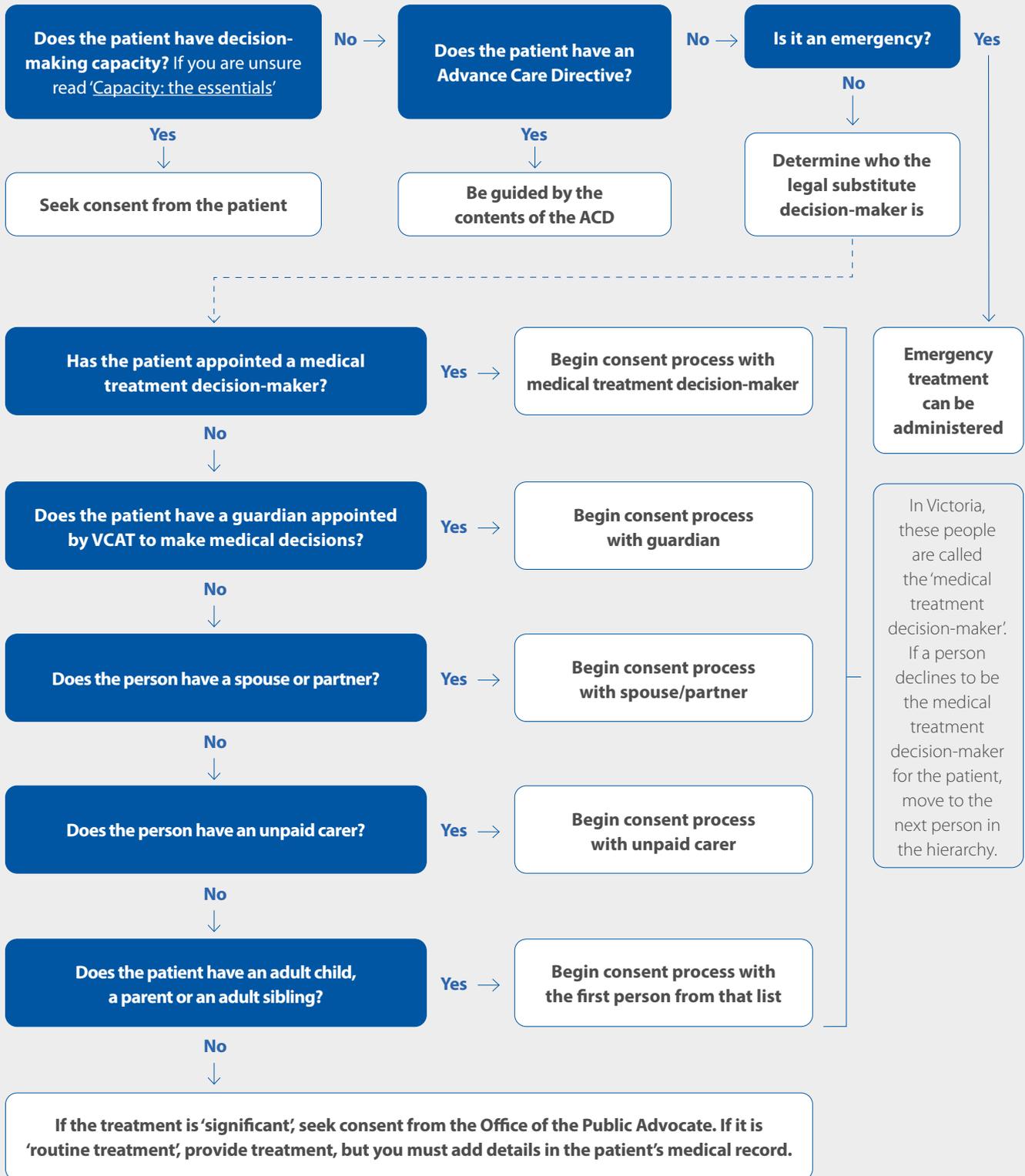


Capacity: Substitute decision-makers for health care

Victoria

Many doctors will encounter situations where there is a need to provide care for a patient who has limited or no capacity to make health care decisions for themselves. For these situations, the law has established mechanisms for you to seek consent to provide treatment. It is your legal obligation to understand which person, document or institution to turn to in these circumstances. Use this decision-making flowchart to assist you.



Emergencies

You should assess if the decision needs to be made urgently. Where the patient is unable to give consent, treatment should be provided if it is required to save a person's life or prevent serious injury to the patient's health, subject to any guidance in an advance health directive that is in place.

Supported decision-making

Although you may have determined that the patient's capacity is limited, they may be capable of making their own decisions with appropriate support. There is increasing recognition of the concept of 'supported decision-making'. Rather than substituting another person into the role of 'decision-maker', the person receives assistance from a support person with understanding options, working out what their preference is, and communicating the decision. If a person has capacity to make a decision with support, then the person's decision is final even if it conflicts with their support person's judgement. This allows the person with disabilities to exercise their autonomy in decision-making to the greatest extent possible.

Victoria is the only Australian state which formally recognises this concept through legislation (see, for example, *Medical Treatment Planning and Decisions Act 2016*). A support person can assist another person by collecting and interpreting information and assist them to communicate their decision.

The concept and terminology related to supported decision-making are interpreted slightly differently depending on the organisation or state where you provide care. You should check your organisation's policies for specific information to help determine your obligations to your patient and their appointed support person.

Advance care directives (ACDs)

An ACD is a formal record of a person's preferences for future care if they lose capacity and therefore cannot provide consent to medical treatment. If your patient does not have capacity you should explore whether they have an ACD. You must refer to an ACD if there is one.

In Victoria, ACDs can be either instructional or contain the person's values. An instructional directive is binding. It can contain the treatments that the person would consent to or refuse. If it does not contain the relevant instruction, the practitioner will need to seek consent from the person's medical treatment decision-maker.

In a values directive, a patient would include their preferences and values about treatment. These would form the basis on which their medical treatment decision-maker could make decisions in the future.

The Victorian government has a suggested [form](#) to use to help ensure the validity of a ACD. In Victoria, a person cannot appoint a medical treatment decision-maker in an ACD. Instead, there is a separate [form](#) to appoint this person. An ACD can be added to a patient's My Health Record so that it is visible to their treating doctors.

The laws regarding ACDs are different across the country so it is important to make sure you understand the requirements where you practise. For more information, forms and resources for practitioners in Victoria please visit the [Office of the Public Advocate](#). For all other states and territories please visit [Advance Care Planning Australia](#).

Determining the legally-appropriate substitute decision-maker

There is a hierarchy for identifying the patient's substitute decision-maker for a discussion about treatment options. This hierarchy is important to consider if that patient loses capacity and there is not an ACD or an appointed medical treatment decision-maker. Each state and territory have different legislation that outlines who is the correct decision-maker for these health care decisions.

It is the responsibility of the doctor to identify who the correct medical treatment decision-maker is. As illustrated in the flowchart, it is not automatically a patient's next of kin.

Decision-making principles

In Victoria, a medical treatment decision-maker can provide consent to 'medical treatment' and this term is broadly defined. It includes the authority to consent to life-sustaining treatment and the authority to refuse the commencement or continuation of medical treatment.

Once you have made an assessment about what is clinically feasible, then a discussion between you and the medical treatment decision-maker and support persons must occur. The decision-maker must make decisions that they believe the patient would have made for themselves. If there is an ACD in place then they must consider that first. After that, they must consider other relevant values and preferences that the patient expressed when they had capacity. As far as possible, the decision-maker should make the same decision that the patient would make, if the patient had capacity.

Dealing with conflict

There may be times where conflict arises about the decisions of the medical treatment decision-maker, from other family members or people close to the patient. There may be differences of opinion or you or someone else may suspect that the patient is or was subjected to undue influence. People have different views on autonomy and how it should be respected. In these situations of conflict, we recommend that you call Avant or seek legal advice. You may need to approach the Victorian Civil and Administrative Tribunal to intervene.

Additional resources

For more information on assessing capacity, please see the [Avant factsheet: Capacity: the essentials](#)

For information on advance care planning and directives in Victoria please visit the [Victorian Department of Health](#) website

For specific state or territory information, forms and resources for practitioners please visit [QUT End of Life Law](#) and [Advance Care Planning Australia](#)

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