LEGISLATING AND PROMOTING ADVANCE MEDICAL DIRECTIVES IN HONG KONG

Daisy Cheung & Rebecca Lee, Faculty of Law, HKU

24 May 2024
Legislative change: convinced the HK Government to adopt a revised assessment of mental capacity for making AMDs

Immediate amendment of Hospital Authority guidelines on life-sustaining treatment

Promoting understanding of AMDs and patient autonomy

International collaboration
**WHAT IS AN ADVANCE MEDICAL DIRECTIVE (AMD)?**

A document that describes your medical care preferences during emergencies or end-of-life situations.

**WHAT TREATMENTS YOU DO NOT WANT**

eg cardiopulmonary resuscitation (CPR) / other life-sustaining treatments?

**WHO NEEDS IT**

anyone wishing to express their preferences for medical treatment in advance of incapacity, in particular the elderly and terminally-ill patients.

**HOW TO MAKE IT**

legally valid when person making it has decision making capacity takes effect when person loses decision making capacity.
Cheung & Lee applied their expertise in mental health and capacity law to (1) advocate for legislative change in the proposed capacity assessment for AMDs; and (2) promote AMDs amongst the population to enhance their decision-making autonomy in end-of-life decisions.
UNDERPINNING RESEARCH

ASSESSMENT OF DECISION MAKING CAPACITY

Cheung: no unified test for decision making capacity in the Mental Health Ordinance (MHO), and instead, various tests exist for different contexts such as adult guardianship, Part II Committees, and Part IVC medical and dental treatment.

- unnecessary and undesirable inconsistency in application
- problematic formulation of each of these tests
- advocated for a unified legislative test for capacity, one that would be applicable across all contexts, to provide clarity and consistency.

PATIENT AUTONOMY

Lee: need to balance protection and autonomy in adult guardianship and other mental disability regimes. No presumption of legal capacity in MHO; cf statutory presumption of capacity and respect of autonomy in some overseas jurisdictions.

- significance of autonomy in decision-making for individuals with mental incapacity
- different types of decision-making assistance arrangements
RESEARCH OUTPUTS

- **Cheung**, ‘The Importance of Supporting Legislation: Mental Capacity Law in Hong Kong’ (conference paper) at the Living Will, Living Well: Advance Directives Across Asia workshops on 30 Sept and 2 October 2020.
- **Cheung** & Michael Dunn (eds), *Advance Directives Across Asia: A Comparative Sociolegal Analysis* (Cambridge University Press 2023)
SIGNIFICANCE OF THE KEY INSIGHTS FROM THE RESEARCH

• Lack of unified assessment of decision-making capacity in Hong Kong. Current assessments often open to subjective interpretation among healthcare practitioners, and hence inconsistent and unreliable

• Limited transparency for individuals who wish to make AMDs

• Urgent need for a revised and more comprehensive assessment of decision-making capacity to facilitate broader adoption of AMDs
IMPACTS ACHIEVED

- Legislative change
- Change in HA healthcare guidelines
- Promote understanding of AMDs and patient autonomy
- International collaboration
LEGISLATIVE CHANGE

ADVANCE DECISION ON LIFE-SUSTAINING TREATMENT BILL

**Original formulation**

‘capability to make an AMD’

**Current, revised formulation based on Cheung’s proposal**

Takes into account whether the individual (i) understands information relevant to the decision; (ii) can retain that information; (iii) can use or weigh that information as a part of the process of making the decision; and (iv) can communicate their decision.

- full-fledged assessment of decision-making capacity
- respects patient autonomy
CHANGE IN HA GUIDELINES

HOSPITAL AUTHORITY GUIDELINES ON LIFE-SUSTAINING TREATMENT IN THE TERMINALLY ILL

Current, revised formulation based on Cheung’s proposal

The removal of the requirement to “make a free choice (i.e. free from pressure)” from the assessment of capacity to a separate duty of the medical team to “…ensure that the patient is able to make a free choice (free from undue pressure from another)”

💡 achieves better conceptual clarity
PROMOTING UNDERSTANDING OF AMDS AND PATIENT AUTONOMY

- Workshops and conferences presented by legal, medical and government experts, attracting a total of nearly 1500 participants and viewers such as healthcare practitioners, other stakeholders, policymakers and the general public in Hong Kong
- Workshop at the Hong Kong Academy of Medicine
- Cheung was also appointed a member of the Mental Health Law Committee of the Law Society of Hong Kong in April 2020
INTERNATIONAL COLLABORATION

- collaborated with international experts in Asia and the UK through organising conferences to identify best practices and innovative developments in AMDs

- shared Hong Kong’s experience with Asian jurisdictions that have yet to implement dedicated regulation of AMDs, such as mainland China, Japan and Macau