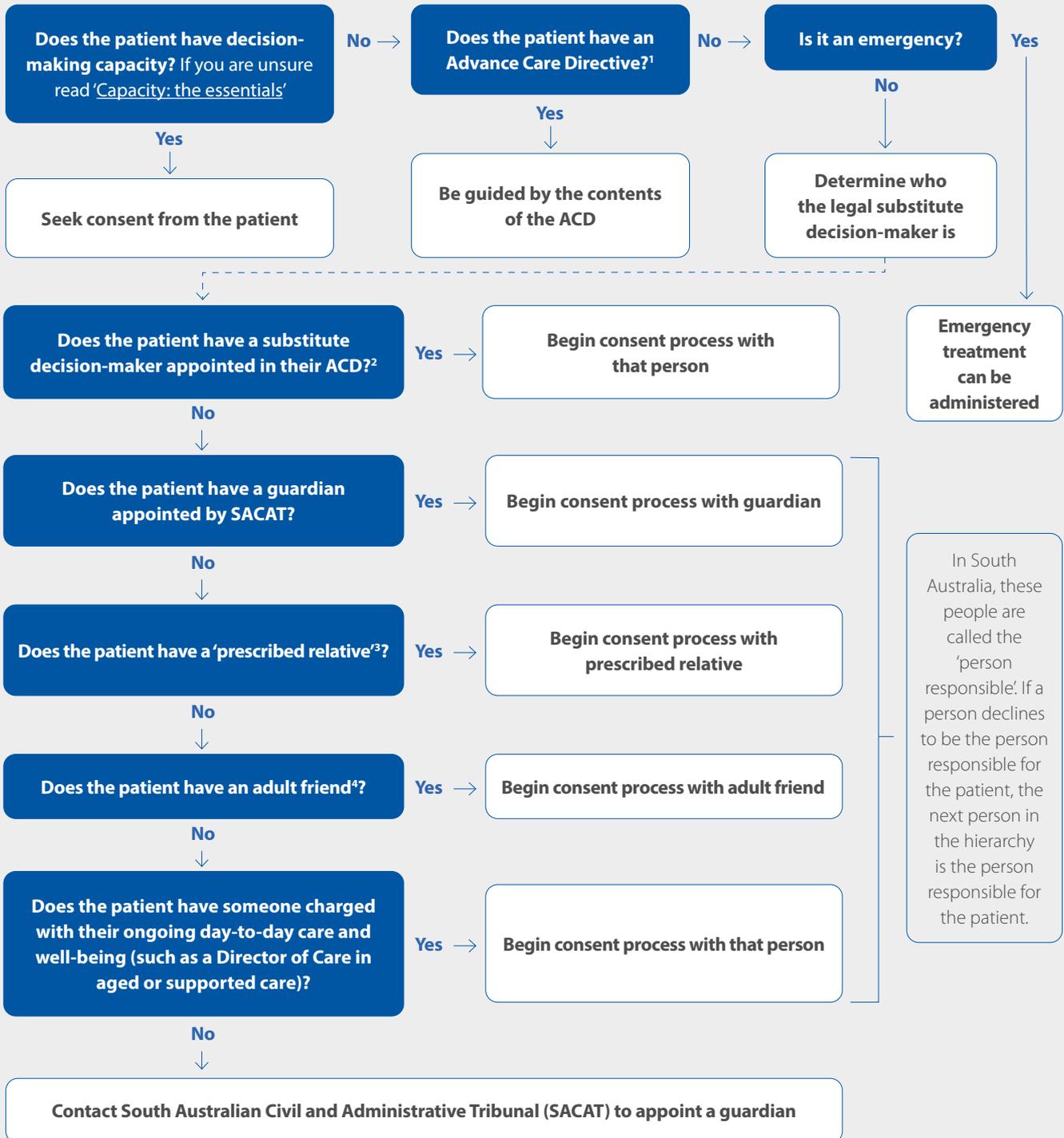


Capacity: Substitute decision-makers for health care

South Australia

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.



¹ Prior to 2014, a patient could have made a Medical Power of Attorney, Enduring Power of Guardianship or an Anticipatory Direction. Follow the most recent document.

² Prior to 2014, a patient could have appointed a Medical Agent under a Medical Power of Attorney or an Enduring Guardian under an Enduring Power of Guardianship. If so, begin consent process with that person.

³ A prescribed relative is a spouse, a partner, an adult related by blood, marriage, adoption or according to Aboriginal or Torres Strait Islander Kinship rules.

⁴ The person must have a close and continuing relationship with the patient.

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 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. An ACD can also appoint one or more substitute decision-makers to make health decisions on the person's behalf. 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 South Australia, if a person's ACD includes a refusal of consent to future health care it is binding and must be followed. This includes withholding life-sustaining treatment. All other health care described in the ACD is non-binding, but should be complied with as far as it is reasonably practicable.

In South Australia, an ACD must comply with specific regulations. To help ensure the validity of an ACD, patients should complete the [form](#) provided by the South Australian government. 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 South Australia please visit the [Office of the Public Guardian](#) or [Advance Care Directives](#).

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 has not been a person appointed through an ACD, a Medical Power of Attorney or an Enduring Power of Guardianship. Each state and territory has different legislation that outlines who is the correct substitute decision-maker for health care decisions. In South Australia, this person is called the 'person responsible'.

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

Decision-making principles

When a substitute decision-maker is making a decision for the patient, they must consider what the patient would have decided if they had capacity. This is the paramount consideration. If any of the present wishes of the patient can be ascertained, these must also be considered. It is important for substitute decision-makers to 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 South Australia, substitute decision-makers can generally make most health care decisions, including consenting to or continuing life-sustaining treatment and palliative care. However, they cannot make decisions about some types of treatments, such as termination of pregnancy or sterilisation.

In the case of the Medical Attorney, Enduring Guardian or a Guardian, the decisions they can make will depend on the instructions given in the document that appointed them to their position.

Dealing with conflict

There may be times where conflict arises about the decisions of the person responsible, 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 Advocate to intervene or seek advice from the SACAT.

Additional resources

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

For more information on substitute decision-making in other states and territories please visit [QUT End of Life Law for Clinicians](#) and [Advance Care Planning Australia](#).

This publication is not comprehensive and does not constitute legal or medical advice. You should seek legal or other professional advice before relying on any content, and practice proper clinical decision making with regard to the individual circumstances. Persons implementing any recommendations contained in this publication must exercise their own independent skill or judgment or seek appropriate professional advice relevant to their own particular practice. Compliance with any recommendations will not in any way guarantee discharge of the duty of care owed to patients and others coming into contact with the health professional or practice. Avant is not responsible to you or anyone else for any loss suffered in connection with the use of this information. Information is only current at the date initially published. © Avant Mutual Group Limited 2020 MJN268 06/20 (1166-4)