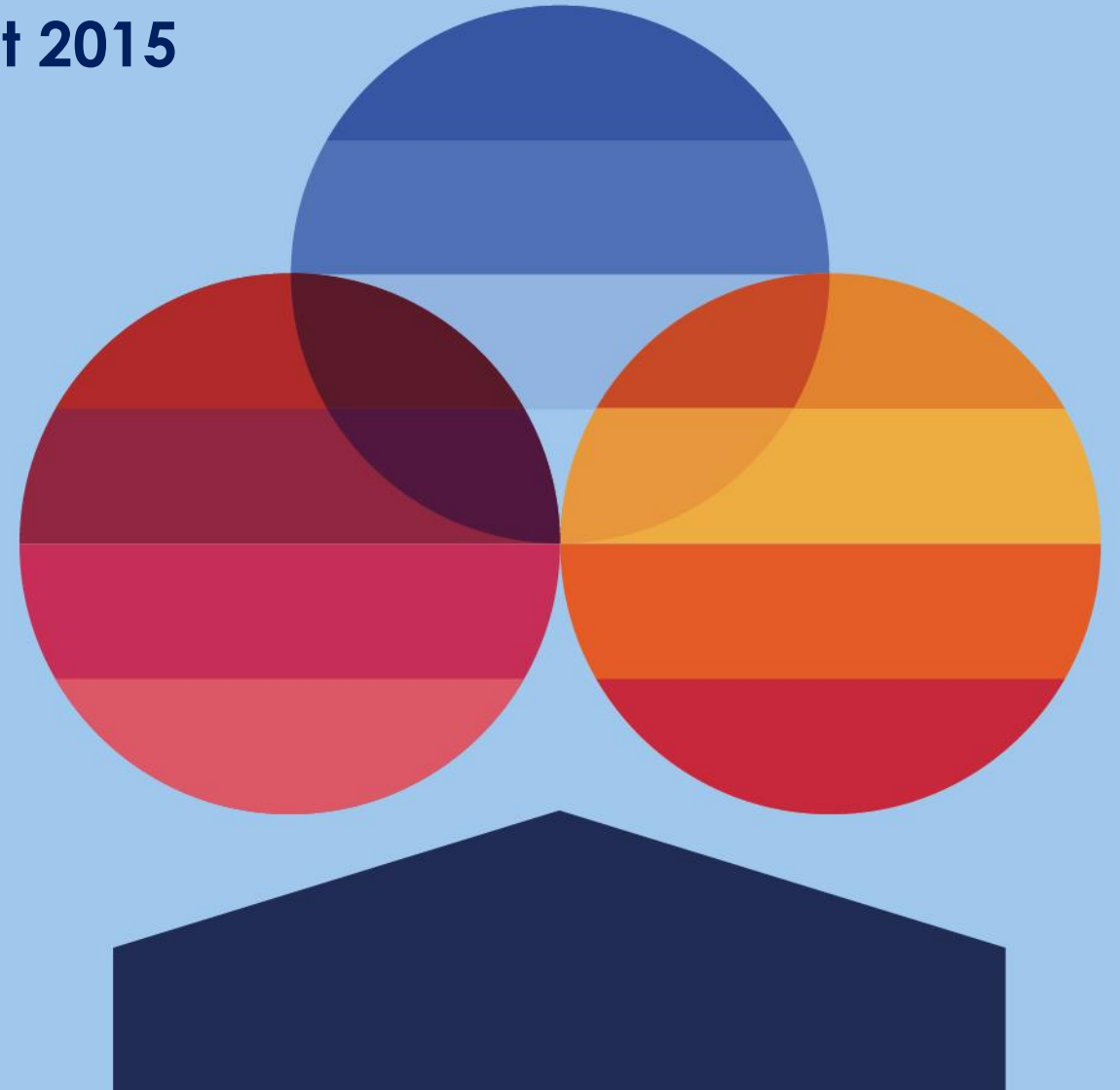


Assisted Decision-Making (Capacity) Act 2015 & Decision Support Service:

Overview and Updates

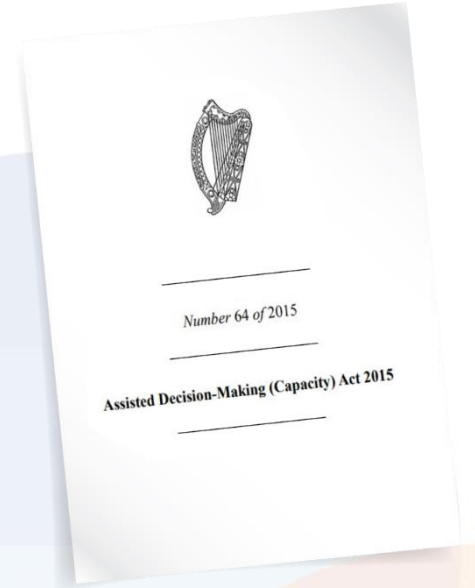
Banking Workshop
9.11.23

Áine Flynn
Director of the Decision Support Service



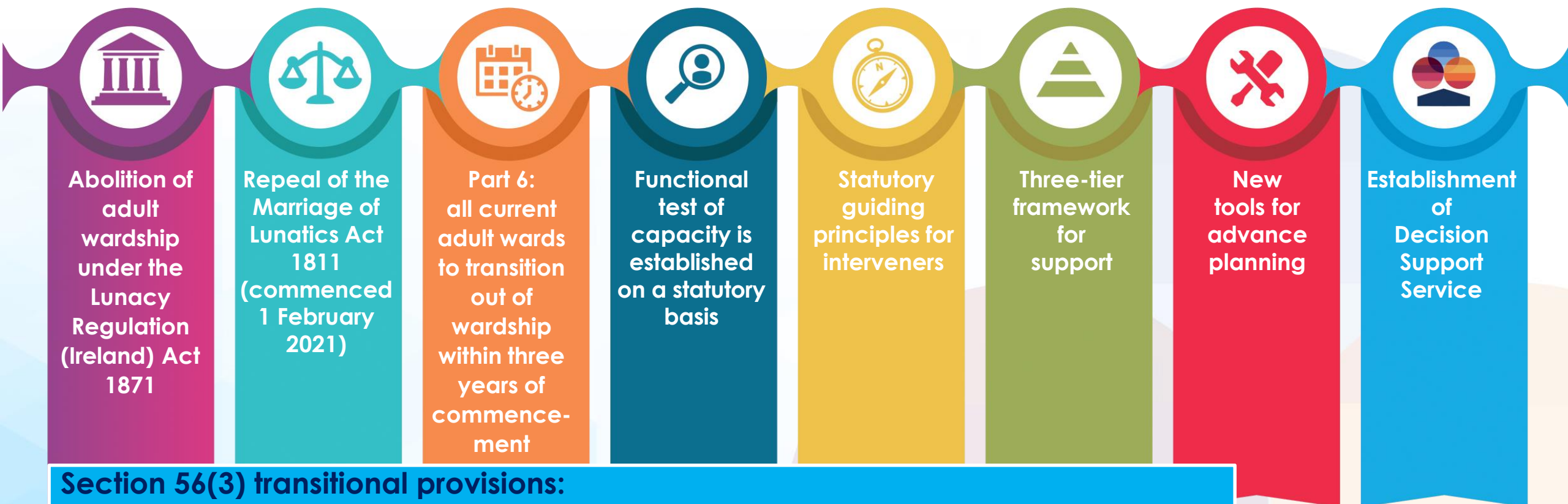
Assisted Decision-Making (Capacity) Act 2015

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



- Enacted 30 December 2015
- Assisted Decision-Making (Capacity) (Amendment) Act 2022 signed into law 17 December 2022
- Act as amended commenced 26 April 2023

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



Section 56(3) transitional provisions:
wardship proceedings initiated before commencement have not lapsed but intended wards can instead transfer to supports under the 2015 Act

Statutory functional assessment of capacity

- 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. **No reference to 'mental capacity'**
- With exceptions for formal capacity statements required for co-decision-making agreements, enduring powers of attorney and court applications the Act is not prescriptive or exhaustive about who may assess capacity
- A person lacks capacity if unable to:
 - understand;
 - retain;
 - weigh up information;
 - communicate a decision, with appropriate assistance if necessary
- This was already the common law approach before the 2015 Act



Guiding Principles for Interveners

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 with others in all aspects of life*



Decisions that may be supported

Property and affairs, including:

- Buying and selling property
- Applying for benefits
- Carrying on a business
- Paying debt and liabilities
- Providing for other persons
- Court and other tribunal proceedings

Personal Welfare, including

- Accommodation
- Education and training
- Social services
- Healthcare
- Participation in healthcare/social care research, not including clinical trials
- “...other matters relating to the relevant person’s wellbeing”

New support framework - to be availed of as needed

3

Decision-Making Representative
Court appointed, Part 5 or Part 6 of Act
Registered with & supervised by DSS



2

Co-Decision-Maker
Registered with DSS
Supervised by DSS



1

Decision-Making Assistant
Notified to the DSS



- Eligibility criteria apply
- All 'supporters' must apply the guiding principles

1. Decision-making assistant (DMA)



- Lowest and least formal tier
- Appointed by a person who considers that his or her capacity is or may shortly be in question
- Relevant decisions are set out in a decision-making assistance agreement
- Functions of decision-making assistant:
 - assist to obtain and explain relevant information
 - ascertain and help appointer to communicate will and preferences
 - assist appointer to make and express decisions
 - help to ensure that decisions implemented
- **The appointer still makes the decision**
- No capacity assessment required
- Notified to but not formally registered with the Decision Support Service
- DSS can verify that decision-making assistance agreement is in place
- Not subject to DSS supervision but subject to complaints process

2. Co-decision-maker



- Person ('appointer') who considers that his or her capacity is or may shortly be in question may appoint a relative or friend in a pre-existing relationship of trust as co-decision-maker
- Section 19: functions of co-decision-maker:
 - advise, by helping 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 by medical or other healthcare professional prescribed by regulations
- No provision for gifts
- Relevant decisions taken otherwise than jointly are null and void
- Co-decision-making agreement is kept under review by DSS
- Co-decision-maker keeps records and submits annual reports to the DSS; non-compliance may lead to removal.

3. Decision- making representative



Court appointment under:

- Part 5: application by *any person with a bona fide interest in the welfare of the relevant person* or
- Part 6: review and discharge of adult wards of court by the wardship court
- Court rules set out procedure and documentation.
- The court may make a declaration about the person's capacity; this declaration is kept under review by the court
- The court may make the decision for the person
- The court may appoint a decision-making representative

Decision-making representation order (DMRO)

- Court has regard to matters including:
 - will and preferences of the relevant person
 - desirability of preserving family relationships
 - any conflict of interest
 - complexity of decisions and expertise available to DMR
- Where no suitable, willing DMR, court shall seek nominations from the DSS panel
- Court may include limitations and conditions in DMRO as appropriate
- Court may appoint more than one DMR to take different decisions or to take decisions together



**Court notifies the DSS of decision-making representation order.
DSS holds register of orders**

Functions of decision-making representative (DMR)

Authority is based on court order; restrictions apply

Ascertain and assist with communication of will and preferences

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

DMR keeps accounts and reports to DSS; DSS may apply to court if non-compliant

Restrictions apply:

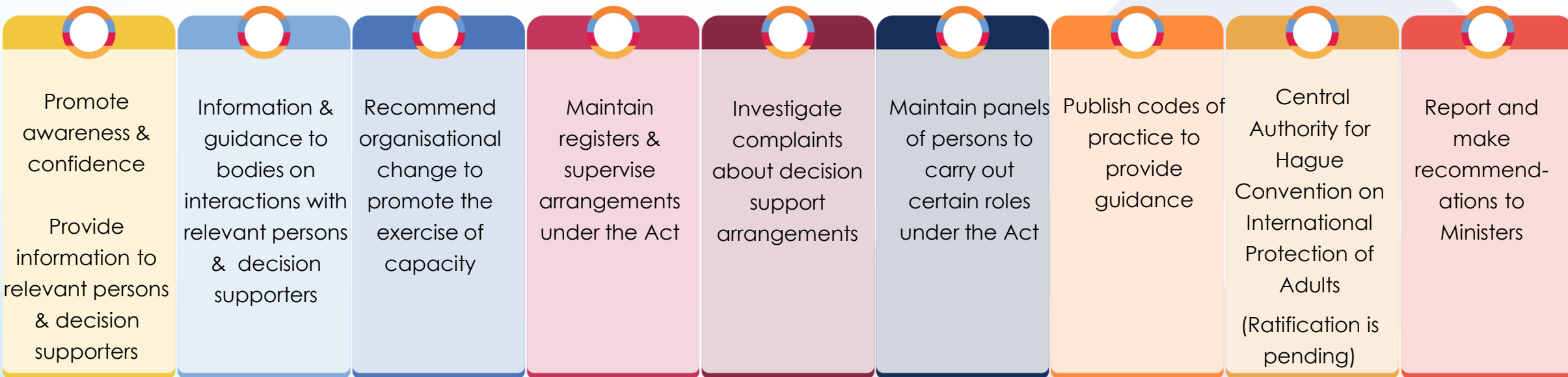
- gifts must be explicitly provided for in the court order
- DMR requires approval of the court to act in relation to trusts

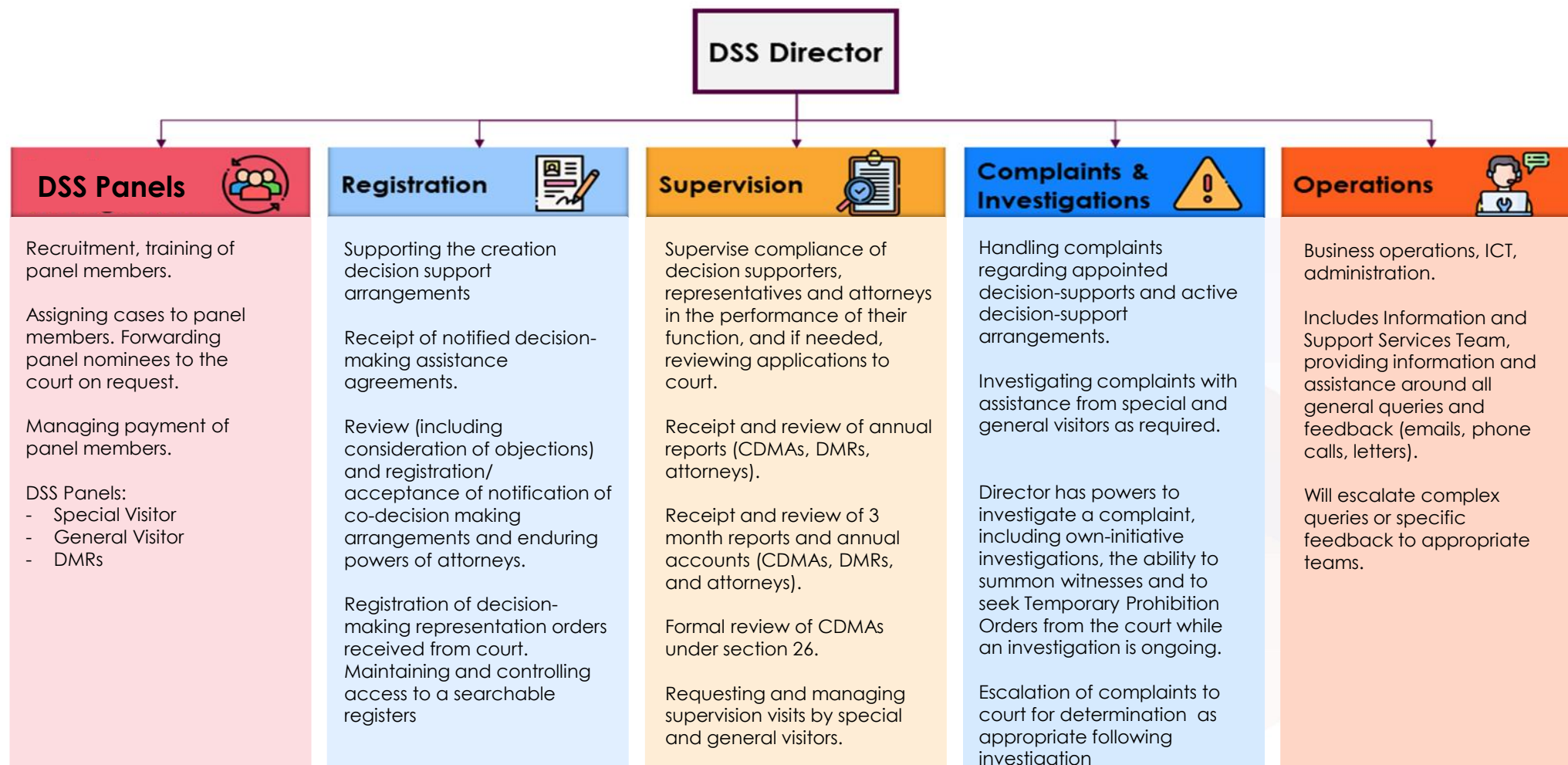
Decision Support Service (DSS)

Director of the DSS is appointed by the MHC to carry out functions conferred on the Director by the 2015 Act

Director is an intervener and must apply the guiding principles

Functions include:





Planning ahead: revised enduring powers of attorney

- EPA under Powers of Attorney Act 1996 is still valid
- **Court** will continue to hold register of 1996 Act EPAs
- DSS may investigate a complaint against a 1996 Act attorney
- EPA made after 26 April 2023 is subject to 2015 Act processes
- New two-stage process:
 - **registration** with the DSS at time of creation
 - **notification** to DSS by attorney for EPA to come into effect
- Section 58A: Director has published requirements for trust corporation acting as attorney
- Attorney under 2015 Act is supervised by and submits reports to the DSS. Non-compliance may lead to removal.

Register searches

- DSS register of arrangements is searchable by:
 - bodies and classes of persons as prescribed by regulation (S.I. 206/2023) and approved following DSS process
 - *regulated financial service providers under section 2(1) of the Central Bank Act 1942 (No. 22 of 1942);*
 - a person who can demonstrate a legitimate interest
- DSS registers:
 - co-decision-making agreements and decision-making representation orders
 - EPAs under the 2015 Act

DSS keeps record of searches

Prescribed bodies include:

- Designated centres
- Approved centres
- Public bodies and authorities
- Banks
- Regulated financial service providers

Prescribed classes of persons include:

- Legal practitioners
- Financial professional
- Registered healthcare professionals
-

Legitimate interest:

- Any person can apply to the DSS
- Must demonstrate a legitimate interest in inspecting the register at that time

24/7 access when approved

Pending development of digital searches:
registersearches@decisionsupportservice.ie

Case-by-case access

Safeguards: Investigations of Complaints



Grounds of complaint

- Acting outside scope
- Unsuitability
- Arrangement not in accordance with will and preferences
- Fraud, coercion, undue influence
- Capacity issues
- Breach of function or a breach of Act, including guiding principles

- **A complaint may be made by any person**
- **DSS has published complaints procedures**

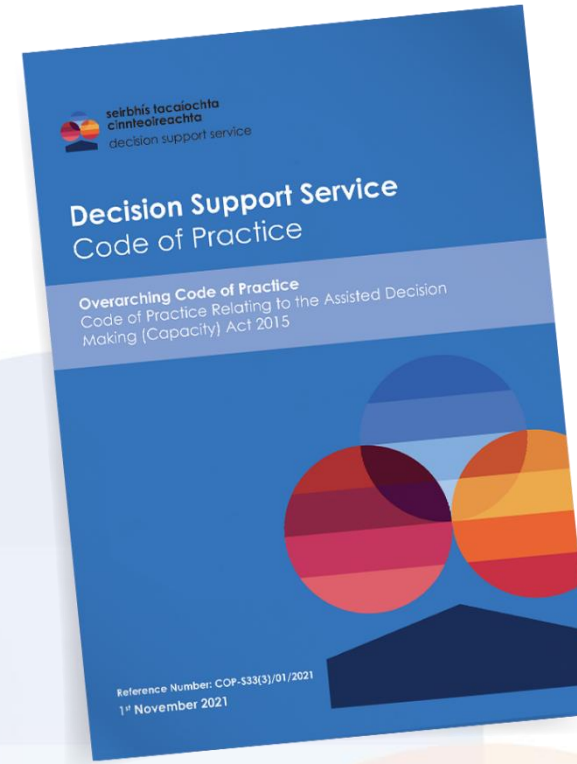


Director may

- Commission a special or general visitor
- Summon witnesses
- Take up evidence
- Escalate to court
- Apply to court to suspend temporarily pending investigation
- Escalate for criminal investigation, if necessary
- Conduct own initiative investigations
- Resolve informally

Codes of Practice

- drafted by National Disability Authority with expert input
- public consultation November 2021-February 2022
- general guidance code on supporting decision-making and assessing capacity
- guidance for financial service providers
- codes have been published with Ministerial consent
- *A person concerned shall have regard to a code of practice when performing any function under the Act in respect of which the code provides guidance*
- provisions of a code/ failure to comply with a code may be taken into account in other proceedings
- codes are available on the DSS website with supplementary materials and vignettes





Summary DSS reports (7.11.23)

- **No. of submitted applications/orders (pending registration):**

•enduring power of attorney:	226
•co-decision-making agreement:	28
•decision-making assistance agreement:	20
• <u>decision-making representation order:</u>	<u>51</u>
• Total:	325

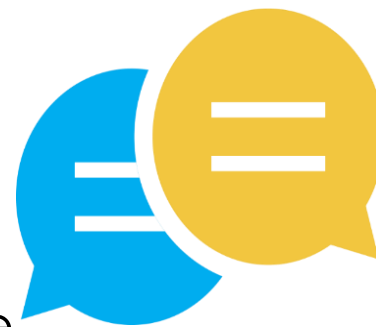
- **Registered applications:**

•enduring power of attorney:	12
•co-decision-making agreement:	6
•decision-making assistance agreement:*	6
• <u>decision-making representation order:</u>	<u>53</u>
• Total:	77

*** We are notified of/ do not formally register decision-making assistance agreements**

- **3845 verified MyDSS accounts**
- **Over 1,200 applications are being progressed on the DSS portal at present**
- **Over 10,500 queries by telephone and email since commencement**
- **Complaints:
12 active investigations**

‘Matters arising’ for financial service providers:



- Review of policy and procedure
- Direct customer queries about the new framework to Decision Support Service
- Interaction with decision supporters in transactions; understanding their remit
 - under the Act, including the guiding principles and codes of practice
 - in specific decision support arrangements
- Access to DSS register; obtaining authenticated copies when necessary
- Problems arising in a decision support arrangement; escalation of complaints to DSS
- Interaction with DSS investigation of complaint against a decision supporter
 - section 96: Director may require any person to provide written information
- Promoting understanding so that the Act is not misapplied as a barrier to services

Thank You



seirbhís tacaíochta
cinnteoireachta

decision support service

www.decisionsupportservice.ie/

Email: queries@decisionsupportservice.ie

Telephone: 01 2119750

This presentation is intended as an overview of aspects of the Assisted Decision-Making (Capacity) Act 2015 and related matters and should not be relied on as legal advice or opinion



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