

立法會

Legislative Council

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Paper for the House Committee Meeting on 8 December 2023

Legal Service Division Report on Advance Decision on Life-sustaining Treatment Bill

I. SUMMARY

- 1. The Bill**

The Bill seeks to provide for:

 - (a) the making and revocation of advance medical directives (“AMDs”) as regards life-sustaining treatments and the operation of instructions in AMDs;
 - (b) the making, revocation and operation of do-not-attempt cardiopulmonary resuscitation orders that have a continuing effect; and
 - (c) related matters.

- 2. Public Consultation**

The Administration conducted a public consultation in 2019 on the detailed arrangements for AMDs and the relevant end-of-life care. According to the Administration, outcomes of the public consultation indicated widespread support for the legislative proposals.

- 3. Consultation with LegCo Panel**

The Panel on Health Services was consulted on 8 November 2019, 13 December 2019 and 12 May 2023. Members generally supported the legislative proposals.

- 4. Conclusion**

The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. Since the Bill seeks to introduce a new legal framework for advance decisions on life-sustaining treatments, Members may consider forming a Bills Committee to study the Bill in detail.

II. REPORT

The date of First Reading of the Bill is 6 December 2023. Members may refer to the Legislative Council (“LegCo”) Brief (File Ref.: HHB CR 2/581/23) issued by the Health Bureau on 22 November 2023 for further details.

Object of the Bill

2. The Bill seeks to provide for:
 - (a) the making and revocation of advance medical directives (“AMDs”) as regards life-sustaining treatments and the operation of instructions in AMDs;
 - (b) the making, revocation and operation of do-not-attempt cardiopulmonary resuscitation (“DNACPR”) orders that have a continuing effect; and
 - (c) related matters.

Background

3. At present, Hong Kong has no legislation that provides for the legal status of AMDs and DNACPR orders. Nevertheless, AMDs are considered legally binding under the common law. According to paragraphs 3 and 5 of the LegCo Brief, both AMD makers and healthcare professionals may encounter practical difficulties and legal concerns in implementing an AMD, including whether or not an AMD may supersede statutory provisions when in conflict. In light of the increasing acceptance of AMDs by patients, their families and healthcare professionals reflected by the growing number of AMDs made, the 2018 Policy Address (see paragraph 195) set out the Administration’s plan to allow terminally ill patients more options for their own treatment and a relevant public consultation was then conducted in 2019. The Bill is introduced to implement the relevant legislative proposals. Key provisions of the Bill are summarized in the ensuing paragraphs.

Provisions of the Bill

Advance Medical Directives

4. An AMD is proposed, under clause 2(1) of the Bill, to mean an instrument made by a person that contains one or more instructions that if the person is mentally incapable of deciding on a life-sustaining treatment and the precondition of the instruction (as specified in the AMD) is met, the person would not be subjected to any life-sustaining treatment specified in the instruction.

5. Under clause 5 of the Bill, an AMD would be made if all the conditions set out in clauses 6, 7(1), 8 and 9(1) are met. For instance, the maker of an AMD

must be an adult (i.e. aged 18 years or above) and mentally capable of deciding on a life-sustaining treatment. An AMD must also be made in writing (not in electronic form) and all instructions in an AMD must be presented in a clear way, and such condition would be presumed, until the contrary is proved, to have been met if Form 1 or 2 (as appropriate) prescribed in Schedule 1 to the Bill is adopted. Furthermore, the maker of an AMD must sign the AMD in the presence of not less than two witnesses who must satisfy certain conditions (e.g. not being a beneficiary under the will or any insurance policy of the maker of the AMD), and one of whom must be a registered medical practitioner.

6. Under clause 2(1) of the Bill, a validating copy of an AMD (as proof of validity of instructions in the AMD to the treatment providers under clauses 15 to 17 of the Bill) would include a clearly legible copy of the AMD that is in the form of an electronic record (e.g. a scanned and digitized copy of the paper form AMD) and is stored in an electronic system designated by the Secretary for Health (“Secretary”) under clause 57 of the Bill.

7. As mentioned in paragraph 5 above, an AMD must be made in writing under the Bill but according to paragraph 10 of the LegCo Brief, the Administration plans to enable an AMD to be made in digital form by electronic means in due course. As stated in paragraph 13 of the LegCo Brief, the Administration is exploring the feasibility of enabling the making of an AMD direct in digital form by electronic means (as an alternative for the making of an AMD in writing) and examining the operational details. The Administration is also exploring the option of enabling a digitally authenticated and certified true copy of the AMD already made in writing to be accepted as a validating copy of an AMD in the future. The Administration intends to continue working on the above matters, together with any further suggestions by the Bills Committee (if formed), at the Committee stage by building in provisions in the Bill to allow the full electronic route for an AMD when the operational details are ready, and to let the legislative provisions take effect when the electronic system is ready.

8. Pursuant to clause 10 of the Bill, an AMD would be revoked by its maker if any of the specified acts takes place (e.g. the maker revokes the AMD concerned verbally in the presence of one or more witnesses being adults, or the maker makes another AMD) and the maker is mentally capable of deciding on a life-sustaining treatment at that time.

9. Clause 19 of the Bill seeks to provide that a treatment provider of a person would not incur any liability for subjecting, or not subjecting, the person to a life-sustaining treatment under specified circumstances (e.g. where the treatment provider who subjects the person to a life-sustaining treatment does not know of the existence of the AMD made by the person).

Do-not-attempt cardiopulmonary resuscitation orders

10. Under clause 2(1) of the Bill, a DNACPR order is proposed to mean an instrument that has a continuing effect and directs not to perform cardiopulmonary

resuscitation (“CPR”) on a person-in-arrest (i.e. a person who is in cardiopulmonary arrest). Pursuant to clauses 24 and 30 of the Bill, a DNACPR order could only be made by two registered medical practitioners, and at least one of whom must be a specialist (i.e. a registered medical practitioner whose name is included in the Specialist Register as defined by section 2(1) of the Medical Registration Ordinance (Cap. 161)).

11. According to clause 25 of the Bill, three types of DNACPR orders could be made, including one that would be AMD-based. A DNACPR order would be made if all the conditions set out in clauses 27, 28(1), 29(1) and (2) and 30 are met, e.g. it must be in an applicable form (i.e. Form 1, Form 2 or Form 3) as prescribed in Schedule 2 to the Bill and the form must be properly completed (not in electronic form) and signed.

12. Clauses 31 and 32 of the Bill seek to provide for the circumstances in which, and the means by which, a DNACPR order would be revoked (e.g. an order made for a person under the age of 18 years would be revoked when the person reaches that age).

13. Under clause 40 of the Bill, a medical carer of a person-in-arrest would not incur any liability for performing, or not performing, CPR on the person-in-arrest under specified circumstances (e.g. the medical carer does not know of the existence of the DNACPR order that has been made for the person-in-arrest). Clause 41 of the Bill seeks to provide for the protection from liability for certain responses given by console operators at the Fire Services Communications Centre in good faith in relation to DNACPR orders or whether to perform CPR on the person-in-arrest.

Related matters

14. Clauses 44 to 51 of the Bill seek to provide for various offences and related matters in relation to an AMD and a DNACPR order (e.g. the offence of wilfully obstructing a treatment provider in the following of a valid and applicable instruction in an AMD under clause 45).

15. The Bill also seeks to provide for other related and miscellaneous matters. For instance, pursuant to clause 52, the Bill would not authorize an act that causes or accelerates death as distinct from an act that permits the dying process to take its natural course. Under clause 58 of the Bill, the Secretary may, by notice published in the Gazette, amend Schedule 1 or 2 to the Bill (which contain the relevant prescribed Forms as stated in paragraphs 5 and 11 above). Such notices would be subsidiary legislation subject to the negative vetting procedure of LegCo under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1). Clause 60 seeks to amend section 7 of the Fire Services Ordinance (Cap. 95) to the effect that the duty of the Fire Services Department to resuscitate or sustain a person’s life would cease to apply in relation to the performance of CPR on the person in specified circumstances involving DNACPR orders.

Commencement

16. The Bill, if passed, would come into operation on a day to be appointed by the Secretary by notice published in the Gazette.

Public Consultation

17. According to paragraph 5 of the LegCo Brief, the Administration conducted a public consultation in 2019 on the detailed arrangements for AMDs and the relevant end-of-life care. The Administration stated that outcomes of the public consultation indicated widespread support for the legislative proposals.

Consultation with LegCo Panel

18. As advised by the Clerk to the Panel on Health Services, members generally supported the initial proposals and the legislative direction on AMDs when the Administration briefed the Panel on 8 November 2019 and received deputations' views thereon on 13 December 2019. When the Panel was further consulted on the proposed legislative framework on AMDs on 12 May 2023, members generally supported it. Members requested the Administration to introduce an electronic and centralized registration system for AMDs. Given that amending an AMD under the Administration's proposal required two witnesses, members raised concerns on whether it would hinder AMD makers from amending their AMDs, and therefore requested the Administration to consider streamlining the relevant process.

Conclusion

19. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. Since the Bill seeks to introduce a new legal framework for advance decisions on life-sustaining treatments, Members may consider forming a Bills Committee to study the Bill in detail.

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