



**Community
Legal Centres
Queensland**



ADA Law
Community Legal Service

The University of Queensland
LAW SCHOOL
CREDIT COURSE
Pro Bono Centre

The University of Queensland Law School
Pro Bono Centre



Health Decisions in Qld - *Whose Decision Is It?*

9 November 2021

Acknowledgement of country

Community Legal Centres Queensland acknowledges the traditional owners of the land on which we are holding this presentation, the Turrbul and Jaggara people.

We pay our respects to their elders, past, present and emerging, and acknowledge the important role Aboriginal and Torres Strait Islanders continue to play in our society.

As this presentation is being viewed throughout Queensland, we also pay respect to the traditional owners of the land throughout the country and extend a warm welcome to any First Australians listening to this presentation.

GoToWebinar housekeeping

- **Facilitator:**
 - Sammy Cooper, Sector Sustainability Coordinator, Community Legal Centres Queensland
- **Recording:**
 - This webinar is being recorded and will be available on the Staff Training page of our website: <https://communitylegalqld.org.au/clc-staff/staff-training-and-cle>
- **PowerPoint / webinar materials:**
 - Emailed prior to today's session
 - Available to download from Handouts section of GTW control panel
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 - Questions will be addressed at the end
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The presenters



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ADA Law assists and represents adults with questioned capacity in QCAT, EPOA and some MHRT matters.

UQ Pro Bono Centre develops, promotes and provides student pro bono legal services through partnerships with the NFP sector.



Poll

- Are you a:
 - Lawyer
 - Health Professional
 - Advocate
 - Community Worker
 - Student
 - Other

Aim of this webinar

This webinar has 2 purposes –

1. *Discuss new easy-use resources that are available to health consumers, legal and health practitioners, and decision makers, which display the health decision-making regime in Qld and provide improved certainty for decision-making.*
 - *Recent Research (Sellars et al “Public Knowledge, Preferences & Experiences about Medical Substitute Decision Making: A National Cross-Sectional Survey” BMJ Supportive and Palliative Care 2021) found that 33% of Australian adults knew about the decision making laws and only 13% reported having acted in the role.*
- *2. Showcase how organisations can work with the UQ Pro Bono Centre to develop CLE resources, benefitting both community, practitioners and law students*



What this webinar covers

- The recent Qld introduction of the *Human Rights Act 2019* and passing of the *Voluntary Assisted Dying Act 2021* brought about discussions in relation to health or medical decision-making. Such as:
 - Who can consent – to what and when?
 - Why, when and how does a practitioner conduct a capacity assessment?
 - What if the consumer doesn't appear to understand sufficiently?
 - What if the consumer wasn't able to consent last time?
- It highlighted that both health and legal practitioners were unclear of the current laws in relation to healthcare decision making, relying on out-of-date practices and concepts (e.g. who is the next of kin?)
- It also showed what health consumers and their supporters were struggling to understand.
- It showed that this complex space was about to get more complicated.



QLD's legislation is multiple and complex

- Qld's legislation is also gradually recognising and applying Australia's obligations to the UNCRPD.
 - These rights include a least-restrictive approach to decision-making, and a recognition of the right to autonomy, including in healthcare.
 - This can bring a question of balance –autonomy and dignity of risk v duty of care
- There are already multiple pieces of legislation and policy at play for Qld health consumers, eg
 - Guardianship and Administration Act 2000
 - Qld Capacity Assessment guidelines 2020
 - Powers of Attorney Act 1998
 - Mental Health Act 2016
 - Civil Liability Act
 - Human Rights Act
 - Transplant and Anatomy Act
 - Public Health Act

Poll: What is your level of understanding of Health Care Decision Making

- A lot
- A bit
- None
- Other

The project

- Create usable resources which help to demystify health decision-making in Qld
- Utilise the resources of the UQ Pro Bono Law Centre
 - Provides students with practical learning –
 - law, collaboration, legal interpretation and application
 - Delivers resources with less financial burden for CLCs
 - Supports the legal sector by project being targeted to identified areas of need
- Collaboration between ADA Law and UQ Pro Bono
 - ADA Law devised the project parameters
 - UQ Pro Bono advertised and vetted suitable students
 - ADA Law supervised the students re content and deliverables
 - UQ Pro Bono maintained regular contact with the students to provide further guidance and support
 - Students worked remotely, having regular Zoom meetings with supervisors
 - Two semesters of students (5 overall) from idea to deliverable

The scenarios

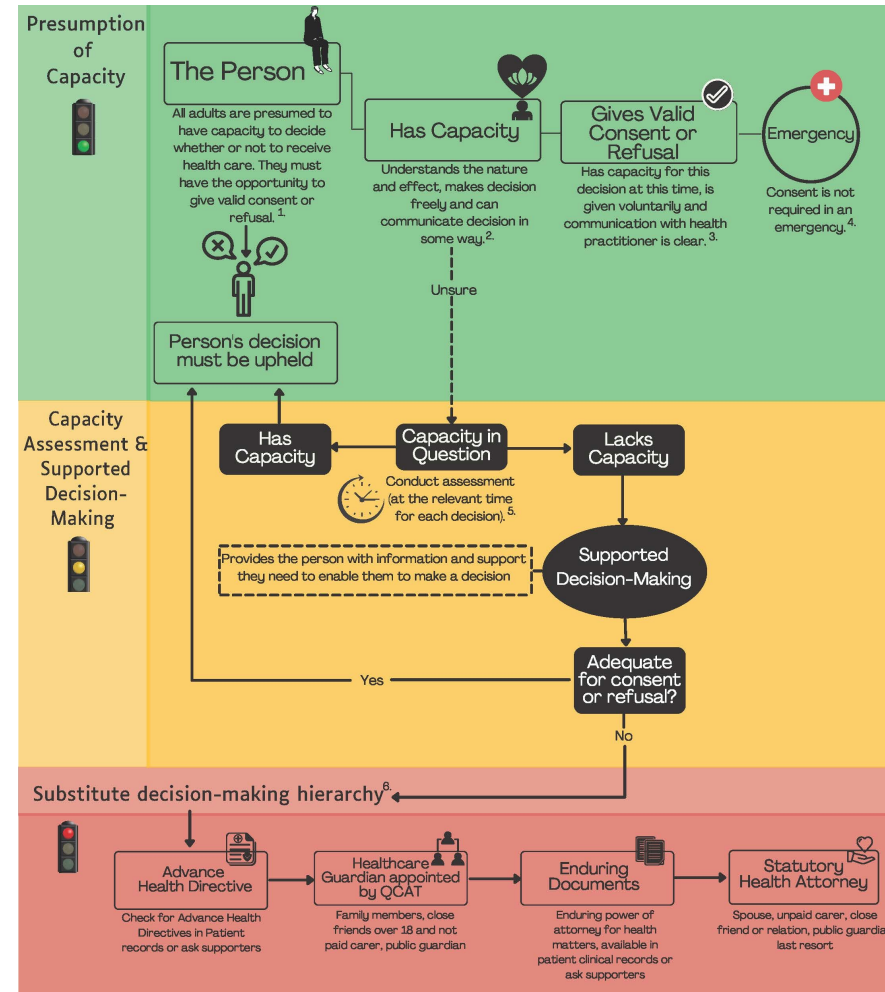
- The students were given 3 scenarios, based on common hospital presentations where decision-making is called into question.
 - Maria, an older woman who had a fall and is now in Emergency Department (ED), confused
 - Abraham, a young man who was involved in a car accident, unconscious in ED, possibly with brain injury
 - Elizabeth, a long-term kidney dialysis patient, who is now refusing further treatment





Easy to use Resources

- Flow charts with icons were effective ways to deliver information to both professionals and health consumers alike.
- Health practitioners' legal literacy in acknowledging rights of patients in the context of questions about capacity is emerging.
 - Sinclair et al "Professionals Views & Experiences in Supporting Decision Making Involvement for People Living with Dementia", *Dementia*, 2021

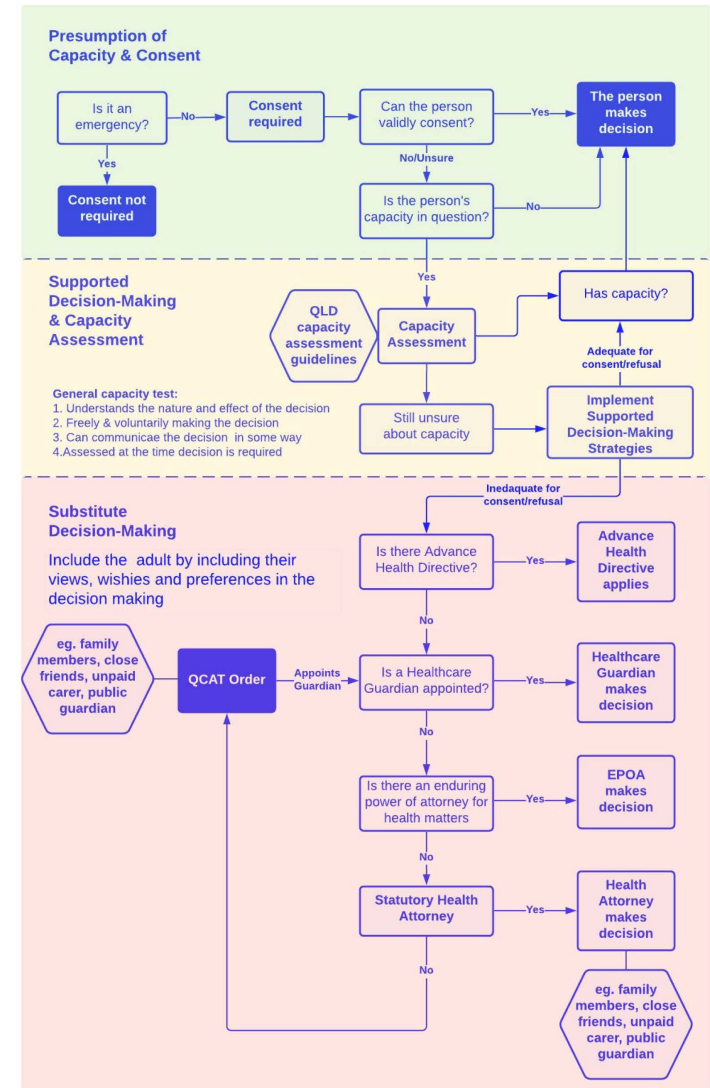




Focus on legal requirements & rights framework

- This requires a better understanding of:
 - Supported Decision Making
 - Focus on inclusion
 - How is necessary support being provided?
 - Capacity assessments
 - are to be positive (not deficit) focussed
 - what decisions can the person make?
 - Under what circumstances
 - When to review this?
 - Statutory Health Attorney (default) role
 - who, what, how, when

Healthcare Decision Making in Queensland Process





Recognising Autonomy

- When it comes to making decisions about health, whether in an emergency situation or regarding an ongoing health issue, it is everyone's right to have the opportunity to consent to or refuse treatments.
- The person must remain at the centre of health decisions

Self Determination



Principle 1. Always assume an adult has capacity

Principle 2. Capacity is decision-specific and time-specific.

Capacity is a constant question.

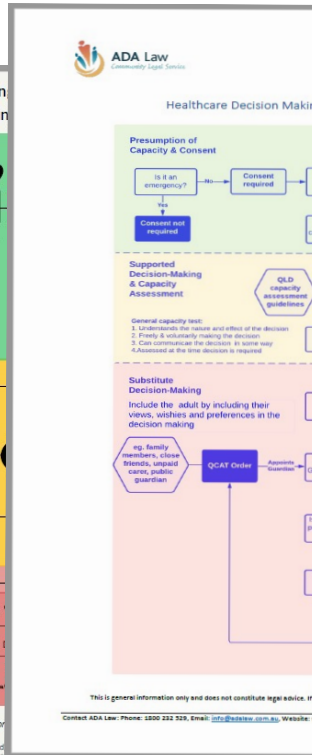
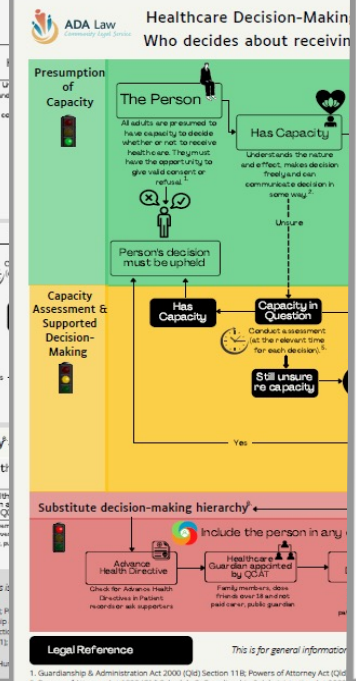
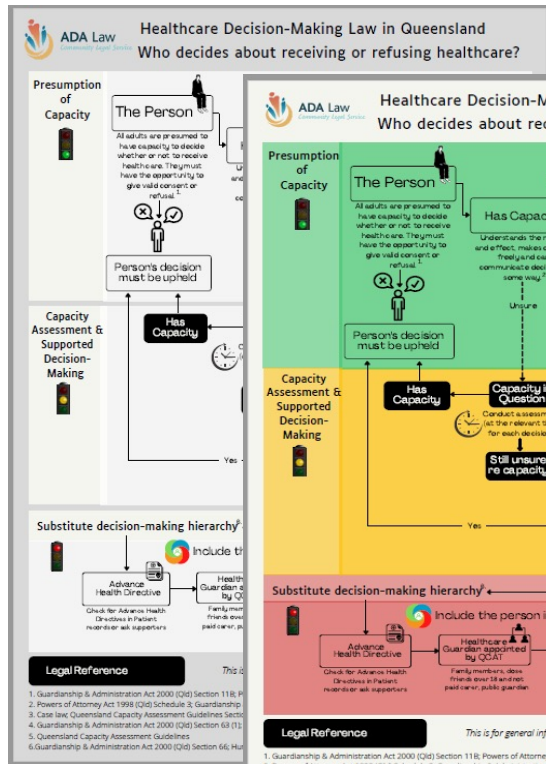
Principle 3. Provide the adult with the support and information they need to make and communicate decisions

Principle 4. Assess the adult's decision-making ability rather than the decision they make

Principle 5. Respect the adult's dignity and privacy


Transparency is key.

Resources for Consumers, Lawyers, Health Practitioners and Decision-Makers



Healthcare Decision Making: Key principles for health practitioners

When it comes to making decisions about health, whether in an emergency situation or regarding an ongoing health issue, it is everyone's right to have the opportunity to consent to or refuse treatments. The person must remain at the centre of health decisions.



Self Determination

Principle 1. Always assume an adult has capacity

- All adults are presumed to have capacity to make decisions for themselves including whether or not to receive healthcare.
- Intellectual or cognitive impairment, mental illness, brain injury, dementia and age may impact on an adult's decision-making ability but it doesn't necessarily mean they lack capacity.

Principle 2. Capacity is decision-specific and time-specific. Capacity is a constant question.

- It can change or fluctuate.
- Adults with dementia or delirium for example might have capacity on some days or during parts of the day.
- Health practitioners need to continue to presume capacity at each new decision or time.

Principle 3. Provide the adult with the support and information they need to make and communicate decisions

Referring to a substitute decision maker is the last resort.

- Capacity can change with support.
- Providing support to help the person make a decision is the first step when capacity is in question.
- An adult can't be treated as unable to make a decision unless all practicable steps have been taken to provide the information and support necessary to make that decision.

Principle 4. Assess the adult's decision-making ability rather than the decision they make

It's not a case of 'good' or 'bad'.

- Capacity assessment is not focused on whether the final decision is a 'good' or 'bad' decision, but the ability to make a decision.
- For example, decisions to withdraw life-sustaining treatment can be difficult. Time it takes to make a decision may not necessarily be a reflection of capacity.


Principle 5. Respect the adult's dignity and privacy

Transparency is key.

- You should be clear and let the adult know that you are assessing their decision-making capacity and why.
- Applying to appoint a substitute decision-maker without the person's knowledge is not in keeping with dignity and human rights principles.

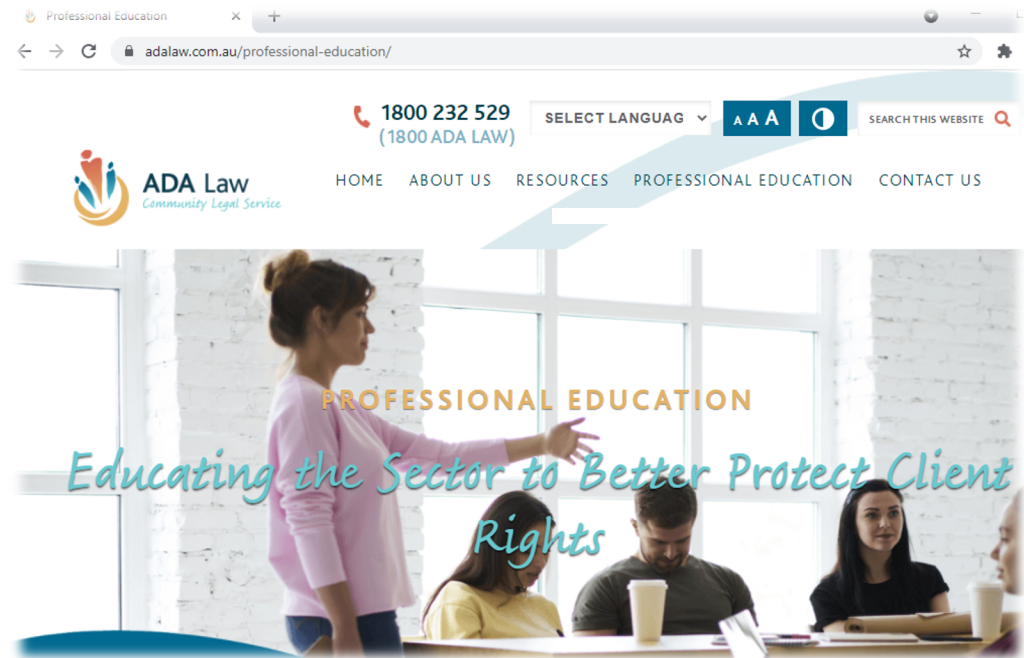
This is general information only and does not constitute legal advice. If you have a specific legal problem, please consult your legal advisor.

Reference: Queensland Capacity Assessment Guidelines 2020



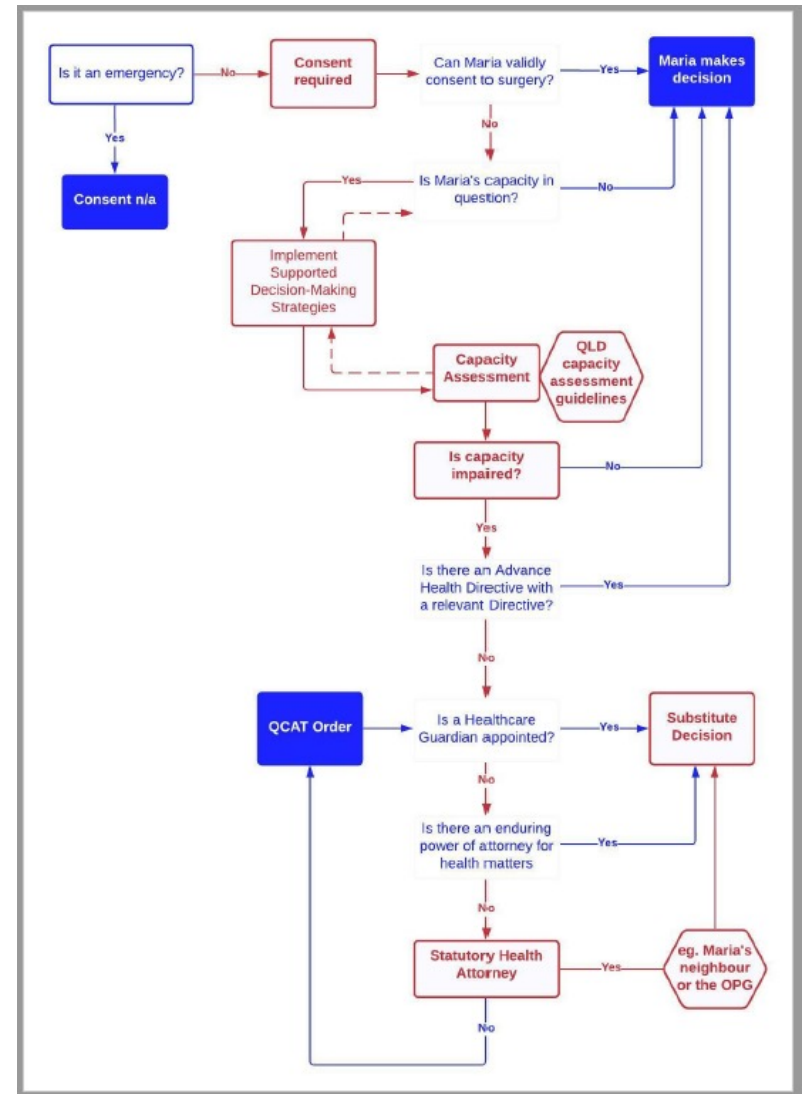
More resources for Lawyers, Health Practitioners and Researchers

- ADA Law Website will house the research conducted by the students.
 - This resource provides a detailed and comprehensive level of source information for further analysis and research
 - This project analysed *WHO* can make the decision
- Future projects may explore *WHAT* decisions they can make



Case study – Maria

- Facts:
 - Not an emergency.
 - The TT are considering a hip replacement may be appropriate in a week's time or so.
 - The TT believe Maria has children but does not have their contact details.
 - The neighbour Hua, has been friends with Maria for a number of years and reports that Maria has not spoken with her daughters for many years.
 - Maria has moments of increasing clarity over coming days.





Using the flowchart

Poll Questions:

- Is consent / refusal required?
 - Yes
 - No

Using the flowchart

Poll Questions:

- Who should be the decision maker if Maria is too confused?
 - Any of her children
 - Maria
 - Her neighbour
 - Public Guardian (because we can't find her children)
 - The Doctor
 - Nobody, consent is not necessary
 - Don't know



Using the flowchart

Poll Questions:

- When does the decision need to be made?
 - While Maria is in the emergency department before she is transferred into a ward.
 - On her first day in the orthopaedic ward
 - On the morning of her planned operation
 - As she is waiting for the operation to commence

Using the flowchart

Poll Questions:

- When does Maria's capacity need to be assessed?
 - Only when she is admitted to the hospital
 - Once the TT has decided she will need the operation
 - Throughout Maria's admission, including before all procedures are done
 - No need, her operation is an emergency
 - I'm not sure

Important points from this webinar

- Lawyers, Health Professionals and public and private Decision Makers need to know the law in Queensland for health decision making.
- We all need to better understand the human rights focus on supported decision making, and always include the person in their decisions.
- This can be a difficult concept for lawyers and other professionals.
- We never know when we will be needed to step in and make decisions for others.

Useful contacts/additional resources

- **Website:** www.adalaw.com.au
- **Monday to Friday 9am – 5pm**
– **FREECALL: 1800 232 529**
- **Human Rights Commission – Health Rights factsheet**
– https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0007/19906/QHRC_factsheet_HRA_s37.pdf
- **Office of the Public Guardian – Statutory Health Attorney factsheet**
– https://www.publicguardian.qld.gov.au/_data/assets/pdf_file/0011/490565/opg-factsheet-statutory-health-attorney.pdf

UQ Pro Bono Centre

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Centre Contact: probono@law.uq.edu.au

Website: <https://law.uq.edu.au/pro-bono/about-uq-pro-bono-centre>





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Thank you.

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