





Capacity  **RONAN  
DALY  
JERMYN**

- Current system uses “all or nothing” approach
- Does not allow for fluctuations in capacity
- No statutory definition of capacity for these purposes
- Oxford Dictionary defines capacity as “mental power, faculty or talent”
- Mental power equated to self determination



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Assisted Decision Making (Capacity) Bill 2013


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Capacity  **RONAN  
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- Recognised human right to self determine
- UN Convention on the Rights of Persons with Disabilities (UNCRPD) – the existing body of all human rights should apply equally to persons with disabilities
- Ireland’s current domestic law are deficient
- Hence the need for the Assisted Decision Making (Capacity) Bill 2013
- One of the main focus of the Bill is to support people in making their own decisions – Self determine

Assisted Decision Making (Capacity) Bill 2013  **RONAN  
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- First presented to the Dail on 15 July 2013
- Referred to a Select Committee on Justice, Defence and Equality
- Hoped to appear before Committee in May 2015

New approach to capacity  **RONAN  
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- Formally recognises that all persons will be presumed to have capacity unless the contrary is shown
- Irish Medical Council’s Professional Conduct and Ethics – “Every adult patient is presumed to have capacity about their own healthcare”

## Statutory Definition



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- 2013 Bill defines capacity in Section 3(2) as follows

“A person lacks capacity to make a decision if he or she is unable

- (a) to understand the information relevant to the decision
- (b) to retain that information
- (c) to use or weigh that information as part of a process of making the decision
- (d) to communicate his or her decision...”

## Current Decision Making Models



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### Enduring Power of Attorney (EPA)

- Prior to any incapacity, a person nominates an Attorney to legally make decision on their behalf in the event that they are no longer able to do so
- When a question of loss of capacity arises, Attorney applies to the Wards of Court office to register the EPA
- Only once the EPA is registered does the Attorney have legal standing to make decisions
- An EPA can limit decisions to be made by the attorney. Always read the EPA before relying on decisions from the Attorney
- An EPA cannot deal with healthcare and medical decisions

## New approach to capacity



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- New legal definition adopts a Functional Approach to assessing capacity
- It is time specific and issue specific
- Allows for fluctuations in capacity
- Looks at individuality of the person

## Current Decision Making Mechanisms



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### Wardship

- Arises where no arrangement has been made by the person before losing capacity
- An application is made to the President of the High Court
- Once President is satisfied that the person is of unsound mind and incapable of managing own affairs, he will appoint a Committee
- A Committee can only do what s/he is authorised by the Court to do and has no authority or power to act on his own behalf
- Instructions should always be taken from a Committee on foot of a Court Order

## New approach to capacity



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- Proposed changes will provide more certainty to third parties relying on decisions from a person with questioned capacity
- Next of kin or family members have **NO** decision making authority
- Irish Medical Council recognises this in the medical ethics guidelines by endorsing consultation with family members but there is no requirement to act on those instructions.

## Wardship



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- If medical treatment is needed for which a Consent is necessary, approval by the President of the High Court is needed.
- Exception is emergency situations
- Wardship is based on 140 year old law which defines persons with mental health problems or intellectual disabilities as “lunatics”
- An unwieldy, costly and outdated system
- New law intends to abolish Wardship and discharge all Wards

## New Decision Making Models



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### Decision Making Assistance Agreements

- A person appoints a Decision Making Assistant (DMA)
- Agreements sets out what decisions the DMA will assist with
- The DMA does not make decisions for the person
- Full decision making authority remains with the person
- Authority to access documents about the person in order to assist with decisions
- Mechanism to simply assist with decision and assist with communicating them

## New Decision Making Models



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### Advance Healthcare Directives

- Document which sets out a person's instructions on future medical treatment, including the refusal of medical treatment up to and including life sustaining treatment
- This is the first time these directives will be put on a legally binding platform
- Likely to be significant amendments to the Bill on this area before it becomes law

## New Decision Making Models



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### Co-Decision Making Agreements

- Arrangement where a person is assisted to make co-decisions with a person
- A Co-Decision Maker is appointed (CDM)
- A person can decide to make the Agreement or another can apply to the Court to have an agreement made
- Decision to be made jointly are set out in the agreement
- CDM cannot make decisions on their own
- CDM must agree with decisions made by person unless he believes that the decisions are unreasonable and like to cause harm

## Office of the Public Guardian



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- Office of the Public Guardian tasked to oversee this area
- All agreements provided for in the Bill will be registered with the Office
- Reporting obligations for all assistants, co-decision makers, representatives and attorneys
- An independent office with supervisory powers to protect the vulnerable person

## New Decision Making Models



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### Decision Making Representative

- Person is deemed to have fully lost capacity
- Application made to the High Court
- If agreed by the High Court that there has been a loss of capacity a Decision Making Representative (DMR) will be appointed
- DMR will not have the authority to make decisions but will act at all times on the Order of the Court