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 this 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

Yes, if the treatment is minor:

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).

Yes, if the treatment is urgent:

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 **if** there are no known objections **and only if** 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.

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.

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.

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**

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