

THE NEW MENTAL HEALTH ORDINANCE 1996 TO 1997 — A REFERENCE GUIDE FOR PHYSICIANS AND MENTAL HEALTH WORKERS

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ABSTRACT

The multifarious amendments to the Mental Health Ordinance of Hong Kong in 1996 to 1997 can be conceptualised into two main themes:

- To facilitate mentally incapacitated persons in obtaining the treatment and supervision they need: (a) expanded definition of relative; (b) increased powers of the court in managing their property and affairs; (c) introduction of a guardianship order and supervision and treatment order; (d) increased powers of the guardian; and (e) statutory recognition of the physician's power in providing medical treatment without consent to mentally incompetent adults.
- To protect mentally incapacitated persons from undue control under the Mental Health Ordinance: (a) re-definition of mental handicap from mental disorder; (b) offenders found unfit to plead or not guilty by reason of insanity need not automatically be locked up under hospital order; (c) creation of a guardianship board; (d) specification of special treatments so that these cannot be performed for mentally incompetent adults without court approval; and (e) further safeguards on the human rights of inmates of mental hospitals.

Keywords: *Hong Kong Legislation; Mental Disorder; Mental Handicap; Mental Health*

INTRODUCTION

During 1996 and 1997, substantial amendments were made to the Mental Health Ordinance (MHO) of Hong Kong.^{1,2} Since the original wordings of the Amendment Ordinances are fairly complex, a quick reference guide would be a service to physicians and mental health workers. In addition, some comments and explanatory notes have been written at the end of each Part of the new ordinance, so as to enable the readers to grasp the spirit and implications behind these changes.

The *core spirit* behind these amendments are two: (1) to facilitate the 'mentally incapacitated person' (MIP) in obtaining the treatment and supervision they need; and (2) as a counter-balance, to protect the MIP from undue control under the MHO as a result of such increased powers of the law. All the amendments can be understood from one of these two angles.

The new MHO now consists of 10 Parts. Parts I, II, III, IIIA*, IIIB*, IV, IVA, IVB*, IVC*, and V. For easy access to the most important amendments, the reader can simply read the comments at the end of each Part.

* Denotes entirely new Parts. All other Parts have been amended.

PART I: PRELIMINARY

Section 2(1): Definitions

- (a) the Chinese translation of '*social worker*' has been changed from:
「社會工作人員」 to 「社會工作者」
- (b) different kinds of '*guardian*':
see Table 1
- (c) reduced scope of '*mental disorder*':
see Figure 1
- (d) '*psychopathic disorder*' has been changed from a '*disorder of mind*' to '*disorder of personality*'
- (e) expanded scope of '*Relative*':
see Table 2

Section 2(2): Medical Opinions

Special experience in mental disorder or mental handicap, as approved by the Hospital Authority (HA), is required for at least one or two of the medical practitioners for the purposes shown in Table 3.

Section 2(6): 'Medical Superintendent'

Includes alternative title such as 'Hospital Chief Executive'.

Table 1. Different definitions of 'guardian' in the Mental Health Ordinance (MHO).

Old MHO	New MHO (1996 and 1997)	Age of person under guardianship	Guardian
Section 30: voluntary patients		<16 years	Either person having charge of that person or Director of Social Welfare
All juveniles other than Section 30		<18 years	Person having charge of that person
Section 34: Guardianship	Part IVB: guardianship Part IIIA: guardianship order	≥18 years Any age	Guardian specifically appointed Guardian specifically appointed

Figure 1. Reduced scope of 'mental disorder' in the new Mental Health Ordinance (MHO).

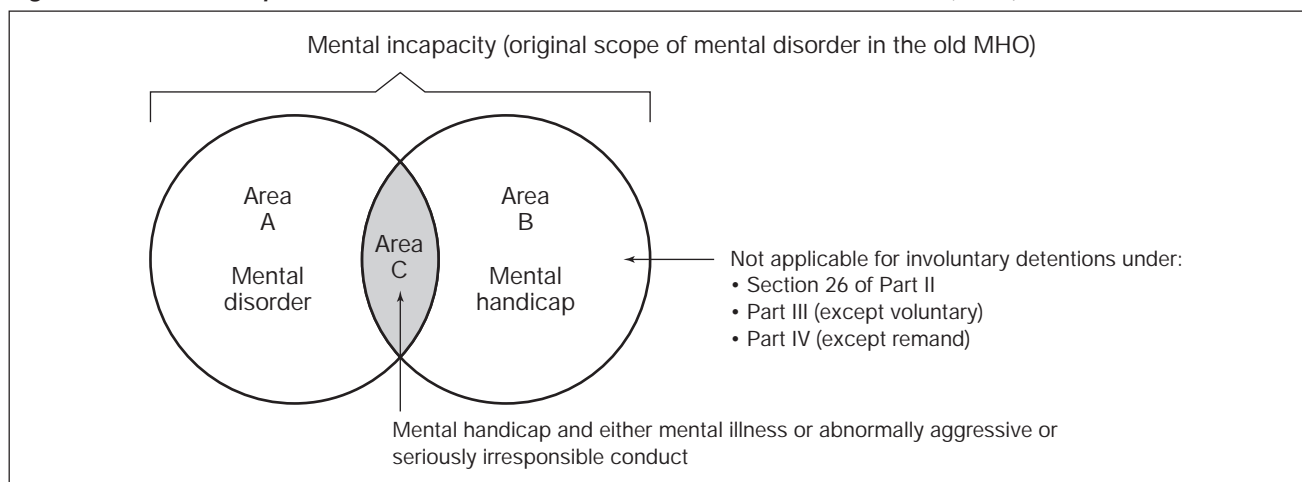


Table 2. Expanded scope of 'relative' in the new Mental Health Ordinance (MHO).

Old MHO	New MHO (1997)
Spouse or reputed spouse (the latter must be living with the patient)	Reputed spouse need not be living with the mentally incapacitated person
Any first and second degree relatives more than 18 years old	Includes also spouses of relatives
Any person more than 18 years old with whom the patient ordinarily resides	The co-resident need not be more than 18 years old 'Ordinarily resides' is replaced by 'resides or has resided'
	The following new categories are added <ul style="list-style-type: none"> • parent-in-law • grandparent-in-law • cousin • cousin's spouse

COMMENTS TO PART I AMENDMENTS

The most important amendments here are as follows:

- The distinction between 'mental disorder' and 'mental handicap' — this is in response to the demands of certain community groups for separate legislation for mental disorder and mental handicap. Instead of separate legislation, however, mental handicap remains within the MHO along with mental disorder under the umbrella-term mental incapacity. The only difference compared with previously is that mental handicap in the absence of mental illness or abnormally aggressive or seriously irresponsible conduct (area B in Figure 1) can no longer be a reason for compulsory detention in a mental hospital or correctional services department (CSD) psychiatric centre apart from under a remand order.

The effect of this, however, is not really as spectacular

as it appears, for even in the old MHO a mentally handicapped person (MHP) could not be certified in a mental hospital (compulsorily detained for longer than 28 days) unless the person is either abnormally aggressive or seriously irresponsible in conduct [Section 36(5)(b)]. The real difference that the new MHO brings is therefore that the MHP without mental illness or serious conduct disorder can no longer be involuntarily detained in a mental hospital or CSD psychiatric centre under (a) Section 26 — (a court order during an inquiry into the person's mental capacity); (b) forms 1/2/3 and form 4 (detention in a mental hospital for up to 28 days); or (c) hospital order, transfer order, or removal order (for detention of a mentally disordered offender). Since (a) is very seldom used, (b)'s duration is short, and (c) is unlikely to apply if the person has no serious conduct disorder, the impact of

Table 3. Purposes for which special experience of medical practitioners is required under Section 2(2).

Old MHO	New MHO (1997)
Certified patients (Section 36)	Certified patients (Section 36)
Guardianship (Section 33)	Guardianship (Section 59M)
Form 4 (Section 32)	No longer required for form 4
	Court inquiry under Part II (Section 7)
	Guardianship order* (Section 44A)
	Supervision and Treatment order* (Section 44D)
	Fitness to be tried* (Section 75 of criminal procedure ordinance)
	Hospital order* (Section 76 of criminal procedure ordinance)

* At least two of the practitioners should be approved under this section, otherwise only one is required.

this new distinction between mental disorder and mental handicap will therefore be extremely minimal. Its real meaning is therefore more political, to apparently appease certain community groups.

- Expanded scope of 'relative' to include more distant relatives and co-residents — this point is important because the relative of a MIP or mentally disordered person (MDP) is legally endowed with a lot of powers, such as application to court for management of the MIP's property and affairs; involuntary hospitalisation of a MDP under forms 1/2/3; application to the mental health review tribunal (MHRT); and application for guardianship. This amendment has been made because the old definition is considered too narrow and the more distant relatives who wanted to help the person might be barred because they were not legally entitled to do so. However, there is one interesting point

about the amendment — the co-resident no longer has a lowest age limit and a child who resides with a person might be regarded as a relative under the new MHO with all the invested powers.

PART II: MANAGEMENT OF PROPERTY AND AFFAIRS OF MENTALLY INCAPACITATED PERSONS

This is a clearer heading compared with the old one of 'Proceedings in Inquiries into Mental Disorders' although they mean the same thing.

Section 7: Procedure of Application to Court

See Table 4.

Sections 10B, 10C, 10E: Powers of Court

The main additional power is on *execution* (簽立) of a will with restrictions of the powers of the court under certain situations such as:

- when the person is a minor
- when any immovable property is outside Hong Kong.
- when the person is domiciled outside Hong Kong at the time when such a will is executed.

Section 10D: Court's Powers in Emergency

The court may take emergency action pending the determination of the question as to whether the person is incapable of managing his/her affairs.

Sections 11, 12, 26A: 'Committee of the Person' vs 'Committee of the Estate'

- 'committee of the estate' is preserved
- 'committee of the person' is repealed, and replaced by guardianship under Part IVB

Section 26: Order for Detention

Mentally handicapped persons who are not mentally disordered (area B in Figure 1) cannot be ordered by the court for detention in a mental hospital.

Table 4. Procedure of application to court for management of property and affairs of mentally incapacitated persons.

Old MHO	New MHO (1997)
Applicant either is: (i) any person related by blood/marriage or (ii) any public officer nominated by the Chief Secretary	Applicant should be in the first place: (i) a 'relative', but, (ii) if no application is made by a relative, then by <ul style="list-style-type: none"> • Director of Social Welfare or • official solicitor or • guardian under Part IVB
Way of application is not specified	Application shall be made by an 'originating summons' within the meaning of the rules of the supreme court
'Medical certificates' is not specified	2 medical certificates are required, one of which is by a doctor with special experience in mental incapacity
Evidence is not specified	A certificate or affidavit signed by the applicant is required, giving particulars of the evidence

Section 26B: Variation of Powers of Committee or Replacement of Committee with Another Committee

Application may now be made to the court for the above purposes.

Section 28: When Unsoundness of Mind of a Detained Patient is Found by the Court to Have Ceased

- (a) in the old MHO, the patient has to be discharged from mental hospital
- (b) in the new MHO (1997), the patient should be referred to the MHRT under Section 59D (1)(a).

COMMENTS TO PART II AMENDMENTS

The most important amendments here are as follows:

- the Court can now make a will on behalf of a rich MIP who is incapable of making a valid will by reason of mental incapacity, so that disposal of the legacy can be properly determined before death
- the court can now take emergency action in relation to a MIP's property even before it is formally established by the court that the MIP is indeed incapable of managing his/her affairs.

PART III: RECEPTION, DETENTION AND TREATMENT OF PATIENTS

Involuntary hospitalisation is no longer applicable to MIPs

who are not mentally disordered (area B in Figure 1).

Section 32: Form 4 (Extension of Observation)

The requirement that "at least 1 of the 2 medical opinions must be approved by the HA as having special experience in the diagnosis and treatment of mental disorders" is repealed.

Sections 33-35: Guardianship

These sections are repealed and replaced by Part IVB.

COMMENTS TO PART III AMENDMENTS

The most important amendment here is that if a MHP is neither suffering from mental illness nor is abnormally aggressive or seriously irresponsible, the relative/doctor/social worker can no longer dispose of him/her by admitting him/her into a mental hospital involuntarily under forms 1/2/3 or form 4 (unless the MHP is able and willing to sign a voluntary form).

PART IIIA: GUARDIANSHIP OF PERSONS CONCERNED IN CRIMINAL PROCEEDINGS*

Sections 44A, B: Guardianship Order

See Table 5.

* A new Part (introduced in 1996 and amended in 1997)

Table 5. Guardianship order for criminal offenders.

Right to receive care/treatment in the community in lieu of a hospital order	Right to be safeguarded from improper control in the community
Guardianship order (the court puts the criminal under guardianship with the same power as Part IVB) [the court can renew the order upon expiry of validity period]	Only applicable to two types of cases: (i) not guilty by reason of insanity, or (ii) under disability and the jury or court is satisfied that the patient did commit the offence after a 'trial of facts'
	Must have adequate grounds (either for the patient's welfare or protection of others)
	Must be supported by at least two doctors approved by the Health Authority in Section 2(2)
	Guardian chosen must be accepted by the Department of Social Welfare
	Order may be revoked by the mental health review tribunal or the court

Table 6. Supervision and treatment order for criminal offenders.

Right to receive care/ treatment in the community in lieu of a hospital order	Right to be safeguarded from improper control in the community
Supervision and treatment order (the court puts the criminal under the Department of Social Welfare's supervision and a doctor's treatment, for not more than two years)	Safeguards are similar to the guardianship order, with the following additional requirements (i) a social inquiry report from the supervising officer must be submitted to court (ii) mental incapacity must be susceptible to treatment

PART IIIB: SUPERVISION AND TREATMENT ORDERS RELATING TO PERSONS CONCERNED IN CRIMINAL PROCEEDINGS*

Section 44D-I: Supervision and Treatment Order

See Table 6.

COMMENTS TO THE NEW PARTS IIIA AND IIIB

A serious drawback to Section 76 of the old Criminal Procedure Ordinance of Hong Kong³ lay in its great inflexibility, in that once the accused person was found to be either “not guilty by reason of insanity” (Section 74) or “under disability” i.e. unfit to plead (Section 75), the Court had no choice but to detain that person in a mental hospital or the Siu Lam Psychiatric Centre under a hospital order for an indefinite period.

The injustice which this ordinance has created for some patients can be illustrated by the following passage “Under the old law those considered unfit to plead were detained in hospital without any finding as to whether they had or had not committed the offence. The Law Society, which sponsored the bill, cites the case of a mentally handicapped woman who confessed under questioning to the murder of her father. She was committed to hospital and released much later only when the real killer came to light. In another case a deaf and dumb man, who was unable to communicate even through sign language, was charged with petty theft and found unfit to plead. He was detained in a psychiatric hospital and discharged three months later only when his solicitor put his case to a mental health review tribunal.”⁴ Here in Hong Kong, MHPs who have committed very minor offences such as loitering or petty theft have been locked up in mental hospitals for years in this way, for the simple reason that they could not understand what they were doing and were therefore legally insane, despite the fact that they were not a real threat to society and detaining them in a mental hospital was not serving any therapeutic purpose.

The greatest improvements brought about by these new Parts IIIA and IIIB of the MHO (in conjunction with the corresponding amendments in the Criminal Procedure Ordinance) are as follows:

- a person found unfit to plead can now have the advantage of a ‘trial of facts’ in the court to determine whether he/she actually committed the offence. If the court is not satisfied that he/she did so, he/she can now be acquitted whereas previously he/she would be sent to a mental hospital for an indefinite period
- if the defendant is found guilty in this trial of facts, or not guilty by reason of insanity, the court will now be able to choose from a range of orders to meet his/her needs. These are a hospital order, a guardianship order, a supervision and treatment order, or an absolute discharge.

* A new Part (introduced in 1996 and amended in 1997)

This amendment will also help people with epilepsy who commit offences during or in the aftermath of a fit. Until now the only plea available to them (apart from guilty) has been not guilty by reason of insanity, which has led to automatic detention in hospital. The new range of orders will be available for people with epilepsy and others found not guilty because of ‘a disease of the mind’.

PART IV: ADMISSION OF MENTALLY DISORDERED PERSONS CONCERNED IN CRIMINAL PROCEEDINGS, TRANSFER OF MENTALLY DISORDERED PERSONS UNDER SENTENCE, AND REMAND OF MENTALLY INCAPACITATED PERSONS

MHPs who are not mentally disordered (area B in Figure 1) can only be remanded under this Part.

COMMENTS TO PART IV AMENDMENTS

The most important amendment here is that a mentally handicapped offender who is neither suffering from mental illness nor is abnormally aggressive or seriously irresponsible can no longer be detained in a mental hospital or the Siu Lam Psychiatric Centre under a hospital order, transfer order or removal order of the MHO.

However, as pointed out before, the impact of this is likely to be small, since if the MHP has committed a criminal offence, he is probably also aggressive or irresponsible in some way.

PART IVA: MENTAL HEALTH REVIEW TRIBUNAL

Section 59B: Cases Which Can be Reviewed by the Mental Health Review Tribunal

See Table 7.

Table 7. Patients who may be reviewed by the Mental Health Review Tribunal.

Old MHO	New MHO (1997)
Detainees	No change
Absence on trial (Section 39)	No change
Conditional discharge (Section 42B)	No change
Guardianship	(i) covers guardianship order (Part IIIA) and supervision and treatment order (Part IIIB) (ii) does not cover guardianship (Part IVB) [these cases will be reviewed by the new guardianship board]

COMMENTS TO PART IVA AMENDMENTS

The most important amendment here is that the MHRT can no longer review civil cases of guardianship. This creates the discrepant situation in which civil cases of guardianship (Part IVB) are reviewed by the new guardianship board, whereas criminal cases of guardianship (Part IIIA) are reviewed by the MHRT. This arrangement appears to be entirely arbitrary, and there is no convincing reason that it must be so.

PART IVB: GUARDIANSHIP*

This part replaces Part III Sections 33-35 of the old MHO

Section 59J: Guardianship Board

This is a new 'body corporate' (法人團體) with a Chairperson in the legal field, and at least nine members consisting of lawyers, medical practitioners, social workers, and other people with personal experience of mentally incapacitated persons.

Section 59K: Powers of the Board

See Table 8.

Sections 59L, X: Formal Hearings

In contrast to the relatively informal appointment procedure of the guardian in the old MHO, the new guardianship board has formal proceedings including summoning, punishing or paying allowances to witnesses, and requiring production of any relevant document or other items. Evidence may or may not be taken on oath. Proceedings shall be open to the public unless there is good reason not to be so.

Sections 59M, N, P: Application Procedures

The following new provisions are not found in the old MHO:

- (a) a social worker outside the Social Welfare Department (SWD) can now be an applicant
- (b) if the applicant is a medical practitioner, he/she cannot also be one of the two medical opinions supporting the application

Table 8. Powers of the guardianship board.

Powers of the guardian-ship board	In the old MHO, that particular function was performed by
Appoint the guardian	Director of Social Welfare
Make guardianship order which gives directions to the guardian (NB this guardianship order is different from that under Part IIIA)	Director of Social Welfare
Review the guardianship	District judge or mental health review tribunal
Other related functions	Director of Social Welfare

* A new Part (introduced in 1997).

- (c) details of the application shall be notified to the following people:
 - (i) the applicant
 - (ii) the mentally incapacitated person
 - (iii) a relative
 - (iv) the Director of Social Welfare
- (d) a social enquiry report prepared by a public officer of SWD is required.

Section 59O: Criteria for Making the Guardianship Order

The criteria are, in general, similar to the old MHO, with the following additional requirement: The particular needs of the mentally incapacitated person cannot be met by any other less restrictive or intrusive means.

Section 59Q: Emergency Guardianship Order

An emergency order can be made if the board thinks that it is necessary to make immediate provision to protect that person from maltreatment or exploitation.

Section 59R: Term and Effects of the Guardianship Order

- (a) effective duration:
 - (i) the old MHO was two years, then renewable every two years
 - (ii) the new MHO is one year for the first order, then renewable every three years for subsequent extensions.
- (b) powers of the guardian

As well as the three powers stated in the old MHO [requiring the incapacitated person to (i) reside at a place, (ii) attend a place, and (iii) give access to others], 4 additional powers are provided in the new MHO:

- (iv) the power to convey the person to specified places
- (v) the power to consent to treatment (other than 'special treatment' under Section 59ZA, and only to the extent that the person is incapable of understanding the general nature and effect of any such treatment)
- (vi) the power to hold, receive, or pay a monthly sum for the benefit of that person (such sum should not exceed the latest median monthly employment earnings of employed persons specified in the *Quarterly Report on General Household Survey* published by the Census & Statistics Department)
- (vii) the power to apply to court for management of the property and affairs of that person under Part II of the MHO.

Section 59S: Criteria for Selection of Guardian

In the old MHO, it was stated only very crudely that the proposed guardian was accepted by the DSW, and that the proposed person consented in writing.

In the new MHO (1997), the selection criteria are spelled out more clearly as a guardian who is:

- (a) capable (and has attained the age of 18 years)
- (b) willing (consented in writing)
- (c) compatible with the mentally incapacitated person:
 - in their personalities

Table 9. Situations in which guardianship can be reviewed.

Situation	Old MHO	New MHO (1997)
Death, incapacity or resignation of guardian	Reviewed by district judge	Reviewed by the guardianship board
Prior to expiry of guardianship period	No review required if renewal is not intended	Review by the guardianship board is compulsory
Personal requests for review	Application can be made to the mental health review tribunal by (i) the patient (ii) a relative	Application can be made to the guardianship board by (i) the mentally incapacitated person, (ii) the guardian, (iii) Director of Social Welfare (iv) any other person interested in the welfare of the incapacitated person
New provision		The guardianship board may, of its own initiative, review any guardianship order under Part IVB

- no undue conflict of interest, especially financial
- will promote the interests of the incapacitated person
- will respect the views and wishes of the incapacitated person unless it is not in that person's interest to do so.

Sections 59T, U: Review of the Guardianship

See Table 9.

Section 59W: Appeal to Court

Since all the above reviews are performed by the guardianship board itself, further appeal against any decision of the board may be made to the high court.

Section 59Y: Right of Legal Representation

The following persons may be represented by a lawyer:

- the applicant
- the mentally incapacitated person
- a public officer in SWD.

Section 59Z: Rules

Operational rules may be made by the Secretary for Health and Welfare (SHW).

COMMENTS TO THE NEW PART IVB

During the era of the old MHO, guardianship (Sections 33-35 in Part III) was rarely used by clinicians, certainly much less frequently than conditional discharge (CD) [Section 42B]. The reasons for this are (1) the indication for guardianship is mainly for non-violent patients which is much less compelling to the clinician than the violent patients in the case of CD; (2) the procedure of application for guardianship is more complicated than for CD; and, (3) perhaps most importantly, the power of the guardian so appointed is relatively limited. As Eastman pointed out, *"it removes civil rights without offering any appreciable clinical benefit and thus eschews any principle of reciprocity"*.⁵

With this new MHO, the powers of the Guardian have been therefore substantially increased to include the powers to convey the MIP, to consent to treatment on his/her behalf, and to control his/her money. These are great infringements of human rights, for even the 'power to convey' may contravene

the right to liberty under Article 5 of the European Convention on Human Rights as interpreted by the European Court, since forcible conveyance may amount to detention, requiring the patient to suffer from a mental disorder of a nature or degree that warrants such detention.⁶ To counterbalance this increase in powers, a guardianship board will be set up and procedures will necessarily become more complicated than the application of guardianship in the old MHO. Whether this counterbalance between increased power on the one hand and more complicated procedures on the other will result in a greater or lesser frequency of utilisation of this guardianship provision by the clinicians has yet to be seen.

PART IVC: MEDICAL AND DENTAL TREATMENT*

This Part comprises two considerations:

- the right of an adult (aged 18 years or older) who is mentally incapable of giving consent to receive the medical and dental treatments needed (Figure 2).
- the right of such persons to be safeguarded from improper medical and dental treatment.

Sections 59ZA, ZB(3), ZF(3), ZI(1), ZJ(1)

'In the best interests' of the person means:

- to save his/her life
- to prevent damage or deterioration to his/her health and well-being
- to improve his/her health and well-being.

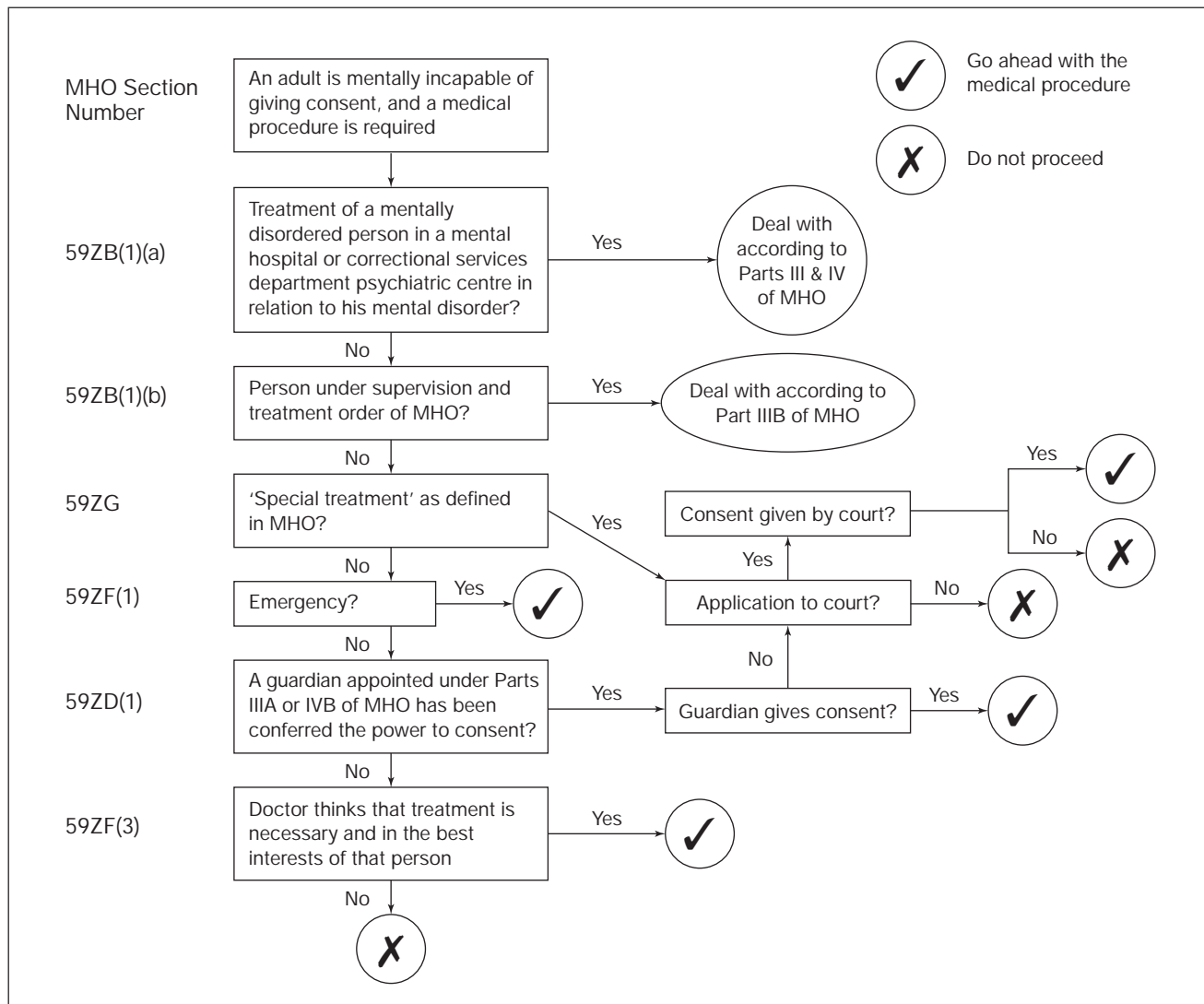
Sections 59ZA, ZC, ZG(1)

'Special treatment' means:

Medical or dental treatment of an irreversible or controversial nature as specified in the Gazette by the SHW, in consultation with the HA with or without other appropriate bodies (including the Department of Health, The Hong Kong Medical Association, and the Hong Kong Dental Association). The court's approval is mandatory before it can be carried out.

* A new Part (introduced in 1997).

Figure 2. Right of an adult (aged 18 years or older) who is mentally incapable of giving consent to receive the medical and dental treatments he/she needs.



Section 59ZB(2)

'Incapable of giving consent' means incapable of understanding the general nature and effect of the treatment.

Sections 59ZH, ZI(2), ZJ(2)

Court proceedings means that the applicant must serve a copy of the application on:

- (i) the incapacitated person
- (ii) the doctor
- (iii) the guardian, unless the court is satisfied that failure to serve the copy on (ii) and (iii) will not affect the proper application of this Part.

The court need not consider the application if the court is not satisfied that the applicant has a sufficient interest in the health and well-being of the incapacitated person.

COMMENTS TO THE NEW PART IVC

This Part deals with the difficult situation where an adult who is mentally incapable of giving consent, needs a medical procedure to be performed outside the mental hospital, since

legally speaking nobody else is able to give a valid consent on behalf of any person aged 18 years or more for such purpose.

In the United Kingdom, Lord Brandon said that "the common law allowed a doctor to treat adults who were incapable of consenting provided the procedure (operation or other treatment) was in the best interests of the patient. The law would regard a treatment as being in the patient's best interests only if it was done to save life or to ensure improvement or prevent deterioration in physical or mental health. When people lacked the capacity to take medical treatment decisions, others had to take them on their behalf or they would be deprived of care they needed and to which they were entitled. In many such cases, it would not only be lawful for doctors to give treatment, but also their common law duty. The lawfulness of such treatment would depend not on any approval or sanction of the court but on whether the operation or other treatment was in the patient's best interest. The standard that would be applied (by a court) would be that of the reasonably competent

Table 10. How the physician decides to give treatment to an adult mentally incapable of giving consent.

	Low risk-benefit ratio or emergency	Moderate risk-benefit ratio		High risk-benefit ratio or controversial even within the medical profession
		Non-controversial nature	Controversial in the eyes of society	
Existing practice under the common law	Not only lawful for doctor to give treatment, but a common law duty to do so if in the best interests of patient	Doctor usually obtains a senior second medical opinion, plus a relative's consent if available	Bring to court	Should not proceed
New MHO (1997)	Either a guardian appointed under Parts IIIA or IVB of MHO has been conferred the power to consent, or if no such guardian was appointed, doctor may proceed if he thinks that treatment is necessary and in the best interests of that person		'Special Treatment' as defined in Section 59ZA cannot be carried out unless approved by court	Guardian appointed under MHO can give consent if it is not a 'special treatment'

doctor practising in the specialty (as laid down in the Bolam case in deciding medical negligence claims).^{7,8}

In Hong Kong, doctors have generally also adopted the above concept of the common law. However, when treatments entail a moderate degree of potential risk, doctors do become hesitant when the patient is unable to consent for himself. In such cases, a common way for the doctor to protect himself is to obtain a second senior medical opinion, so as to fulfil the Bolam standard (that of the reasonably competent doctor acting in accordance with a responsible body of medical opinion). A relative's consent, although not legally binding, is also normally sought when one is available. Despite these facts, some MIPs may still be deprived of some necessary medical treatments, merely because they lack the capacity to consent.

For treatments which may appear controversial in the eyes of society, however, Lord Donaldson in the court of appeal has provided an additional safeguard as follows: "*in the context of the most sensitive and potentially controversial forms of treatment the public interest requires that the courts should give express approval before the treatment is carried out and thereby provide an independent and broad-based third opinion*".⁹ The situation is summarised in Table 10.

It can thus be seen that the new MHO has actually retained the spirit of common law, only that the power of the guardian and the doctor is now based on statutory law instead of common law. In other words, the doctor can now feel more legally protected than before when proceeding with medical procedures for MIPs without their valid consent, even though in practice he/she might have been doing the same thing before under common law.

In contrast to the Mental Health Act of the United Kingdom, the MHO of Hong Kong has not specified the requirement for a second medical opinion. However, the doctor should still bear in mind that reference to a responsible body of medical opinion might still be an important safeguard when he decides on whether a treatment is 'necessary' and 'in the best interests' of that person.

The new MHO has specified a category of 'special treat-

ment' for which it is mandatory to obtain the approval of the court before it can be carried out for an adult mentally incapable of giving consent. As at August 1999, there is only one such special treatment, viz. "*Sterilisation operations except for operations that are intended primarily to treat other diseases of the reproductive system, but having the effect of sterilisation*". In general, however, it would be preferable to include less rather than more treatments into this list so as to give increased flexibility to all parties concerned (because treatment not specified under Section 59ZC may still be brought to court when controversy cannot otherwise be settled).

As can be seen in Table 10, my personal suggestion of criteria for including a treatment as a 'special treatment' are that it should carry a moderate risk-benefit ratio and be liable to create substantial controversy in the eyes of society. On the other hand, for medical procedures which carry a high risk-benefit ratio or are substantially controversial even within the medical profession, my opinion is that they should never be done to a person incapable of giving consent. Two examples of the latter category may be psychosurgery and the surgical implantation of hormones for the reduction of male sexual drive for which, according to Part IV of the Mental Health Act of the United Kingdom, the patient's consent (as well as a second medical opinion) is mandatory and hence could never be done to a person incapable of giving consent. In Hong Kong, however, a loophole has been created in our new MHO in that a guardian appointed under Part IIIA or IVB may still give consent on behalf of the MIP for this category of treatments.

PART V: GENERAL PROVISIONS

Section 72: Mental Health Regulations (amended 1996 and again 1997)

- (a) regulations will be made by the SHW instead of the Governor-in-Council
- (b) new regulations will be added in relation to Part IVC (treatment and special treatment).

Table 11. Persons or bodies specified in the Mental Health Ordinance (MHO) to be exempted from the medical superintendent's (MS) power of censorship on postal articles.

	Old MHO	New MHO (1996)
List of persons or bodies so specified	(i) Hospital Authority (ii) Mental Health Review Tribunal (iii) Secretary for Health and Welfare (iv) Registrar of the Supreme Court	(i) no change (ii) no change (iii) any public officer (iv) Chief Executive of Hong Kong Special Administrative Region (v) member of Executive Council (vi) member of Legislative Council (vii) member of Urban Council (viii) member of Regional Council (ix) member of District Board (x) justice of the peace (xi) mental hospital visitor (xii) patient's solicitor
Articles sent by a patient to the above list	MS has no power to open, examine, delete any part, or refuse to permit such an article from leaving the mental hospital	No change
Articles addressed to a patient by the above list	No special provision	MS cannot delete any part, or refuse to allow the patient to receive such an article except with the prior consent of the sender

Regulation 4(1): Visitors

Specific reasons are stipulated for refusing to allow a visitor to see a patient in a mental hospital:

- (a) if it may cause unnecessary distress to the patient
- (b) if it may adversely affect the treatment of the patient.

Regulation 4(2): Telephone Calls

Specific reasons are stipulated for refusing to allow the patient to make or receive a telephone call:

- (a) if the patient will suffer unnecessary distress or the treatment will be adversely affected
- (b) if any person other than staff will suffer unnecessary distress
- (c) if the person to whom the patient makes the call has given notice in writing that telephone calls made to him/her by the patient should be disallowed.

Regulations 5(5)F: Censorship of Postal Articles

- (a) specific reasons are stipulated for refusing to allow the patient to send or receive an article, and for deleting part of a letter:
 - (i) if the patient will suffer unnecessary distress or the treatment will be adversely affected
 - (ii) if any person other than staff will suffer unnecessary distress
 - (iii) if the person to whom the patient sends the article has given notice in writing that such should not be sent
 - (iv) if any person will suffer danger
- (b) a list of exemptions from the Medical Superintendent's (MS's) power of censorship is shown in Table 11
- (c) the duties of the MS after exercising his/her power under this regulation are to:
 - (i) give notice, within 7 days, to both the sender and the addressee
 - (ii) return the article to the sender.

Table 12. Searching a visitor of a mental hospital patient suspected to be conveying forbidden items.

	Old MHO	New MHO(1996)
A female person may be searched by	Female staff only	Female staff only
A male person may be searched by	Male or female staff	Male staff only

Regulation 6: Execution of Documents

A specific reason is stipulated for forbidding a patient from executing a document — if the patient is incapable of understanding its legal implications.

Regulation 7: Employment of Patients

- (a) a specific reason is stipulated for employing a patient to work in mental hospital — if this is desirable in regard to his/her treatment
- (b) the MS cannot compel a patient to work.

Regulation 8: Possession of Articles

Specific reasons are stipulated for forbidding a patient to possess certain articles:

- (a) if the patient will suffer unnecessary distress or the treatment will be adversely affected
- (b) if any other patient will suffer unnecessary distress or the treatment will be adversely affected
- (c) if any person will be placed in danger.

Regulation 9: Restriction on Receipt by Patient of Certain Items

- (a) a specific reason is stipulated for forbidding a patient to receive certain items — he/she is incapable of looking

after or using the item properly

- (b) a visitor suspected to be attempting to convey the forbidden item to the patient may be searched. There is, however, one interesting amendment (Table 12).

COMMENTS TO PART V AMENDMENTS

The most important spirit of the amendments to the Mental Health Regulations under Part V is to re-emphasise the patient's human rights while he/she is an in-patient of a mental hospital, regarding his/her rights to receive visitors, make or receive telephone calls, send or receive a postal article, execute a document, refuse enforced working, and possess or receive certain articles.

The conditions under which the MS can restrict the above rights of the patients are now much clearer than in the old MHO. For instance, whereas previously the MS had the power to forbid an inmate sending a letter to a Legislative Councillor, he now no longer has the power to do so, however absurd the MS may think the contents of the letter are.

Another interesting amendment is that, whereas previously a female staff member could search the body of a male visitor, only male staff are now allowed to do so. A very interesting example of society's current emphasis on gender equality.

OVERALL CONCLUSION

The essence of the multifarious amendments to the MHO in 1996 to 1997 can be succinctly conceptualised into the two themes put down in the Abstract of this paper.

The directions of the changes are correct, but as explained in the text, the impact will probably not be as great as they may initially appear.

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