

# MENTAL HANDICAP AND MENTAL HEALTH (AMENDMENT) ORDINANCE 1997

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## ABSTRACT

The Mental Health (Amendment) Ordinance 1997 was passed in June 1997. Much of the content of the amended ordinance is concerned with service provision for the mentally handicapped. The essence of the amendment is discussed in relation to mental handicap.

**Key words:** *Hong Kong; Mental Handicap; Mental Health Ordinance.*

## BACKGROUND

The Mental Health Ordinance was previously amended in 1988. Since then, community groups (particularly relatives groups of mentally handicapped people) proposed separate handling and legislation for mentally handicapped people from mentally disordered people.<sup>1</sup> The inclusion of mental handicap into the category of 'mental disorder' in the ordinance has aroused dissatisfaction among these community groups. 'Guardianship' has been criticised as emphasising supervision and control, rather than care provision.

The needs of adult mentally handicapped persons were repeatedly cited by community groups and the media. Specific issues related to consent and authorisation of carers were discussed. Successful negotiation of these community groups with Legislative Council members and government officials resulted in the re-amendment of the ordinance in 1996. The Amendment was passed by the Legislative Council and published in the Gazette in June 1997. The amended ordinance was implemented in 1998.

## WHAT IS NEW ?

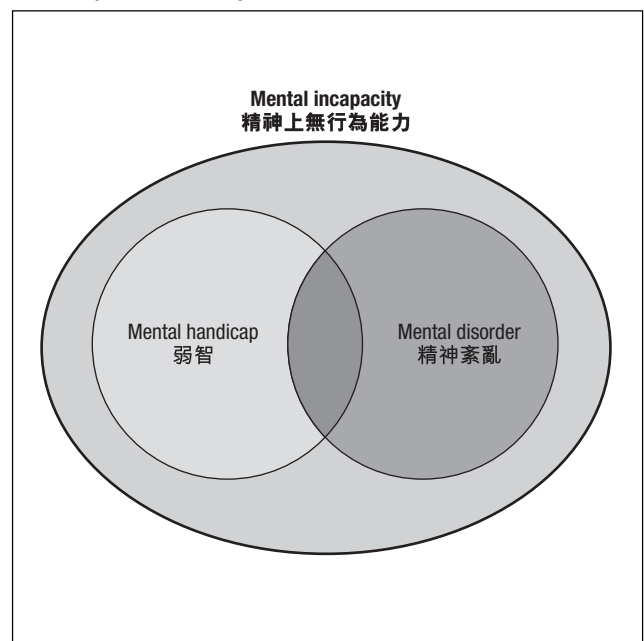
The ordinance has been renewed after consideration of similar laws in other countries, including the UK, USA, and Australia. The Mental Health (Amendment) Ordinance 1997<sup>2</sup> differs from the Mental Health Ordinance 1987<sup>3</sup> in the following aspects:

1. A new category of 'mental handicap' has been defined as an entity independent from 'mental disorder'. The former means "sub-average general intellectual functioning with deficiencies in adaptive behaviour". The concept of mental impairment (i.e. mental handicap associated with "abnormally aggressive or seriously irresponsible conduct") of the Mental Health Act 1983 of the UK has been included in the mental disorder category. However, the term 'mental impairment' does not appear in the Hong Kong ordinance. Previously, mental impairment was

included in the category of 'psychopathic disorder'.

2. A new category of 'mental incapacity' appeared. The term is defined as 'mental disorder or mental handicap'. This category may include persons with dementia or psychosis (e.g. refusal of medical treatment for delusional reasons). The relationship between mental handicap, mental disorder, and mental incapacity are illustrated in Figure 1.
3. A guardianship board has been established. The board will be responsible for making, defining, and reviewing guardianship orders and appointing guardians for adult mentally incapacitated persons. The powers of guardianship are extended and may include giving consent to treatment and paying small amounts of cash on the mentally incapacitated person's behalf (trustee role).

**Figure 1: The relationship between mental handicap, mental disorder, and mental incapacity in the Mental Health (Amendment) Ordinance 1997.**



4. A new section — Medical and Dental Treatment (Part IVC) — has been included for adult mentally incapacitated persons (see below).
5. A section on Management of Property and Affairs of Mentally Incapacitated Persons (Part II) replaces the previous section on Proceedings in Inquiries into Mental Disorders. The latter was slightly expanded and revised to accommodate the new concept of 'mental incapacity' and its related management.

## **CONSENT TO MEDICAL AND DENTAL TREATMENT**

Mental handicap workers and relatives of mentally handicapped people have been facing a dilemma in the area of consent for many years. On the one hand, nobody can sign a valid consent for any person aged 18 years or older, even though the person may have significant mental handicap and is obviously incompetent to give consent for himself/herself. On the other hand, it is absurd to leave various medical procedures undone, simply because no valid informed consent is possible.

Hesitation over the lack of valid informed consent would prevent the mentally handicapped person's access to usual investigations such as computed tomography scanning or barium enema, simple procedures such as drainage of a superficial abscess or suturing of a scalp laceration, and more complex but often necessary procedures such as cataract extraction. Signed consent by two doctors is valid only for emergency procedures to save life or prevent serious deterioration. The previous Mental Health Ordinance allowed treatment without consent for compulsorily detained patients only. Furthermore, treatment in the previous ordinance only referred to psychiatric treatment and did not cover medical or dental treatments.

In the UK, such dilemmas had been settled a decade ago by various authorities, including the law and the Royal College of Psychiatrists.<sup>4-7</sup> Practice of reasonable medical treatment, even without a valid informed consent from a mentally incompetent adult, is protected by the common law. Common law requires a doctor to exercise 'a duty of care', to 'act in the patient's best interests' and to 'act in good faith'. Withholding proper treatment due to a lack of valid consent may, in contrast, be proven to be an act of negligence. However, a similar resolution has not been widely accepted and practised in Hong Kong.

The Mental Health (Amendment) Ordinance 1997 has legitimatised similar resolutions in Part IVC. This section applies to mentally incapacitated persons aged 18 years or older who are incapable of giving consent to necessary treatment or special treatment. Consent may be given by an appointed guardian or the court on behalf of a mentally incapacitated person aged 18 years or older for usual medical and dental treatments, to the extent that the mentally incapacitated person is incapable of understanding the nature and effects of such treatment. Necessary medical or dental treatments can be given without consent if no guardian is

available or the guardian appointed has not been conferred with the power to consent. The principles to follow are:

1. The mentally incapacitated person is not deprived of the necessary treatment or special treatment, merely because he lacks the capacity to consent.
2. To act in the best interests of the person, i.e. to improve physical/mental health, to prevent damage or deterioration to physical/mental health, or to save life.

Common sense tells us that not all persons with mental handicap or mental disorder are incompetent to give consent to all medical and dental procedures. Implied consent inferred from the person's cooperation by giving his arm may be adequate for venepuncture. Consent for simple procedures may be signed by the person himself. The more complex the procedure, the higher is the mental competency required to understand the nature and the potential implications of the procedure.<sup>8</sup>

Special treatment includes irreversible or controversial treatments (so far only includes sterilisation) as defined by the Secretary for Health and Welfare. A court decision is required for special treatment or for over-riding a guardian's refusal or lack of consent to treatment.

## **MANAGEMENT OF PROPERTY AND AFFAIRS OF MENTALLY INCAPACITATED PERSONS**

This section includes various court orders and procedures in relation to financial transfer, settlement of property, and execution of a will on behalf of a mentally incapacitated person. The appointed trustee, guardian, or committee of the estate may be involved.

This section may be applied after an inquiry has proved the person to be incapable, by reason of mental incapacity, of managing and administering his property and affairs. Such inquiry requires the submission of two medical certificates, evidence of the relatives or next-of-kin and the property, and other relevant documents.

## **CONCLUSION**

The newly amended Mental Health Ordinance has been pursued by workers in the mental handicap field and relatives of mentally handicapped persons for a long time. Elements have been added to facilitate care provision in addition to supervision and control. The dilemma related to consent has been settled. Criteria for detention of mentally handicapped persons for psychiatric treatment are more explicitly stated. Many of the principles applied to mental handicap are applicable to other categories of mental disorder, under the same umbrella of mental incapacity.

Although the Mental Health (Amendment) Ordinance 1997 will not make a dramatic impact in the sense of revolutionising the day-to-day service provision to mentally handicapped people, it is certainly helpful in settling controversial issues as well as grey areas in mental handicap care.

## REFERENCES

1. Chang W. Inspirations obtained by self-help organizations in the process of promoting the Mental Health Amendment Bill 1997. Hong Kong: The Hong Kong Joint Council of Parents of the Mentally Handicapped; 1997.
2. Hong Kong Government, Mental Health (Amendment) Ordinance 1997.
3. Hong Kong Government, Mental Health Ordinance 1987.
4. Consent of non-volitional patients. Royal College of Psychiatrists. London: Council Report CR6; 1989.
5. Kanjidal GC. Consent and the Mentally Handicapped. Psychiatr Bull 1989;13:82-83.
6. Bicknell DJB. Consent and people with mental handicap. Br Med J 1989;299:1176-1177.
7. Section for the Psychiatry of Mental Handicap. Sterilization and mentally handicapped people: position statement. Psychiatr Bull 1989;13:215.
8. Curran J, Hollins S. Consent to medical treatment and people with learning disability. Psychiatr Bull 1994;18:691-693.

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