



## Reply to questionnaire for the country reports – Hong Kong

### 1. What legislation is relevant for the protection of adults?

- Mental Health Ordinance
- Enduring Power of Attorney Ordinance

### 2. What are the types of formal measures that exist to support people with disabilities in exercising their legal capacity?

- the enduring power of attorney
- proposal by the Law Reform Commission in 2006 to introduce advance directives not yet implemented "[Substitute Decision-making and Advance Directives in Relation to Medical Treatment](#)"
- statutory guardianship & committee of estate (NB no private guardianship system)

### 3. Who decides on the appointment of a supporter / legal representative and what are the requirements for the respective measures?

- the enduring power of attorney is chosen by the person executing the attorney
- a guardian is appointed by the Guardianship Board, which is a quasi-judicial tribunal

### 4. Who is involved in the procedure of determining the need for support in legal affairs and in what capacity?

- For guardianship, the following parties may make an application to the guardianship board for a guardianship order: a relative of the person concerned; a social worker; a registered medical practitioner; or a public officer in the Social Welfare Department. The Board may appoint as guardian either a family member or friend of the person concerned, i.e. a private guardian; or the Director of Social Welfare, i.e. a public guardian.
- For enduring powers of attorney, the donor himself/herself determines the need to execute the document, and the medical practitioner certifies his lack of mental capacity at a subsequent stage before the enduring power of attorney can be activated.

### 5. How significant is the legal capacity of the adult concerned and is there a constitutive ascertainment of (lack of / limited) legal capacity?

Medical practitioners are involved in determining whether the person concerned has mental capacity.

### 6. What are the responsibilities of a supporter / representative and what are the obligations and principles he/she must comply with?

#### *Duties of the attorney of an enduring power of attorney*

The attorney is expected to administer the donor's assets only for the donor's benefit. He owes duties set forth in the Enduring Powers of Attorney Ordinance to exercise his powers honestly and

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Prof. Dr. Dagmar Brosey  
Vizepräsidentin · [vice-president](#)

[www.wcag2016.de](http://www.wcag2016.de)

Prof. Dr. Volker Lipp  
Präsident · [president](#)

Karl-Heinz Zander  
Geschäftsführer · [secretary](#)

[orga@wcag2016.de](mailto:orga@wcag2016.de)

c/o  
Betreuungsgerichtstag e.V.  
Kurt-Schumacher-Platz 9  
D-44787 Bochum  
Deutschland · [Germany](#)

Bankverbindung  
[bank account](#)

Bank für Sozialwirtschaft Köln  
BIC: BFSWDE33XXX  
IBAN:  
DE73 3702 0500 0008 2767 01

with due diligence, to keep proper accounts and records, not to enter into any transaction where a conflict of interest would arise with the donor, and not to mix the property of the donor with other property. He must not benefit himself or anyone other than the donor except for individuals (including himself) that the donor might have been expected to provide for their needs or to make reasonable gifts on customary occasions or charitable gifts which the donor might have been expected to make. The statute also makes it clear that he acts in fiduciary capacity.

#### *Duties of a guardian*

A guardian needs to make decisions on behalf of the person concerned in accordance with the powers and specific conditions set out in the guardianship order, with an aim to promote and protect the concerned person's interests.

The Mental Health (Guardianship) Regulations, a subsidiary legislation to the Mental Health Ordinance also impose duties on the guardian to cooperate with the Director of Social Welfare of the government to enable monitoring and checks, and to provide reports accordingly.

#### **7. What role do family members play and what are the requirements imposed on them?**

In so far as they serve as attorneys or guardians, they assume these additional roles. Purely as family members, they do not have any official role to play, save they are typically listed as interested parties to bring applications to court to prevent the abuse of attorneys or guardians.

#### **8. What role do volunteers play and what are the requirements imposed on them?**

No official role.

#### **9. Are there professional supporters / legal representatives and what requirements / qualifications do they have to satisfy?**

Officers of the Social Welfare Department of the Hong Kong government play the role of guardians by way of default of suitable family members.

#### **10. Who bears the costs for procedures and the supporter / legal representatives?**

The tribunal is informal and does not involve any mandatory cost as such.

#### **11. How are supporters / legal representatives supervised and what is done to ensure that the rights, the will and the preferences of the adult concerned are respected?**

They are supervised by the general law on fiduciary duties, tort law and property law, as well as statutory provisions in the Enduring Power of Attorney Ordinance and the Mental Health Ordinance and the Mental Health (Guardianship) Regulations mentioned under Q6.

Furthermore, interested parties (typically family members of the person concerned) may make an application to court to require the attorney to produce records and accounts and make an order for their auditing; revoke or vary an enduring power; or if required by the interest of the donor, remove the attorney.

Apart from duties in private law, guardians are required under the Mental Health (Guardianship) Regulations to make reports of all relevant matters to the Director of Social Welfare, and commits an offence for failure to comply with the Regulations.

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c/o  
Betreuungsgerichtstag e.V.  
Kurt-Schumacher-Platz 9  
D-44787 Bochum  
Deutschland · [Germany](#)

Bankverbindung  
[bank account](#)

Bank für Sozialwirtschaft Köln  
BIC: BFSWDE33XXX  
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**12. Who decides on deprivation of liberty and involuntary medical measures and what requirements does this decision underlie? Is there a distinction between self-endangerment and endangerment of others?**

If a guardian is appointed, the guardian has the power to decide on medical treatment that he considers to be in the best interest of the person concerned, except if the medical treatment is irreversible or controversial (such as sterilization).

In the absence of an appointed guardian, a medical doctor has the power to give urgent or non-urgent medical treatment without his/her consent, if the person concerned does not understand the nature and effect of the proposed treatment, and provided that the treatment is necessary and in his/her best interests.

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