

# Supported Decision Making

Resources for a Rights Respecting Community

# Presenters

**Mary Burgess**

Solicitor

Queensland Advocacy for Inclusion

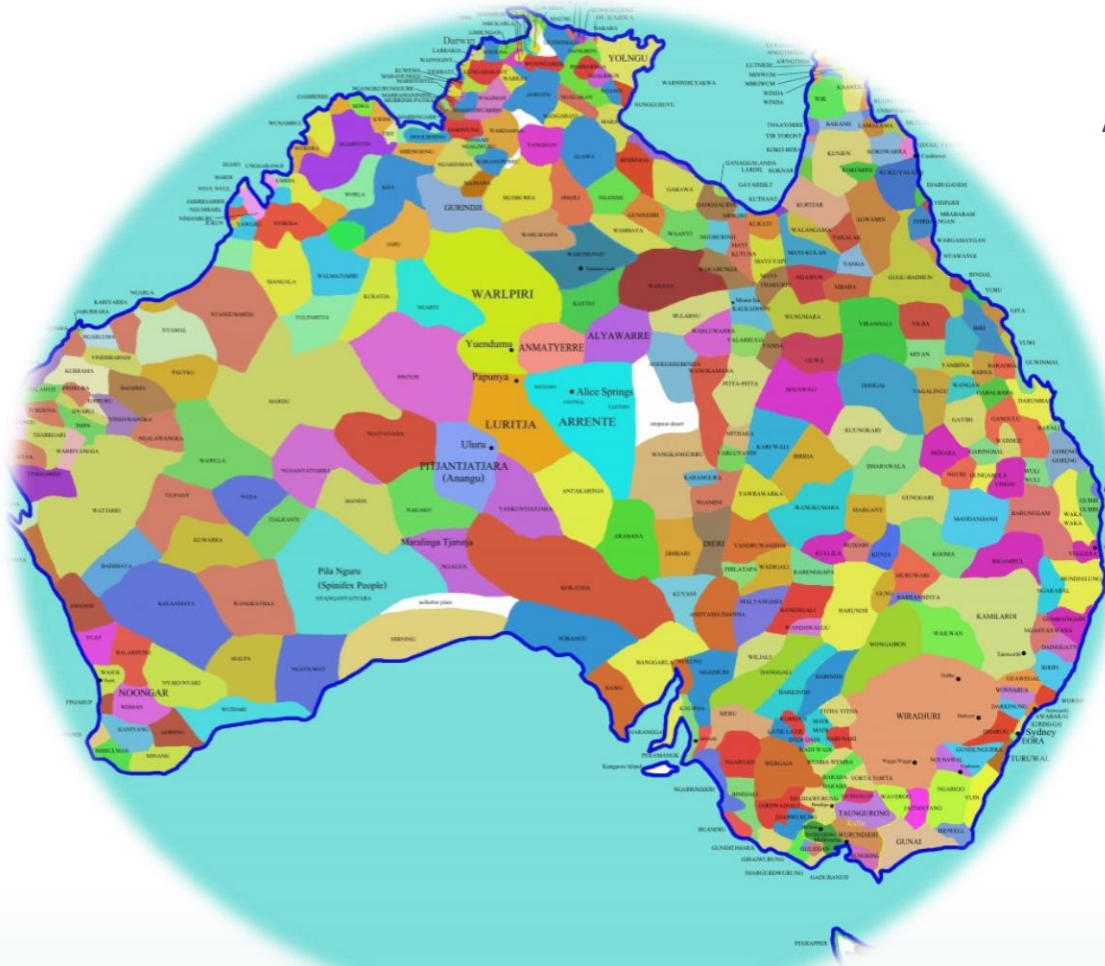
**Karen Williams**

Principal Solicitor

ADA Law

# Acknowledgment of Country - Brisbane (Meanjin)

Jagera and Turrbal Nations



**ADA Law**  
Community Legal Service



“ Supporting people to make their own decisions, rather than having someone else make them, doesn’t sound that hard. But in a world where service systems are complex, and where the focus on ‘consumer choice’ sees people asked to make ever more decisions about the services they receive, anyone who has difficulty making decisions is at risk of having others step in and take over. ”



Dr John Chesterman, Qld Public Advocate

# Rights based reforms and legislation

- *UNCRPD*
- *Human Rights Act*
- *Guardianship Act*
- *Mental Health Act*
- *Disability Royal Commission (DRC)*
- *NDIS*
- *Aged Care Royal Commission (ACRC)*

## ALERT

- ASK** What is your understanding of what you have to decide
- LISTEN** Pay attention to words, feelings, body language & other forms of communication
- EXPLAIN** Explain everything, including all the choices, in a way that the person can understand OR ask someone else to help such as a key worker or independent advocate
- REALITY** Go through all the possible choices and consequences, summarise.
- TELL** Tell me about your decision, why that particular choice is important for you and how you made this decision.



**Barriers to 'own decision-making'**

# Ageism and Discrimination

- Systems responses to a person, based on their age or diagnosis rather than situation, examples...
  - Repeated hospital admission – Aged Care placement
  - Elder Abuse v Family Violence – displace and disempower the victim
  - A person with cognitive or learning difficulties
    - Capacity more likely to be questioned
- Hard wired protective practices and (or despite) contrary statements, examples...
  - Capacity only travelling in 1 direction
  - Safety trumping human rights and autonomy





# Best Interests

- Brennan J in *Marion's Case 1992*:
- The absence of a community consensus on ethical principles may be thought to support this approach. But it must be remembered that, in the absence of legal rules or a hierarchy of values, **the best interests approach depends upon the value system of the decision-maker.** Absent any rule or guideline, that approach simply creates an unexaminable discretion in the repository of the power. Who could then say that the repository of the power is right or wrong in deciding where the best interests of an intellectually disabled child might lie when there is no clear ethical consensus adopted by the community?
- Citing Professor Ian Kennedy (142) In his paper "Patients, doctors and human rights", in Blackburn and Taylor (eds), *Human Rights for the 1990s*, (1991), pp 90-91
  - In fact, of course, there is no general principle other than the empty rhetoric of best interests; or rather, there is some principle (or principles) but the court is not telling. Obviously, the court must be following some principles, otherwise a toss of a coin could decide cases. But these principles, which serve as pointers to what amounts to the best interests, are not articulated by the court. Only the conclusion is set out. **The opportunity for reasoned analysis and scrutiny is lost.**"

# EPOA Activation and Interference

- Poor general understanding of Attorney obligations, scope with no real governance and education available
- Premature and wrong use of EPOA powers
  - Exclusion of the principal supported by solicitors, institutions, community in general
  - Can result in abuse without any opportunity for recourse for the person



## Overuse of Tribunals and Substitute Decision Making (EPOAs, AHDs)

Too often, due to time or other pressures, systems operators seek a decision maker be formally appointed, or an enduring document be enacted, without fair and supported opportunities for the person to make their own decision.



Mr Uli Cartwright, appearing at Disability Royal Commission, Nov 2022 discussing assumptions made about his ability to be independent because of his disability



- ***... It's hard because it's frustrating. And the only reason it's frustrating is because I know for damn sure that if anyone else did it they wouldn't be controlled or stopped just because the other person didn't like what they were doing.***

- Recommends a move toward best practice frameworks for supported decision-making...
- Definition:
  - Supported decision-making refers to a range of processes and approaches that assist people to exercise their legal capacity by supporting them to make decisions about their own lives according to their own will and preferences.<sup>(1)</sup>
- Themes and key issues:
  - Choice and control - People with disability have the right to control their own lives, to make their own decisions and to exercise choice. This can be described as the right to autonomy or independence.<sup>(1)</sup>
  - Exercising choice and control and being independent is sometimes confused with being self-reliant and needing no external support. Yet every person, with or without disability, depends on the support of other people and broader social networks.
  - ‘SDM is a fundamental strategy for putting rights into practice’<sup>(2)</sup>



1. DRC Interim Report Summary

2. DRC Research Report – Diversity, dignity, equity and best practice: a framework for supported decision-making, January 2023

# Supported Decision Making Guide

Practical solutions to helping people while  
maintaining or enhancing their independence and  
decision-making capacity

# Supported Decision Making

Helping people to make their own decisions  
(A guide for adults and those supporting them)

Including Informal Support Checklists



# Supported Decision Making

Helping people to make their own decisions  
(A guide for adults and those supporting them)

Including Informal Support Checklists



## 1.

### Introduction

The guide has explanatory pages, and is broken down into chapters, based on the most common areas of decision making which result in QCAT applications, or enactments of EPOAs.

The guide aims to:

- provide some of the answers to: Who, What, Where and How
- Encourage people to explore and implement supported decision making and proper application of Qld's legislation
- Empower people to make their own decisions or have decisions which reflect their will and preference



2.

Getting Help:  
Help at Home or  
Access to Aged Care

For people aged 65 or older and  
First Nations people aged 50 or older

3.

Getting Help:  
NDIS

For people aged under 65

4.

Getting Help:  
Healthcare

5.

Getting Help:  
Personal Wellbeing

6.

Getting Help:  
Finances

including Centrelink

7.

Getting Help:  
Legal Matters

## Topics

# Dictionary

## Advance Health Directive (AHD)

a legal document completed by a person to instruct health professionals, and to appoint health decision makers for the future, in case the person is unable to make some or all of their own health decisions

## Advocate

an independent party to help a person raise an issue, access more information, know their rights, eg Aged Care Advocate, Disability Advocate

## Aged Care Assessment Team (ACAT)

a government agency which provides an assessment of a person if they, or someone who knows them, thinks they may need help with services or moving into aged care

## Aged Care Quality and Safety Commission (ACQSC)

the national regulator of aged care services, responsible for accreditation, assessment and monitoring of aged care services in Australia

# Contact Details

## Government Agencies

My Aged Care (MAC)

<https://www.myagedcare.gov.au>

National Disability Insurance Scheme (NDIS)

<https://www.ndis.gov.au>

The Public Trustee of Queensland

<https://www.pt.qld.gov.au>

# Accessing the NDIS

(The NDIS funds services for people under 65 years old, who live in Australia and have a permanent and significant disability)

## What is the decision?

- To register with NDIS
- Get help with daily living

## How is this done?

- By contacting NDIA a

# Selecting an NDIS Service Provider

## What is the decision?

- Selecting a provider to deliver a

# Complaining about an NDIS Provider

## What is the decision?

- Raising concerns and complaint, and ha

Print this page

## Did You Know?

- A Disability Advocate can help you access and navigate the NDIS and get support
- If you don't have a Support Coordinator, you can get help from the Local Area Coordinator (LAC). The LAC can also help you change Support Coordinators
- You can nominate someone to help you sign up for the NDIS - 3RD PARTY AUTHORITY

Print this page

## NDIS Support Checklist

**Remember:** formal Guardianship is the MOST restrictive option available, and must only be considered as the LAST Resort. Absolutely all reasonable steps must have been taken first, and found insufficient

NDIS Services	Living agreeable to help from service providers	Able to arrange help (incl. with support)	Can access education/employment
What informal supports/strategies are available for these decisions? <small>(Does the person have friends / family / professionals available to help?)</small>			
What would it take for the person to make this decision? <small>(eg Assistive Technology, Interpreter, Written/Picture Information, Professional Advice, Time ...)</small>			
Are these challenges temporary or reversible? <small>(eg Mental Illness, Illness, Sensory Impairment, Grief, Cultural, Medication Side Effects...)</small>			
Challenges / Barriers (Make note of whether these are temporary (short term) or long term) <small>(eg Disability / Cost / Risk of Unsafe Influence / Neglect / Family Disputes / Lack of Supporters ...)</small>			
Have these options been tried? <ul style="list-style-type: none"> <li>• Mediation / Family Meetings</li> <li>• Attorney under Enduring Power of Attorney (EPA)</li> <li>• Nominee with NDIA</li> </ul> If not, what are the barriers?			
<b>NB. seek legal advice about what options may be available and before applying for a formal decision maker, confirm and document that all the above steps have been explored and are insufficient</b>			
For those areas where you have concern, what informal strategies have you tried? What problems remain?			
If ultimately a formal Decision Maker is considered necessary, what is the least amount of time, and power, suggested for the appointment? <small>(eg Only to arrange Services, short time...)</small>			

E.g...  
NDIS

## NDIS



### NDIS Services

#### Who Can Make NDIS Decisions?

#### Accessing the NDIS

- The Person (Participant)
- Family member, Caregiver (non-NDIS funded) or Friend
- Attorney (for Personal Matters)
- Guardian (for Services)



# Case Scenarios

# COI and Strong Family Advocacy

- Jane is 52, lives with her mother, and has an intellectual disability.
- Jane has NDIS supports in place, which her family arranged when the NDIS commenced.
- Jane's family has always been strong advocates for Jane, and support her right to remain living with her mother, and her wish not to try a lot of new activities.
- The support providers believe the family is limiting Jane's choices and controlling her. They want Jane to move into a shared home with other clients.
- The support providers applied to QCAT to have the Public Guardian appointed for accommodation. They were appointed under Interim appointment and nobody told Jane or her family until after it happened.

Jane



- QCAT had a hearing, and Jane and her family were prepared.
- Jane's brother Lance explained how the family has always worked with Jane about decision-making, listening to her views and wishes, encouraging her to try things occasionally, but also recognising that she has anxiety and prefers to maintain a routine.
- QCAT appointed Lance as Jane's decision maker for Services. QCAT did not appoint a decision maker for Accommodation as they recognised that Jane did not have to nor want to move, so no decision was necessary.
- The service providers could have used the **SDM Guide** to work through options with Jane and understand what was important to her. Now that the family is aware of the **SDM Guide** they will use it when helping Jane with decisions.



- Ivan had a stroke, spent 9 weeks in hospital while recovering, and waiting for hospital to arrange transition care at home. Ivan was never willing to consider aged care.
- Hospital had concerns that home wasn't appropriate as house-mate *might* take advantage of Ivan.
- Hospital delayed discharge, initiated QCAT application and obtained interim PTQ appointment. Eventually Ivan was discharged home.
- Ivan continued to improve, and was self-managing finances, as per pre-stroke.

- QCAT hearing – Application dismissed, PTQ removed as no need established.
- Conclusion: Ivan is angry with the hospital, has paid PTQ fees, is now left to reinstate any direct debits etc he had in place.
- Better option: use **SDM guide** while in-patient; work with Ivan to establish how he pays bills; what's already set up; how he can get help if he needs it; gain a solid understanding of his support network.



- Lorraine is 75 and has been experiencing falls and confusion and is becoming depressed, not eating or sleeping very well. Her GP wants to enliven her EPOA, but her attorney Patrick is reluctant to act prematurely. Lorraine lacks confidence and wants help at home and accessing appointments.
- Lorraine and Patrick (L & P) arrange with the GP for Lorraine to see the Older Person's Mental Health Service (OPMH), which diagnoses depression and provides mental health care, but also connects Lorraine with more supports for her overall wellbeing.
- L & P seek assistance to navigate home care supports, health treatments and streamlining some day-to-day activities.

- The OPMH social worker provides them with a link to the **SDM Guide**, and also prints out the pages relevant to My Aged Care (MAC).
- L & P sit together and work through the pages, gain a better idea of what they need to do, and they then call MAC and Lorraine requests an ACAT assessment so she can commence home supports.
- L & P realise that Lorraine can make her own decisions, she just needs support with accessing information; breaking decisions into small steps; time to decide; and self-confidence.
- Lorraine is now returning to some of her usual activities, reconnecting with friends, and regaining confidence.

# Links

- <https://adalaw.com.au/decision-making/>
- <https://qai.org.au/supported-decision-making-helping-people-to-make-their-own-decisions/>
- <https://www.sageadvocacy.ie/resources/legal-rights/decision-making-capacity>
- <https://www.sageadvocacy.ie/media/2468/alert-poster.png>





# Questions?

- Thank You