

# **LEGISLATIVE COUNCIL BRIEF**

## **Mental Health Ordinance (Chapter 136)**

### **Mental Health (Amendment) Bill 2000**

#### **INTRODUCTION**

At the meeting of the Executive Council on 11 January 2000, the Council ADVISED and the Chief Executive ORDERED that the Mental Health (Amendment) Bill 2000, at Annex A, should be introduced into the Legislative Council.

#### **BACKGROUND AND ARGUMENT**

##### **General Background**

2. Part IVC of the Mental Health Ordinance (the Ordinance), at Annex B, was enacted in 1997 and came into operation in February 1999. It provides for the carrying out of dental, medical or special treatment on mentally disordered or mentally handicapped persons (collectively referred to as mentally incapacitated persons (MIPs) in the Ordinance), who are adults and who are incapable of giving consent to the carrying out of such treatment. According to the Ordinance, an MIP is incapable of giving consent if he is incapable of understanding the general nature and effect of such treatment.

3. Medical and dental treatment can be administered to an adult MIP, who is incapable of giving consent to the carrying out of such treatment, under Part IVC in the following situations –

- (a) with consent given by his legal guardian who has been given the power to consent under the Ordinance;
- (b) with consent given by the Court of First Instance in response to an application if the Court is satisfied that the proposed treatment is in the best interests of the MIP;

- (c) without consent from anybody if a registered medical practitioner or dentist, who intends to carry out or supervise the treatment, considers that as a matter of urgency, the treatment is necessary and is in the best interests of the MIP; and
- (d) without consent from anybody if the MIP does not have a guardian or his guardian does not have power to consent, and a registered medical practitioner or dentist intending to carry out or supervise the treatment considers that the treatment is necessary and is in the best interests of the MIP.

4. The situations described in paragraph 3 do not cover special treatment which can only be carried out with the consent of the Court. Special treatment is a medical or dental treatment of an irreversible or controversial nature. It is specified under section 59ZC of the Ordinance by the Secretary for Health and Welfare in consultation with the Hospital Authority, Department of Health, Hong Kong Medical Association and Hong Kong Dental Association. To date, only sterilisation operations have been specified as special treatment.

5. “Medical treatment” is defined in the Ordinance to include “any medical or surgical procedure, operation or examination carried out by, or under the supervision of, a registered medical practitioner and any care associated therewith”. It was suggested in 1998 that the definition might include a surgical operation to remove an organ for transplant into another person. The possibility of specifying organ donation by MIPs as special treatment so that their guardians could not give consent to an organ donation on their behalf, was also raised. According to section 2 of the Human Organ Transplant Ordinance (Cap. 465), “organ” is defined as “any part of the human body consisting of a structured arrangement of tissues which, if wholly removed, cannot be regenerated by the body, and includes part of an organ”.

### **Present Position**

6. Legal advice has confirmed that the definition of “medical treatment”, if construed literally, might include surgical operations to remove an organ from a living MIP for the purpose of transplant into another person. Such an interpretation would be contrary to our original policy intent. Given the significant risk and pain associated with an organ removal operation, and

impairment to the donor's body and health, we do not accept the argument that the removal of an organ from a living MIP for transplant into another person could be a treatment that is necessary and in the best interests of the donor.

7. We have consulted the Hospital Authority, the Department of Health, the Hong Kong Medical Association and the Hong Kong Dental Association in accordance with section 59ZC of the Ordinance. Medical opinion unanimously opposes specification of the removal of an organ from an MIP for transplant into another person, as special treatment. Such an operation should not be regarded as treatment that is necessary and in the best interests of the MIP. They all support the proposed Bill as being necessary to protect the rights and interests of those MIPs who lack the ability to understand the nature and possible effects of an organ removal operation.

8. The proposal to limit the operation of Part IVC of the Ordinance so that a third party may not give consent on behalf of an adult MIP to donate an organ, is consistent with our policy on organ donation by other persons. The Human Organ Transplant Ordinance stipulates that a prospective donor should fully understand the procedure and the risks involved as well as his entitlement to withdraw consent at any time. It also prohibits organ donation by persons below the age of 18 years (or 16 years if married) - parents and guardians cannot give consent for organ donation on behalf of their children or minors under their care. This proposal will ensure that MIPs who are incapable of giving consent, enjoy the same protection afforded to all under the Human Organ Transplant Ordinance.

## **The Proposal**

9. To ensure full protection to MIPs who are incapable of giving consent, we propose to clarify that Part IVC of the Ordinance shall not be construed as enabling the removal of organs from adult MIPs, who are incapable of giving consent, for transplant purposes. The proposal will not affect organ donation by MIPs who are capable of giving consent and who are able to fulfill the requirements under the Human Organ Transplant Ordinance. It will not affect the ability of MIPs to receive an organ, for example, to treat a disease.

10. The opportunity is also taken to propose a few minor textual amendments to the Ordinance.

## **THE BILL**

11. Section 59ZBA is added to Part IVC to clarify that the Ordinance shall not be construed as enabling the removal of organs from an adult MIP who is incapable of giving consent, for transplant into another person (**Clause 6**).

## **PUBLIC CONSULTATION**

12. We consulted the Legislative Council Panel on Welfare Services on the proposed amendment on 6 December 1999 and Members supported the proposal. Prior to that meeting, we consulted a number of other interested bodies including the Rehabilitation Advisory Committee, the Medical Council, the Hong Kong Academy of Medicine, the Hong Kong Council of Social Service and parents' groups. The overwhelming majority of views collected support the proposal. A minority have suggested that the matter should be left to the Court to decide, according to the merits of individual applications. However, given the position adopted by the Hospital Authority, the Department of Health and the Hong Kong Medical Association that given the risks involved, such an operation could never be in the interests of the MIPs, we do not see how the Court could ever grant consent.

## **BASIC LAW IMPLICATIONS**

13. The Department of Justice advises that the Bill is consistent with those provisions of the Basic Law carrying no human rights dimensions.

## **HUMAN RIGHTS IMPLICATIONS**

14. The Department of Justice advises that the proposed legislation is consistent with the human rights provisions of the Basic Law.

## **BINDING EFFECT OF THE LEGISLATION**

15. The amendments will not affect the current binding effect of the Ordinance.

## **FINANCIAL AND STAFFING IMPLICATIONS**

16. There are no financial or staffing implications.

## **LEGISLATIVE TIMETABLE**

17. The legislative timetable is as follows -

Publication in the Gazette	14 January 2000
First Reading and commencement of Second Reading debate	26 January 2000
Resumption of Second Reading debate, Committee Stage and Third Reading	to be notified

## **PUBLICITY**

18. A press release will be issued on 13 January 2000. A spokesman will be available to answer media enquiries.

## **ENQUIRIES**

19. For any enquiries on this brief, please contact Miss Mandy WONG, the Assistant Secretary for Health and Welfare, at 2973 8181

Health and Welfare Bureau  
File Ref: HW CR 36/3939/99

**Mental Health Ordinance (Chapter 136)**

**Mental Health (Amendment) Bill 2000**

Annex A - Mental Health (Amendment) Bill 2000

Annex B - Part IVC of the Mental Health Ordinance

A BILL

To

Amend the Mental Health Ordinance.

Enacted by the Legislative Council.

**1. Short title**

This Ordinance may be cited as the Mental Health (Amendment) Ordinance 2000.

**2. Effect of guardianship order**

Section 44B(1)(c) of the Mental Health Ordinance (Cap. 136) is amended by repealing “治療、第 59ZA 條所指的” and substituting “第 59ZA 條所指的治療或” .

**3. Board may make guardianship orders**

Section 590(3)(c) is amended by repealing "intrusive" and substituting "intrusive".

**4. Term and effect of guardianship order**

Section 59R(3)(c) is amended by repealing “治療、第 59ZA 條所指的” and substituting “第 59ZA 條所指的治療或” .

**5. Review of guardianship orders**

Section 59U(6)(a)(i) is amended by adding "of" after "case".

**6. Section added**

The following is added -

**"59ZBA. Prohibition against organ transplant**

(1) Nothing in this Ordinance shall be construed as enabling the removal, in the course of any treatment or special treatment of a mentally incapacitated person who has attained the age of 18 years and is incapable of giving consent to the carrying out of such treatment or special treatment, as the case may be, from that person of any organ for the purpose of transplanting it into another person.

(2) In this section, "organ" (器官) has the same meaning as in section 2 of the Human Organ Transplant Ordinance (Cap. 465)."

#### Explanatory Memorandum

This Bill amends the Mental Health Ordinance (Cap. 136) (the "Ordinance") so as to prohibit the removal, from any mentally incapacitated person who has attained the age of 18 years and is incapable of giving consent, of any organ as defined in section 2 of the Human Organ Transplant Ordinance (Cap. 465) for the purpose of transplanting the organ into another person (clause 6). The Bill also contains some textual amendments to the Ordinance (clauses 2 to 5).

## **PART IVC**

### **MEDICAL AND DENTAL TREATMENT**

#### **59ZA. Interpretation**

In this Part, unless the context otherwise requires—

"dental treatment" (牙科治療) includes any dental procedure, operation or examination carried out by, or under the supervision of, a registered dentist and any care associated therewith;

"in the best interests" (符合最佳利益), in relation to the carrying out of treatment or special treatment, as the case may be, in respect of a mentally incapacitated person, means in the best interests of that person in order to—

- (a) save the life of the mentally incapacitated person;
- (b) prevent damage or deterioration to the physical or mental health and well-being of that person; or
- (c) bring about an improvement in the physical or mental health and well-being of that person;

"medical treatment" (醫療) includes any medical or surgical procedure, operation or examination carried out by, or under the supervision of, a registered medical practitioner and any care associated therewith;

"special treatment" (特別治療) means medical treatment or dental treatment or both of an irreversible or controversial nature as specified by the Secretary for Health and Welfare under section 59ZC and includes proposed special treatment;

"treatment" (治療) means medical treatment, dental treatment or both, and includes proposed treatment but does not include special treatment.

#### **59ZB. Application and principles**

(1) This Part applies to treatment or special treatment of a mentally incapacitated person who has attained the age of 18 years and is incapable of giving consent to the carrying out of that treatment or that special treatment, as the case may be, but does not apply to—

- (a) in the case of a mentally incapacitated person who is mentally disordered, treatment of that person in a mental hospital or the Correctional Services Department Psychiatric Centre in relation to his mental disorder; or
- (b) in the case of a mentally incapacitated person who is a supervised person (within the meaning of Part IIIB), treatment of that person pursuant to a supervision and treatment order made under that Part.

(2) A mentally incapacitated person is incapable of giving such consent if that person is incapable of understanding the general nature and effect of the treatment or special treatment.

(3) The Court when considering whether or not to give consent to the carrying out of treatment or special treatment, or the guardian when considering whether or not to give consent to the carrying out of treatment, under this Part, shall observe and apply the following principles, namely to—

- (a) ensure that the mentally incapacitated person is not deprived of the treatment or special treatment, as the case may be, merely because he lacks the capacity to consent to the carrying out of that treatment or that special treatment; and
- (b) ensure that any treatment or special treatment that is proposed to be carried out in respect of the mentally incapacitated person is carried out in the best interests of that person.

#### **59ZC. Specification of special treatment**

(1) The Secretary for Health and Welfare may in consultation with the Hospital Authority within the meaning of the Hospital Authority Ordinance (Cap. 113) or that authority and other appropriate bodies, by notice in the Gazette, specify any dental treatment, medical treatment or both, as the case may be, to be special treatment for the purposes of this Part.

(2) In this section, "other appropriate bodies" (其他適當機構) includes—

- (a) the Department of Health;
- (b) the Hong Kong Medical Association;
- (c) the Hong Kong Dental Association.

(3) It is hereby declared that a notice under subsection (1) is subsidiary legislation.

**59ZD. Who may give consent**

(1) Consent to the carrying out of treatment in respect of a mentally incapacitated person to whom this Part applies may be given by the guardian of that person appointed under Part IIIA or IVB in respect of whom a guardianship order has conferred the power to consent under section 44B(1)(d) or 59R(3)(d).

(2) Subject to sections 59ZF(1) and 59ZJ, consent to the carrying out of treatment or special treatment in respect of a mentally incapacitated person to whom this Part applies may be given by the Court under this Part.

**59ZE. Requests for consent**

Any registered medical practitioner or registered dentist may request a guardian of a mentally incapacitated person appointed under Part IIIA or IVB to consent to the carrying out of treatment in respect of that person.

**59ZF. When treatment may be carried out without consent**

(1) Treatment by a registered medical practitioner or registered dentist may be carried out in respect of a mentally incapacitated person to whom this Part applies without consent under section 59ZD(1) or (2) if that registered medical practitioner or registered dentist intending to carry out or supervise the treatment considers that as a matter of urgency that treatment is necessary and is in the best interests of the mentally incapacitated person.

(2) Subject to subsection (3), treatment by a registered medical practitioner or registered dentist may be carried out in respect of a mentally incapacitated person to whom this Part applies without consent under section 59ZD(1) if—

(a) after all reasonably practicable steps have been taken by that practitioner or that dentist to ascertain whether or not a guardian has been appointed under Part IIIA or IVB responsible for that person, there is, or appears to be, no guardian so appointed; or

(b) the guardian appointed under Part IIIA or IVB has not been conferred the power to consent in a guardianship order under section 44B(1)(d) or 59R(3)(d).

(3) Where a registered medical practitioner or registered dentist intending to carry out or supervise the treatment under subsection (2) considers that that treatment is necessary and is in the best interests of the mentally incapacitated person, then he may carry out that treatment without the consent of the mentally incapacitated person or that person's guardian (if any) accordingly.

### **59ZG. Applications to Court**

(1) Any person, including a medical superintendent, registered medical practitioner or registered dentist, may apply to the Court for consent to the carrying out of special treatment in respect of a mentally incapacitated person to whom this Part applies.

(2) Any person, including a medical superintendent, registered medical practitioner or registered dentist, may apply to the Court for consent to the carrying out of treatment in respect of a mentally incapacitated person to whom this Part applies in circumstances where a guardian of that person appointed under Part IIIA or IVB who has been conferred the power to consent in a guardianship order under section 44B(1)(d) or 59R(3)(d)—

- (a) is, for whatever reason unable or unwilling to make a decision concerning a request under section 59ZE for his consent to the carrying out of treatment in respect of that person; or
- (b) having failed properly to observe and apply the principles described in section 59ZB(3), refuses to give such consent.

### **59ZH. Service of applications**

(1) The person making an application under section 59ZG(1) or (2) shall, as soon as practicable after making the application, serve a copy of the application on—

- (a) the mentally incapacitated person the subject of the application;
- (b) the person (other than the applicant) who is proposing that treatment or special treatment, as the case may be, should be carried out in respect of the mentally incapacitated person; and
- (c) the guardian (if any) appointed under Part IIIA or IVB who is responsible for that person.

(2) Subject to section 59ZJ(2), any failure to serve a copy of an application under subsection (1)(b) or (c) shall not affect any decision of the Court in respect of the application, but the Court shall take into account any such failure in making its decision.

**59ZI. Consent of Court**

(1) Without prejudice to section 59ZF(1), if after conducting a hearing into an application under section 59ZG(1) or (2), the Court is satisfied that it is appropriate that treatment or special treatment, as the case may be, should be carried out in the best interests of the mentally incapacitated person to whom this Part applies, the Court may consent to the carrying out of that treatment or that special treatment and make an order to the applicant to that effect.

(2) Nothing in this section requires the Court to consider an application under section 59ZG(1) or (2) if the Court is not satisfied that the applicant has a sufficient interest in the health and well-being of the mentally incapacitated person to whom this Part applies.

**59ZJ. Restriction on the giving of consent by Court**

(1) The Court shall not consent under this Part to the carrying out of special treatment in respect of a mentally incapacitated person to whom this Part applies unless the Court is satisfied that the special treatment is the only or most appropriate method of treating that person or that the special treatment is in the best interests of that person.

(2) In the case of a failure to serve a copy of an application under section 59ZH(1)(b) or (c), the Court shall not consent under this Part to the carrying out of treatment or special treatment, as the case may be, in respect of a mentally incapacitated person to whom this Part applies unless the Court is satisfied that that failure will not affect the observation and application of the principles referred to in section 59ZB(3).

**59ZK. Effect of consent**

Consent given under this Part for the carrying out of treatment or special treatment, as the case may be, in respect of a mentally incapacitated person to whom this Part applies has effect for all purposes as if—

- (a) that person had been capable of giving such consent to the carrying out of that treatment or that special treatment; and
- (b) that treatment or that special treatment had been carried out with the consent of that person."