long enough to make a decision. Capacity is the assessment of the ability to make a decision at a specific time, which is at the time of assessment.



If information can be retained long enough for the relevant person to be able to make the decision at the material time, that is sufficient, even if the relevant person cannot then retain that information for any longer period. The relevant person may use the support of memory aids as evidence of their ability to retain information.

### **How long information should be retained**

However, the length of time for which the person should be able to retain the information may depend on the decision being made. In the case of a treatment decision, it may only be necessary to retain information about the possible complications and alternative options for long enough to make the decision or give consent. On the other hand, if the decision was to change a will, the relevant information would need to be retained for longer.

### **Expressing consistency of choice**

The person assessing capacity must consider whether the relevant person remembers key information relating to the decision and/or expresses consistency of choice and of expressions of will and preference over time. A consistent response may be sufficient as evidence that the person is able to retain information. However, this must be balanced against the complexity and gravity of the decision to be made. Where there is a question about the relevant person's ability to retain information, it may be necessary to talk to the relevant person on more than one occasion.

### **5.2.3 Assess the relevant person's ability to use or weigh up information**

The person assessing capacity must determine whether the relevant person is able to use or weigh up the information relevant to the decision as part of the decision-making process. Using and weighing information can be difficult to evaluate as it is an assessment of a thinking process that the relevant person may not easily demonstrate. An assessment of the relevant person's ability to use or weigh up information includes an assessment, not just of their understanding of key facts, but of their ability to act on the decision they make.

### **Weighing benefits and risks**

The relevant person should be able to state the benefits and risks of each option available to them using relevant information and explain why they prefer one of the options. An understanding of risks and benefits may be expressed as why some options might be better than others. The person assessing capacity must determine whether the relevant person has an awareness of risk, for example, whether major negative consequences are overlooked and how likely certain things are to happen.

A relevant person might not be considered able to use or weigh up relevant information if they are unable to recognise their current context or circumstances, for example, that they suffer from a condition that is requiring treatment or that they do not have sufficient funds to maintain mortgage repayments. However, if the relevant person refuses the advice of experts or professionals, despite serious consequences, they may still be

regarded as having capacity as long as they demonstrate an understanding of the serious consequences. If the relevant person can express sufficient understanding of the risks and consequences of different choices, the fact that one of those choices may be perceived to be unwise is not a sufficient reason to deem that person to lack capacity.

### **Appropriate standard for ability to use or weigh up information**

The standard of using or weighing up information can be difficult to assess if the relevant person is weighing important facts against their personal beliefs or values. The assessment of an apparently irrational or unwise decision must be considered in the context of the relevant person's related beliefs and values taken as a whole.

The standard of weighing up information should not be set too high. The relevant person should be able to demonstrate that they have considered relevant information in the decision-making process and show some ability to change their decision if additional information is offered. The person assessing capacity may consider whether the relevant person expresses the same will and preference when questioned in different ways, or on separate occasions. The person assessing capacity must also consider whether a relevant person's ability to use or weigh information is freely and voluntarily made where there is suspicion of susceptibility to undue influence or coercion from others.

### **5.2.4 Assess the relevant person's ability to communicate their decision**

The person assessing capacity must determine whether the relevant person is able to communicate their decision. Where a relevant person cannot communicate a decision in any way, e.g., by talking, using sign language, assistive technology or any other means, they are considered unable to make a decision for themselves.

Every effort must be made to facilitate a person to communicate their decision, before concluding that a relevant person lacks capacity for the reason that they are unable to communicate. A relevant person may have severe communication difficulties caused by a physical condition, sensory impairment, accident or injury.

It may be necessary to access the skills of a speech and language therapist, or family carer familiar with the relevant person's specific communication needs. This is particularly important if the person is non-verbal and communicates through eye movements or simple muscle movements.

Where possible, communication needs and supports necessary to conduct the capacity assessment should be identified as part of the preparation for the assessment.

## **5.3 Manage the outcome of the assessment**

A number of steps are involved in this stage described below.

### **5.3.1 Consider the findings of the capacity assessment**

The person assessing capacity must consider the four elements of the functional assessment of capacity and make a determination of whether or not the relevant person lacks capacity to make the specific decision. In considering the findings of the capacity assessment, the person assessing capacity must ensure they have done the following:

- Ensured clarity about the decision or decisions that is being assessed
- Ensured the relevant person was provided with information about the decision and details of the choices available
- Identified key facts and reasonably foreseeable consequences that the relevant person needs to understand
- Demonstrated the efforts taken and supports provided to promote the relevant person's ability to make the decision
- Produced evidence for each element of the assessment, i.e., could the relevant person understand, retain, use/weigh, the information relevant to the decision, and communicate the decision?
- Identified any conditions, events or circumstances that may be affecting the relevant person's capacity and whether they are likely to be temporary
- Produced evidence to show that the relevant person lacks capacity to make the decision as opposed to making an unwise decision

### 5.3.2 Make a determination

There are three possible outcomes to the capacity assessment described in turn below.

#### **The relevant person lacks capacity**

The relevant person will be considered to lack capacity if they were unable to satisfy any one of the elements of the assessment. The person assessing capacity should give detailed, specific examples (actual quotes) of where the relevant person did not meet one of the elements. If the person assessing capacity determines that the person lacks capacity in relation to one or more of the decisions considered as part of the assessment, they should also provide a view about whether the person is likely to regain capacity, taking into account the various internal and external factors that may be affecting capacity.

#### **The relevant person has capacity**

Where the relevant person is found to have capacity for the specific decision, but serious concerns have been expressed by family members or others, or where the decision carries significant risk, the person assessing capacity must document the relevant findings of the assessment. They must demonstrate that all factors have been assessed and that, even where there is a condition or illness, or event or circumstance, affecting the relevant person's capacity, the person has the ability to understand, retain, reason, and communicate adequately for the purpose of the decision.

#### **The outcome of the assessment is unclear**

If there are still doubts about a relevant person's capacity after an assessment, the person assessing capacity may consider obtaining a second opinion about the relevant person's capacity. Factors indicating that a second opinion might be necessary include:

- a dispute by the relevant person concerned, who believes they still have capacity
- a disagreement between family members, carers, community workers or other professionals about the relevant person's capacity.

Additionally, as the seriousness of a decision and its consequences increases, the possible need for a second opinion also increases when there is still a question of the relevant person's capacity to make that decision. Even where a second opinion is sought, the final decision about capacity is ultimately made by the designated person assessing capacity (in the specific situations set out in section 4.4) or by the person requiring the specific decision to be made.

### 5.3.3 Communicate the outcome of the assessment

The person assessing capacity must inform the relevant person, in writing and verbally, and in any other way that best suits the relevant person's needs and preferences, of the outcome of the assessment. Where appropriate, the relevant person should also be informed of what is likely to occur as a result.

#### **Where the relevant person disputes the outcome of the assessment**

If the relevant person disputes the outcome of the assessment, they should be offered the option of a second assessment and be supported in accessing this second assessment. If, after this second assessment, the relevant person continues to dispute the finding of the assessment, they should be informed of the possibility of referring the matter to court under Part 5 of the Act.

### 5.3.4 Document the assessment

The person assessing capacity must document the findings of the assessment. The report of the assessment requires the person assessing capacity to document the decision that was assessed and the information that was relevant to the decision, and to provide an explanation of whether the relevant person was unable to satisfy the functional assessment and why. The person assessing capacity should record the practicable steps they took to support the person to make the relevant decision for themselves and any steps taken by other parties involved.

All assessments of capacity must be recorded at an appropriate level to the urgency, complexity and potential consequences of the specific decision being made at a particular time.

# 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/ 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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