

## **The MAP Working Group Report on Articles 36 and 37.**

The MAP Subcommittee on Mental Health and the Law focused on Articles 36 and 37 of the Mental Health Act between 2022 and 2023. This group, was set up to look at issues, and lobby for changes in the law related to mental health.

The below is a report on the work conducted in this group.

**Aim of Report:** To generate discussion, and to lobby for better standards and best practices for patients.

**Background:** The Mental Health Act of 2012 gives specific provisions for the care of Mentally Disordered Offenders (MDOs), in Part VIII – *Patients Concerned in Criminal Proceedings*.

As MAP members, and clinicians working with persons detained under the legislation provided in part VIII within Malta's licensed mental health facilities (both Mount Carmel Hospital and the Forensic Unit of the Correctional Services Agency (CSA), we encounter several issues that we feel could be improved.

It was with this in mind that a meeting with the Minister for Justice, Equality and Governance, Hon. Dr Edward Zammit Lewis, was held, and we were asked to put together our recommendations. Furthermore, meetings were held with the Clinical Chair of Psychiatry, and the Commissioner of Mental Health.

Some legal issues discussed:

- Several persons are detained beyond the time needed for adequate treatment of their mental illness and their rehabilitation, before, either being declared not guilty by reason of insanity at the time of the offence, or alternatively facing proceedings once their mental state has improved sufficiently to face proceedings.
- Thus several persons remain in MCH or the Forensic Unit of (CSA) far beyond the time that they would have otherwise been incarcerated for the relevant offence, or before facing trial.
- As mental health professionals we feel that the current legislation, both discriminates against potential offenders with mental disorder and lacks a sense of proportionality to the offence in question, as the legislation currently makes no differentiation between offences, particularly in terms of the danger to society arising from the underlying mental disorder. Thus, it subjects all mentally disordered offenders (MDOs) to be detained in custody with unsatisfactory limitation on "duration, renewal and expiration"
- Finally, no distinction is made between long term insanity (*Ġenn*) and temporary insanity

Practical issues discussed:

- Article 37 MDOs frequently spend more time than clinically needed, detained in Mount Carmel Hospital, due to prolonged delays in communication when requests for leave and/or discharge are made.
- Because the MHA 2012 Article 37 deals simultaneously with the accused 'insane at the time of the offence, whether or not he is insane at the time of the criminal proceedings, **or if found to be insane at the time of the proceedings**'. This means that the MHA is not distinguishing between the **former who is not guilty and should not be in CSA** and the **latter, who has yet to face trial if and when mentally sane**. This in turn has led to ambiguity as to whether Article 37 persons belong in MCH or in the FU of CSA.
- Clinicians commonly encounter difficulty in accessing relevant court documents relating to the sentence passed down and the crime committed. This seems to be because the judiciary often refers in broad terms to the provisions Part VIII of the MHA 2012 without stating precisely under which Article the accused is being sent. At other times, the judiciary does not seem to realise that the Forensic Unit is part of the Correctional Service Agency and not part of Mount Carmel Hospital.
- Similar problems are encountered in relation to Article 36 patients, be they at the Corradino Correctional Facility (CCF) or the Forensic Unit (FU) of the CSA.

### **Common Ground – EPA and WPA Guidance on treatment of MDOs**

The European Psychiatric Association (EPA) and the World Psychiatric Association (WPA) issue guidance, position statements and declarations which are equally relevant to the care of MDOs. Particularly relevant points are highlighted on bold.

The **WPA Bill of Rights for persons with mental illness** highlights the following rights among others:

- "Right to live independently in the community as other citizens"
- "Right to be recognized as equal before the law as other citizens"
- "Right to participate in the cultural and social life of the community"

The **WPA** in its **Statement and Viewpoints on the Rights and Legal Safeguards of the Mentally Ill** also identifies that:

- "Involuntary intervention is a great infringement of the human rights and the fundamental freedom of a patient. Therefore, specific, and carefully defined criteria and safeguards are needed for such intervention. [...] Involuntary intervention must be carried out in accordance with the least restrictive principle."
- "The necessity for the deprivation of liberty shall be reviewed at regular and fixed intervals as prescribed by national law."

In its **position statement on Prison Public Health**, the **WPA** also sets out that:

- All Governments should ensure that all imprisonment is reasonable, proportionate, decent, and humane.
- As healthcare and justice roles have potential to conflict, healthcare provision should function independently of the criminal justice system.
- **The Bill of Rights for Persons with Mental Illness should apply equally to people in prison.**
- **"Without access to effective rehabilitation, the containment of people who are [...] mentally disadvantaged can be damaging. It serves no economic or humanitarian purpose, and it may foster further criminal activity on eventual release"**

The EPA in its *Guidance on forensic Psychiatry* identifies that:

- **In some countries in the EU, it is recognised that –"the longer the detention, the more relevant considerations of proportionality become with the patients' right to freedom being balanced against any risk they may pose."**
- **Some countries have developed diversion schemes which allow for "early detection of mental disorder (e.g. at the time of arrest), then allowing to divert the person to the health system without the involvement of the criminal justice system."**
- **"MDOs should be directed towards and diverted into psychiatric care early in the judicial process wherever possible."**

The MAP remains in communication with stakeholders about this, and we are committed to lobby when possible and necessary.

MAP EC

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