

Presented at Seminar on  
**“Adoption of Community Treatment Order in HK”**  
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**Involuntary Community Treatment**  
**for the**  
**Mentally Incapacitated Persons**  
**in Hong Kong :**

**(A) Provisions in the current Mental Health Ordinance**  
**and (B) Ethical Considerations**

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# Explanation of Title of Talk

## Involuntary

- Incapable of giving consent, or
- Refusing to give consent

## Community

- Outside the mental hospital
- Outside penal institutions

## Treatment (as defined by Part IVC of MHO)

Any medical, surgical, or dental procedure, operation or examination carried out by, or under the supervision of, a registered medical practitioner and any care associated therewith.

## Mentally Incapacitated Person (as defined by Part I of MHO)

- Mentally Disordered Person, or
- Mentally Handicapped Person

# I Shall Talk About:

- (A) Provisions in the  
*current Mental Health Ordinance*
  
- (B) *Ethical* Considerations

**(A)**

**Provisions in the  
*current*  
*Mental Health Ordinance***

# **(A) Provisions in the *current Mental Health Ordinance***

## **Part III**

Section 39 ----- ***Absence on Trial*** (for Form 1/2/3, Form 4, or Certified Patients)

Section 42B ----- ***Conditional Discharge*** (for patients with propensity to violence)

## **Part IIIA**

***Guardianship Order*** (for criminal cases)

## **Part IIIB**

***Supervision & Treatment Order*** (for criminal cases)

## **Part IVB**

***Guardianship*** (for non-criminal adult cases)

## **Part IVC**

***Medical & Dental Treatment*** (for adult patients incapable of giving consent)

## **Part III Section 39**

### ***Absence on Trial***

**(for Form 1/2/3, Form 4, or Certified Patients)**

#### **Power of Ordinance**

- (1) Absence may be subject to ***conditions***
- (2) May ***recall*** patient back to mental hospital

#### **Safeguard against Abuse**

- (1) Subject to ***review by MHRT*** just like patients being detained in mental hospital
- (2) *Recall*** should be made in the interests of the patient's health or safety or for the protection of other persons.
- (3) *Cannot recall*** if original section has expired

## Part III Section 42B

### *Conditional Discharge*

### *(for Patients with Propensity to Violence)*

#### Power of Ordinance

- (1) Patients discharged from mental hospitals or CSD Psychiatric Centre may be subject to *conditions*
- (2) May *recall* patient back to mental hospital

#### Safeguard against Abuse

- (1) Only applicable to involuntarily *detained* patients.
- (2) Only applicable to patients with disposition to commit criminal *violence*.
- (3) May *recall* only if non-compliant with any condition
- (4) Patient/Relative may appeal to *MHRT*

## Part IIIA

### ***Guardianship Order*** (for criminal cases)

#### Power of Ordinance

- (1) Court can put a criminal under guardianship with same ***power as Part IVB***
- (2) Court ***can renew*** the order upon expiry of validity period

#### Safeguard against Abuse

- (1) Only applicable to ***2 types of cases*** :-
  - a) Not guilty by reason of insanity, or
  - b) Under disability + Jury satisfied that patient did commit the offence
- (2) Must have adequate ***grounds*** (either for patient's welfare or protection of others)
- (3) Must be supported by ***2 Doctors*** (both specialists in psychiatry)
- (4) Guardian chosen must be accepted by ***DSW***
- (5) Order may be ***revoked*** by MHRT or Court



## Part IIIB

### ***Supervision & Treatment Order*** (for criminal cases)

#### Power of Ordinance

Court can put the criminal under

- (1) DSW's ***supervision*** and
- (2) a Doctor's ***treatment***

#### Safeguard against Abuse

Safeguards are ***similar to Guardianship Order***, with the following additional requirements :-

- (1) A ***social inquiry report*** from supervising officer must be submitted to court
- (2) Mental incapacity must be ***susceptible to treatment***
- (3) The maximum period for this order is ***2 years***.

# Part IVB

## *Guardianship*

(for non-criminal cases aged 18 or above)

### Power of Ordinance

Section 59N : Relative/Dr./Social Worker  
applies to Guardianship Board.



Section 59R : Appoints a Guardian for 1 year (then renewable every 3 years) with the following powers :-

- (1) Requiring MIP to reside at a place
- (2) Requiring MIP to attend a place for treatment, occupation, education or training.
- (3) Requiring MIP to give access to others.
- (4) Convey MIP to specified places.
- (5) Consent to treatment on behalf of MIP.
- (6) Hold, receive or pay a monthly sum for MIP's benefit.

Section 59Q : Emergency Guardianship Order may be made which lasts not exceeding 3 months.

**Part IVB**  
***Guardianship***  
**(for non-criminal cases)**

**Safeguard against Abuse**

Section : Application must be supported by **2 Drs.**  
59M (neither being the applicant) (at least 1 is approved as having special experience in MIP).

Section : - Applicant must **have seen MIP**  
59N within last 14 days.  
- Details of application must be **notified** to all relevant people.

Section : Must have **adequate grounds** (either for  
59O MIP's welfare or protection of others, and this cannot be met by any less restrictive means.)

Section 59P : Must be supported by a **social enquiry report** of SWD.

Section 59Q : **Emergency Guardianship Order** can be made only for immediate protection from maltreatment or exploitation.

Section 59R : - Guardian's **power to consent to treatment** does not include "Special Treatment" under Section 59ZA, and only to the extent that the MIP is incapable of understanding the general nature and effect of that treatment.

- Guardian's **power to hold monthly sum** should not exceed the latest median monthly employment earning of employed persons specified in Quarterly Report of Census & Statistics Department.

Section 59S : Criteria for **Selection of Guardian** :-

- (a) **Capable** (and has attained age 18)
- (b) **Willing** (consented in writing)
- (C) **Compatible** with the mentally incapacitated person
  - (- in their personalities
  - 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).

Section 59T & U : Guardianship may be **reviewed** by Guardianship Board upon :-

- (a) Death, incapacity or resignation of guardian.
- (b) Prior to expiry of period.
- (c) Request by anybody interested in welfare of MIP.
- (d) Guardianship Board's own initiative.

Section 59W : **Appeal** against any decision of the Board may be made to High Court.

Section 59Y : Applicant, MIP, or SWD may be represented by **lawyer**.

## Part IVC

### ***Medical & Dental Treatment***

(for adult patients incapable of giving consent)

### **Power of Ordinance**

Treatment may be given under the following conditions:

- (1) ***Emergency***
- (2) A ***guardian*** appointed under Part IIIA or IVB of MHO has been conferred the power to consent
- (3) Doctor thinks that treatment is necessary and in the ***best interests*** of that person

## Part IVC

### *Medical & Dental Treatment*

(for adult patients incapable of giving consent)

### Safeguard against Abuse

Section 59ZB(2) :- "**Incapable of giving consent**" = incapable of understanding the general nature and effect of the treatment

Sections 59ZA ZB(3) ZF(3) ZI(1) ZJ(1) :- "**In the best interests**" means in the best interests of that person in order to  
(i) save his life, or  
(ii) prevent damage to his health and well-being, or  
(iii) improve his health and well-being

Sections 59ZA ZC ZG(1) :- "**Special treatment**" (Sterilization) is not allowed to be carried out unless with the approval of Court

Section  
59ZBA

- :- **Prohibition against organ donation**  
(Removal of organ from MIP, while alive, for transplanting to another person)

Sections  
59ZH

:- **Court proceedings**

ZI(2)  
ZJ(2)

- The applicant must serve a copy of the application on (i) the incapacitated person (ii) the doctor and (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.



(B)

***Ethical* Considerations**

# The 4 Ethical Principles of Childress & Beauchamp

*(A) Perspective of Therapist or Society*

**(1) Beneficence**  
*(paternalism)*

**(2) Justice**  
*(communitarianism)*

*(B) Perspective of Patient*

**(1) Autonomy**  
*(liberalism)*

**(2) Non-Maleficence**  
*(Primum non nocere)*

**VS**

# (A) Perspective of Therapist or Society:

## (1) *Beneficence* (paternalism)

- All is done in the patient's ***Best Interests***. (e.g. taking medications, or living in a HWH)
- Compare: compulsion to wear a ***seatbelt***
- "***Right to treatment***" vs. "Right to refuse treatment".
- An effective ***treatment exists*** for the condition that the patient is suffering from. (e.g. ? for psychopathic personality)
- That treatment is ***available and accessible*** in the locality in which the patient is situated. (e.g. adequate resources from the government)
- That treatment is ***enforceable*** (e.g. can you be sure that the patient is taking your drug?)
- Can patient come out from the involuntary treatment when treatment is no longer beneficial? (***Lobster pot effect***)

## (A) Perspective of Therapist or Society:

### (2) *Justice (communitarianism)*

- Involuntary treatment is given for the sake of *fairness* to others. (i.e. treatment is more for others than the patient)
- The strongest ground here is *dangerousness* to others. (Intervention is given on a preventive basis.)
- Lesser degrees of *social disturbances* may be more controversial.
- Distribution of *resources* in society may be another consideration. (Is enforced community treatment saving or demanding more resources than alternatives? Can the resources be better used elsewhere?)

# (B) Perspective of Patient

## (1) *Autonomy (liberalism)*

- ***A mentally competent person has the right*** to make lawful decisions about all aspects of his life without undue intrusion from the state or others.
- ***MacArthur's 4 tests of mental competence:***
  - a) Evidencing a choice (How)
  - b) Understanding (What)
  - c) Appreciation (Consequences)
  - d) Reasoning (Why)
- “If a patient does not agree with the doctor, then the patient is incompetent?”  
----- Incompetence would be more ethically sound if it has a ***biological basis***.
- ***If a patient is found incompetent***, there are 2 approaches:
  - a) Substituted Judgment Approach
  - b) Best Interest (Beneficence) Approach
- ***If a patient's mental capacity comes and goes (Revolving Door Patients)***, a lengthy outpatient commitment can be imposed by applying the “Substantially Impaired Capacity” Test, which requires the person to lack capacity “much of the time” instead of for the whole period.

## (B) Perspective of Patient

### (2) *Non-Maleficence (Primum non nocere)*

- “First do *no harm*”
- *Side-effects* of treatment (inclusive of medico-surgical and psychosocial treatments)
- Use of *force*
- Damage *therapeutic relationship*
- More *excessive control or restriction* on patient than necessary: the Least Restrictive Principle (e.g. Is it really necessary to keep the patient in a HWH? To what extent can a “Mentally Incapacitated Person” be allowed to make decisions of his own? How long should a patient be kept on a community order?)
- *Stigmatization* (by being labeled as a special category)
- *Safeguards from abuse* (2<sup>nd</sup> opinions, reviews, appeals, clear criteria, clear limits, legal aids, etc.)

# Balance of All Factors:

## *Utilitarianism*

- ***Utility*** is defined as “The greatest good for the greatest number.”
- Compare between ***alternatives***  
(If you don't do this, would the alternatives be better or worse?)
- The ultimate answer will lie in ***empirical studies*** on the effectiveness and harm of involuntary community treatments.

*Thank You !*