



seirbhís tacaíochta  
cinnteoireachta  
decision support service

# Decision Support Service

## Code of Practice for Decision-Making Assistants

This Code should be read in conjunction with the Assisted Decision-Making (Capacity) Act 2015. For the avoidance of doubt, in the event of any conflict or inconsistency, the legislative provisions prevail.

Draft

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At the request of Department of Justice and Equality, the National Disability Authority (NDA) drafted 11 non-healthcare codes of practice to support implementation of the Assisted Decision-Making (Capacity) Act 2015. It was agreed that each code would be developed to the stage of a second draft, informed by the NDA's own research and the input of relevant technical experts.

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# Introduction and overview

## 1.1 Introduction to decision-making assistants

Under the Assisted Decision-Making (Capacity) Act 2015, a person aged 18 or over who considers that their capacity is in question or may shortly be in question can choose somebody they know to assist them with decisions relating to personal welfare or property and affairs or both. A decision-making assistant could, for example, be a family member or carer.

A decision-making assistant is appointed under a decision-making assistance agreement which is notified to the Decision Support Service as provided for by regulation.

For the purposes of this code, the person making the appointment is referred to as the relevant person.

A decision-making assistant does not make decisions on behalf of, or jointly with, the relevant person. The decision-making assistant's role is to support the relevant person by obtaining and explaining necessary information and by assisting the relevant person in communicating their will and preference.

A relevant person may appoint more than one person to act as a decision-making assistant and may specify that the assistants should act jointly, or separately, or jointly for some matters and separately for others. The relevant person can also specify exceptions, exclusions, or conditions to the decisions to be the subject of the decision-making assistance agreement.

The Director of the Decision Support Service specifies the format of decision-making assistance agreements. A decision-making assistant is supervised in the performance of their functions by the Decision Support Service.

## 1.2 Purpose of this code of practice

The purpose of this code of practice is to guide you in meeting your statutory obligations as a decision-making assistant under the Assisted Decision-Making (Capacity) Act 2015. Good practice includes adhering to the guiding principles within the Act and working with other decision supporters and interveners.

As an intervener under the Act, a decision-making assistant should also follow the code of practice on supporting decision-making and assessing capacity which provides guidance on how the guiding principles may be applied and how to conduct a functional assessment of capacity as well as further information on supporting a relevant person in making a decision. That code of practice can be found on the Decision Support Service website [www.decisionsupportservice.ie](http://www.decisionsupportservice.ie)

### 1.3 About the Assisted Decision-Making (Capacity) Act 2015

The Assisted Decision-Making (Capacity) Act 2015 (the Act) was signed into law by the President on 30 December 2015, <and came into force on X date>. It is an important piece of reforming human rights law. The Act repealed two laws about decision-making capacity that had been in place since the 19th century. These are the Marriage of Lunatics Act 1811 (repealed in February 2021) and the Lunacy Regulation (Ireland) Act 1871 (repealed on commencement of the Act).

The Assisted Decision-Making (Capacity) Act 2015 established a modern legal framework to support decision-making by adults who may have difficulty making decisions without help. It includes three types of decision support arrangements for people who currently, or may shortly, face challenges when making certain decisions. It also provides for people who wish to plan for a time in the future when they might lose capacity, through a further two types of decision support arrangements.

Under the Act, a person over the age of 18 is always presumed to have capacity. In a situation where a person's capacity is questioned, capacity is assessed based on their ability to make a specific decision at a specific time. This is called the functional test of capacity. A person is considered to have the capacity to make a decision if they can:

- understand information relevant to the decision,
- remember the information long enough to make a choice,
- use or weigh up the information to make a decision, and
- communicate their decision (this may be with assistance).

The Act includes important safeguards requiring the Director of the Decision Support Service (DSS) to oversee and supervise decision support arrangements. This includes monitoring decision supporters, for example, through general and special visitors and through the review of annual reports that decision supporters are required to provide. The Act also requires the Director to receive and investigate complaints made about decision supporters and decision support arrangements.

### 1.4 Legal status of this code of practice

This code of practice is one of twelve codes provided for under section 103 of the Act. Section 103(2) states that the Director of the DSS may publish codes for the purposes of providing guidance to a broad range of people. Once published, those for whom the code is intended must have regard to its contents while performing any function under the Act to which that code refers, as set out in section 103(13). Section 103(12) of the Act provides for these codes to be admissible in legal proceedings. Under section 103(14), where it appears to a court, tribunal or other body conducting proceedings that a provision of or breach of a code is relevant to the question before it, it shall take the provision or breach of the code into account in deciding the question.

### 1.5 Terms and language used in this code

As far as possible, Plain English principles have been adhered to in the writing of this code. However, in order to accurately reflect the Act, it has sometimes been necessary to use terms and language that may not be familiar to readers. A full list of these terms can be found in the Glossary.

The term intervention is defined in a narrow way under the Act, limited to the actions of people defined in the Act as interveners and only when such actions are specifically identified within the Act as actions to be undertaken when acting as an intervener. The person who makes a decision-making assistance agreement is referred to in Part 3 of the Act as the appointer and elsewhere as the relevant person. Only the term relevant person is used in this code. Under section 8 of the Act, only these named interveners are obliged to apply the guiding principles (described in section 1.6). A decision-making assistant is an intervener. The person who makes a decision-making assistance agreement is referred to in Part 3 of the Act as the appointer and elsewhere as the relevant person. Only the term relevant person is used in this code.

### 1.6 Guiding principles

The Act is based on a set of guiding principles that are the foundation for interpreting and administering the Act. As an intervener, a decision-making assistant is obliged to give effect to these guiding principles.

There are nine guiding principles in the Act, each of which is summarised below. For further information including on how the guiding principles may be applied, please see the code of practice on supporting decision-making and assessing capacity.

- **Presume capacity:** Presume the relevant person has capacity to make a decision on the issue in question at the time the decision needs to be made.
- **Support the relevant person to make decisions:** Support the relevant person as much as possible to make their own decision on the issue in question before considering them unable to make this decision at the time the decision needs to be made.
- **Unwise decisions:** The fact that a decision appears unwise does not mean the person lacks the capacity to make it.
- **Do not intervene unless necessary:** Only intervene in respect of a relevant person where it is necessary to do so having regard to the individual circumstances of the relevant person.
- **Minimal intervention:** Any intervention in respect of a relevant person must:
  - take an approach that minimises restrictions of the person's rights and freedom of action,
  - have due regard for dignity, bodily integrity, privacy, autonomy and control over financial affairs and property,
  - be proportionate to the significance and urgency of the matter on which a decision is to be made, and
  - be as limited in duration as practicable having regard to the individual circumstances of the relevant person.

**Give effect to will and preferences:** In making an intervention in respect of the relevant person, the intervener must, as far as practicable and ascertainable:

- permit, encourage and facilitate the relevant person to participate, or to improve his or her ability to participate, as fully as possible in the intervention,
  - give effect to the past and present will and preferences of the relevant person,
  - take into account the beliefs and values of the relevant person, especially those in writing and any other factors which the relevant person would be likely to consider if they were able to do so,
  - consider the views of any person named by the relevant person as someone to be consulted on this or a similar issue, and any decision supporter for the relevant person,
  - act in good faith and for the benefit of the relevant person, and
  - consider all other circumstances of which they are aware, and which would be reasonably regarded as relevant.
- **Consider the views of others:** In making an intervention in respect of the relevant person, the intervener may consider the views of any person engaged in caring for, or with a bona fide interest in the welfare of the relevant person, or healthcare professionals.
  - **Consider the urgency of the intervention:** Before making an intervention in respect of the relevant person, consideration should be given to the likelihood of the relevant person regaining capacity to make a decision on the issue in question and the urgency of making the intervention prior to such time as the relevant person may regain capacity.
  - **Use of information:** In making an intervention in respect of the relevant person, the intervener must only obtain information that is reasonably required to make a decision on the issue in question; only use this information for the purposes of making that decision; and take reasonable steps to ensure this information is kept secure from unauthorised access, use or disclosure and is safely disposed of when the intervener believes it is no longer required.

### 1.7 Relevant decisions

The provisions of the Act apply to personal welfare decisions and to property and affairs decisions. Personal welfare decisions include decisions related to the relevant person's health and social care as well as to accommodation, employment, education and social activities. Property and affairs decisions include decisions related to the relevant person's property, business and/or money matters and the conduct of court proceedings.

### 1.8 Decision support arrangements

The Act names five decision support arrangements for people with decision-making capacity challenges who may need support in making certain decisions. These arrangements are based on the different levels of support that a person requires to make a specific decision at a specific time. Under these arrangements, a person can be appointed as a decision supporter. The type of support a decision supporter can provide depends on the decision support arrangement that is put in place.

There are three decision support arrangements for people who currently, or may shortly, face challenges making certain decisions:

- **Decision-making assistance agreement:** A person who requires support to make certain decisions can appoint a decision-making assistant to help them access information, understand their options, and communicate their decisions to others.
- **Co-decision-making agreement:** A person who requires more support than that provided by a decision-making assistance agreement can appoint a co-decision-maker to make certain decisions jointly with them.
- **Decision-making representation order:** If a person is unable to make certain decisions, the court may appoint a decision-making representative to make those decisions on their behalf. The court can also make a decision-making order to make a decision on behalf of the person.

There are two types of arrangements for people who wish to plan for a time in the future when they might lose decision-making capacity:

- **Advance healthcare directive:** A person can set out their wishes regarding healthcare treatment decisions, including treatment refusals, in case they are unable to make those decisions at some time in the future.
- **Enduring power of attorney:** A person can appoint someone (or multiple people) to make certain decisions about their welfare, property and money matters if they are unable to make those decisions for themselves at some time in the future.

The Act recognises that a person's decision support requirements may change over time. This tiered system of decision support arrangements allows for the amendment, cancellation or replacement of one type of arrangement with another, depending on the person's capacity and needs.

# 2

## Your functions and duties

### 2.1 Before undertaking your role as a decision-making assistant

#### 2.1.1 Understanding the decision-making assistance agreement

When making the decision-making assistance agreement, the relevant person will set out the decisions or areas with which you can assist them. The relevant person may give you a general authority to assist them or may only specify certain decisions for which they need your assistance. They may also specify any exceptions, exclusions or conditions relating to those decisions.

Following your appointment and following notification of the decision-making assistance agreement, you must read and understand the decision-making assistance agreement because it is the legal basis for actions you take as a decision-making assistant. You must always act within the scope of the decision-making assistance agreement. If you are uncertain about any aspect of the decision-making assistance agreement, you should contact the Decision Support Service.

You may need a copy of the decision-making assistance agreement to obtain information from relevant third parties and organisations as well as to communicate decisions to them. You will be able to access a copy of the decision-making assistance agreement through the DSS Online Portal.

#### 2.1.2 Payment and expenses

You are not entitled to claim any remuneration or compensation for your role and functions as a decision-making assistant.

You are not entitled to claim any expenses or reimbursement for your role and functions as a decision-making assistant.

### 2.2 Telling relevant people about your appointment

Following notification of the decision-making assistance agreement, as described in Chapter 3, you may need to contact people and organisations to advise them of the scope and nature of your appointment. This may include professionals and organisations such as the relevant person's bank, accountant, solicitor, general practitioner, other healthcare provider or residential care provider. You may also need to contact people who have an interest in the welfare of the relevant person to make them aware of your appointment.

When you contact service providers you should advise them of the areas or decisions for which the decision-making assistance agreement applies and where you will be providing support.

You should also advise service providers that the relevant person continues to have capacity, and that decisions will continue to be made by the relevant person and must be respected by service providers.

You should provide your current contact information to service providers. This will enable service providers to contact you about supporting decisions and consents of the relevant person, as required.

You may be asked to provide some people and organisations with a copy of the decision-making assistance agreement. However, you should only share this information where it is necessary in order for you to carry out your functions as set out in the decision-making assistance agreement.

### 2.3 Apply the guiding principles

The guiding principles must be applied in the performance of your duties as a decision-making assistant, for the duration of your appointment. The guiding principles include general principles as well as specific principles that you must follow when taking an action as a decision-making assistant. The sections below refer to the guiding principles as they relate to your functions and duties as a decision-making assistant.

A detailed guide to the guiding principles is set out in detail in the code of practice on supporting decision-making and assessing capacity that can be found on the Decision Support Service website [www.decisionsupportservice.ie](http://www.decisionsupportservice.ie).

### 2.4 General functions as a decision-making assistant

Your general functions as a decision-making assistant include supporting the relevant person so that they can participate in the decision-making process to the fullest extent possible. This includes obtaining and explaining relevant information and working with the relevant person to determine their will and preference in relation to a specific decision.

Your general functions as a decision-making assistant are described in section 14(1) of the Act and include:

- ascertaining the will and preferences of the relevant person in relation to the specific decision
- obtaining information relevant to a specific decision that needs to be made, including the relevant person's personal information
- explaining relevant information and considerations relating to a specific decision
- discussing the relevant person's options and likely consequences of different choices
- helping the relevant person to communicate their will and preference in relation to the specific decision
- making reasonable efforts to ensure that the decision is implemented.

The rest of this section advises you on how to carry out these general functions.

### 2.4.1 Ascertaining will and preferences

Having obtained relevant information and explained it to the relevant person, you can support them in considering and articulating their will and preferences in relation to the specific decision that needs to be made.

You may, for example, discuss previous decisions made by the relevant person and how they felt about the outcome of those decisions. You may also discuss the relevant person's values and beliefs and how they might align with the different options available to them.

You may need to consider whether the relevant person demonstrates consistency in their choice. You could do this by framing the options available to them in a different way, or by discussing different scenarios. If the relevant person expresses inconsistent or contradictory views on a matter, you must consider whether there is a logical reason for this that is consistent with their will and preference and values and beliefs.

Expressing a preference which appears to be irrational or unwise does not necessarily mean that the decision should not be made, or that the relevant person lacks capacity to make the decision. However, you should discuss the reasons for the stated preference with the relevant person to ensure that they have weighed up, understood and considered relevant information in expressing their preference.

You must ensure that the relevant person has sufficient time to consider and weigh up the options available to them in order to be able to express their will and preference.

### 2.4.2 Check whether this decision is within scope of the agreement

You must ensure that you have the appropriate authority to assist the relevant person. This is particularly important when seeking to obtain the relevant person's personal information or assisting the relevant person in communicating a decision. You should review the decision-making assistance agreement to ensure that the decision in question comes within the scope of your authority.

If you are unsure about whether a decision is within the scope of your authority, or an urgent decision arises which is not within the scope of your authority, you should contact the Decision Support Service.

### 2.4.3 Obtaining relevant information

As a decision-making assistant you should access information for the relevant person. This may include accessing the relevant person's personal information and records. The purpose of accessing this personal information could, for example, be to ensure that there is a full understanding of the relevant person's current circumstances and supports and of any unmet needs.

You should access and obtain personal information where this will allow the relevant person to consider key facts relevant to the decision and to weigh up that information when making a decision.

When you access the relevant person's personal information, you should do so with the agreement and consent of the relevant person. You should only access information that is needed for the relevant person to make a specific decision. See section 2.7 for further information on accessing information and use of information.

Accessing information also includes obtaining information relevant to the specific decision that needs to be made. You must ensure, as much as possible, that the relevant person has all the information they need to make an informed choice. This includes information on the different options available to them and the risks, benefits, and possible consequences of those options, including the option of doing nothing.

You may need to access information from third-party organisations, or support the relevant person in accessing specialist advice, such as from a healthcare professional or financial or legal advisor.

You may also need to get information or seek advice from the relevant person's family or friends or from other trusted persons. See section 2.4.5 for further information on seeking the views of others.

Where possible, you should seek to obtain information in an accessible format that is suitable for the relevant person's needs.

### **2.4.4 Explaining and considering relevant information**

As a decision-making assistant, you should support the relevant person by explaining all relevant information on the different options available to them and the risks and benefits of those different options. You must ensure, as much as possible, that the relevant person is supported in understanding the likely short-term and long-term consequences of the options available.

Some information relevant to the decision to be made may not be available in an accessible format appropriate to the relevant person's needs. This may include, for example, information on treatment options and medications, or complex information on financial and banking arrangements. As a decision-making assistant, you should explain information to the relevant person in the way they are best able to understand it and in the relevant person's preferred communication mode and format.

You should explain the facts and all options about a specific decision in a balanced way. You should explain the likely consequences and effects of each option on the relevant person and other important people in their life, including people involved in their care, where relevant.

It is not required that the relevant person has a detailed understanding of all aspects of a decision for the purpose of making that decision. For some decisions, it will be sufficient to provide the relevant person with a simple and broad explanation of relevant facts and options.

### 2.4.5 Consulting others for views

As part of the information you gather in order to assist the relevant person, you must consider whether there are any people you could consult that might provide you with useful information in relation to the specific decision at hand. You should discuss with the relevant person whether they would like you to consult any specific people.

You should consider whether there are people that could provide the relevant person with important information about the consequences of certain decisions, or who could provide expert advice to ensure you are acting for the benefit of the relevant person.

People you should consider consulting include:

- Any person engaged in caring for the relevant person
- Any person who has a true interest in the welfare of the relevant person
- Healthcare professionals
- Subject matter experts

If you consider that it would be beneficial to consult someone, you must ensure that you do so with the consent of the relevant person and that you do not disclose the relevant person's private information unless it is strictly necessary to do so in order to allow for appropriate consultation.

For major decisions, you should make a record of any person you consulted as part of the decision-making process, including why you consulted them and the information they gave to you.

### 2.4.6 Helping to communicate a decision

If you support the relevant person through the decision-making process and you ascertain their will and preference in relation to a specific decision, you are assisting the relevant person as much as possible to give effect to that decision.

As the decision-making assistant you must also support the relevant person in communicating that decision, where needed. This may include ensuring the relevant person has the appropriate tools and supports, including assistive technologies, to communicate the decision to others where required. You may also be required to communicate on behalf of the relevant person, if the relevant person requests and consents to this.

For major decisions, it may be necessary for you to be present with the relevant person to communicate the decision that has been made.

## 2.5 Obtaining specialist advice and services

You may support the relevant person in engaging professionals such as solicitors, accountants and regulated financial advisers to assist the relevant person to make a decision. This may include obtaining the specialist advice and/or services of healthcare professionals based on the needs of the relevant person.

You should consider obtaining specialist advice or services where such services are commonly required in order to support decision-making for the specific decisions included in the decision-making assistance agreement. This could include, for example, obtaining advice from a solicitor about the sale of a property or advice from a regulated financial advisor about completing an annual account or tax return.

The professional must be engaged, instructed, and paid by the relevant person. You are not authorised to engage services without the relevant person's agreement and consent.

When supporting the relevant person to engage professional services or specialist advice you must take reasonable steps to ensure you are obtaining value for money and that the relevant person is not incurring unnecessary costs.

Steps you may take to ensure value for money may include:

- Getting quotes from two or more persons
- Getting evidence of fair market value
- Obtaining evidence of an established relationship with the service provider and relevant person

### 2.6 Decisions which may involve a conflict of interest

You should exercise care and caution when supporting the relevant person in making decisions if there is a conflict between your personal interests and the interests of the relevant person. This could occur, for example, if you or a member of your family wishes to purchase a property belonging to the relevant person. This could also arise if the relevant person is considering awarding a contract to, or engaging the services of, a member of your family or a business in which you have an interest.

If the relevant person makes such a decision with your support, you may be required to demonstrate how the decision was made, the information and options explained to the relevant person and the steps taken to ascertain the relevant person's will and preference.

If you are unsure about what to do, you should follow the guiding principles and ensure you are acting in good faith for the benefit of the relevant person. You can contact the Decision Support Service who may advise you to seek legal advice and/or direct you to other sources of information.

### 2.7 Use of information

#### 2.7.1 Access to information

You must not obtain access to or use information of the relevant person if:

- it is not relevant to your role and functions as set out in the decision-making assistance agreement, or
- it is not necessary to allow you to fulfil your general functions and duties as a decision-making assistant, as set out in the Act and this Code.

### 2.7.2 Sharing information

You must ensure the relevant person's personal information is shared only with individuals or organisation who require such information for the benefit of the relevant person, or for legal reasons. The relevant person must agree to share the information.

### 2.7.3 Retention and storage of information

You must ensure you only keep personal information about the relevant person, that you have accessed and obtained during your role and functions as a decision-making assistant, for as long as it is needed during your appointment.

For as long as you keep information and records to support the relevant person, you must ensure it is held securely and cannot be accessed by any other person who is not expressly authorised.

If you store information or records on a shared device e.g., a personal computer, tablet or other device that is used by other members of your family, you must ensure you have sufficient security settings so that the information cannot be accessed by anyone other than you. If you store information or records electronically, you must also ensure that the information is backed up to prevent unintended loss.

### 2.7.4 Destruction or disposal of information

If your appointment ends for any reason, you must ensure that documentation concerning the relevant person is either returned to the relevant person or disposed of securely.

### 2.7.5 Loss, unauthorised use or sharing of information

A data breach occurs when there is any unauthorised or accidental disclosure, loss, or any other form of unauthorised, accidental, or unlawful collection, use, recording, storing, or distributing of personal data.

You must immediately report to the Decision Support Service any data breach in relation to the personal data of the relevant person that you have accessed and obtained during your appointment. This includes any personal data contained in records you have kept.

## 2.8 Maintaining a record-keeping system

As a decision-making assistant it is important for you to keep and maintain accurate records, as appropriate. You must keep a basic record of the major or important decisions that you assisted the relevant person with so that you have a history for the relevant person. The reason for this record-keeping is that you are accountable to the relevant person and the Decision Support Service for the actions you take as a decision-making assistant.

Keeping records will demonstrate how you were involved in the life of the relevant person and that the actions you took to assist the relevant person were in line with the decision-making assistance agreement and in compliance with this Code, the Act and the guiding principles.

You may be asked to provide your records on foot of a complaint made, an investigation initiated by the Decision Support Service, or as part of the general supervision activities and functions of the Decision Support Service.

### 2.9 Interacting with other decision supporters

As a decision-making assistant you may be required to interact with other decision supporters appointed by the relevant person, or by the court. If the relevant person has different decision supporters for different decisions, you will be required to ensure that you are acting consistently for the benefit of the relevant person.

When assisting and supporting the relevant person in making a decision, you may be required to obtain the views of other decision supporters. It may be appropriate for you to seek the views of another decision supporter where the decision may impact on the decisions with which the other decision supporter provides support or assistance. The other decision supporter may also provide you with information on the relevant person's past or present will, preferences, values, and beliefs.

### 2.10 Demonstrating your legal authority

Your authority as a decision-making assistant is based on the decision-making assistance agreement and the Act. The Decision Support Service will receive a copy of the decision-making assistance agreement and you will be able to download a copy through the DSS Online Portal.

If a third-party requires evidence of your authority you can provide them with a copy of the decision-making assistance agreement. You can also direct a third party to apply to the Decision Support Service to obtain a copy.

In addition, approved persons and organisations registered with the Decision Support Service will be able to verify the status of the decision-making assistance agreement through the DSS Online Portal

If, when you present evidence of your legal authority, a third party refuses to recognise your authority, you should, where the third party is an organisation, professional or service provider, seek to follow the complaints or escalation procedure that is operated by that third party. Alternatively, you can contact the Decision Support Service.

### 2.11 Assistance in court proceedings

Following your appointment, the court may request or allow you to assist the relevant person in a court application. This could happen where the relevant person is the subject of an application to determine or review their capacity to make specific decisions. Where the relevant person has no legal representation, the Act provides that a decision-making assistant may assist the relevant person in relation to the proceedings if the decision-making assistant is willing to do so.



## Interacting with the Decision Support Service

### 3.1 Registration with the Decision Support Service

You will be supervised by the Decision Support Service (DSS) during your appointment as a decision-making assistant.

If the relevant person does not already have an account on the DSS Online Portal, you are invited to assist the relevant person in setting one up as soon as possible following your appointment.

Having an account will enable the relevant person and you to access a copy of the decision-making assistance agreement if the relevant person has registered it with the DSS. It will also mean that you will be able to submit queries via the portal to the DSS and that the relevant person and you will be able to access guidance information.

If the relevant person and you are unable to set up or access the relevant person's account for any reason, you should contact the DSS.

### 3.2 Varying the decision-making agreement

Where the relevant person requires support in making decisions that were not included in the decision-making assistance agreement, you may be required to support the relevant person in making an application to vary the decision-making assistance agreement. A decision-making assistance agreement can be varied at any time, but any variation must be made in writing. The varied decision-making assistance agreement must be notified to the Decision Support Service.

### 3.3 Occasional reporting to the Decision Support Service

You are not required to prepare and submit regular reports to the Decision Support Service on the performance of your functions as a decision-making assistant.

However, the Decision Support Service may require you to provide a report on a specific matter or decision at any time to ensure you are acting in compliance with the decision-making assistance agreement, the Act and this Code.

### 3.4 Changes in capacity

The relevant person's capacity may change during your appointment as a decision-making assistant. It is important that you are aware of any such changes in capacity. As changes in capacity may be temporary or fluctuating, it is important that action is not taken pre-emptively. Some changes in capacity may not require an intervention. That would be the case, for example, if there is no relevant decision that needs to be made at the time.

### 3.4.1 Loss of capacity or diminishing capacity

A person may lose capacity to make certain decisions over time. This may be due to a degenerative or age-related condition. The relevant person may also be affected by a specific incident or condition during your appointment.

If you believe that the relevant person is losing capacity and requires support in an area not covered by the decision-making assistance agreement (and not covered by a co-decision-making agreement, enduring power of attorney or court order), you may need to take action. You may need to make an application with the relevant person to the Decision Support Service to vary the decision-making assistance agreement, or you may need to consider whether more support is needed.

If you believe the relevant person is losing capacity to make decisions, even with support, you may need to make an application to court for a declaration in relation to the relevant person's capacity.

### 3.4.2 Gaining capacity

A relevant person may gain capacity over time through being supported and involved in decision-making. A person may also regain capacity over time if their capacity was affected by a specific incident or temporary or fluctuating condition.

If you believe that the relevant person is gaining capacity in an area covered by the decision-making assistance agreement, you may need to make an application to the Decision Support Service to vary or revoke the decision-making assistance agreement.

### 3.4.3 Notifying changes in capacity

If you believe there has been a change in the relevant person's capacity that is likely to be sustained and is not a one-off occurrence, and that the change in capacity may affect the relevant person's ability to make necessary decisions, you should contact the Decision Support Service.

The Decision Support Service may advise you to obtain a formal capacity assessment from a medical practitioner, healthcare professional or other appropriate person, depending on the decision that needs to be made. The Decision Support Service may also send a special visitor to visit the relevant person.

## 3.5 Identifying and reporting concerns

### 3.5.1 Identify issues of concern and safeguarding concerns

During your appointment, you may identify or be alerted to safeguarding concerns relating to the relevant person, supporter, or other related person's safety, rights, or wellbeing. You have a duty to report any concerns you identify whether or not they directly relate to the scope and purpose of your role. Serious safeguarding concerns must be reported to the Decision Support Service immediately, in accordance with the DSS Safeguarding Policy. If you think a person is in immediate danger, or that an offence has occurred, you should immediately contact the Gardai who can investigate concerns.

### 3.5.2 Issues about the quality of a service

During your appointment you may have concerns in relation to the quality of service the relevant person is receiving from a care provider. This may arise from direct observation and/or through discussion with the relevant person or other concerned people. Before taking action, it is advisable to discuss the concern with the relevant person and if they are agreeable, you may then raise the issue informally with the service provider.

### 3.6 Complaints and investigations

Any person may make a complaint to the Decision Support Service about you in your role as a decision-making assistant for one or more of the following reasons:

- That you have acted, are acting, or are proposing to act outside the scope of your functions as specified in the decision-making assistance agreement
- That you are unable to perform your functions as specified in the decision-making assistance agreement
- That you used fraud, coercion, or undue pressure to induce the relevant person to enter into or vary or revoke the decision-making assistance agreement

Following receipt of the complaint, the Decision Support Service will consider whether the complaint is within its remit. If the complaint is within its remit, the Decision Support Service will consider whether informal resolution procedures may be appropriate or whether an investigation is required.

The Decision Support Service does not need to receive a complaint in order to carry out an investigation. The Decision Support Service may initiate its own investigation where a concern arises that you may have breached your functions or breached a provision of the Act.

Further information about the complaints procedure can be found in the Decision Support Service Complaints Policy.

### 3.7 Interacting with special visitors and general visitors

The Decision Support Service maintains a panel of general visitors and special visitors to assist with the supervision of decision supporters. The Decision Support Service may request a general visitor or special visitor to visit you, the relevant person and/or other persons to check that you are performing your functions in accordance with the Act and this Code.

A general visitor or special visitor may be asked to visit you as part of a general check-in following your appointment, or because of a complaint received or investigation initiated by the Decision Support Service.

The visitor may ask you for specific information, including documentation relating to specific decisions which you have assisted the relevant person with.

You must not obstruct a general visitor or special visitor in carrying out their visit. You have a duty to facilitate the visitor and their requests for information, insofar as is practicable and reasonable.



## Offences

The Act creates specific offences which are relevant to your role as a decision-making assistant. If the DSS becomes aware of a suspected offence, it will report its suspicions to the Gardaí for investigation.

### 4.1 Making a false statement

It is an offence to make a statement that you know to be false, for example in reports submitted. If you do so, you could face up to six months imprisonment or a fine of up to €5,000 or both, or up to two years imprisonment or a fine of up to €15,000, or both, depending on the type of conviction.

### 4.2 Fraud, coercion, or undue pressure

It is an offence to use fraud, coercion, or undue pressure to force a relevant person to make, vary or revoke a decision-making arrangement. If you do so, you could face up to 12 months imprisonment or a fine of up to €5,000 or both, or up to 5 years imprisonment or a fine of up to €50,000 or both, depending on the type of conviction.

### 4.3 Ill-treatment or neglect

It is an offence to ill-treat or neglect the relevant person. If you do so, you could face up to 12 months imprisonment or a fine of up to €5,000 or both, or up to 5 years imprisonment or a fine of up to €50,000 or both, depending on the type of conviction.

### 4.4 Not cooperating with an investigation or obstruction

It is an offence not to cooperate with an investigation carried out by the Director or to hinder or obstruct the Director, or a member of staff of the DSS in carrying out their functions. In such a case, you will be subject to a fine of up to €5,000.



## Ending your appointment

### 5.1 Resigning as a decision-making assistant

The procedures relating to revocation of a decision-making agreement, where either you or the relevant person do not wish the agreement to continue, are set out in regulations. If you are unable to continue in your role for any reason, you should inform the Decision Support Service.

### 5.2 Disqualification as a decision-making assistant

#### 5.2.1 Grounds for disqualification

You will be disqualified from acting in your role if, at any time following your appointment, you:

- Are convicted of an offence in relation to the relevant person or his or her child
- Are convicted of an offence in relation to the property of the relevant person or the property of the child of the relevant person
- Become the subject of a safety or barring order in relation to the relevant person or his or her child
- Become bankrupt, enter into a debt settlement arrangement, personal insolvency arrangement or are disqualified from being director or secretary of a company (unless the decision-making assistance agreement limits decisions to personal welfare matters only)
- Are convicted of fraud or dishonesty (unless the decision-making assistance agreement limits decisions to personal welfare matters only)
- Become the owner or registered provider of a residential facility, approved centre, or mental health facility where the relevant person resides, or you work for or live with such an owner or registered provider (there is an exception if you are the partner or an immediate family member of the relevant person)
- Are convicted of an offence under the Act
- Become a relevant person under any active decision-making support arrangement

Where you are in a relationship with the relevant person, you will be disqualified from acting in your role if, at any time following your appointment, you:

- Are the spouse or civil partner of the relevant person and the marriage or civil partnership is annulled or dissolved, or there is a judicial separation or written agreement to separate

- Are the spouse, civil partner or cohabitant of the relevant person and you have separated and have not lived together for a continuous twelve-month period. However, if the reason you are not living together is because one or both of you had to move to a health or residential facility or an institution (including prison), you will not be regarded as having separated.

### 5.2.2 Notifying your disqualification

You must notify the Decision Support Service if you become aware that you meet one or more of the disqualification grounds in Section 5.2.1. You will be disqualified from the date that any of these conditions are met.

### 5.3 Termination of your appointment

Your appointment may be terminated by the court following an application by the Decision Support Service.

The Decision Support Service may, following an investigation, on the basis of a complaint against you or on its own initiative, make an application to the court for a determination on whether you should continue to act in your role as a decision-making assistant.

Your appointment may be permanently terminated by the court, or may be temporarily suspended pending the outcome of an investigation.

### 5.4 Death of the relevant person

You must notify the Decision Support Service if you become aware of the death of the relevant person. You may be required to provide information to the executor of the relevant person's estate.

# Glossary

## **(the) Act**

The Assisted Decision-Making (Capacity) Act 2015

## **Advance healthcare directive**

An advance healthcare directive is an advance expression made by a person with decision-making capacity in accordance with the requirements of the Act of the person's will and preferences concerning healthcare treatment decisions that may arise if he or she subsequently lacks decision-making capacity.

## **Advance healthcare planning**

Advance healthcare planning is a process of discussion and reflection about the goals, values, will and preferences for healthcare treatment occurring in the context of an anticipated deterioration in the person's condition. Advance healthcare plans are generally not legally enforceable unless they are in the form of an advance healthcare directive.

## **Advocate**

A person nominated by an individual adult to speak on their behalf and represent their views. Advocacy comes in different forms including informal support and independent advocacy services. Advocacy should always be independent from the service providing care or support.

## **Another person**

A person, whom the court deems suitable, willing and able to assist the relevant person during the course of a Part 5 application hearing and who is chosen by the relevant person to assist him or her during the course of the hearing. Another person could be, for example, a trusted family member or friend or an independent advocate.

## **Applicability**

Applicability refers to whether something applies, in other words, is relevant or appropriate in a particular situation. When used in the context of a decision-support agreement, directive or order, it means checking that the relevant criteria are being met for a specific decision at a specific time.

## **Assessment of decision-making capacity**

An assessment of decision-making capacity is where a person's ability to understand the nature and consequences of a decision to be made by him or her is assessed in accordance with a functional test of capacity.

### **Attorney (2015 Act)**

An attorney is a person appointed by an adult who has decision-making capacity (referred to as a donor), in an enduring power of attorney, to make decisions on behalf of the donor when the donor no longer has the capacity to make those decisions for himself or herself. The enduring power of attorney must be registered with the Director of the Decision Support Service before the attorney has the authority to make relevant decisions on behalf of the donor.

### **Attorney (1996 Act)**

An enduring power of attorney created under the Powers of Attorney Act 1996 will continue to be governed by the rules and regulations provided for in the 1996 Act. On commencement of Part 7 of the 2015 Act, no further enduring powers of attorney can be created under the provisions of the 1996 Act. Part 7 of the Act provides for some oversight of attorneys under the 1996 Act by the Director of the Decision Support Service. The Director can investigate complaints against attorneys under the 1996 Act in a similar manner to an investigation of complaints against attorneys appointed under the 2015 Act.

### **Autonomy**

The right to make decisions and take actions that are in keeping with one's beliefs and values.

### **Basic care**

Basic care includes (but is not limited to) warmth, shelter, oral nutrition, oral hydration and hygiene measures but does not include artificial nutrition or artificial hydration.

### **Bona fide**

Bona fide means acting in good faith.

### **Capacity**

Capacity is understood to refer to decision-making capacity. In this context, capacity means a person's ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by them in the context of the available choices at the time.

### **Cardiopulmonary resuscitation (CPR)**

Cardiopulmonary resuscitation (CPR) is a treatment which attempts to restart a person's heart and maintain breathing where the person's heart or breathing has stopped. Cardiopulmonary resuscitation usually involves chest compressions, ventilation of the lungs, attempted defibrillation with electric shocks and the injection of drugs.

### Co-decision-maker

This is a person appointed by a relevant person to jointly make decisions with him or her. This may occur where the relevant person does not have the capacity to make decision(s) even with the aid of a decision-making assistant but does have the capacity to make decision(s) with the help of a co-decision-maker. A co-decision-maker must be appointed in a written and witnessed agreement. The co-decision-making agreement must be registered with the Director of the Decision Support Service in order to bring it into force.

### Cohabitant

A cohabitant is one of two adults who live together as a couple in an intimate and committed relationship, and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.

### Consent

Consent is the giving of permission or agreement for an intervention (including medical treatment), receipt or use of a service or participation in research following a process of communication in which the person has received sufficient information to enable them to understand the nature, potential risks and benefits of the proposed intervention or service. Consent is a legal requirement at common law and the requirement is supported by the Constitution of Ireland and the European Convention on Human Rights.

### Court

The circuit court has general jurisdiction under the Act, apart from certain matters reserved for the high court:

- Any decision regarding the donation of an organ from a living donor where the donor is a person who lacks capacity
- Where an application in connection with the withdrawal of life-sustaining treatment for a person who lacks capacity comes before the courts for adjudication.

### Court friend

A person appointed by the Director to assist the relevant person in relation to an application to the circuit court under Part 5 of the Act in respect of which the relevant person is the subject. A court friend is appointed by the Director when no other person is available, willing or suitable to assist the relevant person in relation to a Part 5 application.

### Decision-making assistant

A person appointed through a formal decision-making assistance agreement by a relevant person to support him or her in making a decision, for example, by obtaining information or personal records and by ensuring that the relevant person's decisions are implemented. The decision-making assistant will not make the decision on behalf of the person. Decision-making responsibility remains with the relevant person.

### Decision-making representation order

A court order appointing a decision-making representative to make one or more decisions for a person who has been declared to lack capacity.

### Decision-making representative

A person appointed by the court when the relevant person lacks capacity to make a decision. The scope of a decision-making representative's authority to make decisions depends on the court order, which may include the attachment of conditions relating to the making of decisions by the decision-making representative, or the period of time for which the order is to have effect.

### Decision supporter

Someone with legal authority specified in a decision-making support arrangement to support a relevant person to make their own decisions or to make the decisions on their behalf.

### Decision Support Service (DSS)

The Decision Support Service (DSS) is an office based within the Mental Health Commission established by the Act 2015. See also Director of the Decision Supporter Service.

### Designated healthcare representative

A person named by the directive-maker, in his or her advance healthcare directive, to exercise certain powers as set out in the advance healthcare directive.

### Directive-maker

The directive-maker is the person who makes the advance healthcare directive.

### Director of the Decision Support Service

The role of the Director of the Decision Support Service is to support decision-making by and for adults whose capacity is or may be in question. The statutory functions of the Director, as provided for in Part 9 of the Act, are:

- to provide information in relation to the various decision-making support options under the Act
- to provide guidance and information to organisations in the State in relation to their interaction with people who have decision-making capacity difficulties and those who have been appointed to assist in decision-making
- to identify and make recommendations for changes of practices in organisations where the practices may prevent a person with decision-making capacity difficulties from exercising his or her capacity under the Act

- to supervise and handle complaints about those who are appointed to assist persons in making decisions, decision-making arrangements and any person who used fraud, coercion or undue pressure to induce a person to make, vary or revoke a decision-making arrangement
- to maintain registers of co-decision-making agreements, decision-making representation orders and enduring powers of attorney created under the Act
- to maintain panels of suitable persons to act as decision-making representatives, court friends, general visitors and special visitors
- to approve, draft and consult on codes of practice under the Act
- to act as the central authority for the purposes of the operation of the Hague Convention on the International Protection of Adults.

### Donor

The person who creates an enduring power of attorney and who appoints an attorney to make decisions on his or her behalf when the donor no longer has the decision-making capacity to make those decisions.

Do not attempt cardiopulmonary resuscitation order

This is a written order stating that cardiopulmonary resuscitation should not be attempted if a person suffers a cardiac or respiratory arrest.

### Enduring power of attorney

This is a legal agreement made in accordance with the requirements of the Act whereby a donor gives authority to an attorney to act on their behalf in the event that the donor lacks decision-making capacity at any time in the future. An enduring power of attorney created under the Powers of Attorney Act 1996 will remain valid after commencement of the 2015 Act. An enduring power of attorney created after commencement of the 2015 Act will be subject to the 2015 Act.

### Financial professionals and financial service providers

All persons who provide one or more financial products or services, whether regulated or unregulated including those operating in the State and those outside the State who provide a financial service to consumers in the State.

### Functional assessment of decision-making capacity

Assessing decision-making capacity on a functional basis means that the emphasis is on the capacity to make a specific decision, at the time the decision has to be made (issue-specific and time-specific):

- Issue-specific: Decision-making capacity is assessed only in relation to the decision in question. A judgement that someone lacks decision-making capacity in relation to one issue does not have a bearing on whether decision-making capacity is present in relation to another issue.

- Time-specific: Decision-making capacity is assessed only at the time in question. A judgement that someone lacks decision-making capacity at one time does not have a bearing on whether decision-making capacity in relation to that issue is present at another time.
- Functional decision-making capacity focuses on how a person makes a decision and not the nature or wisdom of that decision.

### General practitioner

A medical doctor based in the community who provides initial, on-going and continuous personal medical care, with responsibility for integrating care, treating people with acute, minor or chronic illnesses, and referring those with serious conditions to a hospital when specialist treatment is likely to be necessary and be of benefit.

### General visitor

A person appointed by the Director of the Decision Support Service to assist the Director in performing his or her supervisory functions as defined in the Act. A general visitor may be directed by the Director to visit a relevant person, decision-making supporters and any other person who may be able to assist with information, and to submit a report to the Director following such visits. A general visitor may also be directed by the Director to obtain copies of any health, personal welfare or financial records held in relation to a relevant person.

### Healthcare professionals

Healthcare professionals refers to the various health and social care staff who support people while they are receiving healthcare treatment. The term covers all health and social care professions whether or not the profession is a designated profession within section 3 of the Health and Social Care Professional Act 2005.

### Healthcare treatment

Healthcare treatment means an intervention that is or may be done for a therapeutic, preventative, diagnostic, palliative or other purpose related to the physical or mental health of the person and includes life-sustaining treatment.

### Independent advocate

A person who works with and for a relevant person, around a specific issue or issues which have arisen, where they have difficulty voicing their will and preferences. An Independent Advocate is employed or engaged by an advocacy organisation, is free from conflict of interest and is independent of family and service providers.

### Instrument/legal instrument

This is the document in which the decision-support arrangement (such as an enduring power of attorney) is created.

### Interveners

The Act provides for legally recognised persons referred to as interveners to support a person to maximise their decision-making capacity. As defined in the Act, an intervener can be:

- (a) The circuit court or high court
- (b) A decision-making assistant, co-decision-maker, decision-making representative, attorney or designated healthcare representative
- (c) The Director of the Decision Support Service
- (d) A special visitor or a general visitor
- (e) A healthcare professional
- (f) Court friend

### Intervention

This is any action taken, direction given, or any order made in respect of a relevant person under the Act. The intervention may be made by the courts, by a healthcare professional, or any person under the formal agreements set out in the Act and should reflect the level of support the relevant person requires.

### Jointly

When used in reference to decision supporters, this means that all the appointed interveners must work together to make joint relevant decisions and where appropriate each person must sign any relevant documents. A decision made by one person alone will not be valid. A document signed by one person only will not be valid.

### Jointly and severally

When used in reference to decision supporters, this means that any one of the appointed interveners may make a relevant decision or where appropriate sign a relevant document. Signatures from other decision supporters are not required to make the document valid.

### Key worker

The staff member in the service who carries particular responsibility for the person with a disability, liaises directly with them, coordinates their services and supports, and acts as a resource person.

### Legal practitioner

A practicing barrister or a practicing solicitor.

### Life-sustaining treatment

This is any clinically appropriate medical treatment, technology, procedure or medication that is administered to forestall the moment of death. These treatments may include, but are not limited to, mechanical ventilation, artificial hydration and nutrition, cardiopulmonary resuscitation (CPR), haemodialysis, chemotherapy, or certain medications including antibiotics although antibiotics are not routinely considered to be life-sustaining treatment.

### Multidisciplinary team

A group of healthcare professionals who are members of different disciplines (e.g., psychiatrists, social workers etc.) each of whom provide specific services to the relevant person.

### Palliative care

Palliative care aims to improve the quality of life of a person and their family facing the problems associated with life-threatening illness, through the prevention and relief of suffering by means of early identification and assessment and treatment of pain and other problems, physical, psychosocial and spiritual. The aim of palliative care is to enhance quality of life and, wherever possible, to positively influence the course of illness. Palliative care also extends support to families to help them cope with their family member's illness and their own experience of grief and loss.

### Palliative care approach

This is the application of palliative care principles by healthcare professionals who do not solely work in specialist palliative care.

### Personal welfare decisions

These include decisions concerning accommodation, employment, education, training, social activities, social services, healthcare and well-being.

### Presumption of decision-making capacity

This means that it must be presumed that a person has capacity in respect of a specific decision unless otherwise shown. The onus of proving that a person lacks capacity to make a decision is on the person who is questioning a relevant person's ability to make a particular decision.

### Property and affairs decisions

These include decisions concerning property (i.e., acquisition, sale, lease and mortgage), business, contracts, debts, taxes, benefits and finances.

### Registered medical practitioner

A person who holds a basic medical qualification, and who is registered under section 46, 47, 48, 49 or 50 of the Medical Practitioners Act 2007.

### Relevant decision

A decision made, or to be made, which is the subject of a decision-making assistance agreement, co-decision-making agreement, a decision-making order, decision-making representation order, enduring power of attorney or advance healthcare directive.

### Relevant person

This is a person:

- whose decision-making capacity is in question or may shortly be in question in respect of one or more matters (i.e., a person who may have difficulty reaching a decision without the support of someone), or
- who lacks decision-making capacity in respect of one or more matters (i.e., a person who may be able to make some decisions but not others), or
- whose decision-making capacity is in question or may shortly be in question in respect of one or more matters and who lacks decision-making capacity at the same time but in respect of different matters (this is a combination of the above).

### Revocation

This means the cancellation of a legal document.,

### Special visitor

A person appointed by the Director of the Decision Support Service to assist the Director in carrying out his or her functions. A special visitor may be directed by the Director to visit a relevant person, decision-making supporters and any other person who may be able to provide relevant information and carry out assessments of decision-making capacity in relation to a relevant decision. A special visitor submits a report to the Director following such visits. A special visitor may also be directed by the Director to obtain copies of any health, personal welfare or financial record held in relation to a relevant person.

### Suitable person

This refers to the eligibility of a person to become a decision-supporter or other intervener, through meeting the specific criteria set out in the Act.

### Supporting decision-making

This refers to any process in which an individual is supported, through whatever means necessary, in making a particular decision.

### Trust corporation

A category of companies empowered to undertake trust business, provided certain other conditions are met which are contained in section 30 of the Succession Act 1965. A trust corporation is deemed a person for the purposes of an enduring power of attorney in the Act but may only be given authority in relation to property and affairs decisions.

### Unwise decision

This is a decision which may be perceived as being ill-advised or risky. This may reflect a difference in values, goals and preferences between the relevant person and the person interacting with them. The decision may have adverse consequences for the relevant person.

### Validity

This is the state of being officially legally binding or acceptable.

### Wardship

This was the process whereby an application was made to the court to hold a formal inquiry into the question of a person's decision-making capacity. If, following such an inquiry, a person was declared by the court to be of unsound mind and incapable of managing their personal affairs and property then they were described as a ward of court and the court assumed overall control of the person's affairs and had to make decisions on the person's behalf in their best interests. The wardship process operated under the following legislative provisions: Courts (Supplemental Provisions) Act 1961, section 9; Rules of the Superior Courts, Order 67; Circuit Court Rules, Order 47; and the Lunacy Regulations (Ireland) Act 1871. The Assisted Decision-Making (Capacity) Act 2015 provides for people who were brought into wardship under the above-mentioned legislative provisions to have their capacity by the wardship court and to be assessed and to be provided with supports under the new statutory framework as appropriate.

### Witness

A witness is a person who signs one of the following legal instruments: an advance healthcare directive; a co-decision-making agreement; or an enduring power of attorney, in accordance with the requirements of the Act, so as to attest that the instrument was signed by the person making it. Alternatively, a witness could refer to a person whom the Director of the Decision Support Service has called to provide information as part of an investigation.



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