

# A Practical Guide to Mental Health Law in Hong Kong

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# Foreword

People who lost their mental capacities are vulnerable and the law should protect them from being exploited. At the same time, it can be quite taxing for those who take care of such persons and the law should not unduly burden such carers with administrative duties on them. Further, different members in the family of such a person can have different views on what are the best for that person. Sometimes, for one reason or another, such differences cannot be resolved amongst these members by themselves. In those cases, the law needs to provide an efficient and effective means to resolve such differences. Though Hong Kong does not have a Court of Protection, our mental health law has undergone quite significant developments in the past decade. With the promulgation of Practice Direction 30.1 in 2005, there have been more cases coming to court for the establishment of committees for mentally incapacitated persons and the court has examined many aspects of the supervisory jurisdiction under Part II of the Mental Health Ordinance and its interactions with other authorities monitoring the welfare of those persons like the Guardianship Board and the Director of Social Welfare. It is therefore opportune for a book on mental health law in Hong Kong to be published. Sherlynn Chan must be congratulated for her efforts in this work which represents a substantial contribution to the promotion of the sound and proper engagement of the legal process in this area. It is a work which provides useful and up-to-date guidance to practitioners in this field. I would highly recommend it to lawyers and students.

The Honourable Mr Justice Johnson Lam Man Hon  
Vice-President of the Court of Appeal of the High Court

# 1

## Case Studies

Over the years, I have seen many cases involving families with members who are suffering from some form of behavioural challenge, such as autism, dementia and other brain diseases, and subjected to financial abuse by others, some by their own family members and/or their care-givers.

Here are some modified case studies based on real life scenarios for you to consider. You may be able to identify some common issues faced by these people and their family members, and wonder what families can do to protect their loved ones from financial abuse and what plans they can make in the best interests of their loved ones who are unable to make decisions for themselves in various situations.

This practical guide is intended to provide some basic knowledge on how to protect your loved ones who lack the mental capacity to make reasoned decisions for themselves, whether on their personal welfare or financial affairs.

If you encounter similar situations or are interested to find out more about these issues, please seek appropriate legal advice and/or contact relevant organizations or government departments with your enquiries.

### Case Study 1: The Young Man Who Inherited a Property

*Mr and Mrs A are in their late 50s. They have one child, X, who was diagnosed with severe autism and global development delay since childhood. X is now 25 years old and continues to suffer from autistic spectrum disorder and epilepsy and has a mental age of 10 years old. X just inherited a residential property in Hong Kong from his paternal grandfather who passed away recently.*

*The solicitors handling the probate matters for X's paternal grandfather are concerned that X does not have the mental capacity to understand and sign legal documents for the transfer of the property into his name.*

*Mr and Mrs A are also concerned that their son may be a target for financial abuse when they themselves grow old and can no longer look after X.*



## Subsequent Developments

This scenario is not uncommon. Many couples with special needs children are concerned with who will look after their children when they themselves grow old and are no longer able to look after their special needs children. The solicitors handling the probate matters and intended transfer were correct to raise concerns about the mental capacity of X to sign the legal documents.

Based on the above concerns, Mr and Mrs A made enquiries as to what options they had and eventually decided to instruct solicitors to take out a Part II application under the Mental Health Ordinance (Cap 136) (**MHO**) to apply to the Mental Health Court in Hong Kong for an order that Mrs A be appointed as the committee of the estate (**Committee**) of X to manage the property and financial affairs of X.

The Mental Health Court conferred various powers on the Committee as set out in a court order, including, among other things, the power to sign the necessary legal documents for the transfer of the property inherited from X's paternal grandfather to X; renting out the property; and depositing the rental income into the Committee's account for X's use and benefit, which included payment of X's medical and other therapy fees.

Mrs A understood that she had to file annual accounts to the court and was more than happy to do so, since she felt that she was creating a blueprint to facilitate others to take over in future when she is no longer capable of looking after her son.

For more information on the scope and powers of a committee, refer to Chapter 3 and Practice Direction 30.1 (PD 30.1).<sup>1</sup>

## Case Study 2: The Elderly Businessman

*Mr Y's three sons all work in the same family business which was founded by Mr Y in the 1950s. Mr Y is in his mid-80s but still relatively healthy and walks to work every day. His wife passed away almost 10 years ago.*

*One morning, when Mr Y was walking to work, he was hit by a car whilst crossing the street and fell into a coma. He was then hospitalized for many months.*

*While Mr Y's sons were helping their father sort out his bank statements and credit card payments, they discovered that their father had opened several new personal accounts in recent months and Mr Y's secretary alerted them of some irregular lump sum withdrawals from one of Mr Y's new personal bank accounts since the car accident.*

*The sons subsequently discovered that one of Mr Y's female business partners, Ms C, had been in a close relationship with Mr Y and residing in one of his investment properties rent free for about eight years prior to the accident.*

## Subsequent Developments

Although Mr Y's medical condition improved and he came out of the coma, he was unable to speak coherently. Due to severe brain damage, he required 24 hour nursing care, regular physiotherapy, occupational therapy and speech therapy.

Mr Y's sons initially wanted to make a report to the police regarding the "unauthorized" lump sum withdrawals, but after speaking to their father's accountant and making enquiries with the bank and third parties, they discovered that Ms C had Mr Y's written authorization to operate the new personal accounts opened by Mr Y in recent years, and decided otherwise.

Mr Y's three sons agreed that they would apply jointly to be the Committee of Mr Y under Part II of the MHO to protect their father from

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1. Practice Direction 30.1 dated 10 October 2005, issued by the Hong Kong Judiciary.





financial abuse and to properly manage the family business, properties and other financial affairs of their father.

### Case Study 3: The Wealthy Widow

*Mrs Z is a 78-year-old widow without any children. She inherited substantial assets when her husband passed away. She has some nieces and nephews residing in Hong Kong and some in the mainland. They all visit her regularly. Mrs Z was recently diagnosed with dementia and hospitalized after she had a stroke.*

*There have been disputes between Mrs Z's nieces and nephews (who are divided into two groups, "**Camp A**" and "**Camp B**") regarding whether Mrs Z should return to her own home after being discharged from hospital and stay with one of her nieces who had been looking after her before she had a stroke, or whether she should be transferred to an elderly home with around-the-clock nursing care and a resident doctor.*

*One of the nieces from Camp A applied to the Guardianship Board to be appointed as Mrs Z's guardian, but this was disputed by the legal representatives of Camp B. At the same time, the nephew from Camp B applied for a Committee Order to be appointed as the Committee to manage the property and affairs of Mrs Z.*



## Subsequent Developments

The two camps of nieces and nephews both considered their representative to be the more appropriate person to be appointed as the guardian of Mrs Z under Part IVB of the MHO. Since the documents were not in order, the Guardianship Board was unable to set the date for the hearing and the parties became anxious when the doctor at the hospital advised that Mrs Z was ready to be discharged.

Meanwhile, a Part II application under the MHO for a Committee to be appointed for Mrs Z was taken out by a nephew from Camp B, but the application was opposed by the nieces and nephews in Camp A. Fortunately, despite their antagonistic approach in court, the parties soon realized that the best possible solution for both camps in the circumstances was to appoint an independent Committee.

When an independent Committee was appointed and met with both camps, all the nieces and nephews agreed that it was in the best interests of Mrs Z to be discharged from hospital immediately and transferred to an elderly home with appropriate nursing care.

Shortly thereafter, at the Guardianship Board hearing, the Board assessed the medical reports, social enquiry report and opposing views regarding the care and accommodation arrangements, and ordered that a public guardian, ie the Director of Social Welfare, was the most appropriate person to be appointed as guardian of Mrs Z.

## Case Study 4: The Medical Professional Who Suffered a Stroke

*Dr H was a highly successful doctor in a private clinic before he suffered a double stroke at the age of 55. He did not prepare any will or enduring power of attorney. He is not married, but has had several female companions. Dr H's parents passed away several years ago and he does not have any siblings.*

*Dr P, the close business partner and friend of Dr H, decided to make an application to the Guardianship Board to be Dr H's guardian, and made arrangements for Dr H to be transferred to a hospice care centre immediately after he was discharged from hospital.*

*However, one of Dr H's female companions, Ms W, was dissatisfied with Dr P's care arrangements and wanted to replace Dr P as Dr H's guardian.*

## Subsequent Developments

After Dr P was appointed as guardian of Dr H, he made detailed care arrangements for Dr H at the hospice care centre, including employing a private registered nurse, a physiotherapist, an occupational therapist and a speech therapist to look after Dr H.

Whilst Dr P used his best endeavours to make appropriate care arrangements for Dr H and visited Dr H once every two weeks, he was criticized by Ms W, one of Dr H's female companions who visited Dr H regularly, that the needs of Dr H were being neglected.

Ms W also disagreed with the frequency of private physiotherapy and other treatments arranged by Dr P and wanted to remove Dr P as Dr H's guardian. She therefore made a request to the Guardianship Board to review the Guardianship Order.

Guardianship Orders are reviewed and renewed regularly by the Guardianship Board and the Board will look at what is in the best interests of the patient/concerned person and not the personal preference of one family member over the other.<sup>2</sup> In this case, the Guardianship Board obtained a social enquiry report, reviewed updated medical reports and renewed the Guardianship Order in favour of Dr P.

2. See s 59U and s 59O of Part IVB of the MHO and the website of the Guardianship Board, available at <http://www.adultguardianship.org.hk/admin/Data/uploadfile/174/L2Erev4.pdf>.

## Case Study 5: The Undiscovered Talent of an Autistic Street Sleeper

*Mr D was a street sleeper. A bystander saw him wandering on the street, talking to himself and banging his head against the wall until his head was bleeding. The bystander called the ambulance to take Mr D to hospital and reported the incident to the police. Mr D was subsequently diagnosed by a government psychiatrist with severe cognitive disorder and intellectual disability.*

*The Director of Social Welfare was asked to prepare a social enquiry report at the Guardianship Board hearing, during which they found out that Mr D's father had passed away recently and had set up a trust naming Mr D as the sole beneficiary under the trust. The Director of Social Welfare also discovered that Mr D is an autistic savant with exceptional talent in playing the piano and painting.*

### Subsequent Developments

The trustees under the trust set up by the late father of Mr D were immediately notified of Mr D's condition. The trustees then applied to the court for an order appointing them as Committee of Mr D and a public guardian was also appointed to look after his welfare and arrangements.

In view of Mr D's condition and preference, the public guardian made arrangements for him to reside in a government-subsidized hostel in Yuen Long, which allowed Mr D to work in a sheltered environment and go on outings and even overseas trips with other members, together with well-trained staff and social workers.

The social worker looking after the welfare of Mr D noted Mr D's talents. He was able to arrange art exhibitions for Mr D at the hostel and often displayed Mr D's artwork on the walls of the hostel. He also invited Mr D to play the piano during festive celebrations and parties.

## Case Study 6: The Celebrity with Brain Cancer

*Mr K is a celebrity who was diagnosed with brain cancer last year at the age of 39. His health deteriorated rapidly and during a recent media interview on his battle with cancer, his speech was not coherent and he was slurring. Mr K's parents, sister and close friends were concerned about his ability to make reasonable decisions in relation to his personal circumstances, in particular giving consent to medical treatment and handling his finances.*

*When he was admitted to hospital, he refused to receive any form of treatment for his cancer and insisted that no one should have any right to make any decision for him. He said that he was prepared to die anytime and did not want to be subjected to any pain or surgery.*

*The doctors at the hospital certified that Mr K was mentally incapacitated and unable to make reasonable decisions for his well-being. Mr K's family members immediately applied for an Emergency Guardianship Order so they could make immediate provisions to protect Mr K.*

## Subsequent Developments

The family members and close friends of Mr K all held different views. Some believed that Mr K should be allowed to refuse any form of invasive or non-invasive medical treatment and be allowed to make his own decision as to how to live or end his life with dignity, while some believed that Mr K was incapable of understanding the general nature and effect of the proposed treatment and the decision to refuse medical treatment was unreasonable and might be detrimental to his well-being.

Since Mr K was certified by two medical practitioners that he was mentally incapacitated and incapable of making reasonable decisions in respect of matters which related to his personal circumstances, it was possible for his family members to apply for an Emergency Guardianship Order and make immediate provisions to protect Mr K, which was what happened.

## Case Study 7: The Elderly Landlady

*Mr and Mrs G have one adult son. After Mr G passed away, he left Mrs G with two properties in Hong Kong and a significant sum of cash.*

*Not long after Mr G had passed away, Mrs G suffered a stroke and her son started to look after her and take care of all her medical arrangements and expenses. One of the tenants refused to pay rent after learning that Mr G had passed away and Mrs G was hospitalized.*

*The son threatened to take legal action against the tenant if the latter continued to refuse to pay rent. He made an application to be appointed as the Committee of Mrs G and sought, among other things, the right to issue legal proceedings against the tenant on behalf of Mrs G as her next friend.*

*However, during the application process Mrs G's son discovered that Mrs G had prepared a will giving all her estate to her favourite charity and appointed her private banker to be the executor, leaving nothing for him.*

## Subsequent Developments

The son was shocked that his mother prepared a will leaving nothing to him and raised queries with the private banker to ascertain the reason why Mrs G would make such a will. Whilst the private banker showed understanding, he was not willing to assist or answer the son's queries.

An independent Committee was appointed under Part II of the MHO for Mrs G, and enquiries were made as to the circumstances of the making of Mrs G's will.

In the end, the court, having considered the circumstances of the case and with paramount consideration given to Mrs G's welfare and requirements, approved the execution of a statutory will to avoid the high possibility of an expensive probate action after her demise between the son, the private banker and the charity as beneficiary.

If you are interested in this topic, refer to the judgment in *Re CYL* (HCMP No 2567/2005), where the court authorized the execution of a statutory will and set out the reasons for exercising its discretion to direct the execution after considering the complexity of the matter, the stance of the parties and assessment of the mentally incapacitated person's requirements and sections 10B(1)(e) and 10C of the MHO.

## Case Study 8: The Retired Widower with Family Residing Overseas

*Mr F is a retired wealthy businessman. His wife passed away recently. He has six adult children, five of whom live with their own families in Canada, Singapore and Australia. Only the youngest son, Mr N, and daughter in law live in Hong Kong with Mr F.*

*When Mr F started to show signs of dementia, his youngest son and family in Hong Kong started to alienate Mr F from friends and relatives. The other siblings heard from friends living in Hong Kong that they had not seen Mr F for many months and were concerned about his well-being. When they called their brother and sister in law in Hong Kong, they refused to answer the phone and responded in e-mail that their parents were doing fine and refused to take Mr F to see the doctor.*

*When the eldest sister and her family members came to Hong Kong, they were not allowed to visit their father and grandfather. She later found out from her father's domestic helper, who was employed by Mr N to care for Mr F, that Mr F had not left the home for two years and no one was allowed to enter the house without her employer's permission.*

## Subsequent Developments

The other family members and close friends of Mr F were made aware of the situation. Since Mr N was very hostile and uncooperative to all his siblings and other family members, the other family members sought advice from solicitors in Hong Kong.

Eventually, Mr N agreed to take Mr F to be assessed by a doctor and produced a medical report to confirm that while Mr F showed early signs of dementia, he was still capable of managing his property and affairs. Mr F's other family members subsequently obtained contrary medical evidence as to the mental capacity of Mr F, and thus took out an application under Part II of the MHO for a Committee to be appointed for Mr F.

The court set down a two-day hearing to determine whether Mr F was mentally incapacitated for the purpose of appointing a Committee under Part II of the MHO. The court, having considered the medical reports and heard evidence from the medical experts, the siblings and Mr F himself, decided that Mr F was incapable of handling his property and affairs.

If you are interested in reading more on this topic, refer to Chapter 4 on mental capacity.

## Case Study 9: The Young Businesswoman

*Ms M was a highly successful business woman who owned several landed properties in Hong Kong. When she was on holiday in Europe, she suffered from severe allergy which resulted in suffocation and subsequent brain damage. She had not prepared any will or enduring power of attorney.*

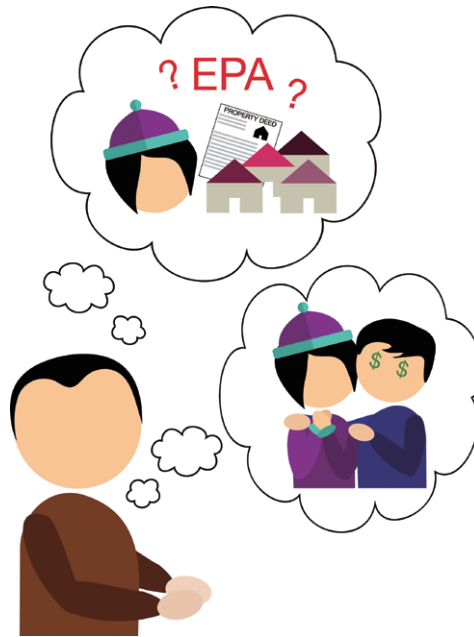
*Ms M's brother made arrangements for Ms M to return to Hong Kong and she has been in a coma since returning to Hong Kong. Ms M's brother applied to the court for an order to sell one of Ms M's properties to pay for the private hospital's fees which exceeded HK\$100,000 per month.*

*However, Ms M's brother discovered that Ms M had, unbeknownst to her family, been maintaining her boyfriend.*

## Subsequent Developments

Since Ms M did not execute any enduring power of attorney in Hong Kong, a Part II application under the MHO was initiated by her brother.

Ms M's boyfriend subsequently made an application to the court for maintenance from Ms M's estate. Since he was able to prove that, had Ms M not been mentally incapacitated, she would have continued to provide for



his rent and utilities, the court made an order for monthly payment to Ms M's boyfriend in such amount as it deemed appropriate.<sup>3</sup>

The Committee therefore followed the court order to manage the financial affairs of Ms M including the monthly payment to her boyfriend.

### Case Study 10: The Husband in Matrimonial Proceedings

*Mrs E issued divorce proceedings against Mr E on the grounds of unreasonable behaviour and domestic violence. Mrs E revealed to her solicitors that around three years ago, Mr E had begun suffering from personality adjustment disorder and depression after he was laid off by his employer during the financial crisis, after which he saw a psychiatrist and received treatment for a period of about 15 months.*

*The solicitors for Mrs E were concerned about Mr E's mental fitness to defend the ancillary relief claims under the divorce proceedings after serving the petition for divorce on him and suggested that Mr E be assessed by a psychiatrist to see if he was fit to give instructions in the proceedings.*

*However, Mr E refused to see any doctor and insisted that he did not need any legal representation in the divorce proceedings.*

3. See s 10A (c) of the MHO.



## Subsequent Developments

Mrs E's solicitors obtained a direction from the court that the Official Solicitor be asked to make enquiries with the relevant government psychiatrist as to whether or not Mr E was fit to give instructions. Since the medical evidence obtained confirmed that Mr E was not fit to give instructions and defend his rather complex ancillary relief claim, the court appointed the Official Solicitor to be Mr E's guardian ad litem (guardian for the purposes of the legal proceedings) because there was no suitable next of kin who was willing to act in that role.<sup>4</sup>

It is important to note that the court may, in appropriate cases, direct the Official Solicitor to consider giving his consent to be a party's guardian ad litem and/or make enquiry as to that party's mental capacity or fitness to give instructions in divorce and other legal proceedings.

## Case Study 11: The Child Who Suffered Serious Injuries in a Car Accident

*Mr and Mrs B have three daughters and one son, aged 6, 8, 13, and 16 respectively. Their 8-year-old daughter, AB, was knocked down by a truck when she was walking back home from school with her elder sister and suffered severe brain damage. AB underwent numerous operations. Her cognitive and speech functions have been severely damaged.*

*The doctors told Mr and Mrs B that their daughter has dystonic quadriplegic cerebral palsy and will be dependent on gastrostomy feeding and specialist care for the rest of her life.*

*The truck driver was charged with and convicted of the offence of reckless driving causing serious bodily harm. Mr and Mrs B applied for legal aid and took out a personal injuries claim against the driver and a rather large settlement was reached and approved by the High Court.*

## Subsequent Developments

Mrs B acted on AB's behalf to commence a personal injuries claim against the driver and the motor insurers. Her lawyers also made an application under Part II of the MHO for Mrs B to be appointed as Committee of AB. She was legally represented at all times and a substantial settlement sum was approved by the court with her lawyers' advice, and the money was duly paid by the motor insurers.

4. See r 105(5) of the Matrimonial Causes Rules (Cap 179A).



Unfortunately, neither Mrs B nor any of the family members of AB had practical knowledge on how to properly map out the care regime for AB or how to seek appropriate help after AB's personal injuries claim was settled.

Mrs B as Committee of AB applied to the Mental Health Court for directions to engage a case manager to map out a comprehensive care regime for AB, as well as a financial consultant for the Committee to advise on how to invest the settlement sum or any part thereof, to ensure that AB would be able to get better care and necessary treatment and protection.

Refer to Chapter 5 on "persons with acquired brain injury due to accidents" to read more on this topic.

## Case Study 12: The Paraplegic Construction Worker

*Mr Q was a construction worker who suffered severe injuries in an industrial accident rendering him a paraplegic. He was the breadwinner of the family with three young children. His wife received formal education up to primary school and looks after the children on a full time basis.*

*A social worker accompanied Mr Q's wife to apply for legal aid to take out proceedings against the employer for compensation. Mr Q's wife also applied to be appointed as Committee of Mr Q.*

*However, when a substantial settlement sum was awarded to Mr Q at the conclusion of the court proceedings, it was transpired that Mrs Q had started to suffer from severe depression and other personality disorders.*



## Subsequent Developments

Since Mrs Q was suffering from depression and personality disorders, it soon became clear to the other family members, the doctors and her legal representatives that she was not fit to continue to act as Committee of Mr Q. Thus, the court appointed Mr Q's sister, who had no interest adverse to Mr Q, to replace Mrs Q as the Committee.

## Further Analysis

While legal aid in Hong Kong is available to help victims of traffic and industrial accidents to issue proceedings against the wrongdoer, it is usually limited to reaching a settlement or award and does not cover the costs relating to setting up a Committee with a proper care regime.

Thus it can be difficult for family members of victims who have suffered very serious injuries to acquire knowledge of how to set up the Committee and apply for money to be released from the court to set up a proper care regime for the victims after conclusion of legal proceedings. Unlike professional Committees, many laypersons find it difficult to find such assistance.

When large sums of money are paid into the court intended to provide better care and treatment for the victims, they should not lie idle in the Sutors' Fund in court, which happens often.

To read more on this topic, see the reasons for decision in *Fong Yau Hei v Gammon Construction Limited et al*, in particular the comments and reminder to practitioners in the field of personal injury litigation made by Mr Justice Bharwaney.<sup>5</sup>

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5. Decision dated 25 October 2017 (HCPI No 1222/2003), paras 14 to 19 and 53 to 56.

## 2

# A Brief Overview of the Mental Health Ordinance (Cap 136)

The Mental Health Ordinance (Cap 136) (**MHO**) was first enacted in 1962. It is essentially the consolidation of all statutory provisions relating to the protection of mentally incapacitated persons in respect of their health care, consent to medical treatment and management of their property and affairs. “Property and affairs” generally refers to business matters, legal transactions and other dealings of a similar kind.

While a number of amendments have been made to the MHO since its enactment, Hong Kong is still very slow in developing this area of law and many of the concepts used are rather archaic compared to the mental health legislation in other common law jurisdictions.

I will highlight some of the main concerns and inadequacies in this area of law in the final chapter. In this chapter I will provide a brief overview of the existing statutory provisions and Part II and Part IVB of the MHO.

In short, the aim and purpose of the MHO are:<sup>1</sup>

- 1) to amend and consolidate the law relating to mental incapacity and the care and supervision of mentally incapacitated persons;
- 2) to provide for the management of the property and affairs of mentally incapacitated persons;
- 3) to provide for the reception, detention and treatment of mentally incapacitated persons who are mentally disordered persons or patients;
- 4) to provide for the guardianship of such patients and for mentally incapacitated persons in general;
- 5) to make provision for the giving of consent for treatment or special treatment in respect of mentally incapacitated persons who have attained 18 years of age;

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1. As stated in the long title of the MHO.

- 6) to provide for the removal of objectionable terminology relating to mental incapacity in other statutory provisions; and
- 7) to provide for matters incidental or consequential thereto.

The MHO is divided into 10 parts, each dealing with different aspects of the law relating to mentally incapacitated persons:

- Part I—Preliminary (sections 1 to 6)
- Part II—Management of Property and Affairs of Mentally Incapacitated Persons (sections 7 to 28)
- Part III—Reception, Detention and Treatment of Patients (sections 29 to 44)
- Part IIIA—Guardianship of Persons Concerned in Criminal Proceedings (sections 44A to 44B)
- Part IIIB—Supervision and Treatment Orders Relating to Persons Concerned in Criminal Proceedings (sections 44C to 44I)
- Part IV—Admission of Mentally Disordered Persons Concerned in Criminal Proceedings, Transfer of Mentally Disordered Persons under Sentence and Remand of Mentally Incapacitated Persons (sections 45 to 59)
- Part IVA—Mental Health Review Tribunal (sections 59A to 59H)
- Part IVB—Guardianship (sections 59I to 59Z)
- Part IVC—Medical and Dental Treatment (sections 59ZA to 59ZK)
- Part V—General Provisions (sections 60 to 74)

## Protection versus Deprivation of Liberty under the MHO

There are lively discussions amongst academics and experts internationally on the human rights issues arising from the involuntary treatment and detention of mentally incapacitated persons. There is concern as to whether some of the provisions in the MHO, such as those dealing with involuntary treatment and compulsory detention, may violate the Universal Declaration of Human Rights (UDHR).

For example, Article 12 of the UDHR provides that “no one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.<sup>2</sup>

2. See Article 12 of the UDHR, available at [www.ohchr.org](http://www.ohchr.org).

Article 12(4) of the Convention on Rights of Persons with Disabilities (CRPD) provides that:

All measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Article 14 of the CRPD also provides that:

State Parties shall ensure that persons with disabilities, on an equal basis with others: a) enjoy the right to liberty and security of person; and b) are not deprived of their liberty unlawfully or arbitrarily and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

In 2012, Hong Kong had approximately 800 patients detained at the psychiatric in-patient units due to medical evidence that the patient was suffering from a mental disorder of a nature or degree which warranted his or her detention in a mental hospital for observation.<sup>3</sup> It has been argued that the legal threshold for detaining a patient "for observation" under sections 31 and 32 of the MHO is very low.

Section 31(1) of the MHO provides that:

An application may be made to a District Judge or Magistrate for an order for the detention of a patient for observation on the grounds that the patient a) is suffering from mental disorder of a nature or degree which warrants his detention in a mental hospital for observation (or for observation followed by medical treatment) for at least a limited period; and b) ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons.

The application under this section is based on the written opinion of a registered medical practitioner who has examined the individual concerned within the previous seven days and, unless the individual requests, the judge or magistrate does not need to see the individual.

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3. The Human Rights Committee requested and responded to the review on the provisions and operation of the MHO. See "Unfinished Business: Reforming Hong Kong's Mental Health Ordinance to Comply with International Norms", available at <http://www.cmel.hku.hk/wp-content/uploads/2017/04/Day-1-Presentation-3-Professor-Carole-Petersen.pdf>.

Hence, there needs to be a fine balance between “protection” of an individual and “deprivation” of the individual’s liberty when considering whether the compulsory mental health treatment of a patient is necessary. We must therefore ask ourselves whether the involuntary treatment and compulsory detention are necessary for the patient’s own good (a “prevention of harm to self” justification) or whether it is necessary for the protection of others from the patient but not necessarily for the patient’s own good (a “prevention of harm to others” justification).

It is therefore understandable that some human rights lawyers will argue that Part II of the MHO may be in violation of several provisions of the UDHR and/or the CRPD.

While this is a very important topic, particularly given that the current legislation is based on rather archaic concepts and outdated compared with other jurisdictions, this book is mainly written from the carer’s perspective and will focus on the care and management of special needs and mentally incapacitated persons under Part II and Part IVB of the MHO.

## **Part II and Part IVB of the MHO**

As mentioned, Part II of the MHO deals with the “Management of Property and Affairs of Mentally Incapacitated Persons” and Part IVB provides for the establishment of the Guardianship Board and the powers conferred to a guardian, which include authorization and consent to medical treatment and accommodation arrangements for mentally incapacitated persons.

I will therefore briefly introduce the roles of the Director of Social Welfare, the Official Solicitor and the Guardianship Board in the application for a Committee and a guardian under these two parts of the MHO and outline the relevant Practice Directions with which one should be familiar when making an application under Part II of the MHO.

The application procedures under Parts II and IVB of the MHO will be covered in Chapter 3.

## **Practice Directions**

Apart from the MHO, it is important to note that the Judiciary issued Practice Direction 30.1 (**PD 30.1**) in 2005 relating to applications under Part II of the MHO. PD 30.1 covers the two-stage process of an application under Part II in detail and includes annexes with the various forms to be used in the application.

In cases where personal injuries claims are involved and the victim of a traffic accident or industrial accident becomes mentally incapacitated as a result of the acquired brain injury, provisions in Practice Direction 18.1



(PD 18.1)<sup>4</sup> relating to actions on behalf of mentally incapacitated persons will also be relevant.

Further, Order 80 of the Rules of the High Court (Cap 4A) provides that a person under disability may not make a claim in any proceedings except by his next friend (his legal representative) and may not defend any claim except by his guardian ad litem.<sup>5</sup> A “person under disability” is defined as a person who is a minor or a “patient”. A “patient” is defined as a person who, by reason of mental disorder, is incapable of managing and administering his property and affairs within the meaning of the MHO.<sup>6</sup>

PD 30.1 and relevant extracts from PD 18.1 can be found at the end of this chapter.

## **The Role of the Director of Social Welfare**

The Director of Social Welfare is the head of the Social Welfare Department which is one of the two departments under the Labour and Welfare Bureau of the Hong Kong government.

The Social Welfare Department is responsible for implementing the government’s policies on social welfare including, among other things, social security, services for the elderly, family and child welfare services, medical social services and rehabilitation services for people with disabilities.

Under section 7 of the MHO, the Director of Social Welfare is given the express power to make an application to the court for an inquiry as to whether any person subject to the jurisdiction of the court who is alleged to be mentally incapacitated is, by reason of mental incapacity, incapable of managing and administering his property and affairs, if such application is not made by any relative of the person alleged to be mentally incapacitated.

The Director of Social Welfare is also given the power under section 26B of the MHO to make an application to the court in cases where no relative of the mentally incapacitated person takes action to vary any powers of a Committee already appointed or to replace the Committee with another Committee.

Additionally, the Director of Social Welfare is heavily involved in applications under Part IVB of the MHO for a Guardianship Order. Section 59N of the MHO gives power to a public officer in the Social Welfare Department to make such an application. It also expressly requires the Guardianship Board to send a copy of the application papers to the Director of Social Welfare,

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4. Practice Direction 18.1 dated 12 February 2009, issued by the Hong Kong Judiciary.

5. Order 80 rule 2, the Rules of the High Court.

6. Order 80 rule 1, the Rules of the High Court.

unless the application is made by a public officer in the Social Welfare Department.

Furthermore, section 59P provides that the Guardianship Board must receive a social enquiry report signed by or on behalf of the Director of Social Welfare and prepared by a public officer in the Social Welfare Department for the Guardianship Board's consideration in making any Guardianship Orders.

The Director of Social Welfare may also be appointed by the Guardianship Board as a guardian under section 59S where it appears to the Guardianship Board that there is no appropriate person available to be appointed as the guardian of a mentally incapacitated person who is the subject of a guardianship application.

In the event that a private guardian appointed by the Guardianship Board dies or relinquishes the functions of a guardian, the guardianship of the mentally incapacitated person shall, subject to a review by the Guardianship Board, vest in the Director of Social Welfare.

If the private guardian is incapacitated by illness or any other cause from performing the functions of a guardian, those functions shall, during the incapacity of the guardian and subject to a review by the Guardianship Board, be performed on his behalf by the Director of Social Welfare or any other person approved by the Guardianship Board.

The Director of Social Welfare may request the Guardianship Board to review a Guardianship Order made under Part IVB of the MHO such that the Guardianship Order be varied, suspended or revoked.

The Director of Social Welfare accordingly plays a vital role, especially in relation to the guardianship applications under Part IVB of the MHO. He or she is involved in the preparation of the mandatory social enquiry report, appointed as a guardian, and empowered to make various applications to the Guardianship Board including review of any Guardianship Orders made.

For more information about the Social Welfare Department, visit its website, available at [https://www.swd.gov.hk/en/index/site\\_dsw/welcome/](https://www.swd.gov.hk/en/index/site_dsw/welcome/).



## **The Role of the Official Solicitor**

The Official Solicitor is appointed pursuant to the Official Solicitor Ordinance (Cap 416). This Ordinance was enacted in 1991 and the Director of Legal Aid

has been designated as the first Official Solicitor (**OS**). The Director of Legal Aid shall continue in effect until the Chief Executive appoints an OS.<sup>7</sup>

The OS is a public officer with a specific duty to look after the interest of persons under disability, eg minors under the age of 18 or adult persons with mental incapacity, in legal matters. The duties of the OS as set out under Schedule 1 to the said Ordinance include, among other things, acting as guardian ad litem or next friend to any person under a disability of age or with mental incapacity in proceedings before any court and acting as committee of the estate of a mentally incapacitated person if so appointed under the MHO.

The MHO also states that the OS can make an application to the court for an inquiry as to whether any person subject to the jurisdiction of the court who is alleged to be mentally incapacitated is, by reason of his mental incapacity, incapable of managing and administering his property and affairs under section 7 of the MHO, if such application is not made by any relative of the person alleged to be mentally incapacitated.

Similar to the Director of Social Welfare, the OS is also given the power under section 26B of the MHO to make an application to the court in cases where no relative of the mentally incapacitated person takes action to vary any powers of a Committee already appointed or to replace the Committee with another Committee, including the OS.

Under PD 30.1, notice of an application under Part II of the MHO should be given to the OS with a set of draft directions, the originating summons and relevant papers. The OS will review the papers and raise requisitions or comment on the content before the court gives a date for the inquiry.

Papers (including the draft order and skeleton bill of costs) in relation to the substantive inquiry should also be sent to the OS for comment well in advance of the inquiry.

The OS therefore plays an important role in overseeing applications made under Part II of the MHO and assisting the court by reviewing the relevant papers and providing comments. It is good practice to send papers to the OS for comments in good time to enable the OS to make observations and clarifications to an application under Part II to save time and costs at the hearing.

For more information about the Official Solicitor's Office, visit its website, available at <https://www.oso.gov.hk/eng/solicitor/who.html>.



7. See s 2 and s 7 of the Official Solicitor's Ordinance (Cap 416).

## The Guardianship Board

The Guardianship Board (**Board**) is a quasi-judicial tribunal established as a body corporate under section 59J of the MHO consisting of a Chairman with legal experience, who is appointed by the Chief Executive, and not less than nine other members who shall not be public officers. The sponsoring body of the Board is the Labour and Welfare Bureau of the Hong Kong government.

Of the members of the Board, at least three shall be persons who are barristers or solicitors; at least three shall be persons who have had experience in assessing or treating mentally incapacitated persons, who may include registered medical practitioners or social workers; and at least three shall be persons other than the above two categories who have had personal experience with mentally incapacitated persons.

As mentioned earlier, Part IVB of the MHO provides for the establishment of the Board. The Board is given specific functions and powers under Part IVB of the MHO which will be discussed further in the next chapter.

The vision of the Board is to **promote the welfare, interests and protection of mentally incapacitated adults through guardianship**. To manifest its vision, the Board commits to:

- 1) support, protect and advocate the best interests of mentally incapacitated adults;
- 2) facilitate the resolution of disputes with relatives and service providers; and
- 3) keep the guardianship legislation under continuous review so that it promotes the best interests of mentally incapacitated adults.<sup>8</sup>

The values of the Board are:

- 1) protection;
- 2) compassion;
- 3) fairness;
- 4) independence;
- 5) respect; and
- 6) accessibility.

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8. See the vision, mission and values of the Guardianship Board on its website, available at <http://www.adultguardianship.org.hk/content.aspx?id=home&lang=en>.

It is interesting to note that the Board has published a report, “A Case for Reform—Re-discovering Adult Guardianship”,<sup>9</sup> which highlighted the limitations of guardianship law in Hong Kong. The Board set out key elements for reform, summarized as follows:

- 1) the powers of a legal guardian should be extended to include all powers as a guardian in law and equity;
- 2) the financial powers of a legal guardian should be extended to a Committee’s powers which means the power of the Guardianship Board to appoint a Committee;
- 3) an independent Public Guardian and Public Trustee (Advocate) Office which can act with full Committee powers should be established; and
- 4) existing definitions of mentally incapacitated persons and criteria of guardianship should be replaced.

For more information on the work and services of the Guardianship Board and its vision, mission and values, visit their website: <http://www.adultguardianship.org.hk/content.aspx?id=home&lang=en>.



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9. See the Guardianship Board 4th Report (2009–2011), published in 2012.

## The Way Forward

So, what is the way forward for Hong Kong?

Here are a few points to consider.

First, there is no consolidated statutory body to govern and supervise the various roles and work of the guardian, Committee and attorneys, be it the enduring power of attorney or the proposed continuing power of attorney.

There is also no Court of Protection to protect mentally incapacitated persons under guardianship or generally, and no Office of the Public Guardian or Public Trustee (Advocate) Office. The work is currently shared between the Court of First Instance and Guardianship Board with support from the Director of Social Welfare and the Official Solicitor.

Further, although there are many excellent initiatives undertaken by government and non-government bodies, these initiatives may not be easily accessible to the public and would undoubtedly benefit from some further consolidated effort to promote and strengthen the existing services and resources in order to meet the demands of a rapidly ageing population.

Hence, there is an urgent need for fundamental reform of the mental health law and guardianship regime to enable Hong Kong to meet the challenges of the coming decades.

### Suggestions on Reform

#### *1. Consolidation of existing initiatives*

It is encouraging that the Hong Kong government has, in response to the ageing population and demands from the public for enhanced support to elderly persons suffering from dementia and their carers, made significant progress to promote and strengthen mental health and welfare services for special needs persons.

In January 2016, the Department of Health launched a three-year territory-wide “Joyful@HK” campaign to promote mental health. The objectives of the campaign were to increase public engagement in promoting mental

well-being and enhance public knowledge and understanding of mental health.

In February 2017, a two-year pilot scheme steered by the Food and Health Bureau in collaboration with the Hospital Authority and Social Welfare Department on dementia community support services for the elderly, entitled the “Dementia Community Support Scheme (Pilot Scheme)”, was launched.

Further, according to a Legislative Council paper published on 28 March 2017, the government has adopted a multi-disciplinary and cross-sectoral approach in the provision of holistic care to persons with dementia.

In respect of educating the public, the Hospital Authority has also made the information relating to dementia, medical care and community resources available on its one-stop information platform, the smart patient website.<sup>1</sup>

The Community Legal Information Centre (**CLIC**), organized by the Law and Technology Centre jointly run by the Faculty of Law and Department of Computer Science of the University of Hong Kong, has set up various bilingual websites to provide quick internet guide for the general public to find out relevant legal information, including support for special needs persons and their carers. There is also a senior CLIC website specifically targeting the elderly in Hong Kong to assist them in seeking free or subsidized legal assistance.

However, there is a continuous need to push for consolidated efforts by different departments, including the Food and Health Bureau, Home Affairs Bureau, Labour and Welfare Bureau, Department of Health, Hospital Authority, Official Solicitor’s Office, Social Welfare Department, Commissioner for Elderly, Commissioner for Rehabilitation and the emerging Commissioner for Children, to promote and strengthen the existing mental health and welfare services in the climate of a rapidly increasing ageing population.

The Hong Kong community would certainly benefit from a consolidated effort by the various government bureaux and departments together with non-government organizations, because currently the existing facilities and services for the elderly and special needs persons are rather fragmented and difficult for carers and family members to locate.

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1. A list of government and non-government resources is included in Appendix II to this guidebook.

## ***2. Establishment of a Court of Protection and Office of the Public Guardian and/or Public Trustee (Advocate)***

Establishing a Court of Protection to adjudicate disputes relating to attorneys and other judicial decisions regarding the property and financial affairs or health and welfare of incapacitated adults would better equip the judiciary to handle the significant increase in the number of cases foreseeable in the coming years.

At the same time, consideration should be given to set up an independent Office of the Public Guardian and/or Public Trustee (Advocate) to expand the powers of the Guardianship Board.

## ***3. Amendment of unclear terms in current mental health laws***

There is a need to amend the definitions of certain terminology in the current legislation so that it is more in line with international standards to provide better care for special needs persons while respecting their liberty and dignity.

For example, “mental incapacity” is defined as a “mental disorder” or “mental handicap” under section 2 of the MHO. “Mental disorder” is further defined as:

(a) mental illness; (b) a state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned; (c) psychopathic disorder; or (d) any other disorder or disability of mind which does not amount to mental handicap.

However, the MHO does not provide further explanation as to what would be considered “mental illness” or “any other disorder or disability of mind which does not amount to mental handicap”.<sup>2</sup>

A significant burden is therefore placed on the medical practitioner to diagnose whether the person in question has a mental illness and/or other form of disability of the mind.<sup>3</sup> In fact, there has not been a clear definition of “mental disorder” since the MHO was first enacted in 1960.<sup>4</sup> It is therefore suggested that “mental disorder” be defined in a more detailed manner to reflect contemporary understandings of mental health.

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2. The Law Reform Commission of Hong Kong, Report on Substitute Decision-making and Advance Directives in Relation to Medical Treatment (Hong Kong: Printing Department, August 2006), para 6.3, p 69.

3. Ibid., para 6.4, p 70.

4. Ibid., paras 6.11 and 6.13, p 73.



## Conclusion

The number of single elderly in Hong Kong is forecast to rise to 1.13 million by 2064.<sup>5</sup> Around 1 in 10 people aged 65 years old or above and around 1 in 3 people aged 80 or above will likely have dementia, a common cause of mental incapacity. Hong Kong must be prepared for the impact this will have on the community.

Let's work together to improve education and promote awareness of mental health, elderly and special needs issues; to provide training to detect and prevent mental deterioration and physical, emotional and financial abuse against mentally incapacitated persons; to plan for rehabilitation; and to utilise advance care planning tools for a better community.

I hope that after reading this guidebook you are more aware of the mental health regime and resources in Hong Kong. The legislators are urged to continue to push for a more advanced legal framework and social support system to protect the physical and financial well-being of special needs children, adults and elderly persons.

**THE TIME TO ACT IS NOW.**

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5. "The 'dementia tsunami' and why Hong Kong isn't ready to cope with expected surge in cases as population ages", *South China Morning Post*, 16 April 2018.