



**Ministry of Attorney General
Strategic Planning and Legislation Office**

Consultation on Advance Directive Legislation

CONSULTATION ON ADVANCE DIRECTIVE LEGISLATION

BILL 32 – ADULT GUARDIANSHIP AND PERSONAL PLANNING STATUTES AMENDMENT ACT

On April 27, 2006, the *Adult Guardianship and Personal Planning Statutes Amendment Act* (Bill 32) was introduced in the legislature.

Bill 32 updates the statutes related to adult guardianship and to personal planning instruments. It is intended to:

- *provide adults with the best tools possible to plan for possible future mental incapacity; and*
- *ensure that those British Columbians who do not choose to plan, or whose plans fail, would be well served under modern adult guardianship law.*

Bill 32 may be viewed online at http://www.leg.bc.ca/38th2nd/1st_read/gov32-1.htm.

On May 10, 2006, government announced that Bill 32 would not proceed in the Spring 2006 legislative session to allow further review and consultation. The purpose of this document is to invite comment on the policy and provisions of Bill 32 related to **advance directives**.

ADVANCE DIRECTIVES

What is an advance directive?

- An advance directive contains a person's instructions in respect of health care treatments that are to be followed in the future. They can be made only by capable adults and they become effective in situations where the adult is no longer capable of making health care decisions.
- An advance directive provides instructions to be followed directly by the health care provider, without the involvement of a substitute decision maker.

What is the situation in other jurisdictions?

- In Canada, several jurisdictions provide for advance directives (Alberta, Saskatchewan, Manitoba, PEI, Newfoundland and Labrador, NWT). These directives typically permit the maker to appoint another person to make health care decisions on their behalf, or to provide instructions to be followed directly by the health care provider, or both. For example, one directive may specify the types of health care decisions that the maker wants to provide direct instructions about, while leaving the remainder of the decisions to be decided by the appointed proxy.
- A number of other jurisdictions outside Canada, such as most of the U.S. states and Australian states, also allow advance directives.

What is the current situation in British Columbia?

- Under the current legislation, the options available to British Columbians for advance planning for health care decisions are:
 1. The *Representation Agreement Act* (in force since 2000) enables individuals to appoint another person (a representative) to make decisions, including health care decisions, on their behalf should they become incapable of making these decisions.
 2. Since 2003, an adult may make an instruction or wish that must be followed:
 - in an emergency by a physician or other health care provider when no family member is available to make decisions; and
 - in a non-emergency by a temporary substitute decision maker.

There are no forms or other execution requirements, such as a witnessing requirement.

INTENT OF BILL 32 – PERSONAL PLANNING INSTRUMENTS FOR HEALTH CARE

- Bill 32 responds to the desire of many British Columbians for greater accessibility and choice in advance planning options, similar to other jurisdictions, by:
 - strengthening representation agreements by streamlining the execution requirements, making them easier and less costly to make;
 - providing capable adults with the option of providing advance written instructions directly to health care providers, without the involvement of a substitute decision-maker, in non-emergency situations; and
 - providing safeguards to avoid or lessen the potential for abuse or misuse of these instruments.
- Bill 32 builds on British Columbia’s advancements in personal planning law, and reflects the principles of autonomy and dignity and respect for patient choices that are valued in modern society.

PUBLIC RESPONSE TO ADVANCE DIRECTIVE PROVISIONS OF BILL 32

- Government received letters from individuals and groups who supported the advance directive policy as responding to the wishes of many British Columbians who want this planning option. For example:

“...I fully support the introduction of legislation to empower me to take control of my own end of life experience.”

and

“As someone who would like to have my wishes followed re my own health care, I am in favour of legislation that would allow me to provide instructions about future healthcare without having a substitute decision maker involved...I have no siblings, an aged parent, and no children...and I know what I do (and don't want) when it comes to intervention if I become unable to communicate my wishes in any way.”

and

“We are encouraged to see recognition in this legislation that individuals have a right to directly inform health care givers about their wishes...”

- Government also received letters from those who raised concerns with the policy. The chart below summarizes these issues and how they are dealt with in Bill 32, as well as other changes that are proposed to further address the issues.

REQUEST FOR COMMENTS

Comments are invited on the advance directive provisions in Bill 32 and the outlined proposals.

Comments should be submitted **by December 8, 2006** to the Strategic Planning and Legislation Office:

By email: AGWEBFEEDBACK@gov.bc.ca (Include “Bill 32” in the subject line.)

By mail: Strategic Planning and Legislation Office
Ministry of Attorney General
PO Box 9283 Stn Prov Govt
Victoria BC V8W 9J7

By fax: 250 953-4072

Please note that freedom of information legislation may require the Ministry to make responses available to those requesting access.

ADVANCE DIRECTIVES -- RESPONSE TO ISSUES RAISED

ISSUE RAISED	BILL 32 PROVISIONS	COMMENTS/PROPOSAL
<p>Advance directive legislation will eliminate representation agreements as a planning option or will void existing representation agreements.</p>	<p>Representation agreements will continue to be available to all British Columbians. Bill 32 would strengthen this option by amending the <i>Representation Agreement Act</i> to make it easier and less expensive for individuals to make a representation agreement.</p>	<p>Comment: Advance directive legislation would not affect existing representation agreements.</p> <p>Since the <i>Representation Agreement Act</i> was introduced in 1993, other jurisdictions have followed with similar instruments, but they have also provided the option of advance directives. British Columbians have asked to have this option available for capable adults as is the case in other jurisdictions.</p>
ISSUE RAISED	BILL 32 PROVISIONS	COMMENTS/PROPOSAL
<p>Advance directives would override representation agreements; instead a representation agreement should always override an advance directive.</p>	<p>Advance directives would not override representation agreements. Instead, the representation agreement always takes precedence.</p> <p>If a health care provider is aware that the adult has a representative, the health care provider is required to obtain a substitute decision from the representative. The advance directive would then guide the representative's decision making.</p>	<p>Comment: Concerns raised indicate a need to clarify how advance directives and representation agreements work together.</p> <p>Representation agreements are broader than proposed advance directives. Under Bill 32, representation agreements would continue to provide for personal care, as well as for health care decisions. However, advance directives would provide instructions about health care, but not about personal care decisions.</p> <p>In addition, some adults wish to provide instructions about certain kinds of health care directly to health care providers, while leaving other decision-making about health care to a representative, or temporary substitute.</p>

		<p>Proposal:</p> <p>Ensure that capable adults who wish to plan for future incapacity may choose to have either a representation agreement, or an advance directive, or both instruments for health care decisions.</p> <p>Clarify how the instruments work together, if an adult <u>chooses to have both an advance directive and a representation agreement</u>, by providing in the legislation that:</p> <ul style="list-style-type: none">• Adults who wish to give instructions directly to a health care provider, as well as appoint a representative to make other health care and/or personal care decisions, may include an advance directive as part of a section 9 representation agreement. (This is consistent with other jurisdictions).• If an advance directive is separate from a representation agreement, the advance directive will serve as pre-expressed wishes that must be followed by the adult's representative, instead of instructions directly to the health care provider. (The current legislation provides for instructions or wishes to be acted on directly by a health care provider in an emergency. This will not be affected by the proposal.)
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ISSUE RAISED	BILL 32 PROVISIONS	COMMENTS/PROPOSAL
<p>People, particularly persons with disabilities, will be required to sign an advance directive in order to receive health care or to be admitted to a health care facility, resulting in the denial of required treatment and care.</p>	<p>Completing an advance directive is entirely voluntary.</p> <p>An adult must be capable to complete an advance directive.</p> <p>Care will not depend on completing an advance directive.</p>	<p>Comment: The Ministry of Health has issued a policy directive to the health authorities and has established a standard for residential care homes and facilities licensed under the <i>Community Care and Assisted Living Act</i> which clarifies that a health care facility <i>cannot</i> require the completion of an advance directive, or any form of personal planning document, as a prerequisite to receiving health care or to admission to a health care facility.</p> <p>Proposal: Expressly provide in the legislation:</p> <ul style="list-style-type: none"> • requirements, including witnessing requirements, for completing an advance directive; • that the making of an advance directive can never be a prerequisite for obtaining services, including health care services, or for admission to a health care facility; • an incapability test: an adult may make an advance directive unless the adult is incapable of understanding the nature and consequences of the proposed advance directive.

ISSUE RAISED	BILL 32 PROVISIONS	COMMENTS/PROPOSAL
<p>Instructions in an advance directive may be dated and:</p> <ul style="list-style-type: none"> ▪ may not include the adult's most current wishes; or ▪ may be based on old medical information or technology and may not address new treatment options. 	<p>The health care provider <u>must not</u> follow the advance directive if the health care provider reasonably believes that the adult's wishes, values or beliefs have changed and the change is not reflected in the advance directive.</p> <p>Bill 32 requires the adult to turn their mind specifically to the possibility that medical advances could overtake their current wishes. The legislation reinforces the importance of making an informed decision by providing that the advance directive is not valid unless it states that the adult refuses the health care even if changes in medical knowledge, practice or technology that might benefit the adult have occurred since the advance directive was made.</p>	<p>Proposal: Expressly provide in the legislation that an adult may, while capable, change or revoke an advance directive.</p> <p>Through education, encourage those who have advance directives to review them periodically.</p>
ISSUE RAISED	BILL 32 PROVISIONS	COMMENTS/PROPOSAL
<p>An advance directive will be a checklist and a person's wishes cannot be adequately presented in a checklist of treatment options.</p>	<p>Advance directives must be in a mandatory prescribed form.</p>	<p>Comment: There will be consultation on the form that will be required.</p>
ISSUE RAISED	BILL 32 PROVISIONS	COMMENTS/PROPOSAL
<p>Protections at the end of life will be eliminated by the proposal.</p>	<p>Does not change the law with respect to euthanasia or assisted suicide, both of which remain illegal in Canada.</p> <p>Advance directive legislation is intended to promote autonomy and dignity around health care decisions, including end of life treatment.</p>	<p>Proposal: Expressly provide in the legislation that an instruction in an advance directive that is prohibited by law is not valid.</p>

ISSUE RAISED	BILL 32 PROVISIONS	COMMENTS/PROPOSAL
<p>How will a health care provider know if a person has an advance directive?</p>	<p>Requires a health care provider to make a reasonable effort to determine whether the adult has an advance directive. What this requires depends on the specific circumstances at the time.</p>	<p>Comment: An adult who makes an advance directive should make sure that those who may need to know are aware that the adult has an advance directive or that they are provided with a copy of it.</p> <p>Proposal: As part of government’s intention to provide education around personal planning instruments, information can be provided about who should know about an advance directive and where it should be kept. For example, an adult may wish to provide a copy to his or her doctor, the hospital, or a close relative.</p> <p>To make it easier to determine whether a person has an advance directive, government will also review alternative mechanisms for locating personal planning instruments (e.g., voluntary registry; link to health care card).</p>

ISSUE RAISED	BILL 32 PROVISIONS	COMMENTS/PROPOSAL
<p>What will happen with the advance directives or living wills that have been made prior to Bill 32 coming into effect?</p>	<p>Provides authority for regulations to set out criteria for recognizing existing advance directive-type documents.</p>	<p>Comment: Other Canadian jurisdictions have generally taken one of two approaches with respect to pre-existing directives:</p> <ul style="list-style-type: none"> • grandparent existing directives that meet the requirements (e.g., execution requirements) of the new legislation; or • only recognize directives that are made after the new legislation comes into force. <p>Providing authority to set criteria in regulations to recognize existing advance directive-type documents would allow the development of an approach to suit circumstances in British Columbia. Any regulation would be developed in consultation with stakeholders.</p>

ISSUE RAISED	BILL 32 PROVISIONS	COMMENTS/PROPOSAL
<p>There are not enough resources, education and promotion of representation agreements.</p> <p>Most citizens are unaware of representation agreements because health authorities are promoting advance directives.</p>		<p>Comment: Government believes that planning for possible future incapacity is important and recognizes the need for information and education for both the public and for professionals about all types of personal planning tools.</p> <p>Bill 32, which would make improvements to all of the personal planning instruments, provides an opportunity to promote education of all options, including representation agreements.</p> <p>Proposal: Government will host a Personal Planning website and will review other ways to promote public and professional education about planning for future incapacity.</p>