

Mental Capacity Certification in Malta: Assessing its Process and Juridical Significance under the Mental Health Act

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This article by **Zacharias Micallef** was previously submitted as part of MCT1005 and is being published with the author's permission. The Mental Health Act has defined mental capacity as the ability and competence to make independent decisions and assume responsibility of oneself. Whilst this definition does not outline the inabilities related to mental incapacity, it aids to distinguish mental incapacity from mental illness, and thus indirectly expresses that people with mental disorders do not necessarily have difficulty in decision-making. Mental capacity is certified by the responsible specialist, who submits the Eleventh Schedule of the Act to the Commissioner. Following this, the Commissioner appoints an independent specialist to verify mental incapacity. The notion of mental capacity is essential for the Act as it provides criteria for the responsible carer and curator, who shall protect the patient from abuse and exploitation and administer the necessary treatment.

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Introduction

The objective of this article is to outline the process to certify mental incapacity as described in the Mental Health Act, Chapter 525 of the Laws of Malta, and discuss the juridical significance of this certification to the regulation of mental health services in Malta. This will be done by primarily engaging with the aforementioned Act, whilst also referring to secondary sources, including the Seminar on Mental Capacity held in 2014. The article shall be divided into various sections. The second section shall outline the definition of the terms 'mental capacity' according to the Act. The third section shall discuss the certification process of mental capacity and the process to revoke a certificate of mental incapacity. The fourth section shall discuss the juridical significance of this certification. Finally, there shall be a conclusion which shall summarise the main points of the article.

The Definition of Mental Capacity

This section shall address the definition of mental capacity as described in the Mental Health Act.

The Mental Health Act provides definitions of various terminologies in Article 2, including the definition of mental capacity and mental disorders. According to the Act, "'mental capacity" means the patient's ability and competence to make different categories and types of decisions and to be considered responsible for his actions.' Meanwhile, the term 'mental disorder' means:

a significant mental or behavioural dysfunction, exhibited by signs and, or symptoms indicating a disruption of mental functioning, including disturbance in one or more of the areas of thought, mood, volition, perception, cognition, orientation or memory which are present to such a degree as to be considered pathological in accordance with internationally accepted medical and diagnostic standards and "mental illness" shall be construed accordingly, and for the purpose of any matter related to criminal proceedings, it shall include "insanity" as understood for the purpose of the Criminal Code.¹

Considering mental disorders do not encompass the inability of decision-making as a symptom, the law indirectly expresses that a person with mental disorders can still have mental capacity. Both these definitions are necessary to fully engage with the core principles of the Mental Health Act which, as stipulated in the long title, are 'To regulate the provision of mental health services, care and rehabilitation whilst promoting and

¹ Mental Health Act, Chapter 525 of the Laws of Malta, Article 2.

upholding the rights of people suffering from mental disorders'. They provide criteria for the treatment and regulation of mental health services, care and rehabilitation. Mainly, the definition of mental capacity ensures psychiatrists are aware of the symptoms of mental incapacity when providing certification.

However, in a seminar held in 2014, Chief Justice Emeritus Vincent De Gaetano critiqued the definition of mental capacity in the Act as unclear on the basis that 'the decision on assessing the patient's mental capacity still lies on the psychiatrist without giving clear definitions'.² In particular, the legislation does not clarify how the person is incapable to decide independently. Chief Justice Emeritus De Gaetano has recommended that the definition of mental capacity should be the one outlined in Article 3 of the English Mental Capacity Act of 2005:

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).³

This section addressed the definition of mental capacity and mental disorders as stipulated in the Mental Health Act, as well as Chief Justice Emeritus De Gaetano's critique on the definition to improve the certification process outlined in the Act. The following section shall address and engage with the certification process.

The Certification of Mental Incapacity and the Revocation of the Certificate of Mental Incapacity

This section shall engage with the certification process outlined in the Mental Health Act. In particular, it shall engage with Articles 24 and 25 and the Eleventh Schedule of the Act. This section shall outline the process of revocation of the certificate of mental incapacity outlined in the aforementioned Article 24 and the Twelfth Schedule of the Act, which allows people who were previously certified to be mentally incapable to be able to make independent decisions whenever they regain possession of mental

² Office of the Commissioner for Mental Health and Older Persons, *Mental Capacity in Maltese Legislation* (Report on Reflection Seminar, 22 February 2014) <https://commissionermentalhealth.gov.mt/wp-content/uploads/2024/04/mental_capacity_report.pdf> accessed 5 January 2025.

³ English Mental Capacity Act 2005, Article 3.

capacity.

The Mental Health Act dedicates the fifth part of the Act, consisting of Articles 24 to 27, to provide details on the certification of mental capacity. In particular, Article 24 stipulates the certification process. Sub-article (1) states that 'a person suffering from a mental disorder shall be deemed able and competent to make decisions unless certified by a specialist as lacking mental capacity to do so'.⁴ Chief Justice Emeritus De Gaetano noted that a clear distinction between the terms 'mental capacity' and 'mental illness' establishes that 'a person with a mental disorder can still have the ability to take decisions'.⁵ In particular, he noted how Article 24, as previously mentioned, 'recognises that the person who suffers from mental illness can still decide on aspects important to his life e.g. decisions about his status and financial aspects amongst other things'.⁶

In this sub-article, a specialist is mentioned to certify mental capacity. The notion of the specialist is further expanded on in sub-article 2 to stipulate that only 'a specialist may certify a person suffering from a mental disorder as having mental capacity or lack thereof'.⁷ This specialist is the responsible specialist of the patient.

The third sub-article outlines the outcome of a lack of mental capacity for less than two weeks, stipulating that 'whenever it is deemed by a specialist that lack of mental capacity is of a transient nature not exceeding fourteen days, such transient lack of mental capacity shall be duly documented in the patient's clinical records'.⁸ The term 'transient nature' is defined as an impermanent condition and thus notes how there are various natures of mental capacity in terms of their duration. This nature may also be permanent, according to the Mental Health Foundation in the United Kingdom.⁹

Returning to Article 24 of the Mental Health Act, the fourth and fifth sub-articles outline the procedure which is taken if the nature of the illness exceeds two weeks but not twenty-six weeks, which is half a year. The articles are as follows:

(4) Certification of lack of mental capacity for a period exceeding fourteen days but not exceeding twenty-six weeks or for the purpose of an application for incapacitation or interdiction in terms of the relevant provisions of the Civil Code and the Code of Organization and Civil

⁴ Mental Health Act (n 1) Article 24(1).

⁵ *Mental Capacity in Maltese Legislation* (n 2).

⁶ *ibid.*

⁷ Mental Health Act (n 1) Article 24(2).

⁸ *ibid* Article 24(3).

⁹ Mental Health Foundation, 'Mental Capacity' (*Mental Health Foundation*)

<<https://www.mentalhealth.org.uk/explore-mental-health/a-z-topics/mental-capacity>> accessed 10 January 2025.

Procedure shall be made by the specialist on the prescribed form in accordance with the Eleventh Schedule giving:

- (a) the reasons for such a decision; and*
- (b) the category and, or type of decisions that the person is incapable of taking; and*
- (c) the estimated duration of such lack of mental capacity.*

(5) It shall be the duty of the specialist to refer the duly filled prescribed form to the Commissioner within twenty-four hours of such certification and the Commissioner shall appoint an independent specialist to verify such certification.¹⁰

The relevant provisions are Articles 189 to 192 of the Civil Code, excluding Article 190 as it has since been repealed, and the Articles 520 to 527 of the Code of Organization and Civil Procedure. In particular, Article 527(3) of the Code of Organization and Civil Procedure stipulates that a part of the online Register of Interdicted and Incapacitated Persons shall be dedicated to those whom have a certificate of mental incapacity issued:

The register shall be divided into three parts. The first part shall contain a list of interdicted persons, the second part shall contain a list of incapacitated persons and the third part shall contain a list of persons in respect of whom a certificate of lack of mental capacity has been issued in accordance with the Mental Health Act. Each part of the register shall be held in alphabetical order.¹¹

The register is also mentioned in Article 24(8) of the Mental Health Act:

The Commissioner shall notify the Registrar of the Court of Voluntary Jurisdiction of all certificates of lack of mental capacity approved or revoked in terms of the Eleventh and Twelfth Schedules respectively and the Minister with the concurrence of the Minister responsible for Justice, shall make regulations to establish the procedure for entry and removal of such registrations.¹²

This is not the only reference to the Civil Code and the Code of Organization and Civil Procedure in the Mental Health Act, with Article 2 referring to the meaning of interdiction and incapacitation ‘as interpreted for the purposes of the Civil Code and the Code of Organization and Civil Procedure’.

Regarding the independent specialist appointed by the Commissioner, the specialist is a psychiatrist as well. The specialist acts independently from the decision of the first specialist to ensure the patient truly lacks mental

¹⁰ Mental Health Act (n 1) Articles 24(4) and (5).

¹¹ Code of Organization and Civil Procedure, Chapter 12 of the Laws of Malta, Article 527(3)

¹² Mental Health Act (n 1) Article 24(8).

incapacity and their rights are observed.

Article 24(6) of the Mental Health Act outlines the validation of the certification by the approval of the Commissioner for Mental Health:

*Certification in terms of the Eleventh Schedule shall only be valid as approved by the Commissioner, and if such approval includes the recommendation of an application for incapacitation or interdiction, such certification shall cease to be valid after the lapse of twenty-six weeks from the date of approval, unless procedures for incapacitation or interdiction have been initiated.*¹³

Sub-article (7) refers to the revocation of the certification of mental incapacity. Notably, the Twelfth Schedule is used to apply for this revocation, as opposed to the Eleventh Schedule in the case of the certification of lack of mental capacity. The process is identical to the regular certification, which means that the responsible specialist certifies mental capacity, the Commissioner then appoints an independent specialist to certify mental capacity, and finally the Commissioner approves or disapproves the revocation according to the opinion of the appointed specialist. The final decision of the Commissioner, in terms of both the Eleventh and Twelfth Schedules, is 'communicated in writing to the responsible specialist, the person, and the responsible carer'.¹⁴ Sub-article (7) states:

*If during an approved period of lack of mental capacity, it is found that the person concerned no longer lacks mental capacity, a specialist shall apply to the Commissioner for the revocation of the certificate of lack of mental capacity in terms of the Twelfth Schedule, and the Commissioner shall appoint an independent specialist to assess the person and approve or otherwise the revocation of the certificate of lack of mental capacity.*¹⁵

As the long title specifies, one of the objectives of the Act is to protect and safeguard the human rights of the persons. In line with these objectives, the Commissioner may submit a report to stop court proceedings if the proceedings were initiated not out of the interest of the patient, as outlined in Article 25:

*During any court proceedings regarding the incapacitation or interdiction of a person, the Commissioner may submit a report to the Court before which the proceedings are pending if he suspects or has knowledge that such court proceedings were initiated for vexatious or fraudulent reasons.*¹⁶

Additionally, the Commissioner may request the assessment of three

¹³ *ibid* Article 24(6).

¹⁴ *ibid* Eleventh and Twelfth Schedule.

¹⁵ *ibid* Article 24(7).

¹⁶ *ibid* Article 25.

specialists to certify mental capacity in cases of interdiction or incapacitation to protect the rights of the party, as mentioned in Article 24(9):

Every decree of incapacitation or interdiction given by a court of law on grounds of lack of mental capacity shall be notified to the Commissioner who may, if he so deems necessary, during the period of incapacitation or interdiction request the assessment by three specialists to review the mental capacity of the person concerned and where, after considering the said review, the Commissioner is of the opinion that the person concerned no longer lacks mental capacity, the Commissioner shall inform the court accordingly.¹⁷

This section aimed to outline this process alongside the revocation of the certificate, as according to the Mental Health Act. However, for the purposes of this article, there has to be a discussion formulated on the juridical significance of this certification, which shall be the focus of the following section.

The Juridical Significance of the Certification of Mental Incapacity to the Regulation of the Provision of Mental Health Services

This section shall discuss the juridical significance of the certification of mental incapacity to the regulation of the provision of mental health services, care and rehabilitation, as demanded in the title. This shall be a broad discussion focusing on key aspects where mental capacity plays a role.

Mental capacity provides a criteria for various cases in the Mental Health Act. For instance, whenever a responsible carer has not been appointed due to the patient's lack of mental capacity, the law provides for whoever shall be the responsible carer under Article 4(2):

(a) the husband or the wife, if any, unless permanently separated from the patient, either by a judgment or by mutual consent authorised by a decree, in either case given by the competent court, or has deserted or has been deserted by the patient for any period which has not come to an end; or

(b) sons and daughters over the age of eighteen years; or

(c) either parent by mutual consent; or

(d) a close friend or other relative of the patient; or

(e) in those instances where a responsible carer under paragraphs (a) to (d) above cannot be identified, traced or refuses to give his consent, a healthcare professional shall be appointed by the Commissioner to assume the role of responsible carer, in so far as the giving or withholding of

¹⁷ ibid Article 24(9).

*consent to treatment is concerned.*¹⁸

The appointment of a responsible carer is necessary as they form part of the multidisciplinary care team, alongside the responsible specialists, doctors, nurses, psychiatrists, therapists, and community workers.¹⁹ This multidisciplinary care team is involved in the multidisciplinary care plan, which highlights the different roles of the team and how treatment shall proceed. The care plan provides ‘a comprehensive professional assessment, crisis stabilisation, medication management and an individual plan aiming for a transition towards a community-based care and eventually, independent living’.²⁰ The responsible carer gives consent to any changes in the care plan, as outlined in Article 7 of the Act. Their role is to support and represent the patient on their behalf since the patient lacks the ability to make independent decisions. Another case where the responsible carer decides on behalf of the patient due to the latter’s mental incapacity is whenever surgery has to be performed on the patient, excluding life emergencies, as outlined in Article 32:

32.(a) No major medical or surgical procedure shall be carried out on a patient suffering from a mental disorder unless such person gives written informed consent.

(b) In those cases where in the opinion of the responsible specialist, the person lacks mental capacity to give consent, or being a minor lacks sufficient maturity and understanding to consent to treatment, then consent shall be given by his responsible carer.

*(c) The provisions of paragraphs (a) and (b) shall not be applicable in an emergency where the patient’s life is at risk.*²¹

Similarly, the responsible carer must give his approval on behalf of the patient for clinical trials to be held, alongside approval of the Ethics Committee and the Commissioner’s satisfaction of an assessment proving the harm outweighs the benefits, as outlined in Article 35(2):

No person who lacks the mental capacity to give free and informed consent may be subjected to clinical trials or other medical or scientific research unless:

(a) the Commissioner is satisfied after assessment by two independent experts, one of whom shall be a specialist in mental health, that the expected benefits of the trials or research are likely to outweigh any potential harm to that person; and

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

¹⁸ *ibid* Article 4(2).

¹⁹ Gov.mt, ‘Community Mental Health Teams’ (mentalhealthservices.gov.mt)

<<https://mentalhealthservices.gov.mt/en/community-mental-health-services/community-mental-health-teams/>> accessed 2 January 2025.

²⁰ *ibid*.

²¹ Mental Health Act (n 1) Article 32.

(c) there is the approval of the Ethics Committee appointed by the Minister under the Clinical Trials Regulations.²²

Therefore, the definition of mental capacity becomes important in the context of Article 4 as it provides a procedure to appoint a responsible carer in cases when the patient cannot choose one independently because of lack of competence.

Mental incapacity is also significant in terms of Article 26 which outlines that a curator may be appointed by the Commissioner to ensure the patient's treatment and prevent abuse:

In addition to any other function, duty or responsibility imposed by any other law, a person appointed to act as a curator for a person who lacks mental capacity and who has been incapacitated or interdicted by order of a court shall also:

- (a) encourage and support the person to live a normal life in the community;*
- (b) ensure that the person is complying with any treatment prescribed for his mental and physical conditions;*
- (c) ensure that the person, as far as possible, be self-reliant in matters relating to his personal, domestic and financial affairs;*
- (d) protect the person from any neglect, abuse or exploitation;*
- (e) submit to the Commissioner within three months of his appointment a register of assets belonging to the person;*
- (f) notify and seek the approval of the Commissioner of any transfer of assets belonging to the person to a third party prior to such transfer taking place;*
- (g) submit every six months to the Court and to the Commissioner an income and expenditure account of the person backed by all relevant documents.²³*

Article 27 stipulates that the Commissioner must seek out the curator to ensure his functions are being carried out and has the power to submit an application to change the curator if the patient's rights are being neglected:

(1) The Commissioner shall monitor and seek any information from the curator in order to ascertain that the person is not being neglected, abused or exploited and that the functions referred to in the preceding article are being carried out.

(2) If the Commissioner finds or has reason to believe that the curator is not acting in the best interests of the person, he shall file an application in the competent court asking for a change of curator.²⁴

²² *ibid* Article 35(2).

²³ *ibid* Article 26.

²⁴ *ibid* Article 27.

This section addressed the juridical significance of mental capacity in the regulation of mental health services by referring to the role of the responsible carer and the curator in administering treatment and care whilst protecting the patient's rights.

Conclusion

This article provides an outline of the certification process of mental capacity and the juridical significance of the certification for the regulation of mental health services which was addressed in the third and fourth section respectively by engaging with the various provisions of the Mental Health Act. Additionally, the second section addressed a critique on the definition of mental capacity in the Act made by Chief Justice Emeritus De Gaetano. Thus, the outcome of this article has been reached through a broad discussion on the procedures and significance of mental capacity in Maltese legislation.



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