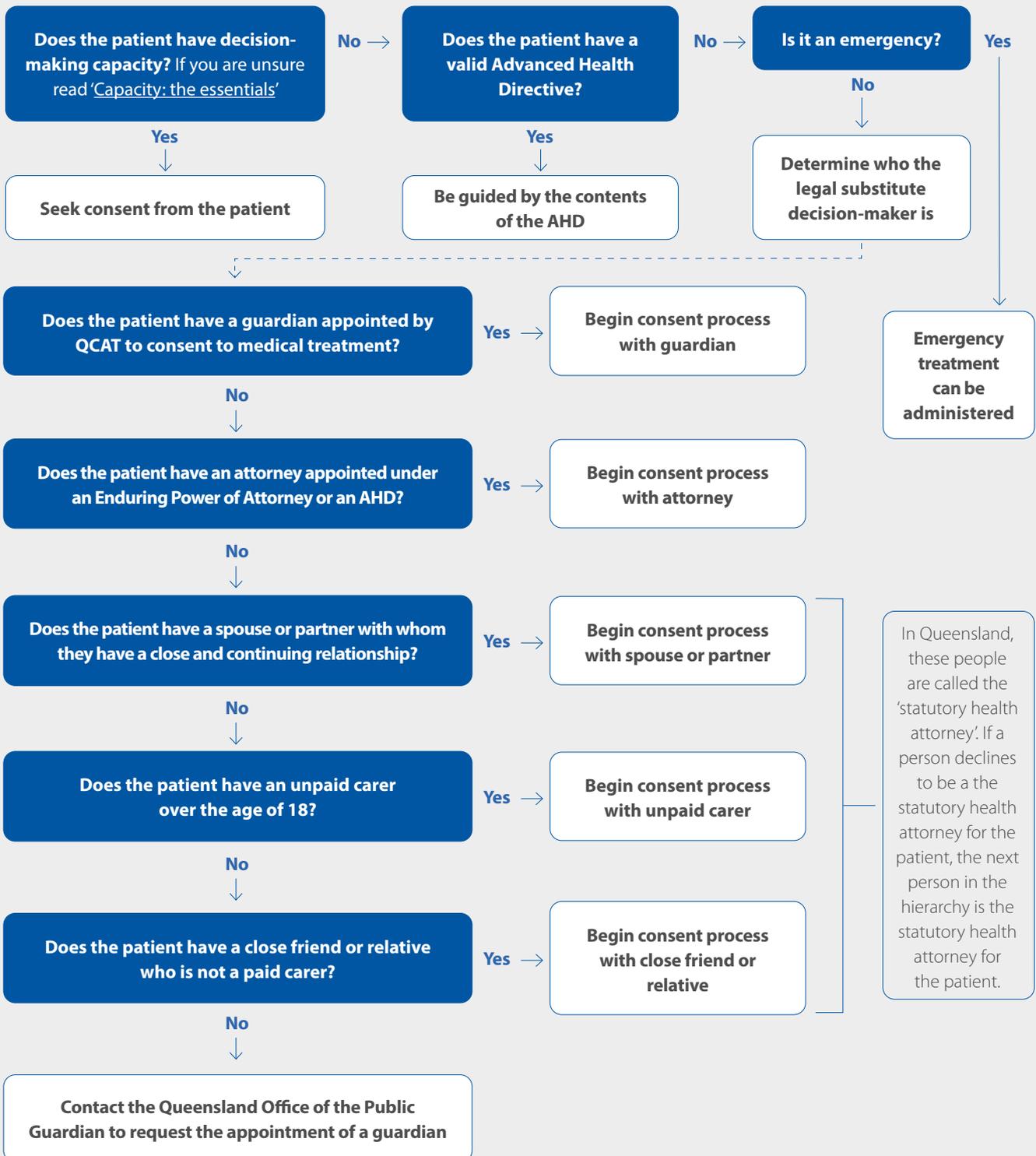


Capacity: Substitute decision-makers for health care

Queensland

Many doctors will encounter situations where there is a need to provide care for a patient who has no or limited ability 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.

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 health directives (AHDs)

An advance health 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 AHD. You must refer to an AHD if there is one.

In Queensland, an AHD must be in writing and using the Government's [form](#) is advisable to ensure that it meets the requirements to be considered valid. An AHD can be added to a patient's My Health Record so that it is visible to their treating doctors.

In an AHD, a person provides an outline about their treatment preferences if they lose capacity. They can also appoint an attorney to make health decisions on their behalf.

The laws regarding AHDs 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 Queensland 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 AHD in place or if an attorney is not appointed in the AHD or in an Enduring Power of Attorney.

Each state and territory has different legislation that outlines who is the correct substitute decision-maker for these health care decisions. In Queensland, this person is called the 'statutory health attorney'.

It is the responsibility of the doctor to identify who the correct statutory health attorney is. As illustrated in the flowchart, it is not automatically a patient's next of kin.

Decision-making principles

All substitute decision-makers should apply the 'general principles' and the 'health care principles' when making a decision on behalf of someone else. These are specific principles that underpin Queensland's guardianship framework and can be found [here](#). The substitute decision-maker must recognise and preserve, to the greatest extent practicable, the patient's right to make their own decision and support them with that if possible. They must take into account the patient's views, wishes and preferences or what they likely would have been (for example, if they expressed their wishes before they lost capacity).

Types of decisions

In Queensland, a statutory health attorney can make most health care decisions, except those called 'special health care matters'. These include procedures which are irreversible such as sterilisation, donation of tissue and termination of pregnancy. Only a Court or the Queensland Civil and Administrative Tribunal can provide consent for a special health care matters.

A statutory health attorney can decide to withhold or withdraw life sustaining measures if the decision is consistent with good medical practice. However, if a doctor believes that life-sustaining treatment should commence or continue (because it is good medical practice), then they can override a statutory health attorney's decision to withhold or withdraw such treatment.

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 Office of the Public 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 Queensland please visit [Office of the Public Guardian](#).

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