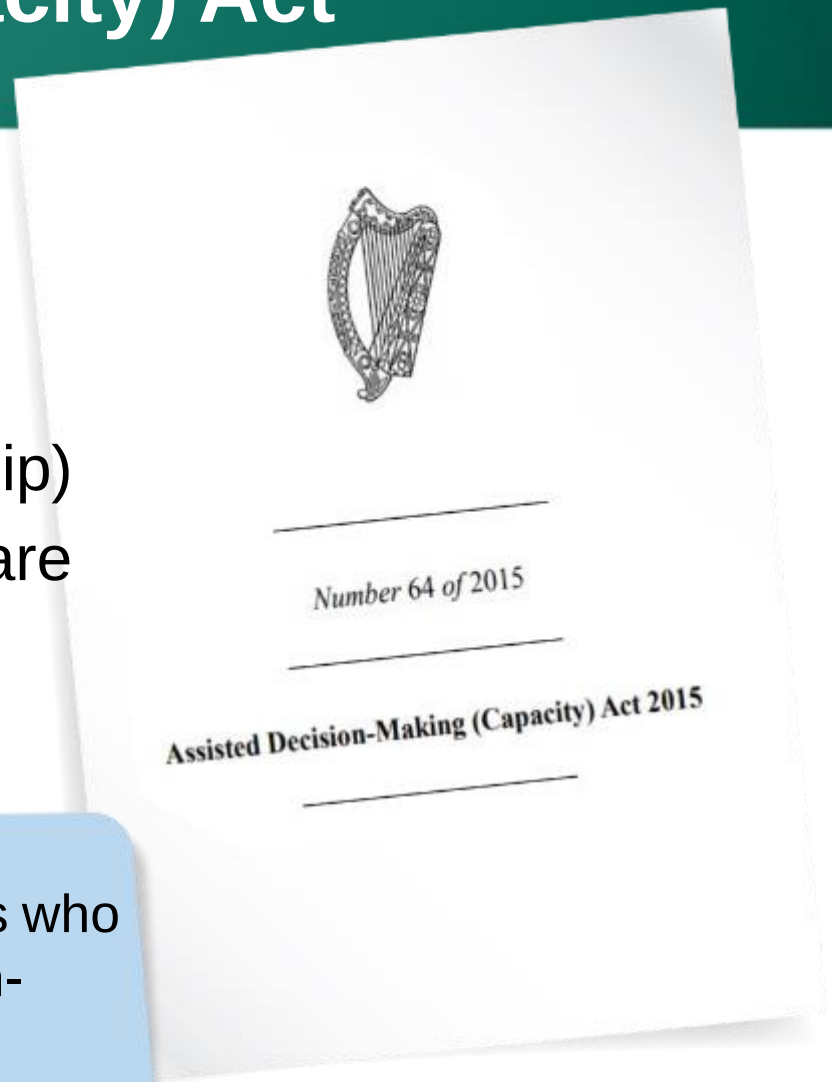
Assisted Decision-Making (Capacity) Act 2015 – The intention, the interpretation, the practice

Caoimhe Gleeson, General Manager, HSE Human Rights and Equality

Assisted Decision-Making (Capacity) Act 2015 - Background

- Signed into law 30 December 2015
- Commenced 26 April 2023
- Abolishes Lunacy Regulations Act 1871 (wardship)
- Provides a legal framework for advance healthcare directives



An Act to provide for the reform of the law relating to persons who require or may require assistance in exercising their decision-making capacity, whether immediately or in the future.

What was the intention of the Act?

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What was the intention of the Assisted Decision-Making (Capacity) Act 2015?

- Replace Victorian system of wardship
- Establish a modern, rights based framework to support decision-making for adults
- Enable compliance with the United Nations Convention on the Rights of People with Disabilities
- Provide statutory tiers of supported and substituted decision-making
- Start with the presumption of capacity
- Limit the use of substituted decision-making

New focus on rights – personhood, legal capacity, rights holders even if a person lacks decision-making capacity

New language- Will and preference, protection of liberty (not deprivation of liberty), good faith and for the benefit of the person

Voice of the person – at all levels, in services, court, advocacy, in written decisions- High Court, Circuit Court

Presumption of capacity

Decision-specific focus – no blanket disempowerment

Act giving voice to experts by experience

NGO's enabled to use the 2015 Act to advance rights e.g. right to financial autonomy, right to privacy

Staff enabled to use the 2015 Act to ensure human rights are protected

Families empowered to use the Act – asserting rights of the relevant person

What has the Act meant in practice?

What has the Act changed for practitioners:

- New documentation to consider:
  - Codes of practice
  - Court rules
  - Complex forms
  - Complex processes
  - Statutory instruments
  - Regulations
  - Statutory register
- Impact of Act on existing documentation:
  - Local Placement Forums,
  - Transitional Care Funding (TCF)
  - CSARS
  - National Consent Policy
  - Admission forms
  - Next of Kin

Supported decision-making v substituted decision-making?

Roll-out so far- Decision-making arrangements

160 decision-making assistant agreements notified (to 31st August 2025)

139 co-decision-making arrangement

1,628 decision-making representation orders**

3,722 enduring powers of attorney registered**

117 enduring powers of attorney notified

https://www.decisionsupportservice.ie/decision-support-arrangement-statistics

Inherent jurisdiction

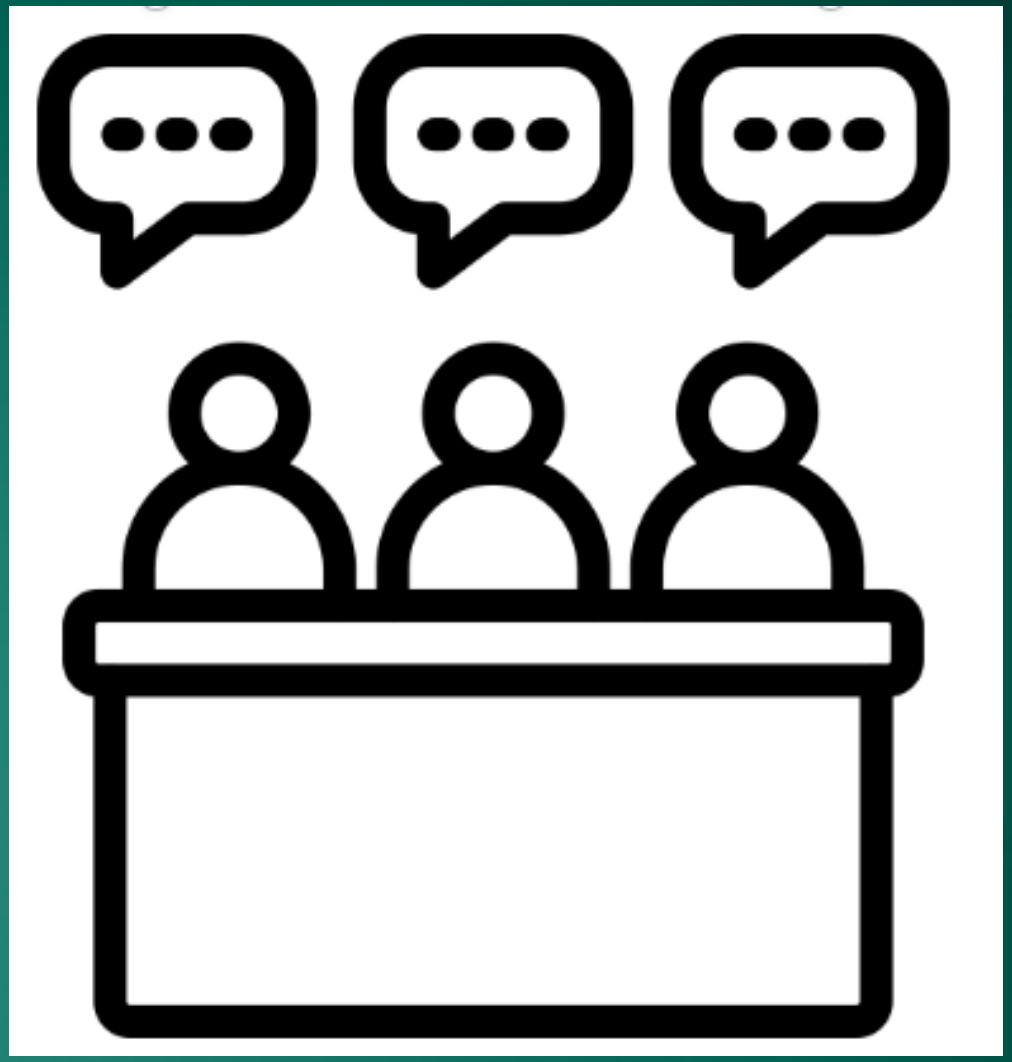
		2023 (from 1st May 2023)	2024	2025 (to date on 8th April 2025)	Total from 2023 to date on 8th April 2025
Cases	Cases pursuant to the Inherent Jurisdiction of the High Court in respect of the Capacity of an individual	78	255	51	384
Orders	Orders made pursuant to the Inherent Jurisdiction of the High Court	284	1088	334	1706

Care representatives v Decision-Making Representative Orders

Care representatives vs Decision-Making Representation Orders

- Change from **Care representative orders** to **Decision-Making representative orders** (from the 26th April 2023)
- Amendments to the role and scope of Specified persons under Nursing Home Support Scheme Act - no nieces and nephews
- Significant numbers of DMR applications in Dublin - linked to applications for Ancillary State Support (ASS) under the Nursing Homes Support Scheme (328 applicants out of 438 cases in Dublin court from commencement to 26th March 2025)
- Application for ASS requires a DMR if no Enduring Power of Attorney in place
- Previous process for a **care representative- 4-6 weeks**
- Process for a **DMR- 6-9 months*****
- Impact on Delayed Transfer of care (Type F cases)

Decision-Making Representatives

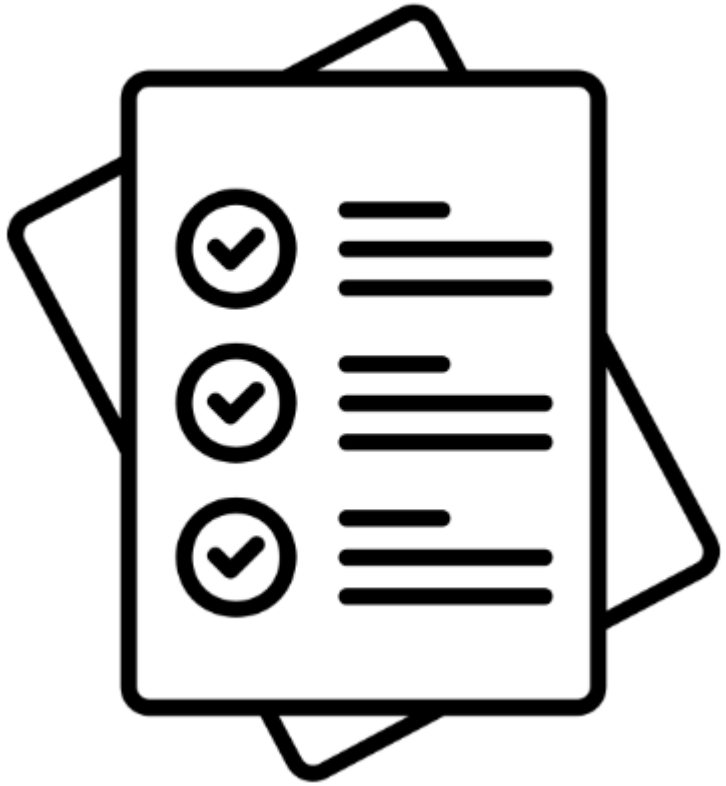


Who are the Decision-making representatives?

- Court appointed
- 80% family member/lay decision-making representatives, 20% appointed from DSS panel (Dublin Circuit Court to 26 March 2025)
- DSS maintains a panel of suitable persons who can be nominated following a direction from the Circuit Court
- They are appointed by the court and their duty is to the court
- All DMRs (panel and non-panel) supervised by the DSS

Decision-making representation orders

- Decision-making representatives takes their authority from the court order and must always act within this authority
- Become the decision-making representative on appointment by the Court – not contingent on DSS registration
- Option for the Court to appoint a DMR to make decisions jointly with the RP where practicable- CDMA
- DMR must follow the guiding principles
- What are the particular decisions that need to be made?
- Services not notice parties – unable to challenge decisions in orders unless an application is made to Court
- Seeing orders that are:
  - Pre-emptive orders
  - Orders in case the person loses capacity
  - Kitchen sink



Decision-Making Representative Panel

- **Section 38(7) Assisted Decision-Making (Capacity) Act 2015**

Where the court propose to appoint a decision-making representative for a relevant person but no suitable person is willing to act as such decision-making representative -

a) The court shall request the Director to nominate 2 or more persons from the panel established under *section 101* for consideration by the court for such appointment

a) The Director shall comply with a request by the court under paragraph (a), and

a) The court may, under subsection 2(b), appoint, from amongst those nominees, a person to be a decision-making representative for the relevant person for a purpose referred to in that paragraph

Panel of Decision-Making Representatives

Profession	% Breakdown
Legal	66%
Social Worker	23%
Medical	8%
Finance	3%

Data from the Decision Support Service

Expectations on Panel Decision-Making Representatives

- Some challenges in relation to scope of the role
- Panel DMRs can only work within the order of the court
- Panel DMR's often appointed in difficult cases e.g. safeguarding issues, young people leaving care, person does not have any natural supports
- Staff expectations may exceed what the person is instructed to undertake
- Not there to be social worker / key worker / solicitor/ aftercare worker (even though that might be their background)
- Not 'owned' by the DSS

Decision making supports and safeguarding concerns

- Most often in residential care facilities- disputes may arise between family members or between family and service provider, may also be safeguarding concerns
- Relative (+/- ex parte) makes capacity application; HSE is not a notice party and is unaware of this application
- Relative is appointed as a DMR with extensive decision-making scope
- “I want my mother’s medication stopped”; Full control of the person’s care plan and choices, full control of finances
- Strongly recommend in DMR applications that reports are sought from the service provider when a relevant person is in a residential care facility.

What happens after discharge from hospital?

Discharge abyss?

- Who manages the DMR case after the person is discharged from hospital? Need for collaboration between acutes and community
- No liaison social work and very limited primary care social work– some areas doing this de facto on top of day to day job
- Long stays on TCF waiting on the court process – need someone to follow up on application / reapply for TCF – people being left with hefty bills for nursing homes
- Reviews of DMR – capacity assessment – more difficult once someone has been discharged into community. Original assessor no longer involved?

In-camera court processes

In-Camera Court

- Limited data from the Courts service to assess trends / numbers
- Very helpful data from Dublin Circuit Court – not the same level of data available from other Circuit Courts
- Without data- difficult to extrapolate trends, patterns and lessons for practitioners
- Staff unable to attend hearings as they are not a notice party – difficult to flag concerns if they are not aware of the case
- “Secret Court” in the Court of Protection in England and Wales – now open court due to significant public policy concerns raised
- Suggestions:
  - Lift the current in-camera rule but have strict reporting restrictions

Inherent Jurisdiction

No protection of liberty safeguards

- A Decision-Making Representative **has no powers of restraint or detention**
- Only the Court under **its inherent jurisdiction** can make permissive orders for detention e.g. if a person lacks decision-making capacity, has significant care needs and is refusing to enter long term care, if a person needs a medical intervention, lacks capacity and requires that intervention
- Significant numbers of applications to the High Court for such orders since commencement
  - 2023 (from 1st May) – 78 cases, 284 orders
  - 2024 – 225 cases, 1088 orders
  - 2025 (to 8th April) – 51 cases, 334 orders
- Most orders subject to a 3 month review - significant drain on clinical time
- Costly

No protection of liberty safeguards

- Significant number of cases relate to nursing home admission
- Inherent Jurisdiction applications will remain until legislation is enacted and commenced
- No sign of heads of bill to commence the legislative process
- Test- necessary and proportionate grounded in strong reasoning
- What alternatives have been considered? Trial discharge? Vulnerable customer account? Least restrictive options?

Wardship

Discharge from wardship

All adult wards of court will be discharged by April 2026, the relevant person (RP) assessed and will align with one of the following tiers of support:

1. Discharge and no decision-making assistance is required
2. Discharge with the assistance of a decision-making assistant
3. Discharge with the assistance of a co-decision maker
4. Discharge with a decision-making representative

At all times consideration must be given to the guiding principles of the Act set out in s.8

Roll-out so far- wardship

634 discharge applications received (to end of July 2025)

158 people discharged from wardship

29 discharged with capacity

8 discharged with a co-decision-maker

121 discharged with a decision-making representative

1072 – no discharge application received

Voice of the person

Importance of the voice of the person – Section 139

Application to court shall be heard in the presence of the relevant person subject to the application, unless, in the opinion of the court or High Court:

The fact that the RP is not or would not be present would not cause an injustice to the RP

Attendance may have an adverse effect on the health of the RP

The RP is unable, whether by reason of old age, infirmity or any other good reason to attend the hearing

The RP is unwilling to attend

National Office for Human Rights and Equality Policy

Why is it important to include the voice of the person?

- It is their life and the proceedings are for their benefit.
- Participation provides a procedural safeguard against arbitrariness.
- Helps the Judge to understand the emotional context and the importance of the decision to the person.
- It may improve the quality of the decision-making.
- It often changes the outcome.
- Important mechanism to alert the Judge as to any possible undue influence or safeguarding matter
- Person may lack capacity to execute a decision but has a strong will and preference at to what matters to them

Why voice of the person matters - emerging trends

- In some cases person was not aware a DMR application was being made
- Estranged family members with no relationship to the relevant person seeking to become DMRs
- Not clear how papers were served on the relevant person (or if at all)
- Person required a less restrictive support
- S.139 acts as a safeguard against sharp practice

Need for safeguards when hearing the voice of the person

- Essential person is supported during the hearing
- Essential basic supports like proper audio is in place
- When the person is appearing online, who else is in the room with them?
  - Undue influence?
  - Coercive control?
  - Hearing private information?
  - Independent advocacy critical

Is the relevant person better off in the new system?

New system

- Potential for significant cost to the applicant and the estate of the relevant person - €5 - €15k
- Very complex process with extensive court forms
- Significant numbers of Lay litigants – may have difficulty completing forms and not always clear about what orders to seek = delay in seeking the DMR. Requires Social Work support. (34% of applicants in Dublin from commencement to 26 March 2025)
- Low numbers of relevant persons attending court themselves
- Broad orders for DMRO
- Lengthy process

New system

- Reviews of DMRO:
  - Difficult for DMR to organise updated functional assessment of capacity
  - Need for easy to read information on the process – complex forms to complete
- "*It is just for the loan on the family home*" – this is rarely the case
- Court vacation – significant delays on hearings – knock on effect on Delayed Transfer of Care
- Services not as notice parties – may be unaware that an application has been made

Better off?

- Are there better legal controls on the Relevant Person's estate now?
- Is there better accountability now of the Relevant Person's affairs?
- Has a judicial process introduced more and better safeguards?
- What impact has this process had on financial abuse? Coercive control?
- Are least restrictive measures really being exhausted?

HSE National and Regional Response

HSE National Response

- Led by HSE Human Rights and Equality
- HSE Clinical Lead for ADM/Consent - Professor Shaun O'Keeffe
- HSE ADM National Oversight Group since commencement - CCO/REO's
- Training and information
  - HSE ADM Mentorship programme - 500 participants
  - HSE Training on assessment of capacity (online and in-person)- 2600/600 participants
  - E-learning programmes on HSELand
  - Webinars – available on www.assisteddecisionmaking.ie
- Advice and guidance hub – complex case meetings and supports
- On-site engagement on Type F DTOC cases

Key links

- On-line training on functional assessment of capacity
- In-person training on functional assessment of capacity- Joanne.Haffey@hse.ie
- Guidance on HSE and HSE Funded agencies accessing the DSS register
- Elearning programmes on HSELand:
  - HSE National Consent Policy
  - Assisted Decision-Making (Capacity) Act 2015: Guidance for Healthcare Workers
  - Supporting decision-making in health and social care
- Webinars on the Act

Questions??

Further information

Website – www.assisteddecisionmaking.ie

Email – adm@hse.ie

Thank you for listening.

Assisted Decision-Making (Capacity) Act 2015 - Intention

- Establish a modern, rights based framework to support decision-making by adults who have difficulty making decisions without help
- Repeal Marriage of Lunatics Act 1811 and Lunacy Regulation (Ireland) Act 1871
- Meet requirements under the United Nations Convention on the Rights of People with Disabilities
- Provide a statutory framework enabling formal arrangements to be made by people who believe their capacity is in question or may shortly be called into question with trusted persons through decision-making assistance agreement or a co-decision-making agreement
- Provide for the making of applications to court to seek a decision-making representation order for people who lack capacity

New focus on rights – personhood, legal capacity, rights holders even if a person lacks decision-making capacity

New language- Will and preference, protection of liberty (not deprivation of liberty), good faith and for the benefit of the person

Voice of the person – at all levels, in services, court, advocacy, now written decisions- High Court, Circuit Court

Presumption of capacity

- Decision-specific focus – no blanket disempowerment
- Act giving voice to experts by experience
- NGO’s using the 2015 Act to advance rights e.g. right to financial autonomy, right to privacy
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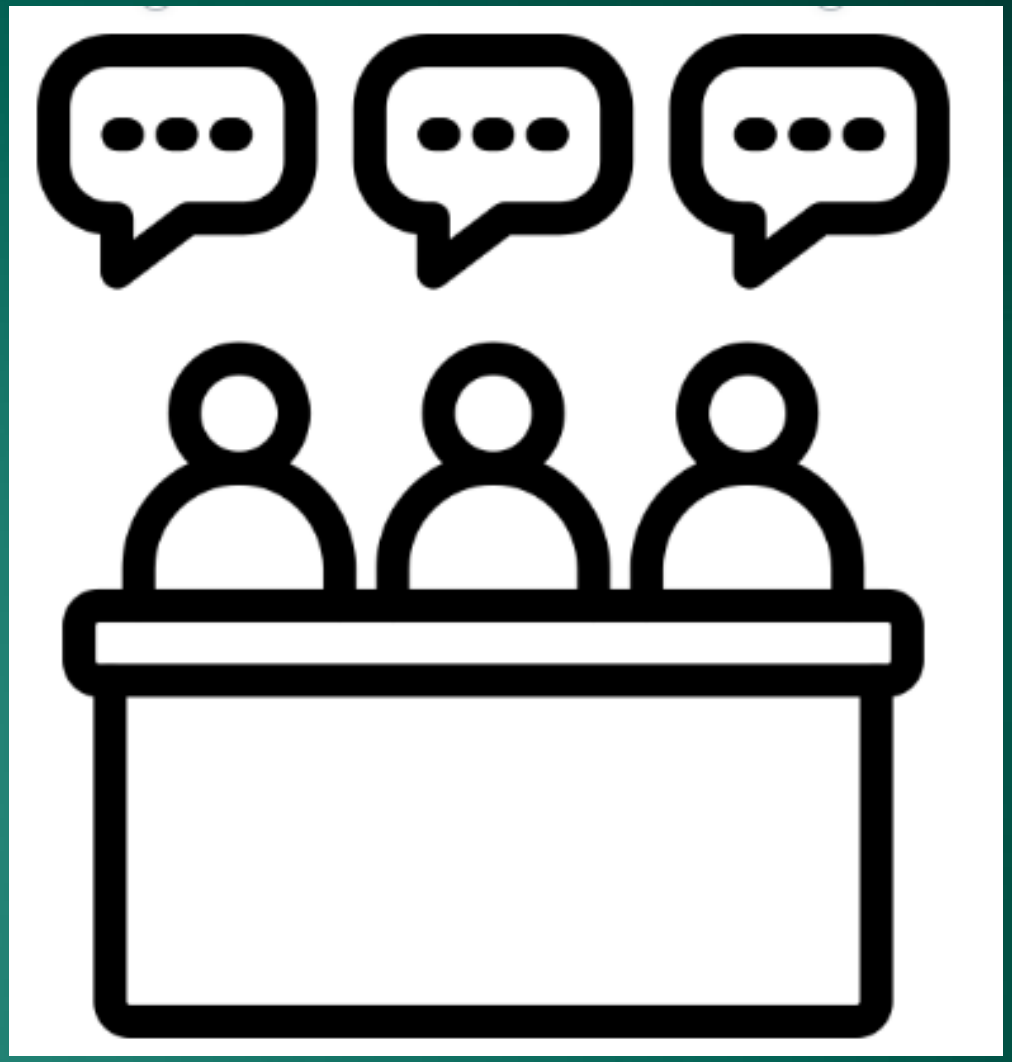
Decision-Making Representatives



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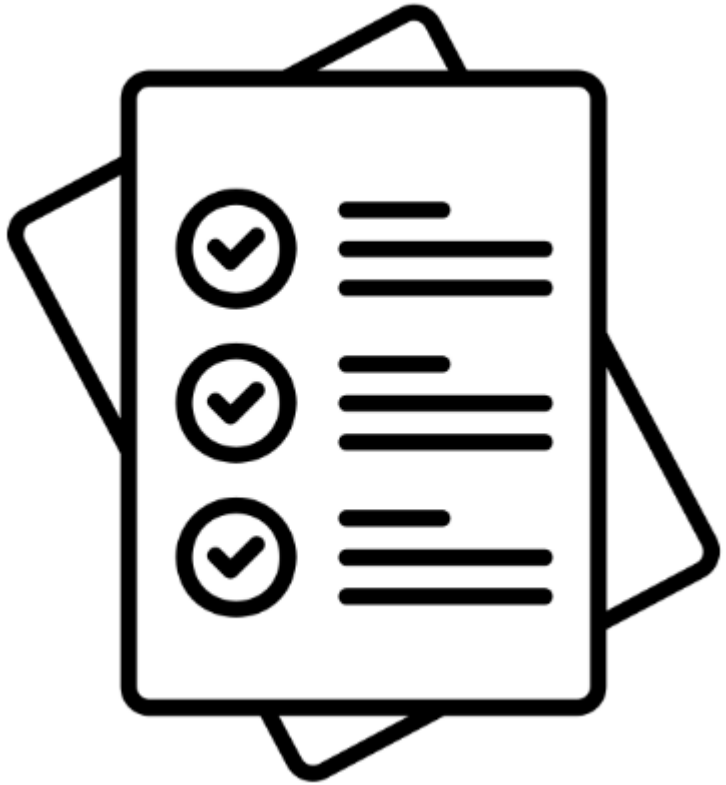

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Panel of Decision-Making Representatives

Profession	% Breakdown
Legal	67%
Social Worker	23%
Medical	8%
Finance	2%

Data from the Decision Support Service

Expectations on Panel Decision-Making Representatives

- Some challenges in relation to scope of the role
- Can only work within the order of the court
- Not there to be social worker / key worker / solicitor (even though that might be their background)

Decision-making supports have been ‘weaponised’ in some cases

- Most often in residential care facilities, often dispute between family members or between family and service provider, sometimes safeguarding concerns
- Relative (+/- ex parte) makes capacity application; HSE is not a notice party and is unaware of this
- Relative is appointed as a DMR with extensive decision-making scope
- “I want my mother’s medication stopped” (Sometimes, they may be right!)
- It would help if reports were sought when a relevant person is in a residential care facility.

Impact of decision-making representation process

- 6 week pilot of case tracker in selected hospitals
- Aim – identify delays in the process, optimise flow of cases
- Not all hospitals returned data
- Feedback:
  - Can be difficult to get a functional assessment of capacity completed in a timely manner depending on the medical team
  - Delays – legal process is lengthy and it can take some time to get a court date

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Capacity Assessment

- Court's Medical Visitor - functional capacity assessment – low numbers Committee or RP can obtain their own functional capacity report
- Functional Capacity Assessment – assess the RP's capacity in the areas of Healthcare, Welfare/ADL and Property & Finance
- Report will recommend to Court a tier of decision support or none
- Issue – different template to Part 5 capacity assessment.
- Concern about broad orders

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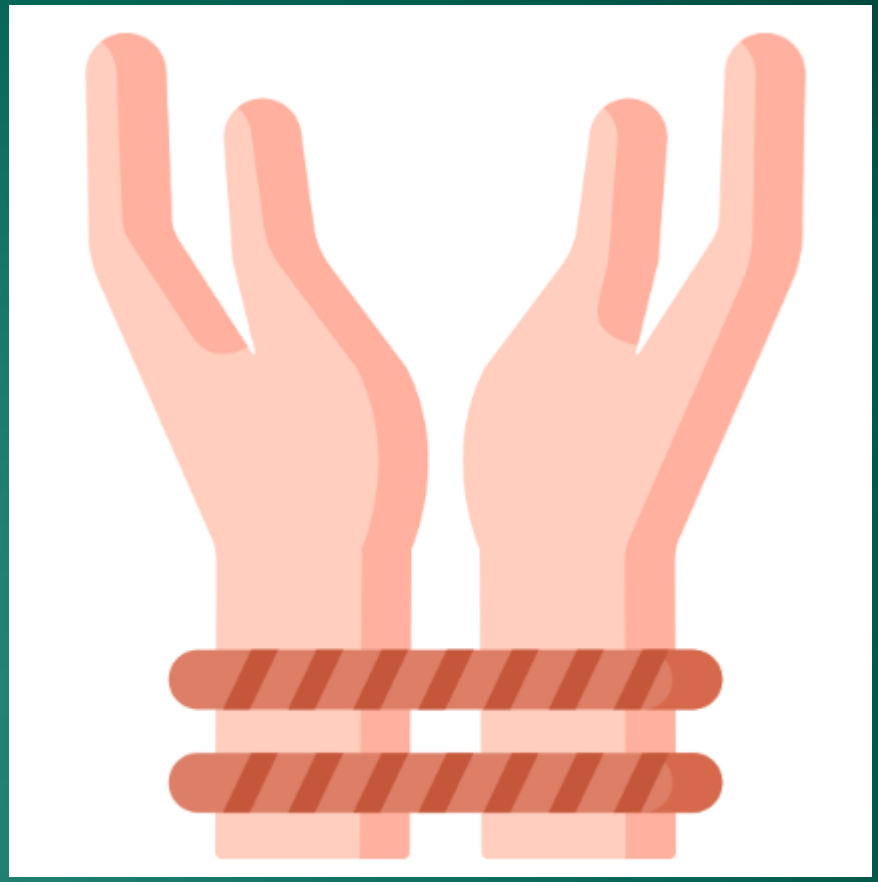
In-camera court processes

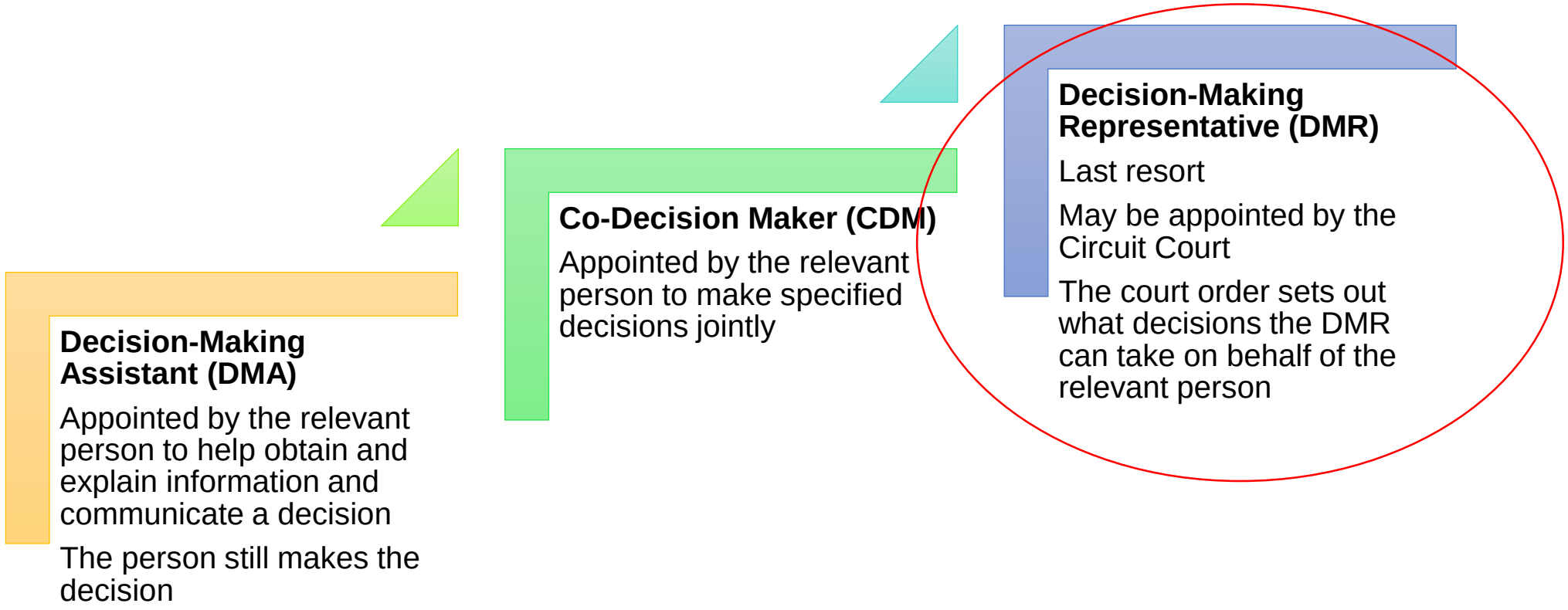
In-Camera Court

- Difficult to extrapolate trends and patterns as unable to attend
- Staff unable to attend as not a notice party – difficult to flag concerns
- Limited data from the Courts service to see trends / numbers
- Very helpful data from Dublin Circuit Court – not the same across the country
- “Secret Court” in England and Wales – now open court due to lobbying
- Suggestions:
  - Lift the in-camera rule but have strict reporting restrictions

Least restrictive intervention



New three-tier framework of decision supporters



These are all options to support the person if needed - not mandatory interventions!

Least restrictive intervention

- Any action/intervention taken for a person should be the least restrictive of their rights and freedom. Any action should respect the person's dignity, bodily integrity, privacy, autonomy, and right to control over their financial affairs and property. An action should be proportionate to the significance and urgency of the matter in question, and be time limited
- Does this happen in practice?
  - Applications that include decisions that do not need to be made at the moment
  - Applications being made when there is no urgency around the decision
  - Has the person been fully supported to make the decision before an application is made

No protection of liberty safeguards

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Is the relevant person better off in the new system?

What could be improved?

- Potential for huge cost to the applicant - €5 - €15k
- Significant numbers of Lay litigants – difficulty completing forms and not always clear about what orders to seek = delay in seeking the DMR. Requires SW support. (34% of applicants in Dublin to 26 March 2025)
- Very complex process with complex court forms
- Low numbers of relevant persons attending court themselves
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  - Difficult for DMR to organise updated functional assessment of capacity
  - Need for easy to read information on the process – forms to complete, etc
- Broad orders for DMRO
- Need to go back for additional decisions to be added – “it is just for the loan on the family home” – what else needs to be included?

What could be improved?

- Court vacation – significant delays on hearings – knock on effect on DTOC
- Services not as notice parties – may be unaware that an application has been made

HSE National and Regional Response

HSE National Response

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- HSE Clinical Lead for ADM/Consent - Professor Shaun O'Keeffe
- HSE ADM National Oversight Group since commencement - CCO/REO's
- Training and information
  - HSE ADM Mentorship programme - 500 participants
  - HSE Training on assessment of capacity (online and in-person)
  - E-learning programmes on HSELand
  - Webinars – available on www.assisteddecisionmaking.ie
- Advice and guidance hub - National Office for Human Rights and Equality
- On-going Inter-agency and NGO bilaterals
- Escalation process
- On-site engagement on Type F DTOC cases

Questions??

Further information

Website – www.assisteddecisionmaking.ie

Email – adm@hse.ie

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