IRISH MEDICAL ORGANISATION
Ceardchumann Dochtúirí na hÉireann

IMO Submission to the Decision-Making Support Service on Code of Practice on Advance Healthcare Directives for Healthcare Professionals

7th January 2022

The Irish Medical Organisation (IMO) is the trade union and representative body for all doctors in Ireland. Please find below the IMO's initial comments in relation to the Draft Code of Practice on Advance Healthcare Directives for Health and Social Care Professionals.

Chapter 2 - Your functions and duties

2.1.2 Take steps to ascertain if the person has an advance healthcare directive

Where you, as a healthcare professional, have reached a decision that the relevant person lacks the capacity to make a treatment decision, you should take all reasonably practicable steps to ascertain if that person has made an advance healthcare directive.

The Act provides for the establishment of registers of Co-decision-making agreements, Decision-making representation orders, and Enduring powers of attorney, however, there is no register of Advanced Healthcare Directives despite provision for such in the Act. This will make it more difficult for medical professionals to ascertain if an Advanced Healthcare Directive has been made. It may be useful for a Directive maker to have a bracelet or necklace indicating to health and social care professionals that they have an Advanced Healthcare Directive with the contact number.

2.1.4 Response to an advance healthcare directive

If the advance healthcare directive is valid and applicable, you must comply with any refusal of healthcare treatment in the advance healthcare directive. This reflects the legal right of a person with capacity to refuse treatment. You must also take into consideration any request for treatment.

There will be situations where a refusal to treat will not be clinically indicated and is likely to cause the patient more harm than benefit and will cause the patient pain , discomfort or distress. For example, a patient with debilitating MS who refuses thickeners in drinks and as a result is aspirating.

These situations are likely to be very problematic for the health and social care professionals involved.

> The fact that you have a conscientious objection cannot prevent a refusal of treatment in a valid and applicable advance healthcare directive 13 Code of Practice on Advance Healthcare Directives for Healthcare Professionals from being given legal effect in accordance with the Act and a healthcare professional who treats the directive-maker in such a circumstance is potentially liable under criminal and civil law.

If a health or social care professional has a conscientious objection and it is not possible to make arrangements to transfer the person then the person must be treated in accordance with the valid and applicable Advance Healthcare Directive.

Again these situations are likely to be very problematic for health and social care professionals.

2.2.1 Validity of an advance healthcare directive

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There is some disconnect between Part 8 of the Assisted Decision Making (Capacity) Act 2015 and the Guide to Professional Conduct and Ethics for Registered Medical Practitioners (Amended) 8th Edition 2019.

Under the Act, there is no requirement for Directive-makers to consult with a medical professional when making an Advance Healthcare Directive However under paragraph 16.2 of the Guide to Professional Conduct and Ethics for Registered Medical Practitioners states that:

> *"An advance healthcare plan or directive has the same status as a decision by a patient at the actual time of an illness and should be followed provided that:*
> - *the request or refusal was an informed choice in line with the principles in paragraph 9;"*

Appendix C of Guide to Professional Conduct and Ethics for Registered Medical Practitioners also lists the information patients want or should know before they decide whether or not to consent to treatment or an investigation.

There is no legal clarity as to what action a medical professional should take if he/she suspects (for example, through the course of a conversation with the Designated Healthcare Representative) that an Advance Healthcare Directive has been made without the Directive Maker having received the information necessary to make an informed choice. To expect a medical practitioner to comply with an Advance Healthcare Directive when no medical advice or input has been provided poses a significant ethical and legal challenge for practitioners.

Given the range of treatment options that may be available as well as the rapid advances taking place in medicine, legal clarity on this issue is required.

Referral to court

> … Any interested person may make an application to court for a declaration as to whether an advance healthcare directive is valid and/or applicable or whether a designated healthcare representative is acting in accordance with the powers contained in the advance healthcare directive.

While any interested person may make an application to the Court, but the Guide is not clear on who will shoulder the expense.

Chapter 3 - Making, revoking or amending an advance healthcare directive

3.2 Role of the healthcare professional

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The IMO is concerned that in making an Advance Healthcare Directive there is no requirement for Directive-makers to consult with a Medical Professional in order to make an informed decision on their care. This is of particular concern given the substantive misinformation available on the internet. It is essential that Directive-makers consult with a medical professional before making an Advanced Healthcare Directive, and ideally with a medical professional who has in-depth knowledge of the relevant condition(s) to which the Advance Care Directive will apply and who is likely to be responsible for complying with the Directive.

As the creation of an Advance Healthcare Directive has significant legal implications, it may also be advisable for Directive makers to seek legal advice.

Treating illness is a complex and dynamic process, with priorities for the patients and those looking after them changing as circumstances change and sometimes very quickly. While a non-legally binding plan rather than a legally binding Advance Healthcare Directive may better serve the patient, it is unclear if individuals have that option.

People do need support in End-of-Life planning and a formal consultation with adequate time and resources allocated is required, otherwise medical practitioners may find themselves legally exposed. The preparation of an Advanced Care Directive with a Medical Practitioner is not currently provided for under the GMS contract. The HSE should ensure that adequate resources are provided to GPs to support the preparation of Advance Healthcare Directives for those covered by the GMS.

Final Remarks

It is likely that a range of scenarios may arise which are not provided for under the Draft Codes of Practice, It will be important that both the Act and the Codes of Practice are regularly reviewed to ensure that medical professionals are not held liable for any unforeseen circumstances that may arise.

Training for all healthcare staff in assessing capacity is vital- as the issues are complex and precise, with a huge potential for miscommunication and a difficult situation could rapidly arise through no real mal-intent on anybody's part. In particular, training should reach new overseas-trained NCHDS and locum doctors arriving into Ireland.

It is important that the Decision Support Service consult with the Medical Council to address any potential discrepancies between the Draft Codes of Practice and the Medical Council Guide to Professional Conduct and Ethics for Registered Medical Practitioners.