European Network of (Ex-) Users and Survivors of Psychiatry

Vesterbrogade 103, 1.sal
1620 København V, Denmark
Tel: +045 33261623 enusp.info@gmail.com /
www.enusp.org

Secretary of the Committee on Bioethics (DH-BIO)
v/Laurence Lwoff
dgI.consultation@coe.int

Subject: Public consultation on the Draft Additional Protocol to the Oviedo Convention on Human Rights and Biomedicine concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment

15 November 2015

To the members of the Committee on Bioethics,

The **European Network of (Ex-) Users and Survivors of Psychiatry (ENUSP)**[1] is the grassroots, independent representative organisation of mental health service users, ex-users and survivors of psychiatry at a European level.

The European Network of (Ex-) Users and Survivors of Psychiatry (ENUSP) takes this opportunity to provide comments on the draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment.

We have very serious concerns regarding the compatibility of the draft Additional Protocol with the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD). Our main concerns arise in relation to equal recognition before the law, liberty and security of a person, the prohibition of torture and ill-treatment, and access to justice. We are also extremely concerned about the deformation of human rights concepts by conflating terminology used in the Draft Additional Protocol.

ENUSP emphasizes that there is a fundamental difference between coercion and care, and the references to the claimed beneficence of involuntary placement and involuntary treatment are outdated and misplaced. It is widely acknowledged that coercive practices are not a therapeutically beneficent intervention. Rather, such interventions constitute discriminatory and harmful practices that can cause severe pain and suffering, as well as deep fear and trauma in its victims. Deprivation of liberty can in itself be harmful. Indefinite detention is especially harsh, and commonly practiced against persons with psychosocial disabilities in mental health settings. Mental health detention is regularly accompanied by intrusive and involuntary medical interventions such as forced drugging, forced electroshock (ECT), restraint and solitary confinement. These practices should not be characterized as treatment in any sense, but rather constitute forms of ill-treatment.

[1] www.enusp.org

uropean Network of (Ex-) Users and Survivors of Psychiatry

Vesterbrogade 103, 1.sal
1620 København V, Denmark
Tel: +045 33261623 enusp.info@gmail.com / www.enusp.org

The fact that a person has psychosocial disabilities, or may have a need to overcome a mental health crisis situation does not justify the deprivation of fundamental rights. What is needed is support, not confinement or involuntary treatments. When persons experience a mental health problem or crisis, responding by subjecting them to primitive restrictions, such as confinement, forced drugging and physical restraints, is the opposite of mental health care and support, and leads to segregation, emotional and physical abandonment, and suffering. Obviously, involuntary placement and involuntary treatments are counter-effective to the wellbeing of the person subjected, and do not support personal recovery. These interferences cause more struggle, distance, and psychosocial problems, which in itself increases the risk of new or additional crises and does not contribute to safety or a healthy community at all. The claimed necessity of these interventions to avert risk of serious harm to the person concerned is further refuted by the fact that subjecting persons to involuntary institutionalization, forced treatment and other forced psychiatric interventions, represents in itself a significant risk of serious harm, as well as violating the fundamental rights of persons with disabilities.

The suggested criteria and procedures in the Draft Additional Protocol for involuntary placement and involuntary treatment in the context of mental health care conflate the distinguished concepts of care and confinement and authorize deprivation of liberty based on psychosocial disabilities combined with other criteria, such as the presumptive risk of serious harm to self or others. Besides being discriminatory, such criteria for deprivation of liberty also contain the paradox of applying detention regimes that cause serious harm for the purpose of preventing some speculative and hypothetical harm in the future. Therefore in itself, the Draft Additional Protocol should be aborted.

Furthermore, the decision to elaborate a legally binding instrument on "the Protection of the Human Rights and Dignity of Persons with Mental Disorder with regard to Involuntary Placement and Involuntary Treatment" was taken based on observations of the Steering Committee on Bioethics (CDBI) which found legal gaps in certain Member States of the CoE in the implementation of Recommendation(2004)10 on the protection of human rights and dignity of persons with mental disorders. However, this recommendation was developed before the UN CRPD, and is based on now outdated standards contrary to the CRPD. There is therefore no longer a need to bridge the gap between Rec(2004)10 standards and domestic legislation. Instead, there is a need to implement the CRPD in domestic law.

In the preamble to the draft Additional Protocol it is stated that it is taking into account "the work carried out at the international level on the protection of dignity and rights of persons with mental disorders, in particular the United Nations Convention on the Rights of Persons with Disabilities". However, the very title of the draft Additional Protocol itself, just like Rec(2004)10, immediately and clearly show that the draft Protocol is a medical model-based instrument that runs counter to the CRPD by authorizing mental health detention and non-consensual psychiatric treatment.

The Draft Additional Protocol to the Oviedo Convention is contrary to the CRPD in its object and purpose, and in every one of its provisions that refer to involuntary treatment and involuntary placement. Contrary to paragraph 46 of the Explanatory Report accompanying the draft Protocol, the CRPD prohibits all involuntary placement and involuntary treatment of persons with disabilities, and does not allow any exceptions. The jurisprudence of the CRPD Committee makes this absolutely clear in both General Comment No. 1[2] on Article 12, and its most recent Guidelines on Article 14[3].

[2] CRPD Committee General Comment no.1 on article 12 Equal recognition before the law (April 2014)
[3] CRPD Committee's Guidelines on article 14 Liberty and security of person (September 2015)

uropean Network of (Ex-) Users and Survivors of Psychiatry

Vesterbrogade 103, 1.sal
1620 København V, Denmark
Tel: +045 33261623 enusp.info@gmail.com / www.enusp.org

The CRPD guarantees the equal enjoyment of all human rights and all fundamental freedoms on an equal basis to all persons with disabilities. Among these rights are legal capacity, liberty, freedom from torture and other ill-treatment, and the right to health care based on free and informed consent. There is no room under the CRPD for a separate and unequal regime of non-consensual interventions applicable uniquely to persons with alleged mental disorders, contrary to Article 7 of the Oviedo Convention and to the object and scope of the draft Protocol (Articles 1 and 2).

General Comment No. 1 establishes that people with psychosocial disabilities cannot be deprived of their right to make decisions, including decisions about treatment, on the basis of another person's negative assessment of their mental capacity or decision-making skills. Once again, there is no room under the CRPD for a separate and unequal regime of involuntary measures based on an alleged impairment of the person's decision-making skills, as the draft Protocol attempts to do through its provisions on involuntary placement and involuntary treatment, found in Articles 10 and 11 of the draft Protocol.

General Comment No. 1 and the Guidelines on Article 14 both make clear that free and informed consent of the person concerned continues to apply in emergency and crisis situations. There is no room under the CRPD for refusal to recognize a person's legal capacity and performing forced interventions based on the characterization of a person's situation as amounting to an emergency, contrary to the provisions suggested under Article 13 of the draft Protocol.

The Guidelines on Article 14, which summarize the CRPD Committee's jurisprudence, establish that neither the risk of harm to the person or to others, nor the person's alleged need for treatment, can justify involuntary placement in mental health facilities or involuntary treatment. In fact these practices are absolutely prohibited and constitute serious human rights violations. Involuntary placement in mental health facilities, as an instance of disability-based deprivation of liberty, is a form of arbitrary detention; forced treatment is among the practices found to be inconsistent with the prohibition of torture and cruel, inhuman or degrading treatment or punishment. There is no room for exceptions to this absolute prohibition, contrary to Articles 3, 4, 10, 11, 12 and 13 of the draft Protocol.

The remaining articles in the draft Protocol refer to auxiliary measures that have no relevance once the CRPD absolute prohibition against involuntary treatment and involuntary placement are upheld.

The Committee on Bioethics has rejected the CRPD Committee's authoritative interpretation of the CRPD in the draft Additional Protocol, and claims the draft is in line with the treaty. In the preamble, the Bioethics committee alludes to CRPD Art. 14, but changes the wording to reflect their own outdated standard, so that their version reads "the existence of a mental disorder **in itself** shall in no case justify an involuntary measure".

Regional human rights standards should not undermine or be in conflict with international human rights standards. The Committee on Bioethics should acknowledge and address the discrepancies between the draft Additional Protocol, as well as the Oviedo Convention Articles 6 and 7, and the UN CRPD.[4]

[4] Article 6 of the Oviedo convention authorizes substituted decision-making and withdrawal of legal capacity based on mental disability. There is a need for change of paradigm away from substitution of a person's will to the new paradigm based on supported decision-making as set forth by the CRPD Article 12.
Article 7 of the Oviedo convention runs counter to the CRPD by authorizing forced psychiatric interventions.

uropean Network of (Ex-) Users and Survivors of Psychiatry

Vesterbrogade 103, 1.sal
1620 København V, Denmark
Tel: +045 33261623 enusp.info@gmail.com / www.enusp.org

The Bioethics Committee could look to another regional mechanism, the Organization of American States (OAE) Committee for the Elimination of All Forms of Discrimination against persons with disabilities (CEDDIS), which has already started the process of interpreting the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities in the context of the CRPD. [5] The Inter-American Convention has a provision contradicting the CRPD reading "If, under a state's internal law, a person can be declared legally incompetent, when necessary and appropriate for his or her well-being, such declaration does not constitute discrimination" (Article I.2(b)). CEDDIS has addressed this discrepancy by adopting interpretation criterion declaring that;

"*This Committee declares that the criterion established in Article I.2(b) in fine of the OAS Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, (..)* ***seriously contradicts the provisions of Articles 2 and 12 of the United Nations Convention, and the Committee therefore construes that the aforementioned criterion must be reinterpreted in light of the latter document currently in force.***"

CEDDIS has also requested the OAS Secretary General to order a revision, by appropriate legal bodies, of Article I.2(b) *in fine* of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, with a view to aligning it with Article 12 of the UN CRPD.

Just as with Article I.2(b) of the Inter-American Convention, there is an urgent need to bring outdated, discriminatory Council of Europe provisions, such as the Oviedo Convention articles 6 and 7 (together with the European Convention on Human Rights article 5.1e) in line with the global standards protecting the human rights and dignity of persons with disabilities.

41 out of 47 Member States of the Council of Europe have ratified and are legally bound by the UN CRPD. In addition, 5 Member States have signed the CRPD and are therefore obligated to refrain from acts that would defeat the object and purpose of the treaty. The UN CRPD as the newest and most specialized international instrument on the human rights of persons with disabilities should, based on *lex posterior* and *lex specialis* principles, supersede provisions of regional instruments in case of conflict. Moreover, states are obligated to follow the highest standard of human rights protection that is applicable to them. A state that has ratified both the Oviedo Convention and the CRPD must therefore prohibit mental health detention and involuntary treatment and cannot use the contrary standard of the Oviedo Convention as an excuse for its failure to do so.

ENUSP is deeply concerned about the fact that forced institutionalization and forced treatment of persons with psychosocial disabilities is currently authorized in the laws of all European countries to various degrees, and under certain binding Council of Europe instruments, such as the European Convention on Human Rights article 5.1.e, and the Oviedo Convention, which run counter to the

[5] Committee for the Elimination of All Forms of Discrimination Against Persons with Disabilities, *General Observation of the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities on the need to interpret Article I.2(b)* in fine *of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities in the context of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities*, OEA/Ser.L/XXIV.3.1, CEDDIS/doc.12(I-E/11) rev.1 (28 April 2011).

uropean Network of (Ex-) Users and Survivors of Psychiatry

Vesterbrogade 103, 1.sal
1620 København V, Denmark
Tel: +045 33261623 enusp.info@gmail.com / www.enusp.org

CRPD by authorizing mental health detention and non-consensual psychiatric treatment.[6] This discriminatory international and domestic legislation does not only authorize harmful practices against persons with psychosocial disabilities, but it also poses insurmountable barriers to effective access to justice for persons with psychosocial disabilities who have been harmed, ill-treated, tortured or even killed by forced psychiatric interventions, and the perpetrators are generally treated with impunity, since these violations can be considered as legal under these outdated standards.

Finally, ENUSP also points to the ethical principle of "doing no harm", which applies both from the care ethics perspective, as well as from the human rights perspective, and emphasizes moreover, that the Draft Additional Protocol does not correspond to the responsibilities of the Committee on Bioethics. The administration of severe mental or physical pain and suffering, by or in acquiescence of the State, with the goal of changing someone's opinion falls under the scope of torture and ill-treatment, which is absolutely prohibited, including in emergency or crisis situations. Perpetrators cannot hide behind "superior orders" [7], which means that the Draft Additional Protocol is not practicable, and not only puts persons with psychosocial disabilities at risk, but also care givers and States, including the authors of the Draft Additional Protocol themselves.

ENUSP emphasizes that there are a growing number of approaches to psychosocial disabilities and crisis situations in the field of mental health which practice supported decision making instead of substitute decision making, and reflect the paradigm shift as enshrined in the CRPD. Typically, these good practices are not focused on the medical model, but take a human rights-based approach and focus on personal wellbeing and recovery[8] of the person concerned.
Examples of such good practices are: The Personal Ombudsman in Sweden, Intentional Peer Support (IPS), WRAP (Wellness Recovery Action Plan), Family Group Conferencing, Open Dialogue, Soteria houses, peer-run respite-houses, community support and also some practices of progressive, community-based, professional, voluntary mental health support.
This shows that there are a range of possibilities which can be developed and explored further.

We encourage the Committee on Bioethics to withdraw the draft Protocol and initiate a process of aligning the Oviedo convention Articles 6 and 7 with the CRPD in cooperation with the Steering Committee for Human Rights (CDDH) and other relevant CoE bodies, and with consultation and involvement of disabled persons' organizations (DPOs).

On behalf of ENUSP Board

Olga Kalina

Chair

[6] EU FRA report: Involuntary placement and involuntary treatment of persons with mental health problems (2012)
[7] Convention Against Torture (CAT) article 2
[8] The recovery approach, which has flourished since the 1990s, focuses on the personal journey to achieving a satisfying, hopeful, and meaningful life even with limitations or barriers.

uropean Network of (Ex-) Users and Survivors of Psychiatry

Vesterbrogade 103, 1.sal
1620 København V, Denmark
Tel: +045 33261623 enusp.info@gmail.com / www.enusp.org