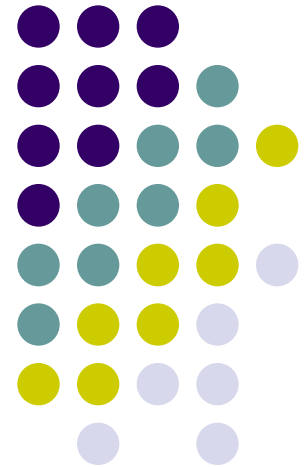


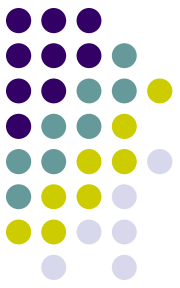
Social Workers Capacity and the Law

1st April 2011

Mary Keys
School of Law
NUI Galway



NUI Galway
OÉ Gaillimh

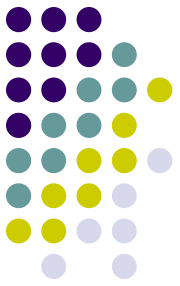


Capacity and the Law -Context

- Human Rights Law
 - UN Convention on Rights of Persons with Disability Article 12+
 - European Convention on Human Rights-
- Constitutional law
- Common law
- Legislation/Statute law
- Law reform

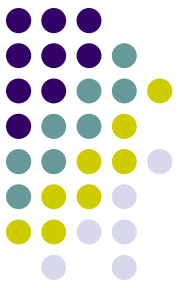


Legal Capacity



- Historically and current=Any mental disability=not able to decide-
- State/family/institution decided ?still do?
- Extreme laws removing total legal persona
- Human rights requires different approach
 - Individual assessment for each legal decision
 - Assistance to make decisions





UN Convention on the Rights of Persons with Disabilities (UNCRPD)

- Purpose-promote, protect and ensure the full participation of persons with disabilities
- Core human rights: dignity, autonomy, equality and independence
- Recognises capacity of persons with disabilities to make own decisions equally with others
- Ireland has signed but not ratified yet



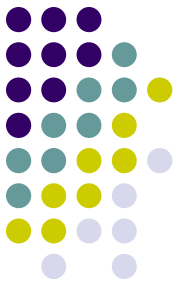


UNCRPD

- Article 1: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

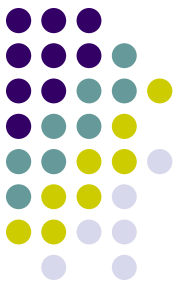


UNCRPD



- Article 12=All persons with disabilities have legal capacity in all areas of life
- Article 14=Right to liberty on an equal basis with others
- Article 17=Right to physical and mental integrity
- Article 19 right to live independently in community
- Article 25 Health care interventions to respect right of confidentiality and informed



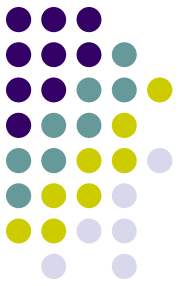


Obligations Article 12

- Persons with disabilities have the right to recognition everywhere as persons before the law.
- Recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
- Take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

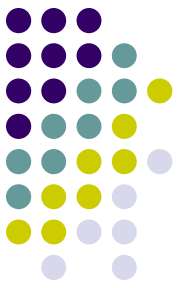


Legal Capacity



Article 12: a legally recognized status shared on an equal basis with all other persons to have rights and to exercise those rights, with support as needed – i.e. to enter agreements that give effect to personal decisions that one wishes to make, in the pursuit of life goals (Bach 2006)



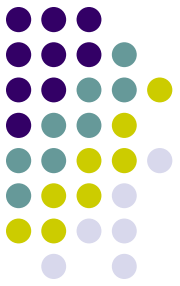


Obligations Article 12

- Ensure all measures that relate to the exercise of legal capacity provide for **appropriate and effective safeguards to prevent abuse**. Such safeguards shall ensure that measures relating to the exercise of legal capacity **respect the rights, will and preferences** of the person, are **free of conflict of interest** and **undue influence**, are **proportional and tailored to the person's circumstances**, apply for the **shortest time possible** and are **subject to regular review by a competent, independent and impartial authority** or judicial body.
appropriate and effective measures to ensure the **equal right** of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are **not arbitrarily deprived** of their property

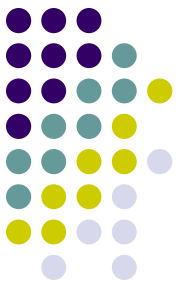


European Convention on Human Rights (ECHR)



- European Convention on HR Act 2003-IR law
- Article 8 provides for a right to respect for privacy and family life including personal integrity (sex rels)
- Right of autonomy fundamental human right
- Refusal of treatment may lead to death, treatment without consent of a mentally competent person is an interference with a person's right under Article 8 *Pretty v United Kingdom* (2002)
- Such interference would have to be justified as necessary and proportionate



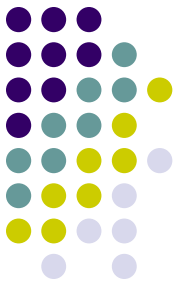


ECHR Articles 8 and 12

- *Storck v Germany* (2005)-even a minor interference
- *X & Y v Netherlands* (1998) no legal redress from abuse-held to breach privacy rights
- *Glass v UK* (2004) parents objected to non-emergency treatment-Court must decide
- Right to marry and found family A12.

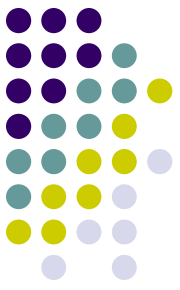


ECHR Article 5 Deprivation of Liberty



- *HL v UK* (2004) compliant incapacitated informally admitted to psych ward
- **Test used by the court:** Hospital staff complete and effective control over assessment, treatment, contacts, movement and residence
- Continuous supervision, control and not free to leave. Lack of any fixed procedural rules for admission of compliant incapacitated person
- Deprived of liberty within Article 5(1) breach of human rights law-wider application than mh area

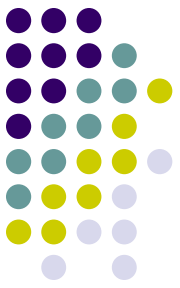




Case law

- The ECtHR said that mental illness cannot be the sole reason to justify stripping someone of legal capacity
- The deprivation of capacity was said by the ECtHR in this case to be a “very serious” and disproportionate interference with a person’s private life, and with no tailor-made approach
- Major procedural deficits=no safeguards.
- *Shtukaturov v Russia* (2008)

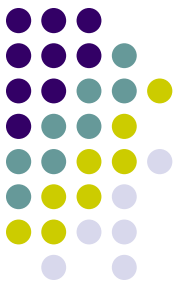




ECtHR Case law

- ECtHR held that the automatic loss of legal capacity to manage his own affairs under domestic law, due to compulsory admission for mental health care and without any separate assessment or hearing, breached the right to fair procedures in Article 6(1).
- *Winterwerp v. Netherlands* (1979)





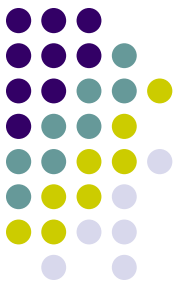
Case law

- “court had difficulty in accepting that every person divested of the capacity to act should be automatically excluded from adoption proceedings concerning his or her child...”
- In this sensitive area the ECtHR stated, “there is an even greater call than usual for protection against arbitrary interferences.”
- *X v Croatia* (2008)



Constitution - Capacity

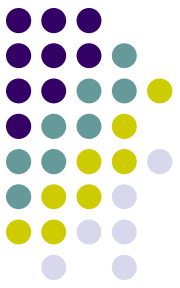
Re A Ward of Court (1996)



- Competent adult has the right to refuse medical treatment even if it leads to death
- Right not absolute -eg medical emergencies, contagious disease, mental health
- Same constitutional rights for incapacitated person
- Court decided –
- **Test used:**
- Act on best interests and from the perspective of a prudent, good and loving parent



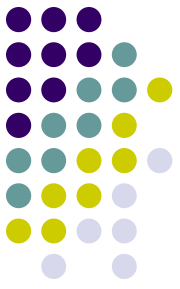
Irish law - Legislation and capacity



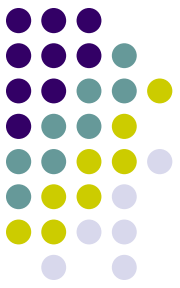
- Adult impaired capacity - unless a ward of court, no one has legal power to act as proxy
- No legal basis for medical decisions by family members on behalf of adults lacking capacity
- No legal framework for substitute decision-making for non-emergency situations apart from wardship
- High Court has inherent jurisdiction - *Parens patriae* - paternalistic role of court-



Ward of Court system-Lunacy Regulation (IR) Act 1871+ Court provisions



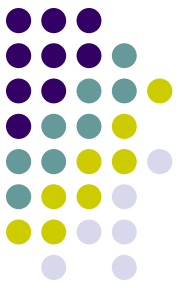
- Criteria:
 - Must be of unsound mind and unable to manage person or property
 - Following wardship adult has no legal autonomy-
 - No account of individual differences or fluctuating capacity
 - Becomes a non-person unknown to law



Consequences of Wardship

- Removal and almost total restriction of legal rights
- No legal right to autonomy and self-determination
- Specifically rights to marry, contract, deal with property/money, jury service
- Committee acts on day to day decisions
- Major decisions made by High Court –permission sought through Registrar of Wards office
- No automatic review-antiquated, breach of human rights
- *In re Francis Dolan* (2004, 2007, 2008)



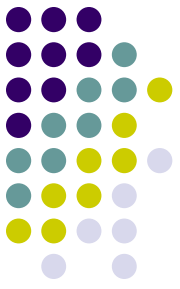


Powers of Attorney Act 1996

- Must have capacity to create one (AD)
- **Endures** after onset of incapacity
- Right to choose who will act on one's behalf following incapacity,
- Person retains control until then
- Personal care decisions Only
- No power to make advance decisions re health care under current system

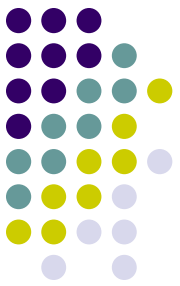


Common Law: Capacity



- Common law presumption is that adults have legal capacity unless proven otherwise
- Every person who has reached 18 years has full capacity to make a decision affecting him or her, until proven otherwise
- Where capacity to make decisions is in question:
 - Balance between self-determination and welfare/benevolence-often difficult
 - Promotion of empowerment, autonomy while ensuring adequate protection





Common law – capacity-consent

- Where capacity is lacking, decisions are made on the basis of the person's best interests
- The common law doctrine of necessity applies as a defence in such circumstances – Re F (1990)
- Professional must act in accord with the required standard of care



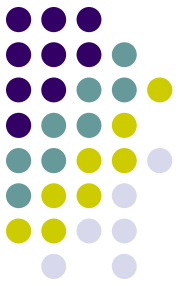


Approaches to decision making

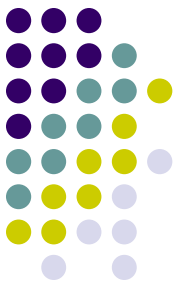
- **Status approach**
- Having a disability=no capacity
 - Children under 16=no capacity
 - Being a ward of court=no capacity
- **Outcome approach**
 - Decision of the person unexpected/does not agree with professional view point of what should happen
 - C case
- **Functional approach-**
 - Does person understand nature and effect of the decision, having choices at the time it needs to be made



Re C (Adult Refusal of Medical Treatment) (1994)



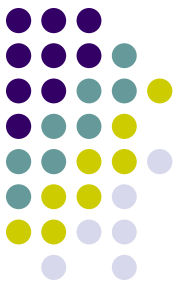
- Sought injunction to prevent amputation now & in future without written consent
- Relevant question:
 - whether it is established that the patient's capacity is so reduced by his mental illness that he does not fully understand the nature, purpose and effects of the treatment



Capacity and Medical Care

- C understood and retained the relevant information,
- He believed it,
- He arrived at a decision understanding the consequences
- “In his own fashion” he understood
- He had capacity to refuse and his advance directive upheld
- Decision affirmed in *Fitzpatrick v FK* (2008)

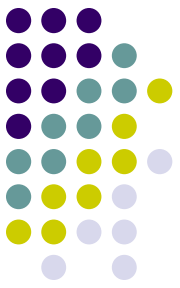




Valid refusal ?

- *Fitzpatrick v FK* [2008] IEHC 104
 - Did she have capacity?
 - Was her son part of the decision?
- Presumption of capacity can be rebutted
- Cognitive ability
- C case factors
- Treatment information



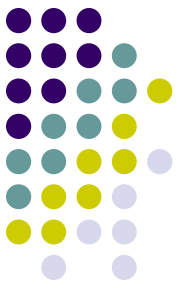


Valid refusal?

- Distinction between misunderstanding of information in decision making (?evidence of incapacity) and irrational decision (not relevant)
- Gravity of decision in terms of consequences-
- Quality of Refusal-coca cola and tomatoes instead of blood
- Capacity was impaired not a valid refusal
- Transfusion was lawful



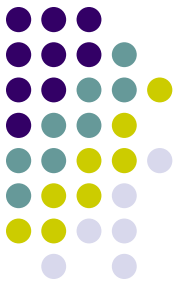
Criminal law-capacity-sexual relationships ¹



- Criminal Law (Sex offences) Act 1993 s5 prohibits SI with mentally impaired person.
- Mentally Imp person =suffering from a disorder of mind, whether through mental handicap or mental illness which is of such nature or degree as to render a person incapable of living an independent life or guarding against exploitation.



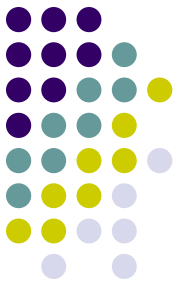
Criminal Law capacity and sexual relationships ²



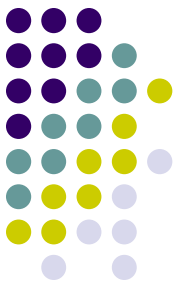
- Competent male with incompetent male/female - open to prosecution even if no exploitation intended
- If both male and female are 'mentally impaired' and have consensual sex, the male can be prosecuted
- Purpose of law originally to protect females against exploitation
- Law Reform Commission working on this area



D v Borough Council 2011



- Capacity to consent to the act
 - Sex specific –not person but... Impact of fear etc
 - Mechanics of act
 - Health risks
 - Risk of pregnancy in heterosexual rels

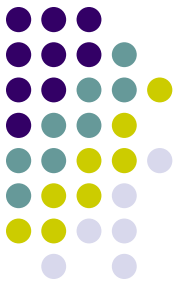


Capacity for legal activities

- Functional approach
- Wills-over 18, sound mind at the time- includes understanding, memory and awareness of obligations-effect of wishes after death.
- Marriage-may have capacity for simple contract but not for complex will! *Re Park* 1953



Nursing Home Support Scheme Act (Fair Deal) 2009

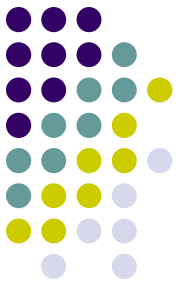


- Relates only to nursing home care-
- A care representative is appointed if the person does not have the capacity to make a decision if he or she is unable-
- (a) to understand the information relevant to the decision,
- (b) to retain that information,
- (c) to use or weigh that information as part of the process of making the decision, or
- (d) to communicate his or her decision (whether by talking, using sign language or any other means) or, if the decision requires the act of a third party to be implemented, to communicate by any means with that third party.



Capacity Law proposal

Scheme of Mental Capacity Bill 2008

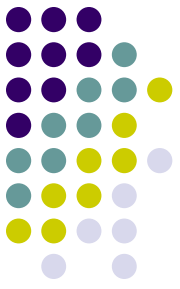


Guiding Principles ¹

- All adults presumed to have capacity unless proven otherwise
- No intervention unless necessary taking account of
 - Needs and individual circumstances of person
 - If capacity is likely to increase or return

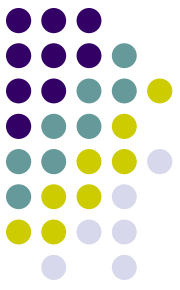


Guiding principles ₂



- Person not to be treated as unable to make a decision unless all practicable steps taken to **help** him/her are unsuccessful
- Not to be treated as unable just because s/he makes unwise decision
- Any action must be least restrictive of person's rights/freedom to act

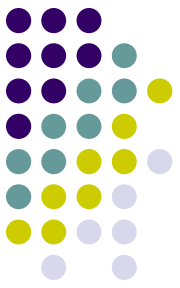




Guiding Principles ³

- Respect for dignity, bodily integrity, privacy and autonomy
- Account of person's past and present wishes as far as can be ascertained
- Views of anyone with interest in welfare of person
- Any act or decision made must be made in the person's best interests

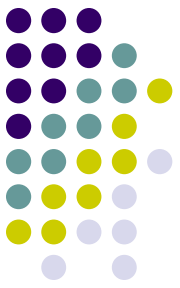




Definition of capacity ¹

- Ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made (the capacity to make a decision)
- Functional approach

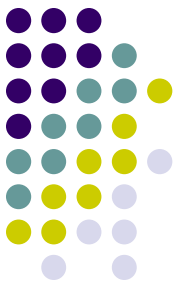




Definition of capacity ³

- Person lacks capacity to make a decision if unable:
 - To understand information relevant to the decision
 - Retain the information
 - Use or weigh that information as part of the decision making or
 - Communicate the decision **by any means even involving a third party**

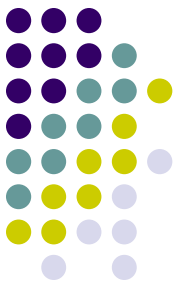




Definition of capacity ⁴

- Not to be regarded as unable to understand relevant information if –
 - Able to understand explanation given in a manner **appropriate to his circumstances**
- Retention of information for a short period only does not prevent person from having capacity

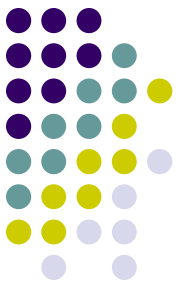




Best interests 1

- Consider all relevant circumstances
- Likelihood of capacity and when it might return
- Permit and encourage **participation** as far as practicable, or
- **improve ability to participate** as fully as possible in any act or decision



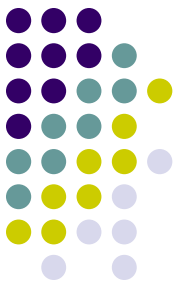


Best Interests ²

- Past and present wishes and feelings,
- any relevant **written statements** when the person had capacity
- Consult anyone named by person,
- anyone engaged in caring or interested in person's welfare
- Beliefs and values of person

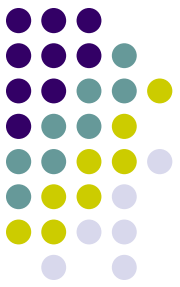


Court or Specialist body for assessment of legal capacity?



- Multi-disciplinary to assist court
- eg medical, **social**, health care including care in community, financial
- No reference to other less formal experts
- Review of decisions:
 - Application can be made at any time for permission of court to have review
 - Automatic review not exceeding 12 months
- Regular review required and special review in risky situations

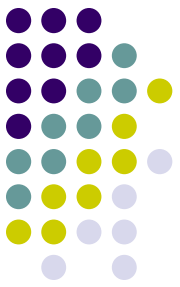




Legal Representation

- Recognised as a key issue in removal of a civil right
- Right must be real —*Airey v. Ireland*(1979)
- How is evidence presented/challenged otherwise?
- Rights of appeal accessed?

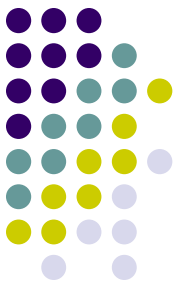




Personal guardian

- Broad range of powers possible
- Power should be limited in scope/duration and can be revoked
- Conflicts of interest must be recognised
- Guardian should not make decision if believe person may have capacity





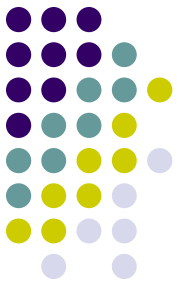
Informal decision making

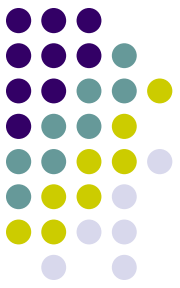
- If capacity in doubt, person acting on behalf of another must:
- Take reasonable steps to see if the person lacks capacity before and when doing act (eg medical treatment)
- The act/decision is in the best interests of person
- Informal decision-maker **must** have regard to the **Principles and Best Interests** provisions



Exclusive Court decisions

- Withdrawal of life sustaining care
- Sterilisations where non-therapeutic
- Organ donation

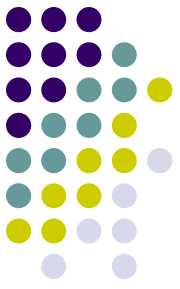




No change to current law

- Capacity to consent to marriage/civil p/ship
- Judicial separation/divorce/nullity
- Consent to place child for adoption
- Consent to make adoption order
- Consent to sexual relations
- Voting
- Jury membership



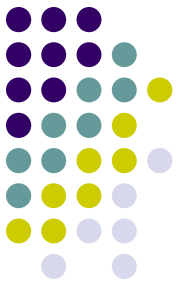


Key issues

- Centrality of good information for all parties
- Human Rights Law standards
- Assisted/supported decision making
- Communication training at all levels
- Effective oversight
- Advocacy and representation



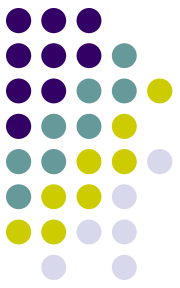
Assisted/Supported decision making



Inclusion:

- Importance of addressing the needs of people most at risk of not fitting new criteria
- Danger of a new form of exclusion and effectively the retention of a status approach
- Lack of equal and effective participation



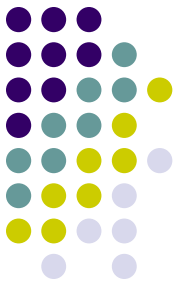


Assisted/Supported Decision Making

- ... to enable people to maintain full legal capacity (both recognition of rights and capacity to exercise those rights) while availing... of legally recognised access to supports (Bach 2007)
- Importance of interdependence



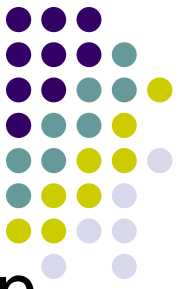
Assisted/Supported decision making



- Difficulty in meeting criteria for people with significant intellectual psychosocial, communication disabilities
- Require different approach to assistance in decision making as legally recognised alternative method
- E.g. Personal network of trusted assistants making decisions in formalised way recognising the authentic **will, preferences**



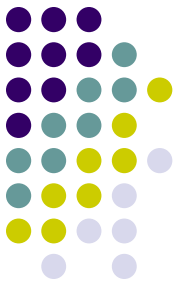
Assisted Decision Making (Bach 2006)



1. Assistance provided to people to make own decisions and meet the usual definition of capacity
 - Plain language, Assistive devices
 - Interepreters and translators
 - **Advocates**
2. Supported Decision Making Networks
 - Assistance to those who don't meet usual test of capacity

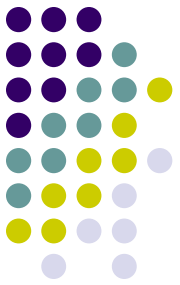


Key issue



- What steps do we need to take to reform policy and law and to enable people with intellectual including communication and other disabilities the opportunity to enjoy full legal capacity, so they can enjoy all the rights of the UN CRPD?





References

- Law Reform Commission Report on Vulnerable Adults and the Law 2006 www.lawreform.ie
- Scheme of Mental Capacity and Guardianship Bill 2008 www.justice.ie
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