Office of the Commissioner for Mental Health and Older Persons

“Mental Capacity in Maltese Legislation”

Report on Reflection Seminar held under the auspices of H.E. The President of Malta on

22nd February, 2014

Verdala Palace,
Buskett
Mental Capacity in Maltese Legislation

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Reflection Seminar held under the auspices of
H.E. The President of Malta Dott. Gorg Abela
on 22nd February, 2014

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Thanks to all who have contributed and supported the event

Special thanks go to

H.E. The President of Malta Dr George Abela,
EU Commissioner for Health and Consumer Rights, Dr Tonio Borg
Minister for Health, Godfrey Farrugia
Speaker of the House of Representatives Dr Anglu Farrugia

Key note Speaker
Chief Justice Emeritus Vincent De Gaetano

The Chamber of Lawyers
The Chamber of Notaries

Panel of Experts
Dr Daniel Bianchi
Rev Prof Emmanuel Agius
Dr Antoine Vella
Dr Annalise Micallef
Dr David Mamo

All staff of
the Office of the Commissioner for Mental Health and Older Persons
Staff at the Office of the President and Verdala Palace

Photographs courtesy of Department of Information
Mental Capacity in Maltese Legislation

The need to look at Mental Capacity in the light of current Maltese legislation and what changes are necessary in order to give adequate protection to vulnerable people who lack mental capacity in the absence of Mental Disorder was the theme of this seminar. The Seminar was held under the auspices of His Excellency the President of Malta Dr George Abela on the 22nd February at Verdala Palace in Buskett, Rabat.

Introductory remarks

According to the Mental Health Act "mental capacity" means the patient's ability and competence to make different categories and types of decisions and to be considered responsible for his actions.

His Excellency the President of Malta Dr George Abela explained that he views this seminar as a means of raising awareness to an issue which touches the most vulnerable people at the core. His Excellency urged politicians to look at the necessary legislation which has the people and their protection as its basis.
On a similar note was the position expressed by the EU Commissioner for Health and Consumer Rights Dr Tonio Borg who stressed that this theme was in line with EU actions and in agreement with the EU paper on Fundamental Rights that in front of the law everyone should be treated equally and not discriminated against. He spoke of various EU initiatives in the field of mental health and reminded of EU funding opportunities for research and implementation of adequate practices for the improvement and safeguarding of the more vulnerable in society.

The Speaker of the House of Representatives Dr Anglu Farrugia appealed to the professionals working with people who have a temporary or transient problem of Mental Capacity including doctors, notaries and lawyers to act in the best interest of the person in the absence of formal protective means in legislation. He reminded of the existing legislation regarding interdiction and guardianship whilst at the same time he stressed on the importance that one is to ensure that the curators and guardians are meeting their legal obligations. Dr Farrugia appealed to the ethical principles guiding the professionals when they are faced with the dilemma whether a person is mentally capable or not of making decisions as understanding the consequences of these decisions. He concluded by mentioning the introduction in Malta of legislation and/or mechanisms such as Advanced Directives, lasting powers of attorney practices and assisted decision making.

The seminar was addressed by the Minister for Health Dr Godfrey Farrugia who explained how health problems may arise leading persons to be in a position where others have to take decisions on their behalf and how sometimes these situations may strip persons of their rights and dignity. He encouraged the health and other professionals dealing with the person to take their time to ensure that the wishes of the person are being taken into account and safeguarded in all aspects including the health care services provided.
Key note Address

Chief Justice Emeritus Vincent De Gaetano gave the key note address at this seminar. He highlighted the developments in the legal framework from practices in the early 70s where a person’s mental capabilities depended upon the final word of the psychiatrist to a more holistic framework which takes into consideration various aspects of the person’s life and abilities. He described the words ‘mad’, ‘of insane mind’ and in a ‘state of madness’ as expressions which were built on medical jargon and which had a very negative connotation on a social aspect. He based his speech on 3 main items: an overview of relevant legislation from Maltese and European laws, an overview of definitions from these laws which were relevant to lead to the following discussion by panel of experts and lastly lessons which can be learnt from the European Court of Human Rights which can help in the local context and scenario.

The first legislation dealing with Mental Health in Malta was the Mental Health Act (Cap 262) of 1976 which was enacted in 1981. Over the years this law was followed by other legislation which improved the language used in the text, such as the Equal Opportunities act which changed the definition of mental health issues from a purely medical model to a more social interactive model by removing words such as ‘mad’, ‘sick mind’ and ‘state of imbecility’ to more acceptable terms. He explained in detail other implications of this law on other legislation with the definition given of ‘disability’ and the rights and duties this new definition gives in practice to persons suffering from a disability. Chief Justice Emeritus De Gaetano focused on the positive changes brought about by the Mental Health Act (Cap 525) which was enacted in October 2013 and comes in full-force in October 2014. He explained that the list of rights given by law and the social aspect of the new law are a considerable improvement on the old law which basically listed how a person was to be detained. He outlined similarities between this law and others such as the Civil Code where together this legislative framework acts to safeguard the person’s rights whilst at the same time offering protection to self and others. He spoke of the situation where restrictions are legally applied on the basis for the protection of health or for the protection of the rights and freedoms of others, however this has to be kept to the essential minimum.

Referring to the Mental Health Act (Cap 525) – Chief Justice Emeritus DeGaetano described this act as a very positive step forward especially since in the very first section of the law it outlines a list of patients rights – these rights are favourable for the client since if he feels aggrieved by any actions the law is a tool for him to seek compensation without the need to go through complicated legal procedures. The fact that the responsible carer is broader than the old concept of next of kin is a further positive development which offers safeguards. An important improvement which is brought about by the new Mental Health Act which critical for the seminar topic was the clear distinction between Mental Illness and Mental Capacity, where it is now established that these can exist separately and thus a person with a mental disorder can still have the ability to take decisions. He referred specifically to Article 24 of the law which recognises that the person who suffers from Mental illness can still decide on aspects important to his life e.g. decisions about his status
and financial aspects amongst other things. He viewed the law as giving a sound basis and protects the person with regards to mental capacity by placing obligations on the Commission that the verification of certification of incapacitation is done by an independent specialist. The law also provides measures for the reversal of incapacitation and interdiction and other means to ensure that there is no abuse. However the question arises when there is a query about mental capacity which does not fall or is not covered by the Mental Health Act and this is a lead consideration to be made in highlighting the negative aspects of the new Act.

Whilst the role of Commissioner is being heavily laden with responsibility, within the law there are no specific qualification requirements for a person to occupy this position, has no security of tenure and is responsible to evaluate the service delivery given by the public authorities whilst at the same time, the commissioner is accountable to the Minister of Health for the execution of his performance. This accountability partially hinders the impartiality of the position of the commissioner, more so with regards to the change brought about by the removal of the Mental Health Tribunal to evaluate and decide on the detention or release from a mental health institution of a person and placing this within the responsibility of the commissioner. There are measures within the Maltese Constitutional court which ensure a fair process although Chief Justice Emeritus DeGaetano stated that these may not be enough to meet the obligations of Article 5(4) of the Human rights convention. It has repeatedly been noted by the European Court of Human Rights that this Article is not met on the basis of timeliness by the Maltese Courts.

The third negative aspect highlighted is the list of obligations of the curators which are already regulated by other legislation. There are already other obligations which these curators need to meet under the Civil code and additional burdens may hinder persons who genuinely would like to act as curators for interdicted and incapacitated persons due to a mental disorder.

Chief Justice Emeritus DeGaetano drew parallels between the Mental Health Act and Guardianship legislation with emphasis on the similarities and differences between obligations of curator and guardian where whilst the first is primarily held responsible for the financial matters the latter is more focused on the welfare of the person. In view of these parallels between the 2 laws the speaker queried whether the different procedures should be revised and joined up into one. He debated the point about the composition and procedures adopted by the guardianship board which could possibly be in breach of the European Convention on Human Rights.

The Court of Protection in England and Wales and the Mental Capacity Act 2005 (UK) were mentioned as examples of entities which take decisions behind closed doors. These do not focus on mental health or mental disorder but focus on the person who for some reason or other is not capable of taking certain decisions and this may be due to dementia, autism or other injury to the brain of a temporary or permanent nature. Procedures held behind closed doors where subject to criticism in the last months due to their controversial nature. However two important learning points from this legislation are the definition of ‘Mental Capacity’ and the concept of the ‘lasting powers of attorney’. In the Maltese Mental Health Act the decision about the person’s mental capacity lies totally in the hands of the certifying specialist whilst at the same time the law does not establish any criteria about the what and the degrees of incapacitation. The English law gives the parameters of what and for what the person is incapable of taking decisions. This leads to the second point concerning ‘lasting powers of attorney’. In Maltese law there is the possibility of appointing someone to act on one’s behalf, however this power is null if the person becomes incapable of taking decisions by court decree or otherwise and there are no provisions to see that the person’s wills are followed through when the person’s mental abilities deteriorate or the person is in a
permanent state of coma. This is safeguarded in the English legislation, which gives the option of the lasting powers of attorney which establishes that the donor can give to someone the powers to look after matters of personal welfare and property in the circumstance where the donor no longer has the capacity to deal with such matters. This means that in English law power of attorney is given when the person has full mental capacity and this remains active in the circumstance of the person loosing the abilities to take decisions. This is highly regulated in the English law so as to avoid abuse and hardships on the donor.

The concluding remarks were focused the important aspect of human dignity which is not specified in the Convention of the European Rights but is found in the EU Charter of fundamental rights. Article 1 states that Human dignity is inviolable. It must be respected and protected and this is amplified in Article 2 concerning the right to life which states that everyone has the right to life and no one shall be condemned to the death penalty, or executed. This enforces the respect for the person from the slightest hint of conception to the last remaining bones of a being and only with these principles in mind can one open a debate on capacity or incapacity. These are the standards for protection of the person which Malta has subscribed to by signing various international treaties which regulate even our parliament in its legislative work.

The full text in Maltese of Chief Justice Emeritus De Gaetano's speech is available on

Panel Presentations
Presentations were made by Dr. Daniel Bianchi on behalf of the Chamber of Advocates, Rev. Prof. Emmanuel Agius, Ethicist, Dr. Antoine Vella, Consultant Geriatrician, Dr. Annalise Micallef for the Chamber of Notaries and Prof. David Mamo, Consultant Psychiatrist. The Panel Discussion was chaired by Dr John M. Cachia (Commissioner).
Empowerment:
Persons who are vulnerable as a result of mental or physical disability or because of a degree of mental incapacity due to a variety of conditions such as having dementia, particularly in its early stages; having difficulties with speech or writing; having learning difficulties; or being vulnerable or at risk from himself or herself or others do not fall under the mental Health Act. Regulatory and legal systems that already exist and those that are in process such as the guardianship act, advance care directives and living wills are essential to empower rather than to restrict these vulnerable individuals.

Empowerment should underpin the guiding principles applied in deciding which measures will be most suitable for meeting the needs of the individual. The same guiding principles must also be used whenever decisions need to be made on behalf of the adult. The aim is to protect people who lack capacity to make particular decisions, but also to support their involvement in making decisions about their own lives as far as they are able to do so.

The guiding principles include:

Principle 1 – There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the vulnerable adult and that such benefit cannot be reasonably achieved without the intervention.

Principle 2 – Where an intervention in the affairs of an adult is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.

Principle 3 – In determining if an intervention is to be made, and, if so, what intervention is to be made, account shall be taken of the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult. Before concluding that someone is totally unable to communicate and therefore lacks capacity, strenuous efforts must be made to assist and facilitate communication – using whatever method is appropriate to the needs of the individual, including advice and assistance from a speech and language therapist. It is important to note that it is compulsory to take account of the present and past wishes and feelings of the adult if these can be ascertained by any means possible.

Principle 4 – In determining if an intervention is to be made, and, if so, what intervention is to be made, account shall be taken of the views of the nearest relative and primary carer of the adult, or a named person, or any guardian, attorney or curator of the adult who has powers relating to the proposed intervention.

Principle 5 – Any guardian, attorney or curator should encourage the person to exercise whatever skills the vulnerable adult has concerning property, financial affairs or personal welfare as the case may be, and to develop new such skills.

Empowerment means giving elderly and persons with disability better control over their lives including their health when they are still well enough to do so in preparation for a time when they might not be capable of doing so. Empowerment can guide vulnerable adults to decide early on what to do if in the future, they cannot take decisions regarding their estate, their residential requirements and their care and health.
**Assisted Decision Making:**

This seminar dwells upon questions concerning decision making, in particular decisions regarding health and care of people have a lack of mental capacity. When one has the legal capacity to consent to receive care, the issue dwells around professional advice on treatment options. This can also be assistance to persons to exercise legal capacity. But what happens when this is not possible? What happens when patients cannot decide on their own, at the time when a decision is needed whether to proceed with care or treatment? On what basis will a decision be made in such circumstances? What is the guidance on the decision?

An option available nowadays, which is not covered by the laws of Malta, is the principle of "advance directives". Through advance directives, a person can determine decisions today on what might arise in the future when not in a position to take such a decision, about for example refusing or giving prior consent to particular care or treatment given such the situation occur.

The use of advance directives varies between jurisdictions. A decision taken by a patient using an advance directive may have the same binding effect of a decision taken only as and when required at a particular point in time. One must recognise that such mandatory obligations cause issues to the treating team. The patient is given a tool to express and take decisions which otherwise cannot taken by the patient when actually needed those decisions himself. The choice of the effect of advance directives in terms of mandatory obligations on the caring professionals and the caring others remains in the hands of the legislator.

It is appropriate to mention the limits of advance directives. Certainly they do not solve all problems. For example, one must have determine at what point in life a person possesses the necessary mental capacity to formulate advance directives. If one never had problems of lack of mental capacity, then advance directives may be useful for that individual. The availability of complete and exhaustive information and the ability to decide based on that information is often questioned. On the other hand, the use of advance directives is a form of protection for those who must eventually decide, because it alleviates the burden of the eventual decision which can be based on indications or decisions given by the person concerned months or even years before.

It is appropriate that any debate concerning the use of advance directives takes an appropriate amount of reflection, study and thought. It may not be the best option. It is not the only option. But if the reflection is complete, the principle of advance directives is an option among others in relation to decisions to be taken for and on behalf of persons who cannot decide for themselves at a given moment in the future.
Capacity to enter contractual obligations:
Notaries are in daily contact with vulnerable persons, officiating agreements and deeds whereby persons deliberate on their patrimony. By law, the notary must verify the voluntariness to act of the parties and once all the elements for the deed subsist, a notary is obliged to offer his services. The assessment of volition and understanding by parties to a transaction is the remit of the notary and this, undoubtedly, is in itself a highly subjective exercise, particularly in view of the presumption that a person is deemed capable at law unless proven otherwise. Accordingly, it becomes very difficult to conclude that an individual does not have the required level of discernment necessary to partake in acts and agreements.

Difficulties exist even if one considers interdicted and incapable individuals where there is an official decree on the incapacity of the individual, in practice it is very difficult to ascertain whether a particular individual is interdicted or incapacitated. It is of impelling importance to have an ad hoc register accessible to practitioners whereby one can readily verify if a person if interdicted or incapacitated. It has become common practice for notaries to request a medical certificate attesting the testamentary capacity of the client in cases where there could be doubt about this. It can be argued that such a practice is tantamount to an admission that the person lacks adequate capacity. The bottom line is that we urgently require legislation and unequivocal guidance on how to act when faced with such common-place cases.

It is important for our legal system to incorporate instruments such as ‘advanced directives’ and ‘lasting powers of attorney’. We come across situations where these instruments are drawn up and presented and there is absolutely no guidance in our legal system on how to treat these, more so in view of the added benefits these instruments would permit to individuals, empowering them to make decisions for future moments in their lives when it will be no longer possible for them to validly posit their consent. At the outset, this legal development would require the concept of ‘consent’ and ‘capacity’ in our law to be broadened to incorporate consent that is conditional on a set of future contingent circumstances. Last but not least, this would precipitate an overhaul of present cultural concepts and a change of approach by the public at large.

In view of the consideration to adequately protect vulnerable individuals, it is strongly advisable to promote the set up of trusts as per Chapter 331 of the Laws of Malta, which are instruments already available in our legislation, that offer comprehensive solutions to vulnerable individuals. Informing individuals of these possibilities is a step forward to breed the cultural change that goes alongside a robust system of protection of vulnerable adults. Ultimately, when dealing with capacity, one can never approach the subject with a ‘one size fits all’ approach - different acts require a different degree of capacity; different vulnerabilities pose different threats to individuals. It is only by adopting an interdisciplinary approach that the best solutions can be found such that the medical dimension is reflected in a legal system that safeguards the interests of vulnerable individuals while preserving their sense of dignity.
**Vulnerability:**
Action taken in this regard must at all times respect the principles of the Oviedo convention concerning the primacy of the human being over the sole interest of science or society and the protection of human rights and dignity. Health care must be according to needs, and designed to maintain or improve the state of health or to alleviate suffering. Care must be delivered according to standards that reflect scientific progress and be subject to continuous quality assessment.

Elements of good quality include the right to active participation of the person in the decision making process, the right to free and informed consent, the right to complete and clear information in a format that is understandable by the person concerned, the right to withdraw consent and the right to respect and dignity.

There must be special provisions and added protection in case of minors and adults who are unable to give consent. Again here the underlying principles are added benefit, the least restrictive option should prevail, the autonomy of the person is to be respected at all times and the vulnerable person is to be legally represented in the decision making process. Government policies and bodies must provide protection to people who are unable to make decisions for themselves.

The full text of presentations made by members of the Panel may be accessed on [https://ehealth.gov.mt/HealthPortal/others/officeofthecommissionerformentalhealth/mental_capacity_seminar/seminar_presentations_and_proceedings.aspx](https://ehealth.gov.mt/HealthPortal/others/officeofthecommissionerformentalhealth/mental_capacity_seminar/seminar_presentations_and_proceedings.aspx)
Discussion

Key note speech and panel presentations were followed by contributions and questions from the floor. On a query about the basis of certification of Mental Capacity, Chief Justice Emeritus DeGaetano explained that although there is a new Mental Health Act, the decision on assessing the patient’s mental capacity still lies on the psychiatrist without giving clear definitions. It is common practice that the psychiatrist makes good judgement and analysis whether the patient is subject to internal or outside pressure when drawing a will. English Law explains that with regards to decisions taken in relation to a particular matter, persons are considered capable if they can fulfil the following:

- Can take a decision
- Understand the consequences of such a decision
- Retain that decision and
- Can communicate that decision.

Individuals without a mental disorder, under UK legislation enacted in 2005, may be entitled to a public guardian, on the advice of the Attorney General and this ensures that there is no abuse on the person by others such as forcing to change a will or other matters.

With regards to the local practice of power of attorney, it was explained that once the person has adequate mental capacity, power of attorney can always be revoked by the person giving these powers. Powers to revoke are extinguished once the said person is declared incapacitated or interdicted. A decree declaring a person’s interdiction implies that the person still has full human rights but the person is interdicted from certain civil rights whilst retaining others.
Mental capacity in children was briefly discussed. All minors are perceived to be incapable of taking decisions. Following assessment a Psychiatrist can state if a minor can take a decision. Mental capacity does not refer to the inability to take decisions because of immaturity due to age reasons. Within this discussion on the issue of children giving consent, concern was expressed on how much onus is being given to children giving consent such as the recent Law enacted in Belgium dealing with Child Euthanasia. Kummissjoni Nazzjonali Persuni b'Dizabilita emphasised that not all people are to be put in the same category, and that it must be always assumed that a person has mental capacity until proved otherwise.

On the delicate subject of taking decisions dealing with end of life issues and treatment in severe cases where there may be discrepancies between the wishes of the person and thenext of kin, it was explained that ethical guidance is that the medical team involved must act in the person's best interest and must seek the opinion of next of kin but the final decision lies with the team leader.

**Comments collected via feedback forms**

Feedback forms were distributed in the participants pack and close to 50% of those who attended submitted the feedback form. Feedback was asked about seminar preparation and logistics, content and participants’ expectations. All feedback was positive ranging from good, very good and excellent. This was also confirmed via written feedback on the level of the presentations made by speakers which was positively commented upon. A general comment was that the content was high level and merited more time for expansion and discussion considering its value and possible impact on people's lives. The participants wanted more time for questions and discussion. A recurring comment was that whilst the legal and medical aspects were well represented in the presentations the social and psychosocial perspective of the topic was missing. A recurring suggestion was the request for presentation of case studies or even real life situations to make the discussion closer to reality and not just theoretical.

Participants were also asked to submit any comments which they did not voice during the discussion or they wanted to submit in a confidential manner. Such comments included the need for clear protocols, guidelines or legislation on mental capacity to give professionals dealing with vulnerable people clear pathways to practise safely and report any abuse if they are aware of this. Examples of situations were given such as people admitted at Accident and Emergency in a state of intoxication or children or elderly who may not necessarily realise that those who are caring for them have secondary motives rather than their care. The development of these protocols or/and legislation need to be formulated with a multidisciplinary perspective to include a holistic approach. It was also suggested to look at the mechanisms which are being practised in other countries such as the advanced directives or public guardian office. Some participants suggested that professional front-liners dealing with such vulnerable population need to be adequately trained and knowledgeable on rights and ethical issues whilst they are backed by a sound legal framework to enable them to do their duties well.