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| Office of the United Nations High Commissionerfor Human Rights (OHCHR)Palais des NationsCH-1211 Geneva 10SwitzerlandSpecial Rapporteur on the rights of persons with disabilities |  | The Danish Institute for Human RightsWilders Plads 8KDK-1403 Copenhagen KPhone +45 3269 8888CELL nini@humanrights.dkhumanrights.dkDoc. No. 17/01139-330 May 2017 |

The right to liberty and security of persons with disabilities in denmark

The Danish Institute for Human Rights has received your questionnaire regarding the right to liberty and security of persons with disabilities in Denmark. The Danish Institute for Human Rights has the following comments:

1. **Legislation related to exercise of legal capacity**

Danish law provides various forms of support measures to persons needing assistance to use their legal capacity. The Danish Guardianship Act allows for support in the form of traditional financial and/or personal guardianship, cf. Section 5, as well as for the less intrusive co-guardianship, cf. Section 7. The most comprehensive form of guardianship is the court-imposed guardianship under Section 6.

Co-guardianship in accordance with Section 7 of the Guardianship Act means that the person under guardianship must take decisions in consultation with another person, i.e. the co-guardian. A co-guardian may be appointed if a person needs assistance to manage his or her assets or take care of financial affairs due to lack of experience, impaired health or similar problems. This person must him-/herself request a co-guardian. Nobody can be forced into a co-guardianship.

A person is placed under financial and/or personal guardianship in accordance with Section 5 of the Guardianship Act if the person requests for or needs a guardian due to a weakened state e.g. mental illness, severe dementia, mental retardation or another type of impairment that makes the person unable to look after his or her personal and/or financial affairs. The guardian is a legal representative and can enter into legally binding agreements on behalf of the person under guardianship. However, the person under guardianship is not deprived of his or her legal capacity.

Whether a person should be placed under guardianship in accordance with Section 5 or Section 7 is decided by the State Administration. The State Administration’s decision to place a person under guardianship as well as the State Administration’s decision to modify or terminate a guardianship can be appealed to the court in accordance with Section 22 of the Guardianship Act and the Danish Administration of Justice Act Chapter 43.

Section 6 of the Guardianship Act provides the deprivation of legal capacity and financial responsibility. A person is placed under guardianship in accordance with Section 6 if he or she is under full financial guardianship in accordance with Section 5 but still enters into legally binding agreements that are detrimental to the person. The objective of guardianship in accordance with Section 6 is thus to prevent the person in question from exposing his or her assets, income or other economic interests to substantial deterioration. Whether a person should be deprived of legal capacity is decided by the court.

It is noteworthy that deprivation of legal capacity pursuant to Section 6 can only concern financial issues. In other words, guardianship in accordance with Section 6 does not entail the loss of legal capacity to act in personal matters. This means that the guardian cannot use force in order to impose personal decisions, e.g. if the person in question disagrees or physically resists being moved to a nursing home.

There must always be a specific need for a guardian and the various provisions of the Guardianship Act must be specifically adapted to the individual. A guardianship may be limited so that it only covers certain financial or personal matters and furthermore, the provisions can be implemented for a specific period of time. However, the Danish Guardianship Act does not require the guardian to attempt to promote the person’s legal capacity to act, nor does it require periodic reassessments of guardianship arrangements.

A pervasive principle in the Guardianship Act is the ‘principle of least means’ in Section 8. This principle entails, inter alia, that deprivation of legal capacity under Section 6 cannot be implemented if it is sufficient for the person with a disability to be placed under a co-guardianship in accordance with Section 7 or under a traditional financial and/or personal guardianship in accordance with Section 5.

A copy of the Guardianship Act is available through this link: <https://www.retsinformation.dk/forms/r0710.aspx?id=2681> (Danish version). Unfortunately, it has not been possible to find an English translation of the act.

1. **Legislation and policies related to the rights of persons with disabilities in institutions including processes of deinstitutionalisation**

The first version of the Danish Social Service Act was passed in 1998. With it, the concept of ‘institution’ was abolished and housing offers and the need for care and/or personal support in everyday life were separated from each other. The current Social Service Act thus distinguishes assisted housing from offers of care services and/or personal support for persons with disabilities.

According to Section 107 of the Social Service Act, the municipal council may offer temporary accommodation to persons in need thereof due to substantially impaired physical or mental functional capacity or special social problems.

According to Section 108 of the Social Service Act, the municipal council shall provide accommodation in facilities suitable for long-term accommodation for persons who, due to substantially and permanently impaired physical or mental functional capacity, need extensive assistance for general day-to-day functions or care, attendance or treatment, and where such needs cannot be addressed in any other way.

Pursuant to Section 105 of the Danish Act on Social Housing, the municipal council shall, to the extent necessary, provide social housing for the elderly, which can be let out to the elderly and persons with disabilities with a particular need for such housing.

According to Sections 129 of the Social Service Act, cf. Section 131, the municipal council may recommend that the State Administration should decide that a person objecting to removal or lacking the capacity to give informed consent thereto shall be admitted to a specific accommodation facility when a number of conditions are met, cf. Section 129(1). In case of admission to special accommodation facilities under Section 129(1) the municipal council shall ensure that the person involved receives legal assistance for the purpose of safeguarding his/her interests, cf. Section 132 of the Social Service Act.

The decisions of the State Administration on admission to specific accommodation facilities under Section 129 may be appealed to the National Social Appeals Board, cf. Section 134 of the Social Service Act.

Notwithstanding that the concept of ‘institution’ was abolished with the Social Service Act in 1998, some persons with disabilities continue to live in institution-like facilities and dwellings are still being built with a size and location that cause them to take on institutional characteristics. For instance, a study from 2012 showed that almost half the citizens living in publicly provided residential facilities, were living with 30 other people or more.

Thus, there is an increasing tendency that the housing provided under the provisions of Sections 107-108 of the Social Services Act is constructed as large units, justified with reference to economies of scale. This return to large institution-like accommodations is not in accordance with the abolition of the ‘institution concept’, and it reduces the options for persons with disabilities to choose where, how and with whom they want to live. The 2012 survey, for example, shows that many citizens in need of special support cannot decide for themselves where to live and do not obtain the opportunity to choose.

An English translation of the Social Service Act is available through this link: <http://www.english.sm.dk/media/14900/consolidation-act-on-social-services.pdf>

A copy of the Act on Social Housing is available through this link: <https://www.retsinformation.dk/forms/r0710.aspx?id=183636> (Danish version). Unfortunately, it has not been possible to find an English translation of the act.

1. **Legislation related to involuntary admission to mental health services or other institutions**

Treatment in the Danish healthcare system is based on informed consent by patients and their voluntary participation. For individuals whose decision-making capacity is reduced, and who do not understand the consequences of resisting treatment, other individuals can give consent to treatment. In such cases, medical examination and treatment can only be carried out if the individual refrains from resisting treatment either verbally or through their actions.

Thus as a rule, admission to mental health services must be subject to informed consent in accordance with Section 5 of the Danish Health Act. The Danish Psychiatric Act, however, allows for involuntary admission to psychiatric departments and compulsory treatment and other uses of force at such departments.

The common basic criterion for the use of force within psychiatry, including involuntary admission, is mental illness or 'conditions fully comparable with mental illness', cf. Section 5 of the Psychiatric Act. The person whom it is intended to subject to force must therefore be denotable as mentally ill (psychotic) or, for instance, as having an affect-explosive condition or being in a state of abnormal isolated reaction accompanied by consciousness changes.

Furthermore, in order to be committed or forcibly detained, the person in question must either 'pose an obvious and major hazard to him/herself or others' (dangerousness indication) or be in a situation where 'the prospect of cure or appreciable and crucial improvement in condition will be essentially impaired' unless the psychiatric treatment system takes action (treatment indication), cf. the Psychiatry Act Section 5. The Psychiatry Act also stipulates expressly that detention is only allowed 'with a view to treatment', making it illegal, for instance, to commit a demented person to a psychiatric hospital because no place at a nursing home has been found for that person.

When the requirements for compulsory admission pursuant to Section 5 of the Psychiatry Act are no longer present, the detention of a person at a psychiatric department must be terminated immediately, cf. Section 11 of The Psychiatric Act.

Every time coercion, including compulsory admission, is resorted to, the therapists must detail the nature and causes of the intervention in the coercion records, cf. Section 20 of the Psychiatric Act. The purpose of registering and reporting the use of force is twofold: firstly concern for the individual patient's civil rights, for example when considering grievances; and secondly the desire to reduce the use of force, in hope that registration can have a preventive effect on the staff's inclination to resort to coercion.

According to Section 24 of the Psychiatric Act, a patient counsellor must always be appointed in specific cases where coercion is resorted to, including compulsory admission. The patient counsellor must guide and advise the patient on all matters relating to admission, stay and treatment at psychiatric departments. Moreover, the patient counsellor must assist the patient in initiating and following through any complaints.

By request of the patient or the patient counsellor the hospital authority must lodge complaints concerning, inter alia, compulsory admission to the Psychiatric Patients’ Board of Complaints

If the patient is discontent with decisions made by the Psychiatric Patients’ Board of Complaints regarding, inter alia, compulsory commitment and detainment, the patient or the patients’ adviser can demand that the ruling of the Psychiatric Patients’ Board of Complaints should be appealed to a court of law.

A copy of the Psychiatric Act is available through this link: <https://www.retsinformation.dk/forms/r0710.aspx?id=174248> (Danish version). Unfortunately, it has not been possible to find an English translation of the Act.

1. **Legislation related to criteria to be found not criminally responsible**

Section 16 of the Danish Penal Code states that punishment cannot be imposed upon persons, who at the time when the offence was committed, were irresponsible owing to insanity or similar conditions or to mental deficiency.

The wording of Section 16 reads as follows:

***Section 16 (1)*** *Persons who, at the time of the act, were irresponsible on account of mental illness or a state of affairs comparable to mental illness, or who are severely mentally defective, are not punishable. Provided that the accused was temporarily in a condition of mental illness or a state of affairs comparable to mental illness on account of the consumption of alcohol or other intoxicants, he may in special circumstances be punished.*

***(2)*** *Persons who, at the time of the act, were slightly mentally defective are not punishable, except in special circumstances. The same shall apply to persons in a state of affairs comparable to mental deficiency.*

Where an accused is acquitted in accordance with Section 16 of the Penal Code, the court may decide on the use of other measures, which it considers to be expedient for the prevention of further offences, cf. Section 68. In addition, please see Sections 69-73a of the Penal Code.

An English version of the Danish Criminal Code is available through this link: <https://www.unodc.org/tldb/pdf/Denmark_Criminal_Code_2005.pdf>

* 1. **Legislation related to unfitness to stand trial or unfitness to plead**

***Criminal cases***

Generally, in accordance with Section 729a and Sections 730-735 of the Administration of Justice Act a defendant can choose his or her own defense attorney.

If the defendant does not choose a defense attorney, an attorney will be appointed to the defendant under certain circumstances as described in Sections 731-735 of the Administration of Justice Act. According to Section 732 the court has to appoint an attorney to a defendant if the defendant’s person requires it, e.g. if the defendant has a mental disability.

***Civil cases***

In general, pursuant to the Danish Administration of Justice Act a plaintiff or a defendant can choose to be represented in court by a process agent e.g. an attorney.

According to Section 259 of the Administration of Justice Act a plaintiff or a defendant can also choose to represent him- or herself in court, unless the court assesses that the case will not be presented in an appropriate manner without assistance. However, Section 257(1) of the Administration of Justice Act prescribes that minors (i.e. persons under the age of 18) and persons under guardianship in accordance with Section 6 of the Guardianship Act cannot represent themselves in court.

A person placed under guardianship in accordance with Section 6 of the Guardianship Act will be represented by his or her guardian.

According to Section 26 of the Guardianship Act the guardian is obliged to consult the person under guardianship before deciding on important matters unless the person under guardianship is under 15 years old, the person is unable to understand the importance of the decision or consulting the person cannot be done without significant difficulties.

Furthermore, the guardian is required to obtain consent from the person under guardianship in order to initiate judicial proceedings in the situations referred to in Section 257(2) of the Administration of Justice Act. For instance, the guardian need the consent of the person under guardianship in order to initiate judicial proceedings concerning valid and legally binding agreements, which the person under guardianship have entered into.

A copy of the Administration of Justice Act is available through this link: <https://www.retsinformation.dk/Forms/r0710.aspx?id=183537> (Danish version). Unfortunately, it has not been possible to find an English translation of the provisions referred to above.

1. **Legislation related to security measures and diversion programmes**

***The Social Service Act***

The Social Service Act allows for certain forcible measures / “security measures”, cf. Sections 125-129 of the act. The provisions concerned are applicable to persons with substantial and permanent impairment of mental function who are receiving personal and practical help and socio-educational assistance etc. under Sections 83-87 of the Social Service Act, treatment under Sections 101-102 or social or other activities under Sections 103-104, and who do not consent to any of the measures described in Sections 125-129.

The forcible measures allowed for in the Social Service Act are as follows:

* Personal alarm or paging systems in accordance with Section 125.[[1]](#footnote-1)
* Use of physical force in restraining a person or leading a person to another room in accordance with Sections 126-126(a).
* Detention in the home in accordance with Section 127.
* Use of fabric braces in accordance with Section 128.
* Admission to special accommodation facilities without consent in accordance with Section 129.

In a case of detention in the home under Section 127 or admission to special accommodation facilities under Section 129 the municipal council shall ensure that the person involved receives legal assistance for the purpose of safeguarding his/her interests, cf. Section 132 of the Social Service Act.

According to Section 136 of the Social Service Act admission to accommodation facilities under Section 129 and any forcible measures taken, including in connection with measures under Sections 125-128, shall be registered and reported by the facility.

Decisions on measures under Sections 125-129 may be appealed to the National Social Appeals Board in accordance with Sections 133 and 134 of the Social Service Act.

An English translation of the Social Service Act is available through this link: <http://www.english.sm.dk/media/14900/consolidation-act-on-social-services.pdf>

***The Psychiatric Act***

The Psychiatric Act also allows for certain forcible measures in relation to admission, stay and treatment in psychiatric wards.

According to Section 14(2), forced physical restraint may be used for a short period of time and only as long as it is necessary to prevent a patient from exposing him-/herself or others to imminent danger of sustaining injury to the body or health; pursuing or by other means seriously molesting other patients or causing significant malicious damage. A patient may be restrained for a longer period than a few hours if the patient's or someone else’s life, mobility or safety demands it, cf. Section 14(3).

Section 17 provides that physical force can be used for restraining or, if necessary, transferring a patient to another place at the hospital provided that the above mentioned requirements in Section 14(2) are met.

Personal alarm or paging systems and special door locks can be used for a patient suffering from dementia or dementia-like conditions, in order to prevent the person from leaving a psychiatric department and thereby exposing him-/herself or others to a significant risk of sustaining personal injury, cf. Section 17a. .

According to Section 18 regarding protective restraint, a particular protective means may be used in order to prevent a patient from unintentionally exposing him- or herself to significant danger provided that a physician has attended to the patient and determined which particular protective means to use.

Section 18d prescribes that one or more staff members may constantly be in close proximity to the patient without his or her informed consent if the patient is suicidal or endangers other patients.

According to Section 18f, a physician may decide that doors must be locked in the psychiatric department under certain circumstances.

For the purpose of reducing the use of force, the Psychiatry Act prescribes that the principleof the least expedient must be practised. This means that measures less drastic than force must always be used wherever possible and that the least intrusive form of force must always be resorted to.

Yours sincerely,

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Teamleader, Disability, Equal Treatment

1. However, intervention pursuant to Section 125(2), 1st sentence, is not considered a forcible measure. [↑](#footnote-ref-1)