

3 February 2021

Health Quality and Safety Commission
Level 9, Customs House
17–21 Whitmore Street
Wellington 6011

Attention: Leigh Manson, Senior Programme Manager
Advance care planning and clinical communication training programme

Dear Leigh

Opinion - Legal status of an Advance Directive - Advance Care Planning programme

- 1 Thank you for your instructions to provide a summary opinion on the legal status of an advance directive.
- 2 We acknowledge the substantial national programme of work being delivered by the Health Quality and Safety Commission on advance care planning (**ACP**), and the role that an advance directive plays as part of ACP. As part of this opinion, we have reviewed the material about advance directives on the Commission's website and in our view that material is accurate from a legal standpoint, including:
 - 2.1 The ACP Legal Framework video; and
 - 2.2 The accompanying video transcript
- 3 An advance directive is consent or refusal to specific treatment(s) which may or may not be offered in the future when a person no longer has mental capacity.¹
- 4 Every person has the right to make and use an advance directive in New Zealand.²
- 5 The advance directive does not come into effect until the specific treatment is offered and the person is unable to consent to the treatment.
- 6 We can confirm that **an advance directive is legally binding if it is valid.**
- 7 An advance directive is generally valid when:
 - 7.1 The directive is created by a person who has mental capacity to make the directive;
 - 7.2 The directive is made freely and without undue influence;
 - 7.3 The person intends the directive to apply to the current circumstances; and
 - 7.4 At the time of making the directive, the person understood the benefits, risks and consequences of consenting to or refusing the specific treatment.
- 8 If the advance directive is valid and applicable in the circumstances, it must be followed by clinicians. There are very limited exceptions to this when compulsory treatment is authorised

¹ (Right 7(4) of the Code of Health and Disability Services Consumers' Rights).

² (Right 7(5) of the Code of Health and Disability Services Consumers' Rights).

(for example under the Mental Health (Compulsory Assessment & Treatment) Act 1992 or (Substance Addiction (Compulsory Assessment and Treatment) Act 2017).

- 9 Providing treatment that is contrary to an advance directive can be unlawful.
- 10 However, there is no obligation on a person's doctor to offer treatments that are not clinically indicated simply because they are contained in that person's advance directive. This is why it is important that a person should consult with their GP or treatment team when preparing an advance directive.
- 11 Further information about the legal status of advance directives is available through a publication authored with the New Zealand Law Society on ACP and advance directives, available here: [NZCLE Advance Care Planning - Issues for lawyers - Sep 2019](#).

Yours sincerely



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