Queensland Government

Flowchart for Health Care Decision Making in Adults Without Capacity

An Advance Care Planning Resource for Health Care Professionals

1 Does the patient have capacity for the health care decision?

- **Yes** → Patients must make their own health care decision
- **No** → Decide who has authority to make <u>this</u> decision
- **Unsure** → Arrange a medical assessment

Consider:
Capacity may fluctuate and require more than one assessment over a treatment period. It may also vary depending on the type and gravity of the decision being made. An adult with impaired capacity has a right to adequate and appropriate support for decision making. There may be different decision makers depending on the health care in issue. For further information consult the *Queensland Capacity Assessment Guidelines 2020*.*

2 Who will make the health care decision?

The patient

if

an **Advance Health Directive** is in place.

An AHD **is lawfully binding** as though the individual had capacity and was currently in a position to consent to or refuse. Refer to sections 4 and 5. **Restrictions** apply for decisions to withdraw or withhold health treatment.

Substitute decision maker

if

1. there is a **Guardian** appointed by the Tribunal; or
2. an **Enduring Power of Attorney** authorised to make all health care decisions except **special health matters**; or
3. a **Statutory Health Attorney** in the following order:
   a. A **spouse** if the relationship is close and continuing;
   b. A **person who has care** (not a paid carer);
   c. a **close friend** or **relation** (not a paid carer);
   d. the **public guardian**

Note:
An **Acute Resuscitation Plan** (which acts as a medical order by a doctor) or a **Statement of Choices** (which can record a patient's values and preferences) are **not** legally binding and do **not** substitute for a lawful consent.

These documents may be used as **guidance** for medical practitioners and legally recognised substitute decision makers (section 4 below).

Disagreements between statutory heath attorneys can be referred to the Public Guardian.

3 Can the medical practitioner act without consent of a patient or a substitute decision maker?

- **Yes, if the treatment is minor**
- **Yes, if the treatment is urgent**

and if there are no known objections by the patient

And it is **not reasonably practicable** to find a substitute decision maker **and**:
a. it is **necessary** to promote the patient's health and wellbeing; and
b. the treatment is **minor** or **uncontroversial**

Examples include external physical examinations, diagnostic tests, analgesia, minor wounds or treating infection (including intravenous).

And the proposed treatment is required to prevent **imminent** risk of life or health **or** significant pain or distress

Examples include **life sustaining** and **prolonging** measures: CPR, ventilation, nutrition, hydration, antibiotics – but **not** blood transfusions, organ donation. Refer to **section 5** for decisions about not treating or withdrawing treatment.

Note:
A decision to **withhold** or **withdraw life** sustaining measures (except nutrition and hydration) can only be made and acted upon immediately in an acute emergency **<u>if</u>** there are no known objections **<u>and only if</u>** the provision of life sustaining or life prolonging measures would be inconsistent with **good medical practice** (being recognised clinical and ethical standards of the medical profession). **Objections** can be written, oral, or ascertained by conduct.

4 When should the documented wishes of the patient be followed?

The documented wishes of the patient are clear, unambiguous and valid.

Binding

An AHD is **lawfully binding** as though the individual had capacity and was currently in a position to consent to or refuse (noting restrictions in section 5 below).

A substitute decision maker or medical practitioner who acts contrary to the patient's direction relating to a refusal of treatment – for example no CPR – could be liable for civil or criminal action.

Not binding

An **Acute Resuscitation Plan** or a **Statement of Choices** (or other values based type document) is good evidence of a patient's wishes and may be used as a **guide** by legally recognised substitute decision maker/s and medical staff when making decisions about the provision of, or the withholding or withdrawal of, health care. **Consent** by a substitute decision maker about the health matter is still required.

5 Does the decision involve withholding or withdrawing a life-sustaining measure?

Yes → **The decision can be made if a medical practitioner believes that treatment is inconsistent with good medical practice. Consent is still needed.**

This applies even if there is an **AHD** that directs the withholding or withdrawal of the treatment and **only if** the patient has no reasonable prospect of regaining capacity and one of the following:

a. an incurable condition or terminal illness, where in the opinion of two doctors, death is expected within 12 months; **or**
b. severe and irreversible brain damage causing a persistent vegetative state or permanent unconsciousness; or
c. no reasonable prospect of living without life sustaining measures.

Decisions about life-sustaining measures must be based on standards of good medical practice and the patient's best interests, even if there is an AHD.

Further information:
There are **limits** to the obligation to comply with a patient's wish for certain treatment, such as:

- unlawful requests
- treatment that would be futile in accordance with good medical practice.

Ideally, the AHD will be in the **format** provided by the Queensland Department of Justice and Attorney General but not necessarily. Seek legal advice if an AHD is in a different format.

Validity of an AHD or EPOA may be questioned if there is any cause for concern about the document/s such as:

- if circumstances have changed to the extent that the directions are inappropriate
- if it was made at a time the adult **did not** have capacity
- if not signed and witnessed or fails to include medical officer certification (where required)
- if there is inconsistent wording or actions by the adult
- if there is evidence of a changed mind.

Legal advice should be sought if there are any questions about the validity or compliance of an AHD or EPOA provided, including if produced **interstate**, so that any regulation requirements can be checked.

Voluntary Assisted Dying (VAD)
Access to VAD will become lawful on 1 January 2023. If a patient makes a request for VAD, the request and assessment process in this Act must be followed. The patient must be assessed under this Act as eligible, including having decision-making capacity for VAD. This document does not apply to VAD.

Queensland Capacity Assessment Guidelines 2020*: https://www.publications.qld.gov.au/dataset/capacity-assessment-guidelines

BNE15 0136 | OCTOBER 2021