

立法會

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Panel on Health Services

Background brief prepared by the Legislative Council Secretariat for the meeting on 8 December 2008

Advance directives in relation to medical treatment

Purpose

This paper gives an account of the past discussions by the Panel on Health Services (the Panel) on the Consultation Paper on Substitute Decision-making and Advance Directives in relation to Medical Treatment (the Consultation Paper) issued by the Law Reform Commission (LRC) on 13 July 2004.

Background

2. On 23 March 2002, the Secretary for Justice and the Chief Justice directed the LRC to review the law relating to -

- (a) decision-making for persons who are comatose or in a vegetative state, with particular reference to the management of their property and their affairs and the giving or refusing of consent to medical treatment; and
- (b) the giving of advance directives by persons when mentally competent as to the management of their affairs or the form of health care or medical treatment which they would like to receive at a future time when they are no long competent,

and to consider and make recommendations for such reform as may be necessary.

3. The Sub-committee on Decision-making and Advance Directives (the Sub-committee) was appointed in May 2002 to examine and to advise on the present state of the law and to make proposals for reform. On 13 July 2004, the Sub-committee issued the Consultation Paper setting out its initial proposals on the reference. The Consultation paper is concerned with two aspects of decision-making

in relation to medical treatment for persons who are unable to make those decisions at the time of execution of the associated action, i.e. substitute decision-making and advance directives. 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. Under existing common law, a person might choose when still competent to issue instructions as to the medical treatment he wishes or does not wish to receive once he has become terminally ill and is no longer able to make those decisions for himself. If these advance directives are validly made, the doctors must comply with them.

Deliberations of the Panel

4. On 19 July 2004, the Panel discussed the Consultation Paper which recommended the following -

- (a) in relation to substitute decision-making, the definition of "mentally incapacitated persons" in the Mental Health Ordinance (Cap. 136) 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 were comatose or in a vegetative state; and
- (b) in relation to advance directives, a non-statutory model form should be used to reduce uncertainty and help ensure that the patient's wishes were complied with. The model form would require that it be witnessed by two witnesses, one of whom should be a medical practitioner and neither witness should have an interest in the estate of the person making the advance directive. It would remain a matter for the individual to decide whether to choose the proposed model form or some other form.

5. Major views/concerns raised by members and responses from the Deputy Chairman of the Sub-committee are summarised in the ensuing paragraphs.

6. Members were supportive of including persons who were comatose or in a vegetative state in the definition of "mentally incapacitated persons" in Cap. 136. Members also agreed with the Sub-committee's view of not legislating advance directives at this stage, as the concept of advance directives was still little understood in Hong Kong.

7. Whilst supporting the use of a model form of advance directives, some members pointed out that it was inevitable that disputes might arise between medical staff and a patient's family as to the patient's wishes. Deputy Chairman of the Sub-committee responded that in such cases, recourse might have to be made to the court, albeit this was not ideal. Court proceedings were costly and beyond the means

of many in the community. In addition, the traditional courtroom atmosphere and the legal culture of adversarial proceedings might alienate and intimidate applicants. The Sub-committee believed that the use of a model form which, if completed fully, would offer a clear and unambiguous statement of the patient's wishes, could reduce disputes to a minimum. The Sub-committee recommended that the Government should encourage those who wished 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 made the advance directive.

8. Members shared the Sub-committee's view 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 of Hong Kong and the Hospital Authority, in the campaign.

Latest development

9. LRC released a Report on Substitute Decision-making and Advance Directives in relation to Medical Treatment on 16 August 2006. The Commission recommends, amongst other things, that the concept of advance directives should be promoted initially by non-legislative means; the use of the model form of advance directives should be encouraged; and the definition of "mentally incapacitated person" in Cap. 136 should be amended to cover comatose or vegetative persons.

Relevant papers

10. Members are invited to access the Legislative Council's website (<http://www.legco.gov.hk>) for details of the relevant paper and minutes of the meeting.

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