



# Advance Directives - the Legal Issues

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## What are Advance Directives?

These are directions given by an adult, at a time when he is mentally competent, concerning the medical treatment which he wishes to receive or does not wish to receive at a future time when he will no longer be mentally competent. In other words, these are medical directions given by an individual patient in advance, to be put into effect if and when he subsequently becomes (either temporarily or permanently) mentally incompetent.

## What are the Relevant Legal Principles?

Advance directives are recognised under common law. Currently, there is no statutory framework. It reflects the principle of self-determination<sup>1</sup>, according to which respect must be given to the wishes of an adult patient of sound mind regarding his medical treatment.

As already stated, at the time of giving his directions, the individual patient has to be mentally competent. His mental capacity should not be diminished by long term illness or medication. Furthermore, there should be no undue influence by any third party.

In the same way that a mentally competent patient can validly refuse treatment (and such refusal must be respected), the patient can communicate his wishes at an earlier time before he becomes incapable of communicating them.

Those involved in looking after the terminally ill (including patients who have become mentally incompetent) have a duty to respect the wishes of the patients. According to the Hospital Authority's Guidelines<sup>2</sup>, validly executed advance directives, including those refusing life-sustaining treatment, should be respected.

In deciding whether or not to withhold life-sustaining treatment, a medical practitioner should take into account the wishes of the patient (as well as those of his family)<sup>3</sup>. These wishes would be recorded in an advance directive, if one has been executed. Similarly, where a guardian has been appointed by the Guardianship Board to consent to medical treatment on behalf of a mentally incapacitated person ("MIP"), in deciding whether or not to consent to treatment, the guardian is required to consider what is in the MIP's best interest. In doing so, the guardian should take into account any prior wishes expressed by the patient before he becomes mentally incapacitated.

## The Present and the Future

In August 2006, the Law Reform Commission published a report on advance directives in relation to medical treatment, having collected views from the public through a consultation paper (published in 2004). The Law Reform Commission has made the following recommendations:

- The concept of advance directives should be promoted, initially by non-legislative means, until the community has become more widely familiar with the concept (recommendation 1).
- The Commission put forward a model form of advance directive. This ensures that the directions given are clear and unambiguous. The form should be witnessed by two witnesses, one of whom should be a medical practitioner who is in a position to explain to the patient the nature and implications of the advance directive. Neither of the witnesses should have an interest in the estate of the patient (recommendation 7).
- The model form does not allow the patient to refuse basic or palliative care necessary to maintain the patient's comfort and dignity, or to relieve pain.
- If for any reasons the patient is unable to make a written advance directive, then an oral advance directive should be made before a doctor, lawyer or another independent person (recommendation 7). (It is important that the doctor records such directives/instructions in the medical records.)
- The advance directive can subsequently be revoked in writing or orally. If it is revoked in writing, then the revocation should be witnessed by an independent witness who does not have an interest in the estate. In the case of an oral revocation, it should be made before a doctor, lawyer or another independent person (recommendation 8).

More recently, on 23rd December 2009, the Food and Health Bureau published a consultation paper in response to the above-mentioned report. This consultation again addresses the issue of whether the concept of advance directives should be introduced in Hong Kong, the contents of information to be provided to the public as well as the guidance to be provided to the medical profession. It is proposed that procedures and guidelines should be developed for medical and healthcare professionals on the making and handling of advance directives.

## References

1. Airedale NHS v. Bland [1993] 1 All ER 821
2. Guidelines on life-sustaining treatment in the terminally ill, published by the Hospital Authority (paragraphs 5.16 to 5.23)
3. Code of Professional Conduct for the Guidance of Registered Medical Practitioners, paragraph 34.3