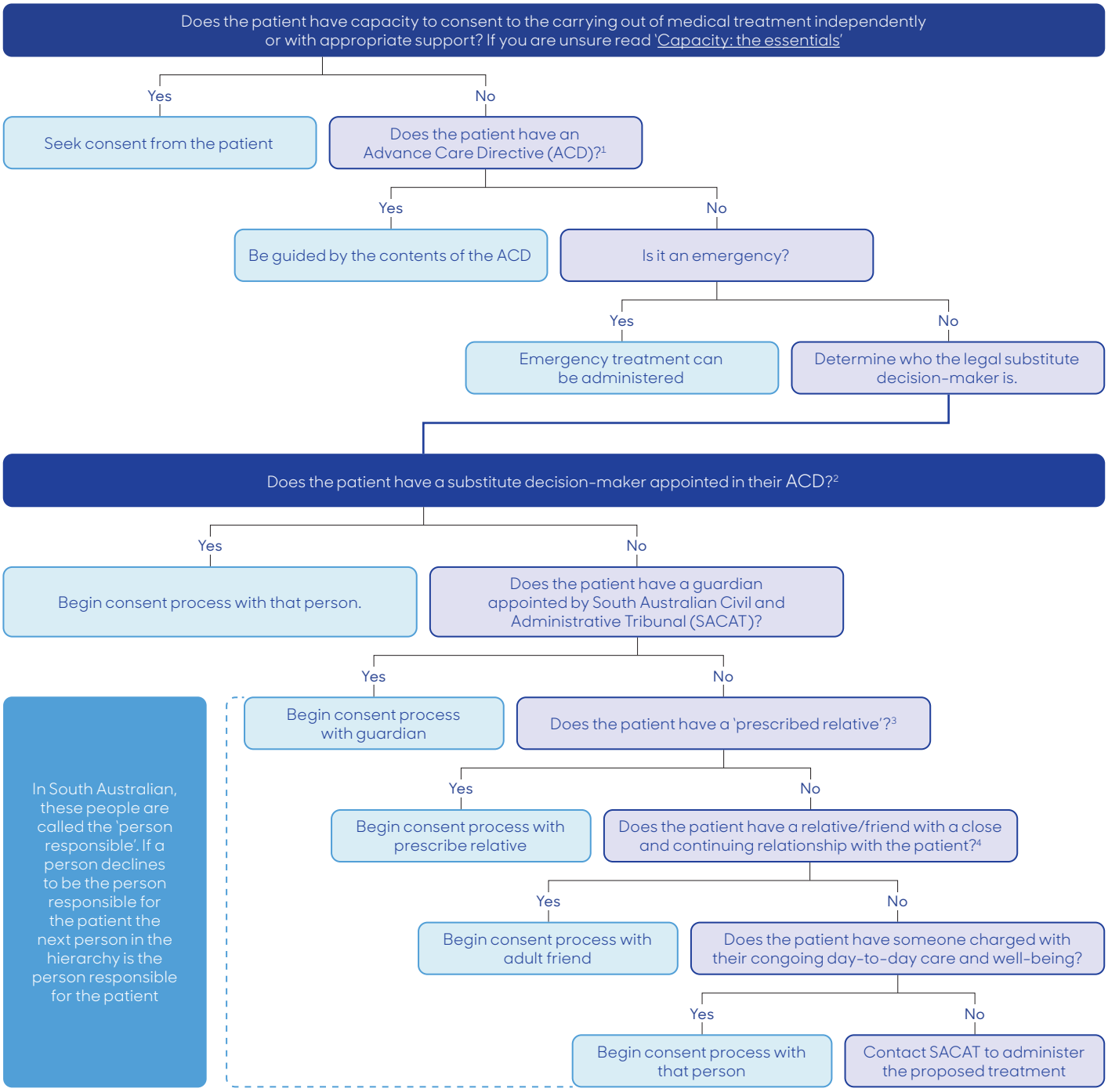
Avant
By doctors for doctors

Substitute decision-makers for healthcare South Australia

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.



[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 and Enduring Power of Guardianship. If so, begin consent process with that person.

[3] A prescribed relative is a spouse, a domestic partner (in a close relationship and living together for 3 years or have a child together), 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 whether urgent treatment is required. Where the patient is unable to give consent, treatment may be provided without consent if it is necessary to address an imminent risk to the patient's life or health.

Where practicable, you should:

- obtain a second written opinion from another medical practitioner who has examined the patient
- make reasonable inquiries as to whether the patient has an Advance Care Directive (ACD) or an available guardian or person responsible

If an ACD or decision-maker is identified and it is practicable to do so, consent should be sought.

Where known, any applicable ACD should be followed. However, in limited circumstances, a refusal of treatment in an ACD may be overridden in an emergency.

Advance Care Directives

An ACD is a formal record of a person's decisions, wishes and preferences about future healthcare if they lose capacity. An ACD can only be made by an adult with decision-making 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 set out a person's wishes or preferences about future healthcare, include refusals of specific treatments, and appoint one or more substitute decision-makers to make healthcare decisions on the person's behalf.

A refusal of treatment in an ACD is legally binding and must be followed, including decisions to refuse life-sustaining treatment. Other statements in an ACD, such as preferences or values, are not binding but should be followed as far as is reasonably practicable.

In limited circumstances, a refusal of treatment in an ACD may be overridden. This includes where treatment is reasonably necessary to save the patient's life and the risk arises from attempted suicide or self-harm.

In South Australia, an ACD must be completed in the approved form.

Decision-maker

If a patient does not have capacity, you will need to identify the appropriate person to make decisions on their behalf. This is not automatically the patient's next of kin.

If the patient has an ACD that appoints a substitute decision-maker, that person should be approached to make the decision.

If there is no appointed substitute decision-maker, a guardian appointed by the South Australian Civil and Administrative Tribunal may have authority to make decisions on the patient's behalf.

If there is no applicable ACD or appointed guardian, consent may be provided by the person responsible under South Australian law. This is determined according to a statutory hierarchy, which may include a prescribed relative, a person with a close and continuing relationship with the patient, or a person responsible for the patient's ongoing care and wellbeing.

A prescribed relative includes a spouse or domestic partner, an adult related by blood, marriage or adoption, or a person recognised according to Aboriginal or Torres Strait Islander kinship rules. The person must have a close and continuing relationship with the patient.

Prior to 2014, a patient may have made a Medical Power of Attorney, Enduring Power of Guardianship or an Anticipatory Direction, or appointed a Medical Agent or Enduring Guardian under those documents. If so, the most recent valid document should be followed and the appointed person should be approached to make the decision.

South Australian law also recognises Aboriginal and Torres Strait Islander kinship relationships when determining who is the appropriate decision-maker.

Limits on decision-making

In South Australia, a decision-maker can generally make most healthcare decisions on behalf of a patient, including consenting to or refusing life-sustaining treatment and palliative care.

However, a decision-maker cannot consent to certain treatments, including termination of pregnancy and sterilisation. Consent for these treatments must be obtained from the South Australian Civil and Administrative Tribunal.

A decision-maker cannot refuse the administration of medication to relieve pain or distress, or the ordinary provision of food and drink by mouth.

The scope of a decision-maker's authority may also be limited by the terms of their appointment. For example, a substitute decision-maker appointed under an ACD, or a guardian appointed by SACAT, must act within the powers granted to them.

Additional resources

For more information on

- assessing capacity, please see the Avant factsheet: Capacity: the essentials
- advance care planning in SA, including forms, guidance and resources, see the Office of the Public Advocate or SA Health Advance Care Directives
- advance care planning in all states and territories, see QUT End of Life Law for Clinicians or Advance Care Planning Australia

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