Assisted Decision-Making (Capacity) Act 2015 and the Decision Support Service:

Overview of Key Reforms and role of the Decision Support Service

Presentation to Sage Advocacy Erasmus Event – Human Rights & Older Age – Where Rhetoric meets Reality.

16 November 2022

Patsy Fitzsimons

Head of Complaints and Investigations

seirbhís tacaíochta cinnteoireachta
decision support service

Assisted Decision-Making (Capacity) Act 2015

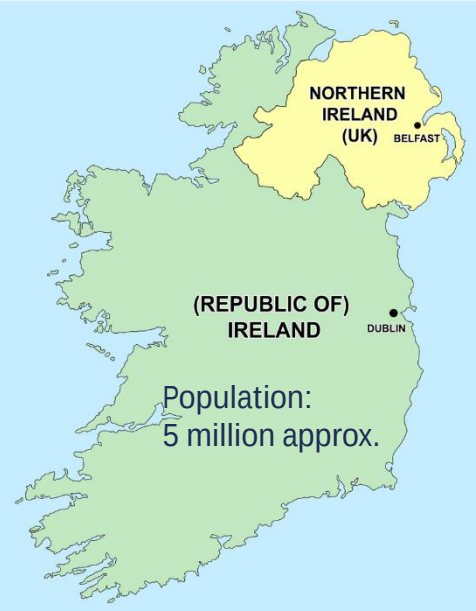
- The Act is about how we support people to make their own decisions independently
- The Act provides formal supports where necessary
- The Act applies to people who are over 18
- The planned date for commencement is early 2023
- The Department of Children, Equality, Disability, Integration and Youth is responsible for the Act.

- *An Act to provide for the reform of the law relating to persons who require or may require assistance in exercising their decision-making, whether immediately or in the future.*

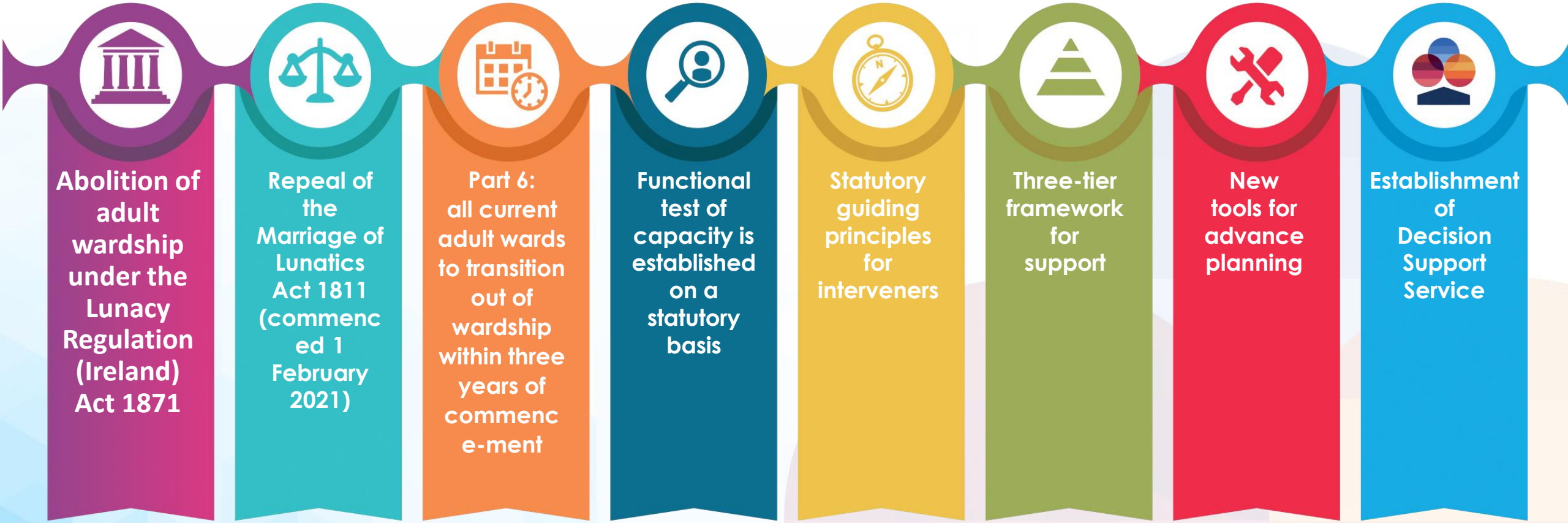
Current statutory arrangements in Ireland

- Wards of court system; plenary guardianship:
  - Lunacy Regulation (Ireland)Act 1871
  - *A person of unsound mind… incapable of managing person or property*
  - approximately 2,200 adult wards at present

- Enduring power of attorney (EPA)
  - Powers of Attorney Act 1996
  - donor may appoint an attorney to take decisions in relation financial affairs or personal care
  - registered in the event that the donor becomes 'mentally incapable'
  - 1, 338 EPAs registered in 2020



Key Reforms under the Assisted Decision-Making (Capacity) Act 2015



Statutory functional assessment of capacity

- Section 3: A person's capacity shall be assessed on the basis of his or her ability to understand at the time that a decision is to be made, the nature and consequences of the decision in the context of available choices

- Contrast with 'person of unsound mind' in wardship

- No diagnostic criteria or threshold

- A person lacks capacity if unable to:
  - understand;
  - retain;
  - weigh up information;
  - communicate a decision, with appropriate assistance if necessary

- Already applies in common law: Fitzpatrick & Anor -v- K. & Anor, [2008] and policy including HSE National Consent Policy, Irish Medical Council Guidelines

Guiding Principles

Including:

- presumption of capacity; already the standard at common law
- persons must be supported to make own decisions as far as possible
- an unwise decision does not mean that the person lacks capacity
- minimal restriction of rights and freedom of action
- dignity, bodily integrity, privacy, autonomy, right to control over own financial affairs and property
- permit, encourage and facilitate participation in intervention
- give effect to as far as practicable to past and present **will and preferences**
- act in good faith and for the benefit of the person
- **no reference to 'best interests'**
- ethos of United Nations Convention on Rights of Persons with Disabilities, ratified by Ireland in 2018:
  - Article 12: *persons with disabilities enjoy legal capacity on an equal basis others in all aspects of life*

Definitions

Section 2:

a) A person whose capacity is in question or may shortly be in question in respect of one or more than one matter

b) A person who lacks capacity in respect of one or more than one matter, or

c) A person who falls within paragraphs a) and b) at the same time but in respect of different matters

- Decision-making assistant (DMA)
- Co-decision-maker (CDM)
- Decision-making representative (DMR)
- Attorney appointed under an enduring power of attorney (EPA)
- Designated healthcare representative (DHR) appointed under an advance healthcare directive (AHD).

Categories of Decisions

Property and affairs, including:

- Custody, control and management of property
- Sale, exchange, mortgage, gift etc. of property
- Acquisition of property
- Carrying on of business
- Discharging debts and liabilities
- Providing for other persons
- Conduct of court proceedings
- Applying for benefits

Personal Welfare

- Accommodation
- Education and training
- Social Services
- Healthcare
- "…other matters relating to the Relevant Person's wellbeing"

New framework of 'decision supporters'

3 **Decision-Making Representative (DMR)**

2 **Co-Decision-Maker (CDM)**

1 **Decision-Making Assistant (DMA)**

- There are eligibility criteria
- All must apply the guiding principles

1. Decision-Making Assistant

- Lowest and least formal tier
- Appointed by a person who considers that his or her capacity is or may shortly be in question
- Decisions are set out in a decision-making assistance agreement
- Functions of decision-making assistant:
  - assist to obtain relevant information about these decisions
  - explain relevant information
  - help to communicate will and preferences
  - assist person to make and express decisions
  - help to ensure that decisions are implemented
- **The person still makes the decision**

2. Co-Decision-Maker

- Mid-tier, more formal support
- Appointed by a person ('appointer') who considers that his or her capacity is or may shortly be in question
- Co-decision-maker is a relative or friend in a pre-existing relationship of trust
- Section 19: functions of co-decision-maker:
  - assist appointer to obtain and understand information
  - ascertain and help appointer to communicate will and preferences
  - make a relevant decision **jointly**
  - make reasonable efforts to ensure that decision is implemented
- Co-decision-making agreement is registered within the DSS with supporting documents including capacity statement
- Co-decision-maker submits regular reports and is supervised by the DSS

3. Decision-Making Representative

- **Court appointment**
- Begins with an application to the Circuit Court by a person with bona fide interest in the welfare of the relevant person
- Court rules will set out the forms and documents required
- Legal Aid will be available
- The court may make a declaration about the person's capacity; this is kept under review
- The court may make the decision for the person
- The court may appoint a decision-making representative
- The court must consider the person's will and preferences

Decision-Making Representation Order

- Court shall have regard to matters including:
  - will and preferences of the relevant person
  - desirability of preserving family relationships
  - any conflict of interest
  - complexity of financial affairs and expertise available to DMR
- Where no suitable, willing DMR, court shall seek 2 or more nominations from the DSS panel and may make appointment
- Decision-making representation order is limited in time and scope
- Court may appoint more than one DMR in relation to different decisions

Functions of Decision-making Representative

Authority is based on court order; restrictions apply

Ascertain and assist with communication of will and preferences

Act as agent, make decisions on behalf of the relevant person

CDM is supervised by the DSS and submits reports

Restrictions : DMR may not make decisions about life-sustaining treatment

Planning ahead: enduring power of attorney

Donor appoints a trusted person to act as attorney in future if necessary

Formal capacity statements are required at time of making and when activated

Attorney appointed under the 2015 Act is supervised by the DSS and submits reports

EPA already made under the Powers of Attorney Act 1996 is still valid – not supervised by the DSS but subject to our complaints process.
Under Amendment Bill an EPA may not include treatment decisions

Advance Planning: Advance Healthcare Directive (AHD)

- To enable person to be treated according to will and preferences
- To provide healthcare professionals with information about treatment choices
- May appoint a **designated healthcare representative** as agent
- Refusal of treatment as effective as if made contemporaneously
- May extend to life sustaining treatment; must be explicit
- May not include refusal of basic care
- Minister for Health *may* make regulations to provide for a register of AHDs;
- An AHD does not require registration to be valid

Advance Healthcare Directives

Distinction between request and refusal of treatment

Where there is doubt, court may determine validity and applicability

Protections from civil and criminal liability

Existing criminal law unaffected

Exception where directive-maker is detained under Mental Health Act **(note amendments)**

‘Next of Kin’: what does it really mean?

Incorrect belief that the next of kin already has a legally recognised role as decision-maker

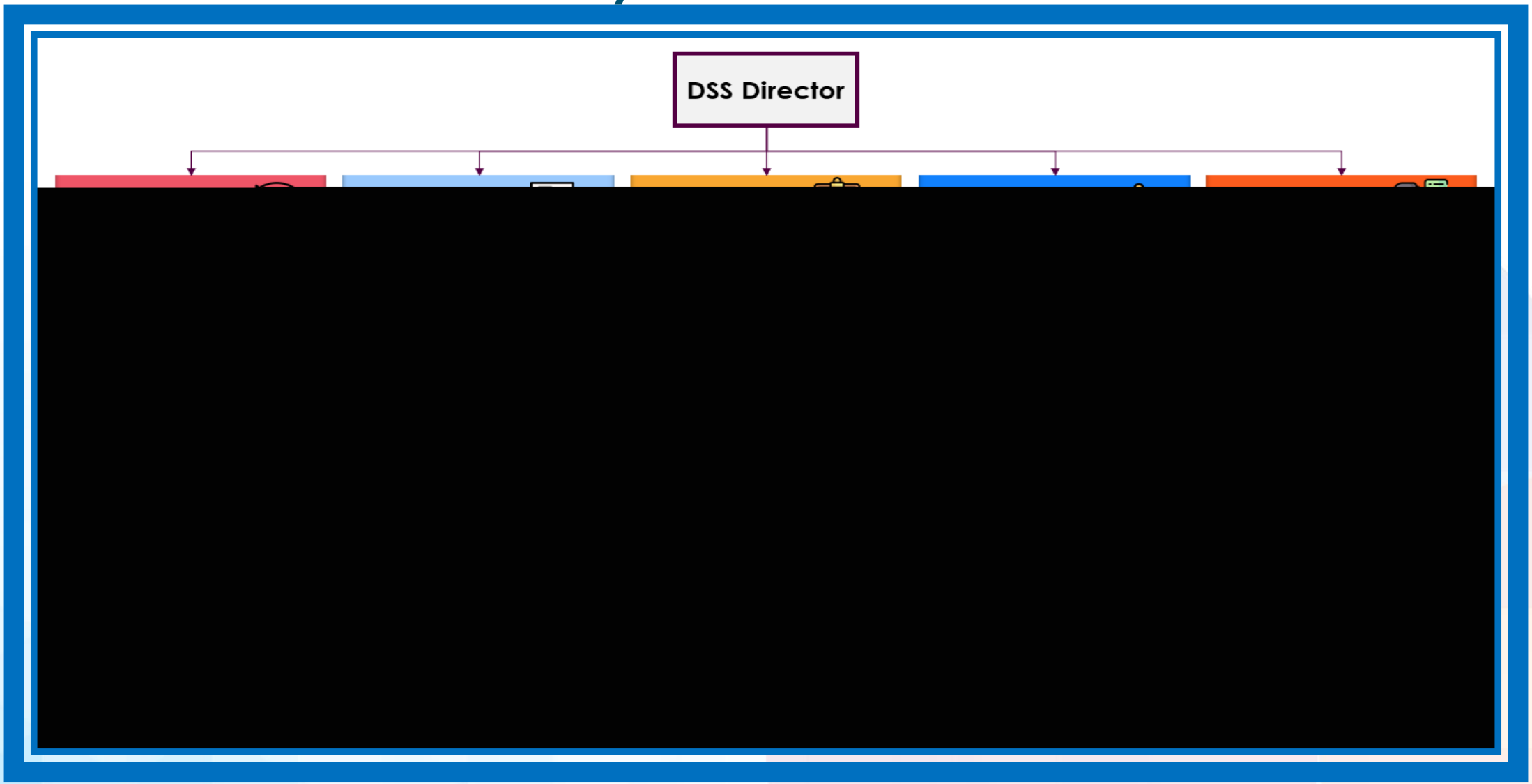
57% of survey respondents believed that next of kin can make healthcare decisions and consent to treatment

32% believed that next of kin can access bank accounts and manage assets

- Sage Advocacy, Next of Kin Survey 2018

Decision Support Service (DSS)

Functions include:

- Promote awareness & confidence
  Provide information to relevant persons & decision supporters
- Information & guidance to bodies on interactions with relevant persons & decision supporters
- Recommend organisational change to promote the exercise of capacity
- Maintain registers & supervise arrangements under the Act
- Investigate complaints about decision support arrangements
- Maintain panels of persons to carry out certain roles under the Act
- Publish codes of practice to provide guidance
- Central Authority for Hague Convention on International Protection of Adults
- Report and make recommend-ations to Ministers

Summary of the DSS Divisions