IRISH MEDICAL ORGANISATION
Ceardchumann Dochtúirí na hÉireann

Submission to the HSE on the Draft Code of Practice on Advance Healthcare Directives for Health and Social Care Professionals

May 2018

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IMO Submission on the Draft Code of Practice on Advance Healthcare Directives for Health and Social Care Professionals

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

4. Do you think the Draft Code of Practice for Health and Social Care Professionals provides sufficient information for you to apply it in practice in your work

No

5. Are any aspects of the Draft Code of Practice for Health and Social Care Professionals confusing / difficult to understand? Please specify section and page number

There are a number of issues which may cause significant medico-legal and ethical concerns to medical practitioners.

1.6 Functional Approach to Decision Making (page 16)

In order to have capacity to make a decision, a person must be able to understand the information relevant to the decision to be made and be able to use and weigh up the information. This implies that the person must have some knowledge and understanding of the medical issues involved. If the person has not consulted with a medical practitioner in creating an Advance Healthcare Directive, this may be open to challenge.

The presumption of capacity without a formal assessment may leave doctors legally exposed.

2.4.5 Conscientious Objection (page 29)

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.

This leaves health and social care professional in a totally invidious position.

3.2 Making an Advance Healthcare Directive: the Role of the Health and Social Care Professional (page 33)

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. There is no requirement in the Act for Directive-makers to consult with a medical professional when making an Advance Healthcare Directive and this is clearly indicated in the HSE Draft Code of Practice for Health and Social Care Professionals. However 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 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.

In addition if a health and social care professional is asked to act as a witness to an Advance Care Directive.

"The mere act of witnessing an Advance Healthcare Directive by a Health and Social Care Professional does not require the Health and Social Care Professional to undertake a capacity assessment to determine whether the person has the capacity to make an Advance Healthcare Directive. Nor does it imply that s/he has done so. However, if a Health and Social Care Professional, notwithstanding the presumption of capacity, is concerned that a person may not have the capacity to make an Advance Healthcare Directive, s/he should not witness the Advance Healthcare Directive."

This seems contradictory and open to misinterpretation. Either a healthcare professional has a role or does not have a role determining capacity.

3.3 Support in Making an Advance Healthcare Directive

People do need support in making an Advance Healthcare Directive 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.

4.3.1 Referral to Court

In relation to a patient living in the community, it is unclear whose responsibility it is to make an application to the High Court or who is to shoulder the expense.

6. Please provide more detail on where you think the document could be improved so you can apply it in practice in your work (please specify section and page number)

Glossary (Page 9)

The definition of General Practice requires some improvement. A better definition might be sought from the Medical Council - Working with your doctor: useful information for patients:

Most patients go to their family doctor – called a General Practitioner (GP) – when they are concerned about their health. If a GP is registered in the Specialist Division of the Register, they have completed recognised specialist training in General Practice after they qualified as a doctor. This allows them to provide personal and continuing care to people in the community. Your GP will refer you to a hospital if you have a health condition that needs specialist management or treatment.

7. Please detail any sections in the draft Code of Practice for Health and Social Care Professionals that should be further clarified / explained.

1.6 Functional Approach to Decision Making (page 16)

Functional Capacity is Time Specific. This implies that an Advance Healthcare Directive must be made at the same time as the Capacity assessment. This should be clarified.

Functional capacity is also Context Specific. It is unclear what context specific means.

8. Do the vignettes help with your understanding of how an Advance Healthcare Directive can be applied in practice?

Yes

9. Please provide details on how the vignettes could be improved (please specify vignette number and page number)

10. Is there any issue which is currently not covered by a vignette which you think would benefit from a vignette?

2.3 The Implications of an Advance Healthcare Directive (Page 23)

A refusal to treat is legally binding provided that it is valid and applicable while a request for healthcare treatment is not legally binding and can be refused if it is not clinically indicated.

> *"Situations where a healthcare treatment may not be clinically indicated include those where the Health and Social Care Professional judges that a healthcare treatment:*
>
> *Is unlikely to work; or*
>
> *Might cause the patient more harm than benefit; or*
>
> *Is likely to cause the patient pain, discomfort or distress that will outweigh the benefits it may bring."*

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.

11. Do you have any other views on the Draft Code of Practice for Health and Social Care Professionals? (please provide as much detail as possible)

It is important that the HSE consult with the Medical Council to address any potential discrepancies between the HSE Draft Code of Practice for Health and Social Care Professionals and the Medical Council Guide to Professional Conduct and Ethics for Registered Medical Practitioners

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

Training for all staff in this will be 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. I am particular, training should reach locum consultants and new overseas-trained NCHDS in peripheral hospitals.

12. Would you like to give feedback on any of the other Draft Codes of Practice?

In relation to the Draft Code of Practice on How to Make an Advance Healthcare Directive, the IMO is concerned that there is no requirement to consult with a Medical Professional in order to make an informed decision on their care. It is essential that Directive-makers consult

with a medical professional before making an Advanced Healthcare Directive, ideally 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.

Directive-makers and Designated Healthcare Representatives should be informed of the possibility of making a non-legally binding advance healthcare plan. 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. A non-legally binding plan rather than a legally binding Advance Healthcare Directive may better serve the patient.

The preparation of an Advanced Healthcare Directive with a Medical Practitioner requires substantial time and resources and 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.

In addition to registering an Advance Healthcare Directive on the Register of Advanced healthcare Directives provided for in the Act, 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