



Údarás Náisiúnta Míchumais
National Disability Authority

18 February 2022

Áine Flynn,
Director,
Decision Support Service,
Waterloo Road,
Dublin 4.

Subject: NDA Submission to the Public Consultation on eight Codes of Practice under the Assisted Decision-Making (Capacity) Act 2015

Dear Áine,

Many thanks for providing us with the opportunity to comment on the second tranche of Codes of Practice in relation to the Assisted Decision-Making (Capacity) Act 2015. As per the approach taken in relation to the public consultation on the first tranche of Codes of Practice, the NDA has once again drafted a brief letter to outline a number of points that we suggest may merit further consideration, rather than a formal submission through the consultation process. Once again, we were very pleased to see that many of the headings and much of the original text set out in the initial drafts of the Codes we submitted to you have been retained, especially given the thorough process carried out with experts and other stakeholders in respect of the proposed language used in the draft Codes of Practice. We also note that several issues, gaps or sticking points that we had flagged in accompanying cover letters to the DSS have been given due regard in the Codes.

Following our reading of the Codes, we outline some further considerations below.

Comments relevant to all Codes of Practice

- During a consultation carried out on behalf of the NDA on parts of the draft Codes of Practice for decision-making supporters, focus group participants concluded that vignettes were helpful to their understanding of the application of the legislation. The NDA draft Codes included vignettes developed by the Technical Expert Advisory Group and we suggest re-inserting some or all of them.
- In the Glossary, we advise that ‘another person’ should be included in the definition of ‘intervener’. Head 3 of the Heads of Bill for the Assisted Decision-Making (Capacity) (Amendment) Bill 2021 extends the definition of ‘intervener’ to include ‘another person’. The Glossary should reflect this.

- Many of the people who will take on the roles of decision-making supporters are not professionals- many will be friends and family. With that in mind, the NDA advises that the relevant guidance should be as accessible as possible and that all Codes should include repetition of some main points of the legislation. This includes material on the guiding principles, guidance on how to support a person, how and when to assess capacity, and an outline of the five decision-making supporters. We believe that readers would be much more inclined to read one longer comprehensive code than have to find and read two or more Codes. The NDA is aware that information on all the points mentioned above appears in various Codes, but advises that they also be covered – perhaps as an appendix – in all Codes. For example, where a Code of Practice is directed at an intervener, who is legally obliged to give effect to the Guiding Principles, a comprehensive explanation of those Principles and how they should be applied should be included in each Code.

In the same vein, all of the Codes, as currently written, assume the reader has prior knowledge/experience of the legislation. This will not be the case for the majority of readers, especially family members and friends who may be moving towards a more formal structuring of their supporting role. The Codes provide only summary detail in some areas, providing a sentence or two on ‘becoming a decision-making supporter’ or ‘assisting a person in court’ without much context. Again, including some of the main boilerplate text on guiding principles/ supporting and building capacity, and the roles of the decision-making supporters in every Code may help to set the context for the reader.

Comments relevant to specific Codes of Practice

- In respect of the Codes of Practice for Decision-Making Assistants, Co-Decision-Making, Decision-Making Representatives and Attorneys, there is no enumeration of the people who **cannot** become one of these supporters. The DSS Codes do list ‘reasons for disqualification’ but it should also be stated that these same characteristics are relevant to the eligibility of supporters. This section had been included in the NDA draft Codes of Practice, as we believed it was important to state from the outset who is not eligible to become a supporter. From listening to stakeholders, it will be especially important to outline the ineligibility of persons employed in residential facilities, approved centres or mental health facilities.
- In respect of the Codes of Practice for Decision-Making Assistants, Co-Decision-Making, Decision-Making Representatives and Attorneys, there is no comprehensive guidance regarding assisting a relevant person in court. NDA previously advised that implementation of the Codes could be underpinned by detailed guidance for specific areas of activity. One such area would be the need to assist a relevant person in court, as for many supporters, especially family members and friends, court proceedings may be as new to them as they are to the relevant person, therefore we believe further guidance is needed on what this function might entail. As we also noted in our accompanying Cover Notes, clarification is still outstanding on whether a supporter assisting a relevant person in a Part 5 application may follow the guidance provided in the Code of Practice for Court Friends (for example, on making submissions to the court or attending briefings on behalf of the relevant person) when carrying out that function.

- When the NDA submitted the draft Codes, we noted in our accompanying advice that we were aware of some concerns among key stakeholders with regard to the reporting requirements for decision supporters. We note that in the DSS Codes submitted for public consultation, a further reporting requirement has been included – namely value for money. While recognising the importance of this concept for the safeguarding of the resources of a relevant person or the State, the NDA advises that further consideration may be required with regard to the implications for a decision supporter in terms of: achieving value for money, demonstrating same, and the consequences of being considered to have failed to achieve value for money.
- The NDA draft Codes of Practice included clear steps on how to make the various decision-making support arrangements. This guidance has been removed from the DSS Codes. It may be the case that this guidance will be contained in other documents, or as information on the DSS website, but again, the NDA would advise the approach of including all relevant information in one document – where possible - rather than asking people to source various guidance documents.
- In our discussions prior to drafting the Codes, the NDA Technical Expert Advisory Group noted that the role of ‘another person’ would likely be taken on, in many cases, by an independent advocate. This is because they may have knowledge and experience of court proceedings, through their advocacy work. A relevant person, on whose behalf they advocate and with whom they have a close and trusting relationship, might request that an independent advocate assist them in the absence of legal representation or a decision-making supporter. The NDA previously advised that comprehensive guidance should be provided to independent advocates on how to carry out the role of ‘another person’. The NDA advises that if it is not intended to develop such practical guidance in a separate document, that key points would be useful to include in the text of this Code.
- In the Code of Practice for Court Friends especially, and maybe in other Codes, such as the Code for Advocates, the NDA previously advised that more background and context would be helpful to provide on the forthcoming change of legislation around Wards of Court and the imminent and significant process of discharging them from wardship. This process will take place over the course of 36 months upon commencement, and will involve the High Court returning estates to over 2,000 former Wards upon discharge. The court will then consider the capacity of each former Ward to make relevant decisions, and may make a declaration of capacity putting in place a support arrangement. As outlined in the Amendment Bill 2021, Wards of Court will be able to seek the same assistance available to relevant persons involved in Part 5 applications; that is access to legal representation, ‘another person’ or a Court Friend, whose role it will be to assist that person in court. Therefore, the NDA advises that the Code of Practice for Court Friends (which is also applicable to an ‘another person’) should set out a comprehensive overview of this process and their functions therein.
- Upon transferring the draft Codes to the DSS, the NDA flagged that a grey area remains around a Decision-Making Representative assisting a relevant person in court. The Code is very clear that a Decision-Making Representative is bound by the clear and precise direction of the court order. However, if a relevant person requests that a Decision-Making Representative assist them in court (and the

Decision-Making Representative is willing and able), but the court order does not specify authority in that regard, the Decision-Making Representative finds him/herself in a difficult position. This is a question which may have a straightforward solution (for example, the court order could include a generic sentence around this) however, the NDA advises that this scenario should be considered in the Code.

- The Code of Practice for Decision-Making Assistants does not clearly state what the Decision-Making Assistant **must not** do. This section had been included in the NDA draft Codes of Practice, which stated that a Decision-Making Assistant must not:
 - Make decisions on behalf of the relevant person
 - Give or refuse consent on behalf of the relevant person
 - Access and spend the relevant person's money or dispose of the relevant person's property
 - Attempt to obtain access to information that is not relevant to the making of the relevant decision
 - Use relevant information for a purpose other than that in relation to the relevant decision.

The NDA believed that this was an important section to include in the Code, as the involvement of a Decision-Making Assistant in decision-making should be quite minimal. Clear guidance on what is considered within – and outside - the scope of a DMA would be helpful to avoid an intrusive application of the legislation.

- In its engagement with the stakeholders, the NDA has heard questions around the guiding principle of presumption of capacity being raised quite often. Stakeholders have queried why they are obliged to apply the presumption of capacity in respect of decisions for which a court has declared a lack of capacity. The Codes of Practice may need to develop this topic, to provide practical advice, with clear reasoning, on the application of this particular guiding principle.

Finally, upon reading all Codes of Practice, we suggest that a guidance document for relevant persons, while not provided for by the legislation, is very important and very much needed. At the centre of every statutory Code of Practice is the relevant person, yet there is a significant gap in the guidance being provided to relevant persons on practical matters such as choosing a supporter, entering into support arrangements, and making complaints about alleged violations of their rights. This guidance should be developed in a range of formats (subtitled videos, Irish Sign Language) and accessible language.

The NDA is more than happy to continue to engage with the Decision Support Service on the Codes of Practice, and the legislation more generally as it prepares for commencement and operationalisation.

Yours sincerely,



Dr. Aileen Hartney

Director