

## The Assisted Decision-Making (Capacity) Act 2015

1. Signed by President on December 30<sup>th</sup> 2015.
2. Will eventually come into operation at the end of 2022, when Amendment Act is enacted.
3. Legislation establishes a Modern Legal Framework to support decision-making by adults (referred to as “a relevant person”) who may have difficulty making decisions without help.
4. A relevant person (who is over 18) includes:
  - a) A person whose decision making capacity is in question or may shortly be in question;
  - b) A person who lacks capacity in respect of one or more than one matter.
5. Note: A Family Member or next-of-kin has no Legal Authority to make decisions for a relevant person

## Possible Applicability of New Legislation to the following persons:

1. Over 64,000 persons with dementia
2. Over 18,000 adults with an intellectual disability
3. Over 15,000 persons admitted to psychiatric centres each year
4. Over 2,500 adult Wards of Court
5. Thousands of other people with reduced decision-making capacity

## APPLICABLE TEST OF CAPACITY (A Functional Test)

Under the legislation a relevant person is always presumed to have capacity. In a situation where this person's capacity is questioned, capacity will be based on their ability to make a specific decision at a specific time. This is called the "functional test" of capacity.

## **A person lacks capacity if he or she is unable:**

- A) To understand the information relevant to the decision,
- B) To remember the information long enough to make a voluntary choice,
- C) To use or weigh up that information to make a decision.
- D) To communicate their decision (this may be with assistance)

## GUIDING PRINCIPLES

The Legislation also sets out 9 Guiding Principles for anyone interacting with a person who has difficulties with their decision-making capacity. These include:

- Presume every person has the capacity to make decisions about their life
- Support people as much as possible to make their own decisions
- Don't assume a person lacks capacity just because of an unwise decision
- Only take action where it is really necessary
- Any action should be the least restriction on a person's rights and freedoms
- Give effect to the person's will and preferences
- Consider the views of other people
- Think about how urgent the action is
- Use information appropriately

## Decision Supporter (DS)

Where a relevant person's capacity to make a decision is in question, he/she can appoint a person to assist, co-decide or have somebody appointed (the "decision supporter") to represent them, for the purpose of making a decision. The DS must always support the wishes of the relevant person.

A DS can support or assist in decision making regarding personal welfare decisions and to property and affairs decisions.

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

## Types of Decision Supporters

1. Decision making assistant (DMA)
2. Co-decision maker (CDM)
3. Decision-making representative (DMR)
4. Attorney under Enduring Power of Attorney (EPA)
5. Healthcare representative under advance healthcare directives.

Note: If a relevant person has made a valid EPA, the attorney can act under the EPA, when registered, and there is no need for any other decision supporter to be appointed.

## General Functions as a Co-Decision Maker

- Obtaining information relevant to a specific decision that needs to be made, including the relevant person's personal information
- Explaining relevant information and considerations relating to a specific decision
- Discussing the relevant person's options and likely consequences of different choices
- Ascertaining the will and preferences of the relevant person in relation to the specific decision
- Helping the relevant person to communicate their will and preference in relation to the specific decision
- Making specific decisions jointly with the relevant person
- Making reasonable efforts to ensure that the decision is implemented

# Decision-Making Assistant (DMA)

1. Appointed by legal agreement recorded in Decision Support Service.
2. The relevant person who has substantial assisting capacity appoints an assistant (DMA) who is a trusted person, such as a relative, friend or carer. The DMA helps the person to access information understand their options and communicate their decisions to others.
3. All decisions are made by the relevant person. (The DMA cannot make a decision for the relevant person).
4. The DMA must ascertain the will and preferences of the relevant person, having helped him/her to understand all the relevant issues.
5. The DMA must ensure the will and preferences of the relevant person are followed.
6. The DMA is supervised by Decision Support Service.
7. If you believe that the relevant person is losing capacity and requires support in an area not covered by the DMA Agreement, you may need to vary the DMA Agreement, or you need to make an application to court for a declaration in relation to the relevant person's capacity.

Note: The DMA gathers relevant information and explains it to the relevant person, who makes the decision themselves.

## Co-Decision Maker (CDM)

1. Co-decision maker is appointed by legal agreement recorded in Decision Support Service.
2. Normally a trusted relative or friend of relevant person who has reduced independent decision-making capacity.
3. Makes decisions jointly with the relevant person on issues specified in agreement.
4. All decisions must reflect the will and preferences of the relevant person.
5. If the relevant person insists on making a decision, the CDM must not withhold agreement unless the decision will result in serious harm to the relevant person or another person.
6. The CDM must submit an annual report to the DSS which includes a record of major decisions made jointly.
7. The original CDM Agreement can be varied after 6 months, if the relevant person requires greater joint decision support. New Statements of Capacity would be required from a doctor to support application.

## Decision-Making Representative (DMR)

1. Appointed by Circuit Court where relevant person is unable to appoint another decision supporter.
2. Court can impose conditions and specify issues covered in legal agreement
3. Court must be satisfied the DMR is a suitable person.
4. Court can appoint DMR from panel maintained by Decision Support Service.
5. Annual reports by DMR to Decision Support Service.

## Suitability of Decision-Making Representatives

When considering the suitability of a person to be a decision-making representative for a relevant person, the Court shall have regard to the following:

- (a) the known will and preferences of the relevant person;
- (b) the desirability of preserving existing relationships within the family of the relevant person;
- (c) the relationship (if any) between the relevant person and the proposed representative;
- (d) the compatibility of the proposed representative and the relevant person;
- (e) whether the proposed representative will be able to perform the functions to be vested in him or her;
- (f) any conflict of interest.

## Decisions of Decision-Making Representative

If the relevant person is unable to make certain decisions, the court can appoint a decision-making representative to make those decisions on your behalf. The court will usually appoint someone the person knows and trusts in this role. However, if that is not possible, the court can select someone suitable from the panel of trained experts.

The decision-making representative can only make decisions that are written down in the order and must consider the person's wishes at all times during the decision-making process. If the decision-making representative is from a panel of trained experts, they will be paid for their work. This payment may be taken from the person's assets.

The court can appoint more than one person to act as a decision-making representative. The court decides whether the decision-making representatives must make decisions together or individually.

The decisions included in a decision-making representation order are kept under review by the court.

## **Application for a decision-making representation order.**

If the relevant person is unable to make certain decisions for themselves, someone who has a genuine interest in the person's welfare, will be able to ask the court to make a decision-making representation order.

If the court agrees that the relevant person is not able to make certain decisions for themselves, it can give one or more decision-making representatives power to make those decisions on behalf of the person.

## **How can it be known if someone has a decision-making representation order?**

When the court makes a decision-making representation order, it must notify and send a copy of the order to the DSS.

The DSS will keep a register of decision-making representation orders. If they have a good reason to do so, certain people and organisations will be able to search the register, for example, banks, lawyers and doctors. They will also be able to request a certified copy of the decision-making representation order.

The DSS will keep a record of anyone who searches the register or receives a certified copy of a decision-making representative order.

## **Monitoring a decision-making representation order**

The court will check that the arrangement is working the way it should on an ongoing basis.

The DSS will also monitor decisions made by the decision-making representative. The decision-making representative must submit a written report to the DSS every year. Each report must include any details of financial matters, costs and expenses related to the decisions included in the order.

If the decisions relate to your property and affairs, the decision-making representative must submit a list of the person's assets, liabilities, income and expenses so that we can monitor these.

## **Ending a decision-making representation order**

A decision-making representation order can be ended if:

- The court decides to end the order following an application by the relevant person or decision-making representative or any other person with a genuine interest in your welfare.
- The court decides that the person has regained capacity
- The decision-making representative is unwilling or unable to continue in their role
- The period of time that the decision-making presentation order covers has passed.

## **Changing a decision-making representation order**

Only the court can change a decision-making representation order. The court may decide to change a decision-making representation order following an application to the court by the relevant person or decision-making representative or any other person with a genuine interest in your welfare.

### **What does it cost:**

There will be a fee to make an application to the court. There may also be a fee for the ongoing monitoring of the arrangement by the DSS.

## Complaints about a decision-making representative

Any person can make a complaint to the DSS about a decision-making representative and it must be for one of the following reasons:

- The decision-making representative is making, or is trying to make, decisions that are not included in the court's decision-making representation order
- The decision-making representative is not suitable for the role
- The decision-making representative is disqualified or is no longer eligible for the role
- The decision-making representative is ill-treating or neglecting the person

## Obtaining relevant information

Before making a decision, the DMR must gather all relevant information on the different options available and the pros and cons of those different options. The DMR must ensure that, as far as possible, he/she has understood the short-term and long-term consequences of the options available.

Some options available to the DMR include various risks and benefits. It is important that the DMR has all relevant information available to justify reasons for accepting certain risks.

When gathering information, it is important that the DMR seeks information on any factors that the relevant person would have considered important if they were making the decision themselves, irrespective of whether other people would consider such things to be important.

## Obtaining Relevant Information by DMR

The DMR should also obtain information about the relevant person's current needs and wishes. Even if the DMR knows the relevant person well, it is important to document and maintain a record of the relevant person's will, preference, values, and beliefs in relation to the decisions you may be required to make. This may involve gathering information from the relevant person themselves and from a range of persons known to them.

Where the relevant person has a condition or long-lasting difficulty which affects their decision-making capacity, the DMR should become familiar with the condition of difficulty, any associated limitations, potential for future growth and development issues that may coincide with it.

Where pertinent, the DMR should obtain current information regarding services the relevant person is receiving (e.g., medical treatment, training programmes and social groups). Where within the scope of the court order, the DMR will need to ensure any current services are reviewed with the service provider in relation to decisions and/or consents currently in place.

## Consulting others for views

As part of the information that the DMR gathers to make a decision on behalf of the relevant person, the DMR must consider whether there are any people who should be consulted to obtain useful information on the relevant person's will and preferences in relation to the specific decision at hand.

The DMR should also consider whether there are people who could provide important information about the consequences of certain decisions, or who could provide expert advice to ensure that the DMR are acting for the benefit of the relevant person.

People you should consider consulting include:

- Any person engaged in caring for the relevant person
- Any person who has a true interest in the welfare of the relevant person
- Healthcare professionals
- Subject matter experts

## 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.

## Obtaining specialist advice and services

The DMR may be permitted to engage professionals such as solicitors, accountants and regulated financial advisers to in carrying out the role. In addition, the DMR you may be required to obtain the specialist advice and/or services of healthcare professionals based on the needs of the relevant person.

The DMR are not permitted to delegate your responsibilities to another person. For example, the DMR cannot employ a specialist advisor or service to carry out the DMR's responsibility to pay fees to a nursing home.

The court order may specifically authorise the DMR to obtain specialist advice or services to enable the DMR to make and implement specific decisions. The DMR may also obtain specialist advice or services where such services are commonly required in order to fulfil your function as set out in the court order. This could, for example, include obtaining advice from a solicitor about the sale of a property or advice from a regulated financial advisor about completing an annual account or tax return. If the DMR is a professional (e.g., a solicitor, financial adviser or social worker), the DMR may be required under the court order to provide such specialist services themselves.

## Bank Accounts

If the DMR is authorised to manage the day-to-day finances and expenses of the relevant person, he/she will need to establish appropriate banking arrangements that provide sufficient transparency of transactions and ensure the relevant person maintains as much access and control over their finances as is possible, in line, with the court order.

The DMR must not maintain a joint account with the relevant person, unless this was an established part of the relationship with the relevant person at a time when they had full capacity, e.g., with a spouse or civil partner. The DMR must not set up a new joint account with the relevant person.

The DMR may already have an established joint account with the relevant person, for example, for savings or mortgage repayments. Even in this situation the DMR should establish a separate nominated bank account for specific transactions relating to decisions within the scope of the court order, including day-to-day management of the relevant person's finances, where relevant. This will simplify reporting requirements.

If the DMR manages transactions relating to the relevant person's finances through cash, he/she will be required to keep a record and receipts of every transaction.

## Investments

When the DMR is required and/or authorised to make or maintain investments on behalf of the relevant person, he/she should ensure that such investments are taken in line with appropriate specialist advice. He/she must ensure that investments are made in line with the relevant person's will and preference and in good faith for their benefit. The DMR must not invest the relevant person's money in a speculative investment involving an unreasonable financial risk to their assets.

## Gifts

The DMR may not dispose of the property of the relevant person as a gift unless specifically authorised by the court. Property includes the relevant person's house, land, money and personal possessions.

The DMR may be required to make gifts on the relevant person's behalf for special occasions, e.g., as birthday and Christmas presents or to a charity. He/she must ensure that the value of any gift and intended recipient is in accordance with the established will and preference of the relevant person. However, the DMR will be required to take account of any changes to the relevant person's finances.

## **Property**

Even if the court order authorises the DMR to make decisions in relation to the relevant person's property and affairs, he/she must give notice to the Decision Support Service of any intended sale or purchase of real property (for example, a house, land or farm) on behalf of the relevant person.

## **Healthcare**

Even if the court order authorises the DMR to make certain decisions in relation to the relevant person's healthcare, the DMR must not refuse treatment that will save or sustain the life of the relevant person. However, if the relevant person has an advance healthcare directive (AHD), which under which they refuse certain treatment, this decision must be respected. Where the relevant person has appointed a designated healthcare representative, the DMR should where appropriate make contact with that representative who is responsible for healthcare treatment decisions specified in the AHD.

## Wards of Court

1. Will be reviewed by Court and brought under jurisdiction of the 2015 Act, within 3 years, of commencement of legislation.
2. Court will make the following orders:
  - a) That Ward has capacity or,
  - b) Appoint co-decision making assistant or a decision making representative.
3. All assets of former Ward will be transferred back into name of that person.
4. The role of the Committee will end once the Ward is discharged from Wardship
5. If the Court appoints a DMR for a former Ward, the DMR may be the former committee.
6. Any DMR appointed for a former Ward should obtain a Court Order regarding the future management of funds owned by the former Ward.

1. An Attorney can make Personal Welfare decisions, which includes healthcare but it does not include treatment decisions.
2. Guiding principles under the Act must be followed.
3. Attorney must be a suitable person.
4. Registration commences when Donor lacks capacity in relation to one or more relevant decisions.
5. Maintaining investments must be taken in line with appropriate specialist advice.
6. Reports by Attorney to Director:
  - a) Statements of assets within 3 months of registration;
  - b) Full report of all activities within 12 months;
  - c) Annual report thereafter.
7. Objections can be made by a person with sufficient interest.

**Note 1:** A Treatment Decision is defined as “an intervention that is or may be done for a therapeutic, preventative, diagnostic, palliative or other purpose”.

**Note 2:** 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.

## Designated Healthcare Representative

1. The 2015 Act makes provision for 2 types of Advance Healthcare Directive (AHD) made by an individual (“Directive Maker”):
  - a) An advance expression in writing regarding treatment decisions to be made if that individual subsequently lacks capacity; or
  - b) The appointment of a designated Healthcare Representative to make such treatment decisions for the individual.
  
2. A Directive Maker may in his/her AHD authorise representative to:
  - a) Advise and interpret the person’s will and preferences regarding treatment;
  - b) Consent to or refuse treatment up to and including life-sustaining treatment, based on the will and preferences of the Decision-Maker.

## Director of Decision Support Service

1. Employed by Mental Health Commission.
2. Will supervise Interveners.
3. Will promote public awareness.
4. Will provide advice and guidance
5. Will deal with complaints
6. Will issue Codes of Practice.
7. Will establish a website.
8. Can make recommendations to the Minister.

## Court Applications

1. Will determine capacity of a relevant person.
2. Will adjudicate on a proposed intervention, where necessary.
3. Can make interim orders.
4. Can review capacity orders at regular intervals.
5. Can request relevant reports.
6. Provision for legal aid.