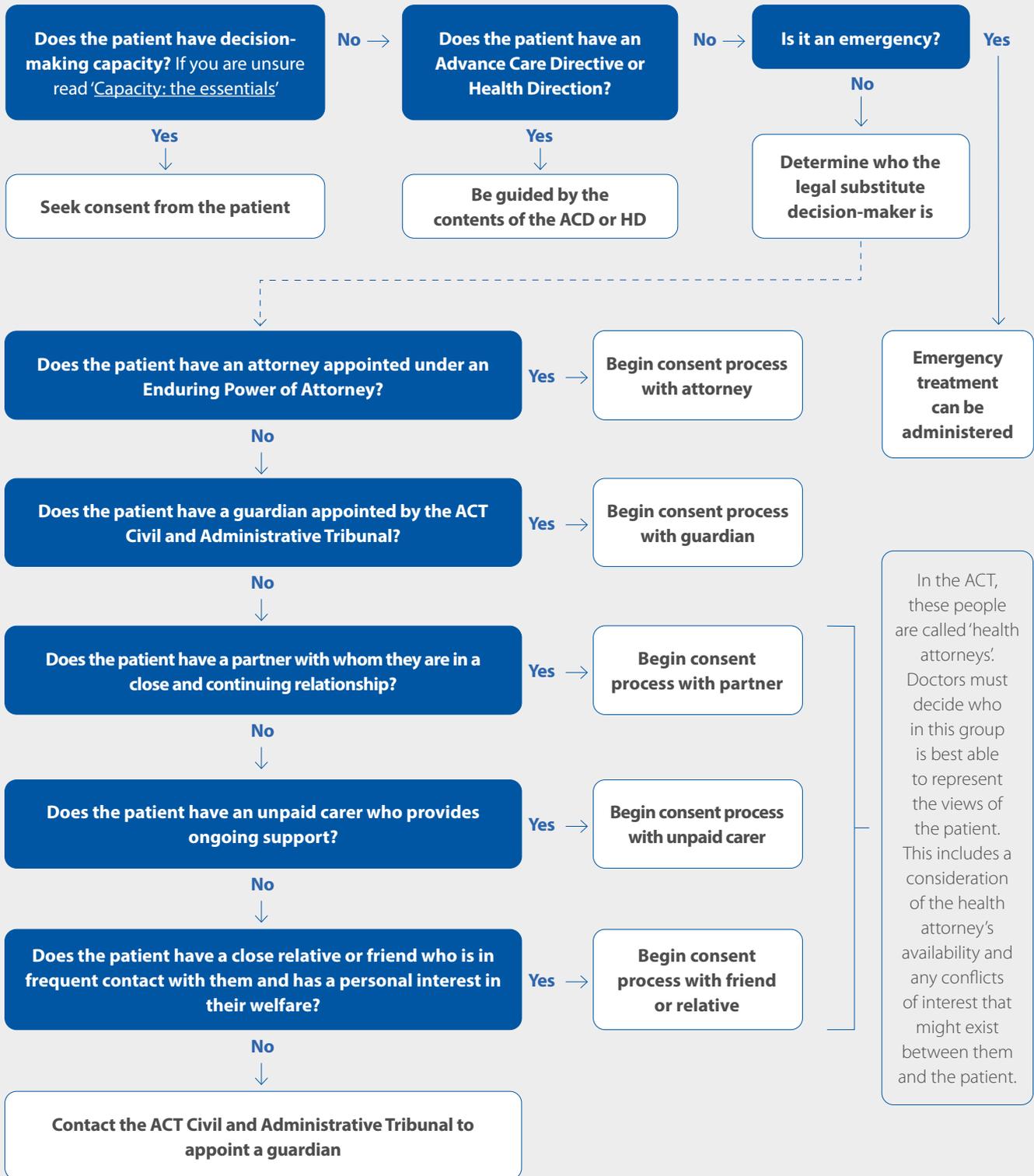


# Capacity: Substitute decision-makers for health care

## Australian Capital Territory

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 a health direction 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.

The concept and terminology related to supported decision-making are interpreted slightly differently depending on the organisation, state or territory 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

In the ACT, people can make a Health Direction, which is a formal record of their future decisions regarding the refusal or withdrawal of medical treatment generally or of a particular kind. A person can also make an Advance Care Directive which records their preferences for future care, if they lose capacity and therefore cannot provide consent to medical treatment.

A person can also formally appoint someone to make future health care decisions for them through an Enduring Power of Attorney. They can also provide directions to that person in that document. If a patient has both a Health Direction and Enduring Power of Attorney, which are inconsistent, the document which was created most recently is the one a health attorney should follow.

To help ensure the validity of a directive, patients should complete the [forms](#) provided by the ACT Department of Health. All forms can be added to a patient's My Health Record so that it is visible to their treating doctors.

The laws regarding advance care directives and planning 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 the ACT or any other state or territory, please visit [QUT End of Life Law for Clinicians](#) and [Advance Care Planning Australia](#).

## Determining the legally-appropriate substitute decision-maker

It is the responsibility of the doctor to identify and decide who the correct substitute decision-maker is. As illustrated in the flowchart, it is not automatically a patient's next of kin. In the ACT, doctors need to consider whether there is Health Direction in place, whether an attorney has been appointed under an Enduring Power of Attorney, or whether the patient has a guardian appointed by the ACAT.

If these do not exist or the documents do not cover the particular decision at hand, a doctor may need to approach a decision-maker known as a 'health attorney'. A doctor may seek consent from the health attorney that they consider is best able to represent the views of the patient. To make this decision, a doctor may take into account any circumstance they believe to be relevant. This includes a consideration of the attorney's availability to make the decision.

## Decision-making principles

Health attorneys must give effect to the wishes of the patient, to the extent that they were known or could be discovered. The attorney should consult with each carer of the patient and any other supporting documents to work out these wishes. Health attorneys should make decisions based on what they believe the patient would have wanted, not on what the attorney themselves might want in the same situation.

## Types of decisions

In the ACT, a health attorney can provide consent for most medical procedures and treatments. However, they cannot consent to a prescribed medical procedure which includes procedures such as abortions, sterilisations or electroconvulsive therapies.

## Dealing with conflict

There may be times where conflict arises about the decisions of the substitute 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 Public Trustee and Guardian to intervene.

## Additional resources

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

For information on making health care decisions for others in the Australian Capital Territory please visit the [Public Trustee and Guardian](#).

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