



**Declassified<sup>1</sup>**

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## **Committee on Social Affairs, Health and Sustainable Development**

# **Protecting the rights of persons with psychosocial disabilities with regard to involuntary measures in psychiatry**

Rapporteur: Ms Reina de Bruijn-Wezeman, Netherlands, ALDE

### **Revised introductory memorandum**

#### **1. Introduction**

1. The motion for a resolution which is at the origin of this report was tabled in June 2017, by Ms Stella Kyriakides (Cyprus, EPP/CD), former Committee Chairperson, and 21 other Assembly members.<sup>2</sup> However, the issue of involuntary measures in psychiatry has been on our Committee's agenda for more than four years. While most Committee members are familiar with the historical background of this motion, it is important to recall some key facts.

#### **2. The Council of Europe's work on a legally-binding instrument on involuntary measures in psychiatry**

2. In 2013, the Committee on Bioethics of the Council of Europe (DH-BIO) started drawing up an Additional Protocol to the Convention on Human Rights and Biomedicine (ETS No.164, "Oviedo Convention"), concerning the protection of human rights and dignity of persons with "mental disorder" (who would be better termed as "persons with psychosocial disabilities") with regard to involuntary placement and involuntary treatment.

3. Right from the onset, the Parliamentary Assembly was involved in this work through a motion tabled by the members of our Committee. The motion drew attention to the possible implications of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) for the Additional Protocol in the making.<sup>3</sup> As the work on the Additional Protocol progressed, the Rapporteur, Ms Guguli Magradze,<sup>4</sup> raised her doubts about the compatibility of the draft text with the new human rights-based framework established by the CRPD and the appropriateness of elaborating, at Council of Europe level, a legally-binding instrument which would give legal sanction to involuntary measures in psychiatry, despite the CRPD Committee's<sup>5</sup> clear opposition to such measures. She also expressed concern with regard to the drafting process, which was being conducted without direct involvement of disability-rights organisations, as required by the CRPD and recommended by the Assembly itself, in its Resolution 2039 (2015) on "Equality and inclusion for people with disabilities".

4. During a public consultation held from June to November 2015, the draft Additional Protocol received strong criticism from a number of high-profile human rights bodies, including the Council of Europe

<sup>1</sup> Revised introductory memorandum declassified by the Committee on Social Affairs, Health and Sustainable Development at its meeting on 11 October 2018 in Strasbourg.

<sup>2</sup> Doc. 14334.

<sup>3</sup> Doc. 13316, "Involuntary placement and treatment of people with psychosocial disability: need for a new paradigm".

<sup>4</sup> Ms Magradze is no longer member of the Assembly.

<sup>5</sup> The CRPD Committee is responsible for monitoring the implementation of the CRPD, which has been ratified by 177 States, including 46 Council of Europe member States and the European Union.

Commissioner for Human Rights, reinforcing the Rapporteur's doubts and concerns, in particular regarding compatibility with the CRPD. This culminated in the adoption on 22 April 2016, of Recommendation 2091 (2016) on "The case against a Council of Europe legal instrument on involuntary measures in psychiatry", in which the Assembly opposed the drafting of the Additional Protocol and recommended to the Committee of Ministers to invite DH-BIO to instead focus its work on promoting alternatives to involuntary measures in psychiatry. The Assembly also recommended that, should a decision to go ahead with the Additional Protocol nevertheless be taken, the Committee of Ministers encourage DH-BIO to directly involve the disability-rights organisations in the drafting process.<sup>6</sup>

### **3. Follow-up to Assembly Recommendation 2091 (2016)**

5. At its meeting held in June 2016, DH-BIO "after having discussed possible options on the way forward in the light of the submissions made during the public consultation and the Recommendation of the Parliamentary Assembly", agreed on the necessity of continuing the work undertaken on the Additional Protocol.<sup>7</sup> As for the Committee of Ministers, in its reply to the Assembly recommendation, dated 6 November 2016, it gave its green light to continue the work on the Additional Protocol. It also encouraged DH-BIO to directly involve disability-rights organisations to participate in the work still to be undertaken.<sup>8</sup>

6. Consequently, DH-BIO prepared a revised version of the Additional Protocol which was sent to its delegations for comments. On 25 April 2017, our Committee adopted a first set of comments on this draft. The motion at the origin of this report was tabled in this context, with a view to trying to minimise negative effects the Additional Protocol may have on the rights of persons with psychosocial disabilities and ensuring the adequate involvement of disability-rights organisations in the drafting process.

7. As the representative of the European Network of (Ex-) Users and Survivors of Psychiatry (ENUSP) pointed out at the DH-BIO meeting held in June 2017, it is "hard to believe that the drafting process for this protocol continues given the overwhelmingly negative response to the consultation from key actors in the field, including (...) the Council of Europe Commissioner for Human Rights,<sup>9</sup> the United Nations Special Rapporteur on the Rights of Persons with Disabilities, the Office of the United Nations High Commissioner for Human Rights (OHCHR), as well as the decision taken by the Parliamentary Assembly of the Council of Europe itself asking DH-BIO to withdraw the draft Additional Protocol." The fact remains that the Council of Europe is continuing to draw up a highly controversial legal instrument.

8. At its meeting held on 14-16 March 2018, the DH-BIO Bureau agreed that the draft Additional Protocol was mature enough to be sent for opinion to other Council of Europe bodies/committees, subject to the decision of DH-BIO. It also agreed that DH-BIO might consider whether to declassify the draft document so as to make it publicly available.

### **4. Aim and scope of the report**

9. As mentioned previously, the motion at the origin of this report was tabled so as to ensure continued involvement in the Additional Protocol's drafting process, with the primary objective of minimising the text's possible negative effects on the rights of persons with psychosocial disabilities. The motion also aimed at ensuring the adequate involvement of disability-rights organisations in the drafting process. Hence, it had both a content-related and procedural focus.

10. On 25 April 2018, I presented an introductory memorandum to the Committee where, in addition to the background information above, I clarified my approach to both questions of content and procedure. In view of DH-BIO's then possible upcoming decision to send the draft Additional Protocol to other Council of Europe bodies/committees (including the Assembly) I abstained – at that time – from formulating any comments on

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<sup>6</sup> For further details, see Ms Magradze's report, Doc. 14007.

<sup>7</sup> Extract from the abridged report of 9<sup>th</sup> DH-BIO, see DH-BIO website.

<sup>8</sup> Doc. 14199.

<sup>9</sup> During the public consultation, the former Commissioner Nils Muižnieks submitted very detailed comments which are highly critical. He subsequently and publicly reiterated this position on several other occasions, including during the plenary debate on the Assembly recommendation on 22 April 2016; in presenting his second quarterly activity report to the Committee of Ministers on 14 September 2016; in his speech on the occasion of the launching of the Council of Europe disability strategy held in Cyprus on 27 March 2016; and finally in his human rights comment "Respecting the human rights of persons with psychosocial and intellectual disabilities: an obligation not yet fully understood" published on 24 August 2017.

the substance. I also expressed my reservations as to the appropriateness of formulating such comments on a text which the Assembly is fundamentally opposed to. With regard to the involvement of disability-rights organisations in the drafting process, I expressed the view that it so far could qualify as neither adequate nor meaningful due to the limited representation of persons directly concerned by the Additional Protocol. Upon my request, the Committee agreed to make the introductory memorandum available to DH-BIO and the Council of Europe Commissioner for Human Rights.

11. On 14-15 May 2018, I attended the consultation meeting on Human Rights and Mental Health organised by the OHCHR, in Geneva (Switzerland). In addition to high-level panellists, the meeting was attended by Permanent Representatives to the United Nations Office at Geneva, and representatives of specialised NGOs including the International Disability Alliance, the World Network of Users and Survivors of Psychiatry, Mental Health Europe and Human Rights Watch. Many panellists criticised coercive measures in psychiatry as being dysfunctional and incompatible with the CRPD, stressing that the current approach to mental health and the resulting mental health laws normalising coercion were leading to exclusion, human rights abuses and over-medication. There was strong emphasis on the need to establish and strengthen community-based services and supported decision-making mechanisms, and examples were provided to illustrate the positive outcome of such alternatives to coercion. There was also strong emphasis on stigma and myths attached to mental health conditions, problems around depriving persons with psychosocial disabilities of their legal capacity, and the need to address the social determinants of mental health. Ultimately, it was everyone's conviction that political commitment was crucial in initiating and sustaining the much needed change in mental health policies.<sup>10</sup>

12. During the consultation meeting, several panellists raised concerns about the draft Additional Protocol, which they considered to be contrary to the CRPD and detrimental to the rights of persons with psychosocial disabilities. A number of NGOs also criticised the draft Additional Protocol and stated that there was no meaningful consultation of organisations of persons with disabilities in the drafting process. On the first day of the consultation, the European Disability Forum (together with its members ENUSP, Autism Europe, Inclusion Europe, Mental Health Europe, and with the International Disability Alliance) sent an open letter to the Secretary General of the Council of Europe and called for the withdrawal of the draft protocol.<sup>11</sup> ENUSP also started a campaign against the draft Additional Protocol encouraging its members "to address the national stakeholders and raise awareness about the danger the draft Additional Protocol poses for the rights of (ex) users and survivors of psychiatry".<sup>12</sup>

13. On 23-25 May 2018, I attended the DH-BIO meeting and made a statement where I recalled the Assembly's position on the draft Additional Protocol, stressing that this instrument had also been criticised by several UN bodies and the Council of Europe's Commissioner for Human Rights. Drawing on the conclusions of the consultation meeting in Geneva, I conveyed the message that the future protocol was unlikely to reduce recourse to involuntary measures and prevent human rights abuses. I thus called on DH-BIO to focus on reflecting how States can avoid coercion in psychiatry. I also spoke strongly in favour of both sending the finalised draft to the Assembly (and the Commissioner for Human Rights), as well as its declassification.

14. At the same meeting, DH-BIO decided to send the draft Additional Protocol for comments, to the following Council of Europe committees and bodies: the Steering Committee on Human Rights (CDDH); the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT); the Parliamentary Assembly; the Commissioner for Human Rights; and the Conference of INGOs.<sup>13</sup> It also decided to declassify the new draft. I very much welcome this decision.

15. At its meeting held in Lisbon on 17 September 2018, the Committee considered preliminary draft comments on the draft Additional Protocol, with a view to their finalisation and adoption during the October part-session. It also held an exchange of views with Mr Miguel Xavier, Professor of Psychiatry, Director of the

<sup>10</sup> [https://www.ohchr.org/Documents/Issues/MentalHealth/A\\_HRC\\_39\\_36\\_EN.pdf](https://www.ohchr.org/Documents/Issues/MentalHealth/A_HRC_39_36_EN.pdf)

<sup>11</sup> <http://www.edf-feph.org/newsroom/news/disability-organisations-urge-council-europe-withdraw-addition-protocol-oviedo>

<sup>12</sup> <http://enusp.org/2018/04/18/enusp-started-campaign-against-the-draft-additional-protocol-to-the-oviedo-convention/>

<sup>13</sup> Furthermore, the European Committee on Crime Problems (CDPC) will also be invited to send comments regarding the applicability to persons subjected to an involuntary measure, to address a mental health condition while serving a prison sentence or in detention, but without any link between the measure and a criminal offence (whether the offence at the origin of the prison sentence or detention or a different one). The DH-BIO agreed to put the same question also to the CPT.

Mental Health Programme in the Directorate General of Health of the Ministry of Health of Portugal.<sup>14</sup> On 20 September 2018, I was informed that the CRPD Committee adopted a statement calling States parties to the CRPD to oppose the draft Additional Protocol to the Oviedo Convention.<sup>15</sup>

16. Notwithstanding DH-BIO's upcoming decision on how to proceed next with the draft Additional Protocol, I would like to propose re-orienting this report's focus from the Additional Protocol itself towards an issue which I think is at the very heart of the controversy around this text: the lack of a human rights approach in the context of mental health.

17. The drafters of the Additional Protocol depart from the following assumption: in all countries that have ratified the CRPD, there are mental health laws regulating involuntary placement and treatment of persons with psychosocial disabilities.<sup>16</sup> Since the most serious human rights abuses occur in the context of these involuntary measures, by focusing on designing a legal framework with safeguards and controls, we can prevent such abuses from happening and "protect the dignity and identity of persons with mental disorder and guarantee, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to involuntary placement and involuntary treatment".<sup>17</sup> This assumption fails to acknowledge that these safeguards and controls "often do not work in practice".<sup>18</sup>

18. Therefore, the best way to protect the rights of persons with psychosocial disabilities with regard to involuntary measures in psychiatry is to avoid such measures in the first place by ensuring these persons' access to a range of support services,<sup>19</sup> so that they can live independently, be included in the community, exercise their autonomy, participate meaningfully in, and decide upon all matters affecting them, as well as by working towards the progressive elimination of involuntary measures which fail to respect their rights, will and preferences. The Council of Europe should reflect on how States can move towards this goal, instead of drawing up a legally-binding instrument which seriously risks perpetuating the *status quo* by taking as its starting point "what is" instead of "what should be".

19. This is a challenging process that will take time. It requires combating stereotypes and a change of mind set for our societies, where there is still a common misperception that psychiatric patients are inherently dangerous<sup>20</sup>. Discriminatory attitudes and stigmatisation have damaging and harmful consequences on persons with psychosocial disabilities. As underlined in the Council of Europe Disability Strategy 2017-2023 – "Human Rights: A Reality for All", awareness-raising, including through the education system, is a specific State obligation under the CRPD (Article 8). Persons with disabilities are still confronted with indifference, unacceptable attitudes and stereotypes based on existing prejudices, fear and distrust in their abilities. Therefore, action should be aimed at changing these negative attitudes and stereotypes through effective awareness raising policies, strategies and actions involving all relevant stakeholders, including the media.

20. The process requires above all a paradigm shift concerning mental health policies and practices. Despite recognising the need for such a paradigm shift,<sup>21</sup> many States still show strong resistance to the idea of a clear prohibition of forced treatment and confinement in psychiatry. Similarly, there are concerns expressed from within the medical communities. Even within the United Nations system, "not all human rights mechanisms have embraced the absolute ban on involuntary detention and treatment articulated by the CRPD Committee. However, their interpretation of exceptions to justify coercion is narrower, signalling on-going

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<sup>14</sup> Bulgaria, Portugal and "the former Yugoslav Republic of Macedonia" have publicly declared their opposition to the draft Additional Protocol.

<sup>15</sup> [https://www.ohchr.org/Documents/HRBodies/CRPD/Statements/StatementOviedo\\_CRPD20th.docx](https://www.ohchr.org/Documents/HRBodies/CRPD/Statements/StatementOviedo_CRPD20th.docx)

<sup>16</sup> In my own country, the Netherlands, we have just adopted two new laws which will change the existing legal framework regarding involuntary placement and involuntary treatment.

<sup>17</sup> Article 1 of the draft Additional Protocol as it currently stands.

<sup>18</sup> See the Council of Europe Commissioner for Human Rights comment "Respecting the human rights of persons with psychosocial and intellectual disabilities: an obligation not yet fully understood" published on 24 August 2017. The Commissioner had made the same observation in his comments submitted during the public consultation.

<sup>19</sup> The Commissioner for Human Rights has already reported some encouraging examples of these support mechanisms such as Finland's Open Dialogue approach to acute psychosis which involves the patient in all treatment decisions and appears to have a very high success rate.

<sup>20</sup> "The misperception that mentally ill people are inherently dangerous is one of the most treacherous ideas in circulation about us. It surfaces widely every time a mass shooter is on the loose, and results in the subjugation of people who are not menacing in any way", Andrew Solomon, The New York Times, 26 October 2016.

<sup>21</sup> See the United Nations Human Rights Council Resolution on Mental Health and Human Rights approved on 28 September 2017, A/HRC/36/L.25.

discussions on the matter (...) there is shared agreement about the unacceptably high prevalence of human rights violations within mental health settings and that change is necessary. Instead of using legal and ethical arguments to justify the *status quo*, concerned efforts are needed to abandon it. Failure to take immediate measures towards such a change is no longer acceptable.”<sup>22</sup>

21. At the Council of Europe level, this challenging exercise will also require addressing the potential conflicts that may arise from the interpretation of Article 2 of the European Convention on Human Rights (e.g. the State’s positive obligation to protect the life of a patient with suicidal tendencies) and the interpretation of the CRPD Committee (i.e. obligation to refrain from involuntary measures).

## 5. Working methods and planning

22. The hearing initially planned for the June 2018 part-session finally took place during the October 2018 part-session<sup>23</sup> with the participation of Ms Catalina Devandas Aguilar, the United Nations Special Rapporteur on the Rights of Persons with Disabilities; Ms Dunja Mijatović, the new Council of Europe Commissioner for Human Rights; Ms Beatrice Gabriela Ioan, Chairperson of DH-BIO; Mr Christos Giakoumopoulos, Director General of Human Rights and Rule of Law of the Council of Europe; and Ms Olga Runciman, psychologist and owner of Psycovey. It was organised as a joint public hearing with the Committee on Equality and Non-Discrimination which is seized for opinion on this report. The preliminary draft comments I presented in September (see paragraph 16) were revised following this joint hearing and the Committee adopted its final comments on the draft Additional Protocol on 11 October 2018, and transmitted them to DH-BIO. The Committee on Equality and Non-Discrimination adopted and transmitted its comments on the draft Additional Protocol on 10 October 2018.

Date	Action
<i>October 2018 part-session, Strasbourg</i>	Joint public hearing with the Committee on Equality and Non-Discrimination  Adoption of comments on the draft Additional Protocol
<i>19 March 2019, Paris</i>	Consideration of a preliminary draft report
<i>15 May 2019, Paris (to be confirmed)</i>	Consideration of a draft report and adoption of a draft resolution and/or recommendation

The formal deadline for the adoption of this report in Committee is 30 June 2019. It is proposed to be considered by the Assembly during the June 2019 part-session.

<sup>22</sup> Report of the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 28 March 2017, A/HRC/35/21.

<sup>23</sup> Both the Commissioner for Human Rights and the Chairperson of DH-BIO were unavailable in June.