

Dear MHE members,

You will be pleased to hear that the European Commission published today its paper (as a Staff Working Document): "Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union".

http://ec.europa.eu/justice/discrimination/files/swd_2014_182_en.pdf

As the UN CRPD is the first ever human rights convention that the EU ratifies, it is a very new exercise they have done in preparing this document. Unfortunately civil society was not properly consulted when drafting it. The European Disability Forum, of which MHE is a member, is in the process of preparing an alternative report. MHE will feed into this work and has as its particular responsibility to prepare input concerning Article 14. You will find attached a first outline, based on the Myth Buster on forced treatment as well as of input from ENUSP. It also includes a short analysis on the new recommendation on vulnerable suspects in criminal proceedings. Please do not hesitate to provide feedback to it.

Best wishes,

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Article 14 Liberté et sécurité de la personne

1. Les États Parties veillent à ce que les personnes handicapées, sur la base de l'égalité avec les autres :

- a) Jouissent du droit à la liberté et à la sûreté de leur personne;
- b) Ne soient pas privées de leur liberté de façon illégale ou arbitraire; ils veillent en outre à ce

que toute privation de liberté soit conforme à la loi et à ce qu'en aucun cas l'existence d'un handicap ne justifie une privation de liberté.

2. Les États Parties veillent à ce que les personnes handicapées, si elles sont privées de leur liberté à l'issue d'une quelconque procédure, aient droit, sur la base de l'égalité avec les autres, aux garanties prévues par le droit international des droits de l'homme et soient traitées conformément aux buts et principes de la présente Convention, y compris en bénéficiant d'aménagements raisonnables.

Article 14 - Liberty and security of person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

a) Enjoy the right to liberty and security of person;

b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

Persons with mental health problems are all too often subject to deprivation of liberty without consent throughout Europe (forced/compulsory "treatment").

Laws authorizing detention and/or compulsory treatment on grounds linked to the existence of a psychosocial disability contravene the Convention on the Rights of Persons with Disabilities (CRPD). Furthermore, unequal detention regimes for people with psychosocial disabilities as part of the penal system violate Article 14 and other provisions.

While there are different definitions of forced or compulsory psychiatric treatment under different national legislations within the EU, this term is generally used when someone is subjected to medical treatment against his or her own will. In this regard psychiatry represents a clear exception because other medical fields usually do not allow for forced treatment. Coercive treatment most often entails the administration of psychiatric drugs, but sometimes physical measures are also applied. The latter refer to restraint, seclusion, caged or net-beds and electroshock. In most European countries, compulsory psychiatric treatment is legally permitted. The rules on the application of such treatment vary country by country. Such measures are either ordered by court or on the basis of medical professionals' or general practitioners' assessments. The duration of the treatment varies, and so does the possibility of revision.

In their Concluding Observations under Article 14, the CRPD Committee has recently urged States parties to "ensure that no one is detained against their will in any kind of a mental health facility" (Austria) and to "repeal all legislation that authorizes medical interventions without free and informed consent of the persons with disabilities concerned, and legal provisions that authorize commitment of individuals to detention in mental health services, or the imposition of

compulsory treatment either in institutions or in the community via Community Treatment Orders (CTOs).”

The CRPD Committee recommended in their comment that until new legislation is in place, “all cases of persons with disabilities who are deprived of their liberty in hospitals and specialised institutions be reviewed and that the review also include a possibility of appeal”.

These recommendations send out a clear signal to States that legal provisions permitting the hospitalisation or institutionalisation of persons with intellectual or psycho-social disabilities on the basis of their disability is in contravention of Article 14 of the CRPD.

A procedure to review all cases of detention should be compatible with due process and fair trial guarantees. This means that persons with disabilities should be provided with individual and public hearings, accessible information regarding their rights, and be provided with adequate legal representation paid for the State. This will require training for judges and attorneys to ensure they have a thorough understanding of the CRPD’s requirements as well as that of relevant domestic law. Judges need this so that they can administer justice in a fair manner, and attorneys need this as they need an appropriate attitude and at least the minimum level of skills in order to provide effective representation to people with disabilities throughout these new procedures.

Article 14(1)(b) of the CRPD is particularly challenging to conventional mental health practice, since, along with the general right to liberty, it provides that ‘the existence of a disability shall in no case justify a deprivation of liberty.’ (Art. 14(1)(b)). The Office of the UN High Commissioner for Human Rights has adopted a robust view of this provision, as it applies to psychiatric detention:

[48.] ... Article 14, paragraph 1 (b), of the Convention unambiguously states that “the existence of a disability shall in no case justify a deprivation of liberty”. Proposals made during the drafting of the Convention to limit the prohibition of detention to cases “solely” determined by disability were rejected. As a result, unlawful detention encompasses situations where the deprivation of liberty is grounded in the combination between a mental or intellectual disability and other elements such as dangerousness, or care and treatment. Since such measures are partly justified by the person’s disability, they are to be considered discriminatory and in violation of the prohibition of deprivation of liberty on the grounds of disability, and the right to liberty on an equal basis with others prescribed by article 14’.

On this account, ‘mental disorder’ or ‘mental illness’, even if it comprises only one of a number of necessary criteria for involuntary detention, makes that set of criteria incompatible with Article 14, that a disability shall in no case justify a deprivation of liberty.

In relation to Article 14 (2), the EU is working to achieve common minimum standards of procedural rights in criminal proceedings to ensure that the basic rights of suspected and accused persons are protected sufficiently. Following the Stockholm programme, it has submitted proposals to strengthen the rights of citizens in criminal proceedings. One of the initiatives is linked to the right to protection for “vulnerable suspects”.

A European Commission recommendation of the 27th of November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013/C 378/02 is one of the adopted measures. Whilst the initiative includes positive statements there are a number of points that need to be made:

- Firstly, the recommendation is using a questionable language when speaking of vulnerable persons. A person can be in a vulnerable situation, but to speak about the person as vulnerable as patronizing. To state that the assessment of the vulnerability can be made by police officers is inappropriate (6th preamble). A presumption of vulnerability goes for persons with “serious psychological, intellectual, physical or sensory impairments” (Article 8). No further explanation is given as to why persons with physical disabilities are vulnerable per se. For others, information in accessible formats should be given, but only upon explicit request.
- Guardianship is incompatible with the UN CRPD. Still, the recommendation proposes this to be a solution for the ‘legal representative’ (preamble 8) and Article 11.
- Moreover, the recommendation states (preamble 11) that vulnerable persons “are not able to understand the criminal proceedings”. Therefore, they are not entitled to waiver their right to a lawyer. Not only this statement is judgmental towards persons with disabilities, it also takes away their equal right to make decisions in relation to their own procedure.
- Whilst the CRPD provides with a shift from the medical to the social model, Article 12 states without any explicit reason that “vulnerable persons” should have access to systematic and regular medical assistance throughout criminal proceedings.
- On a more positive note, it is stated in the 17th Article that police officers, law enforcement and judicial authorities competent in criminal proceedings conducted against vulnerable persons should receive specific training. However, the content of the training and who provides it would need to be in accordance with the CRPD in order to ensure that this training will really lead to positive outcomes instead of further increasing prejudices against persons with disabilities.