Legal recognition of advance refusal

To the Editor—I read with interest Dr Athena Liu's paper "Legal recognition of advanced refusal needed"[1] and I beg to differ on a number of points. Whilst the advanced and persistent refusal of a Jehovah's Witness to receive blood products could come into the remit of the Hong Kong Law Reform Commission Consultation Paper (LRCCP) on 'Substitute Decision-Making and Advance Directives in relation to Medical Treatment' (http://www.info.gov.hk/hkreform), as a doctor I tend to find such a lumping together of such refusals confusing. Certainly, I have never met colleagues, in my hospital or the various inter-hospital committees in which I participate, who would speak of Jehovah's Witnesses and Advanced Directives in the same breath, although I can certainly understand the logic of lawyers who feel they are but different parts of the same spectrum of refusal of therapy.

Dr Liu found it inexplicable that the LRCCP should reject a statutory status for advanced directives. I would probably put it down to pragmatism. In paragraphs (para) 3.30-3.32 of the LRCCP, the report discussed the impact of the Enduring Powers of Attorney Ordinance (Cap 501) that sets up a legal framework for advanced decision making and appointment of a proxy for the management of property, financial affairs, etc. Given the reluctance of the local population even to write wills, let alone Enduring Powers of Attorney, with the subject matter of either being money and property, something much more concrete than acceptance or refusal of therapies, it may be more practical to first introduce the idea of advanced directives and later codify it in law. My impression is that the average local citizen is rather shy of the law except in conveyancing. The paper also noted in para 8.71 that in the 6 years since Cap 501 was enacted only three powers of attorney have been registered within the terms of that Ordinance.

I also beg to differ on the question of requesting therapy. I discovered the following High Court Ruling, handed down on 30 July 2004, R (Burke) v The General Medical Council (hereafter referred to as "Burke"). Whilst Mr J Munby reaffirms the principles enunciated by In re J (A Minor) (Child in Care: Medical Treatment) [1993] Fam 15, he also adds that "it is wrong to make an order requiring a doctor to treat a patient in a particular way contrary to his will or requiring him to adopt a course of treatment which in his bona fide clinical judgment is not in the best interests of the patient: for this, it was said, is to require the doctor to act contrary to the fundamental duty he owes his patient, which is to act in accordance with his best clinical judgment. A doctor should not be put in a position where he may be required to choose between his conscience and imprisonment for contempt." (Burke, para 187). Yet pertinently in his ruling, he would give Burke the leeway of forbidding his doctors to withdraw tube-feeding, a controversial aspect of care for terminal patients. The LRCCP evades this problem by stating that basic care, including nutrition and hydration and palliative care, must be provided at all times.

Finally the problem of applicability is a complicated one. The Law Commission of England and Wales commented on the problems of living wills, "Very detailed living wills risk failing to foresee a particular turn of events, whereas those written in general terms may be ambiguous in their application to particular circumstances and require considerable interpretation by medical practitioners." (LRCCP, para 8.48). This could equally well apply to Advanced Directives. Mr J Munby also made an eloquent argument about the problems of changing circumstances during a serious illness leading to impending and changing best interests at each stage (Burke, para 47).

The problem relating to end-of-life planning is a complicated one. Whilst I can also see the lawyers clamouring for statutory recognition of advanced refusals, it will not help society at all if a citizen fails to make use of such statutory instruments. I would not entirely disagree with Dr Liu that a legal framework should be something to aim for. Perhaps a non-statutory introduction to familiarise our citizens with the utility of Advanced Directives is not such a bad step.

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Reference

1. Liu A. Legal recognition of advanced refusal needed. Hong Kong Med J 2005;11:133-4.