Substitute decision makers

Many doctors will encounter situations where there is a need to provide care for a patient who has limited or no capacity to make a health care decision for themselves. For these situations, the law has established mechanisms for you to seek consent to provide treatment.

Quick guide

- Start with the patient. Assess whether they can make the decision, including with appropriate support.
- If the patient cannot make the decision, check for any relevant directive or documented wishes.
- If there is no applicable directive, identify who is authorised to make the decision on the patient's behalf.
- In an emergency, where urgent treatment is required and consent cannot be obtained in time, you can generally proceed.
- Refer to the relevant state or territory flowchart and seek advice if you remain unsure.

You may need to identify a substitute decision-maker when a patient is unable to make a healthcare decision for themselves. This can arise in a range of situations, including acute illness, cognitive impairment, or where a patient's decision-making ability fluctuates.

Determining who can make decisions on a patient's behalf is not always straightforward. The law governing substitute decision-making differs across Australian states and territories, and the appropriate approach will depend on the jurisdiction in which you are practising, or where your patient is located.

Supported decision-making

Before identifying a substitute decision-maker, consider whether the patient can make the decision with appropriate support.

All states and territories recognise supported decision-making. Even where capacity is limited, a patient may still be able to understand information, make a decision and communicate that decision with assistance.

If a patient can make a decision with support, their decision prevails.

When a substitute decision-maker is required

If a patient does not have capacity to make a healthcare decision, even with support, you may need to identify someone who is authorised to make the decision on their behalf.

For the purpose of this resource, a substitute decision-maker refers to any person authorised to make healthcare decisions for a patient. This may include a formally appointed decision-maker, such as an attorney or guardian, or, where none exists, a person identified under the relevant legal framework.

Terminology and legal structures differ between jurisdictions. Importantly, a patient's next of kin is not automatically the substitute decision-maker.

Emergencies

In an emergency, where a patient is unable to consent and urgent treatment is required to save life, prevent serious harm, or relieve significant pain or distress, you can generally proceed without consent.

This applies where there is no time, or it is not possible or practicable, to identify a substitute decision-maker or locate any relevant directive or documented wishes.

Where possible, you should still consider whether any known directive or previously expressed wishes apply.

Conflict

Disagreements can arise between the substitute decision-maker, family members and the clinical team about appropriate treatment.

You are not required to provide treatment that is clinically inappropriate, futile, or would constitute unprofessional conduct, even if requested by a substitute decision-maker or others.

State and territory law

The law relating to substitute decision-making is state and territory specific. Terminology, legal frameworks and the process for identifying who can make decisions on behalf of a patient differ between jurisdictions.

For this reason, we have developed jurisdiction-specific flowcharts. These are designed to guide you through the process relevant to the state or territory in which you are practising, or where your patient is located. You should select the appropriate flowchart and follow the steps for that jurisdiction.

Each jurisdiction sets out a hierarchy to determine who can act as the decision-maker. This hierarchy must be followed. However, the legislation generally incorporates concepts such as availability, willingness and the nature of the relationship with the patient when identifying the appropriate person within that framework. For example, references to an "unpaid carer" are intended to capture a person who has a close and continuing relationship with the patient and is regularly involved in their care, rather than someone providing only occasional assistance.

Jurisdiction-specific flowcharts

Australian Capital Territoty

Substitute decision-makers for healthcare Australian Capital Territory

New South Wales

Substitute decision-makers for healthcare New South Wales

Northern Territory

Substitute decision-makers for healthcare Northern Territory

Queensland

Substitute decision-makers for healthcare Queensland

South Australia

Substitute decision-makers for healthcare South Australia

Tasmania

Substitute decision-makers for healthcare Tasmania

Victoria

Substitute decision-makers for healthcare Victoria

Western Australia

Substitute decision-makers for healthcare Western Australia

Substitute decision-making can be complex and fact-specific. If you have reviewed the relevant factsheet and flowchart and remain unsure, you should seek advice.

Avant's Medico-legal Advisory Service can provide assistance.

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