

## Filling the Wardship Gap



**The Assisted Decision-Making (Capacity) Act 2015 – Reflections, Challenges and Opportunities**  
**3 December 2024**

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## What the ADMCA does

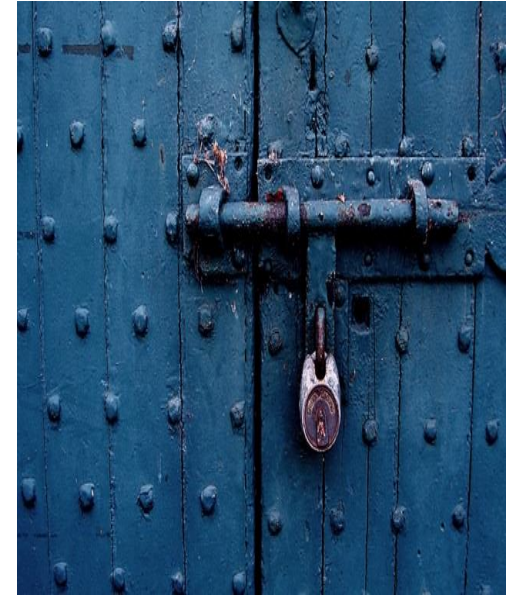
Discontinues new applications for admission to Wardship from 26 April 2023

## What the ADMCA does not do

- Provide for Authorisation of Deprivation of Liberty
- Provide for end-of life treatment decisions
- Provide for safeguarding actions

# Deprivation of Liberty: European Convention on Human Rights

The Court reiterates that the right to liberty is **too important** in a democratic society for a person **to lose** the benefit of Convention protection **for the single reason that he may have given himself up to be taken into detention ...**, especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action.



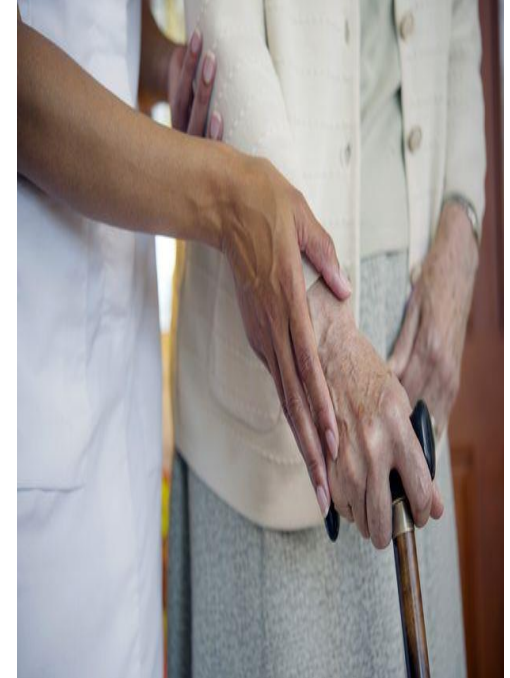
*HL v United Kingdom* [2005] 40 EHRR 32

# Deprivation of Liberty: Ireland

## Key points:

- Does the patient truly want to leave?
- If she truly wants to leave and she has capacity, she must be allowed to leave
- If she lacks capacity, hospital has no general right to hold her
- But a brief detention is allowed to get the matter to the Court

*AC v Hickey and Ors* [2019] IESC 73



## Inherent Jurisdiction

- General definition: Implied powers of the Court exercisable by judges to make decisions in the interests of justice, where no statutory regime exists
- An “ill-defined and unregulated territory” *per* McKechnie J *In re JJ* [2021] IESC 1
- Affirmation of continuance in the ADMCA, s. 4(5)



## Increased Reliance on the Inherent Jurisdiction

Total Cases (to 16 September 2024): 230

- 78 in 2023
- 152 in 2024

Total Orders (to 16 September 2024): 935

- 284 in 2023
- 651 in 2024

Most common applicant

- HSE
- Dublin Hospitals

Most common basis

- Nursing home admission
- Once-off treatment decisions

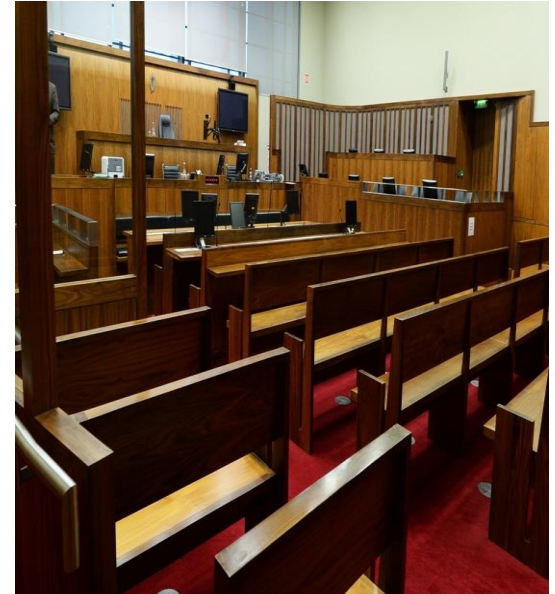
# The Inherent Jurisdiction List

- New Practice Direction (HC 128): In operation from 2 October 2024
- Inherent Jurisdiction (Capacity) List sits every day at 10 am
- Applications heard by President or nominee
- Provision for immediate hearing of very urgent *ex parte* applications



# Hearings under the Inherent Jurisdiction

- Voice of the Person
  - Legal Representative
  - Guardian ad Litem (significant efforts to ascertain will and preferences)
  - Remote Attendance
- Application of ADMCA Principles:
  - Past and present will and preferences
  - Least restrictive alternative
  - Respect for rights
  - Act always for benefit of person





## The Future

- Development of Legislative Protection of Liberty Safeguards
- Original consultation Paper: 2018
- Expected new consultation: 2025

