

LRC publishes report on decision-making in relation to medical treatment

A report on two aspects of decision-making in relation to medical treatment of persons who are comatose or in a vegetative state, namely substitute decision-making and advance directives, was released by the Law Reform Commission today (August 16).

The Commission's report follows an earlier consultation paper on this subject which was issued in July 2004 by a Commission sub-committee chaired by Mrs Sophie Leung, and of which Dr Lawrence Lai was deputy chairman.

"Substitute decision-making" refers to decisions made by a third party in relation to the medical treatment of persons who are comatose or in a vegetative state. "Advance directives" refers 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.

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".

However, 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 persons" in the Ordinance.

To address the question of substitute decision-making for this group of people, Mrs Sophie Leung, speaking at a press conference, said that the Commission proposes that the definition of "mentally incapacitated persons" in the Mental Health Ordinance 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, Mrs Leung explained that under the existing common law an individual may, while capable, give directions as to his future health care once he no longer has the capacity to make such decisions. Those directions will be recognised as valid if they are sufficiently clear and are not challenged on the grounds of, for instance, incapacity or undue influence. There is, however, no agreed form in which those directions should be set out, and that presents difficulties and uncertainty for both the individual and the medical practitioners treating him or her.

Mrs Leung said that the Commission considered and rejected the idea of providing a statutorily prescribed form for advance directives. "The Commission considered that it would be premature to attempt to legislate on advance directives when the concept is still new to the community and it is one on which most people have little knowledge," she said.

Instead, the Commission has put forward a model form of advance directive which could be used by those wishing to make decisions as to their future health care.

The Commission believes that the advantage of a model form of advance directive is that, if correctly completed, an individual can be reasonably assured that his wishes will be carried out. The model form will also assist medical practitioners in their consideration

of consent to medical treatment and make it easier for them to be confident as to the patient's prior wishes.

The model form would require two witnesses, one of whom must be a medical practitioner. Neither witness should have an interest in the estate of the person making the advance directive.

The advance directive would be triggered only where the individual is terminally ill, in a persistent vegetative state or in an irreversible coma.

An advance directive can be revoked at any time by the person who has made it. Those wishing to revoke an advance directive should be encouraged to do so in writing, but it may also be revoked orally.

The Commission considers that 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 Commission 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.

Copies of the report are available on request from the Secretariat of the Law Reform Commission at 20/F Harcourt House, 39 Gloucester Road, Wanchai, Hong Kong. The report is also available on the Internet at <www.hkreform.gov.hk>.

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