

Assisted Decision Making (Capacity)

Act 2015

The Story So Far: Some reflections

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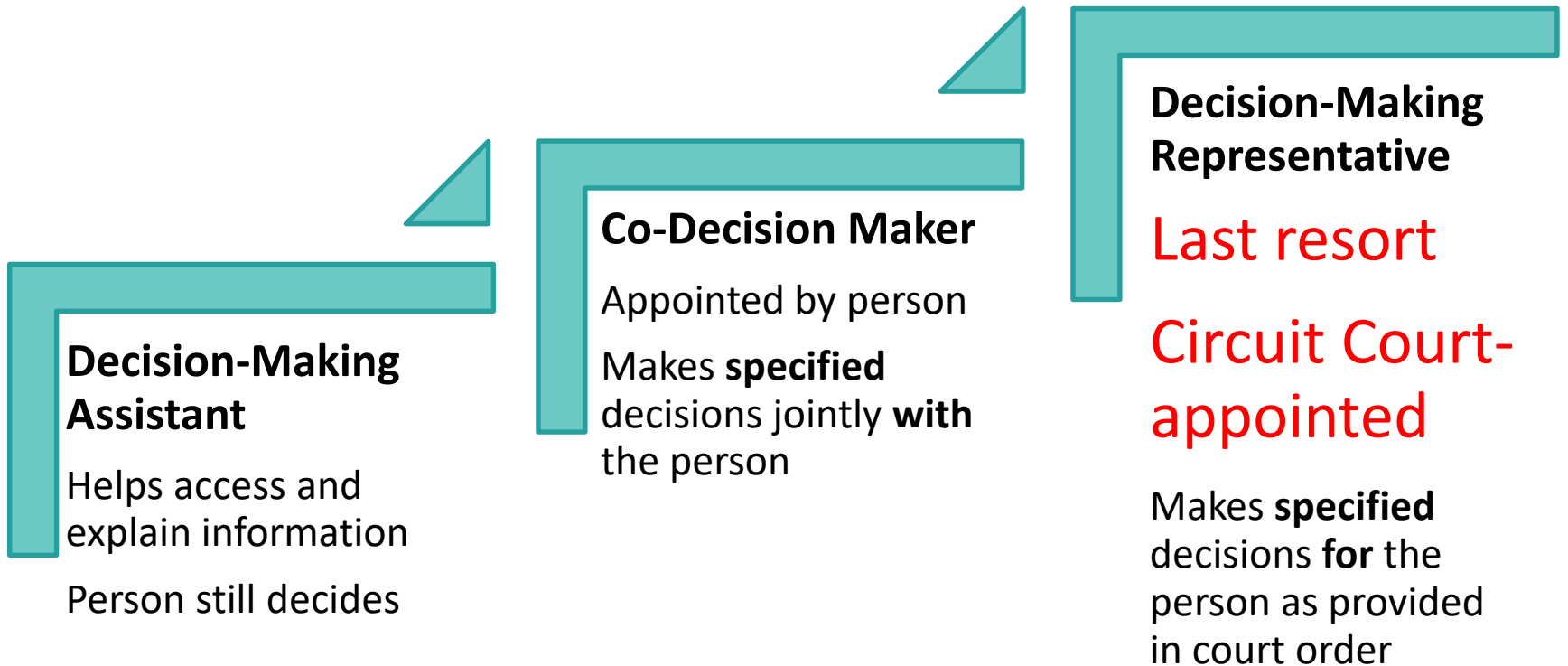
Overall Engagement?

- Very high for social workers and nurses
- Less good for doctors
- HSE management/ corporate
 - Good generally
 - Still lack of some ADM leads
 - Impact on social work workload needs to be reflected in posts / manpower planning

Capacity Assessment ADM Myths Persist

- *We need to identify everyone who lacks capacity, so I now need to do capacity assessments.*
 - **No, you don't!**
 - Only if there is a good reason for assessment. (Presumption of capacity is not overturned by dementia, disability, mental illness, etc or merely by making what others consider an unwise decision) **AND**
 - There is some idea of what will happen after the assessment. How will it benefit the person / influence what you do? It's not 'if we find incapacity we must do something'.
- *If I find a lack of capacity, I have new powers to do things or to make someone accept my recommendations*
 - **No, you don't!** ADM has nothing to do with coercion/ detention.
- *If I'm worried about a decision someone is making, they've got to convince me they have capacity to make it before they can be allowed to make the decision.*
 - **The person doesn't have to prove anything:** the onus is on the person challenging capacity

Wardship replaced by 3 tier hierarchy



The new 3 tiers are options to support the person.
They are problem-solving tools
They are not mandatory interventions!

Rush of Part 5 DMRO applications?

- Hasn't happened
- Dominated by NHSS (as amended) especially for ancillary state support
- Some unnecessary requests for DMRO when the NHSS (as amended) is sufficient
- Still working out where best used for non-financial matters where capacity is in question

Relative neglect of Co-Decision-Making Agreement (CDMA) as an option

A co-decision maker (CDM) is “a relative or friend of the Appointer who has had such personal contact with the appointer over such a period of time that a relationship of trust exists..” appointed to make a relevant decision(s) jointly with them.

Has capacity to decide

Has capacity to decide
jointly with CDM

Doesn't have capacity
decide even jointly

Understands✓
Retains✓
Use and weigh✓
Communicate✓



How large a
cognitive space?

As large as can be consistent with the Act:

An important layer of support for a relevant person to ‘extend out’ their autonomy if they have “partial” capacity

It is a very new concept – a lot of work to be done

Use of the Guiding Principles

- Good awareness, especially of will and preferences

BUT remember

- Starting presumption of capacity, but rebuttable
- Not a 'right to make unwise decisions'

Code of Practice 1: *Who applies the guiding principles?*

- Anyone interacting with a relevant person in the context of the Act should apply the guiding principles as best practice.
- Anyone who is an intervener... must apply the guiding principles when carrying out an intervention under the Act.

Consent for treatment if patient lacks capacity post ADM

- Myths of ‘next of kin’ consent and that ADM ‘abolished’ it.
 - Perpetuated by multiple HSE forms and policies
 - It didn’t – it never had legal validity
 - ‘No other person such as a family member, friend or carer (and no organisation) can give or refuse consent on behalf of an adult who lacks capacity to consent unless they have formal legal authority to do so’. (NCP 2013)
- “Well then, do we need to go to court to get a decision-making representative appointed who can give consent”? **NO!!**
- Most treatment decisions are not interventions under the ADM Act (in the absence of an existing support arrangement)
- The Consent Policy takes the position that healthcare professionals should act **as if** the decisions were interventions under ADM and apply the guiding principles AND provides new draft templates

HSE National Consent Policy Updated 2023 emphasises the Guiding Principles

- Consent Policy position (after legal advice OLS and consultation with State Claims Agency): if the person cannot consent for themselves and there is no relevant decision support arrangement, use the Guiding Principles of ADM including:
 - It is for the overall benefit of the person
 - It is consistent with the person's will and preferences if ascertainable
 - Consider the views of others (e.g. family and friends)If all aligned, proceed with the intervention
- The policy discusses the limited situations where legal advice re formal support arrangement should be considered
- Some slow learners – harking after fictitious 'next of kin consent': Need to change HSE forms

Things to do/improve

- Quality of reports especially for Part 5 applications
- Planning for reviews of existing DMROs
- Training for assessments – online, in-person.
- Focus on groups we haven't accessed well so far
- Promotion of future care planning

Thank You