

# MALTA

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**Updated: October 2009**

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# Contents

<b>Executive summary</b> .....	5
<b>1. Definitions</b> .....	8
<b>1.1. Terms used in National Legislation</b> .....	8
1.2 Meaning within the National Context.....	12
<b>2. Anti-discrimination</b> .....	15
<b>2.1. Incorporation of United Nations standards</b> .....	15
<b>2.2. The anti-discrimination national framework</b> .....	15
2.2.1. Anti-discrimination/equality rules in respect of persons with mental disorders and persons with intellectual disability.....	15
2.2.2. Preferential Treatment arrangements in respect of persons with mental disorders and persons with intellectual disability.....	20
2.2.3. “Reasonable Accommodation”.....	24
2.2.4. Equality body competent to deal with cases of discrimination on grounds of intellectual disability.....	26
<b>3. Specific Fundamental Rights</b> .....	28
<b>3.1. The Right to life</b> .....	29
<b>3.2. The right to freedom from torture or cruel, inhuman or     degrading treatment or punishment</b> .....	31
<b>3.3. The right to freedom from exploitation</b> .....	35
<b>3.4. The right to liberty and security</b> .....	36
<b>3.5. The right to fair trial</b> .....	39
<b>3.6. The right to privacy, including the access to one’s own     confidential medical records</b> .....	43
<b>3.7. The right to marry, to found a family and to respect of family life</b> 45	
<b>3.8. The right to have children and maintain parental rights</b> .....	46
<b>3.9. The right to property</b> .....	47
<b>3.10. The right to vote</b> .....	48
<b>4. Involuntary placement and Involuntary Treatment</b> .....	50

<b>4.1. Legal Framework.....</b>	<b>52</b>
4.1.1. Legal Framework regulating involuntary placement and involuntary treatment: Scope, Date of Adoption and Proposed Amendments.....	52
4.1.2. Distinction between involuntary placement and involuntary treatment	53
4.1.3. Involuntary placement without treatment.....	54
4.1.4. Aims pursued by the relevant legal framework.....	55
4.1.5. Legal provision for aftercare following involuntary placement or treatment	55
4.1.6. Regulation for involuntary treatment of children and young adults	56
4.1.7. Involuntary placement for certain groups of patients.....	57
<b>4.2. Criteria and Definitions.....</b>	<b>59</b>
4.2.1. Criteria to be fulfilled by law to order an involuntary placement or involuntary treatment.....	59
4.2.2. Less intrusive alternatives.....	60
4.2.3. Involuntary treatment and patient’s opinion.....	61
4.2.4. Definition of risk level of danger.....	61
<b>4.3. Assessment, Decision Procedures and Duration.....</b>	<b>62</b>
4.3.1. Authority deciding on Involuntary Placement.....	62
4.3.2. Number of expert opinions required for the assessment of the psychiatric condition.....	62
4.3.3. Expertise of the medical staff involved in the decision procedure for involuntary placement.....	63
4.3.4. Authority deciding the termination of involuntary placement/treatment.....	64
4.3.5. Procedure when voluntary placement becomes involuntary.....	64
4.3.6. Maximum period between psychiatric assessment and beginning of the compulsory placement.....	65
4.3.7. Duration in emergency situations.....	66
4.3.8. Maximum duration of initial placement.....	66
4.3.9. Legally regulated coercive measures.....	67
4.3.10. Other coercive measures.....	69
4.3.11. Reviews and appeals concerning the lawfulness of involuntary placement or treatment.....	73
4.3.12. Free legal support.....	74
<b>5. Competence, Capacity and Guardianship.....</b>	<b>74</b>
<b>5.1. “Competence” and “capacity”.....</b>	<b>75</b>
<b>5.2. Mental health related causes and legal incapacity.....</b>	<b>75</b>
<b>5.3. Degrees of Incapacity.....</b>	<b>75</b>
<b>5.4. Systems of protection of adults lacking capacity.....</b>	<b>76</b>

5.5.	Conditions for placing adults lacking capacity under the protective systems established by national law .....	77
5.6.	Minimum and maximum time limits of measures placing adults lacking capacity under a protection system .....	78
5.7.	Who may request the placing of an adult lacking capacity under a protective regime .....	78
5.8.	Jurisdiction of National Authorities .....	79
5.9.	Appeal procedures against a decision of incapacity/incompetence ...	79
5.10.	Persons or bodies appointed to implement the measures placing an adult under a system of protection.....	80
5.11.	Scope and extent of powers of the entrusted person/body .....	80
5.12.	Appeal procedures against a decision of appointment of person/body entrusted to implement the system of protection .....	81
5.13.	Periodical review of the need of a guardian.....	81
6.	Miscellaneous.....	82
6.1.	Access to legal remedies.....	82
	Annexes-Case Law .....	84

# Executive summary

## Definitions

- [1]. National legislation defines ‘mental disorder’ as ‘mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind’<sup>1</sup>. On the other hand, ‘disability’ is defined as ‘a physical or mental impairment that substantially limits one or more of the major life activities of a person’.<sup>2</sup> No definition is given to the term ‘mental impairment’.

## Anti-discrimination

- [2]. Malta signed the Convention on the Rights of Persons with Disabilities and its Optional Protocol on the 30<sup>th</sup> March 2007. However, it has not ratified it. Besides protection from discrimination given in the Constitution<sup>3</sup> and under the European Convention Act<sup>4</sup>, discrimination on the ground of disability is regulated in ordinary laws, including the Persons with Disability (Employment) Act<sup>5</sup> and the Equal Opportunities (Persons with Disability) Act.<sup>6</sup>

The Equal Opportunities (Persons with Disability) Act establishes the National Commission Persons with Disability<sup>7</sup>, which is in effect the designated equality body, and has the function of, *inter alia*, receiving and investigation complaints. The Commission indicates that its remit is interpreted to cover *intellectual disability* and mental illnesses, and has in fact accepted complaints from persons with mental disability and mental health problems alike.

- [3]. The scope of the Equal Opportunities (Persons with Disability) Act is to prohibit discrimination on the ground of disability and establishes administrative measures of redress. It promotes the integration of persons with a disability in matters related to employment, education, accommodation, the provision of and access to goods and services and facilities. On the other hand,

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<sup>1</sup> Section 2, Mental Health Act, Chapter 262 of the Laws of Malta; [www.mjha.gov.mt](http://www.mjha.gov.mt)

<sup>2</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Disability) Act, Section 2; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>3</sup> Constitution of Malta; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>4</sup> Chapter 319 of the Laws of Malta; [www.mjha.gov.mt](http://www.mjha.gov.mt); giving direct applicability to the European Convention for the Protection of Human Rights and Fundamental Freedoms within the national legislative and judicial framework.

<sup>5</sup> Chapter 210 of the Laws of Malta, The Persons with Disability (Employment) Act; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_5/chapt210.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_5/chapt210.pdf)

<sup>6</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Disability) Act; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>7</sup> National Commission for Persons with Disability; <http://www.knpd.org/>

the Persons with Disability (Employment) Act aims at increasing access to employment for persons with disability.

## Specific fundamental rights

- [4]. No case-law is available which determines the level of protection of fundamental rights in relation to persons with mental illness. The specific legislation which is currently in force and which deals with public mental health is the Mental Health Act<sup>8</sup>. No specific reference or declaration of rights of mentally ill patients is found therein. However, this legislation is under review and the draft Mental Health Act<sup>9</sup> specifically provides for the rights of patients within the public healthcare system for the mentally ill.
- [5]. An analysis of the current Mental Health Act and mental hospital protocols<sup>10</sup> does not indicate an interference with a patient's right to life, especially when one considers that such right excludes a right to die; on the other hand, the draft Mental Health Act makes specific reference to this right, refers to the protection of integrity of the person, as well as places emphasis on the requirement of informed consent for treatment. Other than freedom from exploitation, the current Mental Health Act does not refer or provide for freedom from torture, cruel, inhuman or degrading treatment or punishment; the draft legislation, on the other hand, specifically recognises this as a patient's right as well as establishes a new offence punishable with a fine where seclusion or restraint is prolonged beyond the period necessary, used as a punishment or used for the convenience of staff. While the current legislation regulates the manner in which the liberty of a person with mental illness may be restricted to provide admission into a hospital for observation and treatment purposes, the draft legislation also caters for forced community care. In assessing the right to fair trial, especially before the Mental Health Review Tribunal, it is noted that, while the draft legislation specifically allows for legal representation, the Mental Health Act in force does not do so. Privacy of the person is only protected within the Mental Health Act in force in the sense of suggesting the interview and examination of the patient to be held in private; however, the draft legislation also provides for privacy of correspondence and receiving visitors in private during their stay in hospital. Contracting civil or religious marriage is subject to valid consent being given and there seems to be impediments under both civil law and canon law in respect of persons who are

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<sup>8</sup> Chapter 262 of the Laws of Malta; [www.mjha.gov.mt](http://www.mjha.gov.mt)

<sup>9</sup> The authors have obtained from the Ministry of Social Policy a hard copy of the Bill to amend the Mental Health Act, however this is not publicly available. Since stark differences are identified between the Act currently in force and the draft Bill, the authors have considered it important to present both situations.

<sup>10</sup> The authors have received a hard copy of these Protocols from the Administration of the public mental health institute, Mount Carmel Hospital. However no reference to a soft copy can be made as these are not available online. The general website of this hospital is: [http://www.health.gov.mt/health\\_services/hospitals/mch.htm](http://www.health.gov.mt/health_services/hospitals/mch.htm)

of 'infirm' mind whether these are interdicted or not, and those who due to psychological reasons are unable to assume the essential obligations of marriage. Parental rights may be lost in a number of circumstances which may be consequent to a person having a mental illness. While, in theory, the right to property is not limited, it is only the curator who may administer one's property when a person is interdicted or incapacitated on the basis of mental infirmity or being of unsound mind.

## Involuntary placement and involuntary treatment

- [6]. Contrary to the Mental Health Act<sup>11</sup> in force, which regulates involuntary placement and involuntary treatment, the draft Mental Health Bill adopts the perspective of patients' rights and consequently provides different nuances in the regulation it proposes. Under the current legislation, a person may be admitted for observation or treatment if the patient is suffering from mental disorder of a nature or degree warranting hospital detention, given that such detention is necessary, 'in the interests of his own health or safety or with a view to the protection of other persons.'<sup>12</sup> The draft legislation, on the other hand, lays down more concrete requirements, including certification by a medical officer that the person has a severe mental disorder, that there is a serious likelihood of immediate harm to that person or to others and that failure to admit or detain would lead to a serious deterioration in his/her condition.<sup>13</sup>

## Competence, capacity and guardianship

- [7]. Provisions within Maltese law concerning legal incapacity refer to persons who are in a state of imbecility or other mental infirmity, or who are habitual idiots, insane, frenzied or prodigal. Civil law provides for interdiction or incapacitation which removes the power of administering one's property from the person and vests it in a curator. The effects of interdiction or incapacitation stop when the cause of the court's order ceases. When issuing an interdiction or incapacitation order or when revoking such original decree, the court heavily relies on the certificate provided by a medical doctor who must confirm his opinion on oath. The review or revocation of an order of interdiction or incapacitation is not systematic and automatic, but depends on the court receiving an application seeking such review of revocation

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<sup>11</sup> Chapter 262 of the Laws of Malta, Mental Health Act:  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>12</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 14(2):  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>13</sup> Mental Health Bill (Draft September 2009) Section 9. *This version of the Bill was provided by the Ministry of Social Policy upon request by the authors of this report. (unavailable online)*

# 1. Definitions

- [8]. The legal framework concerned with persons with mental disorders and intellectual disorders, consists of two main legislative Acts.
- [9]. The main legislation which addresses persons with mental disorders is the Mental Health Act<sup>14</sup>. Section 2 of this law defines ‘mental disorder’ as ‘mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind.’ The aim of the law is to set up a legislative framework for the provision of mental health care and consequently it does not distinguish between mental disorders, or mental illnesses or intellectual disability. It further provides a definition of psychopathic disorder as ‘a persistent disorder or disability of mind (whether or not including sub normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient, and requires or is susceptible to medical treatment’.<sup>15</sup>
- [10]. Although definitions of the term ‘Persons with intellectual disability’ are not provided for within Maltese law, the Equal Opportunities (Persons with disabilities) Act defines ‘disability’ as ‘a physical or mental impairment that substantially limits one or more of the major life activities of a person’.<sup>16</sup> Given that the term ‘disability’ is here described in functional rather than causal terms, this definition has been interpreted, also by the National Commission Persons with Disability<sup>17</sup>, as including both persons with intellectual disabilities and persons with mental disorders.

## 1.1. Terms used in National Legislation

- [11]. Yet, other terms are often used in other areas of law which also address care and rights of persons with mental disorders or with intellectual disability. A stakeholder that deals with persons with mental disorders or persons with intellectual disability is the Child Development Assessment Unit<sup>18</sup>. This Unit is set up under the Ministry of Health but strongly collaborates with the Directorate for Educational Services in order to identify the particular

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<sup>14</sup> Chapter 262 of the Laws of Malta, Mental Health Act; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>15</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 2; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>16</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Disability) Act, Section 2; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>17</sup> This was confirmed in writing by the Executive Director of the National Commission Persons with Disability, Mr. Alfred Bezzina, upon request specifically made in relation to this report. (Sep 09)

<sup>18</sup> Child Development Assessment Unit; [www.education.gov.mt](http://www.education.gov.mt)



educational needs of students with special needs and recommends the service and whether support is needed. However, the terminology is here not defined and terms used are students 'with special needs' or students 'with a disability' or students 'with an impairment'. The Policy regarding students with a disability implementing Inclusive Education as issued by the Ministry of Education in 2000<sup>19</sup> does not define the terminology used, but states that 'All students with an impairment that interferes with their educational progress are eligible for an IEP'.<sup>20</sup> Furthermore, the assessment carried out under the Inclusive Education policy is one that must consider 'the main areas of concern, namely physical, sensorial, mental/cognitive, communicative, behavioural and social.'<sup>21</sup> This indicates that even in this area of health and education care, the service is provided to an all-encompassing array of mental health and intellectual disability situations.

[12]. It is also interesting to note that under the Social Security Act<sup>22</sup>, a pension is given to persons suffering from a disability and distinctly to 'severely disabled person'. The term 'severely disabled person' is defined in Section 2 of the Social Security Act as a person who still has a reasonable expectancy of life and who is incapable of supporting himself through full-time employment or self-occupation, or who will be rendered so incapable when of age to do so, owing to a permanent disability arising from –

*(a) total deaf mutism; or*  
*(b) achondroplasia, hypopituitarism, osteogenesis imperfect or other forms of dwarfism; or (c) one of the following diseases, namely:*  
*Multiple Sclerosis*  
*Muscular Dystrophy*  
*Spina Bifida*  
*Systemic Lupus Erythematosus*  
*Haemophilia or any other similar permanent disorder of the blood characterised by chronic or repeated bleeding*  
*Hydrocephalus*  
*Huntington's Chorea*  
*Cystic Fibrosis*  
*T C II Deficiency;*  
*Cerebellar Ataxia;*  
*Chronic-Granulomatous Disease;*  
*Leopard's Syndrome; or*

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<sup>19</sup> Ministry of Education (Ministerial Committee on Inclusive Education), 'Inclusive Education. Police regarding Students with a Disability', 15 July 2007; [http://www.education.gov.mt/ministry/doc/pdf/policy\\_on\\_inclusion\\_of\\_students\\_with\\_disability\\_of\\_mcie.pdf](http://www.education.gov.mt/ministry/doc/pdf/policy_on_inclusion_of_students_with_disability_of_mcie.pdf)

<sup>20</sup> *Ibid*, Section 4. Note: IEP is defined as 'Individualised Education Programme'

<sup>21</sup> *Ibid*, Section 16

<sup>22</sup> Chapter 318 of the Laws of Malta, Social Security Act, [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt318.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt318.pdf)

*(d) permanent total paralysis or permanent total severe malfunction or permanent total disease, whether through amputation or otherwise, of both upper or lower limbs; or*  
*(e) epilepsy with a frequency of attacks exceeding four per month, which condition is confirmed by appropriate investigations including an electroencephalogram and so certified by a Government neurologist or psychiatrist provided that the person concerned is not in possession of a driving licence; or*  
*(f) congenital indifference to pain.*<sup>23</sup>

[13]. Moreover, the same legislation does provide a pension for those certified to be suffering from a ‘mental severe subnormality or to be a severely disabled person ... or to be suffering from cerebral palsy’<sup>24</sup> It defines ‘mental severe subnormality’ as ‘arrested or incomplete development of mind, resulting in marked lack of intelligence which in turn renders the person affected incapable of living an independent life or of guarding himself against serious exploitation or will render him so incapable when of age to do so’.<sup>25</sup> Yet in section 26 the Social Security Act provides for an invalidity pension for such persons who have been incapable for suitable full-time or regular part-time employment or self-occupation by reason of a serious disease or bodily or mental impairment (other than mild mental disorder or mental impairment).<sup>26</sup> The Act also provides for social assistance to persons who suffer from mental infirmity but does not in any way define these terms, often depending on the assessment of a certified medical practitioner specialising in the field of the impairment or infirmity or disability that is being claimed.<sup>27</sup>

[14]. In regulating civil life and civil transactions, the Civil Code<sup>28</sup> does use the terms of ‘mental infirmity’ and ‘mental disability’. However, it does not provide definitions in such regard. In regulating interdiction or incapacitation of a person, the law allows this to take place where a person is ‘in a state of imbecility or other mental infirmity or is prodigal’<sup>29</sup>. With regard to the setting up of trusts, the Civil Code uses the terms, ‘the beneficiary is subject to a mental or physical disability which renders him incapable of sustaining

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<sup>23</sup> Chapter 318 of the Laws of Malta, Social Security Act, Section 2;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt318.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt318.pdf)

<sup>24</sup> Chapter 318 of the Laws of Malta, Social Security Act, Section 27;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt318.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt318.pdf)

<sup>25</sup> Chapter 318 of the Laws of Malta, Social Security Act, Section 2;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt318.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt318.pdf)

<sup>26</sup> Chapter 318 of the Laws of Malta, Social Security Act, Section 26(1)(a);  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt318.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt318.pdf)

<sup>27</sup> Chapter 318 of the Laws of Malta, Social Security Act, Section 30(8)  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt318.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt318.pdf)

<sup>28</sup> Chapter 16 of the Laws of Malta, Civil Code, Sections 189(1), 189(3), 958B(11), 958B(14);  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_2/chapt16.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt16.pdf)

<sup>29</sup> Chapter 16 of the Laws of Malta, Civil Code, Section 189(1)  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_2/chapt16.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt16.pdf)

himself<sup>30</sup>. When further regulating interdiction or incapacitation the Code of Organisation and Civil Procedure<sup>31</sup> speaks of cases of ‘idiocy or other mental infirmity’ without defining either term. In regulating who is capable of making a will and thereby regulating one’s testamentary dispositions, civil law provides that it is those who are sane of mind who can validly make a will. Although the Civil Code does not define who falls within the definition of ‘sane of mind’, the term has been defined through case-law which is being analysed in sub-section 1.3 of this report.

[15]. Within the criminal legislative framework, the term most commonly used is that of ‘mental infirmity’ whether this is the condition of the victim at the time of the commission of the crime, or the condition of the perpetrator at the time of the commission of the crime or during the criminal process and also as to the type of suffering produced by the crime.<sup>32</sup> However, the Criminal Code also uses the term ‘mental derangement’ when describing the harm that is caused to the victim<sup>33</sup>; the term ‘mental excitement’ when referring to condition of the perpetrator at the moment of carrying out the crime<sup>34</sup>; the term ‘mental defect’ when excluding persons who may serve as jurors<sup>35</sup>; and, the term ‘insanity’ when referring to the position of the accused at the moment of commission of the offence<sup>36</sup>.

[16]. The Persons with Disability (Employment) Act<sup>37</sup> provides a definition of a ‘person with disability’ as being:

*‘a person, being over compulsory school age, who, by reason of injury, disease, congenital deformity or other physical or mental incapacity, is substantially handicapped in obtaining or keeping employment or in undertaking work on his own account, of a kind which apart from that injury, disease, deformity or incapacity would be suited to his age, experience and qualifications; and the*

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<sup>30</sup> Chapter 16 of the Laws of Malta, Civil Code, Section 258B (11); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_2/chapt16.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt16.pdf)

<sup>31</sup> Section 521(d) of the Code of Organisation and Civil Procedure, Chapter 16 of the Laws of Malta; [www.mjha.gov.mt](http://www.mjha.gov.mt)

<sup>32</sup> Chapter 9 of the Laws of Malta, Criminal Code, Sections 201, 216(1)(iv), 216(1)(d), 218(1)(a), 218(2), 222A(1), 276A, 543, 604(3); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt9.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt9.pdf)

<sup>33</sup> Chapter 9 of the Laws of Malta, Criminal Code, Section 214 ; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt9.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt9.pdf)

<sup>34</sup> Chapter 9 of the Laws of Malta, Criminal Code, Section 227(c) ; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt9.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt9.pdf)

<sup>35</sup> Chapter 9 of the Laws of Malta, Criminal Code, Section 603(4)(c); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt9.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt9.pdf)

<sup>36</sup> Chapter 9 of the Laws of Malta, Criminal Code, Sections 33, 402, 488, 620; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt9.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt9.pdf)

<sup>37</sup> Chapter 210 of the Laws of Malta, The Persons with Disability (Employment) Act; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_5/chapt210.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_5/chapt210.pdf)

*word ‘disability’, in relation to any person, shall be construed accordingly’.*<sup>38</sup>

- [17]. In essence, therefore, in regulating the provision of vocational guidance services, vocational training courses, industrial rehabilitation courses and disablement resettlement services, it seems that no distinction is made between those who are classified as having a ‘mental disorder’ and those having an ‘intellectual disability’.

## 1.2 Meaning within the National Context

- [18]. Stakeholders in the field of mental health do, however, distinguish between persons with mental disorders and persons with intellectual disability. This is more so with non-governmental organisations (NGOs) working in this sector, who often restrict their work to one of the groups included in these terms. In this respect, the Mental Health Association<sup>39</sup> is an NGO working for the families and users of mental health services. Its main aim is to reduce stigma associated with mental illness and assist persons who are mentally ill and their relatives. Representatives of this NGO have informed the authors of this report that as an NGO they do not address the situation of persons with intellectual disabilities or learning disabilities, unless these persons develop a mental illness.<sup>40</sup> On the other hand, an NGO named Equal Partners Foundation<sup>41</sup>, specialises in providing individualised support programmes to persons with intellectual disabilities and/or learning difficulties; but, does not cater for persons with mental disorders. The Richmond Foundation<sup>42</sup> provides community services for persons with mental health difficulties including mental illnesses and persons (especially children) with challenging behaviour, but not persons with intellectual disabilities.
- [19]. Stakeholders do not explicitly define ‘mental disorder’ or ‘intellectual disability’ or ‘learning difficulty’ and the other terms generally used in the sector. They, however, share a common understanding by applying either the Diagnostic and Statistical Manual of Mental Disorders<sup>43</sup> or the International

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<sup>38</sup> Chapter 210 of the Laws of Malta, The Persons with Disability (Employment) Act, Section 2 [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_5/chapt210.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_5/chapt210.pdf)

<sup>39</sup> The Mental Health Association does not itself have a website. However, its details are listed on the website of EUFAMI, [www.eufami.org/index.php?option=com\\_membrsdsc&Itemid=130&titleid=23&task=view&id=40](http://www.eufami.org/index.php?option=com_membrsdsc&Itemid=130&titleid=23&task=view&id=40)

<sup>40</sup> Information provided at a meeting held by the authors of this report with representatives of the Mental Health Association on the 22<sup>nd</sup> of September 2009.

<sup>41</sup> [www.equalpartnersmalta.org](http://www.equalpartnersmalta.org)

<sup>42</sup> [www.richmond.org.mt](http://www.richmond.org.mt)

<sup>43</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM VI-TR)* <http://www.psych.org/mainmenu/research/dsmiv/dsmivtr.aspx>

Classification of Diseases<sup>44</sup>. Yet, there does not seem to be a common acceptance of one classification above another, with each stakeholder often choosing the classification preferred by it in implementing its work. It has been brought to our attention by persons working in the field that the public mental health care services generally follow the ICD-10 classification.

### 1.3 Definitions through relevant case-law

- [20]. A number of judicial or administrative tribunals are in a position to clarify and develop the definitions of the terms ‘mental disorder’ and ‘intellectual disability’. The Civil Courts are entrusted with jurisdiction over allegations of discrimination on the basis of disability<sup>45</sup>, while the Industrial Tribunal is entrusted with jurisdiction over claims of discrimination in employment on grounds of disability<sup>46</sup>. The Equal Opportunities (Persons with Disability) Act<sup>47</sup> also establishes a National Commission Persons with Disability which has the function to investigate any allegation of discrimination on the grounds of disability. These three tribunals, together with the courts having a constitutional jurisdiction to review discriminatory claims under the Constitution<sup>48</sup> or under the European Convention Act<sup>49</sup> all have the opportunity to explore the concepts of ‘mental disorder’ and ‘intellectual disability’ in the field of discrimination. However, while the Civil Courts have only considered cases of physical access, the conclusions of investigation carried out by the National Commission Persons with Disability are not publicly available. With regard to the Industrial Tribunal, the authors of this report were informed by its administration that while no claims have so far been made to it by persons with mental disorders or intellectual disabilities, a case is currently pending before the Tribunal that relates to a person with down-syndrome.
- [21]. Yet, the concept has been defined in case-law with regard to a person’s facility to provide for the administration or division of his inheritance. In this regard, however, the definition provided by the Court (in *Carmela Bartolo et v. Giuseppa Spiteri et*, 1958<sup>50</sup>) states that not all forms of mental infirmity render a person incapable of doing a will, but only that psychopathic state because of

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<sup>44</sup> World Health Organisation, International Classification of Diseases (ICD-10), 2007; <http://apps.who.int/classifications/apps/icd/icd10online/>

<sup>45</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Persons with Disability) Act, , Sections 33 and 34; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>46</sup> Chapter 452 of the Laws of Malta, Industrial and Employment Relations Act, Sections 26 and 30, [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_14/chapt452.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_14/chapt452.pdf)

<sup>47</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Persons with Disability) Act, Section 21; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>48</sup> Constitution of Malta; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>49</sup> Chapter 319 of the Laws of Malta, European Convention Act; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt319.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf)

<sup>50</sup> *Carmela Bartolo et v. Giuseppa Spiteri et*, First Hall of the Civil Court, 7<sup>th</sup> June 1958

which the testator does not have a notion of rights and obligations, and does not understand the importance and consequences of his actions. The Court held that if a person, at the time of making a will, does not have the capacity of will and volition in such a manner that the will does not mirror his conscience and will, that person is therefore incapable at law to do a will.<sup>51</sup> Another judgment also stated that ‘the law admits considerable latitude in interpretation as to the mental state of one to be capable of having a will. The validity of a will has successfully been argued even where the testator’s mental faculties were ‘a priori’ dubious, provided the testator is shown to have sufficient intelligence, even if this is inferior to the average, in the legal administration of one’s own assets.’<sup>52</sup> Another judgment explained this as ‘For a testator to be capable of doing a will he does not need to be perfectly and vigorously sane, but it is sufficient that he has the use of reason in such a level that permits him to know what he is doing.’<sup>53</sup>

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<sup>51</sup> ‘Il-ligi tirrendi inkapaci li jagħmel testament lil dak li, għalkemm mhux interdett, ma jkun f’ sensieh fiz-zmien tat-testment. Pero, mhux kull infermita mentali tirrendi inkapaci li wiehed jagħmel testament, imma stat psikopatiku tali li minhabba fih it-testatur ma jkollux nozzjoni tad-drittijiet u doveri tieghu, u ma jkunx jikkomprenzi l-importanza u l-konsegwenzi tal-azzjonijiet tieghu; u hekk hu nkapaci min filwaqt tat-testment, minhabba fl-infermita mentali, ma jkollux l-intendiment u l-volonta, u b’dan il-mod it-testment ma jkunx jirrispekkja l-kuxjenza u l-volonta tat-testatur.’ [Translated version: ‘The renders incapable of doing a will that person who although interdicted is of unsound mind at the time the will is done. However, not all mental infirmities render one incapable of making a will, but that psychiatric state due to which the testator does not have a notion of his rights and obligations and does not understand the importance and consequences of his actions; consequently one is incapable who at the time of making the will lacks intention and volition due to mental infirmity and in this manner the will does not reflect the conscience and will of the testator.’ Carmela Bartolo et v. Giuseppa Spiteri et, First Hall of the Civil Court, 7<sup>th</sup> June 1958

<sup>52</sup> ‘Il-ligi tammetti latitudini konsiderevoli fl-interpretazzjoni ta’ l-istat mentali in kwantu jirriferrixxi ruħ għall-kapacita testamentarja. U giet sostnuta b’succs il-validita ta’ testament magħmul minn persuna li kienet ‘a priori’ turi kapacita dubbja, imma li gie pruvat li kellha intelligenza sufficjenti, għalkemm inferjuri għall-medja, għall-ezercizzju legali tad-disposizzjoni ta’ hwejjigha.’ Carmelo Mifsud et v. Maria Giordano et, First Hall of the Civil Court, 8<sup>th</sup> March 1952 (Translated version: The law allows for a considerable latitude in the interpretation of one’s mental state when referring to testamentary capacity. The validity of a will done by a person who had ‘a priori’ indicated dubious capacity has been successfully substantiated by providing that that the person had sufficient intelligence, even if inferior to the average, to exercise his legal rights of disposing of his assets.’

<sup>53</sup> ‘Illi biex it-testatur ikun kapaci jagħmel testament ma hemmx bzonn li jkun perfettament u vigorozivament san minn mohhu, imma huwa bizzejjed li jkollu l-uzu tar-raguni fi grad tali li jippermettilu jkun jaf x’ inhu jagħmel;’ Joseph Vassallo et v. Avv. Dr Victor R. Sammut et noe, Court of Appeal (Civil) 21<sup>st</sup> April 1950 (Translated version: For a testator to be capable of doing a will it is not necessary that he be perfectly and vigorously mentally sane, but it is sufficient that he has the use of reason in such grade that permits him to know what he is doing.’

## 2. Anti-discrimination

### 2.1. Incorporation of United Nations standards

- [22]. Malta signed the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol on the 30<sup>th</sup> of March 2007. However, it has not ratified the Convention yet, and this situation seems to be the consequence of two issues.<sup>54</sup> One relates to the right to health and particularly the phrase ‘sexual and reproductive health’ in Article 25(a) of the Convention, which Malta interprets as not constituting recognition of any abortion rights. Another reservation relates to Article 29 (a)(i) and (iii) of the Convention, where Malta reserves the right to continue to apply its own election laws concerning voting procedures, facilities and materials, as well as in terms of assistance to persons with disabilities within such voting procedures. However, it is noteworthy to mention that the ratification of the CRPD has been listed as one of the main priorities within Malta’s National Strategy Report on Social Protection and Social Inclusion 2008-2010.<sup>55</sup>

### 2.2. The anti-discrimination national framework

#### 2.2.1. Anti-discrimination/equality rules in respect of persons with mental disorders and persons with intellectual disability

- [23]. Article 45 of the Constitution of Malta<sup>56</sup> refers to the prohibition of discrimination. It is noteworthy to mention that this Article, however, does not list disability as a ground for discrimination and only defines ‘discriminatory’ as meaning ‘affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of one such description are

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<sup>54</sup> United Nations, *Enable Rights and Dignity of Persons with Disabilities*. Declarations and Reservations; <http://www.un.org/disabilities/default.asp?id=475>

<sup>55</sup> National Strategy Report on Social Protection and Social Inclusion 2008-2010 - Malta (2008); [http://ec.europa.eu/employment\\_social/spsi/strategy\\_reports\\_en.htm](http://ec.europa.eu/employment_social/spsi/strategy_reports_en.htm)

<sup>56</sup> Constitution of Malta; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description'. However, any law and any action which amounts to discrimination or discriminatory treatment under the European Convention for the Protection of Human Rights and Fundamental Freedoms, as brought into effect within national law through the European Convention Act<sup>57</sup>, may be declared in violation of such Convention. The difficulty that here arises is that under the European Convention, a claim for discrimination will require a link with any of the other substantive rights recognised within the Convention, since Malta has not signed Protocol Number 12<sup>58</sup> which deals with discrimination as a right in itself.

- [24]. The principle of equal employment opportunities for persons with disabilities was introduced with the 1969 Employment (Handicapped Persons) Act – now known as the Persons with Disability (Employment) Act<sup>59</sup>. This law provides a legislative framework within which the Minister responsible for labour is to provide and make arrangements for the provision of vocational guidance services, vocational training courses, industrial rehabilitation courses and disablement resettlement services for persons with disabilities which includes persons who are over compulsory school age and who,

*'by reason of injury, disease, congenital deformity or other physical or mental incapacity, is substantially handicapped in obtaining or keeping employment or in undertaking work on his own account, of a kind which apart from that injury, disease, deformity or incapacity would be suited to his age, experience and qualifications'*.<sup>60</sup>

- [25]. Moreover, this Act may be said to provide for a 'preferential treatment arrangement' in that it provides for a quota system. Employers, who fall outside the category of SMEs, are obliged to employ persons who are registered on the register of disabled persons and which includes persons with mental disabilities<sup>61</sup>.

- [26]. Malta introduced specific legislation to address discrimination on the grounds of disability in 2000 with the bringing into force of The Equal Opportunities

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<sup>57</sup> Chapter 319 of the Laws of Malta, European Convention Act;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt319.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf)

<sup>58</sup> Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>

<sup>59</sup> Chapter 210 of the Laws of Malta, The Persons with Disability (Employment) Act;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_5/chapt210.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_5/chapt210.pdf)

<sup>60</sup> Chapter 210 of the Laws of Malta, The Persons with Disability (Employment) Act, Section 2;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_5/chapt210.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_5/chapt210.pdf)

<sup>61</sup> Chapter 210 of the Laws of Malta, The Persons with Disability (Employment) Act, Section 5;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_5/chapt210.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_5/chapt210.pdf)



(Persons with Disability) Act, 2000.<sup>62</sup> Although this legislation may be seen as implementing principles established in Council Directive 2000/78/EC, yet it does not specifically state so and stark differences are noticeable when comparing this legislation to the Directive.

- [27]. The purpose of the Equal Opportunities (Persons with Disability) Act, 2000 is to provide equal opportunities for persons with disability in a number of areas of social life. Disability discrimination is defined as unfavourable treatment because of a person's disability, because of non-compliance with a requirement or condition which is unreasonable in the circumstances of the case<sup>63</sup>, or because of a person's use of auxiliary aids or assistance<sup>64</sup>.
- [28]. Part III of the Equal Opportunities (Persons with Disability) Act defines the scope of disability discrimination. The Act states that the prohibition of disability discrimination applies in the areas of **employment** (Part III, Title I), **education** (Part III, Title II) and in the **provision of goods, facilities and services**. The latter is inclusive of, *inter alia*, housing and services of any profession or trade, or of any local or other public authority<sup>65</sup> (including health care).
- [29]. Section 2 of the Act defines 'disability' as 'a physical or mental impairment that substantially limits one or more of the major life activities of a person'. It also defines 'impairment' in the context of disability as meaning 'any loss, restriction or abnormality of psychological, physiological, or anatomical structure or function'<sup>66</sup>. This is the same definition given by the World Health Organization (WHO).<sup>67</sup>
- [30]. Although the term 'mental impairment' is not specifically defined by the Equal Opportunities (Disability) Act, the term has been interpreted as including persons with mental disorders. The National Commission Persons with Disability, which is regulated by this Act and which has the function of, *inter alia*, investigating complaints as may be made to it of failure to comply with

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<sup>62</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Disability) Act; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>63</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Disability) Act, Section 4 provides:  
*A person shall be discriminating against another person on the grounds of disability if such other person is required to comply with a requirement or condition with which the majority of persons who do not have the disability comply or are able to comply, and*  
*(a) which is unreasonable in the circumstances of the case; and*  
*(b) with which such other person does not comply or is unable to comply.*

<sup>64</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Persons with Disability) Act, Sections 5 and 6; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>65</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Persons with Disability) Act, Sections 13(2) (b) and (i); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>66</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Persons with Disability) Act, Sections 2; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>67</sup> World Health Organisation, *International classification of impairments, disability and handicaps, A manual of classification relating to the consequence of disease*, Geneva: WHO, 1980.

any provision of this Act, has accepted complaints from persons with mental health problems<sup>68</sup>.

- [31]. However, this legislation does not specifically provide for definitions of discrimination as including direct and indirect discrimination, harassment and instruction to discriminate. On the other hand, it is only in this legislation that discrimination by association is specifically prohibited within the national anti discrimination legislative framework. Although this legislation provides for the concept of reasonable accommodation by the employer yet it does not use the terminology of the Directive and provides that,

*'an employer shall be considered to discriminate on the grounds of disability against a person as is referred to therein, if such employer unreasonably - ...  
(d) fails to make reasonable accommodation for the disability of such a person, unless the employer can prove that the required accommodation would unduly prejudice the operation of the trade or business run by such employer'*<sup>69</sup>.

- [32]. To this effect therefore, while the National Commission Persons with Disability is the designated equality body and has the functions as listed in the Directive, the law that sets it up and gives it its powers and functions and also its remit, is not the transposing law. This may create difficulties of full and effective implementation of the Directive by the designated equality body.

- [33]. There is another law which also regulates discriminatory treatment on the ground of disability – however, only insofar as employment is concerned.. The Employment and Industrial Relations Act<sup>70</sup>.defines 'discriminatory treatment' as,

*'any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association.'*<sup>71</sup>

- [34]. While this legislation does not define direct or indirect discrimination, yet it includes protection from harassment, sexual harassment and also victimisation without distinction between grounds. Moreover, it gives a victim of

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<sup>68</sup> This was confirmed in writing by the Executive Director of the National Commission Persons with Disability, Mr. Alfred Bezzina, upon request specifically made in relation to this report. (Sep 09)

<sup>69</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Persons with Disability) Act, Sections 7(2)(d); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>70</sup> Chapter 452 of the Laws of Malta, Industrial and Employment Relations Act, [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_14/chapt452.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_14/chapt452.pdf)

<sup>71</sup> Chapter 452 of the Laws of Malta, Industrial and Employment Relations Act, Section 2, [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_14/chapt452.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_14/chapt452.pdf)

discrimination access to the Industrial Tribunal, an administrative tribunal empowered to preside over proceedings instituted against employers where discrimination or discriminatory treatment is alleged by the applicant even on the ground of disability.<sup>72</sup>

- [35]. The law that specifically transposed Directive 2000/78/EC is Legal Notice 461 of 2004 entitled the Equal Treatment in Employment Regulations, 2004<sup>73</sup> enacted by the Minister of Education, Youth and Employment in terms of the powers conferred upon him by the Employment and Industrial Relations Act. Although the Directive is transposed through subsidiary legislation this does not seem to carry legal implications for the effective implementation of the principles therein regulated. However, a position has been created whereby the empowering Act defines discrimination in a different manner to the subsidiary legislation made there under.
- [36]. These regulations define ‘disability’ by referring to the definition used in the Equal Opportunities (Persons with Disabilities) Act and consequently does not create any other definition in this respect. It however provides a definition of discriminatory treatment which is not found in the Directive by stating that ‘discriminatory treatment means any distinction, exclusion, restriction or difference in treatment, whether direct or indirect, on any grounds mentioned in regulation 1(3) which is not justifiable in a democratic society and includes harassment.’<sup>74</sup> Moreover, these regulations do not provide for the transposition of Article 5 of the Directive.
- [37]. Although these regulations do not themselves bring into effect preferential treatment arrangements, they do regularise the position of positive action. Otherwise, the terminology used in the Legal Notice is faithful to the terminology used in the relative Directive.
- [38]. It is expected that in 2009, the National Commission Persons with Disability (KNPD) will be launching a revised Employment Policy for consultation with all stakeholders, yet this has not as yet been issued
- [39]. In the report presented by KNPD for the years 2007 – 2008<sup>75</sup>, which is the last published report, it is indicated that the Commission has dealt with a number of complaints however most of which focus on physical disability. The report only provides a summary of the investigations and consequently no direct references or details are given. However there are two complaints therein mentioned which the authors identify as having also a bearing on persons with

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<sup>72</sup> Chapter 452 of the Laws of Malta, Industrial and Employment Relations Act, Section 30, [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_14/chapt452.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_14/chapt452.pdf)

<sup>73</sup> Equal Treatment in Employment Regulations, 2004 (Legal Notice 46 of 2004), Government Gazette of Malta No. 17,672 - 05.11.2004); [www.doi.gov.mt](http://www.doi.gov.mt)

<sup>74</sup> Equal Treatment in Employment Regulations, 2004 (Legal Notice 461 of 2004), Government Gazette of Malta No. 17,672 - 05.11.2004 - Regulation 2(1); [www.doi.gov.mt](http://www.doi.gov.mt)

<sup>75</sup> National Commission Persons with Disability, Equal Opportunities (Persons with Disability) Act 2000, 2007/2008 Report; [www.knpd.org](http://www.knpd.org)

mental disability. The first refers to children attending Church schools and who require Learning Support Assistants. In this case when the Learning Support Assistant was absent from school the child was being sent back home. Discussions have been ongoing with the Church authorities to remedy this situation however no progress is indicated in the report. Another case relates to insurance whereby an insurance service provider habitually includes a clause in the policies it offers that the insurance does not cover the disabled relatives of the person insured. The policy was being given by one of the leading banks in Malta but was underwritten by an actual insurance company. The latter confirmed that this clause was not found in its prospectus but was only included in the prospectus being given by the Bank in question. In this regard the report also indicates that no progress was registered.

## 2.2.2. Preferential Treatment arrangements in respect of persons with mental disorders and persons with intellectual disability

- [40]. Section 15 of the Equal Opportunities (Persons with Disability) Act<sup>76</sup> refers to positive discrimination and notes that nothing in the Act shall be constructed as prohibiting such positive discrimination with regard to persons who have a disability, whether in the form of: a) actions to ensure equal opportunities with other persons who do not have a disability, b) special treatment commensurate with their special needs in the provision of goods, facilities, c) services or opportunities, or grants, benefits or programmes to meet their special needs. Such actions need to be taken,

*‘with a view to the integration of such persons with other persons who do not have a disability in matters related to employment, education, accommodation, the provision of goods, services and facilities, the administration of laws and their capacity to lead an independent life within the community as a whole.’<sup>77</sup>*

- [41]. The Employment (Handicapped Persons) Act 1969, now known as Persons with Disability (Employment) Act<sup>78</sup>, aimed at increasing the number of disabled people active in the labour market by establishing that a percentage of those employed within private or public entities were on the Employment Training

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<sup>76</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Persons with Disability) Act; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>77</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Persons with Disability) Act, Section 15; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>78</sup> Chapter 210 of the Laws of Malta, The Persons with Disability (Employment) Act; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_5/chapt210.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_5/chapt210.pdf)

Corporation (the state employment agency) unemployed disabled register<sup>79</sup>. The Act stipulates that local entities employing more than 20 people shall ensure that 2%<sup>80</sup> of their workforce is taken from among those disabled people whose name appears on the ETC's register of disabled unemployed persons. However, this quota system has had little effect on the employment rates of disabled people within the open labour market<sup>81</sup> (including persons with intellectual disability).

[42]. In 2000, the Ministry of Education, through the Ministerial Committee on Inclusive Education, issued a policy statement concerning the procedure adopted for the Individual Education Programme (IEP) for students with special needs. The policy document, entitled 'Inclusive Education Policy regarding students with disabilities',<sup>82</sup> consists of a policy consolidating the strategy for the inclusion of physically and intellectually disabled children in mainstream schools. Furthermore, in 2002, guidelines for special examination arrangements for candidates with particular requirements were issued<sup>83</sup>. These guidelines, which were amended in 2007, also seem to cover persons with intellectual disability as well as persons with mental disorders<sup>84</sup>. Special arrangements are made for compulsory education examinations and beyond.

[43]. The Employment and Training Corporation (ETC)<sup>85</sup>, in accordance with Section 4(d)(ii) of the Employment and Training Services Act<sup>86</sup> has the function of making rules in the employment and training field, providing for special consideration to be given to applicants who are disabled, infirm or incapacitated or applicants requiring physical or social rehabilitation. ETC has a section called, *The Supported Employment Section*, which supports and targets

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<sup>79</sup> Chapter 210 of the Laws of Malta, The Persons with Disability (Employment) Act, Sections 15 and 16; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_5/chapt210.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_5/chapt210.pdf). Also refer to Legal Notice 157 of 1995 – Subsidiary Legislation 210.02, Standard percentage of employment of Persons with Disability Order; <http://docs.justice.gov.mt/lom/legislation/english/subleg/210/02.pdf>

<sup>80</sup> Legal Notice 157 of 1995 – Subsidiary Legislation 210.02, Standard percentage of employment of Persons with Disability Order; <http://docs.justice.gov.mt/lom/legislation/english/subleg/210/02.pdf>

<sup>81</sup> Kummissjoni Nazzjonali Persuni B'Dizabilita' (KNPD), Report on employment of disabled people in European countries, Malta Report, submitted to the Academic Network of European Disability Experts (ANED) VT 2007/005; <http://www.disability-europe.net/content/pdf/MT%20employment%20report.pdf>

<sup>82</sup> Ministry of Education (Ministerial Committee on Inclusive Education), 'Inclusive Education. Policy regarding Students with a Disability', 15 July 2007; [http://www.education.gov.mt/ministry/doc/pdf/policy\\_on\\_inclusion\\_of\\_students\\_with\\_disability\\_of\\_mcie.pdf](http://www.education.gov.mt/ministry/doc/pdf/policy_on_inclusion_of_students_with_disability_of_mcie.pdf)

<sup>83</sup> Ministry of Education, 'Special Arrangements and Special Consideration for Candidates with Special Assessment Needs. Arrangements for Candidates with Special Needs. Guidelines.' [http://www.education.gov.mt/ministry/doc/pdf/guidelines\\_of\\_special\\_examintions.pdf](http://www.education.gov.mt/ministry/doc/pdf/guidelines_of_special_examintions.pdf)

<sup>84</sup> Ibid., refer to section of the report called 'Candidates with other Impairments/ Conditions. Request for Special Examination Arrangement, Psychological', p. 26.

<sup>85</sup> Employment and Training Corporation (ETC); <http://www.etc.gov.mt/>

<sup>86</sup> Chapter 343 of the Laws of Malta, Employment and Training Services Act, Section 4(d)(ii); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_8/chapt343.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_8/chapt343.pdf)

disadvantaged groups to enhance their capabilities to integrate into the labour market. The *Bridging the Gap* Scheme<sup>87</sup>, run by this section, is designed to support a trainee in the transition period from unemployment to employment, giving the trainee 80% of the national minimum wage. It allows the employer to evaluate the performance of the trainee in the workplace, prior to proper engagement. Furthermore, the Employment and Training Corporation is currently offering a scheme, called the Employment Aid Programme, which involves, *inter alia*, a subsidy of up to 75 per cent of wage costs for the first year and 60% for the second and third year (maximum duration of 156 weeks), to employers choosing to hire any person who is a registered disabled person and who has a recognised, serious, physical, mental or psychological impairment<sup>88</sup>. The scheme is being financed through the European Social Fund (Malta 2007-2013).

- [44]. Changes were made in December 2007 to the Social Security Act<sup>89</sup>, so as to encourage employers to recruit disabled people. The changes were such that employers employing a severely disabled person or a visually impaired person will have their national insurance for the first 156 weeks of employment refunded.
- [45]. The Social Security Act establishes the right of people with severe impairments to receive a pension if they cannot or do not earn more than the national minimum wage<sup>90</sup>. However, where a disabled person marries a non-disabled person who earns more than the national minimum wage, that person loses his entitlement for the pension.
- [46]. Section 23 of the Chapter 318 of the Social Security Act<sup>91</sup>, which concerns the provision of free medical aid by the State, *inter alia*, refers to a list of conditions and diseases in respect of which sickness assistance may be payable. This list, included in the Fifth Schedule to the Social Security Act, refers primarily to chronic conditions, and includes chronic schizophrenia. Persons suffering from the latter or from schizo-affective disorder are thus entitled to free medical aid and pharmaceuticals<sup>92</sup>. This type of entitlement is granted irrespective of the

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<sup>87</sup> Employment and Training Corporation, *Bridging the Gap*, <http://www.etc.gov.mt/site/page.aspx?pageid=2240>; [http://etc.gov.mt/docs/BRIDGING\\_the\\_gap2.pdf](http://etc.gov.mt/docs/BRIDGING_the_gap2.pdf)

<sup>88</sup> Employment and Training Corporation. Employment Aid Programme (EAP), <http://www.etc.gov.mt/site/page.aspx?pageid=2304>; <http://www.impetuseurope.com/projects/index.cfm>

<sup>89</sup> Chapter 318 of the Laws of Malta, Social Security Act, Section 15(5); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt318.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt318.pdf) – amended by Act XXXII of 2007 - An ACT to implement Budget Measures for the Financial Year 2008 and other administrative measures. *Government Gazette of Malta No. 18,169 - 31st December, 2007*; <http://www.doi.gov.mt/en/parliamentacts/2007/default.asp>

<sup>90</sup> Chapter 318 of the Laws of Malta, Social Security Act, Section 27; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt318.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt318.pdf)

<sup>91</sup> Chapter 318 of the Laws of Malta, Social Security Act, Section 23; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt318.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt318.pdf)

<sup>92</sup> <http://www.sahha.gov.mt/pages.aspx?page=649>

financial position of the patient. Unfortunately, persons suffering from illnesses such as bipolar affective disorder or chronic depression, amongst others, are not eligible for free medicine because the illnesses are not listed under the Fifth Schedule. This has meant that most of the medication being given for free is prescribed under the misdiagnosis of schizophrenia or schizo-affective disorder<sup>93</sup>. The National Commission for Mental Health Reform, when still in office, had advocated for this situation to be addressed<sup>94</sup> and recommended that the Fifth Schedule should include other mental disorders, such as bipolar affective disorder, chronic depression, chronic obsessive compulsive disorder, challenging behaviour in learning disabilities and attention deficit/hyperactive disorder (ADHD).<sup>95</sup>

[47]. The Maltese Government has prioritised the creation of employment opportunities for disadvantaged groups, including disabled persons in all its strategic documents: the National Strategic Reference Framework<sup>96</sup>, Operational Programmes I<sup>97</sup> and II<sup>98</sup>, the National Reform Programme<sup>99</sup>, the pre-budget document *A better quality of life* (2006-2010)<sup>100</sup> and the budget speech for 2008<sup>101</sup>. The National report on strategies for social protection and inclusion (2006-2008)<sup>102</sup> and more recently, the National Report on Strategies for Social Protection and Social Inclusion 2008-2010<sup>103</sup> also made various references to the case for social inclusion measures concerning persons with mental illness<sup>104</sup>.

[48]. In the budget speech for 2009, the government announced increases in children's allowances for disabled children, as well as the fact that it was acceding to a request made by parents of disabled children to exempt completely from succession tax disabled persons who inherit their ordinary

<sup>93</sup> <http://www.maltatoday.com.mt/2007/11/25/t2.html>;

<http://www.maltatoday.com.mt/2008/10/05/t13.html>

<sup>94</sup> [http://www.sahha.gov.mt/showdoc.aspx?id=474&filesource=4&file=info\\_eng\\_mhr.pdf](http://www.sahha.gov.mt/showdoc.aspx?id=474&filesource=4&file=info_eng_mhr.pdf)

<sup>95</sup> Malta Today on Sunday, 'Mass resignation threat by Mental Health Commission, 25<sup>th</sup> November 2007 [<http://www.maltatoday.com.mt/2007/11/25/t2.html>] and: Malta Today on Sunday, 'Government loses its head on mental health' 5<sup>th</sup> October 2008 [<http://www.maltatoday.com.mt/2008/10/05/t13.html>]

<sup>96</sup> The National Strategic Reference Framework, Malta, 2007-2013, December 2006; [www.finance.gov.mt](http://www.finance.gov.mt)

<sup>97</sup> Operational Programme I - Investing in Competitiveness for a Better Quality of Life, May 2007; <http://www.finance.gov.mt/image.aspx?site=MFIN&ref=OP1>

<sup>98</sup> Operational Programme II – Empowering People for more jobs and a better quality of life, May 2007; <http://www.finance.gov.mt/image.aspx?site=MFIN&ref=OP2>

<sup>99</sup> Malta's National Reform Programme 2008-2010, October 2008; <http://www.finance.gov.mt/>

<sup>100</sup> [www.finance.gov.mt](http://www.finance.gov.mt)

<sup>101</sup> Ministry of Finance, Malta, Budget Speech 2008;

<sup>102</sup> [http://www.finance.gov.mt/image.aspx?site=MFIN&ref=2008\\_speech\\_en](http://www.finance.gov.mt/image.aspx?site=MFIN&ref=2008_speech_en)  
National Report on Strategies for Social Protection and Social Inclusion 2006-2008, Malta, September 2008;

[http://ec.europa.eu/employment\\_social/spsi/docs/social\\_inclusion/2006/nap/malta\\_en.pdf](http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/2006/nap/malta_en.pdf)

<sup>103</sup> National Report on Strategies for Social Protection and Social Inclusion 2008-2010, Malta; [http://ec.europa.eu/employment\\_social/spsi/strategy\\_reports\\_en.htm](http://ec.europa.eu/employment_social/spsi/strategy_reports_en.htm)

<sup>104</sup> *Ibid*

residence when living with their parents or guardians, who transfer such residence to them *causa mortis*.<sup>105</sup>

### 2.2.3. "Reasonable Accommodation"

The Equal Opportunities (Persons with Disability) Act sets out that employers are to make "reasonable accommodation" for disabled persons, ie. 'making existing facilities used by employees readily accessible to and usable by persons with disabilities'<sup>106</sup>. It also includes restructuring jobs, instituting part-time or modified work schedules, reassigning vacant positions, acquiring or modifying equipment or devices, appropriately adjusting or modifying examinations, training materials/policies and providing qualified readers or interpreters.<sup>107</sup>

[49]. Failure of an employer to make the needed accommodation for a dependent as aforesaid, is deemed unlawful 'unless the employer can prove that the required accommodation would unduly prejudice the operation of the trade or business run by such employer'<sup>108</sup> Section 7(4) of the Equal Opportunities (Persons with Disability) Act stipulates that the factors to be considered in determining whether an accommodation would unduly prejudice the operation of the trade or business run by the employer include:

- (a) *the nature and cost of the accommodation;*
- (b) *the overall financial resources of the workplace involved in the making of the accommodation;*
- (c) *the number of employees at the workplace requiring accommodation;*
- (d) *the effect on expenses and resources and the impact of the required accommodation upon the operation of the workplace;*
- (e) *the overall financial resources of the employer;*
- (f) *the overall size of the business of the employer including the number of employees, and the number, type and location of its workplaces;*
- (g) *the type of operation or operations of the employer, including the composition, structure and functions of the work-force; and*
- (h) *the availability of financial assistance from public funds to defray the expense of any accommodation.*<sup>109</sup>

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<sup>105</sup> Ministry of Finance, Malta, Budget speech 2009, p. 77 and 80

[http://www.finance.gov.mt/image.aspx?site=MFIN&ref=2009budget\\_Budget\\_Speech\\_en](http://www.finance.gov.mt/image.aspx?site=MFIN&ref=2009budget_Budget_Speech_en)

<sup>106</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Persons with Disability) Act, Section 7(5); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>107</sup> *Ibid*

<sup>108</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Disability) Act, Section 7(2)(d); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>109</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Disability) Act, Section 7(4); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)



[50]. Furthermore, Section 20 of the same legislation<sup>110</sup> sets out a reasonableness test. This test stipulates that accommodation may be declared unreasonable only if it causes an ‘unjustifiable hardship’ on the person required to carry it out. This term carries the same meaning of the term ‘undue prejudice,’ the existence of which needs to be proven in order to consider lawful the failure to accommodate. The factors to be considered in determining whether such actions could be undertaken without unjustifiable hardship include:

- (a) the nature and cost of the actions in question;*
- (b) the overall financial resources of the person, body, authority or institution concerned and the effect on expenses and resources or the impact of such actions upon the operations of such person, body, authority or institution; and*
- (c) the availability of grants from public funds to defray the expense of the said actions.<sup>111</sup>*

[51]. In 2003, the Equal Opportunities Compliance Unit dealt with a complaint, whereby Macdonalds failed to make the necessary reasonable accommodation, so that a person with intellectual disability would be able to continue in employment.<sup>112</sup>

[52]. Despite this, however, it is not the law that specifically purports to transpose Directive 2000/78/EC that is, Legal Notice 461 of 2004, that transposes Article 5 of the Directive. In fact this Legal Notice entitled Equal Treatment in Employment does not provide for such a principle.

[53]. Section 14 of the Equal Opportunities (Persons with Disability) Act<sup>113</sup> deals specifically with the application for accommodation (outside the remit of employment) and prohibits discrimination on the basis of disability. This Section similarly refers to the exception of cases where making arrangements for access would cause “unjustifiable hardship” on the person providing or proposing to provide the accommodation whether as principal or agent.

[54]. In terms of access to the built environment, the Malta Environmental and Planning Authority (MEPA)<sup>114</sup> assigned the National Commission for Persons with Disability (KNPD)<sup>115</sup> the role of advisor with regard to issuing of permits to new building or to existing buildings that require restructuring or change of

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<sup>110</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Disability) Act, Section 20; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>111</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Disability) Act, Section 20(2) [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>112</sup> EOCU-report/2003/p.9; Kumissjoni Nazzjonali Persuni b’Dizabilità, Annual Report 2003: <http://www.knpd.org/pubs/pdf/03rapann-e.pdf>, p. 18

<sup>113</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Disability) Act, Section 14 [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>114</sup> Malta Environmental and Planning Authority; <http://www.mepa.org.mt/>

<sup>115</sup> National Commission for Persons with Disability; <http://www.knpd.org/>

use. KNPD issued its Access for All Guidelines (2000)<sup>116</sup> – amended in 2005 – to make architects and developers aware of their legal requirements in respect to buildings. These guidelines, nevertheless, deal primarily with access for persons with physical disabilities. The KNPD Test of Reasonableness board, set up in 2003, has the task of vetting development plans to determine whether they are accessible to all or not. Failure to comply with the guidelines would mean that a permit is not issued unless reasonable financial or technical reasons are put forward against making the place/building accessible.

#### 2.2.4. Equality body competent to deal with cases of discrimination on grounds of intellectual disability

- [55]. In Malta, the designated disability equality body is the National Commission Persons with Disability (KNPD)<sup>117</sup> and in this capacity is to deal with cases of discrimination on grounds of intellectual disability. KNPD is in charge of ensuring that the Equal Opportunities (Persons with Disability) Act<sup>118</sup> is observed in a reasonable manner. KNPD receives complaints from disabled persons who feel they have been discriminated against on the grounds of their disability. It investigates these complaints, seeking primarily to mediate in order to find a reasonable solution in the shortest time possible. However, where mediation is not possible, KNDP takes complaints to the Arbitration Centre or to Court<sup>119</sup>.
- [56]. Given that intellectual disability is covered by the Equal Opportunities (Persons with Disability) Act, KNPD also has the capacity to receive and investigate complaints related to discrimination on the basis of intellectual disability. KNPD also has a Consultative Committee of Persons with Intellectual Disability within its set-up, in view of discussing issues which are relevant to them.<sup>120</sup>
- [57]. Unfortunately, information published by the National Commission Persons with Disability does not provide details or direct references related to cases it has dealt with<sup>121</sup>. However, an analysis of the information provided in the Commission's recent reports<sup>122</sup> indicates that most cases it deals with tend to relate mostly to persons with physical disability. This notwithstanding, the

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<sup>116</sup> National Commission for Persons with Disability (KNPD), Access for all Guidelines; <http://www.knpd.org/pubs/pdf/accessforall2005.pdf>

<sup>117</sup> National Commission for Persons with Disability; <http://www.knpd.org/>

<sup>118</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Disability) Act; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>119</sup> Chapter 413 of the Laws of Malta, Equal Opportunities (Disability) Act, Sections 32-34; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt413.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt413.pdf)

<sup>120</sup> <http://www.knpd.org/>

<sup>121</sup> Cases, investigations ex officio and investigations upon complaint are not published by the equality body, but short summaries of a few are provided in their annual and other reports.

<sup>122</sup> <http://www.knpd.org>

National Commission for Persons with Disability has indicated to the authors of this report that it has accepted complaints from persons with mental health problems<sup>123</sup>.

- [58]. The authors have identified some cases among those generally described in the Commission's reports as having a bearing on persons with intellectual disability and mental illness. Other than those cited in section 2.2.1 above, in another case decided in 2005, the Commission noted that parents sending their children with disability to independent schools were being made to carry the extra costs needed to support their children. The Commission recommended that these parents should be given a tax rebate on these expenses. This request was accepted by the Government and these parents were to be given a rebate on a maximum of 9317 EUR per annum, as of 2005, if they employed a facilitator for a child with disability who attends an independent school.<sup>124</sup>
- [59]. An ongoing case which has a bearing on persons with intellectual disability or mental illnesses, concerns the lack of a policy or service by the Education Division that allows disabled students to take necessary medication when at school<sup>125</sup>. As a result, their parents have to go to school every day, sometimes more than once, to administer the medicine. The National Commission opened a case against the Ministry of Education, in this regard<sup>126</sup> - although it appears that solutions outside court are being sought after.
- [60]. The Commission's 2007 and 2008 annual reports referred to the case of the Malta College of Arts, Science and Technology (MCAST) and its course PATHWAYS - an intensive educational programme aimed mostly at persons with intellectual disability so that they can enter the world of work with the necessary support. The programme was terminated in 2007<sup>127</sup>, and the Commission held that persons with intellectual impairment were discriminated against as a result. The course PATHWAYS was re-introduced in 2008<sup>128</sup>.

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<sup>123</sup> This was confirmed in writing by the Executive Director of the National Commission Persons with Disability, Mr. Alfred Bezzina, upon request specifically made in relation to this report. (Sep 09)

<sup>124</sup> National Commission Persons with Disability, Equality Opportunities Act Annual Report 2005, p. 11; [www.knpd.org.mt](http://www.knpd.org.mt)

<sup>125</sup> National Commission Persons with Disability, Indaqs Report, June 2009; p. 7; <http://www.knpd.org/indaqs/indaqs0906e.pdf>

<sup>126</sup> National Commission Persons with Disability, Equal Opportunities (Persons with Disability) Act 2000, 2007/2008 Report; p. 35; [www.knpd.mt](http://www.knpd.mt)

<sup>127</sup> National Commission Persons with Disability, Equal Opportunities (Persons with Disability) Act 2000, 2006/2007 Report; [www.knpd.org](http://www.knpd.org)

<sup>128</sup> National Commission Persons with Disability, 2008 Annual Report, p.18; [www.knpd.org](http://www.knpd.org)

### 3. Specific Fundamental Rights

- [61]. Fundamental rights are primarily regulated under the Constitution<sup>129</sup> and under the European Convention Act<sup>130</sup>. At times restrictions on such rights do emanate from and are consequent to the person's mental state. For example, Article 35 of the Constitution<sup>131</sup> prohibits forced labour; however, it excludes from the concept of forced labour, 'labour required of any person while he is lawfully detained by sentence or order of a court that, though not required in consequence of such sentence or order, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained or, if he is detained for the purpose of his care, treatment, education or welfare, is reasonably required for that purpose.'<sup>132</sup> Other rights are considered below individually.
- [62]. However, in considering these rights other ordinary legislation and policies also need to be considered. In general, the Mental Health Act<sup>133</sup> as is currently in force, and also as is being proposed<sup>134</sup>, need to be considered together with the various protocols that act as guidelines for practitioners in the sector. These are indicated hereunder under each right. However, as for the Mental Health Act as is currently in force, for sake of lack of repetition, it is here being noted that this Act does not in any manner refer to civil and political rights of patients in stark contrast to the position of the Mental Health Act which is being proposed. In fact, the draft Mental Health Bill<sup>135</sup> specifically recognises that patients are to continue to enjoy their civil and political rights by stating that 'Without prejudice to anything provided in this Act and unless prevented by law, persons with a mental health disorder shall have the same right to: (a) exercise all civil, political, economic, social, religious, educational and cultural rights...'<sup>136</sup>

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<sup>129</sup> Constitution of Malta; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>130</sup> Chapter 319 of the Laws of Malta, European Convention Act;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt319.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf)

<sup>131</sup> Protection from forced labour

<sup>132</sup> Constitution of Malta, Article 35(1)(b);  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>133</sup> Chapter 262 of the Laws of Malta, Mental Health Act;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>134</sup> Mental Health Bill (version September 2009) – *provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>135</sup> Mental Health Bill (version September 2009) – *provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>136</sup> Mental Health Bill (version September 2009), Section 3(1)– *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

## 3.1. The Right to life

- [63]. To date, no cases have been presented on the basis of the right to life by persons with mental health problems. On the other hand, complaints received by the Mental Health Review Tribunal are not available to the public.
- [64]. The right to life recognised under Article 2 of the European Convention<sup>137</sup> and Article 33 of the Constitution<sup>138</sup> does not in any manner allow for any restriction of such right based on a person's intellectual disability or mental disorder. Malta does not consider the possibility of abortion or euthanasia and consequently both acts are considered as criminal acts<sup>139</sup>. Moreover, medical practitioners are said to strictly follow such prohibitions. Although the Mental Health Act<sup>140</sup> does not specify that mental health patients have a right to life, this does not diminish their entitlement to such a right as the protection is found in the Constitution and the European Convention Act as abovementioned.
- [65]. The protocols used by a number of wards<sup>141</sup> within the main public psychiatric hospital, Mount Carmel Hospital<sup>142</sup> and the main state hospital, Mater Dei Hospital<sup>143</sup>, do not seem to raise any issue which may be foreseen to interfere with the patients' right to life.
- [66]. It is, however, important to include under this right, the right to the integrity of the person which is found under Article 3 of the EU Charter of Fundamental Rights and which specifically provides for a right of respect to one's physical and mental integrity which, in the field of medicine, includes the free and informed consent of the person concerned. Section 16 of the Mental Health Act<sup>144</sup> provides for the compulsory admission (involuntary placement) of a patient to a hospital where the request is made either by the nearest relative or by a mental welfare officer, even where admission is for treatment. The Act, however, does not specifically require a medical practitioner to obtain the informed consent of the patient or to seek to obtain such informed consent before administering treatment.

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<sup>137</sup> Chapter 319 of the Laws of Malta, European Convention Act; [www.mjha.gov.mt](http://www.mjha.gov.mt)

<sup>138</sup> Constitution of Malta; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>139</sup> Chapter 9 of the Laws of Malta, Criminal Code, Sections 241 to 243A;

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt9.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt9.pdf)

<sup>140</sup> Chapter 262 of the Laws of Malta, Mental Health Act;

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>141</sup> These include the Mixed Admission Ward, Female Ward One, the Forensic Unit, the Young People's Unit, the Secure Unit, as well as the Short-Stay Psychiatric Unit at Mater Dei Hospital. .

<sup>142</sup> [http://www.health.gov.mt/health\\_services/hospitals/mch.htm](http://www.health.gov.mt/health_services/hospitals/mch.htm)

<sup>143</sup> [https://ehealth.gov.mt/HealthPortal/health\\_institutions/hospital\\_services/mater\\_dei\\_hospital/mater\\_dei.aspx](https://ehealth.gov.mt/HealthPortal/health_institutions/hospital_services/mater_dei_hospital/mater_dei.aspx)

<sup>144</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 16;

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

[67]. However, the draft Mental Health Bill<sup>145</sup> regulates this issue specifically and involves the patient in every stage of the treatment. It actually specifically recognises as one of the rights of mental health users and carers that of giving their ‘free and informed consent before any treatment or care is provided and such consent shall be recorded in the patient’s clinical record.’<sup>146</sup> It also specifically provides that,

*‘Prior to the administration of any treatment, informed consent shall be given by the patient and in those cases where the patient is incapable of giving consent then it has to be obtained from the responsible person.’<sup>147</sup>*

[68]. This requisite is also strengthened by other sections of the proposed legislation. For example, in relation to patients who are admitted voluntarily the proposed law will require his/her consent in writing<sup>148</sup> and also his/her written informed consent prior to any form of treatment<sup>149</sup>. It is only in cases where patients are mentally incapable or legally prevented from giving consent to treatment, that the interests of the patient are protected by transferring this right to the responsible person for that patient, whose consent will be required instead and who has the right to exercise all rights and measures of redress as if he/she were the patient. The patient’s consent (or that of the responsible carer) is also required with regard to the care plan that is to be established when an application for an Involuntary Community Treatment Order is made<sup>150</sup>. Moreover, the proposed law also requires the identification of the responsible healthcare professional who is to explain to the patient his/her rights and the care plan in a language that the person can understand.<sup>151</sup>

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<sup>145</sup> Mental Health Bill (version September 2009) – provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)

<sup>146</sup> Mental Health Bill (version September 2009) Section 3(1)(i). This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)

<sup>147</sup> Mental Health Bill (version September 2009) Section 14. This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)

<sup>148</sup> Mental Health Bill (version September 2009) Section 7(2)(a). This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)

<sup>149</sup> Mental Health Bill (version September 2009) Section 7(2)(e). This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)

<sup>150</sup> Mental Health Bill (version September 2009) Section 18(3). This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)

<sup>151</sup> *Ibid*

## 3.2. The right to freedom from torture or cruel, inhuman or degrading treatment or punishment

[69]. Article 36 of the Maltese Constitution<sup>152</sup> and Section 3 of the first schedule in the European Convention Act<sup>153</sup> provide that no person shall be subjected to torture, or to inhuman or degrading treatment or punishment.

[70]. Issues that may arise under this right, in relation to persons with mental illness include those relating to forced treatment, forced feeding, forced sedation, solitary confinement, general conditions in which patients are held within the hospitals and also any ‘punishment’ system that may be applied to patients who fail to follow the expected behaviour.

The Mental Health Act as currently in force does not in any manner provide for these issues and the system heavily depends on protocols established within the concerned hospitals and institutions.<sup>154</sup>

[71]. The proposed Mental Health Act specifically recognises the right of patients to ‘full respect for his or her dignity’<sup>155</sup> and to ‘protection from cruel, inhuman and degrading treatment.’<sup>156</sup> Moreover, a new offence punishable with a fine is being proposed for an action that,

*‘(a) prolongs any seclusion and, or restraint beyond the period necessary for the purpose;*  
*(b) use seclusion and, or restraint as punishment or for the convenience of staff.’<sup>157</sup>*

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<sup>152</sup> Constitution of Malta; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>153</sup> [Chapter 319](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf) of the Laws of Malta, European Convention Act;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt319.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf)

<sup>154</sup> For example, provisions related to seclusion, forced feeding and forced medical treatment were noted in the few department-based protocols obtained in hard copy from the main public psychiatric hospital, Mount Carmel Hospital, for the purposes of this report. However, the authors of this report were not provided with a copy of the same hospital’s Protocol regarding Alleged Ill Treatment of Patients.

<sup>155</sup> Mental Health Bill (version September 2009) Section 3(1)(m). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>156</sup> Mental Health Bill (version September 2009) Section 3(1)(n). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>157</sup> Mental Health Bill (version September 2009) Section 34(5). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

[72]. In this respect the use of seclusion or restraint on a patient is also regulated and is only permissible,

*‘if they are: (a) the only means that will prevent imminent harm and danger to self and others; and (b) prescribed by a medical practitioner duly authorised by the clinical director of the facility to order such intervention.’<sup>158</sup>*

[73]. Records of the reasons and duration of seclusion and or restraint and the treatment given to such a patient are to be recorded in his/her clinical records. Such details are also to be entered into a register that is available to the Commissioner for the Promotion of Rights of Persons with Mental Disorders. This makes the use of restraint and seclusion subject to the review of the Commissioner who, according to Section 6 of the proposed Act<sup>159</sup>, has the following functions:

- (a) promote and safeguard the rights of persons suffering from a mental disorder and their carers;*
- (b) review any policies and make such recommendations to any competent authority to safeguard or to enhance the rights of such persons and to facilitate their social inclusion and wellbeing;*
- (c) review, grant and extend any Order issued in terms of this Act. The person subject to such an Order and the responsible carer shall appear before the Commissioner. The patient may be represented by a legal counsel and the Commissioner may call any witness. Summoned witnesses who refrain to appear before the Commissioner are subject to a fine as prescribed by regulations under this Act;*
- (d) review admissions to a facility every three months to ensure that patients are not held in the facility for longer than is necessary;*
- (e) monitor the care and treatment of patients;*
- (f) monitor treatment given in the community;*
- (g) monitor any person under guardianship or tutorship;*
- (h) authorise or prohibit intrusive and irreversible treatments, medical and scientific research on persons under the provisions of this Act;*

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<sup>158</sup> Mental Health Bill (version September 2009) Section 34(1). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>159</sup> Mental Health Bill (version September 2009) Section 6. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*



- (i) review every three months all patient incident reports and death records received from licensed mental health facilities and registered healthcare professionals;*
- (j) establish guidelines and protocols for minimising restrictive care;*
- (k) investigate any complaint alleging breach of patient's rights and take any subsequent action or make recommendations which may be required to protect the welfare of that person;*
- (l) investigate any complaint about any aspect of care and treatment provided by a facility or a healthcare professional and take any decisions or make any recommendations that are required;*
- (m) conduct regular inspections, at least annually, of all facilities to ascertain that the rights of patients are upheld and that all the provisions of this Act are abided with. During such visits he shall have unrestricted access to all parts of the facility and patients medical records as well as the right to interview any patient in the facility in private;*
- (n) report any case amounting to a breach of human rights within a facility to the competent authority recommending the suspension or withdrawal or amendment of such license;*
- (o) report any healthcare professional for breach of human rights abuse or for contravening any provision of this Act. and this without prejudice to any other action that he may deem necessary to take;*
- (p) present to the Minister an annual report of his activity which shall be placed on the table of the House of Representatives by the Minister within two months of receipt; and*
- (q) any other function which the Minister may prescribe.'*

[74]. Furthermore, the proposed legislation also provides that 'a person who is restrained and, or secluded shall be kept under humane conditions and under the care and close and regular supervision of qualified members of staff.' It is also being proposed that the responsible carer<sup>160</sup> must be informed of such intervention within one hour of the order of seclusion or restraint intervention.

[75]. It is also interesting to note that the proposed legislation prohibits the carrying out of a 'major medical or surgical procedure' on a patient suffering from a

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<sup>160</sup> The term, 'responsible carer' is defined as, 'the next of kin or any person appointed in writing by the patient to act on his behalf or any person appointed by a court of law to represent the patient'- vide: Mental Health Bill (version September 2009) Section 2. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

mental disorder unless such person gives written informed consent'.<sup>161</sup> Where the person is not able to give consent due to his mental health disorder, then consent shall be sought from his responsible person. Consent is only done away with in an emergency where the patient's life is at risk.<sup>162</sup> On the other hand, the proposed law states that therapeutic interventions that are invasive and irreversible treatments for mental illness,

*'shall only be carried out on a patient with a mental disorder if:*  
*(a) free and informed consent is given by the patient;*  
*(b) the Commissioner has approved such treatment after an application [...] has been submitted by the responsible carer and he is satisfied that consent is free and informed and that there is sufficient evidence based knowledge that the procedure benefits the health needs of the patient.'*<sup>163</sup>

[76]. The use of sterilisation as a treatment for mental illness or to limit the sequelae of promiscuity is to become unlawful if the proposed legislation is enacted<sup>164</sup>. Moreover, Section 33 (4) of the draft Mental Health Bill stipulates that,

*'electro-convulsive therapy shall only be administered after obtaining informed consent from the patient or responsible person and in no instance shall it be given to minors unless there is a second opinion from a specialist in child psychiatry appointed for the purpose by the Minister who also certifies the need for such treatment.'*<sup>165</sup>

[77]. The proposed law will, however, allow instances for forced treatment. For example, in Section 16(3) it unambiguously states that 'A person who is subject to an Involuntary Community Treatment Order shall be required to undergo the authorised treatment, even if he does not want to.'<sup>166</sup> Section 21 of the proposed legislation<sup>167</sup> provides for the issuance of a Conveyance Order, if the person is

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<sup>161</sup> Mental Health Bill (version September 2009) Section 32. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>162</sup> *Ibid*

<sup>163</sup> Mental Health Bill (version September 2009) Section 33 (2). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>164</sup> Mental Health Bill (version September 2009) Section 33(3). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>165</sup> Mental Health Bill (version September 2009) Section 33(4). 21. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>166</sup> Mental Health Bill (version September 2009) Section 16(3). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>167</sup> Mental Health Bill (version September 2009) Section 21. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

not complying with the prescribed care plan, and, in the event of refusal of treatment, for his/her detention as an involuntary patient in a licensed facility while remaining under the Involuntary Community Treatment Order.

### 3.3. The right to freedom from exploitation

- [78]. No specific reference is made to the right to freedom from exploitation within the constitutional framework. However, issues related to exploitation, such as protection from forced labour, are provided for as fundamental freedoms. Of relevance for the situation of persons with mental illness, being forcefully detained, is Article 35(2) of the Constitution which provides,

*Labour required of any person while he is lawfully detained by sentence or order of a court that, though not required in consequence of such sentence or order, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained or, if he is detained for the purpose of his care, treatment, education or welfare, is reasonably required for that purpose.*

- [79]. Particular issues such as sexual exploitation and economic exploitation of persons (eg. misappropriation) are addressed by various provisions within the Criminal Code.

- [80]. Both the current Mental Health Act and the draft Mental Health Bill do not specifically refer or provide for the right to freedom from exploitation. However, the design of the proposed legislation is based on a foundation of patient's rights and essentially the proposed legislation provides mechanisms through which a patient is not exploited. In this manner, for example, it provides for essential written informed consent either from the patient or where this is not possible from the responsible carer; it also provides for the involvement of the patient or the responsible carer in designing a care and treatment plan.

- [81]. It is also interesting to note that systems are being proposed in the new legislation which will ensure that patients are not exploited. For example, Section 26 of the draft Mental Health Bill<sup>168</sup> imposes an obligation by law on the curator to protect the person he/she is assigned to from any neglect, abuse or exploitation. Section 27 also stipulates that the Commissioner for the Promotion of Rights of Persons with Mental Disorders has the specific obligation to

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<sup>168</sup> Mental Health Bill (version September 2009) Section 26. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

‘monitor and seek any information from the curator in order to ascertain that the person is not being neglected, abused or exploited’ by the curator.<sup>169</sup>

[82]. Another important provision being proposed within the draft Mental Health Bill is Section 45 which lays down that,

*‘Persons with mental disorders shall enjoy equal opportunities. The Commissioner shall take appropriate action against any one who discriminates, or exploits a person by reason of his mental health status.’<sup>170</sup>*

[83]. Furthermore, as noted in Section 4.3.9 in this report (below), the proposed legislation<sup>171</sup> refers to situations of medical and scientific experimentation and research. The proposed law, *inter alia*, provides that no person with a mental disorder may be subjected to medical or scientific experimentation including clinical trials unless a) free and informed consent is given by the patient; b) in the case of patients receiving treatment in a facility an independent specialist appointed by the Commissioner for the Promotion of Rights of Persons with Mental Disorders examines the patient and certifies that the patient is capable of giving such free and informed consent, and that the research will not harm and may be of benefit to the patient; there is the approval of the ethics committee appointed under the Clinical Trial Regulations<sup>172</sup>.

### 3.4. The right to liberty and security

[84]. The right to liberty and security is protected within the Maltese legal framework under Article 34 of the Constitution<sup>173</sup> and also under Article 5 of the European Convention as incorporated into the national legal order through Chapter 319 of the Laws of Malta.<sup>174</sup> The Constitution allows the deprivation of personal

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<sup>169</sup> Mental Health Bill (version September 2009) Section 27. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>170</sup> Mental Health Bill (version September 2009) Section 45. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>171</sup> Mental Health Bill (version September 2009) Section 35. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>172</sup> Legal Notice 490 of 2004: Clinical Trials Regulations, 2004; <http://www.doi.gov.mt/EN/legalnotices/2004/11/LN490.pdf> *Amended* by Legal Notice 248 of 2007: Clinical Trials (Amendment) Regulations, 2007. [http://www.doi.gov.mt/EN/legalnotices/2007/08/LN\\_248.pdf](http://www.doi.gov.mt/EN/legalnotices/2007/08/LN_248.pdf)

<sup>173</sup> Constitution of Malta; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>174</sup> [Chapter](#) 319 of the Laws of Malta, European Convention Act; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt319.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf)

liberty where this is ‘in consequence of his unfitness to plead to a criminal charge’, ‘in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community’ and, ‘in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare’<sup>175</sup>. Moreover, Article 5 of the European Convention allows the deprivation of liberty where this is a procedure prescribed by law and in so far as ‘the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.’<sup>176</sup>

- [85]. Part III of the Mental Health Act<sup>177</sup> currently in force provides for compulsory admission to hospital. A person may be admitted compulsorily for observation or for treatment if he is suffering from mental disorder of a nature or degree which warrants detention in a hospital and if such detention is necessary in the interests of his own health or safety or to protect other persons.<sup>178</sup> Compulsory admission requires the written opinion of two concurring medical practitioners who are also to indicate whether other methods of dealing with the patient are available and if so, why such methods are not appropriate. Moreover, Section 14(4) of the Mental Health Act states that,

*‘Nothing in this article contained shall preclude a patient admitted to a hospital in pursuance of an application for admission for observation from receiving such medical treatment as the responsible medical officer considers appropriate.’<sup>179</sup>*

- [86]. However, a shorter procedure is provided for in Section 15 of the Mental Health Act to cater for cases of emergency. In this respect, it is the applicant who presents a request and this is to be verified by a medical recommendation that it is of urgent necessity for the patient to be admitted and detained for observation and that following the normal course of procedures would involve an undesirable delay. In this case, it is sufficient if only one of the conditions for compulsory admission is met and if only on practitioner who has previous acquaintance with the patient is submitted<sup>180</sup>.. This will be sufficient for a patient to be admitted to hospital for a period of 72 hours. When, within those 72 hours, the manager of the facility receives a second medical recommendation

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<sup>175</sup> Constitution of Malta, Article 34(1)(a),(i), and (g);

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>176</sup> [Chapter](#) 319 of the Laws of Malta, European Convention Act, Article 5;

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt319.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf)

<sup>177</sup> Chapter 262 of the Laws of Malta, Mental Health Act,;

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>178</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 14;

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>179</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 14(4);

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>180</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 15(3);

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

indicating the state of the patient and that he/she requires hospitalisation, the admission/placement will be prolonged<sup>181</sup>.

- [87]. Applications for compulsory admission may be made either by the nearest relative of the patient, or by a mental welfare officer, or in the case of a person serving a sentence of imprisonment, by the Director of Prisons. Further safeguards are provided within Section 17 of the Mental Health Act, which, *inter alia*, requires that the medical practitioners giving their recommendation for compulsory admission have personally examined the patient either together or at an interval of not more than three days. Moreover a medical recommendation cannot be given by the applicant, a partner of the applicant or of a practitioner giving a medical recommendation, a person in the employment of the applicant, a person who receives or has an interest in receiving any payments made on account of the maintenance of the patient or the spouse or relative by consanguinity or affinity up to the second degree of the patient, applicant or medical practitioner<sup>182</sup>.
- [88]. Compulsory admission for observation and/or treatment may, however, arise when a patient is already voluntarily an in-patient in a hospital. In this case, the same application procedure is to be followed<sup>183</sup>.
- [89]. With regard to review of involuntary admission for observation and/or treatment, according to Section 19 of the Mental Health Act a patient may only seek a review of his compulsory admittance to hospital by presenting an application to the Mental Health Review Tribunal within a period of 6 months beginning with either the day on which he is so admitted or in the case of a child who is so admitted before having the age of sixteen years, the day on which he has attained such age, whichever is the later<sup>184</sup>. However, two other possible reviews may be made: the first by the medical practitioner on whose recommendation such admission took place, and the second by the manager of the facility. Within 14 days from admission a medical practitioner may change or amend his recommendation if he finds this to be incorrect or defective<sup>185</sup>. Upon doing so the last recommendation shall have effect as if it had originally been made and given as so amended. On the other hand, if within 14 days from admission it appears to the manager of the facility that one of the two medical recommendations is insufficient to warrant the detention of the patient then he

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<sup>181</sup> *Ibid*

<sup>182</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 17(3);  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>183</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 18;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>184</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 19;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>185</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 20(1);  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

may give notice in writing to that effect to the applicant and disregard the recommendation originally presented<sup>186</sup>.

[90]. The draft Mental Health Bill provides further safeguards, to those provided within the current legislation. Section 8 (1) of the Bill states that,

*'A person may only be admitted involuntarily or retained involuntarily if a specialist:*  
*(a) certifies that such person has a severe mental disorder,*  
*(b) considers that, due to the mental disorder, there is a serious likelihood of immediate harm to that person or to other persons, and*  
*(c) failure to admit or detain that person is likely to lead to a serious deterioration in his condition or will prevent the administration of appropriate treatment that can not be given in the community.'*<sup>187</sup>

### 3.5. The right to fair trial

[91]. The right to fair trial is enshrined in Article 39 of the Constitution<sup>188</sup>. Article 39(2) provides:

*(2) Any court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.*

[92]. The right is also protected through Article 6 of the European Convention as incorporated into the national legal order through Chapter 319 of the Laws of Malta.<sup>189</sup>

[93]. A patient's right to fair trial predominantly depends on the management and administration of cases presented before the Mental Health Review Tribunal, established in pursuance of Section 38 of the Mental Health Act<sup>190</sup>. The

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<sup>186</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 20(3); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>187</sup> Mental Health Bill (version September 2009) Section 8(1). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>188</sup> Constitution of Malta; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>189</sup> [Chapter](#) 319 of the Laws of Malta, European Convention Act; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt319.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf)

<sup>190</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 38 [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

Tribunal is made up of chairperson, who is a person qualified to hold the office of judge and two other members of whom one shall have medical qualifications and experience as the Minister may deem appropriate for the purpose. It does not seem that these members enjoy security of tenure as Section 38(2) of the Mental Health Act indicates that ‘the members of the Tribunal shall be appointed by the Minister, and shall hold and vacate office under the terms of the instrument under which they are appointed’. The Tribunal is assisted by a secretary.

[94]. Its functions are those of considering and determining or otherwise deal with applications made or referred to it under the Mental Health Act. The Tribunal may order the discharge of a patient where it is satisfied that:

- He is not then suffering from mental disorder; or
- It is not necessary in the interests of the patient’s health or safety or for the protection of other persons that the patient should continue to be liable to be detained or
- That the patient, if released, would not be likely to act in a manner dangerous to other persons or to himself.<sup>191</sup>

[95]. The Tribunal is, however, only authorised to deal with applications which are authorised under the Act itself and consequently a patient or his/her guardian would not have access to the Tribunal on any other issue. The circumstances from which a person may seek a review from the Tribunal are spread out in the Act and identified separately. These include the following situations:

- a person admitted to hospital following an application for admission for treatment may apply to the Tribunal within 6 months beginning with the day on which he is so admitted, or in the case of a child who is so admitted before having attained the age of sixteen years, the day on which he has attained such age, whichever is the later.<sup>192</sup>
- a person who has attained the age of sixteen and who has been detained in hospital following admission may seek a review of such detention from the Tribunal.<sup>193</sup>
- a patient or nearest relative may seek the discharge of a person detained for treatment and if this is refused by the hospital manager on the advice of the medical officer in charge of the patient, then the patient or nearest relative may seek a review from the Tribunal.<sup>194</sup> This application may be brought

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<sup>191</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 38(2); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>192</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 19(3); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>193</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 21(6); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>194</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 29(2); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)



within the period of 28 days beginning with the day on which the patient or his/her nearest relative is so informed.

- [96]. In preparing for his/her application a patient may seek the assistance of third persons who to this effect may visit the patient at any reasonable time, visit, interview and examine the patient in private and may also seek and inspect document relation to the detention of the patient and any medical records.<sup>195</sup> However, only one application may be presented within the period during which a patient has a right to present an application<sup>196</sup>.
- [97]. In accordance with Section 41 of the Mental Health Act, the Minister is empowered to make rules of procedure with respect to the making of applications to the Tribunal and with respect to the proceedings of the Tribunal. Indeed, Mental Health Review Tribunal Rules were published by Legal Notice 92 of 1981. However, they are still not yet in force as may be seen from the version of this legislation provided on the Ministry of Justice and Home Affairs online database of legislation.<sup>197</sup> Should these be brought into force, the applicant will obtain a right to request a formal hearing. The Tribunal will also obtain the power to postpone the consideration of any further applications presented by the patient for a time established by the Tribunal after the latter would have already considered an application in his/her regard. However, where such postponement is not deemed necessary by the Tribunal, then applications presented by the same or in respect of the same patient may be considered concurrently. The rules also require notification of the application to be sent to the manager of the hospital who must within one week present a statement in this regard. The contents of the statement may, however, be withheld from the applicant on the grounds that this disclosure would be undesirable in the interests of the patient or 'for other special reasons' as indicated separately by the manager.<sup>198</sup> If there is no request for lack of disclosure, the statement will be notified to the patient.
- [98]. The Mental Health Review Tribunal Rules specifically allow a patient to be represented or even only accompanied by a person of trust<sup>199</sup> and may also present that evidence which he/she deem appropriate, with the Tribunal being authorised to take evidence on oath<sup>200</sup>. Sittings are only held in public if this is so requested by the applicant and if it is deemed not prejudicial to his/her

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<sup>195</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 23;

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>196</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 40(2);

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>197</sup> Subsidiary Legislation 262.03, Mental Health Review Tribunal Rules, Legal Notice 92 of 1981; <http://docs.justice.gov.mt/lom/legislation/english/subleg/262/03.pdf>

<sup>198</sup> Subsidiary Legislation 262.03, Mental Health Review Tribunal Rules, Legal Notice 92 of 1981 - Section 6; <http://docs.justice.gov.mt/lom/legislation/english/subleg/262/03.pdf>

<sup>199</sup> Subsidiary Legislation 262.03, Mental Health Review Tribunal Rules, Legal Notice 92 of 1981 - Section 9; <http://docs.justice.gov.mt/lom/legislation/english/subleg/262/03.pdf>

<sup>200</sup> Subsidiary Legislation 262.03, Mental Health Review Tribunal Rules, Legal Notice 92 of 1981 - Section 13; <http://docs.justice.gov.mt/lom/legislation/english/subleg/262/03.pdf>

interests or health<sup>201</sup>. Decisions are taken by majority, and where there is a tie of votes then the chairperson of the tribunal shall have a second or casting vote. If, while an application is pending before the Tribunal, the patient is released from the hospital, his/her application will automatically be taken to have been withdrawn<sup>202</sup>.

[99]. The proposed Mental Health Act according to the draft Bill currently under consideration<sup>203</sup>, indicates a different system to that currently in force. In fact, the draft Bill proposes the appointment of a Commissioner for the Promotion of Rights of Persons with Mental Disorders<sup>204</sup>. The Commissioner is appointed by the Prime Minister under such terms as are deemed necessary by the Prime Minister but must be a legal person with the right aptitude and commitment to the principles of mental health provision.<sup>205</sup> The draft Bill also seeks to safeguard the Commissioner's independence by stating that in the exercise of the functions given to him/her, the Commissioner shall act independently and is not to be subject to the direction or control of any person or authority.<sup>206</sup> It is interesting to note that the Commissioner is to be assisted by other persons including healthcare users and carers as may be approved by the Permanent Secretary<sup>207</sup>.

[100]. As indicated in Section 3.2 of this report, the functions assigned to the Commissioner are extensive and include:

- a. the review, grant or extension of any Order issued under the Act. In fulfilling this function the Commissioner shall call the patient or responsible carer to appear before the Commissioner and the patient may be represented by a legal counsel who may also call witnesses.
- b. The review of admissions to a facility every three months to ensure that patients are not held in the facility for longer than is necessary
- c. The monitoring of any person under guardianship or tutorship

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<sup>201</sup> Subsidiary Legislation 262.03, Mental Health Review Tribunal Rules, Legal Notice 92 of 1981 - Section 23; <http://docs.justice.gov.mt/lom/legislation/english/subleg/262/03.pdf>

<sup>202</sup> Subsidiary Legislation 262.03, Mental Health Review Tribunal Rules, Legal Notice 92 of 1981 - Section 15; <http://docs.justice.gov.mt/lom/legislation/english/subleg/262/03.pdf>

<sup>203</sup> Mental Health Bill (version September 2009). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>204</sup> Mental Health Bill (version September 2009), Part III. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>205</sup> Mental Health Bill (version September 2009), Section 1. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>206</sup> *Ibid*

<sup>207</sup> *Ibid*, Section 3

- d. The review every three months of all patient incident reports and death records received from licensed mental health facilities and registered healthcare professionals
- e. The investigation of any complaint alleging breach of patient's rights
- f. The investigation of any aspect of care and treatment provided by a facility or a healthcare professional
- g. Report any case amounting to a breach of human rights within a facility to the competent authority recommending the suspension or withdrawal or amendment of such licence
- h. Report any healthcare professional for breach of human rights abuse or for contravening any provision of the Act.<sup>208</sup>

### 3.6. The right to privacy, including the access to one's own confidential medical records

- [101]. The right to privacy is protected under Article 32 of the Constitution<sup>209</sup> which states that every person in Malta is entitled to respect for his private life. It is also protected through Article 8 of the European Convention as incorporated into the national legal order through Chapter 319 of the Laws of Malta.<sup>210</sup>
- [102]. The protection of privacy is also provided for in Article 38(1) of the Constitution<sup>211</sup> which states that, 'except with his own consent or by way of parental discipline, no person shall be subjected to the search of his person or his property or the entry by others on his premises'. Article 38(2) produces conditions to this right based, *inter alia*, on public safety, public order, public morality or decency, public health, amongst other conditions.
- [103]. With regard to medical records, Section 15 of the Data Protection Act<sup>212</sup> refers to the processing of sensitive personal data for health and hospital care purposes, provided that it is necessary for preventive medicine and the

<sup>208</sup> Mental Health Bill (version September 2009) Section 6(1). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>209</sup> Constitution of Malta; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>210</sup> Chapter 319 of the Laws of Malta, European Convention Act; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt319.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf)

<sup>211</sup> Constitution of Malta; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>212</sup> Chapter 440 of the Laws of Malta, Data Protection Act; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_13/chapt440.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt440.pdf)

protection of public health, medical diagnosis, health care or treatment, or management of health and hospital care services. It also provides that such data needs to be processed by a health professional or other person subject to the obligation of professional secrecy. All hospitals and health institutions, including psychiatric institutions, are therefore subjected to this legislation.

- [104]. Privacy of persons with mental illness may be said to be specifically referred to and secured within the Mental Health Act currently in force, only in two instances and by the examination and interview of the patient in private. This is stated in Sections 10(2) and 23 of the Mental Health Act<sup>213</sup>. The former deals with the case of inspecting a mental nursing home during which inspection patients may be interviewed in private; the other instance is when the Tribunal may decide to interview and examine the patient in private. Otherwise, the situation seems to be one where in communal hospital rooms, that is rooms occupied by more than one patient, the patient is spoken to and examined at his/her bed, unless called into special treatment rooms.
- [105]. On the other hand, the draft Bill specifically entitles a patient to his/her right to privacy unless there is a serious risk to the person's health or the safety of others<sup>214</sup>. It also provides patients with the right to have free and unrestricted communication with the outside world when receiving treatment in a facility, including receiving visitors in private, unless such freedom is detrimental to the patient's health or it impinges on the rights and freedoms of others<sup>215</sup>.
- [106]. Under the present legislation, access to one's records is given to the applicant or his/her representative during procedures of an application for review before the Mental Health Tribunal.<sup>216</sup> No other specific instance is mentioned in the Mental Health Act currently in force. One could reasonably assume that a medical doctor will follow the general rule of giving information to the patient should the latter request it and if it is deemed not detrimental to the patient's health.
- [107]. On the other hand, the draft Bill proposes a dual fold protection. Firstly information is held in confidence and its confidentiality is safeguarded. No information may be divulged unless the patient has given his/her consent or where there is a life threatening emergency, it is in the interest of public safety or ordered by the court, or whosoever is requesting such information is entitled

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<sup>213</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Sections 10(2) and 23;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>214</sup> Mental Health Bill (version September 2009) Section 3(1). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>215</sup> Ibid

<sup>216</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 23;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

by law to receive it.<sup>217</sup> At the same time, the patient has access to his/her clinical records unless in the opinion of the responsible specialist the revelation of such information may cause harm to the person's health or put at risk the safety of others. However, if information is withheld, the patient or the responsible person may contest such decision with the Commissioner.<sup>218</sup>

### 3.7. The right to marry, to found a family and to respect of family life

[108]. The right to marry and found a family is protected under Section 12 of the European Convention Act.<sup>219</sup> The right to respect of family life is enshrined the Constitution (Article 32)<sup>220</sup> and is also protected through Article 8 of the European Convention as incorporated into the national legal order through Chapter 319 of the Laws of Malta.<sup>221</sup>

[109]. Chapter 255 of the Laws of Malta, the Marriage Act, provides that:

*'A marriage contracted between persons either of whom is incapable of contracting by reason of infirmity of mind, whether interdicted or not, shall be void.'*<sup>222</sup>

[110]. At the same time, the Civil Code establishes the following rule in relation to marriage agreement entered into by a person under disability to contract in that it stipulates that the consent of the Court is necessary without making any automatic barriers to such agreements:

*'The authority of the court shall, in all cases, be necessary for the validity of a marriage agreement entered into by a person who is under disability to contract'*<sup>223</sup>.

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<sup>217</sup> Mental Health Bill (version September 2009) Section 3(1)(j). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online).* In the case of persons issued with an Involuntary Community Care Order, Section 22 of the draft Mental Health Bill states that no disclosure of information by healthcare professionals to third parties shall take place unless with the written consent of the patients or the release of information is required for the ongoing care of the person, or for the care or safety of other, or unless the recipient is entitled by law to receive it

<sup>218</sup> Mental Health Bill (version September 2009) Section 3(1)(k). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>219</sup> [Chapter](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf) 319 of the Laws of Malta, European Convention Act;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt319.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf)

<sup>220</sup> Constitution of Malta; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>221</sup> [Chapter](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf) 319 of the Laws of Malta, European Convention Act;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt319.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf)

<sup>222</sup> Chapter 255 of the Laws of Malta, Marriage Act, Section 4;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt255.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt255.pdf)

[111]. It has been stated by NGOs working with persons who are mentally ill that some prohibition on marriage is at times applied especially in the light of celebrating a religious marriage. In this regard, it is thought that where during the publication of marriage banns, the Church is informed that one of the future spouses suffers from schizophrenia then there will be an impediment to the occurrence of that marriage. The basis of this is not publicly known although this could find its basis in canon 1095 of the Canon Code which provides that those who lack sufficient use of reason, who suffer from a grave lack of discretion of judgment concerning the essential matrimonial rights and obligations to be mutually given and accepted and those who because of causes of a psychological nature are unable to assume the essential obligations of marriage, are thereby incapable of contracting marriage.

### 3.8. The right to have children and maintain parental rights

- [112]. The right to found a family is protected through Article 12 of the European Convention, as incorporated into national legislation through Chapter 319 of the Laws of Malta.<sup>224</sup>
- [113]. The right to have children is not considered in the Mental Health Act and no mention is found of systems for conjugal visits. Neither does the law or the protocols which the authors obtained from the main psychiatric hospital in Malta refer to medical procedures that render one incapable of conceiving. In this sense, no comment can really be made in this respect.
- [114]. Parental authority is regulated in the Civil Code<sup>225</sup>. Section 154 of the Civil Code specifically mentions the circumstances under which a parent loses parental authority over his/her children without alluding to a person's mental illness. However a parent with a mental illness could find himself/herself losing parental authority when due to that mental illness the parent
- a. Exceeds the bounds of reasonable chastisement, ill-treats the child, or neglects his education;
  - b. If the conduct of the parent is such as to endanger the education of the child

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<sup>223</sup> Chapter 16 of the Laws of Malta, Civil Code; Section 1242 ; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_2/chapt16.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt16.pdf)

<sup>224</sup> [Chapter](#) 319 of the Laws of Malta, European Convention Act; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt319.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf)

<sup>225</sup> Chapter 16 of the Laws of Malta, Civil Code, Sections 131 to 156; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_2/chapt16.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt16.pdf)

- c. If the parent is interdicted, or incapacitated
- d. If the parent mismanages the property of the child
- e. And if the parent fails to look after, maintain, instruct and educate the child.

[115]. While a person suffering from a mental illness may as a consequence perform any of the acts mentioned in the above (a), (b) and (d) and consequently be ordered to cease from parental authority, yet (c) is directly connected to a person having a mental illness since one of the grounds leading to interdiction or incapacitation is precisely suffering from a mental illness. Although loss of parental authority may be limited to that time during which the circumstances that have given rise to it remain present, yet a review of such circumstances is not automatic and the law does not provide for a system of review. In this respect, therefore, it will have to be the interested party who will have to seek a review of the order stopping parental authority. .

[116]. It should be noted that Section 36 of the draft Mental Health Bill makes specific reference to parent-child bonding and separation. It provides that:

*‘Whenever a parent or child is admitted, the admitting facility shall provide adequate facilities and skilled healthcare staff to provide care to both parent and child to safeguard the parent-child bond and to minimise the harmful effects of parent-child separation, unless such separation is in the best interest of the child. These considerations shall apply particularly in the care of a parent with children under the age of 5 years.’<sup>226</sup>*

### 3.9. The right to property

[117]. The right to property is protected through Article 1(1) of the first Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as incorporated into the national legal order through Chapter 319 of the Laws of Malta.<sup>227</sup>

[118]. Apart from Article 32 of the Constitution<sup>228</sup> which refers to the fundamental right to property, Article 37 of the Constitution<sup>229</sup> provides for the right to protection from deprivation of property without compensation. However,

<sup>226</sup> Mental Health Bill (version September 2009) Section 36. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online*

<sup>227</sup> [Chapter](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf) 319 of the Laws of Malta, European Convention Act;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_7/chapt319.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt319.pdf)

<sup>228</sup> Constitution of Malta; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>229</sup> *Ibid*

Article 37(2)(g)<sup>230</sup> states that nothing in this article will be construed as affecting the making or operation of any law insofar as it provides for the taking or acquisition of property by way of the vesting or administration of property on behalf and for the benefit of *inter alia* persons of unsound mind.

- [119]. A person with mental illness is not precluded from retaining property under any title. However, such a person may not be able to validly acquire or dispose of such property due to a vice in that consent that is required for any such civil or commercial transaction. On the other hand, as noted in Section 5 of this report (below), when a person with mental illness is deemed by a Court not to be able to administer his/her property, then the Court may appoint a guardian or curator who is authorised to administer the property on behalf of the person with mental illness. In so doing, the curator or guardian will automatically obtain the responsibility of administering and any person under incapacitation or interdiction loses his/her right to acquire or dispose or even administer his/her property of whatever kind.<sup>231</sup>

### 3.10. The right to vote

- [120]. Article 58 of the Constitution of Malta<sup>232</sup> states that an interdicted or legally incapacitated person cannot qualify to be registered as a voter for the election of members of the House of Representatives if interdicted or incapacitated for any mental infirmity by a court in Malta or is otherwise determined in Malta to be of unsound mind.
- [121]. The Medical Board, which is established by Section 14 of the General Elections Act<sup>233</sup>, is referred questions as to whether a person who has applied to be registered as a voter or is already registered is disqualified from being so registered in terms of Article 58 (a) of the Constitution of Malta. Section 13(9) of the General Elections Act requires that the Medical Board is immediately referred any applications or appeals concerning the erasure of names of a person from the Electoral Register based on the grounds of mental infirmity<sup>234</sup>. Furthermore, the General Elections Act stipulates that the Electoral Commission may not refuse an application by a person to be registered as a

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<sup>230</sup> *Ibid*

<sup>231</sup> Refer to Section 5 (below) of this Report, concerning Guardianship and Curatorship.

<sup>232</sup> Constitution of Malta, Article 58(a);

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>233</sup> Chapter 354 of the Laws of Malta, General Elections Act, Section 14(1);

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_9/chapt354.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_9/chapt354.pdf).

The Medical Board consists of a doctor appointed by the Commission, who shall act as chairperson, and a doctor appointed by each of the political parties – *vide* Chapter 354 of the Laws of Malta, General Elections Act, Section 14(2);

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_9/chapt354.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_9/chapt354.pdf).

<sup>234</sup> Chapter 354 of the Laws of Malta, General Elections Act, Section 13(9);

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_9/chapt354.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_9/chapt354.pdf).



voter, or cancel the registration of a voter, or expunge his name from the Electoral Register in terms of Article 58(a) of the Constitution before it obtains the decision of the Medical Board or unless such person has been interdicted for mental incapacity by a competent court<sup>235</sup>. The Medical Board, therefore, has the power to review any kind of application relating to said erasure on bases of Art. 58 (a) of the Constitution, unless the person in whose regard the said application is made is interdicted or incapacitated on the grounds of insanity:

*‘...meta jkun hemm decizjoni ta’ qorti f’Malta li tinterdici jew tinabilita persuna minhabba xi mard mentali, tali decizjoni ma tistax tkun soggetta għal revizjoni mill-Bord Mediku...’<sup>236</sup>,*

- [122]. Decisions of the Medical Board that a voter is of unsound mind are taken by unanimous vote and are communicated in writing to the Electoral Commission who is required to immediately inform the voter.<sup>237</sup> The decision of the Medical Board is final and binding on the Electoral Commission and the voter, and that there is no from such decision<sup>238</sup>.

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<sup>235</sup> Chapter 354 of the Laws of Malta, General Elections Act, Section 27(1)  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_9/chapt354.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_9/chapt354.pdf).

<sup>236</sup> Court of Appeal, Civil Appeal No. 65/2003/1 ‘Henri Darmanin vs. Carmelina Debattista & the Electoral Commission’, 17th March, 2003, p 5

<sup>237</sup> Chapter 354 of the Laws of Malta, General Elections Act, Section 27(3)  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_9/chapt354.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_9/chapt354.pdf).

<sup>238</sup> Chapter 354 of the Laws of Malta, General Elections Act, Section 27(2)  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_9/chapt354.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_9/chapt354.pdf).

## 4. Involuntary placement and Involuntary Treatment

- [123]. Malta was not included within the scope of the Report on Compulsory Admission and Involuntary Treatment of Mental Ill Patients – Legislation and Practice in EU Member States (2002)<sup>239</sup>.
- [124]. The Committee for the Prevention of Torture has visited the public mental health hospital, Mount Carmel Hospital, on a number of occasions. Although the last time when a visit occurred was in 2008 the report for this visit has not as yet been published.<sup>240</sup> The last report preceeding the 2008 visit was that published in 2007 on the visit held in June 2005.<sup>241</sup> There are two issues mentioned therein which are to be noted. First that the committee had found indications that minors were staying at the mental health hospital unaccompanied and secondly that the patients (in this case irregular immigrants) held at the secure unit in Mount Carmel were not allowed the use of the yard. In this respect the report states as follows:

*'The delegation visited the new secure unit for irregular immigrants, opened in the summer of 2004, at Mount Carmel Psychiatric Hospital. This unit, which takes men (adults and minors) and has 8 beds, was accommodating 5 patients (including 2 minors) at the time of the visit. When necessary, women patients were placed in the women's admissions unit.*

*Conditions for patients were generally good. The premises and rooms were well ventilated and clean, and the equipment well maintained. That said, **the atmosphere in the unit was fairly bleak, due to the lack of decoration. Further, patients should have lockable cupboards or lockers for their personal belongings.***

*The fact that patients were not given access to the nearby exercise yard, although this was fully enclosed, was harmful for the patients. It appears that the police officers who supervised the unit were unwilling to grant patients this "favour", contrary to the assurances given on this point by the Maltese authorities in their reply to the report on the January 2004 visit (cf. CPT/Inf (2005) 16, p. 19). **The CPT reiterates its recommendation that all***

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<sup>239</sup> Available at:

[http://ec.europa.eu/health/ph\\_projects/2000/promotion/fp\\_promotion\\_2000\\_frep\\_08.en.pdf](http://ec.europa.eu/health/ph_projects/2000/promotion/fp_promotion_2000_frep_08.en.pdf)

<sup>240</sup> <http://www.cpt.coe.int/en/states/mlt.htm>

<sup>241</sup> <http://www.cpt.coe.int/documents/mlt/2007-37-inf-eng.pdf>

*patients be allowed one hour of outdoor exercise every day (their state of health permitting).'*

- [125]. CPT's report<sup>242</sup> on their visit in 2001 provides more extensive comments on the position of patients at Mount Carmel Hospital especially when comparing these to the conditions which had been noticed by the committee in 1995. In this regard it comments about the 'forensic ward' where male prisoners from the correctional facility are placed. The ward is often used for 'short-term placements involved patients commencing methadone maintenance treatment'. In relation to the conditions of such ward the CPT commented that:

*'The situation found on 16 May 2001 was unchanged. The 8 m<sup>2</sup> "rooms", which can more accurately be described as cells, were dim and oppressive, their sole embellishments a low bed bolted to the middle of the floor and an unpartitioned toilet which could only be flushed from outside. Patients continued to store their personal items in plastic bags kept on the floor.*

*As in 1995, there was a complete absence of purposeful and leisure activities for patients on the ward; indeed, the situation had deteriorated in certain respects. Access to certain areas (e.g., a dining room) and to television was no longer provided. Even more disturbingly, patients – even those accommodated in the ward for extended periods - had no outdoor activity, the existing yard not being used due to "security considerations". Their only area for movement or association was a narrow corridor, a situation which is totally unacceptable.'*

- [126]. Yet, other positive developments were noted such as the reinforcement of professional staff, provision of occupational therapy, the introduction of in-service training of nursing staff, and the introduction of guidelines for the use of seclusion. The CPT moreover noted that there was an ongoing refurbishment of the hospital wards, one of which was only inaugurated in the last few days.<sup>243</sup>
- [127]. It is, however, interesting to note that the CPT had already been notified of the authorities' intention to revise the existing Mental Health Act of 1976 and the CPT proposed that regard must be had to the Committee's 8<sup>th</sup> General Report on involuntary placement in psychiatric establishments. Yet, despite the passage of a number of years, this law remains in force without amendments, even though a draft Bill does exist.

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<sup>242</sup> <http://www.cpt.coe.int/documents/mlt/2002-16-inf-eng.pdf>

<sup>243</sup> <http://www.timesofmalta.com/articles/view/20091019/local/refurbished-unit-at-mt-carmel-hospital>

## 4.1. Legal Framework

### 4.1.1. Legal Framework regulating involuntary placement and involuntary treatment: Scope, Date of Adoption and Proposed Amendments

- [128]. Involuntary placement and involuntary treatment of persons suffering from mental illness is currently regulated by Part III of the Mental Health Act, Chapter 262 of the Laws of Malta<sup>244</sup>. This Mental Health Act was adopted in 1976 and came into force in 1981. It was closely based on the 1959 Mental Health Act of England<sup>245</sup>, which however was replaced in 1983. The Act has often been referred to as outdated and archaic<sup>246</sup> – particularly in regard to its lack of safeguards of rights belonging to persons with mental illness who are subjected to involuntary admission to hospitals and treatment. Malta initiated a National Mental Health Reform in 1993, which included the constitution of a National Commission for Mental Health Reform and the drafting of a new Mental Health Act. A draft of the Mental Health Bill was published for public consultation purposes in 2007 by the then Ministry for Health, the Elderly and Community Care<sup>247</sup>. The Bill, however, has not as yet been adopted, and has been revised over the years. The authors of this report attained a copy of the latest version (September 2009) from the Ministry of Social Policy, which is not available online.
- [129]. Some of the main changes which the new Mental Health Bill will bring about, if enacted, are aimed at strengthening patients' rights who are compulsorily admitted to a psychiatric institution.<sup>248</sup> Measures proposed within the new legislation include the introduction of a Commissioner for the Promotion of Rights of Persons with Mental Disorders, as well as compulsory care plans – as noted above in other sections of this report.

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<sup>244</sup> Chapter 262 of the Laws of Malta, Mental Health Act:

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>245</sup> House of Representatives Debates, Sitting Number 479, 22nd December 1975 (Official Unrevised Report) – not available online.

<sup>246</sup> National Commission for Mental Health Reform;

[http://www.sahha.gov.mt/showdoc.aspx?id=474&filesource=4&file=info\\_eng\\_mhr.pdf](http://www.sahha.gov.mt/showdoc.aspx?id=474&filesource=4&file=info_eng_mhr.pdf);

Refer also to: Gauci D., 'Pathways to social integration for people with mental health problems: the establishment of social co-operatives', Comment Paper, Malta – part of Peer Review in the Field of Social Inclusion Policies: [www.peer-review-social-inclusion.net](http://www.peer-review-social-inclusion.net);

Saliba, J.R., 'Psychiatry in Malta' in *Psychiatric Bulletin*,

<http://pb.rcpsych.org/cgi/reprint/18/6/368.pdf?ck=nck>

<sup>247</sup> The 2007 version of the Mental Health Bill, as published for public consultation purposes, is available online: <http://www.sahha.gov.mt/pages.aspx?page=785>

<sup>248</sup> This was also noted in Annex to the Press Release on the Visit of the United Nations Working Arbitrary Detention to Malta; [www2.ohchr.org/english/issues/detention/.../WGADAnnexFinal.doc](http://www2.ohchr.org/english/issues/detention/.../WGADAnnexFinal.doc)

#### 4.1.2. Distinction between involuntary placement and involuntary treatment

- [130]. The Mental Health Act which is currently in force,<sup>249</sup> makes a distinction between involuntary placement and involuntary treatment. According to Section 14 of the Mental Health Act, a patient may be admitted to a hospital and there detained for either observation or treatment purposes. The same basic grounds for admission apply whether for observation or treatment purposes: an application for admission may be made in respect of a patient who is suffering from mental disorder of a nature or degree which warrants the his detention in a hospital and given that 'it is necessary that he be so detained in the interests of his own health or safety or with a view to the protection of other persons.'<sup>250</sup> However, it should be noted that the degree or nature of ill-health required in order to justify the involuntary admission of a person against his or her will at a mental health facility is not indicated in the Mental Health Act.
- [131]. In both cases of applications for the admission of a person for observation purposes and for treatment purposes, written recommendations are required by two medical practitioners, indicating that the abovementioned grounds/conditions are applicable. However, Section 14(3) of the Mental Health Act provides that in the case of an application for admission for treatment, the two medical practitioners are required to give detailed reasons for their opinion and must specify whether other possibly available methods of dealing with the patient are not appropriate<sup>251</sup>. Furthermore, the Mental Health Act distinguishes between the detention periods applicable in the case of a person admitted for observation purposes and a person admitted for treatment purposes:

*21. (1) Subject to the following provisions of this Part of this Act, a patient admitted to hospital in pursuance of an application for admission for observation may be detained for a period not exceeding twenty-eight days beginning with the day on which he is so admitted, but shall not be detained thereafter unless, before the expiration of that period, he has become liable to be detained by virtue of a subsequent application, order or direction under any provision of this Act, not being an application for admission for observation.*

*(2) Subject to the following provisions of this Part of this Act, a patient admitted to hospital in pursuance of an application for admission for treatment may be detained in a hospital for a period not exceeding one year beginning with the day on which he was so*

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<sup>249</sup> Chapter 262 of the Laws of Malta, Mental Health Act:  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>250</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 14(2):  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>251</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 14(3):  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

*admitted, but shall not be so detained for any longer period unless the authority for his detention is renewed under the following provisions of this article.*

*(3) Authority for the detention of a patient as is referred to in subarticle (2) may, unless the patient has been discharged previously, be renewed under the following provisions of this article for a further period of one year from the expiration of the period referred to in the said subarticle and, thereafter, for further periods of two years at a time.*<sup>252</sup>

Therefore, under the current legislation, involuntary placement can last up to 28 days. It is only if a person who has been originally admitted to a hospital for observation purposes is then served with an application his admission for treatment<sup>253</sup> or any other similar order, that the maximum detention period is automatically extended to one year from the moment the second application was received by the hospital manager.<sup>254</sup>

Another distinction between persons involuntarily placed in hospital for observation purposes and those placed for treatment purposes, relates to the discharge of such patients. According to Section 28(2) of the Mental Health Act, a patient detained in a hospital pursuant of an application for admission for observation can be discharged based on an order by the responsible medical officer or the hospital manager. On the other hand, in the case of a patient detained pursuant of an application for admission for treatment, an order for discharge can be made by the responsible medical officer, the hospital manager or the nearest relative<sup>255</sup> of the patient.<sup>256</sup>

### 4.1.3. Involuntary placement without treatment

[132]. Pursuant to Section 14 and subsequent sections of the Mental Health Act, involuntary placement without treatment is possible. However, Section 14(4) provides that,

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<sup>252</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 21:  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>253</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 18(2):  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>254</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 18(3):  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>255</sup> Section 30 (1) of the Mental Health Act defines 'relative' as namely: husband, wife, son, daughter, father, mother, brother, sister, grandparent, grandchild, uncle, aunt, nephew or niece. Article 30(3) of the Mental Health Act defines 'nearest relative' as "the person first described in subarticle (1) who is for the time being surviving, relatives of the whole blood being preferred to relatives of the same description of the halfblood and the elder or eldest of two or more relatives described in any paragraph of that subarticle being preferred to the other or others of those relatives, in any case regardless of sex." Article 31 of the Mental Health Act provides for the appointment of the 'acting nearest relative' by the court decree.

<sup>256</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 28(2)(a) and (b);  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf).

*'Nothing in this article contained shall preclude a patient admitted to a hospital in pursuance of an application for admission for observation from receiving such medical treatment as the responsible medical officer considers appropriate'.*

- [133]. Similarly, Section 18(2) provides that an application for admission for treatment can be made even where a patient is already an in-patient in a hospital due to originally being admitted for observation purposes. However, as noted above, in the absence of such application for treatment purposes, the maximum duration for involuntary placement for observation purposes is 28 days.

#### 4.1.4. Aims pursued by the relevant legal framework

- [134]. The Mental Health Act which is currently in force has a custodial approach, aimed at catering for the treatment of the mental disorder, while ensuring that the individual concerned is not of danger to himself or others. The focus of the Mental Health Act is the administrative regulation of mental hospitals and mental nursing homes and, in particular, the basis on which these are detained and given treatment. It does not, however, cater for rehabilitation or community care.

#### 4.1.5. Legal provision for aftercare following involuntary placement or treatment

- [135]. The Mental Health Act does not stipulate aftercare following involuntary placement or treatment.
- [136]. However, following the launch of the National Policy for Mental Health Services in 1995, a pilot community mental health project was developed in 2004, involving day centres and a generic social work team dealing with issues related to mental health<sup>257</sup>. There are now community mental health centres in two areas of Malta, with more planned by the Government in the pipeline.<sup>258</sup> Primary (nurse-led) and secondary (consultant psychiatrist-led) mental health teams are involved at this community level<sup>259</sup>.
- [137]. Furthermore, in the last Budget speech given by the Minister of Finance<sup>260</sup>, reference was specifically made to the Government's aim of extending

<sup>257</sup> Gauci, D., 'Pathways to social integration for people with mental health problems: the establishment of social co-operatives', Comment Paper for Malta, Peer Review in the Field of Social Inclusion Policies: Greece 2005

<sup>258</sup> The Malta Independent, "Caring for mental health sufferers in the community", 6 Sep 2009 <http://www.independent.com.mt/news2.asp?artid=93672>

<sup>259</sup> National Strategy for Social Protection and Social Inclusion 208-2010, p. 58

<sup>260</sup> Ministry of Finance, Budget Speech 2009 pp 83-84  
[http://www.finance.gov.mt/image.aspx?site=MFIN&ref=2009budget\\_Budget\\_Speech\\_en](http://www.finance.gov.mt/image.aspx?site=MFIN&ref=2009budget_Budget_Speech_en)

community services for persons with mental health problems, to be able to continue living in the community. The identification of sites to be used for the mentally ill living in the community was also specifically mentioned.

#### 4.1.6. Regulation for involuntary treatment of children and young adults

- [138]. As opposed to the current Mental Health Act, which does not make specific provision for procedures involved in the involuntary admission of minors to hospital, the draft Mental Health Bill<sup>261</sup> stipulates that an involuntary admission for observation of a minor suffering from a mental disorder shall only be permissible if a Minister-appointed specialist with experience in child psychiatry certifies that based alternatives are not available, are unlikely to be effective or have been attempted at and did not succeed or are unsafe. Furthermore, it stipulates that an Involuntary Admission for Treatment Order in the case of minors shall be granted for a maximum period of 4 weeks. This period can only be extended for up to a maximum period of 12 weeks from the initial date of involuntary admission. According to Section 28(5) of the draft Mental Health Bill, the Commissioner for the Promotion of Rights of Persons with Mental Disorders would be able to grant a Continuing Detention Order for up to a maximum period of three months in the case of minors (renewable subject to a new application being submitted to the Commissioner).
- [139]. Mount Carmel Hospital (the main psychiatric hospital in Malta) has protocols concerning criteria and procedures for admission to its Young Persons Unit<sup>262</sup>. While admission age limits are between 12 and 15 years, a child can remain in the same unit until the age of 17. Children between 5 and 10 years of age are referred to the NGO, Richmond Foundation, which runs the K.I.Ds Programme, which caters for children between 5 and 10 years.<sup>263</sup>
- [140]. According to the Mental Health Act currently in force, a child admitted to hospital on basis of an application for admission for treatment can apply to the Mental Health Review Tribunal only within the six month period as of the day on which he attains the age of sixteen years<sup>264</sup>. Otherwise, it is his parents who can apply on his/her behalf. In the case of a child whose parents have died or have forfeited their parental authority as per Section 158 of the Civil Code<sup>265</sup>,

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<sup>261</sup> Mental Health Bill (version September 2009) Section 38. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online*

<sup>262</sup> This protocol was obtained by the authors of this report upon request made to the administration of Mount Carmel Hospital. The protocol is not available online.

<sup>263</sup> <http://www.richmond.org.mt/kid?l=1>

<sup>264</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 19(3); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>265</sup> Chapter 16 of the Laws of Malta, Civil Code; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_2/chapt16.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt16.pdf)



such a child is subject to be placed under tutorship (guardianship) until he/she becomes of age or marries, and his/her tutor is required by law to represent him/her. In accordance with Section 30(5) of the Mental Health Act, the tutor is considered as the nearest relative of the child patient.

#### 4.1.7. Involuntary placement for certain groups of patients

- [141]. The Mental Health Act addresses the involuntary placement for offenders with mental disorders. Part IV of the Mental Health Act is specifically concerned with patients in criminal proceedings and offenders. According to this Act, the Court may order that an accused be admitted to a hospital for observation if the question of insanity of the accused arises at the time of the offence or of the proceedings<sup>266</sup>. If a plea of insanity was entered in court, it was for the jury to decide whether the person concerned was fit to stand trial and also what that person's state of health had been at the time of the offence, but the judge was responsible for issuing a warrant of detention. The period of detention of the accused at a mental health facility is regulated by the same court issuing the order<sup>267</sup>.
- [142]. Section 43 of the Mental Health Act provides that where a court of criminal jurisdiction or a court martial finds that the accused was insane at the time of the offence, the accused shall be conveyed and detained in a hospital, based on the order of the court. Such persons are not entitled to the same maximum duration periods and renewal procedures as other patients involuntarily admitted for observation or treatment. Furthermore, no application or reference may be made to the Mental Health Review Tribunal with respect to such persons, unless such reference is made for advice purposes by the Minister responsible for justice<sup>268</sup>. This is because the Mental Health Act awards the power to grant leave of absence, transfer the patient, and/or order the discharge of the patient, solely to the Minister responsible for justice, after due consultation with the responsible medical officer, the hospital manager and possibly the Tribunal<sup>269</sup>. The power to recall the patient, after having granted leave of absence, is also vested in the said Minister and the responsible medical officer. In the case of the court finding that an accused is insane at the time of the proceedings, and the concerned person is hence admitted to a hospital, the Minister may remit the accused to prison for the continuation of the criminal proceedings against him if the responsible medical officer or hospital manager notifies the same Minister

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<sup>266</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 42(1); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>267</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 42(2); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>268</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 43(2)(b); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>269</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 43(2); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

that the accused is recovered sufficiently to stand trial. The Minister responsible for justice may also direct that a patient liable to be detained in hospital by virtue of a court order be taken to any place in Malta if the attendance of such patient at that place is desirable in the interests of justice or for the purpose of any public enquiry or for any other public interest.

- [143]. According to Section 44 of the Mental Health Act, the Minister responsible for justice is likewise vested with the power to direct that a person serving imprisonment be transferred and detained in a hospital, if the said Minister is satisfied by reports from at least two medical practitioners that the concerned person is suffering from mental disorder of a nature or degree warranting medical treatment in hospital. The law<sup>270</sup> provides that such person shall no longer be detained at the hospital upon expiration of the imprisonment sentence or when he/she is certified by two medical officers, one of whom designated by the Minister responsible for justice, to be no longer suffering from mental disorder rendering liable to be detained in hospital for treatment.
- [144]. Sections 37 to 29 of the draft Mental Health Bill (2009) make specific provision in relation to persons in prison and mentally ill offenders. The proposed legislation provides such that the court will be able to issue an involuntary community treatment order, instead of imprisonment, when a person having a history of mental disorder or suffering from a mental disorder, commits an offence punishable by a prison sentence. It may do so if it is satisfied that imprisonment may jeopardise the mental health of the person, and provided that the involuntary community treatment order is not longer than the sentence would have been and that if the person fails to fulfil the conditions of probation or of the treatment order, he/she will be recalled back to prison or admitted to a mental health care facility for complete treatment.<sup>271</sup>
- [145]. The draft Mental Health Bill (2009) also provides for the possibility of the court granting a facility order instead of imprisonment when a person is found guilty of an offence punishable by a prison sentence and the person is in need of inpatient psychiatric care at the time of sentencing<sup>272</sup>. Section 38(c) of the Bill provides that if the person needs additional treatment in the facility after expiration of the term given by the facility order, he may continue to be detained therein for further treatment, if the general criteria for involuntary admission are satisfied and after an Involuntary Admission and Treatment Order is granted by the Commissioner. The Bill specifically stipulates that persons detained by virtue of a facility order may only be detained in a facility licensed for forensic patients, and that they will have the same rights as

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<sup>270</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 44(3); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>271</sup> Mental Health Bill (version September 2009) Section 37. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>272</sup> Mental Health Bill (version September 2009) Section 38. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

involuntary admitted patients, subject to restrictions imposed by prison regulations or by court order. It also provides for the possibility of leave being granted to such persons as part of their treatment plan, following approval granted and under such conditions imposed by the Minister for Justice. The responsible carer and social worker responsible for the person during his stay in hospital will need to submit the application for his leave to the Minister. Section 38 (g) of the draft Mental Health Bill also states that if the court is satisfied after the submission of evidence by the multidisciplinary team caring for the person and an independent expert review that imprisonment may jeopardise the mental health of the person, it may convert the remaining part of the sentence to a probation order, with or without an involuntary community treatment order.

- [146]. The draft Bill in turn provides for the transfer of persons who develop a mental disorder whilst in prison and who cannot receive adequate treatment in prison. They can be transferred to a licensed facility for forensic patients, having the same rights as other patients, subject to any restrictions imposed by prison regulations. If involuntary treatment is necessary, the same procedures as those instituted for other patients would be followed. Section 39(2)(c) of the draft Bill establishes that a person will be transferred back to the correctional facility once hospital care is no longer required and if the term of imprisonment has not expired.
- [147]. No specific legislation directly addresses the involuntary placement of other groups of patients, including persons with addictive behaviour. However, the protocols obtained by the authors of this report from the main psychiatric hospital, Mount Carmel Hospital, do refer to patients admitted under the influence of alcohol and provide instruction that such patients are treated in specific wards within the hospital. It is also generally known that only in cases of dual diagnosis, that persons with addictive behaviour are admitted to a psychiatric facility for observation or treatment.

## 4.2. Criteria and Definitions

### 4.2.1. Criteria to be fulfilled by law to order an involuntary placement or involuntary treatment

- [148]. One of two criteria needs to be fulfilled by law for an application for involuntary admission to hospital for observation or treatment purposes. According to the Mental Health Act, these criteria are a) the person suffering from mental disorder of a nature or degree which warrants the his detention in a hospital b) 'it is necessary that he be so detained in the interests of his own

health or safety or with a view to the protection of other persons.’<sup>273</sup> The draft Mental Health Bill, on the other hand, lists more specific criteria, requiring that a specialist:

- Certifies that the concerned person has a severe mental disorder
- Considers that, due to the mental disorder, there is a serious livelihood of immediate harm to that person or to other persons, and
- Failure to admit or detain that person is likely to lead to a serious deterioration in his condition or will prevent the administration of appropriate treatment that cannot be given in the community.<sup>274</sup>

Furthermore, the draft Bill specifies that a person requiring custodial care shall not be kept in a facility as an involuntary patient, and that if other less restrictive alternatives such as community care can be utilised, the concerned person will not be admitted to such a facility<sup>275</sup>.

#### 4.2.2. Less intrusive alternatives

[149]. While the draft Mental Health Bill clearly establishes that involuntary placement will not take place if less restrictive alternatives are available, the current legislation suggests it. Section 14(3) of the Mental Health Act states that in the case of an application for admission to hospital for treatment, recommendations are required from two medical practitioners which not only include a statement indicating that the abovementioned criteria are satisfied, but also ‘give detailed reasons for their opinion and must specify whether other methods of dealing with the patient are available and, if so, why such methods are not appropriate’. However, this legal provision is applicable only in the case of involuntary treatment, and not involuntary admission for observation purposes. Section 3 of the draft Mental Health Bill, on the other hand, refers to the right of mental healthcare users, across the board, to receive treatment in the least restrictive environment and in the least restrictive manner, and to do so primarily in the community.

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<sup>273</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 14(2); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>274</sup> Mental Health Bill (version September 2009) Section 8(1). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

<sup>275</sup> Mental Health Bill (version September 2009) Section 8(2) and (3). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online)*

### 4.2.3. Involuntary treatment and patient's opinion

- [150]. The Mental Health Act which is currently in force<sup>276</sup> does not make any reference to the patient's consent or opinion being taken into account with regard to involuntary treatment. However, Section 3 of the draft Mental Health Bill refers to the right of a mental health user to give free and informed consent before any treatment or care is provided and that such consent shall be recorded in the patient's clinical record. More specifically, Section 15 of the same draft Mental Health Bill provides, 'Prior to the administration of any treatment, informed consent shall be given by the patient and in those cases where the patient is incapable of giving consent then it has to be obtained from the responsible person.' A similar provision is included with regard to minors, except in those cases where the minor lacks maturity and understanding to consent to such treatment, in which case the consent of the person responsible for the minor would be required.<sup>277</sup> Section 32 of the draft Bill establishes that, except in emergency situations, written informed consent by the patient (or by the responsible carer where the person is unable to give consent due to his mental disorder, is required in view of major medical or surgical procedures being undertaken.

### 4.2.4. Definition of risk level of danger

- [151]. The Constitution of Malta states that:

No person shall be deprived of his personal liberty save as may be authorised by law in the following cases, that is to say...in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community<sup>278</sup>.

- [152]. Indeed, one of the criteria for the involuntary admission of a patient to hospital for observation or treatment purposes relates to the risk of danger one poses to oneself or others – as stipulated in Section 14(2) of the Mental Health Act<sup>279</sup>. The element of danger is also reflected in Section 39(2)(c) of the Mental Health Act<sup>280</sup>, which requires the Mental Health Review Tribunal to establish that a

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<sup>276</sup> Chapter 262 of the Laws of Malta, Mental Health Act;  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>277</sup> Mental Health Bill (version September 2009) Section 34(1). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online*

<sup>278</sup> Constitution of Malta, Article 34(1)(i),  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_1/chapt0.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf)

<sup>279</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 14(2);  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>280</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 39(2)(c);  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

person, if released from hospital, would not be likely to act in a manner dangerous to other persons or self. However, Maltese law does not provide for a definition of the risk level of danger to the health or safety of the patient and/or to other persons. Similarly, the draft Mental Health Bill does not provide such a definition, and therefore it does not seem that the new law will incorporate it.

## 4.3. Assessment, Decision Procedures and Duration

### 4.3.1. Authority deciding on Involuntary Placement

- [153]. The law is currently such that the decision whether or not to accept an application for the involuntary placement of a person in a hospital, is taken by the “manager” of the hospital in question. Section 2 of the Mental Health Act defines “manager” as the Physician Superintendent at Mount Carmel Hospital (Malta), the Physician Superintendent at the Chambrai Hospital (Gozo), or the medical officer acting their place in the same capacity. It also refers to the person or persons responsible for the management of other hospitals or mental nursing homes.

### 4.3.2. Number of expert opinions required for the assessment of the psychiatric condition

- [154]. The application for admission needs to be founded on the written recommendations given either jointly or separately by two medical practitioners, including in each case a statement that in the opinion of the practitioner the patient is suffering from mental disorder of a nature or degree which warrants his detention, and that it is necessary that he is detained in the interests of his own health or safety or that of others<sup>281</sup>.
- [155]. According to the current Mental Health Act<sup>282</sup>, an application for the admission of a patient to hospital is sufficient authority for the applicant to take the patient and convey him to the hospital within fourteen days from the date of the last medical recommendation given for the purposes of the application. (In the case of emergency applications, the time-limit is of two days from the date of the medical recommendation). However, Section 20 (2) of the same Act provides

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<sup>281</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 14(2)(a) and (b); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>282</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 19; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

that if within the period of 14 days from the day on which a patient has been admitted, it appears to the hospital manager that one of the two medical recommendations is insufficient to warrant the detention of the patient in pursuance of the application, he may, with that same period, give notice in writing to that effect to the applicant and the medical recommendation is disregarded. The same Section however makes a proviso, allowing for a fresh medical recommendation to be given to the manager within the same 14 day period, and thus for the application to remain sufficient for the patient to continue being involuntarily kept at the hospital<sup>283</sup>. Section 20(3) of the Mental Health Act<sup>284</sup> provides that where the medical recommendations upon which an application for admission is founded are, taken together, insufficient to warrant the detention of the patient in pursuance of the application, a notice in writing to that effect is to be given to the applicant.

#### 4.3.3. Expertise of the medical staff involved in the decision procedure for involuntary placement

- [156]. The current Mental Health Act defines “medical practitioner” as any person whose name is entered in the Medical Register kept by the Medical Council<sup>285</sup>. The latter is constituted under Section 20 of the Department of Health (Constitution) Ordinance<sup>286</sup>.
- [157]. The law specifies that one of the medical recommendations given for the purposes of an application for involuntary admission, needs to be given by a medical practitioner whose name appears on a list which is approved by the Minister responsible for public health after consultation with the Medical Council and which consists of medical practitioners having special experience in diagnosis or treatment of mental disorder<sup>287</sup>. The law also requires that if such medical practitioner did not have previous acquaintance with the patient before, the second recommendation needs to be given by a medical practitioner who would have such previous acquaintance<sup>288</sup>. Furthermore, the two recommendations are to be given by medical practitioners who have personally

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<sup>283</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 20(2);  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>284</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 20(3);  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>285</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 2(1);  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>286</sup> Chapter 94 of the Laws of Malta, Department of Health (Constitution) Ordinance,  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_3/chapt94.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_3/chapt94.pdf)

<sup>287</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 17(2);  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>288</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 17(2);  
[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

examined the patient either together or at an interval of not more than three days.<sup>289</sup>

#### 4.3.4. Authority deciding the termination of involuntary placement/treatment

- [158]. An order in writing is required for the discharge of a patient being involuntarily detained in a hospital for observation or treatment<sup>290</sup>.
- [159]. The Superintendent of Public Health may issue the discharge order<sup>291</sup>. Furthermore, in the case of a patient being detained for observation purposes, the discharge order may be made by the responsible medical officer (ie the medical practitioner in charge of the treatment of the patient) or by the manager of the hospital<sup>292</sup>.
- [160]. In the case of a patient being detained for treatment purposes, the discharge order can also be made by the nearest relative of the patient<sup>293</sup>. However, the order can be made only after giving a minimum of 72 hours notice in writing to the hospital manager. According to Section 29(1) of the Mental Health Act, if within those 72 hours the responsible medical officer provides a report to the manager wherein he states that the patient would be likely to act in a manner dangerous to himself or to others, if discharged, the discharge order issued by the nearest relative shall have no effect. Furthermore, that relative would not be able to issue a discharge order in regard to the same patient for a period of six months from the date of the report. The relative, however, has the opportunity to apply to the Mental Health Review Tribunal within a period of 28 days from the day on which he is informed about such a report<sup>294</sup>.

#### 4.3.5. Procedure when voluntary placement becomes involuntary

- [161]. In terms of Section 3 of the Mental Health Act which is currently in force, a person may seek treatment for a mental disorder through admission to any hospital or mental nursing home and this would not require any application

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<sup>289</sup> *Ibid*

<sup>290</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 28(1); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>291</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 28(3); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>292</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 28(2)(a); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>293</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 28(2)(b); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>294</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 29(2); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)



whatsoever. However, during that person's stay in hospital an application may be presented in his/her regard for compulsory admission for observation or for treatment<sup>295</sup>. This could specifically be the case where such a person either refuses treatment or seeks to leave the hospital. Where a person is admitted even if involuntarily for observation he/she may be detained in hospital for treatment if an application for this purpose is presented<sup>296</sup>.

Compulsory detention for observation or treatment may be imposed on a patient who is already an in-patient in a hospital on a voluntary basis, after a medical practitioner in charge of the treatment of the patient gives the hospital manager a report in writing substantiating and agreeing with the patient's retention in hospital. Moreover, in such case the patient may be 'detained in the hospital for a period of three days beginning with the day on which the report is so furnished.'<sup>297</sup>

In terms of the proposed Mental Health Act, a person may only be retained as an involuntary patient if a specialist certifies that such person has a severe mental disorder, considers that there is a serious likelihood of immediate harm to that person or to other persons and if failure to detain that person is likely to lead to a serious deterioration in his condition or will prevent the administration of appropriate treatment that cannot be given in the community.<sup>298</sup>

#### 4.3.6. Maximum period between psychiatric assessment and beginning of the compulsory placement

- [162]. Following the issue of compulsory detention order, a person may be conveyed to hospital at any time within the period of fourteen days beginning with the date appearing on the medical recommendation last given for the purposes of the application as the date on which the patient was last examined by the medical practitioner before making that recommendation<sup>299</sup>. However, in cases of emergency applications, a person may be conveyed to the hospital within two days beginning with the date appearing on the medical recommendation referred to previously.<sup>300</sup>

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<sup>295</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 18(1); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>296</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 18(2); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>297</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 18(4); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>298</sup> Mental Health Bill (version September 2009) Section 8. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online).*

<sup>299</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 19(1); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>300</sup> *Ibid*

[163]. On the other hand, the draft Mental Health Bill (2009) does not indicate a maximum period within which a person may be conveyed to the hospital for compulsory placement from the psychiatric assessment made. However, it does propose that prior to an involuntary admission for observation a medical assessment is to be made by two medical practitioners within 6 hours from each other. If there is a discrepancy between the two assessments a third independent assessment by a specialist in mental health is to be carried out. In cases of emergency an initial single medical assessment is deemed sufficient provided a second medical assessment is obtained within 6 hours of admission to the hospital.<sup>301</sup>

#### 4.3.7. Duration in emergency situations

[164]. Section 15 of the Mental Health Act addresses compulsory admission for observation in cases of emergency. The Section requires that an emergency application is founded on at least one medical recommendation, given, if practicable, by a practitioner who has previous acquaintance with the patient. However, the said recommendation, which needs to confirm the urgent necessity for the patient to be admitted and detained for observation, will cease to have effect on the expiration of a period of 72 hours from the time when the patient is admitted to hospital, unless a second medical recommendation is received by the hospital manager within that period and both recommendations complement and comply with each other<sup>302</sup>. Only once the second recommendation is received and the placement is approved, the duration of the same involuntary placement for observation will be that of a maximum of 28 days beginning with the day on which he is so admitted,<sup>303</sup>.

#### 4.3.8. Maximum duration of initial placement

[165]. A patient admitted to hospital for observation may be detained for a period not exceeding 28 days beginning with the day on which he/she is so admitted. However, the duration may be extended.<sup>304</sup> On the other hand, a person admitted for treatment may be detained in hospital for a period not exceeding one year beginning with the day on which he/she was so admitted. This too

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<sup>301</sup> Mental Health Bill (version September 2009) Section 9. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online.*

<sup>302</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 15(2) and 15(3); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>303</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 21; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>304</sup> Ibid

may be extended for a further period of one year from the end of the first period of one year, and subsequently for further periods of two years at a time.<sup>305</sup>

- [166]. A review of the period of detention is carried out within a time frame of two months prior to the lapse of an involuntary detention for treatment. This is carried out by the responsible medical officer who is to examine the patient and seek a renewal of his/her detention if it appears to the medical officer that this is necessary in the interests of the patient's health or safety or for the protection of other persons. In this case, the medical officer is to furnish the hospital manager with a report.<sup>306</sup>

#### 4.3.9. Legally regulated coercive measures

- [167]. The current Mental Health Act does not regulate specific coercive care interventions. A reading of the Act provides an indication that any such treatment is carried out upon a recommendation of a medical practitioner taking care of the patient, however no distinction between treatments seems to be made at law. Neither do the Protocols followed by practitioners at the mental health hospital provide any specific regulation in this regard. While electro-convulsive therapy is used at the State mental health hospital<sup>307</sup> and this is indicated as one of the services it offers, yet no specific regulation of such treatment is at least publicly available. It is, however, informally known that psychiatrists may choose to follow regulations established in other jurisdictions, normally the NICE guidelines and also that an internal procedure requiring the approval of the consultant and the head of the mental health facility is followed.
- [168]. On the other hand, the proposed Mental Health Act<sup>308</sup> dedicates specific attention to special treatments, restrictive care and medical research. In this regard, Section 32(a) of the proposed Act provides that 'no major medical or surgical procedure' is to be carried out unless the patient gives written informed consent. In cases where the patient is unable to give consent due to the mental health disorder, such consent may be given by the responsible carer. Moreover, the Commissioner's approval is also required for the administration of special

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<sup>305</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 21(2) and(3); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>306</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 21(4); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>307</sup> [https://ehealth.gov.mt/HealthPortal/health\\_institutions/hospital\\_services/mount\\_carmel\\_hospital/mount\\_carmel\\_default.aspx](https://ehealth.gov.mt/HealthPortal/health_institutions/hospital_services/mount_carmel_hospital/mount_carmel_default.aspx)

<sup>308</sup> Mental Health Bill (version September 2009). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online.*

treatments<sup>309</sup>. It is, however, the Minister's discretion to determine which therapeutic interventions are 'invasive or irreversible treatments' and therefore are to be included in a specific 'Special Treatment Schedule'<sup>310</sup>. Furthermore, the proposed Act identifies and regulates two specific forms of treatment. It prohibits the use of sterilisation to limit the sequelae of promiscuity unless this is approved by the Commissioner<sup>311</sup>. It also specifies that electro-convulsive therapy is only to be administered after the patient or responsible carer has consented. However, in the case of minors this is only possible if there is a second opinion from a specialist in child psychiatry appointed for the purpose by the Minister who certifies the need for such treatment<sup>312</sup>.

[169]. With reference to medical and scientific research trials, Section 35 of the draft Mental Health Bill provides the following,

*(1) No person with a mental disorder may be subjected to medical or scientific experimentation including clinical trials unless:*

*(a) free and informed consent is given by the patient;*

*(b) in the case of patients receiving treatment in a facility an independent specialist appointed by the Commissioner examine the patient and certify in the clinical records of the patient that he is capable to give free and informed consent and that the research or trial will not harm and may benefit the person; and (c) there is the approval by the ethics committee appointed by the Minister under the Clinical Trials Regulations.*

*(2) No person who lacks the capacity to give free and informed consent may be subjected to medical or scientific research but may be included in a clinical trial or experimental treatment if:*

*(a) the Commissioner is satisfied after assessment by the independent experts that the proposed trial or treatment is safe and that there is scientific evidence that the patient's health status may be improved by such trial or treatment;*

*(b) there is the approval of the responsible carer; and*

*(c) there is the approval by the ethics committee appointed by the Minister under the Clinical Trials Regulations*

*(3) The person or, in the case of a person lacking capacity to give free and informed consent, the responsible person, has the right to*

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<sup>309</sup> Mental Health Bill (version September 2009) Section 33. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online.*

<sup>310</sup> Ibid

<sup>311</sup> Mental Health Bill (version September 2009) Section 33(3). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online.*

<sup>312</sup> Mental Health Bill (version September 2009) Section 33(4). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online.*

*withdraw at any time his consent for participation in any medical or scientific research or clinical trial.*<sup>313</sup>

#### 4.3.10. Other coercive measures

[170]. Physical restraint and seclusion is also not specifically regulated in the Mental Health Act currently in force. This is, however regulated in Protocols established by the practitioners in the State mental health hospital. MCH Circular 31/2008<sup>314</sup> issued by Mount Carmel Hospital on the 21<sup>st</sup> August 2008 provides for a framework within which a patient may be retained in the Secure Unit. It, however, refers to a ‘male acute secure unit’ as being ‘a four bedded locked unit with high staffing levels and with its own integral living facilities.’ This unit caters for:

- *‘acutely disturbed patients hospitalised for over eight weeks (ex-Mixed Admission Ward patients) but under one year*
- *Acute relapse of chronic patients elsewhere within the hospital*
- *Severely disturbed patients (including those hospitalised less than eight weeks) needing ready access to secure and seclusion facilities.’*

[171]. The circular seems to indicate that seclusion within this unit is to be a measure of last resort and proposes the use of on-site time-out or seclusion facilities in cases where ‘behavioural problems’ may be contained in this manner. Moreover those who are likely to need repeated use of seclusion ‘in the near future’ are to be retained in the Secure Unit ‘until reasonably well controlled, however not for any longer than necessary.’

[172]. The patient’s consultant is to review the retention of the patient within the Secure Unit daily and where the departmental nurse manager considers that a patient’s retention therein is longer than necessary the nurse manager is to inform the Director of Psychiatry. The circular emphasises that ‘Time spent in the Secure Unit or in seclusion will be kept as brief as possible.’ Interestingly the Circular defines who may be referred to this unit by giving both an inclusive list and also an excluding list of circumstances. So that a person is transferred to the Secure Unit if there is a severe danger to self or others, very destructive

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<sup>313</sup> Mental Health Bill (version September 2009) Section 35. *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online.*

<sup>314</sup> A hard copy of the circular has been provided to the authors of this report by the Directors of Mount Carmel Hospital in October 2009.. The circular is not available online.

behaviour, very high suicide risk, severe distress or disturbance to other patients, severely testing and provocative behaviour and if the patient becomes severely disturbed as a result of the general level of disturbance on the main Medium term Unit. On the other hand, the following are 'not reasons for transfer to the Secure Unit' and that is: high risk of abscondment, mild/moderate danger to self or others, isolated incidents of destructive or acting out behaviour, mild/moderate death wishes or suicide risk, mere inconvenience to other patients or staff, isolated incidents of testing and provocative behaviour and if the patient is merely reacting to general level of activity on the acute ward.

[173]. There is no specific period indicated in the Circular as being the maximum period allowed for the retention of a patient in this unit, however the Circular states 'will only be kept there for the minimum period necessary, ... This will rarely exceed seven days and should usually be much less.' However for a patient who is 'very likely to need repeated seclusion' that patient is nursed on the Secure Unit but out of seclusion for such time that enables his/her stabilisation assessment. Release from the Unit then occurs if the patient has lasted without seclusion for 48 hours.

[174]. The position of such patients is reviewed by the covering consultant within the first 48 hours when speaking of weekdays, and within the first 72 hours if this occurs on weekends, daily by the doctor on duty who must also discuss the circumstances with the patient's consultant on a daily basis, and by the covering consultant before the patient is transferred back.

[175]. Each patient is to have an individualised seclusion contingency plan and 'patients must be allowed out of the single room according to their improved behaviour and level of co-operation.' Moreover this is within the 'discretion of the nursing staff on duty'. The Circular also provides a seclusion policy which, since the document is not available online is being here reproduced:

- *'between 7.00 am and 7.00 pm patients will only be secluded as specified in the seclusion book.*
- *In case of emergency, any patient can be secluded without prior reference to the firm/duty doctor, but the latter must be promptly informed of this so as to visit and assess the situation as soon as other hospital emergencies permit*
- *Between 7.00pm and 10.00pm, since the hospital will be on skeleton staff, no more than one patient at a time will be out of the (unlocked) seclusion rooms. Any patient refusing to cooperate will be secluded (door locked) automatically as a matter of policy and the duty doctor and night superintendent informed*

- *Between 10.00pm and 7.00 am all patients will be secluded (door locked) and only allowed out (one at a time) for use of toilet or urgent personal reasons within the permits of the patient's individualised, seclusion contingency plan.'*

[176]. On the other hand, the 'seclusion book' provides that 'Seclusion will otherwise be reserved for situations as specified in the individualised seclusion contingency plan, where even close nursing supervision would not suffice, such as:

- Persistently overactive dangerous behaviour which has not yet responded to appropriate medication and cannot be safely contained with skilled nursing care
- Persistently overactive behaviour which has not yet responded to medication and nursing care and which is harmfully exhausting the patient
- Persistent and repeated provocative, dangerous or defiant behaviour which requires limit setting behavioural intervention to modify the patient's maladaptive behaviour.'

[177]. A different Protocol<sup>315</sup> applies to 'youngsters' who are children below the age of sixteen. Youngsters are admitted to a ward referred to as the YPU. The place contains areas which are referred to as time out/seclusion rooms allowing for the possibility of voluntary time out sessions where the door is kept unlocked or ajar, or seclusion where the door is locked. Time out sessions are used as therapeutic methods to control the youngster's 'unproductive and potentially dangerous behaviour' and as 'a method of effectively interrupting the viscous cycle of unproductive conflict between the youngster and other youngsters or staff.'

[178]. Seclusion is applied in the following circumstances:

- *'persistently overactive dangerous behaviour which has not yet responded to appropriate medication and which cannot be safely contained with skilled nursing care*
- *Persistently overactive behaviour which has not yet responded to medication and skilled nursing care, and which is harmfully exhausting the youngster, or else giving the youngster an unhelpful sense of power which is detrimental to his/her own well being and to the safety of the Unit*

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<sup>315</sup> A hard copy of the Protocol has been provided to the authors of this report by the Directors of Mount Carmel Hospital in October 2009. The Protocol is not available online.

- *Persistent and repeated provocative, dangerous or defiant behaviour which requires limit setting behavioural intervention so as to modify the youngster's maladaptive behaviour*
- *Seclusion be used only where no other less restrictive intervention would be effective.'*

[179]. Seclusion of youngsters may only be resorted to after the medical and nursing staff have been consulted and the youngster's legal custodian being informed. Both the nurse and doctor are to register the case in the seclusion book, and a copy of this entry be kept in the youngster's case file. The seclusion book of each patient must indicate an individualised seclusion contingency plan however in case of emergency a youngster may be secluded without prior reference to the duty doctor. Yet in this case the duty doctor must be promptly informed of this so as to 'visit and assess the situation as soon as other hospital emergencies permit.' A young person is to be escorted to the seclusion room by a minimum of 2 nurses who are empowered to use 'nursing techniques for manual restraint in such circumstances'. The length of stay in seclusion depends on the orders of the doctor and the consultant who are to determine this within their discretion. If these doctors are delayed in reviewing the young person's retention in seclusion notes to this effect must be recorded in the youngster's seclusion book. However the youngster is not to be 'kept in seclusion longer than indicated, solely to wait until the doctor arrives.' Even if the doctor arrives after the youngster's release from seclusion, he is still to register an entry in the youngster's file.

[180]. The draft Mental Health Bill (2009) specifically regulates restrictive care in the proposed Section 34. In this manner, seclusion or restraint is only permissible if they are 'the only means that will prevent imminent harm and danger to self and others and are prescribed by a medical practitioner duly authorised by the clinical director of the facility to order such interventions. The medical practitioner authorising such procedures is also required to enter the reasons and duration of seclusion and restraint and the treatment given in the patient's clinical records. Moreover a copy of this entry is also to be made in the register which is available to the Commissioner. It is also specifically mentioned that, 'A person who is restrained and, or secluded shall be kept under humane conditions and under the care and close and regular supervision of trained members of staff.'<sup>316</sup> Furthermore, the responsible carer is to be informed of this within 24 hours of such intervention.<sup>317</sup>

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<sup>316</sup> Mental Health Bill (version September 2009) Section 34(3). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online.)*

<sup>317</sup> Mental Health Bill (version September 2009) Section 34(4). *This version of the Bill was provided by the Ministry of Social Policy upon request made by the authors of this report. (unavailable online.)*



[181]. The proposed Mental Health Act makes it an offence ‘when a healthcare professional (a) prolongs any seclusion and, or restraint beyond the period necessary for the purpose; (b) use seclusion and, or restraint as punishment or for the convenience of staff.’ It is also one of the Commissioner’s functions to report any abuse to the appropriate competent authority while he/she may order the taking of any action that is deemed necessary.

#### 4.3.11. Reviews and appeals concerning the lawfulness of involuntary placement or treatment

[182]. The law refers to the right of a patient who is admitted to hospital in pursuance of an application for admission for treatment applying to the Mental Health Review Tribunal. This can be done within six months from the day on which the patient was admitted or from the day on which the patient attained 16 years of age<sup>318</sup>.

[183]. The Mental Health Review Tribunal is composed of a person who holds or is qualified to hold the office of judge of the superior courts and of two other members, one of whom possesses medical qualifications and experience, as the Minister for Public Health deems appropriate<sup>319</sup>. In accordance with Section 39(2) of the Mental Health Act currently in force, the Tribunal considers and determines whether a person who is involuntarily admitted and detained, should be discharged. One of three grounds needs to be satisfied for a person to be discharged:

- The patient is not suffering from mental disorder;
- It is not necessary to detain the patient in the interest of his or her personal health or safety or for the protection of other persons;
- In the case of an application for discharge by the nearest relative under Art. 29(2) of the MHA, the patient, if released, would not be likely to act in a manner dangerous to his or her self or to other persons.<sup>320</sup>

The Mental Health Review Tribunal Rules<sup>321</sup> (MHRTR) were brought into force by means of Legal Notice 92 of 1981. These rules govern the method

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<sup>318</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 19(3); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>319</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 38 [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>320</sup> Chapter 262 of the Laws of Malta, Mental Health Act, Section 39; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_6/chapt262.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt262.pdf)

<sup>321</sup> Subsidiary Legislation 262.03, Mental Health Review Tribunal Rules, Legal Notice 92 of 1981; [www.mjha.gov.mt](http://www.mjha.gov.mt)

applications to the Tribunal are dealt with, the manner hearings are conducted, and the manner decisions are handed down and communicated to the applicant. There are no rules governing the duration of the tribunal process. As things stand, a member of the Tribunal may also be a psychiatrist who exercises his or her profession in the mental hospital wherein the applicant is detained. Overall, the rules confer significant discretion to the Tribunal.

On the other hand, the person may present proceedings before the ordinary courts claiming a violation of his fundamental rights. In this case, the proceedings are of a constitutional or conventional nature, in that the applicant will need to claim a violation of his/her rights under the Constitution of Malta or else under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

#### 4.3.12. Free legal support

- [184]. In terms of the current Mental Health Act it is not indicated that a patient is entitled to be assisted by a lawyer during any procedure in force under the Act. Nor does the subsidiary legislation dealing with procedures before the Mental Health Review Tribunal indicate this. However the draft Act under discussion specifically recognises that a person may be represented by a legal counsel in proceedings before the Commissioner. However, none of these documents refer to free legal support.
- [185]. Moreover Section 911 of the Code of Organisation and Civil Procedure<sup>322</sup> only admits legal aid in court proceedings, in any arbitration which is compulsory by law and ‘before any other adjudicating authority where the benefit of legal aid is by law granted’.

## 5. Competence, Capacity and Guardianship

- [186]. Malta’s current legal framework provides for the management of affairs of persons with mental disorders and persons with intellectual disability if they are unable to do so themselves. However, this is limited to curatorship and the administration of property, interdiction and incapacitation.

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<sup>322</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure;  
[http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

## 5.1. "Competence" and "capacity"

- [187]. There is no formal legal definition of either term however legal capacity is taken to mean that capacity of entering into civil acts and of contracting civil acts such as contracts, marriage, and administration of one's property. Some element of mental capacity is however required for these contracts to be validly contracted. Although the level of mental incapacity may be different depending on the nature of the contract, yet even from the case-law above mentioned, it seems that a minimal understanding of the action or decision being taken and the consequences of such action or decision is sufficient at law.

## 5.2. Mental health related causes and legal incapacity

- [188]. Provisions within Maltese law concerning legal incapacity refer to persons who are in a state of imbecility or other mental infirmity, or who are habitual idiots, insane, frenzied or prodigal. Section 189 (1) of the Civil Code<sup>323</sup> provides for the interdiction or incapacitation of an adult 'who is in a state of imbecility or other mental infirmity or is prodigal' from doing certain acts. Section 520 of the Code of Organisation and Civil Procedure (COCP)<sup>324</sup> stipulates that a demand for interdiction or incapacitation may be made to the Court in relation to four genres of persons: habitual idiots, the insane, the frenzied and the prodigal.

## 5.3. Degrees of Incapacity

- [189]. Section 189 (1) of the Civil Code<sup>325</sup> provides for the interdiction or incapacitation of an adult 'who is in a state of imbecility or other mental infirmity or is prodigal' from doing certain acts, as provided in Sections 520 to 527 inclusive, of the Code of Organization and Civil Procedure<sup>326</sup> (Title IV). Interdiction brings about a total privation of the capacity to act whereas incapacitation brings about a partial privation of the capacity to act. The difference between incapacitation and interdiction transpires from Section 524 (1) and (2) of the COCP respectively:

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<sup>323</sup> Chapter 16 of the Laws of Malta, Civil Code, Section 189(1);

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_2/chapt16.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt16.pdf)

<sup>324</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure, Section 520

[http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

<sup>325</sup> Chapter 16 of the Laws of Malta, Civil Code, Section 189(1);

[http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_2/chapt16.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt16.pdf)

<sup>326</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure,

[http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

*(1) If no sufficient cause for the interdiction is made to appear, it shall be lawful for the court by a decree to order, if the circumstances of the case so require, that the person whose interdiction is demanded be incapacitated from suing or being sued, from effecting any compromise, borrowing any money, receiving any capital, giving a discharge, transferring or hypothecating his property, or performing any act other than an act of mere administration, without the aid of a curator to be appointed in the same decree.*

*(2) It shall also be lawful for the court, if it deems it necessary, to incapacitate any person from performing all or any of the acts of mere administration, entrusting the performance thereof to a curator in such manner as the court may deem fit to direct'.<sup>327</sup>*

## 5.4. Systems of protection of adults lacking capacity

- [190]. According to the Code of Organisation and Civil Procedure<sup>328</sup> (COCP), if the court, upon receiving an application for interdiction of a person, finds that there is a just cause for such interdiction, it is to appoint a curator to administer the property of the person interdicted. Section 523(1) of the COCP establishes the office for curator to administer the property where the Court finds just cause for interdiction.
- [191]. A serious shortcoming of the law is that it obliges the curator to administer the *property* of the person interdicted, without making reference to the entirety of the interests of the person interdicted. The choice of curator is completely at the Court's discretion, although it will generally favour the appointment of a family member. Section 523(2) of the Code of Organisation and Civil Procedure provides that, as far as applicable, the provisions relating to tutorship apply also to the curatorship of interdicted persons.<sup>329</sup> Section 160 of the Civil Code provides that the Court should, in its appointment of curator, prefer competent persons on the basis of nearest consanguinity.

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<sup>327</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure, Section 524  
[http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

<sup>328</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure, Section 523  
[http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

<sup>329</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure, Section 523(2)  
[http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

## 5.5. Conditions for placing adults lacking capacity under the protective systems established by national law

- [192]. According to the Code of Organisation and Civil Procedure, an application for interdiction or incapacitation must include a statement of facts on which the demand is founded, an indication of witnesses, if any, to such facts together with any other documents in support of demand.<sup>330</sup> Medical certificates, confirming the genre and degree of the mental illness or disability, are not required by law. However, applications for interdiction or incapacitation normally include a statement by a psychiatrist indicating that the person in whose regard interdiction or incapacitation is being requested would benefit from interdiction or incapacitation. The Court generally requires that the certificate supplied by the psychiatrist is taken on oath.
- [193]. The Court may summon the person whose interdiction or incapacitation is demanded to appear before it in order to question the said person and subject him or her to be examined by one or more experts<sup>331</sup>. However, the law does not specify the type of experts who should be called in for this purpose. Often the Court requires a medical certificate issued by a medical officer in the field and will also require that medical officer to confirm his/her certificate under oath. However, the selection of the medical officer is often done by the person seeking the interdiction or incapacitation.
- [194]. The Court may also appoint a temporary curator to take charge of the property in whose regard the application for interdiction or incapacitation is made<sup>332</sup>. Applications for interdiction or incapacitation are largely dealt on the basis of a non-legislated procedure. For example, it is completely at the Court's discretion to notify the person in whose regard interdiction or incapacitation is being demanded. This was stated by the Court in an appeal judgement:

*'...il-Qorti fuq ir-rikors tista' ssejjah (u mhux "ghandha" ssejjah) lill-interdicend jew lill-persuna li trid tkun inabilitata tidher quddiemha sabiex tagħmlilha mistoqsijiet u tordna li tiġi eżaminata minn perit wieħed jew iżjed...jidher kwindi illi dik id-dispożizzjoni hija aktarx ta' natura preċettiva u fakoltativa, u mhix projbitiva, b'mod illi mhiex neċessarjament rikjesta n-notifika tar-rikors lill-interdicend jew lill-persuna li għanda tkun inabilitata...'*<sup>333</sup>

<sup>330</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure, Section 520 (2) & (3) [http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

<sup>331</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure, Section 522 [http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

<sup>332</sup> *Ibid*

<sup>333</sup> Court of Civil Appeal Judgement "Perini v. Gatt", dated 11th June 1958

*(Translated version: ‘... upon the application the Court may call ( and not “must” call) the interdicted person or the person whose incapacitation is sought to appear before it to answer questions and to order that the person be examined by one or more experts ... therefore it seems that the disposition is more one of a suggestive or facultative nature rather than prohibitory, in such a manner that the notification of the application to the person to be interdicted or incapacitated is not necessarily required....’*

## 5.6. Minimum and maximum time limits of measures placing adults lacking capacity under a protection system

- [195]. The law does not specify a minimum or maximum period for which a person may be placed under guardianship or curatorship or for which the person may be interdicted or incapacitated. It is however inherent in the system that a person will remain so until the mental health disorder giving rise to the issue of the incapacitation order or interdiction order remains an obstacle to the administration of one’s affairs. It is known that interdictions and incapacitations have at times remained in place throughout the duration of one’s lifetime.
- [196]. In these proceedings the person interdicted or incapacitated may be given free legal aid if he/she satisfies the conditions for free legal aid in terms of the Code of Organisation and Civil Procedure. Section 912 thereof provides that legal aid cannot be granted unless there is reasonable grounds for taking or defending proceedings and that excluding the subject-matter of the proceedings the applicant does not possess property of any sort, the net value whereof amounts to, or exceeds, €6,988.12.

## 5.7. Who may request the placing of an adult lacking capacity under a protective regime

- [197]. The request that a person be interdicted or incapacitated may be demanded in respect of persons who have attained majority or emancipated minors as per Section 156 of the Civil Code:
- a. By one spouse against another;

- b. By any person against another where related by consanguinity;
- c. By any person who is related by affinity to the person whose interdiction or incapacitation is demanded and who may be called upon to supply maintenance to such person;
- d. In case of idiocy or other mental infirmity, by the Attorney General unless the demand is made by any other person.<sup>334</sup>

[198]. Any person related by affinity who, under the provisions of the Civil Code, might be compelled to supply maintenance to the person who is imbecile, mentally infirm, or prodigal may also make the demand for interdiction or incapacitation.<sup>335</sup> Minors under tutorship may be interdicted or incapacitated during the last year of minority and, in such case, the court may appoint as curator either the tutor or any other person from the day the office of tutor expires.<sup>336</sup>

## 5.8. Jurisdiction of National Authorities

[199]. The Court of Voluntary Jurisdiction has the jurisdiction to declare the legal incapacity or interdiction of an adult, as well as request that measures are taken with regard to the protection of the person and the property of the person. Once a person is appointed in this role by the court that person is then obliged to render accounts. However, there is no regular and automatic review of the administration being carried out by the person appointed as curator.

## 5.9. Appeal procedures against a decision of incapacity/incompetence

[200]. The only provision in law which refers to the revocation of the status of interdiction or incapacitation is found in Section 526 of the COCP<sup>337</sup>, which states that ‘Interdiction or incapacitation shall be revoked, when the cause of the interdiction or incapacitation shall cease to exist.’ According to ordinary rules of procedure, it is not possible to appeal a decree of the Court of Voluntary

<sup>334</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure, Section 521 (1) and (2); [http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

<sup>335</sup> Chapter 16 of the Laws of Malta, Civil Code, Section 189(3); [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_2/chapt16.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt16.pdf)

<sup>336</sup> Chapter 16 of the Laws of Malta, Civil Code, Section 191; [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_2/chapt16.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt16.pdf)

<sup>337</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure, [http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

Jurisdiction<sup>338</sup>. Therefore, any party who deems himself to be aggrieved by such decree, needs to institute proceedings before the Civil Court, First Hall, to challenge the original decree<sup>339</sup>; these proceedings being of a contentious nature. If the claim is rejected by the Civil Court, First Hall, an individual may appeal the judgement within 20 days before the Court of Appeal<sup>340</sup>. It is usually the case that before one institutes these contentious proceedings, a person is advised to present an application to the Civil Court, Voluntary Jurisdiction, which had issued the decree of interdiction or incapacitation asking that court to revoke or amend its own decree. In this case, the application will contain submissions and reasons upon which the revocation or amendment is sought.

## 5.10. Persons or bodies appointed to implement the measures placing an adult under a system of protection

- [201]. The system of protection that one could refer to is that of interdiction or incapacitation whereby a person who is in ‘a state of imbecility or other mental infirmity’<sup>341</sup> is placed under the guardianship of a curator. Interdiction or incapacitation and the appointment of the curator may only be ordered by the Civil Court, Voluntary Jurisdiction after receiving an application for this purpose. It is then up to the curator who is to implement the measures given in the court’s order. However there is no formal system of supervision in this regard except that the curator is expected to give account for the administration of the assets of the interdicted or incapacitated person and is also usually asked by the court to provide a general lien over his/her assets guaranteeing good administration.

## 5.11. Scope and extent of powers of the entrusted person/body

- [202]. A curator is empowered to administer the property of the person interdicted or incapacitated as a ‘*bonus pater familias*’ and while the scope is to ensure that the person’s assets are properly administered there is no limitation in extent. However the transfer of any assets of the person, especially immovable

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<sup>338</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure, Section 35; [http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

<sup>339</sup> *Ibid*

<sup>340</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure, Sections 34 and 226(1); [http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

<sup>341</sup> Chapter 16 of the Laws of Malta, Civil Code, Section 189(1);, [http://docs.justice.gov.mt/lom/legislation/english/leg/vol\\_2/chapt16.pdf](http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt16.pdf)



property, requires the approval of the court who is to be convinced that this is beneficial to the person.

## 5.12. Appeal procedures against a decision of appointment of person/body entrusted to implement the system of protection

- [203]. According to ordinary rules of procedure, it is not possible to appeal a decree of the Court of Voluntary Jurisdiction<sup>342</sup>, which is essentially the court that appoints a curator when a decision of interdiction or incapacitation is taken. Therefore, any party who deems himself to be aggrieved by the appointment of a person as curator, needs to institute proceedings before the Civil Court, First Hall, to challenge the original decree<sup>343</sup> of the Court of Voluntary Jurisdiction; these proceedings being of a contentious nature. If the claim is rejected by the Civil Court, First Hall, an individual may appeal the judgement within 20 days before the Court of Appeal<sup>344</sup>. It is usually the case that before one institutes these contentious proceedings, a person is advised to present an application to the Civil Court, Voluntary Jurisdiction, which had issued the decree of interdiction or incapacitation asking that court to revoke or amend its own decree. In this case, the application will contain submissions and reasons upon which the revocation or amendment is sought.

## 5.13. Periodical review of the need of a guardian

- [204]. Automatic or systematic review of orders of interdiction or incapacitation is not specifically provided for in the Civil Code. To this end a review may only be undertaken upon a specific demand being made either by the person interdicted or incapacitated or an interested person, such as a responsible carer.

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<sup>342</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure, Section 35; [http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

<sup>343</sup> *Ibid*

<sup>344</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure, Sections 34 and 226(1); [http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

## 6. Miscellaneous

### 6.1. Access to legal remedies

[205]. Section 781(b) Sub-title IV, of Title II, of Book III of Part Second of the COCP<sup>345</sup> states:

*‘a lunatic or an insane person, and any other person who is not vested with the free exercise or administration of the rights to which the action refers, except in the person of the party to whom such administration is lawfully entrusted, or of a curator ad litem...cannot sue or be sued’.*

This legal provision therefore clearly states that a person who is known to be suffering from mental health problems, particularly if interdicted or incapacitated on the grounds of insanity, cannot personally stand in a court of law in order to protect his or her rights. This was confirmed in a Judgement given by the Court of Appeal in 1975:

*‘huma inkapaci illi joqghodu f’ kawza, sew bhala atturi kemm bhala konvenuti, il-persuni furjuzi jew mohhom marid, u kull persuna ohra illi ma jkollieq l-eżerċizzju jew l-amministrazzjoni libera tad-drittijiet li fuqhom tkun il-kawza hliet fil-persuna ta’ dak li skond il-liġi jkollu f’idejh l-amministrazzjoni...’<sup>346</sup>*

Translated version: *‘Persons who are demented or mentally ill, and any other person who does not have the capacity to exercise or administer freely the rights concerned in a case, save for that person who, according to law, has administrative capacity to do so, are incapable to be party to legal proceedings, be it as a plaintiff or as defendant; they may be party to proceedings only through that person who according to law has administration...’*

At the same time, Maltese legislation does not provide for the possibility of an interdicted or incapacitated person appointing a person of his choice to be his curator and represent his interests. The only exception is when the action is against an already appointed curator:

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<sup>345</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure, [http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf)

<sup>346</sup> Court of Appeal, 22nd February 1975, ‘Emanuela sive Lily Schembri et. v. Joseph Schembri’ p 4, [www.mjha.gov.mt](http://www.mjha.gov.mt)

*‘The application for the appointment of a curator shall not be entertained by the court if the person in respect of whom such appointment is applied for is already represented by a tutor or a curator, unless the action is against such tutor or curator.’<sup>347</sup>*

This may carry implications particularly in the case of interdicted persons, who have to rely on the benevolence of their curator, a person who is only legally bound to administer their property, in order to resort to legal remedies. There is as yet no case-law in relation to this issue.

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<sup>347</sup> Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure, Section 783(3); [http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL\\_1/CHAPT12.pdf](http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_1/CHAPT12.pdf);

# Annexes-Case Law

In different Sections of the Guidelines, experts have been asked to refer to case law. Please present the case law reference in the format below

Except for the judgments mentioned hereunder, there are no other judgments in relation to persons with mental illnesses that have been delivered by the courts. The only other measures of redress are through the Mental Health Review Tribunal, and the National Commission for Persons with Disability and the Industrial Tribunal. The Mental Health Review Tribunal does not publish its conclusions, the National Commissioner for Persons with Disability only publish summaries of its conclusions in investigations and the Industrial Tribunal is only now dealing with a case in relation to a ‘down-syndrome’ person. For this reason, no specific details other than the general comments above provided can be given in the case-law annexes.

<b>Case title</b>	Joseph Vassallo et v. Avv. Dr Victor R. Sammut et noe.
<b>Decision date</b>	21 <sup>st</sup> April 1950
<b>Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])</b>	Qorti ta' l-Appell (Court of Appeal)
<b>Key facts of the case (max. 500 chars)</b>	The applicants sought the nullity of a will claiming that the testator did not have sufficient mental faculty to validly regulate his inheritance.
<b>Main reasoning/argumentation (max. 500 chars)</b>	The question at issue was whether a person who suffers from mental infirmity is capable of validly making a will regulating his/her inheritance. The court concluded that the presumption is that a person has validly contracted a will and it is only by way of exception that a will is deemed invalid due to the mental incapacity of the testator. The capacity required by a testator is limited only to that understanding of one's actions.

<b>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</b>	Persons whose suffer from mental infirmity may not necessarily loose their right to have a will, as long as they possess sufficient faculties to intend and understand such intentions they may validly regulate their inheritance.
<b>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</b>	A person of unsound mind may still validly regulate his/her inheritance provided his/her incapacity does not nullify the capacity of intending and understanding one's decisions.
<b>Proposal of key words for data base</b>	Infirmity of Mind Unsound Mind Capacity to regulate one's inheritance
<b>Case title</b>	Carmela Bartolo et v. Giuseppa Spiteri et
<b>Decision date</b>	7 <sup>th</sup> June 1958
<b>Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])</b>	Qorti Civili, Prim' Awla (First Hall of the Civil Court)
<b>Key facts of the case (max. 500 chars)</b>	The applicants sought the nullity of a will claiming that the testator was impeded by law from making a valid will due to infirmity of mind.
<b>Main reasoning/argumentation (max. 500 chars)</b>	The question at issue was whether a person who suffers from mental infirmity is capable of validly making a will regulating his/her inheritance. The court concluded that not all mental infirmities will render a person incapable of validly making a will but only that psychopathic state which renders a person unable to understand his/her actions and their consequences at the moment of making the will.
<b>Key issues (concepts, interpretations) clarified</b>	Persons whose suffer from mental infirmity may not necessarily loose their right to have a will, as long as they possess sufficient faculties to intend and understand such intentions they may validly regulate their inheritance.

<b>by the case (max. 500 chars)</b>	
<b>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</b>	A person of unsound mind may still validly regulate his/her inheritance provided his/her incapacity does not nullify the capacity of intending and understanding one's decisions.
<b>Proposal of key words for data base</b>	Infirmity of Mind Unsound Mind Capacity to regulate one's inheritance
<b>Case title</b>	Carmelo Mifsud et v. Maria Giordano et
<b>Decision date</b>	8 <sup>th</sup> March 1952
<b>Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])</b>	Prim'Awla tal-Qorti Civili (First Hall of the Civil Court)
<b>Key facts of the case (max. 500 chars)</b>	The applicants sought the nullity of a will claiming that the testator had been suffering from dementia.
<b>Main reasoning/argumentation (max. 500 chars)</b>	The applicants argued that the testator had invalidly done a will and that the inheritance was not to be so regulated as the testator's mental capacities were dubious. The Court concluded that when considering mental faculty to regulate one's inheritance, a wide latitude was to be provided. In this respect, as long as a testator could understand the nature and extent of his/her property and could identify who was to receive these then the validity of the will was to be upheld.
<b>Key issues (concepts, interpretations) clarified by the case (max. 500)</b>	A will made by a person whose sanity was dubious may still be presumed to be valid.

<b>chars)</b>	
<b>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</b>	A person of unsound mind may still validly regulate his/her inheritance provided his/her incapacity does not nullify the capacity of intending and understanding one's decisions.
<b>Proposal of key words for data base</b>	Infirmity of Mind Unsound Mind Capacity to regulate one's inheritance

Please attach the text of the original decisions in electronic format (including scanned versions as pdf).

<b>Case title</b>	Arturo Perini v. Dottor Vincenzo Gatt et
<b>Decision date</b>	11 <sup>th</sup> June 1948
<b>Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])</b>	Qorti ta' l-Appell (Court of Appeal)
<b>Key facts of the case (max. 500 chars)</b>	The applicant who was interdicted sought the nullity of the proceedings of interdiction claiming that he was not notified of these proceedings.
<b>Main reasoning/argumentation (max. 500 chars)</b>	The question at issue was whether the person whose interdiction was being sought had a right to be notified with such claim or whether the medical certificate was sufficient and notification of interdiction proceedings in his/her regard was consequently not required. The Court concluded that the person whose interdiction was being sought did not have a right to be notified with such proceedings and in fact the lack of notification did not bring about the nullity of the interdiction proceedings.
<b>Key issues (concepts, interpretations) clarified</b>	Persons whose interdiction is being sought are not represented in such proceedings and their interests heavily rely on the medical certificate issued by the medical officer..

<b>by the case (max. 500 chars)</b>	
<b>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</b>	A person may be interdicted or incapacitated without knowing and without having the possibility to defend his/her position.
<b>Proposal of key words for data base</b>	Interdiction Party to proceedings Nullity of proceedings
<b>Case title</b>	Emmanuela sive Lily Schembri et v. Joseph Schembri
<b>Decision date</b>	22 <sup>nd</sup> February 1975
<b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available])	Qorti ta' l-Appell (Court of Appeal)



<p><b>Key facts of the case</b> (max. 500 chars)</p>	<p>The applicant who was interdicted sought to institution proceedings for personal separation against her husband.</p>
<p><b>Main reasoning/argumentation</b> (max. 500 chars)</p>	<p>The defendant pleaded that due to her interdiction she was non-suited in that she could not sue nor be sued. In applying article 781(b) of the Code of Organisation and Civil Procedure which provides that <i>‘a lunatic or an insane person, and any other person who is not vested with the free exercise or administration of the rights to which the action refers, except in the person of the party to whom such administration is lawfully entrusted, or of a curator ad litem...cannot sue or be sued’</i>. The court upheld the plea.</p>

<p><b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)</p>	<p>Persons under interdiction are unable to sue or be sued unless this is done on their behalf by the curator appointed for them by the Court.</p>
<p><b>Results (sanctions) and key consequences or implications of the case</b> (max. 500 chars)</p>	<p>Difficulties arise in these situations where the curator would be the person against whom the interdicted person wishes to institute proceedings. In this regard the interdicted person would have to seek a revocation of the curator's appointment prior to the institution of any such proceedings.</p>
<p><b>Proposal of key words for data base</b></p>	<p>Interdiction Capacity to sue</p>

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