“Getting ready for Advance Healthcare Directives under the Assisted Decision-Making (Capacity) Act 2015” Webinar 29th March 2023

Q&A Transcript

1. **Just to say that 'best interests' will no longer exist once the Assisted Decision-Making (Capacity) Act 2015 comes into effect and decisions should be made in accordance with the persons will and preference.**

It is correct that the 2015 Act makes no reference to best interests. There are detailed guiding principles which include the principle of giving effect as far as practicable to a person's past and present will and preferences.

2. **Can the speaker comment on the role of the Designated Healthcare Representative in the context of Mental Health Tribunal hearings?**

Decision supporters, insofar as they are involved in care, must only deal with items within their remit. Decision-making assistants, co-decision-makers, and decision-making representatives might seek to attend mental health tribunals. Chairpersons decide if this is appropriate, noting: (a) The precise role the decision-making supporter seeks to play (e.g., as a support for the patient), (b) The views of the patient (possibly via their legal representative), and (c) That patients do not make treatment decisions in tribunals, and should not be pressured to do so, so decision-maker supporters are not needed for that purpose in tribunals.

An Advance Healthcare Directive is relevant only to treatment but not to admission decisions. So, while a Designated Healthcare Representative may well be there as a supporter, an Advance Healthcare Directive which for example refuses admission will be outside of its remit and so will not be legally binding in that context. The Designated Healthcare Representative will be very important in respect of treatment decisions for someone who has been admitted under the Mental Health Act.

3. **If a person who lacks capacity, is a ward of court and currently has a committee appointed, how will this change going forward?**

All wards of courts will be reviewed by the High Court. This process will start once the Act is commenced. This process will take three years. All wards will be discharged from wardship. Some wards may transition into new arrangements under the Assisted Decision Making (Capacity) Act 2015. All wards have been contacted by case workers in the Office of the Wards of Court.

Further details on this process is available here:

https://www.courts.ie/assisted-decision-making-circuit-court

https://www.courts.ie/assisted-decision-making-capacity-act

4. **Is it reasonable to store Advance Healthcare Directive on digital systems such as ipims in the absence of electronic healthcare records?**

   Advance Healthcare Directive should be stored in relevant medical records, however formulated, so staff can access them.

5. **Provided the Advance Healthcare Directive meets the minimum requirements set out in the Act, does it matter if the Advance Healthcare Directive was made before the**

commencement of the Act in terms of its applicability or the ability of a medical professional to rely on it?

No. If valid and applicable, respect the directive. (Even pre-Assisted Decision Making, medical council guidance would have required this).

6. **Is an electronic copy of the Advance Healthcare Directive sufficient evidence of its existence in order for the medical professional to rely on it?**

There is no restriction here, once the Advance Healthcare Directive is valid, applicable and clear. This really speaks to the usefulness of appointing a Designated Healthcare Representative to assist with interpretation.

7. **Is a Designated Healthcare Representative the same as enduring power of attorney in relation to health care?**

Designated Healthcare Representatives and Enduring Powers of Attorney are different. Enduring Powers of Attorney will not cover health care decisions. The Designated Healthcare Representative will assist in interpreting an Advance Healthcare Directive but will not make decisions apart from assisting with the Advance Healthcare Directive.

Like an attorney, the Designated Healthcare Representative takes their authority from the document. The Advance Healthcare Directive-making process has fewer procedural formalities and documentary requirements than an Enduring Power of Attorney and there is no direct supervision by the Decision Support Service. You don't need to have a Designated Healthcare Representative for an Advance Healthcare Directive to be valid.

8. **If a person has dementia and he is deemed not to have capacity as per GP as well as not open to supports in the home, yet the Solicitor is not in agreement with same, what is the position of the HSE personnel/family who are trying to support the person's safety?**

This is not quite within the remit of the 2015 Act and probably maps more onto good care provision. That said, any interventions under the 2015 Act will need to prioritise the will and preferences of the person, and at present the 2015 Act does not permit coercion or acts against the persons wishes. Supporting safety in these circumstances is challenging and not addressed explicitly in the 2015 Act.

9. **Can I ask if a person presently in a care facility be with capacity be encouraged to make an Advance Healthcare Directive and if so, who should be involved is supporting them?**

This will depend on the person's situation and is not specified in the 2015 Act. Usually, someone's family might help out, or possibly staff. In these situations, the persons could usefully appoint a Designated Healthcare Representative in their Advance Healthcare Directive, to assist with interpretation. That person should ideally be involved form the start. Also, it is helpful if the person discusses future treatment with staff likely to be involved, if possible.

10. **Is there any guidance for staff who may be supporting people in disability/autism services where it may be difficult to determine an individual's understanding?**

There is general guidance about the 2015 Act from the HSE here: https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/assisted-decision-making-capacity-act/. There is general guidance from the Decision Support Service here: https://decisionsupportservice.ie/. I am not aware of specific guidance for autism services.

11. **How much of the Irish population is using Advance Healthcare Directives currently?**

Impossible to know but in my experience written directives uncommon but increasing number of advance plans in recent years.

12. **Can you clarify that Enduring Power of Attorney can only address decision-making with regards to finances, property & ordinary wills drafted by client/patient?**

Enduring Power of Attorney can address a variety of 'personal welfare' and 'property and affairs' issues - not sure what is meant by ordinary wills.

13. **Has the recording from the webinar from last week on 21st March 2023 being released yet?**

Yes, you can find the recording from the webinar on "Getting ready for the commencement of the Assisted Decision-Making (Capacity) Act 2015" which we hosted on 21st March at https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/assisted-decision-making-capacity-act/webinars/getting-ready-for.html. All our webinars are available on www.assisteddecisionmaking.ie

14. **How are we going to be implementing patient/public education of these directives to try and minimise confusion and inevitably aversion to making the Advance Healthcare Directive due to perceived struggle?**

This will be a big task. The HSE material is publicly available: https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/assisted-decision-making-capacity-act/. But experience shows that it is individual interactions with patients that will move this forward the most; i.e., conversations between health professionals and patients on a one-to-one basis. The material on the Decision Support Service website is also publicly oriented, available and excellent: https://www.decisionsupportservice.ie/

15. **Can staff of residents living in long term care help with the Advance Healthcare Directive?**

Absolutely - provided that (with support) the person making the Advance Healthcare Directive has capacity to do so.

16. **How will this Act be regulated will it be regulated by HIQA? The reason I ask is HIQA is currently not regulating home support services?**

HIQA is not given specific regulatory authority by the Assisted Decision-Making (Capacity) Act 2015.

17. **If a person requests treatments such as intramuscular antipsychotics or electroconvulsive therapy in their Advance Healthcare Directive does this have any influence on the need to use the protections of the mental health act should the person require this treatment and lack capacity at the time they need it?**

This is a complex question. The first point is that requests in Advance Healthcare Directives are non-binding but must be taken into account. But that does not impact on use of the Mental Health Act 2001 or change thresholds. Second, it is worth noting that the criteria for 'mental disorder' under the Mental Health Act 2001 are not capacity criteria. I hope this helps.

18. **In my clinical experience, there are patients who fulfil section 3(1)(b)(i&ii) of the Mental Health Act who if left untreated my become so unwell they will then also fulfil section 3(1)(a) risk criterion to self/others. If this patient has an Advance Healthcare Directive refusing all antipsychotic and antidepressant treatment that is valid and applicable, they cannot be treated in an inpatient setting under the Mental Health Act section 3(1)(b) and may well be discharged into the community where their risk to self/others may**

subsequently escalate due to untreated mental illness. Are there any concerns relating to their right to health, right to life, and the right to life of members of the public due to the escalation from 3(1)(b) to 3(1)(a) in the community?

The distinction that the amended 2015 Act draws between Sections 3(1)(a) and (b) in terms of Advance Healthcare Directive is interesting, so your point is certainly valid. It is worth noting, though, that it is unlikely that an Advance Healthcare Directive refusing all antipsychotic and antidepressant treatment would be sufficiently specific to be valid. But if the person is detained solely under 3(1)(b), and has an Advance Healthcare Directive refusing relevant treatment, they would likely fail to meet that criterion (i.e., they would not benefit sufficiently from detention), and so would need to be discharged, until it was reasonably felt they met the 3(1)(a) criterion. Alternatively, if they remained detained on the basis of some other benefit, and if it came to a renewal order, that order might be made under Section 3(1)(a) or both criteria.

19. **If a person lacks capacity and all reasonable steps to include them in the decision-making process and there is no Advance Healthcare Directive, would this then be "best interest"?**

At this point, decisions are made in accordance with the principles set out in section 8 of the Act - 'best interests' is not one of these principles. Instead, the focus is on will and preferences of the person. In some circumstances, depending on how complex or contentious the decision is, it may be necessary to refer the matter to court for the appointment of a Decision-Making Representative.

20. **If the patient made the Advance Healthcare Directive based on a disease with no known cause but later a doctor did get the diagnosis after the patient lost the ability to make the decision, is there any law that can protect that doctor if he didn't follow the Advance Healthcare Directive and saved the patient's life?**

If circumstances change substantially after the Advance Healthcare Directive is made, then it is a circumstance that was not envisaged in the Advance Healthcare Directive. Once its interpretation is reasonable and informed by will and preferences, the healthcare professional's actions are reasonable. It is very helpful if the person appoints a Designated Healthcare Representative to assist with interpreting the Advance Healthcare Directive if it remains relevant. If circumstances change utterly, then its applicability is diminished.

21. **What happens to existing Enduring Power of Attorneys after the commencement of the Act?**

They continue exactly as before.

22. **On a practical level for practitioners - when deciding if an Advance Healthcare Directive is valid do you advise a check list for doctors?**

The Code of Practice on Advance Healthcare Directives will provide this detail. This will be published before commencement of the Act.