

ICLES 2018
International Conference on Law, Environment and Society

**MENTAL HEALTH LEGISLATION FOR THE ELDERLY WITH
MENTAL HEALTH PROBLEMS**

Ramalingam Rajamanickam (a)*, Mohd Zamre Mohd Zahir (b), Tengku Noor Azira Tengku
Zainudin (c), Zainunnisaa Abd Rahman (d)

*Corresponding author

- (a) Faculty of Law, National University of Malaysia, UKM Bangi, Malaysia, rama@ukm.edu.my
(b) Faculty of Law, National University of Malaysia, UKM Bangi, Malaysia, zamrezahir7@gmail.com
(c) Faculty of Law, National University of Malaysia, UKM Bangi, Malaysia, tna@ukm.edu.my
(d) Faculty of Law, National University of Malaysia, UKM Bangi, Malaysia, znar@ukm.edu.my

Abstract

The elderly or also known as older people is a vulnerable group which needs special attention and protection by the government. The United Nations defines people aged 60 years and above as elderly. Although not all countries define older people as above 60 years of age, Malaysia tends to follow the definition provided by the United Nations. Since the population of older people or elderly is growing, Malaysia can be defined as an ageing nation if more than 10% of its population is aged more than 60 years. This has raised some concerns on the part of the government to formulate specific measures to protect and empower the elderly in Malaysia. The Malaysian government has consistently been giving specific attention to the elderly in Malaysia. This can be seen when Malaysia developed the National Policy for Older Persons in 1995 and the Plan of Action for Older Persons in 1998 which after review were reformulated as the new National Policy for Older Persons, 2011 and the new Plan of Action for Older Persons. The new policy works together with the National Health Policy for Older Persons, 2008. Besides this, Malaysia has also exhibited its concern for older people with specific strategies related to enhancing the living environment for the elderly in the Eleventh Malaysia Plan (2016-2020). Although many efforts have been made for older people, there remain many unresolved issues relating to the elderly in Malaysia. As Malaysia is growing as an ageing nation, it will face many issues pertaining to elderly such as mental capacity, guardianship, consent to treatment, advance directives, and so on. Currently, Malaysia has the Mental Health Act 2001 related to mental disorder and to provide for the admission, detention, lodging, care, treatment, rehabilitation, control and protection of persons who are mentally disordered and for related matters. However, this piece of legislation is seen as inadequate as it is not sufficient to cater for all the issues pertaining to elderly in Malaysia with regard to mental health problems.

© 2019 Published by Future Academy www.FutureAcademy.org.UK

Keywords: Mental health, elderly, Mental Health Act 2001, Malaysia.



1. Introduction

The elderly, also known as older people, are a vulnerable group which needs special attention and protection by the government. In Malaysia, older people are defined as those who are 60 years and above. The population of older people or elderly in Malaysia is growing, and as such, the country will be defined as an ageing nation if more than 10% of its population is aged more than 60 years. This government being cognisant of this, has formulated specific measures to protect and empower the elderly in Malaysia, particularly the needs of the elderly with mental health problems which are different from the needs of other groups.

1.1 Conceptual Framework

The concept of this paper is based on the rights of the elderly. Recognizing the inherent value and rights of elderly people, there is a need to promote respect and appreciation for the participation of the elderly in the community (Indramalar, 2017). Furthermore, considering the often vulnerable status of the elderly, the community whether individually and collectively, shall take action to promote the rights and well-being of the elderly (United Nations Human Rights (OHCHR), Office of the High Commissioner, 1996 - 2018). It is important to protect the rights and interests of the elderly and provide the elderly with the support necessary to sustain the quality of life and dignity fitting their respected status in the community (Indramalar, 2017). The community shall protect and promote the health and mental well-being of the elderly, and are bound to represent and augment the rights and interests of the elderly. It is crucial to ensure the visibility and increased use of international human rights standards to address the dire situation of millions of older women and men around the world (United Nations Human Rights (OHCHR), Office of the High Commissioner, 1996 - 2018).

The Malaysian Federal Constitution as stipulated under Article 8(1) states that “All persons are equal before the law and entitled to the equal protection of the law.” The elderly have the inherent right to life, dignity and the integrity of their persons, which shall be protected by law. The elderly have the right to be free from abuse, neglect, and exploitation. The elderly, like other human beings, have the right to be free from discrimination by virtue of Federal Constitution.

1.2. Definition of Elderly

‘Elderly’ is the polite term for old (Cambridge Dictionary, n.d.). ‘Elderly’ is an adjective which refers to a person who is defined by statute or perception as being old (Segen’s Medical Dictionary, 2011). ‘Elderly’ or ‘older person’ is defined as one who is 60 years and above (United Nations, 1982) and this definition of elderly has been used in Malaysia according to Norani Mohd Hashim (2014). The term ‘elderly’ is also to describe a person who is beyond middle age and approaching old age (Mosby’s Dental Dictionary, 2008). The ‘elderly’ are also known as senior citizens (Mosby’s Dental Dictionary, 2008).

1.3. Definition of Mental Health Problem

Mental health problem can be referred to as a mental disorder as stated in section 2 (1), Mental Health Act 2001 (Act 615). It refers any mental illness, arrested or incomplete development of the mind,

psychiatric disorder or any other disorder or disability of the mind, however acquired and “mentally disordered” shall be construed accordingly. Whereas section 51 of the same Act provides that a mentally disordered person means any person found by due course of law to be mentally disordered and incapable of managing himself and his affairs. Based on the definition of mental health problem, read together with the definition of elderly, it can be summed up that an elderly person with a mental health problem is a person who has attained 60 years of age and above, having any type of mental illness, arrested or incomplete development of the mind; psychiatric disorder or any other disorder or disability of the mind by due course of law.

1.4. Issues in the Context of Elderly

Based on the National Population and Development Board Survey 2014¹, almost 30% of the elderly either live alone or with their elderly spouses (compared to 14.7% in 2004). They are experiencing the Empty Nest Syndrome, with their adult children having left home either because of marriage, employment or migration. The remaining 70.1% of the elderly either live with their children or in retirement and care homes. Caring for the elderly has also become more challenging with changing family dynamics as more women are joining the workforce and couples having fewer children to share caregiving responsibilities. With increased life span and better healthcare, caring for the elderly is an issue that needs to be addressed (Indramalar, 2017). For those aged below 14 years old (young age) in 2018, the percentage of population dropped from 24.1% in 2017 to 23.8%. However, the current status of population aged 15-64 years old (working age and including elderly) upturns from 69.6% in 2017 to 69.7% in 2018 (Department of Statistics Malaysia, 2018). The percentage of 65 years and over (elderly) population intensifications from 6.3% to 6.5% for the similar duration (Department of Statistics Malaysia, 2018). The upsurge in the alignment of working age population as well as old age population (elderly) contribute to the increase in the median age in 2018 in Malaysia, which stands at 28.6 years (Department of Statistics Malaysia, 2018).

The Star, a national newspaper, highlighted the dilemma of some 50 elderly people who had been abandoned by their kin at hospitals and are now residing at an old folk’s home in Kampung Pulau Meranti, Puchong (Indramalar, 2017). Many of them live with medical conditions such as diabetes, high blood pressure, heart problems, dementia and Alzheimer’s. They have children and relatives, who infrequently, if ever, visit these old folks. These cases are indicative of a very real and growing problem of neglect and abandonment of the elderly, which needs the urgent attention of the authorities.

2. Problem Statement

The Malaysian government has consistently given specific attention to the mental health of older people in the country. Although many efforts are being taken to address issues concerning older people, there are still many unsettled issues relating to the mental health of the elderly in Malaysia. One of the issues that has become a concern pertains to the coverage and adequacy of the mental health legislation for the elderly with mental health problems in Malaysia. Malaysia only has the Mental Health Act 2001 (Act 615) to address issues pertaining to the elderly with mental health problems from the legal perspective.

¹ The latest data provided by National Population and Development Board Survey, Malaysia for the elderly is in 2014.

However, the concern is to what extent the said legislation is adequate in addressing all issues relating to the elderly with mental health problems in Malaysia.

3. Research Questions

The research questions of this paper are:

- 3.1 What is the legal basis justifying the elderly with mental health problems in Malaysia?
- 3.2 What is the relevant law relating to elderly with mental health problems in Malaysia?
- 3.3 To what extent does the existing law in Malaysia address the relevant issues pertaining to the elderly with mental health problems?

4. Purpose of the Study

The aim of the study is to identify the relevant law relating to the elderly with mental health problems in Malaysia and to examine the issues pertaining to the elderly in Malaysia by analysing the relevant law.

5. Research Methods

This research is a pure legal research as the main focus of the research is the analysis of the legislation in Malaysia relating to the elderly with mental health problems. Therefore, this research adopted a qualitative method of content analysis to examine the relevant legislation to identify the adequacy of the said legislation to cater to for all the issues on the elderly with mental health problems in Malaysia.

Data for the research is mainly collected from the analysis of the Mental Health Act 2001 (Act 615) and some other relevant aspects relating to elderly such as Advance Medical Directive (AMD). The Mental Health Act 2001 is relevant when discussing the issue of mental health problems in Malaysia as it is the only law pertaining to mental health problems.

6. Findings

6.1. Mental Health Act 2001 (Act 615) and the Elderly

The first finding of this paper is based on Mental Health Act 2001. The Mental Health Act 2001 consolidates the laws relating to mental disorder and to provide for the admission, detention, lodging, care, treatment, rehabilitation, control and protection of persons who are mentally disordered and for related matters. However, there is no specific section relating to the elderly in this Act.

According to section 56 of the Act, the court shall decide whether the person alleged is mentally disordered or not. The case of *Ling Towi Sing @ Ling Chooi Sieng v. Sino-America Tours Corporation Pte Ltd (CA) [2017] 8 AMR 725, [2017] 1 LNS 1663, [2017] MLJU 1646* illustrates this provision. In this case, the wife and children of a businessman commenced a suit against the defendant for the recovery of money that was to be paid under a share sale agreement. The action was commenced by the plaintiffs as the committee of the estate of the businessman because, by the time the suit came to be commenced, the businessman suffered from acute dementia. An order has been obtained pursuant to the Mental Health Act 2001 declaring that the businessman was mentally disordered. However, the plaintiffs had not been

appointed as litigation representatives of the businessman. Nor, it would seem, had leave of court been obtained by the plaintiffs pursuant to order 76 rule 1A (1) of the Rules of Court 2012. The court held that in circumstances where a person has been declared by an order of court to be mentally disordered under the Mental Health Act 2001 and a committee has been appointed to represent him in litigation, no further order of court is required for the committee to sue or to defend a suit on behalf of the mentally disordered person.

In *Wu Sor Hwa, Artisan Pesona Sdn Bhd & Primary Capital Sdn Bhd v. Dato' Seri Dr Abdullah Fadzil Che Wan & Ors* [2018] 1 LNS 123 the first defendant was declared mentally disordered and his son, Wannis Che Wan, was appointed as his litigation representative. There was an issue as to whether the requirement for leave of court under order 76 rule 1A of the Rules of Court 2012 was one that needed to be fulfilled by the plaintiffs, or whether it was incumbent upon the litigation representative of the mentally disordered person to obtain leave of court for that person to be made a party to court proceedings.

The court was guided by the Court of Appeal case of *Ziko Abbo v. Ketua Polis Daerah Bau, Kuching, Sarawak* [2011] 3 CLJ 76, (“Ziko”) where the Court of Appeal observed that order 76 Rule 2(1) of the Rules of Court 2012 was not meant to create obstacles or to cause obstructions as the said order 76 of the Rules of Court 2012 was intended to give access to justice especially to the person who is not able to manage himself or his affairs in view of his mental disorder. The Court of Appeal went further to rule that the order “belongs to a species of social legislation which must be construed literally in favour of the patient”.

Therefore, in *Wu Sor Hwa, Artisan Pesona Sdn Bhd & Primary Capital Sdn Bhd v. Dato' Seri Dr Abdullah Fadzil Che Wan & Ors* [2018] 1 LNS 123 which was reported in 2018, the court referred to the case of *Ling Towi Sing @ Ling Chooi Sieng v. Sino-America Tours Corporation Pte Ltd (CA)* [2017] 8 AMR 725, [2017] 1 LNS 1663, [2017] MLJU 1646 and *Ziko Abbo v. Ketua Polis Daerah Bau, Kuching, Sarawak* [2011] 3 CLJ 76 and held that the respondent (the first defendant) in this case was mentally disordered, incompetent and incapable of managing himself and his affairs due to such mental disorder pursuant to section 2 of Mental Health Act and order 76 Rule 2(1) of the Rules of Court 2012. This is because, on the first day of trial on 25 August 2017, the learned counsel for plaintiff informed the court that he had been informed by the counsel for the defendants that the first defendant was “mentally unfit”. Mr Miranda for the defendants then informed the court that the first defendant was suffering from an “advanced stage” of Alzheimer’s disease. Mr How for the plaintiffs raised the question of whether the first defendant was competent to defend the action, in the light of the requirements of order 76 of the rules of Court 2012. On the next date, Mr Miranda informed the court that a court order had previously been obtained (on 4 October 2016) by which the first defendant was declared mentally disordered and by which his son, Wannis Che Wan, was appointed as his litigation representative. Previously, in the judgment, the court identified whether or not the litigation representative was competent to act on behalf of the first defendant in the present case will be dependent on the true construction of the order of 4 October 2016. Having reviewed the terms of this order, the current judge determined that no fresh court order was required.

6.2. Advance Medical Directive in the Context of the Elderly

The second finding of this paper is based on the context of Advance Medical Directive. In the context of the elderly, there is an issue as to whether an elderly patient would want to proceed with his or her

medical treatment. This is because every person including an elderly has the right to decide what they want or do not want to be done to their body before they are incompetent to do so. In this circumstance, the element of consent is an important factor that must exist before a doctor is allowed to treat his/her patients (Zahir et al., 2017). This includes the elderly patients. In discussing this issue, the relevant factor to be discussed is the Advance Medical Directive (AMD). AMD is a document which contains directives by a patient specifying the types of treatment that he will allow to be administered to him and those that are not allowed when he has become incapacitated (Zainudin, Rahim, & Rajamanickam, 2015). A patient who desires to make AMD must be legally competent (Zahir et al., 2019). Thus, an elderly person who is suffering from a mental disorder can, during his lucid period or before his mental health deteriorates, prepare his AMD so that any future medical treatment given will be given according to his wishes. An adult patient has the absolute right to refuse to give consent to medical treatment regardless of whether the decision is rational or not (Re T (Adult) [1992] 4 All ER 649). Therefore, any directive specified by a patient while he has capacity, to refuse to give consent, is legally binding and effective in the subsequent circumstances when he lost that capacity (Kennedy & Grubb, 1998).

However, in Malaysia the development of the law regarding AMD is still slow not just in the context of the elderly but also for other age groups. In fact, as yet there is no reported local case relating to AMD. Even though Article 18 of Consent for Treatment of Patients by Registered Medical Practitioners of Malaysian Medical Council (MMC) provides a general guideline that mentions AMD, but it is still very vague. Pursuant to this, this article will provide an overview of the rights of patients in Malaysia with regard to AMD and also the laws relating to it.

The Malaysian Medical Council (MMC) on the same note had issued a general guideline about AMD entitled “Consent for Treatment of Patients by Registered Medical Practitioners” pursuant to Article 18. Article 18 describes among other things, “a medical practitioner should refrain from providing treatment or performing any procedure where there is an unequivocal written directive by the patient that such treatment or procedure is not to be provided in the circumstances which now apply to the patient.” However, there is no specific guideline and standard regarding AMD in the hospitals in Malaysia (Berliner & Swagerty, 2012).

As had already been stated before, there is no standard and specific guideline relating to AMD in Malaysian hospitals. Indeed, there is no specific statute that governs the practice of AMD in Malaysia. Hence, in Malaysia the need for AMD legislation has become increasingly apparent (Jahn Kassim & Alias, 2015). In order to effectively address the issue of AMD in Malaysia, any effort taken to regulate its practice should involve medical practitioners, academicians, lawyers, religious authorities and relevant government bodies together with the Ministry of Health (MoH) so that they can contribute their skills, knowledge and expertise towards the growth of a practical and sustainable AMD model especially in the context of the elderly in Malaysia.

6.3. Other related Legislations concerning the Elderly

The third finding of this paper is based on legislations. In a context of the elderly, several related legislations provide protection and guidance for this group of citizens. For example, the Employment Act 1955 ensures that older persons who are still working will benefit from this Act since it guarantees their

rights and interests, for example, from the aspect of the working hours and overtime, public holidays, sick and annual leave, termination and benefits.

The Wills Act 1959 (Revised 1988), serves as a guidance in preparing wills for family members or any persons concerned. There is also the Employees' Social Security Act 1969 that provides social security in certain contingencies especially upon entering retirement age. According to the Pension Adjustment Act 1980, it provides for the adjustment of pensions and other benefits of officer in the public service and in statutory and local authorities.

This article found as follows:

- There is no specific law with regards to the elderly as he or she is covered under the concept of equality as enshrined in Article 8 (1) of Federal Constitution. Article 8 (1) states that "All persons are equal before the law and entitled to the equal protection of the law."
- The elderly have the inherent right to life, dignity, and the integrity of their persons, which shall be protected by law. The elderly have the right to be free from abuse, neglect, and exploitation. The elderly like other human beings have the right to be free from discrimination by virtue of the Federal Constitution.
- There are several relevant laws related to the elderly, though not specifically focused on older persons, such as the Employment Act 1955; Wills Act 1959 (Revised 1988); Employees' Social Security Act 1969; Destitute Persons Act 1977; Pensions Adjustment Act 1980; Employees Provident Fund Act 1991; Care Centre Act 1993; Private Healthcare Facilities and Services Act 1998; Persons With Disabilities Act 2008; Domestic Violence Act 1994; and the Mental Health Act 2001.
- Some of the commonwealth jurisdictions have mental capacity legislation besides mental health legislation, such as the Mental Capacity Act 2005 (England & Wales); the Adults with Incapacity (Scotland) Act 2000; and the Mental Capacity Act (Northern Ireland) 2016.
- The research found that the Malaysian Mental Health Act 2001 (Act 615) is inadequate as it is not sufficient to cater to all issues pertaining to the elderly in Malaysia with regard to mental health problems. Issues such as severity of mental disorder, guardianship of elderly, advance medical directive, living will/testament, decision making for the elderly in the best interest of the elderly, determination of mental capacity and place of treatment are still not properly or adequately addressed in Malaysia.

7. Conclusion

There is a need to assess capacity where a person is unable to make a particular decision at a particular time because their mind or brain is affected by illness or disability. One cannot decide that a person lacks capacity solely based upon age, appearance, condition or behaviour alone. If an elderly has been assessed as lacking capacity then any action taken, or any decision made for or on behalf of that person, must be made in his or her best interests. The research suggests that the government must formulate specific legal measures to protect and empower the elderly with mental health problems in Malaysia.

References

Berliner, H., & Swagerty, D. L. (2012). *Advance Directive*. Retrieved from <http://www.kpjdamansara.com/Advance-Directives-article-843.html> (2 June 2017).

- Consent for Treatment of Patients by Registered Medical Practitioners of Malaysian Medical Council (MMC). Retrieved on 18 November 2015, from <http://www.mmc.gov.my/v1/docs/Consent%20Guidelines%2015012013.pdf>
- Department of Statistics Malaysia. (2018). Press Release: Current Population Estimates, Malaysia, 2017-2018. Retrieved from <https://www.dosm.gov.my/v1/index.php?r=column/pdfPrev&id=c1pqTnFjb29HSnNYNUpiTmNWZHArz09> on 6 June 2019.
- Federal Constitution of Malaysia. International Law Book Services (ILBS). Kuala Lumpur, Malaysia.
- Hashim, N. M. (2014). *Aged Care in Malaysia*, Retirement Living & Senior Care SEA 2014, 17 -June 2014, Kuala Lumpur.
- Heuristic. (n.d.). In Cambridge Dictionary's online dictionary (2018). Retrieved from <https://dictionary.cambridge.org/dictionary/english/elderly> (10 July 2018).
- Indramalar, S. (2017, June 2). *Malaysia needs laws to protect rights of elderly*, The Star, Retrieved from <https://www.star2.com/family/seniors/2017/06/02/malaysia-law-elderly-protection/#qPFxxYRIkujrVAAH.99> (2 June 2017).
- Jahn Kassim, P. N., & Alias, F. (2015). The Legality of Advance Directives in Malaysia from the Medical Law Perspective. Paper presented at the Muzakarah Pakar: Bioetika Islami mengenai Isu Advance Medical Directive (AMD) [Expert Discussion: Islamic Bioethics on Advance Medical Directive (AMD)'s Issue]. Institut Kefahaman Islam Malaysia (IKIM), Kuala Lumpur.
- Kennedy, I., & Grubb, A. (1998). *Principles of Medical Law*, Oxford University Press, Oxford.
- Mosby's Dental Dictionary, 2nd edition. (2008). Retrieved July 10 2018 from <https://medical-dictionary.thefreedictionary.com/elderly> (10 July 2018).
- National Population and Development Board Survey. (2014). *Lembaga Penduduk dan Pembangunan Keluarga Negara (LPPKN)*, Kuala Lumpur, Malaysia. Retrieved from <http://www.lppkn.gov.my/> on 6 March 2019.
- Segen's Medical Dictionary (2011). Farlex. Retrieved 2018, July 10 from <https://medical-dictionary.thefreedictionary.com/elderly>
- United Nations (1982). *World Assembly on Ageing*, Vienna.
- United Nations Human Rights (OHCHR). *Human rights of older persons*. Office of the High Commissioner. 1996-2018 Retrieved from <https://www.ohchr.org/en/issues/olderpersons/pages/olderpersonsindex.aspx> on 12 November 2018).
- Zahir, M. Z. M., Zainudin, T. N. A. T., Yaakob, H., Rajamanickam, R., Shariff, A. A. M., Rahman, Z. A., Harunarashid, H., & Hatta, M. (2017). Perspektif Syariah tentang Hak Pesakit berhubung Arahan Awal Perubatan: Suatu Tinjauan Umum [Sharia Perspective on Patient's Rights on Advance Medical Directive: An Overview]. *1 LNS (A) lvii. Current Law Journal. CLJ Law*. Legal Network Series. CLJ Legal Network Sdn Bhd, Ampang Jaya, Selangor.
- Zahir, M. Z. M., Zainudin, T. N. A. T., Yaakob, H., Rajamanickam, R., Harunarashid, H., Shariff, A. A. M., Rahman, Z. A., & Hatta, M. (2019). Hak Pesakit bagi Melaksanakan Arahan Awal Perubatan: Suatu Gambaran Umum [Patient's Right to Implement an Advance Medical Directive (AMD): An Overview]. *Sains Malaysiana* 48(2), 353-359.
- Zainudin, T. N. A. T., Rahim, A. A., & Rajamanickam, R. (2015). Consent to Medical Treatment and the Autonomous Power of Adult Patients: The Malaysian Legal Position. *Mediterranean Journal of Social Sciences*, 6(4S3), 418-423. MCSER Publishing, Rome-Italy.