Assisted Decision Making

Author: Shane Farrell, Compliance Manager at An Post and Chair of Compliance Institute's Consumer Protection Working Group.

What is the Assisted Decision-Making Act?

The Assisted Decision-Making Act 2015 (ADMA) was passed by the Oireachtas in 2015, although key elements were not commenced until April 2023. The ADMA sought to give individuals enhanced autonomy and self-determination in relation to both one off decisions and day to day decisions. The ADMA also implemented an incremental approach to supporting individuals who may require assistance in making certain decisions, or all decisions on the basis of the least intrusive method being applied.

The ADMA repealed and replaced the Lunacy (Ireland) Act, 1871 which like the terminology contained therein aged poorly since its introduction 150+ years ago. By the turn of the 21st century the Lunacy Act was archaic, outdated and in need of an overhaul. The ADMA introduced a progressive approach to capacity and new incremental support system where assistance may be required.

This article will focus on the impact of the ADMA on Financial Services Providers and will therefore focus on two key elements of the act; Assisted Decision Making and Capacity Assessment.

What is the DSS's role?

The Decision Support Service is a statutory body that advocates for the rights and interests of people in need of decision-making support. The remit of the Decision Support Service includes but is not limited to the below:

- Overseeing and registering decision support arrangements;
- Supervise the actions of decision supporters;
- Maintain a panel of experts who will act as decision-making representatives, special and general visitors;
- Hearing complaints made under the ADMA; and
- Promote awareness and provide information about the Act including maintaining the relevant Codes of Practice.

Assisted Decision Making

The ADMA replaced the Ward of Court system with three incrementally interventive methods of supporting decision makers:

- Decision Making Assistants: A person can formally appoint a decision-making assistant, who is supervised by the DSS. The relevant person retains ultimate decision-making responsibility.
- Co-Decision Maker: In this scenario, a person can appoint someone to make decisions jointly with them. The co-decision maker is subject to the supervision of the DSS. A person can have multiple Co-Decision makers and multiple co-decision-making agreements but only one co-decision maker per agreement.
- Decision Making Representative: The Circuit Court can appoint a representative to make certain decisions on behalf of persons. The representative will typically be trusted by the donor but can also be appointed by the Decision Support Service from a panel of trained experts.

A key element of the ADMA in relation to all assisted decision making is the fact the above arrangements can be general in scope or limited in scope. For example, they may apply to decisions relating to investment instruments but not to the operation of the person's current account.

The Potential Pitfalls with Co-Decision Making

As set out above Co-Decision-Making agreements require decisions which are within the scope of the agreement to be made jointly with the person/

customer. While this arrangement provides certain protections whilst maintaining autonomy it does have limitations. Certain services such as online transactions and debit cards are not currently capable of being jointly operated. While this may appear to be a stumbling block, these types of service are typically used on a day-to-day basis and should typically be outside of the scope of Co-Decision-Making Agreements such as to allow autonomy.

It's critical that the effect of implementing a co-decision-making agreement is anticipated when setting out the scope of the agreement such that it doesn't unintentionally result in the subject of the agreement having less autonomy.

Assessing Capacity

Together with the new forms of assisted decision making, the ADMA reimagined what it means to lack decision making capacity. The ADMA sees capacity as something that can be transient in nature. Capacity is always to be assumed in the first instance but is now seen as something that can be present at one moment in time but absent in another. A person might also have the capacity to make one decision but lack capacity in relation to another. This is a vast change from the Lunacy Act which viewed capacity as removed all autonomy from a person deemed to be lacking decision making capacity.

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

- understand the information relevant to the decision,
- retain that information long enough to make a voluntary choice,
- use or weigh that information as part of the process of making the decision, or
- communicate their decision by any means, including by assistive technology.

Functional Assessment

As outlined ADMA redefines the approach to how capacity is assessed. The act together with the supporting Code of Practices requires relevant support be provided where capacity may be in question. This support can include:

- understanding the decision support needs of the relevant person;
- ensuring access to relevant and appropriate information;
- considering environmental factors; and
- communicating in a way that is most appropriate to the relevant person's needs.

Where having provided the above support capacity is still in question a functional assessment must be performed. The Code of Practice on Decision Making and Assessing Capacity sets out how this process is performed. This process is the same for assessing decisions relating to withdrawing money from a financial account as well as to decisions relating to determining end of life care options. There is no leeway in the guidance material to apply a functional assessment in a proportionate, streamlined, manner for day to day decisions.

The process for conducting a functional assessment includes considering the setting, preparing questions and lines of enquiry, ensuring informed consent is obtained from the relevant person, and then assessing the person's capacity relevant to the four elements of capacity. This process makes it difficult to impossible to conduct a functional assessment in certain settings and circumstances.

Conclusions

The introduction of the ADMA and the revocation of the Lunacy Act has brought about a new way of supporting and giving enhanced autonomy to those at risk of harm or abuse/or otherwise in need of additional support. The change enables incremental supports to be offered and put in place where before there was a singular approach which stripped individuals of autonomy and self-determination. While this article has highlighted a number of challenges, they are but teething issues in what has been a very successful and momentous first year for this legislation and the DSS alike.