

Consultation Paper

“Introduction of the Concept of Advance Directives in Hong Kong”

The Law Society has reviewed the Consultation Paper published by the Food and Health Bureau “*Introduction of the Concept of Advance Directives in Hong Kong*”.

We have the following comments on the Recommendations outlined in Annex A of the Consultation Paper together with our answers to the questions posed in Annex B:

I. Recommendations Concerning Advance Directives in the Law Reform Commission’s Report “*Substitute Decision-making and Advance Directives*”

Recommendation 1

The concept of advance directives should be promoted initially by non-legislative means. The Government should review the position in due course once the community has become more widely familiar with the concept and should consider the appropriateness of legislation at that stage. That review should take into consideration three factors, namely, how widely the use of advance directives had been taken up; how many disputes had arisen; and the extent to which people had accepted the model form of advance directive.

Law Society

We agree, save that a time limit should be given rather than “in due course”.

Recommendation 2

The publication and wide dissemination of the model form of advance directive that the LRC proposes, and the use of the model form should be encouraged.

Law Society

We agree with the recommendation for publication and wide dissemination of the model form of advance directive and that the use of the model form be encouraged. However, the suggested wording of the model form should be revised so as to take account of our comments as to it as set out below

Recommendation 3

Appropriate publicity should be given to encourage individuals to consider and complete advance directives in advance of any life-threatening illness.

Law Society

We agree with the recommendation.

Recommendation 4

The Government should launch publicity programmes to promote public awareness and understanding of the concept of advance directives. The Department of Health and all District Offices should have available for public reference material which provides general guidance to the public on the making and consequences of an advance directive and should provide copies of the model form of advance directive for public use.

Law Society

We agree with the recommendation.

Recommendation 5

The Government should endeavour to enlist the support of the Medical Council, medical associations, the Bar Association, the Law Society, the Hospital Authority, all hospitals and medical clinics, non-governmental organisations involved in care for the elderly, and religious and community groups in this information campaign about the use and effect of advance directives.

Law Society

We agree with the recommendation.

Recommendation 6

For the purpose of making an advance directive, the terms “terminally ill” and “life-sustaining treatment” should be defined as follows:

- (a) the “terminally ill” are patients who suffer from advanced, progressive, and irreversible disease, and who fail to respond to curative therapy, having a short life expectancy in terms of days, weeks or a few months.
- (b) “life sustaining treatment” means any of the treatments which have the potential to postpone the patient’s death and includes, for example, cardiopulmonary resuscitation, artificial ventilation, blood products, pacemakers, vasopressors, specialized treatments for particular conditions such as chemotherapy or dialysis, antibiotics when given for a potentially life-threatening infection, and artificial nutrition and hydration. Artificial nutrition and hydration means the feeding of food and water to a person through a tube.

Law Society

We generally agree but suggest the definition of "terminally ill" could be drafted in wider terms.

Recommendation 7

- (a) The model form of advance directive requires that it be witnessed by two witnesses, one of whom must be a medical practitioner, neither witness having an interest in the estate of the person making the advance directive.
- (b) The Government should encourage bodies such as the Hospital Authority, the medical Council, the Hong Kong Medical Association and other relevant professional bodies to consider issuing guidelines for doctors witnessing the making of advance directives to ensure consistency of medical practice in this area. The guidelines should also provide

guidance for the medical profession (a) as to the effect of advance directives and (b) in assessing the validity of an advance directive.

- (c) If in circumstances an individual may not be able to make a written advance directive, the oral advance directive should be made before a doctor, lawyer or other independent person who should not have an interest in the estate of the person making the advance directive.

Law Society

There is an inconsistency between the provisions in (a) and (c). A model form in (a) above requires 2 witnesses when an oral declaration in (c) appears to only require one. Further in (c) what is meant by “in circumstances an individual may not be able to make a written advance directive”. What circumstances? Illiteracy, inability to write: e.g. because the individual is paralysed, or events at the time e.g. a fireman telling a colleague at blaze?

Recommendation 8

- (a) For the sake of certainty and the avoidance of doubt, those wishing to revoke an advance directive should be encouraged to do so in writing;
- (b) If an advance directive is revoked in writing, it should be witnessed by an independent witness who should not have an interest in the estate of the person making the revocation;
- (c) If an advance directive is revoked orally, the revocation should be made before a doctor, lawyer or other independent person who should not have an interest in the estate of the person making the revocation, and where practicable that witness should make a written record of the oral revocation; and
- (d) If medical staff learn that an individual has revoked his advance directive, that information should be properly documented in the individual's medical records.

Law Society

We agree with recommendations in (a) to (d) above.

Recommendation 9

The Government should, as part of its public awareness campaign about advance directives, 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.

We agree with that it is important to increase public awareness of advance directives but question whether it is appropriate for family members to accompany the individual when he makes the advance directive. The decision on the advance directive is personal to the individual and he alone should make a determination on what, if any “life sustaining treatment” can be employed by the doctors. Having an official policy of encouraging family members to accompany an individual when he makes the advance directive may well be counter productive.

We also disagree with the recommendation that individuals should seek legal advice before making an advance directive as the advice sought should be medical not legal.

**[Recommendations 10 and 11 omitted as they are not related to advance directives]
Recommendation 12**

The Government should encourage the Medical Council or other relevant professional body to issue guidelines or a code of conduct to enhance consistency of medical practice in relation to:

- (a) the assessment of a person's ability to communicate;
- (b) the treatment of persons in a vegetative or comatose state;
- (c) the criteria for basic care;
- (d) the assessment of the validity of an advance directive; and
- (e) the implementation of advance directives

Law Society

We agree with the recommendation.

II. Questions for the Legal Profession on Annex B

Question (a)

Do you find the general guidance on advance directives as set out in *Annex B* on the making, altering and revoking advance directives useful?

Answer:

Generally, the guidance on advance directives as set out in Annex B is useful.

We have the following comments on the Proposed Model Form of Advance Directive ("Model Form"):

1. Section II - Paragraph 4 - sub paragraphs A and B

There is no definition or explanation of "*basic and palliative care*" which seems by implication to be "basic care". We note the commentary in footnote 13 of the Consultation Paper and would like to have clarification on whether electing to forgo artificial nutrition will be prohibited as surely the right to opt out of this treatment must be within the contemplation of an individual when making an advanced directive.

The definition of "life sustaining treatment" should be severable e.g. an individual may not want cardiopulmonary resuscitation or artificial ventilation but does want artificial nutrition and hydration. It should also be made clear that artificial nutrition and artificial hydration are two different treatments and an individual can opt out of one (probably nutrition) but chose not to opt out of the other i.e. when connected to a saline drip.

2. Section III: Witnesses

We have concerns the general public will not understand these provisions as the drafting is too broad:

"the will of the maker of this advanced directive"

We query the position of witnesses who may be potential beneficiaries upon intestacy under the statutory trusts. See the Intestate Ordinance (Cap. 73)

“any other instrument made by or on behalf of the maker of this advanced directive.”

The drafting is far too wide. A potential witness may not have knowledge of the maker’s personal affairs, such as the establishment of trusts, which would be covered under this declaration, and so this would lead to complications.

3. “Statement of Witness” - First Witness

Will there be any guidance on the depth of the explanation which the medical practitioner has to give to the individual?

We note the provision that the 2nd witness must sign in the presence of the 1st witness but have concerns that such a requirement could prevent members of the public from embracing advance directives. We cite the existing problems with Enduring Powers of Attorneys which currently require 2 witnesses, one of whom must be a medical doctor to witness the document.

The LRC has put forward proposals to amend the current legislation so that a valid EPA will only require 1 signature. In this regard, if the Model Form is to be witnessed by a medical doctor then it is more important the doctor is satisfied as to and certifies the mental competence of the maker at the time of making of the advance directive.

What happens if a witness is such a beneficiary? Will this invalidate the advance directive or the inheritance or both (or neither)?

4. Record of Oral Revocation of Advance Directive.

As this is a model form it should also include details of where such revocation took place.

Do you think they should be promulgated for general use by the legal profession, and if so, how?

The legal profession can assist with dissemination of well drafted Model Forms.

The Academy of Law could be invited to provide training programmes to lawyers on the concept of Advance Directives which would assist with the promotion of such documents for use in Hong Kong.

Question (b)

Do you consider that any guidance or other tools are needed for the legal profession on advance directives, e.g. tendering advice to patients who wish to make, alter or revoke advance directives?

Answer

No, as such decisions must be made by the individual making the advance directive.

Question (c)

What other aspects of advance directive do you consider as requiring legal inputs to ensure the legal validity of advance directives and their proper handling by the medical profession?

Answer

If the Government intends to launch a publicity drive to promote advance directives then the Hospital Authority and all private hospitals should implement a system whereby front-line staff automatically check whether patients have executed an advance directive (or an advance care plan) and that such documents are recorded with the patient's data as a matter of practice.

The Law Society of Hong Kong

23 March 2010

133355