

## Maria's Scenario

### Facts

Maria has had a fall at home, and is in the hospital emergency department, very confused. Her friend and neighbour called the Ambulance when she discovered her.

The treating team think that Maria has a broken hip (fractured Neck of Femur or #NOF), and plan to operate in about one week.

The hospital believes that Maria has children, but they have not been contacted and the hospital do not have their contact details.

### Issues

There are two key human rights questions that arise in this scenario.

First, could any of the possible health care be occurring in a venue considered to be a public entity for the purposes of the HRA? Second, if any of the decision-makers could amount to a public entity under the HRA, what human rights would they likely have to act compatibly with under their public entity obligations?

The first question will turn on whether the decision-maker is part of a core, functional or opt in public entity?<sup>1</sup> The second question will turn on whether the decision-makers conduct in the scenario could engage any human right in the sense it would interfere with or limit the enjoyment or exercise of any human rights by a person (i.e. Maria)?<sup>2</sup>

So, any decision-maker that amounts to a public entity in the scenario would be obligated to act compatibly with any of Maria's human rights that would likely be interfered with or limited by their conduct.

To determine whether a human right is engaged, it is necessary to understand *'the meaning and content of the right in a purposive way by reference to the values and interests that it represents and protects'*.<sup>3</sup> By ascertaining the meaning and content of the right in this way, the scope of the rights application can in turn be defined.<sup>4</sup> Once the scope of the right is defined, it can be said that public entities must respect all the freedoms that the right affords the individual person within its defined scope or boundary.<sup>5</sup> However, this legal obligation will not arise where a law permits the decision-maker to limit the human right in a way that is reasonable and justifiable<sup>6</sup> or any of the potential exceptions to the public entity obligations arise.<sup>7</sup>

### Analysis

Maria's scenario consists of three categories of possible decision-makers: those undertaking a capacity assessment (including consideration of the impact of supported decision-making strategies), those acting as a substitute-decision maker and QCAT appointed guardians.

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<sup>1</sup> See Brief Overview of HRA, 2.

<sup>2</sup> *PBU & NJE v Mental Health Tribunal and Others* [2018] VSC 564 [105].

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid* [108].

<sup>5</sup> *Ibid.*

<sup>6</sup> See Brief Overview of HRA, 4.

<sup>7</sup> See Brief Overview of HRA, 3-4.

## Capacity Assessment

### Public entity?

A capacity assessment can be carried out by a family member, friend or colleague, health professional, social worker, support worker or advocate, person who works in the law, including a lawyer or a justice of the peace (JP), worker in a financial institution or an Aged Care Assessment Team worker.<sup>8</sup>

A public entity is defined as an organisation in and for Queensland.<sup>9</sup> This would include public hospital but may exclude many other important health organisations.<sup>10</sup> This includes exempting federal public services and entities.<sup>11</sup> Additionally, private hospitals and private healthcare providers will be exempt unless they are treating public patients.<sup>12</sup>

Anyone who carries out a capacity assessment in a private capacity, such as a family member, friend or colleague, would not amount to a public entity.<sup>13</sup>

However, anyone undertaking a capacity assessment in their position as an employee of an organisation that performs a function of a public nature on behalf of the state of Queensland such as a health professional employed by a public residential aged care service facility (since it is operated by the Queensland Government), would amount to a public entity.

Notably as well, a JP would amount to a functional public entity because they provide services to the community on behalf of the government.<sup>14</sup>

### Human Rights engaged?

Undertaking a capacity assessment and the results of such an assessment can engage several human rights.<sup>15</sup>

These include, but are not limited to, the right to equality before the law,<sup>16</sup> the right not to be treated in a cruel, inhuman or degrading way,<sup>17</sup> the right not to be subjected to any medical treatment without full, free and informed consent,<sup>18</sup> the right to not have one's privacy unlawfully or arbitrarily interfered with,<sup>19</sup> the right to liberty and security of the person<sup>20</sup> and the right to humane treatment when deprived of liberty<sup>21, 22</sup>.

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<sup>8</sup> Attorney-General and Minister for Justice, *Queensland Capacity Assessment Guidelines 2020* (Guide, Version 1, 2020) 6.

<sup>9</sup> HRA s 9(5).

<sup>10</sup> [https://www.qhrc.qld.gov.au/\\_data/assets/pdf\\_file/0008/19907/QHRC\\_factsheet\\_HRA\\_WhatIsAPublicEntity.pdf](https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0008/19907/QHRC_factsheet_HRA_WhatIsAPublicEntity.pdf)

<sup>11</sup> Ibid; HRA s58(2).

<sup>12</sup> Ibid.

<sup>13</sup> HRA s 58(3).

<sup>14</sup> HRA s 9(1)(h); <https://www.publications.qld.gov.au/dataset/human-rights-in-decision-making-guide-for-jps-and-cdecs>.

<sup>15</sup> Attorney-General and Minister for Justice, *Queensland Capacity Assessment Guidelines 2020* (Guide, Version 1, 2020) 8.

<sup>16</sup> HRA s 15(3)-(4).

<sup>17</sup> Ibid s 17(b).

<sup>18</sup> Ibid s 17(c).

<sup>19</sup> Ibid s 25(a).

<sup>20</sup> Ibid s 29(1).

<sup>21</sup> Ibid s 30(1).

<sup>22</sup> *PBU & NJE v Mental Health Tribunal and Others* [2018] VSC 564, [110].

Of these rights, three particularly relevant human rights include the right to equality before the law, the right to not be subjected to medical treatment without consent and the right to not have one's privacy unlawfully or arbitrarily interfered with.<sup>23</sup>

## **Right to equality before the law**

### Meaning and content of the right

The right to equality before the law is located in s 15(3)-(4) of the HRA as part of the broader right to recognition and equality before the law.

Section 15(3) and (4) of the HRA state:

- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.
- (4) Every person has the right to equal and effective protection against discrimination.

The purpose of this right to equality before the law is to protect the inherent and universal dignity of human persons.<sup>24</sup>

Three elements can be extracted from this right to equality before the law in s 15(3) and (4) of the HRA: the right to equality before the law, the right to equal protection of the law without discrimination and the right to equal and effective protection against discrimination.<sup>25</sup> In relation to questions of capacity, the latter two are particularly relevant.<sup>26</sup>

The right to equal protection of the law without discrimination essentially requires that laws, in their content, protect people against discrimination in substance.<sup>27</sup> For example, the right may require the law include 'positive adjustments and accommodations' to the effect some are treated differently to others in order to ensure that they have equal protection of the law.<sup>28</sup>

The right to equal and effective protection against discrimination goes beyond the requirement of the right to equal protection of the law without discrimination.<sup>29</sup> It requires that in the operation and administration of the law people have equal and effective protection against discrimination.<sup>30</sup> For example, this right may require that, in the process of conducting court or tribunals hearings, 'positive adjustments and accommodations' are made to the effect some are treated differently to others in order to ensure that they have equal and effective protection of the law.<sup>31</sup>

### Application

A capacity test similar to the one in question has been framed as a functional test where the question is whether the person has the *ability* to remember and use or weigh relevant information and communicate a decision and not whether the person has *actually* done so.<sup>32</sup> Framing the test this way respects the right to equality before the law, namely, it ensures people with mental illness

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<sup>23</sup> Ibid [111].

<sup>24</sup> Ibid [113].

<sup>25</sup> Ibid [114].

<sup>26</sup> Ibid.

<sup>27</sup> Ibid [115].

<sup>28</sup> Ibid.

<sup>29</sup> Ibid [116].

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid [206].

(i.e. those whose capacity are in question) are afforded the same respect for their inherent dignity and autonomy that people without illness whose capacity is not in question are afforded.<sup>33</sup>

### **Right to not be subjected to medical treatment without consent**

#### Meaning and content of the right

The right to not be subjected to medical treatment without consent is located in s 17(c) of the HRA as part of the broader right to protection from torture and cruel, inhuman or degrading treatment.

The general starting point of this particular right is said to be *'the paramount consideration that a person is entitled to make his own decisions about his life'*.<sup>34</sup>

Forcing a person of full mental capacity to have unwanted medical treatment seriously undermines their personal dignity and autonomy.<sup>35</sup> Personal dignity underpins this right.<sup>36</sup>

Whether treatment is medically warranted is not relevant at this point.<sup>37</sup> The person in question, though possibly mentally ill, is still presumed to have full mental capacity.<sup>38</sup> The right to refuse unwanted medical treatment enables the person to choose what should happen to them and thereby protects that person's individual personality, dignity and autonomy.<sup>39</sup>

#### Application

In undertaking a capacity assessment, while the presumption that Maria retains full mental capacity remains in effect, forcing Maria to receive further treatment that she may refuse would amount to an absolute violation of their right to not be subjected to medical treatment without consent on the basis it seriously undermines their personal dignity and autonomy.

### **Right to not have one's privacy unlawfully or arbitrarily interfered with**

#### Meaning and content of the right

The right to not have one's privacy unlawfully or arbitrarily interfered with is located in s 25(a) of the HRA as part of the broader right to not have one's privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

The right to privacy protects people from unjustified interference with their personal and social individuality and identity.<sup>40</sup>

It has been interpreted to include protection of self-determination and personal inviolability.<sup>41</sup>

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<sup>33</sup> Ibid.

<sup>34</sup> *Re Kracke v Mental Health Review Board* (2009) 29 VAR 1 [569].

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> *PBU & NJE v Mental Health Tribunal and Others* [2018] VSC 564, [125].

<sup>41</sup> Ibid [127]-[128].

Self-determination relates to the capacity of people to determine who they are, how they will live their lives and what should be done to them.<sup>42</sup> Notably, since the exercise of self-determination requires personal autonomy, often a term used interchangeably with self-determination, it is also said the right to privacy protects personal autonomy.<sup>43</sup>

Personal inviolability relates to the freedom of all persons not to be subjected to physical or psychological interference, including medical treatment, without consent.<sup>44</sup>

While it has been stressed these rights are not absolute and may be limited by the law when reasonable and justifiable, the starting point is that people with a mental disability (or whose capacity is in question) have the same right of self-determination and the same right to personal inviolability as everybody else.<sup>45</sup>

### Application

In assessing capacity, the assessor must respect the person's right to privacy and its encompassing values of self-determination and personal inviolability.

One central consideration is that a finding of impaired capacity should not be made simply because, in the decision-makers view, the person made a decision that was bad, unwise, the person may not have engaged in the assessment process, unreasonable or not sensible, rational or well-considered.<sup>46</sup> Making such a finding on one of these grounds directly offends the person's right to self-determination, and in turn, the individual dignity of the person in question.<sup>47</sup> The person has the right to make their own decisions that accord with their own values, due to the consideration and acceptance of the value of dignity of risk.<sup>48</sup>

Understandably, there is a natural tendency to make a decision in the best interests of vulnerable persons and thus assess capacity on the grounds of whether the decision made by the person was reasonable.<sup>49</sup> Despite these good intentions, however, the decision made is irrelevant to whether the person has capacity and the focus must be upon the ability of the person to exercise a decision-making process itself.<sup>50</sup> Focusing on the outcome is said to '*penalise individuality and demand conformity at the expense of personal autonomy*'.<sup>51</sup> In any event, a decision to consent to or refuse medical treatment is inherently subjective thereby making it difficult if not impossible for another to objectively characterise it as unreasonable or not.<sup>52</sup>

Ultimately therefore, the capacity test must be applied in a way that is '*criteria-focused, evidence-based, patient-centred and non-judgemental*'.<sup>53</sup>

More generally, in undertaking a capacity assessment, there are several do's and don'ts that must be understood by the assessor to respect the adult's privacy.<sup>54</sup>

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<sup>42</sup> Ibid [127].

<sup>43</sup> Ibid.

<sup>44</sup> Ibid [128].

<sup>45</sup> Ibid [127]-[128].

<sup>46</sup> Ibid [164]-[166].

<sup>47</sup> Ibid [165].

<sup>48</sup> Ibid [164].

<sup>49</sup> Ibid [167].

<sup>50</sup> Ibid [168].

<sup>51</sup> Ibid.

<sup>52</sup> Ibid [169].

<sup>53</sup> Ibid [172].

<sup>54</sup> Attorney-General and Minister for Justice, *Queensland Capacity Assessment Guidelines 2020* (Guide, Version 1, 2020) 14.

The assessor should only ask the adult for their information, this information must be relevant to the decision, the information collected should only be used for the purposes of the assessment and the adult's permission should be obtained before sharing their information with others.<sup>55</sup>

The assessor should not obtain the adult's personal information from others without first seeking their consent, seek information that does not relate to the assessment, use information for other purposes without first seeking the adult's consent and disclose the adult's personal information to others not related to the assessment process.<sup>56</sup>

## **Impact of Supported Decision-Making Strategies**

### **Right to not be subjected to medical treatment without consent**

#### Meaning and content of the right

It should be noted that a person's capacity may fluctuate in response to their health and circumstances and with support capacity may improve. This is recognised in second and third principles found in s3 of the Queensland Capacity Assessment Guidelines.

#### Application

Thus, it must be considered that capacity to give informed consent is issue-specific and capacity to make decisions may be improved with support.<sup>57</sup>

### **Substitute decision-making**

#### Persons acting as a substitute decision-maker

If Maria is found to have impaired capacity and in the absence of any advanced health directive (there is no statement that Maria had an advanced health directive) it may be necessary to appoint a substitute decision-maker, that is, a QCAT guardian (Maria's neighbour or children of Maria may lodge an application), an enduring power of attorney or a person such as Maria's neighbour or children of Maria maybe considered to exercise automatic health care decisions on Maria's behalf (called a Statutory Health Attorney).

For any person appointed as a QCAT guardian, an enduring power of attorney or a statutory health attorney that amounts to a 'public entity' for the purposes of the HRA, they would be subject to the public entity obligations.

However, even if the person appointed does not amount to a public entity, they are still legally obligated to apply a set of 'general principles'.<sup>58</sup> Notably as well, they must apply a set of 'health care principles' whenever they are called upon to make a decision about a health care matter.<sup>59</sup>

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<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Queensland Capacity Assessment Guidelines s3 principle [1]-[2].

<sup>58</sup> <https://www.publications.qld.gov.au/dataset/power-of-attorney-and-advance-health-directive-forms/resource/399ac2cc-9088-48f7-94cd-e29f3f927c48>; *Guardianship and Administration Act 2000* (Qld), s 11B

<sup>59</sup> *Guardianship and Administration Act 2000* (Qld), s 11C.

One important general principle is that the human rights of all adults, regardless of their particular capacity, must be recognised and taken into account.<sup>60</sup> In addition, another principle states the human rights of the adult in question be empowered.<sup>61</sup>

Accordingly, any person acting a substitute decision-maker in Maria's scenario are likely obligated to recognise and take into account Maria's human rights in making a decision on possible further treatment.

### Human Rights engaged

A variety of human rights are potentially relevant for a substitute-decision maker in this context.<sup>62</sup>

However, it is particularly important to recognise and respect the person's right to self-determination protected under their right to privacy.<sup>63</sup>

If possible, it is recommended that the decision-maker ascertain the views and preferences of the person, provide information about the decision and options available and support the person to reach a decision themselves which the decision-maker can then make.<sup>64</sup>

If they cannot obtain the person's views and preferences, it the decision-maker must where possible try 'stand in their shoes' and make the decision that they believe the person would have made, having regard to anything they said or indicated in the past, the views of family and friends and sometimes views of service providers, health care professionals and carers.<sup>65</sup> If the decision-maker does seek out the views of others, it may be important to remind them of the person's human rights when they are providing advice.<sup>66</sup>

If there are several available options, the option that should be favoured is the option that least restricts the person's right to self-determination or their 'freedom of action'.<sup>67</sup> Ultimately, the main priority should be acting in the welfare and interests of the person even if it means acting in a way that the family or carers disagree with.<sup>68</sup>

Once the substitute-decision maker has made a decision their obligation does not end there. It is important for the substitute-decision maker to explain to the person the decision made, the impact it will have on their life, the reasons why it was made and what they can do if they disagree with their decision.<sup>69</sup>

Finally, throughout the whole decision-making process, the substitute-decision maker must only exercise the powers and functions conferred on them by the relevant law in order to respect the person's right to self-determination in the context of the other areas of their life.<sup>70</sup>

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<sup>60</sup> Ibid s 11B(3).

<sup>61</sup> Ibid.

<sup>62</sup> National Association of Community Legal Centres, *How guardians and attorneys can promote, respect and protect human rights* (Fact Sheet, 2013) 2.

<sup>63</sup> Ibid 4.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

## QCAT

In the context of capacity and decision-making for adults, QCAT has the power to make decisions on a range of matters such as making a declaration on a person's decision-making capacity or about the execution and appointment of an enduring power of attorney, appointing a guardian to make some or all personal and health care decisions or making temporary decisions to deal with an urgent situation.<sup>71</sup>

Under the HRA, a court or tribunal will amount to a public entity only when they are acting in an administrative capacity.<sup>72</sup> Tribunals, such as QCAT, often act in an administrative capacity by, for example, reviewing administrative decisions made by government departments, conducting disciplinary proceedings, appointing guardians and administrators and reviewing involuntary treatment orders.<sup>73</sup>

Accordingly, QCAT would be subject to the public entity obligations under the HRA in deciding to appoint a healthcare guardian for Maria's healthcare matters or in making a temporary decision to deal with an urgent situation around further emergency surgeries for Maria.

Notably as well, s 5(2)(a) of the HRA provides that *[t]his Act applies – to a court or tribunal, to the extent the court or tribunal has functions under part 2 ...*'.

Part 2 of the HRA is entitled "Human Rights in Queensland" and contains the 23 human rights protected under the HRA. In determining the substance of the requirement in s 5(2)(a) that the court or tribunal *'has functions under part 2'*, the Queensland Supreme Court has favoured the interpretation of this phrase as meaning courts and tribunals have the obligation of applying or enforcing any of the 23 human rights specified in part 2 that relate to the court or tribunal proceedings.<sup>74</sup> Certain rights that may relate to court or tribunal proceedings include, for example, the right to equality before the law, the right to a fair hearing or the rights in criminal proceedings.<sup>75</sup> Notably, this obligation under Part 2 is said to arise when the courts or tribunals are exercising 'judicial functions' (i.e. hearing cases and delivering judgements).<sup>76</sup>

Thus, where QCAT is exercising judicial functions (e.g. reviewing an earlier QCAT decision to appoint a certain guardian for Maria), QCAT would be obligated under the HRA to respect any human rights that relate to the proceeding in question such as the parties right to a fair hearing.

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<sup>71</sup> <https://www.qcat.qld.gov.au/matter-types/guardianship-for-adults-matters/qcat-decisions-about-adults>

<sup>72</sup> HRA s 9(4)(b).

<sup>73</sup> Queensland Human Rights Commission, 'The role of courts and tribunals under the Human Rights Act 2019', The role of courts and tribunals (Fact Sheet, July 2019) <<https://www.qhrc.qld.gov.au/your-rights/human-rights-law/the-role-of-courts-and-tribunals>>.

<sup>74</sup> *Innes v Electoral Commission of Qld & Anor (No 2)* [2020] QSC 293, [219]-[224].

<sup>75</sup> *Ibid* [222].

<sup>76</sup> Queensland Human Rights Commission, 'The role of courts and tribunals under the Human Rights Act 2019', The role of courts and tribunals (Fact Sheet, July 2019) <<https://www.qhrc.qld.gov.au/your-rights/human-rights-law/the-role-of-courts-and-tribunals>>.