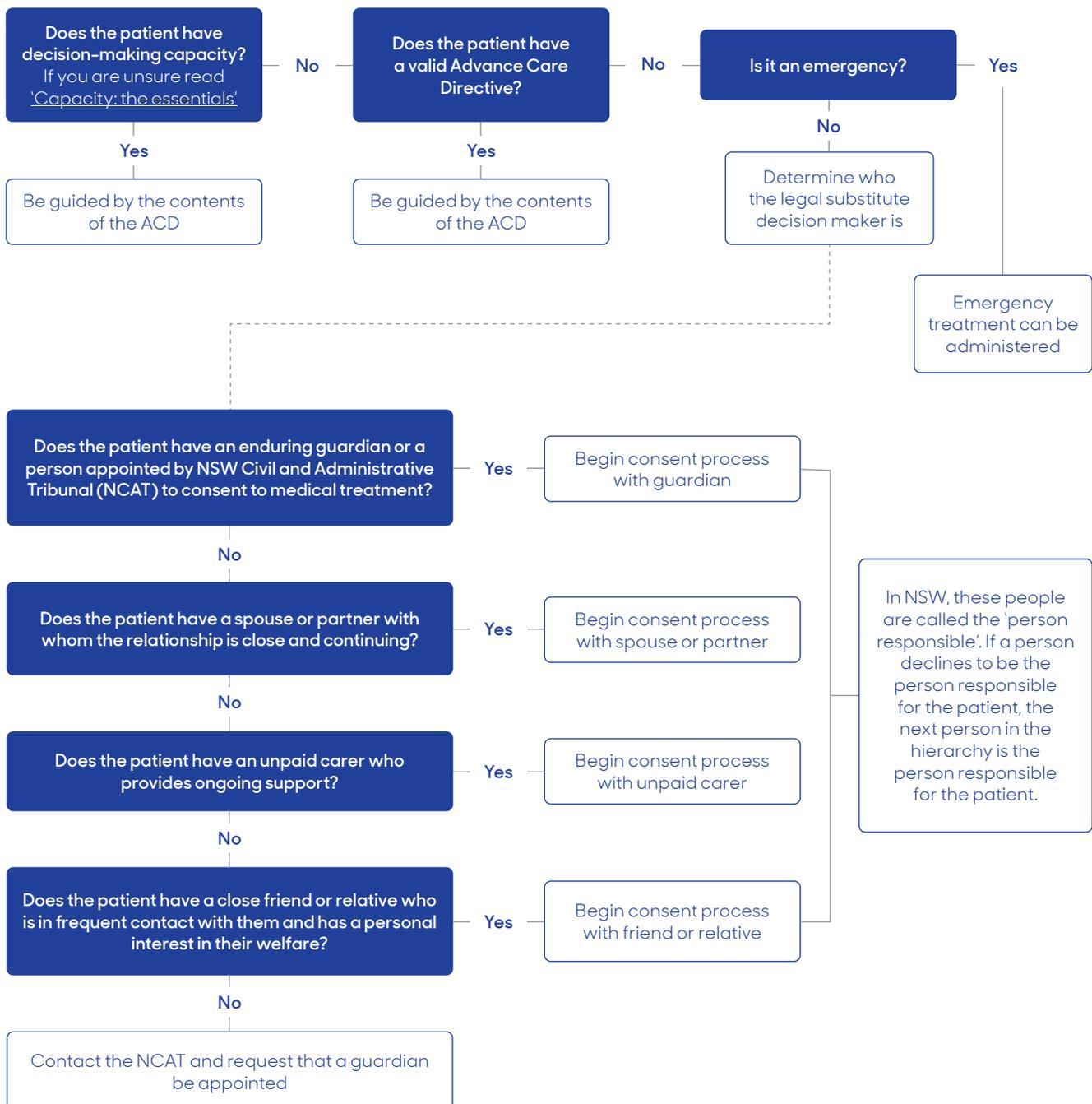


Capacity: Substitute decision-makers for health care

New South Wales

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 care 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.

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 advance care directive 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 NSW, there is not a specific form that ACDs take. However, there are many resources to support people create valid ACDs, including from NSW Health. ACDs can be added to a patient's My Health Record so that it is visible to their treating doctors.

In order for an ACD to be considered valid it must have been made by the patient when they had capacity. It must also be clear and specific about the treatments that a patient would accept or refuse and apply to the situation at hand.

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 NSW 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

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 a valid ACD in place. Each state and territory has different legislation that outlines who is the correct substitute decision-maker for these health care decisions. In NSW, this person is called the 'person responsible'.

It is the responsibility of the doctor to identify who the correct person responsible is. As illustrated from the flowchart, it is not automatically a patient's next of kin.

Decision-making principles

The welfare and interests of the patient should be the paramount considerations of the substitute decision-maker when they are deciding to consent to treatment. The goal is to give the patient the best opportunity of having their health promoted and maintained in a way that they would have wanted. Substitute decision-makers should be guided by what they believe the patient would have wanted, not what the decision-maker themselves might want in the same situation

Types of decisions

In NSW, a person responsible can provide consent for 'major' and 'minor' treatment. These have specific meanings found in guardianship legislation. A person responsible can withhold consent to life-sustaining treatment, provided they are acting in the patient's best interests and in accordance with what the patient would have wanted.

Only NCAT can provide consent for 'special' treatments, which include treatments such as terminations and sterilisations.

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 NCAT to intervene.

Additional resources

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

For information on advance care planning in NSW please visit [Planning Ahead Tools](#).

For more information or immediate medico-legal advice, call us on **1800 128 268, 24/7 in emergencies.** avant.org.au/mlas

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