

13 December 2013

Ministry of Health
National Ethics Advisory Committee Secretariat
PO Box 5013
Wellington 6145

By email: neac@moh.govt.nz

National Ethics Advisory Committee draft advice *Ethical challenges in advance care planning*

The New Zealand Law Society (Law Society) welcomes the opportunity to make a submission on the draft advice *Ethical challenges in advance care* (the advice), prepared by the National Ethics Advisory Committee (NEAC).

The Law Society lends its support to NEAC's efforts to promote and encourage advance care planning in the community. Guidance to health professionals and the health sector generally is welcomed. Using case examples is a helpful way of highlighting ethical challenges that arise in this developing area.

The Law Society recognises NEAC's role and expertise in commenting on advance care planning from an *ethical* perspective. However, the ethical perspective must sit within the relevant legal context. It is the Law Society's view that NEAC's advice will be considerably more useful and practically applicable if it is placed within the current New Zealand legal context.

There is room for greater clarity in describing the distinction between advance planning and 'advance directives'.

Advance directives are established at both common law and under the Code of Health and Disability Services Consumers' Rights (Code). Provided certain criteria are established, advance directives are legally binding. An advance care plan (ACP) is just a plan and is not legally binding (unless it meets the criteria for advance directives).

The advice focuses heavily on planning, which (while potentially useful) could have the unintended consequence of deterring people from making an advance directive. Similarly, once a person who has made an ACP becomes incompetent, it may be unclear whether the person's intention was to make a binding advance directive or merely to express a non-binding care preference.

Likewise, the relationship between advance planning, advance directives and enduring powers of attorney (EPOAs) could be better explained. Health consumers and their families, and indeed health professionals, often have a limited understanding of these different and (at times) interfacing means by which a person can make decisions about future health care needs. The Law Society notes the comment in the Appendix (page 11) that "*some health professionals do not understand the difference between an advance care plan, advance directives and enduring power of attorney*". The advice is an opportunity to assist health professionals to

understand the differences between these concepts. The Law Society's view is that the advice would benefit from greater clarity in its description of the differences.

The advice under the heading "Advance care planning in practice" on page 3 states that:

"Advance care planning can help reduce uncertainty where health professionals make decisions on behalf of a person who lacks capacity."

The Law Society notes that there are only limited circumstances, under Right 7(4) of the Code or in emergency situations, where a person lacks capacity and has no authorised decision-maker, and decisions are made by health professionals. The Law Society recommends that the sentence be reworded accordingly, to read as follows:

"Advance care planning can help reduce uncertainty in the limited circumstances, under Right 7(4) of the Code or in emergency situations, where health professionals need to make decisions on behalf of a person who lacks capacity and has no authorised decision-maker."

The Law Society agrees with the statement (page 3) that ACPs may help "... by prompting early, sensitive discussion between a person and their family members about illness, how best to manage their care, and death and dying", and notes the further discussion about whether an inadequate process is better than no planning process at all.

From a legal perspective, there is increasing recognition (in terms of liability of providers under the Code) that ACP forms part of providing an appropriate standard of care. In *Nilsson v Summerset* [2012] NZHRRT 25, the provider was in breach of Rights 4 and 6 of the Code for its staff's failure to adhere to best practice standards for ACP (by omitting to discuss decisions around care and treatment – should the elderly patient's condition deteriorate – with the welfare guardian and family).

It may assist those preparing the final advice to include a statement setting out the purpose of the advice, the target audience, and why it is needed. Not only would this assist the reader, it may help refine and clarify the content of the advice.

The Law Society notes that the National Advance Care Planning Co-operative, formed in June 2010 by clinicians and health care providers, has produced (with Ministry of Health support) *Advance Care Planning, A guide for the New Zealand healthcare workforce*, and has undertaken a lot of work in this area. By promulgating guidance at a national level, NEAC presumably intends to enable information about the benefits of advance care planning to reach a wider audience. However, it might be helpful for NEAC to review the Ministry of Health document and to clarify its interface with the NEAC document.

This submission has been prepared with the assistance of the Law Society's Health Law Committee. If you wish to discuss the submission please contact the committee convenor, Alison Douglass, through the committee secretary, Jo Holland (phone (04) 463 2967) or email jo.holland@lawsociety.org.nz.

Yours sincerely



Chris Moore
President