

Release of consultation paper on substitute decision-making and advance directives in relation to medical treatment

A Law Reform Commission sub-committee today released a consultation paper on two aspects of decision-making in relation to medical treatment.

The first aspect concerns decisions made by a third party (or “substitute decision-making”) in relation to the medical treatment of persons who are comatose or in a vegetative state, and the second relates to advance decision-making by an individual himself as to the health care or medical treatment he wishes to receive at a later stage when he is no longer capable of making such decisions. The paper explains that these latter instructions are referred to as “advance directives”.

Currently, the Mental Health Ordinance makes provision for the management of the property and affairs, the guardianship and the giving of consent for medical treatment of “mentally incapacitated persons”. The paper explains, however, that it is unclear as to who has authority to authorise medical treatment of persons who are comatose or in a vegetative state, or to manage their property and affairs in the absence of an enduring power of attorney, as such persons do not fall within the definition of “mentally incapacitated person” in the Ordinance.

To answer this difficulty, the sub-committee proposes that the definition of “mentally incapacitated person” should be amended to make it clear that those parts of the Ordinance which deal with the giving of consent for medical treatment, guardianship and the management of a mentally incapacitated person’s property and affairs should apply to persons who are comatose or in a vegetative state.

In relation to advance directives given by persons when mentally competent as to the form of health care or medical treatment which they would like to receive at a future time when they are no longer competent, there is at present no legal framework to give force to such advance decision-making.

The sub-committee does not favour a legislative approach, but has instead put forward a model form of advance directive which could be used by those wishing to make decisions as to their future health care. Those wishing to issue advance directives should be encouraged to use the proposed model form of advance directive.

The instructions in an advance directive would take effect if the individual becomes terminally ill, or is in an irreversible coma or in a persistent vegetative state, and is unable to take part in decisions about his medical care and treatment.

The sub-committee envisages that the model form of advance directive would be witnessed by two witnesses, one of whom should be a medical practitioner. Neither witness should have an interest in the estate of the person making the advance directive.

The sub-committee also recommends the establishment of a central registry, accessible 24 hours a day, for the safe-keeping of all advance directives.

The sub-committee emphasises that any decision to withhold or withdraw artificial life-support procedures for a terminally ill patient will continue to be governed by the medical profession’s medical and ethical guidelines, and does not amount to euthanasia.

The Hospital Authority's current *Guidelines on Life-sustaining Treatment in the Terminally Ill* set out the major principles for decision-making for adults and nothing in the sub-committee's proposals affects the application of these existing guidelines. Under the existing guidelines, a valid advance directive refusing life-sustaining treatment should be respected; the sub-committee's proposed model advance directive is intended to provide a means to help ensure that the individual's wishes are made clear.

In the sub-committee's view, the Government should play a role in promoting public awareness and understanding of the concept of advance directives, and should endeavour to enlist the support of relevant bodies such as the Medical Council and the Hospital Authority in this information campaign.

As part of the public awareness campaign, the sub-committee recommends that the Government should encourage those who wish to make an advance directive to seek legal advice and to discuss the matter first with their family members. Family members should also be encouraged to accompany the individual when he makes the advance directive.

The Decision-making and Advance Directives sub-committee, which is chaired by Mrs Sophie Leung, stresses that the recommendations in the consultation paper are intended to facilitate discussions and do not represent the sub-committee's final conclusions. The sub-committee invites and would welcome views, comments and suggestions on any issues discussed in the consultation paper.

Copies of the consultation paper are available on request from the Secretariat of the Law Reform Commission at 20/F Harcourt House, 39 Gloucester Road, Wanchai, Hong Kong. They can also be accessed on the Commission's website at <www.info.gov.hk/hkreform>.