

LEGISLATIVE COUNCIL
PANEL ON WELFARE SERVICES

Mental Health Ordinance (MHO)
Organ Donation by Mentally Disordered or Handicapped Adults

PURPOSE

Members are invited to comment on the Administration's proposal to ensure that mentally disordered or mentally handicapped adults (i.e. aged 18 or above), who are incapable of giving valid consent, will not have their organs^{Note 1} removed for donation purposes under Part IVC of the Mental Health Ordinance.

BACKGROUND

2. The Mental Health Ordinance was amended in 1997 to strengthen the legal safeguards for the well-being of mentally disordered or mentally handicapped persons - collectively known as mentally incapacitated persons (MIPs) under the Ordinance. A new Part IVC was added to deal with the power to consent to the administration of medical, dental or special treatments on an adult MIP who is incapable of giving consent. An MIP is incapable of giving consent if he/she is incapable of understanding the general nature and effect of such treatment. The relevant extract of Part IVC is annexed.

^{Note 1} : Organ has the same meaning as in section 2 of the Human Organ Transplant Ordinance (Cap. 465). It covers 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.

3. In essence, medical and dental treatment can be administered to an adult MIP under Part IVC in the following situations -

- ◆ with consent given by his/her legal guardian who has been given the power to consent under the Ordinance [s.59ZD(1)];
- ◆ with an order given by the Court (Court of First Instance) in response to an application if the Court is satisfied that the proposed treatment is **in the best interests**^{Note 2} of the MIP [s.59ZI];
- ◆ **without** consent from anybody if a registered medical practitioner or dentist, who intends to carry out or supervise the treatment, considers that the treatment is a matter of **urgency**; or that the treatment is **necessary** and is **in the best interests** of the MIP [s.59ZF].

4. The treatment referred to above does not include special treatment. Special treatment means medical or dental treatment or both of an irreversible or controversial nature as specified by the Secretary for Health and Welfare under the Ordinance. Special treatment is specified by the Secretary for Health and Welfare under s.59ZC in consultation with the Hospital Authority and other appropriate bodies, namely, the Department of Health, the Hong Kong Medical Association and the Hong Kong Dental Association. Consent to the carrying out of special treatment can only be given by the Court.

Note 2 : “in the best interests of the MIP” is defined under s.59ZA as –

- (a) save the life of the MIP;
- (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.

5. After enactment of Part IVC in 1997, the Secretary for Health and Welfare consulted the Hospital Authority, the Department of Health, the Hong Kong Medical Association and the Hong Kong Dental Association on the schedule of special treatment to be specified under s.59ZC. Sterilization was the only treatment recommended unanimously for inclusion in the specification notice. When the notice was discussed by the then Provisional Legislative Council's House Sub-Committee on 9 March 1998, the Administration was asked to consider the Estate Doctors Association's suggestion to specify organ donation by living MIPs as special treatment. The suggestion was made to ensure that MIPs were adequately protected as the Association was worried that consent to organ donation could be given by guardians on behalf of the MIPs under their care.

Administration's Position

6. The Estate Doctors Association's suggestion was referred to the Hospital Authority, the Department of Health, the Hong Kong Medical Association and the Hong Kong Dental Association for advice in accordance with s.59ZC. The Hospital Authority, the Department of Health and the Hong Kong Medical Association objected and argued that the removal of an organ from an MIP, who was incapable of understanding the general nature and effect of such an operation, should not be specified as special treatment. The Hong Kong Dental Association supported the proposed amendment as elaborated in paragraph 10 below.

7. The legislative intent of Part IVC is to ensure that adult MIPs are not deprived of medical or dental treatment merely because of their inability to understand the general nature and effect of such treatment. Under Part IVC, "the best interests of the MIP" is always the predominating principle for the Court or his/her guardian to decide whether consent to treatment should be given; or for a doctor/dentist to judge whether the treatment should be carried out without consent. We do not accept the argument that the removal of an organ from a living MIP for transplant into another person is a treatment to the donor, and could ever be regarded as in the donor's best

interests. Given the significant risk and pain associated with an organ removal operation, and permanent impairment to a donor's body, it is essential that prospective donors fully understand the procedures and risks involved in the operation, as well as their right to change their mind. These requirements are clearly stipulated in the Human Organ Transplant Ordinance. MIPs under Part IVC of the Mental Health Ordinance, lack the ability to understand the nature and possible effects of an organ removal operation, and therefore should not be permitted to donate their organs. Their position should be the same as minors who are also prohibited from donating their organs under s.5(4)(b) of the Human Organ Transplant Ordinance.

8. We have discussed the Estate Doctors Association's suggestion with other interested parties 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 majority of Rehabilitation Advisory Committee members and parents' groups supported the Administration's position; views were divided in the Medical Council and the Hong Kong Academy of Medicine; and the Hong Kong Council of Social Service argued that the Court should decide whether the proposed organ donation would be in the MIP's best interests. According to s.59ZJ of the Ordinance, the Court cannot consent to the carrying out of special treatment unless it is satisfied that the special treatment is the only or most appropriate method of treating that MIP; or that the special treatment is in the best interests of the MIP. Given the position adopted by the Hospital Authority, the Department of Health and the Hong Kong Medical Association from the medical perspective, we do not see how the Court could ever grant consent in the light of s.59ZJ. It may raise false hope and create more frustration every time the Court rejects an application.

9. While we do not support organ donations by living MIPs, they can receive organ transplants, for example, to treat a disease. The Human Organ Transplant Ordinance was amended in February 1999 to provide for the transplant of an organ removed from a living person into an MIP who is incapable of understanding an explanation given to him in respect of the transplant.

Way Forward

10. The term 'treatment' in s.59ZA of the Mental Health Ordinance, if construed literally, can include the removal of an organ solely for the purpose of an organ donation. This is not in line with our policy intent. To ensure that the organs of adult MIPs, who are incapable of giving valid consent, are not removed for donation purposes under Part IVC of the Mental Health Ordinance, we propose to introduce amendments to the Mental Health Ordinance.

Health and Welfare Bureau
Government Secretariat
December 1999

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."