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## Lengthy process:



**Disability rights activists** campaigned for reform of the law since the early 2000s with the focus on supporting people with intellectual disabilities to make decisions and to provide arrangements for persons who may lacked decision-making capacity. Consultation papers were published by the **Law Reform Commission** in 2003 and 2005 on how to protect vulnerable people and respect their human rights.



In 2007, the Irish Government approved proposals for legislation which aimed to facilitate the process of ratifying the **UN CRPD**. This meant that Ireland needed to amend its existing legal framework on capacity to provide appropriate and effective safeguards.



**Public consultation and hearings** on the draft legislation were held. Concerns were expressed about the focus on substitute decision-making, minimal safeguards when it came to informal decision-making, and the use of the term 'best interests.'



The Government revised the proposed legislation and published the Assisted Decision-Making (Capacity) Bill 2013. This Bill was one of the most debated pieces of legislation in Ireland, with fourteen parliamentary debates taking place with multiple revised schemes of the Bill being published. **It was finally passed into law in December 2015 and commenced in April 2023.**

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## Assisted Decision-Making (Capacity) Act 2015 ('ADMCA')

- The central tenet of Article 12 of the UN CRPD is to ensure that all adults are provided with the opportunity and the support to **participate as equal citizens in all decisions that affect their lives**, including their health and social care.
- Requires States to respect the 'inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons.'
- The new law in Ireland is described as a seismic cultural shift away from 'a paternalistic and best interests' approach to 'a rights-based approach of **choice, control and consent**'.
- It requires education and training, time and resources, skills and competencies, leadership and collaboration.

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## Note : declarations and reservations to Art 12 CRPD

- Ireland recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Ireland declares its understanding that the **Convention permits supported and substitute decision-making arrangements** which provide for decisions to be made on behalf of a person, where such arrangements are necessary, in accordance with the law, and subject to appropriate and effective safeguards. To the extent that Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, **Ireland reserved the right to permit such arrangements in appropriate circumstances.**
- The rationale for this was to ensure that difficulties were not encountered in the operation of the ADMCA which allows for the appointment of a decision-making representative to take specified decisions on behalf of a person and for the taking of certain decisions by a court on behalf of a person in limited circumstances.
- In a further declaration, Ireland recognises that all people with disabilities enjoy the right to liberty and security of the person, and a right to respect for physical and mental integrity on an equal basis with others. Ireland declared its understanding that the **Convention allows for compulsory care or treatment of persons, including measures to treat mental disorders**, when circumstances render treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards.
- The rationale behind this declaration was to preserve the insanity defence under criminal law, and to preserve the ability of the state to detain persons with mental disorders differently to those without mental disorders.

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# Who does the Act in Ireland apply to?



- Based on the numbers of adults with established diagnoses of intellectual disability, acquired brain injury, enduring mental health difficulties and age-related cognitive impairment, it has been estimated that approximately **200,000 adults** living in Ireland could have decision-making capacity difficulties.
- Whether any of those people come within the ambit of the Act will depend on their individual circumstances. **No distinction is drawn between people based on age, disability, health condition, behaviour...etc. All adults are entitled to the same presumption of capacity.**
- Any of us, at any time, could find ourselves incapable of making decisions in relation to our healthcare treatment, where we want to live, or our finances. This could be due to illness, an accident or a disability and can be permanent or temporary. This truly is **an Act for everyone.**

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## What has changed since April 2023?

The will and preferences of people with impaired decision-making capacity are at the heart of decision-making.



Key role reversal for professionals from capacity assessor (objective judge) to capacity enhancer (engager and facilitator)

Supporting patients to make decisions for themselves must be an essential part of clinical practice.

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## Guiding Principles in the ADMCA

- **Presumption** of capacity for all adults
- **Functional test** of capacity - time and issue specific
- Duty to **maximise capacity** and **support decision-making**
- **Respect** people's choices even if considered unwise
- **Give effect to** will & preferences, **consider** beliefs & values (even if person lacks capacity)
- **Consult** with legally recognised persons nominated by the person (or the court if person lacks capacity)
- Apply **least restrictive** interventions
- Act in **good faith** and for the benefit of person

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## Supporting decision-making is crucial:

- A person shall not be considered as unable to make a decision unless **all practicable steps have been taken**, without success, to help him or her to do so.
- There is **no 'one size-fits all' way** to support every person who may have capacity issues to make their own decision. What supporting someone to make their own decision looks like in practice will depend on the following factors:
  - the **nature and complexity** of the health or social care decision to be made by the person
  - the person's **ability to understand** the information about the decision,
  - the person's **ability to consider the decision and understand the consequences** or other options available
  - the person's **ability to communicate** their will and preference and decision
  - whether the person is **used to making their own decisions**, and
  - the **time available** to the person to make the decision

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## Other key aspects of the new Act

- **Refusals of care** must be respected even if it goes against medical advice or will have fatal outcome
- **Wardship** system abolished (in existence since 1871), alternative orders must be made for ongoing temporary detention or other support arrangements
- Extension of **Powers of Attorneys** to healthcare
- Recognition of **advance healthcare directives**
- Continuum of decision-making **support options** to respond to a diversity of support needs

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## Legally appointed supporters/ decision-makers

Assisted decision-maker

Co-decision-maker

Decision-making representative

Enduring Power of Attorney

Designated Healthcare Representative

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<https://www.decisionsupportservice.ie/>

- DSS is a new service that was established under the ADMCA. Although it is part of the Mental Health Commission, it has a new and separate role.
- The DSS provides an essential service for people who face difficulties exercising their decision-making capacity. This may include people with an intellectual disability, acquired brain injury, mental health difficulty or dementia.
- **The DSS will help to protect and uphold people's rights to make their own decisions about their personal welfare, property and affairs. The role of the DSS is to:**
  - regulate and register decision support arrangements
  - supervise the actions of decision supporters
  - maintain panels of people who will act as decision-making representatives, special and general visitors.
  - investigate complaints made under the ADMCA
  - promote awareness and provide information about the ADMCA

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## Application of ADMCA to mental health

- The ADMCA **applies equally to people with mental disorders** being treated in the community or in approved mental health centres.
- If a person who is an outpatient or a voluntary inpatient has a decision-making supporter, they must make decisions in accordance with the person's will and preference, so the **decision is the same as if they had made it themselves.**
- None of the support options enable a person to be compelled to accept treatment unless they meet the criteria for involuntary admission and are deemed to lack capacity. So, **the Act facilitates the treatment of compliant people who lack capacity but does not authorise coercion.**

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## Involuntary admission – Mental Health Act 2001

- There are two grounds for involuntary admission to an approved centre –
  - (i) where there is a serious likelihood of the person causing immediate and serious harm to himself or herself or to other persons (the 'Risk' ground)
  - (ii) where the judgment of the person is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in their condition or would prevent the administration of appropriate treatment (the 'Illness/ Therapeutic' ground)
- If a person is involuntarily admitted, **consent** to treatment is ordinarily required **except** if the person **lacks capacity** and the psychiatrist feels **treatment is necessary** to safeguard the life and health of the person.
- Further legislative **alignment of assisted decision-making law and mental health law** is expected soon.

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## Conclusion:

- The Act will be a **challenge** for the health service to implement. It is a fundamental change to existing practices and to a lot of existing thinking, and this change will not happen overnight.
- The aim is to make people's experiences of the health service better by ensuring that they receive a more **person-centred service**, where their wishes and preferences are truly listened to, where all treatment options are presented to them in a manner that they can understand and where they are supported to make the decision that is right for them.
- It is supported by all professional organisations and regulatory bodies. The hope is that this new culture becomes embedded into practice so that it just becomes '**the way we do things around here**'.



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