

Capacity essentials



Capacity is defined as a patient's ability to make decisions. This varies depending on the complexity of the decision needing to be made.

Note: This content is a brief summary of the key issues on this topic. Further insights and information can be found on the Avant Learning Centre or by seeking medico-legal advice.

Essential elements

To have capacity a patient must be able to:

- Understand the facts involved and the nature of the decision to be made
- Weigh up the consequences of the decision and the risks and benefits of their choice
- Communicate their decision.

Is capacity absolute?

Capacity is not all or nothing – it is specific to the situation and to the decision being made. A patient may have capacity to make some decisions, but not others. For example, a patient might be capable of making medical decisions even if they are not capable of managing their finances. Likewise, a patient may be capable of consenting to simple medical treatment (such as taking an antibiotic) but not major procedures (such as major surgery).

Other factors

- It is up to the doctor to assess whether a patient has the capacity to make the particular treatment decision under consideration. If you are uncertain, consider referring the patient for review by an appropriate practitioner (for example, a

neurologist or psychiatrist). Most larger facilities (e.g. hospitals) will also have legal advice available, or contact Avant, or your private indemnity insurer, for guidance.

- A person aged 18 years and over (16 years and over in South Australia) is presumed to have capacity until proven otherwise.
- A patient does not lack capacity simply because you disagree with their decision or because they do not consent to the treatment you are recommending.
- Diseases and disorders can impair a patient's cognitive function and can compromise their capacity to make a treatment decision.

What if a patient does not have capacity to make the decision?

If a patient lacks capacity to make a treatment decision, then consent needs to be obtained from an appropriate substitute decision-maker, although there are a few exceptions to this. For example, treatment can be provided without consent in an emergency. Also, if the patient has a valid advance care directive that applies to the circumstances it must be respected.

Each state and territory has legislation which sets out the appropriate substitute decision-maker to give consent to medical treatment on behalf of a patient who does not have capacity.

Generally, the legislation lists a hierarchy of people who can act as the substitute decision-maker. This list often starts with the patient's guardian (if one has been appointed), and then goes to a spouse or de facto partner, family member or close friend. In some cases, the patient's situation may need to go before the guardianship tribunal for orders to be made. For more information see our factsheet [Avant – Capacity the essentials](#) and information for your location: [Avant – Substitute decision makers](#)

The term 'next of kin' does not have a consistent legal meaning in Australia and does not determine the appropriate substitute decision-maker, except in circumstances outlined in specific legislation, for example human tissue legislation where the "senior available next of kin" is empowered to consent.

Also, consent to certain treatments (for example, sterilisation procedures) for patients without capacity must be obtained from the court or tribunal.

Checklist

- Prioritise efforts to assist patients to make decisions autonomously
- Adults are presumed to have decision-making capacity
- If there is concern, there may be a need to assess capacity
- Capacity is decision specific and situation specific
- Seek assistance for difficult or complex assessments

Want more?

Visit the Avant Learning Centre – avant.org.au/avant-learning-centre, for resources including webinars, eLearning courses, case studies, articles and checklists.

