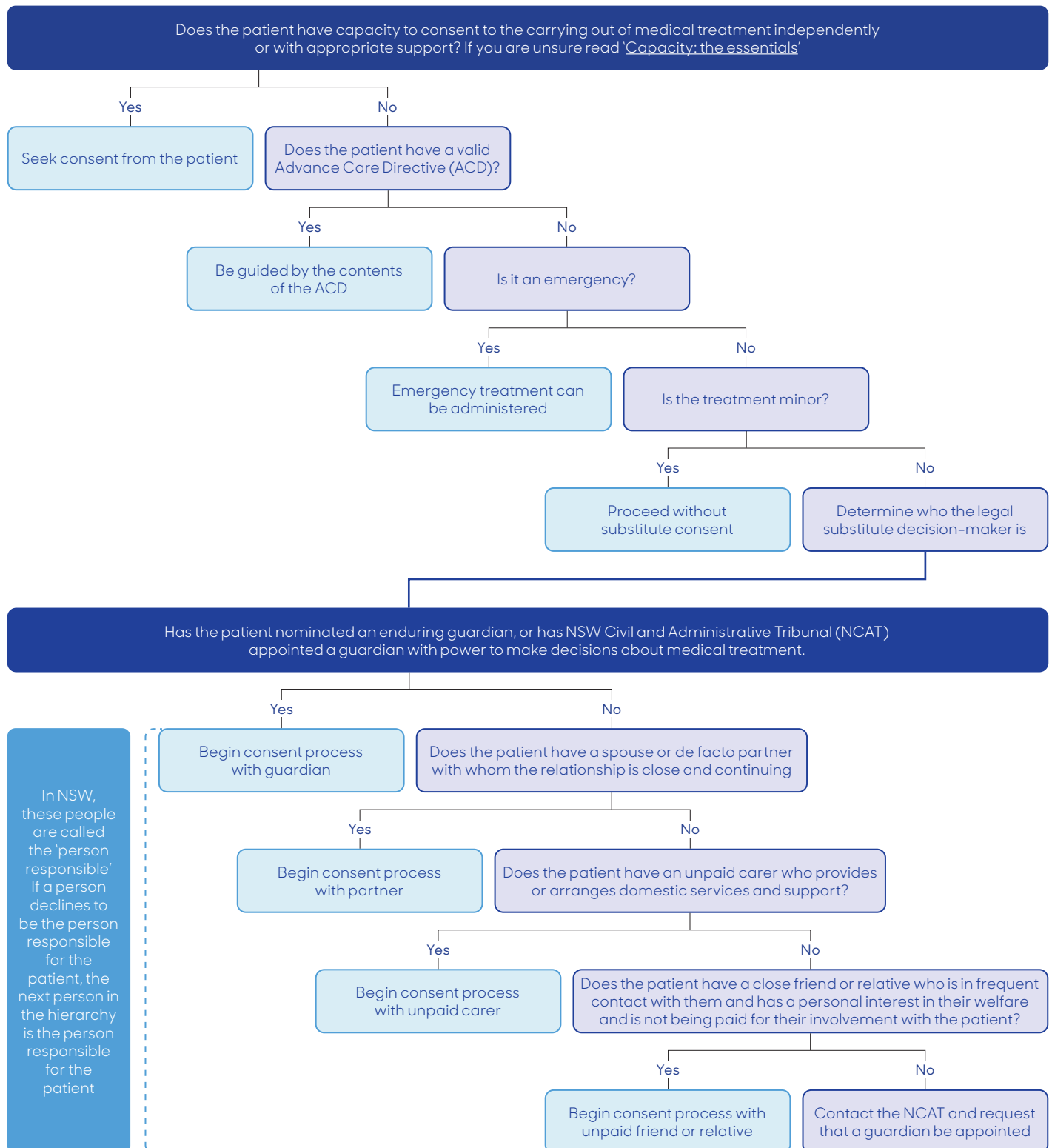


Substitute decision-makers for healthcare New South Wales

You may need to provide care for a patient who has limited or no capacity to make healthcare decisions for themselves. For these situations, the law has established mechanisms for you to seek consent to provide treatment. You need 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 whether the patient requires urgent medical treatment. Where the patient is unable to give consent, treatment can generally be provided without consent if it is required to save life, prevent serious injury or harm, or relieve significant pain or distress.

This applies where it is not possible or practicable to identify a substitute decision-maker or locate any relevant directive. Where known, any applicable Advance Care Directives (ACD) should be followed.

Advance Care Directives

An ACD is a record of a person's preferences or decisions about future medical treatment if they lose capacity.

If your patient does not have capacity, you should take reasonable steps to determine whether an ACD exists and whether it applies to the decision being considered.

An ACD may be legally binding if it is valid and applicable to the situation. A valid ACD must have been made when the person had capacity.

An ACD may include specific directions about treatments a person would accept or refuse, as well as statements of values and preferences that can guide decision-making.

Person responsible

In NSW, if there is no applicable ACD and no appointed decision-maker, consent may be obtained from the person responsible, as defined under NSW legislation.

This is not automatically the patient's next of kin. The appropriate person is identified according to the statutory hierarchy.

Minor treatment

Minor treatment may be provided without consent where:

- it is necessary to promote the patient's health and wellbeing
- the patient does not object
- there is no person responsible available or willing to make the decision.

Major treatment

For major medical treatment, consent must generally be obtained from the person responsible or from the NSW Civil and Administrative Tribunal.

Major treatment includes, among other things:

- treatment involving the administration of a drug of addiction
- treatment under general anaesthetic or sedation
- treatment involving a substantial risk of death, brain damage, paralysis, scarring, or significant pain or distress

For further information about what constitutes major treatment, see [clause 10 of the Guardianship Regulation 2016 \(NSW\)](#)

Limits on decision-making

A person responsible can consent to most medical treatment.

However, certain 'special' treatments require consent from the NSW Civil and Administrative Tribunal, including procedures such as termination of pregnancy and sterilisation.

A person responsible may refuse treatment, including life-sustaining treatment, where this reflects the patient's wishes or best interests.

A person responsible cannot compel a practitioner to provide treatment that is futile, not clinically appropriate, or not in the patient's interests. You do not need consent to withhold or withdraw such treatment.

Additional resources

Avant factsheet: [Capacity: the essentials](#)

NSW Health: [Advance care planning](#)

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