

# Advance care planning and the law: New South Wales

This factsheet gives specific information about advance care planning and New South Wales (NSW) law.

## Advance care planning documentation

In NSW there is no legislation about advance care plans, however the **Advance Care Directive** is recognised as being valid by common law. It only comes into effect if a person loses capacity (cannot make or communicate their decisions). The directive allows the refusal or withdrawal of medical treatment.

## Formal requirements for advance care planning documents

The Advance Care Directive should be on the recommended form or similar. Though not a legal requirement, the form should be co-signed by a treating health professional who confirms that the person making the advance care directive had capacity and was aware of the implications of the information in the documents.

## Amending or revoking advance care planning documents

As there is no legislation, the common law applies and this is unclear. A person who wants to amend or revoke their plan should be encouraged to rewrite their advance care directive.

## Non-statutory advance care planning documents

NSW allows for informal advance care planning documentation such as an advance care plan with general statements about preferences and values. Though non-binding may be taken into consideration under common law.

## Health care professionals' obligations

The common law applies. If the Advance Care Directive complies with the common law requirements, a health care professional should comply with it.

## Advance care planning in context of mental health

In NSW, there is no legislation regarding the recording of mental health preferences.

## Substitute decision-maker

A substitute decision-maker may be nominated by the person, appointed by a tribunal or by default under legislation.

## Enduring Guardian

One or more adults can legally be appointed into this role by completing the Enduring Guardian appointment form. A person involved in providing medical services, accommodation or other daily activities to the person cannot be appointed.

Only these persons can witness this appointment:

- Australian legal practitioner
- Registrar of the NSW Local Court
- overseas-registered foreign lawyer
- approved employee of NSW Trustee & Guardian or Service NSW.

The person can limit the authority an enduring guardian has, but there are no legislative constraints on the authority of an enduring guardian, therefore if not specified they can make decisions relating to refusal / withdrawal of treatment as well as consent for procedures.

## Guardian

A guardian is a person appointed by the New South Wales Civil and Administrative Tribunal to a “person in need of a guardian”. A guardianship order may be continuing or temporary and may be plenary (full) or limited.

## Person responsible

Default substitute decision-maker, the person designated under the law if no guardian or attorney appointed.

1. Spouse
2. Carer for the person
3. Close friend or relative



## Does a Health Direction apply in other states?

A Health Direction made in NSW will apply in:

- Northern Territory, however the substitute decision-maker needs to work within the requirements of Northern Territory
- Queensland, if it aligns with the provisions included in the Queensland Advance Health Directive
- South Australia as long as it complies with South Australian law
- Western Australia, if an order is made by the State Administrative Tribunal to recognise the plan
- Victoria from 12 March 2018, if it complies with Victorian law it will be recognised as a values directive

In the Australian Capital Territory and Tasmania there is no law in place to recognise advance care planning documentation from other states. Further advice should be obtained from the Office of the Public Advocate in the relevant state or territory.

## Where can I get more information?

Advance Care Planning Australia:

[advancecareplanning.org.au](http://advancecareplanning.org.au)

National Advisory Service: 1300 208 582