



# seirbhís tacaíochta cinnteoireachta

## decision support service

### Questions and Answers

#### Enduring Powers of Attorney (EPA)

**Question:** [What happens to an existing EPA when the DSS commences?](#)

**Answer:**

If you have already made an Enduring Power of Attorney (under the Powers of Attorney Act 1996), then you can keep that arrangement and it will continue to have legal effect.

Attorneys appointed under the 1996 Act will be subject to the complaints and investigation process covered by the Assisted Decision-Making (Capacity) Act, 2015. This means that once the 2015 Act has commenced, complaints can be made to the DSS in relation to the way these attorneys are acting within the role or their ability to perform their function.

Following commencement of the Act, if you are making an EPA, you can only do so under the new law. EPAs made under the 2015 Act may include healthcare decisions, which are currently not provided for under the 1996 Act.

**Question:** [Will the options available under the new assisted decision-making process remove the need for power of attorney \(POAs\)?](#)

**Answer:**

POAs made under Part 3 of the Power of Attorney Act 1996 Act are unaffected by the 2015 Act as they do not relate to matters of capacity. The 2015 Act provides for

Enduring Powers of Attorney which are important for advance planning. The new three-tier framework of supports under the Assisted Decision-Making (Capacity) Act, 2015 do not relate to advance planning.

## Wards of Court

**Question:** What will happen to current Wards of Court and what is the timeline for initiating these reviews?

**Answer:**

When the 2015 Act comes into effect, people will no longer be able to be made a Ward of Court. All current Wards of Court will be reviewed and discharged from wardship within three years at the latest. The courts will decide whether a current Ward of Court needs a support.

**Question:** Who has responsibility for initiating these reviews - the DSS or the Service Providers?

**Answer:**

Any current Ward of Court can apply to the wardship court to initiate a review of their case. For further information about current Wards of Court and provision for their review, please see our website [www.decisionsupportservice.ie](http://www.decisionsupportservice.ie)

**Question:** Will there be someone that families can approach for information and who can listen to their concerns?

**Answer:**

A dedicated Information Service will be available within the DSS to deal with any queries, provide relevant information and/or answer any questions. However, queries in relation to current Wards of Court should be addressed to the Office of Ward of Court.

**Question:** If a person is currently receiving a full service from a disability service, has no family, and is currently a ward of court, is there an option for the organisation that supports the person to become a decision-making representative with best interests robustly monitored?

**Answer:**

Under section 39 of the Act, the owner or registered provider or employee of a residential service where the relevant person resides is not eligible to be appointed as a decision-making representative.

Best interests are not the applicable standard under the Act.

If a relevant person has nobody willing or suitable to act as a decision-making representative, the court can appoint a person from the DSS panel. A panel decision-making representative (DMR) is required to have regard to the will and preferences of the relevant person and to work within the remit of the court order.

**Question:** If the person is currently a ward of court and receives a full service from a disability service and has no family, will the organisation become the person's decision-making representative or will this be decided by the courts?

**Answer:**

All persons who are Wards of Court will be reviewed by the wardship court within three years of commencement of the Act. The wardship court will decide on the person's capacity and whether supports are required under the Act. The owner or registered provider or an employee of residential services where the person resides may not become a decision supporter under the Act. The court will decide whom to appoint as a decision-making representative (DMR) if one is to be appointed. In the absence of any other suitable person, the court may appoint a DMR from a panel maintained by the DSS.

### Training/Information provision

**Question:** How will the DSS communicate and implement the changes the legislation and the service bring for people with intellectual disabilities to their families and people with intellectual disabilities themselves?

**Answer:**

Our stakeholder engagement strategy is ongoing, and we are committed to providing guidance and information in a range of accessible formats. Persons with an intellectual disability and their families are amongst our key stakeholders.

**Question:** Will funding be provided for disability services to train staff in section 38 and 39 providers on the Act and guiding principles and how to make the Act operational on the ground?

**Answer:**

Funding for staff training in disability services is a matter for each service provider. The DSS will, however, provide resources to help you fulfil your legal and professional obligations under the Act including the following:

- Codes of Practice
- Guides and Tools
- Training materials

If you are a healthcare professional, the Health Service Executive (HSE) has established the National Office for Human Rights and Equality Policy and is doing a number of things to prepare healthcare staff and services for commencement of the Act. You can find more information on [www.assisteddecisionmaking.ie](http://www.assisteddecisionmaking.ie).

**Question:** How will the DSS work with disability service providers?

**Answer:**

Disability services are a key stakeholder and we have met with a range of service providers already. We are available to provide information and guidance and welcome continued contact from the disability sector.

**Question:** Are solicitors going to get to specific information / training on the proposed new system?

**Answer:**

There will be a code of practice for legal professionals. The DSS has no direct responsibility for the delivery of training but we are happy to continue our engagement with the Law Society and other relevant organisations.

**Question:** Do you provide easy to read documentation?

**Answer:**

Yes, it is our intention to do so. A range of guidance material is currently being prepared. Please contact the DSS if any current material requires clarification.

**Question:** What is being done to prepare legal and financial professionals to embrace the legislation and the statutory codes of practice, and to carry out their obligations?

**Answer:**

We have engaged with legal and financial professionals, and we will continue to do so as per our engagement strategy, and to hear from their representative and organising bodies.

**Question:** Will there be a public advertising campaign on the DSS? Many people, especially family members are not aware of this legislation and service yet.

**Answer:**

We have developed a communications plan, and this will be stepped up as we approach commencement.

**Question:** Access to formalised training and education on the Act for medical professionals is essential. Are there any planned training and education for doctors, especially non-consultant doctors?

**Answer:**

The DSS does not have a direct role in the provision of training but will continue to engage with medical and other healthcare professionals and provide information and guidance as appropriate. The DSS also has a duty to promote organisational change where practices may prevent a relevant person from exercising capacity. There will be a code of practice for healthcare professionals and codes of practice in relation to advance healthcare directives.

**Question:** Will the resources for healthcare professionals include how to assist people with a communication disability such as aphasia to understand information and express their will and preference? How will this be addressed in the resources?

**Answer:**

The Act states that a person should not be considered as unable to make a decision unless all practicable steps have been taken, without success, to help them to do so. The Act also states that the ability to communicate as one element of capacity means the ability to communicate with assistance if necessary. The assistance may include talking, writing, sign language, assistive technology 'or any other means.' This may include speech and language therapy. The code of practice providing guidance for healthcare professionals will address the need to support communication by all appropriate means.

### Advocacy

**Question:** Is there a priority plan for a statutory advocacy service with powers of access to the person and penalties for obstruction of an advocate?

**Answer:**

Independent advocates may have an important role to play in facilitating relevant persons to access and understand the decision supports provided for under the 2015 Act, and to advocate on behalf of those persons to have their decisions implemented. However, the 2015 Act does not relate to the provision of advocacy services, although Section 113 provides for a code of practice for advocates.

**Question:** Does the DSS see the roles of assistant, co-decision and decision-making representation as independent advocacy roles?

**Answer:**

No – these are separate and statutory roles with their own functions under the 2015 Act. You will find more information on our website [www.decisionsupportservice.ie](http://www.decisionsupportservice.ie)

### Costs

**Question:** Doctors do charge medical card holders for letters. How will this be controlled?

**Answer:**

It will be a matter for the Department of Health to consider how medical card holders will be able to access formal capacity statements where these are required under the 2015 Act. We have engaged with the Department of Health in relation to this matter.

**Question:** Is there legal aid for making advanced healthcare directives?

**Answer:**

There is no specific provision in the 2015 Act for the extension of the Civil Legal Aid Act in relation to Advance Healthcare Directives. (It is not intended that it would cost anything to register an AHD with the DSS).

### UNCRPD

**Question:** When will the discriminatory provision in relation to Advance Healthcare Directives be removed from the Assisted Decision Making (Capacity) Act in respect of those who are given 'involuntary' status under the Mental Health Act?

**Answer:**

This relates to Section 85(7) of the Act. The Mental Health Commission and the DSS have been openly supportive of the repeal of this section so that an AHD still has effect even if a person is detained under the Mental Health Act (Part 4).

### Capacity Assessments

**Question:** Can you clarify under the Assisted Decision Making (Capacity) Act 2015 who will carry out assessments of capacity?

**Answer:**

Under the 2015 Act, everyone is presumed to have capacity.

In some circumstances, there may be reason to question a person's capacity to make a certain decision. The person who requires the decision to be made will often be the best person to do the capacity assessment. This could be a lawyer, doctor, or a person working in a bank. There are circumstances under the Act that require a capacity assessment to be undertaken by healthcare professionals. This is where a statement of capacity is required to support the registration of a co-decision-making agreement or an enduring power of attorney. For the purposes of appointing decision-making representatives under the Act, the courts will make formal assessments and declarations of capacity.

**Question:** How is a person's capacity assessed?

**Answer:**

A person's capacity is assessed using the "Functional Test". This means that the assessment is about a specific decision that needs to be made at a specific time. It is not possible to make a blanket assessment that a person has no capacity. Applying the functional test, a person can be said to lack capacity to make a particular decision if the person can't do all of the following:

- Understand information relevant to the decision

- Retain that information long enough to make a voluntary choice
- Use or weigh up that information as part of the process of making the decision and
- Communicate that decision in whatever way they normally communicate (not just verbally).

**Question:** From a capacity point of view, for example, "the weighing up" piece will prove hugely challenging for so many with cognitive challenges. How will the High Court address this challenge?

**Answer:**

This functional approach to assessing capacity has been the standard in common law since 2008, but matters could arise for the court to determine. For the most part this will be the Circuit Court, rather than the High Court.

**Question:** You mentioned that a person can plan for when they lose decision making capacity, can you explain what this means?

**Answer:**

The Act contains tools for advanced planning by way of enduring power of attorney and advance healthcare directives. Neither of these become effective unless a person has lost their capacity as per the above functional assessment in relation to the decision. (Please see above as to who assesses capacity and the website section on advance planning [www.decisionsupportservice.ie](http://www.decisionsupportservice.ie)).

**Question:** If an individual is in a situation where they are happy with their circle of support and decision-making support, be that in a designated centre or in a family situation, will they still have to formerly 'register' their decision support arrangement?

**Answer:**

There is no single answer to this, and it will depend on the individual's circumstances and the decisions they need to make. The first step should always be to support a person to make their own decisions. The DSS will register and supervise only the formal arrangements made under the Act.

### Support Arrangements

**Question:** Does all support that people have or receive in relation to decision-making need to be registered? For example, if someone receives support currently from their family and the person is happy with this support, does this support need to be registered? Is there a risk of overloading the system with support arrangements when there might not be a need for it to be formally registered?

**Answer:**

There is no single answer to this, and it will depend on the individual's circumstances and the decisions they need to make. The first step should always be to support a person to make their own decisions. The DSS will register and supervise only the formal arrangements made under the Act.

**Question:** Will adults with autism (without a diagnosis of a learning disability) be entitled to access the future service?

**Answer:**

No diagnosis of any nature is required to access the service.

**Question:** Who can be a co–decision-maker?

**Answer:**

To be eligible to be a co-decision-maker, a person must be an adult (18 years and over) and must be known and trusted by the person appointing. Some people cannot be a co-decision-maker, for instance, if you:

- Have been convicted of an offence against the person appointing you,
- Are financially insolvent (unless the agreement is only about personal welfare decisions),
- Are the owner or a registered provider of a designated centre or mental health facility where the person lives (unless you are a relative of the person),
- Have previously been a co-decision-maker for the person but were removed from that role.

**Question:** If a relevant person has no family or trusted friends or services working with them what option(s) would they have in terms of assisting them to make decisions if their capacity is called into question?

**Answer:**

An owner or register provider of residential services where the relevant person resides is not eligible to become a decision supporter for the relevant person. At the upper tier, the DSS will hold a panel of decision-making representatives (DMRs) who may be appointed by way of a court order for a relevant person in this situation. Each DMR will be required to apply the guiding principles, follow the codes of practice and be subject to the complaints function in the DSS.

**Question:** In relation to co-decision-making, can the relevant person have more than one person involved as a co-decision-maker?

**Answer:**

Yes, you can. However, you can only have one co-decision-maker for each co-decision-making-agreement.

**Question:** Can there be more than one person appointed as a decision-making representative (for example two parents)?

**Answer:**

Yes, the Court may appoint one or more persons to act in the role jointly.



**Question:** In Adults with Intellectual Disabilities services, service users have key workers that they have built up relationships with and trust. They may also have no family members to help them or become part of the decision-making process should they require it. Will they have to go through the process of getting an individual, who they do not know, registered to help them with decisions and it will take time to build up a relationship and trust with this individual they do not know personally?

**Answer:**

Under section 39 of the Act, the owner or registered provider or employee of a residential service where the relevant person resides is not eligible to be appointed as decision-making representative.

This also applies to decision-making assistants and co-decision-makers. When the court is appointing a DMR, it must have regard to the relevant person's views, will and preferences. This will be a matter for the court. Among other matters, the court must consider the wishes of the person and the importance of existing family relationships as well as the capability of any proposed decision-making representative.

It may be that a service will initiate a court application. An application may be brought by any person who has a bona fide interest in the welfare of the relevant person.

**Question:** If someone with a mental illness presents at hospital, needs medical treatment and is not able to decide, does the doctor need to see decision-making documentation before he/she can treat someone?

**Answer:**

In any medical emergency, a healthcare professional may need to provide you with necessary treatment without your consent.

If you do have a decision supporter with a role in relation to relevant healthcare decisions, or an advance healthcare directive, these must be accessed, unless the urgency is such that the healthcare professional cannot reasonably delay.

It is important that if you make an advance healthcare directive or an enduring power of attorney, that you let important people know, like your family, friends, and general practitioner. This way, you can help to make sure that your medical wishes are respected even in an emergency.

**Question:** When the legislation commences, does the social welfare office now need to see documentation before they can process application especially if next of kin is filling in documents etc

**Answer:**

There is no single answer to this, and it will depend on individual circumstances. The person whose application it is has the presumption of capacity and should be supported to make their own decisions as far as possible. Data protection and privacy considerations around the sharing of information already apply. At present the 'next of kin' has no presumed or automatic role in completing applications on behalf of another

adult. A Department of Social Protection official should be satisfied that the 'next of kin' is acting with the consent of the person. This is currently the practice in operation.

Under the Act, the 'next of kin' may be appointed to a formal role in relation to property and affairs decisions, which can include the processing of applications for benefits.

**Question:** I am interested in the language of independent/semi-independent advocate, professional advocacy in the context of the formal tiers described under the act. Has this been discussed?

**Answer:**

The Act does not specifically address the role of an advocate. The Act provides for a code of practice for advocates. The roles under the formal tiered framework are distinct from the role of an advocate.

**Question:** Will family carers presently doing a great job still be 'legal' once the Act is implemented?

**Answer:**

The need for formal arrangements under the Act will depend on every person's circumstances and the decisions that a person needs to take.

A family member may be appointed by a person to be a decision-making assistant, co-decision maker, attorney or designated healthcare representative. It is most likely that these roles will be taken on by family members as these arrangements depend on familiarity and trust. There are suitability and eligibility criteria for all categories of decision supporter.

At the upper level of need, the court may appoint a family member to be a decision-making representative. Among other matters, the court must consider the wishes of the person and the importance of existing family relationships as well as the capability of any proposed decision-making representative.

**Question:** If two people with intellectual disability want to marry, and their families agree, will they be able to?

**Answer:**

The agreement of families is not required for the marriage to proceed. Adults with an intellectual disability have the presumption of capacity, like everybody else. As in every case, the registrar must be satisfied that parties have the capacity to marry. If necessary, an application may be brought under Part 5 of the Act to ask the court to declare whether the party or parties have capacity to marry.

Under the Act, a decision supporter can never consent to marriage on a relevant person's behalf.

## Stakeholder Engagement

**Question:** In the investigation of concerns of financial abuse by any decision maker, how will the DSS link in with existing adult protection professionals in the HSE and other health agencies?

**Answer:**

The DSS intends to have memoranda of understanding with relevant bodies so that concerns of abuse which come to the attention of the DSS as part of our supervisory and complaint's functions are escalated appropriately. Similarly, it will be important that other bodies who become aware of a complaint of abuse by a decision supporter bring the matter to the attention of the DSS so that the DSS can take its own appropriate action.

**Question:** Do you agree that the banking sector also needs to play a part under this service as it is proving increasingly difficult for adults with diminished capacity to open or access their own bank accounts?

**Answer:**

Yes, and the DSS has engaged with the banking sector. There will be a code of practice for financial service providers.

**Question:** How this will work for people who are already supported by a disability service? How will disability services be supported to work with the DSS?

**Answer:**

It will be important that disability services are aware of the Act and the supports that it can provide to adult disability service users. There is no single answer as to how individual persons who are presently supported by disability services will interact with the DSS. This will depend on their individual circumstances and the decisions that they need to take. The DSS will be available to deal with queries and provide information and guidance.

**Question:** Will there be an obligation for disability service providers to have an internal policy procedure to manage/monitor review decisions that are made with service users or should all bigger relevant decisions be referred to the DSS external to the remit of services?

**Answer:**

It may be opportune for disability services to consider what measures are in place to support decision-making and the position of individual service users. The DSS and the codes of practice will be available to provide guidance.

**Question:** Overall, just how can we best support this act in services? Will there be an expectation to formally record decisions in some way and who will be responsible for ensuring this is being done with the persons will and preferences at the fore? Will systems become more standardized outside the remit of the DSS?

**Answer:**

The DSS will publish a general code to provide guidance on supporting decision making and assessing capacity along with a code for health and social care professionals. The DSS will provide guidance and information. It is expected that the principles of the Act will be reflected in standards and policy. This is already happening. The DSS is directly responsible for individual decision support arrangements and will not be the regulator of services.

### Panels

**Question:** Are education professionals included in the list of professionals or is the list confined to professionals working in a medical sphere?

**Answer:**

There are four panels provided for under the Act: decision-making representatives, special visitors, general visitors and court friends. The Act itself does not specify membership of a particular profession as a requirement. Under the Act, special visitors may be medical practitioners or others with expertise in capacity. The DSS is presently considering the terms and conditions of all panel members.

### Codes

**Question:** When will the DSS codes of practice be published?

**Answer:**

The codes of practice will be the subject of a public consultation. It is intended that this will happen after the legislation to amend the Act is finalised. We understand that the amending legislation will be passed before the end this year. The codes of practice will be published before commencement of the Act.

### Guiding principles

**Question:** Where an older person wishes to leave residential care but there are not sufficient community services available to support them, how can service providers comply with the Deprivation of Liberty Safeguards and respect their wishes?

**Answer:**

The DSS is informed that Deprivation/Protection of Liberty Safeguards are presently being drafted by the Department of Health. In general terms, the Act provides that a person's will and preferences are to be given effect 'as far as practicable'.

**Question:** If a patient's will and preference is to go home but their main carer/spouse reports that they cannot cope and, as such, long-term care is then the only option. What is the advice for an occupational therapist to advocate for the relevant person?

**Answer:**

The Act does not state that a relevant person is always entitled to have their will and preferences fulfilled. There may be other persons whose rights also need to be considered and, in some instances, there may be practical considerations. The HSE's Office for Human Rights and Equality Policy may be able to provide some guidance in individual cases. You can find more information on [www.assisteddecisionmaking.ie](http://www.assisteddecisionmaking.ie).

**Question:** I am particularly interested in the concepts of duty of care and best interests. Can you tell me where these sit in a rights-based approach to supporting decision-making?

**Answer:**

The best interests standard is not mentioned anywhere in the Act.

The DSS has specific duties to regulate arrangements under the Act to ensure that the rights of the relevant person are respected. All decision supporters are obliged to give effect to the guiding principles which require a rights-based approach.

(Please refer to the HIQA/MHC Joint Standards for Adult Safeguarding for a broader consideration of a human rights-based approach to safeguarding. It can be accessed from [National Standards | Mental Health Commission \(mhcirl.ie\)](http://NationalStandards|MentalHealthCommission(mhcirl.ie)))

## Complaints and Investigations

**Question:** What will the DSS mean for adults with intellectual disability living in residential care facilities? Will all residents be required to register with the DSS and will the DSS regulator be carrying out inspections within these settings to see if the residential care facilities follow the legislation?

**Answer:**

There is no requirement for any person to register with the DSS. The DSS regulates and supervises individual decision support arrangements and is not a regulator of services.

**Question:** Will the DSS work with or refer to adult safeguarding if there is a complaint/allegation about a co-decision maker?

**Answer:**

The DSS intends to have memoranda of understanding with relevant bodies so that concerns of abuse which come to the attention of the DSS as part of our supervisory and complaint's function are escalated appropriately. Similarly, it will be important that other bodies who become aware of a complaint of abuse by a decision supporter bring the matter to the attention of the DSS so that the DSS can take appropriate action.

**Question:** What about a situation where a DMR has concerns about a relevant person's welfare and would want to 'protect' the relevant person from engaging with a dangerous person/situation?

**Answer:**

The Act states that a DMR cannot prohibit a particular person from having contact with the relevant person. The DMR must act within the terms of the order of the court appointing them. The order sets out the decisions the DMR is authorised to take. The DMR must also follow the guiding principles. However, any person who has concerns about the safety of an adult can contact the HSE Adult Safeguarding Team in their area. (You will find further information on this website [www.safeguardingireland.org](http://www.safeguardingireland.org))

### Other

**Question:** What role will the DSS have regarding assisted dying declarations in the event of the passing of the Dying with Dignity Bill? If the answer is 'none', why not?

**Answer:**

The Dying with Dignity Bill as presently drafted does not specifically reference the 2015 Act or provide a role for the DSS. The DSS will review any further drafts and provide commentary as appropriate.