

DENMARK

DISCLAIMER: The national thematic studies were commissioned as background material for comparative reports published in the context of the project on the Fundamental rights of persons with intellectual disabilities and persons with mental health problems by the European Union Agency for Fundamental Rights (FRA). The views expressed in the national thematic studies do not necessarily reflect the views or the official position of the FRA. These studies are made publicly available for information purposes only and do not constitute legal advice or legal opinion. They have not been edited.

Updated: November 2009

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1. Executive summary

Definitions

- [1]. The Danish legislation is not consistent in the use of the terms mental disorder and intellectual disability. The correct medical translation of the term mental disorder is *psykisk lidelse*. The term intellectual disability is translated to *nedsat psykisk funktionsevne* [*Reduced mental functional capacity*].

Anti-discrimination

- [2]. Anti-discrimination legislation and protection in Denmark does not consist of one single piece of legislation. It is rather a combination of many acts, which have been amended or introduced when new public issues, debates or ratifications of international obligations gave rise to an increased focus on a specific field of application or a specific vulnerable group.
- [3]. Anti-discrimination legislation does not distinguish between persons with a physical or mental disability. The Act on Prohibition of Differential Treatment in the Labour Market etc. prohibits direct and indirect discrimination based on race, colour of skin, religion or faith, political conviction, sexual orientation, age, handicap¹ and national, social or ethnic origin.²
- [4]. The use of the term ‘handicap’ indicates a narrow definition of the protected group and the Danish Courts operate with a narrow definition requiring “a physical, mental or intellectual disability which results in a need for compensation in order for that person to be able to function on an equal level with other citizens in a similar situation in life”. It seems, according to Danish jurisprudence, that persons with a reduced functional capacity, must establish before the courts, that the reduced functional capacity is significant in their concrete case. Otherwise they probably fall outside the definition of the Danish interpretation of the term ‘handicap’ and they are therefore in Danish legislation and according to the scarce jurisprudence in this field, excluded from the right to reasonable accommodation.³
- [5]. Contrary to age, disability is not a fixed term. Disability is not defined in the directive and it is therefore up to the member states to define the term according to national practice. In practice disability presupposes a physical, mental or intellectual reduced functional capacity, which gives rise to a need for compensation in order for the person to function on an equal level together with other citizens in a similar life situation.⁴ It however depends on a concrete and individual assessment of each case whether a mental disorder or intellectual disability is a disability under the scope of the Act on Prohibition of Differential Treatment in the Labour Market etc.

¹ This report uses the word “disability”.

² Consolidated Act no. 1349 of 16.12.2008 *om forbud mod forskelsbehandling på arbejdsmarkedet mv.* [on prohibition against differential treatment in the labour market].

³ Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC Country Report 2007, Denmark, Birgitte Kofod Olsen

⁴ Preparatory work to Act no. 1417 of 22.12.2004 *om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.* [amending act on prohibition against differential treatment in the labour market], Folketingstidende p. 2704

Specific fundamental rights

- [6]. Denmark is a party to the Convention on the Rights of Persons with Disabilities (CRPD). Denmark signed the CRPD 30 March 2007 and ratified it in the summer of 2009. The convention entered into force 23 August 2009. Indenrigs og Socialministeriet [The Ministry of the Interior and Social Affairs] is now in charge of the implementation of the directive.
- [7]. The Danish Government has for the time being chosen not to join the optional protocol that allows for citizens of the member states to file a complaint with the Committee on the Rights of Persons with Disabilities over violations of the convention.
- [8]. A person who suffers from insanity due to a mental disorder or condition which is comparable to this, when committing a criminal offence can not be punished, confer section 16 of the Danish Criminal Code.

Involuntary placement and involuntary treatment

- [9]. Other measures than punishment can however be applied according to section 68. Persons within the scope of section 68-70 can be detained for a specified period or indefinitely, cf. sections 68a and 69a. However, it is the responsibility of the public prosecution to ensure that measures according to section 68-70 are not upheld longer than necessary. According to section 5 of the Act on Coercion in Psychiatry a person can be committed to a mental hospital if he or she suffers from a mental disorder, the person presents a danger to him or herself or others or the chance for a successful treatment is considerably impaired if the person is not committed.
- [10]. The Danish legal framework does not organise involuntary placement without treatment. Involuntary placement shall always be executed with the purpose of treatment.
- [11]. The CPT *recommended* that the Danish authorities reviewed the legislation and practice of immobilising psychiatric patients as a matter of urgency and that the Danish authorities strived to reinforce staffing levels in the psychiatric establishments visited, in particular by increasing the number of nursing staff at the Maximum Security Department of Nykøbing Sjælland Psychiatric Hospital and the number of psychiatrists at the Psychiatric Department of Bispebjerg Hospital and that efforts should be made to improve the continuous training of doctors and nurses. In addition a targeted introduction courses to the psychiatric health system and patients' rights should be made obligatory for all patient advisers.
- [12]. The CAT Committee called for the State party should ensure respect for the principle of proportionality and establish strict limits on the use of solitary confinement. In addition, the State party was encouraged to increase the level of psychological meaningful social contact for detainees while in solitary confinement. Furthermore the Committee recommended that Denmark should limit the use of solitary confinement as a measure of last resort, for as short a time as possible under strict supervision and with a possibility of judicial review. Solitary confinement of persons under the age of 18 should be limited to very exceptional cases. The State party should aim at its eventual abolition.

Competence, capacity and guardianship

- [13]. *Værgemålsloven [Act on Guardianship]* makes provision for the management of affairs of persons with mental disorders or intellectual disabilities if they are unable to manage their own affairs and it is deemed necessary to provide such assistance, cf. section 5 of the Act on Guardianship. The terms competence and capacity are not specifically defined in Danish legislation. *Mental incapacity* in the

Act on Guardianship covers *sindssygdom [mental disorder]*, or *hæmmet psykisk udvikling [intellectual disability]* or other types of seriously weakened health, cf. section 5. *Sindssygdom* covers among other things dementia, Schizophrenia, paranoid psychosis, manic-depression. Neurosis and momentary mental derangement is not covered by the term. *Hæmmet psykisk udvikling* covers defects which affects the intellectual functioning. *Other types of seriously weakened health* cover various diseases. For instance it can include brain injuries, cerebral haemorrhage or cerebral atrophy.

Miscellaneous

- [14]. Recently issues have been raised that it can be administratively decided that prisoners assessed to be endangering other prisoners due to violent behaviour can be placed in prolonged solitary confinement with no access to judicial review.
- [15]. A report on the use of firearms by police officers concludes that in several cases where police officers use lethal force a person with a mental disorder is involved. The report concludes that Danish police officers could gain from additional training.

2. Definitions

- [16]. The Danish legislation is not consistent in the use of the terms mental disorder and intellectual disability. The correct medical translation of the term mental disorder is *psykisk lidelse*. The term intellectual disability is translated to *nedsat psykisk funktionsevne* [*Reduced mental functional capacity*].
- [17]. For instance consolidated Act no. 941 of 01.10.2009 *om social service (Serviceloven)* [*On Social Service (The Service Act)*] uses the term *Nedsat psykisk funktionsevne*, but this covers intellectual disabilities and to some extent also mental disorders, if the person suffers from a considerable and permanent reduced functional capacity which must be compensated. For instance schizophrenia, autism, various syndromes and mental retardation are covered by the term in the context of the Service Act. For instance in the decision C-33-07, Ankestyrelsen [The National Social Appeals Board], found that a woman who suffered from obsessive compulsive disorder was not covered by the Service Act since her illness was treatable and thus not permanent, and her functional capacity was not reduced. The service Act furthermore uses the term *sindslidelse* which covers mental disorders. In the decision C-17-03 the National Social Appeals Board found that an applicant who suffered from Cri Du Chat Syndrome was not covered by all the provisions in the Service Act on *sindslidelser* or *mental disorders*. The Board emphasized that the applicant suffered from a congenital, permanent and considerable reduced mental functional capacity which would not require the particular service of accompaniment and would therefore not be covered by the provisions of the Service Act relating to accompaniment.
- [18]. The Danish act no. 1015 of 20.08.2007, *Værgemålsloven* [*Act on Guardianship*] and act no. 95 of 07.02.2008, *Sundhedsloven* [*The Health Act*] use the terms *sindssygdom* and *hæmmet psykisk udvikling* [*inhibited mental development*] which most likely covers mental disorder and intellectual disability.
- [19]. The Danish consolidated act no. 1111 of 01.11.2006 on *anvendelse af tvang i psykiatrien* [*Act on coercion in Psychiatry*] uses the terms *sindssyg* and *tilstand, der ganske må ligestilles hermed* which translated would mean mental disorder or condition which is comparable to this.
- [20]. The Danish consolidated act no 1068 of 06.11.2008, *straffeloven* [*Penal code*] also uses the term *Sindssygdom eller tilstand, der må ligestilles hermed*, as well as the term *mental retardering* [*mental retardation*].
- [21]. The term *Sindssygdom* is historically defined as a psychic abnormal condition primarily characterized by a change of reality conception. It constitutes an interference with a persons' ability to experience and estimate the surroundings in accordance with reality and his or her previous conception of the surroundings. *Sindssygdom* includes for instance schizophrenia and paranoid psychoses.⁵
- [22]. The term *hæmmet psykisk udvikling* or can be described as a defect which affects the intellectual functioning of a person. The defect is often congenital or appears at an early stage.⁶ The term *nedsat psykisk funktionsevne* is covered by the same definition.
- [23]. There is no case law which contributes to the definition of the national terminology used.

⁵ Denmark/Justitsministeriet, *Betænkning 1068/1986 om tvang i psykiatrien, 1986*, cf. also Svend Danielsen, *Værgemålsloven – med kommentarer*, Jurist- og Økonomforbundets Forlag, 2006, pp. 92f

⁶ Svend Danielsen, *Værgemålsloven – med kommentarer*, Jurist- og Økonomforbundets Forlag, 2006, pp. 98f

3. Anti-discrimination

3.1. Incorporation of United Nations standards

- [24]. Denmark is a party to the Convention on the Rights of Persons with Disabilities (CRPD). Denmark signed the CRPD 30 March 2007 and ratified it in the summer of 2009. The convention entered into force 23 August 2009⁷ which means that 23 August 2011 is the final date for Denmark to hand in the report on measures taken to give effect to its obligation under CRPD and on the progress made in that regard c.f. article 35, subsection 1 of CRPD.
- [25]. The Danish Government has for the time being chosen not to join the optional protocol that allows for persons in the member states to file an individual complaint with the Committee on the Rights of Persons with Disabilities on violations of the convention.
- [26]. The ratification of CRPD was preceded by amendments that concerned three different laws: Act on Parliament Elections,⁸ Act on election of Danish Members to the European Parliament⁹ and Act on Municipality and Regional Elections.¹⁰ The amendments arose from article 29 in CRPD that establishes rules on participation in political and public life for persons with disability including that all persons with disability have the right to designate a person of their own choice to assist them in the voting process. It follows from the amendment act that in each of the three legislations a provision will be introduced from which follows that help with the secret ballot is done by two returning officers or polling officials but instead of either one returning officer or polling official the voter can demand to receive assistance by a person by his or hers own choice.¹¹ None other amendments to legislation have as of yet taken place. It is of course important to remember that CRPD only entered into force as of 23 August 2009.
- [27]. It follows from the comments to Parliament Decision B 194 of 28 May 2009 that the Ministry of Finance and the Ministry of the Interior and Social Affairs are to make an analysis of how the existing structures in the area can be developed in order to make an informed decision on how monitoring of the convention is to take place.
- [28]. However the Ministry of the Interior and Social Affairs has initiated an analysis of two of the key organisations within the area of disabilities - the Danish Disability Council and the Equal Opportunities Centre for Disabled Persons. The analysis that is to be finished at the end of 2009 is to focus on the two organisations' tasks and how they work according to their mandate from for instance administrative orders, regulations and Parliament Decision B 43 of 2 April 1993 on equality and equal treatment.¹² The purpose of the analysis is partly to take stock of the Council and the Centre's work and partly to assess the future tasks of the organisations inter alia of the monitoring task that follows from article 33 of CRPD.

⁷ Administrative Order no. 35 of 15.09.2009 of the UN-convention of 13.12.2006 on the Rights of Persons with disabilities.

⁸ Consolidated Act no. 145 of 24.02.2009 *om valg til Folketinget [On Parliament Elections]*

⁹ Consolidated Act no. 143 of 24.02.2009 *om valg af danske medlemmer til Europa-Parlamentet [on election of Danish Members to the European Parliament]*

¹⁰ Consolidated Act no. 144 of 24.02.2009 *om kommunale og regionale valg [on Municipality and Regional Elections]*

¹¹ Act no. 1347 of 19.12.2008 *om ændring af lov om valg til Folketinget, lov om valg af danske medlemmer til Europa-Parlamentet og lov om kommunale og regionale valg [amending Act on Parliamentary elections, Act on election of Danish Members to the European Parliament and act on Municipality and Regional Elections]*

¹² Parliament Decision B 43 of 2 April 1993 confirmed that Danish disability politics rest on a principle of equal treatment of citizens with a disability and other citizens.

- [29]. It follows from article 5, subsection 1 and 2 in CRPD that member states must recognize that all persons are equal before and under the law and are entitled without discrimination to the equal protection and equal benefit of the law and that all discrimination on the basis of disability must be prohibited. It is the Danish Government's understanding of this provision that it does not require implementation of a general legislation that prohibits discrimination on the basis of disability in all areas. The Government follows up this statement by expressing that it is a fundamental principle in Danish law that all persons are equal before the law and that persons with a disability enjoy the same rights and protection according to the legislation as other citizens.
- [30]. However, the Danish Institute for Human Rights is of the opinion that Denmark must implement a general prohibition against discrimination on the basis of disability. More on this in the subsequent sections.

3.2. The anti-discrimination national framework

- [31]. Anti-discrimination legislation and protection in Denmark does not consist of one single piece of legislation. It is rather a combination of many acts, which have been amended or introduced when new public issues, debates or ratifications of international obligations gave rise to an increased focus on a specific field of application or a specific vulnerable group. Hence, the protection against discrimination is a web of legislation ranging from protection in the constitution on the grounds of religion, to specific acts covering the areas outside and inside the labour market. The prohibition against anti-discrimination is covered by several Acts in civil and criminal legislation which makes it a challenge to easily explain and for the public to understand.
- [32]. The Danish Constitution section 71 provides that no Danish subject shall in any manner whatsoever be deprived of his liberty because of his political or religious convictions or because of his descent. According to the Danish Constitution section 70 no person shall be denied the right to full enjoyment of civil and political rights by reason of his creed or descent; nor shall he for such reasons evade any common civil duty. Furthermore, the Constitution section 68 provides that no one shall be liable to make personal contributions to any denomination other than the one to which he adheres. Finally the Constitution section 67 provides that the citizens shall be entitled to form congregations for the worship of God in a manner consistent with their convictions, provided that nothing at variance with good morals or public order shall be taught or done. Persons with mental disorders and persons with intellectual disability are covered by the mentioned provisions of the constitution, but their rights are not mentioned expressly at the constitutional level.
- [33]. It is important to stress that the anti-discrimination legislation does not distinguish between persons with a physical or mental disability. The Act on Prohibition of Differential Treatment in the Labour Market etc. prohibits direct and indirect discrimination based on race, colour of skin, religion or faith, political conviction, sexual orientation, age, handicap¹³ and national, social or ethnic origin.¹⁴ According to the preparatory works, which plays a central role in the interpretation of Danish legislation, a 'handicap' occurs where a person with a 'physical, psychological or intellectual impairment must be compensated in order for that person to function on an equal level with other citizens in a similar situation. It is not a necessary requirement for protection against differential treatment on the grounds of disability that there is a specific need for compensation."
- [34]. The use of the term 'handicap' indicates a narrow definition of the protected group and the Danish Courts operate with a narrow definition requiring "a physical, mental or intellectual disability which results in a need for compensation in order for that person to be able to function on an equal level with other citizens in a similar situation in life". It seems, according to Danish jurisprudence, that persons

¹³ This report uses the word "disability".

¹⁴ Consolidated Act no. 1349 of 16.12.2008 *om forbud mod forskelsbehandling på arbejdsmarkedet mv.[on prohibition against differential treatment in the labour market].*

with a reduced functional capacity, must establish before the courts, that the reduced functional capacity is significant in their concrete case. Otherwise they probably fall outside the definition of the Danish interpretation of the term 'handicap' and they are therefore in Danish legislation and according to the scarce jurisprudence in this field, excluded from the right to reasonable accommodation.¹⁵

- [35]. The Act prohibits discrimination in connection with recruitment, dismissal, transfer and promotion as well as discrimination with regard to pay and working conditions and also provides protection against harassment. Similarly, employers are not allowed to discriminate employees as regards access to vocational education and training, continued training and retraining. The same prohibition applies to people providing guidance and training as well as people involved in work placement activities and people who are involved in the formulation of rules and decision making concerning the right to perform activities in professional trades and membership of workers' and employers' organisations.
- [36]. A general protection against discrimination on the basis of disability outside the labour market is at the present not available. For instance a discotheque that does not allow persons with a disability to enter are not violating any prohibitions. Private companies and organisations are however mentioned in the Parliament Decision B 43 of 2 April 1993 on equality and equal treatment that confirmed that Danish disability politics rest on a principle of equal treatment of citizens with a disability and citizens with out a disability. Furthermore within the public administration an unwritten principle of equality before the law exists. It is however the opinion of the Danish Institute for Human Rights that there is a need for a general legislation which prohibits discrimination on the ground of disability in all area of society.¹⁶
- [37]. *Preferential treatment* [in Danish: *positiv særbehandling* or *positiv særforanstaltning*] There is no general provision for special or positive measures in the Danish Constitution or in Danish law in general.
- [38]. However, there exist an exemption in section 9 subsection 2 of the Danish Act on Prohibition against Differential Treatment in the Labour Market. This section states that the Act does not prevent measures being taken with a view to improving employment opportunities for persons of a specific race, skin colour, religion, political opinion, sexual orientation or national, social or ethnic origin, age or disability by virtue of other legislation, provisions by virtue of rules with a different legal basis or other public measures.
- [39]. This right to take special measures does not apply to private employers who want to improve employment opportunities for persons with, for instance a disability. The protection of the principle of prohibition against discrimination is considered by the authorities to be best ensured if it is only by means of legislation or other public measures that the possibility of improving employment opportunities for persons of a different ethnic origin is made possible. According to the Act, section 9, such special measures thus require legal authority and are primarily to be taken by the minister in the course of public projects.
- [40]. Hence section 9, in the Act on Prohibition against Differential Treatment in the Labour Market etc. is primarily directed at the public sector and projects improving the qualifications and integration of ethnic minorities. A private employer needs a specific legislative foundation to perform such a conduct.

¹⁵ Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC Country Report 2007, Denmark, Birgitte Kofod Olsen

¹⁶ The Danish Institute for Human Rights has expressed this opinion on several occasions. For instance in *report no. 5, Effektiv beskyttelse mod diskrimination – om retlige og faktiske tiltag, 2007* p. 72, in legal review of 06.04.2009 j.nr. 540.47/20540, in legal review of 18.10.2008 j.nr. 540.47/19233

- [41]. According to section 9, subsection 3, however, it is possible to allow private employers to take positive measures in relation to age and disability. This means that if two persons have the same qualifications, according to section 9 (3) of the Act on Prohibition against Differential Treatment in the Labour Market etc. it is possible for an employer to prefer the one with the disadvantage, so if two applicants are equally qualified, the private employer may choose the person with a disability instead of the non-disabled person.
- [42]. By Act on compensation to persons with disabilities in jobs,¹⁷ the integration of persons with disabilities in the job market has been advanced. This Act is about how compensation for impairments in the labour market is best given, and has been supplemented by a new governmental order¹⁸. It follows from section 2, subsection 1 in the order that when occupying a position a public employer is *obliged* to give a person who due to his or hers disability has difficulties in obtaining occupation in the regular labour market preferential position to the available position, if the person according to the assessment of the employer is equally qualified for the position as other applicants. The general aim of the act and the government order is to enhance the integration of persons with disabilities in the labour force by means of preferential treatment and various other compensatory measures.
- [43]. In connection with the implementation of the EU anti-discrimination directive (2000/78/EC) in Danish legislation two amendments of the Act on Prohibition of Differential Treatment in the Labour Market etc., were introduced in 2004.¹⁹ With the amendments that followed from Act no 253 the directive's horizontal provisions were implemented. Some of the amendments concerned insertion of definitions of direct and indirect discrimination as well as addition of prohibition against harassment and instruction to discriminate. Act no. 1417 implemented age and disability as grounds of discrimination.
- [44]. Contrary to age, disability is not a fixed term. Disability is not defined in the directive and it is therefore up to the member states to define the term according to national practice. In practice disability presupposes a physical, mental or intellectual reduced functional capacity, which gives rise to a need for compensation in order for the person to function on an equal level together with other citizens in a similar life situation.²⁰ It however depends on a concrete and individual assessment of each case whether a mental disorder or intellectual disability is a disability under the scope of the Act on Prohibition of Differential Treatment in the Labour Market etc.
- [45]. A case from the Western High Court from 23 September 2009²¹ concerned whether a person with an intellectual disability (psykisk udviklingshæmmet) fell under the scope of the Act on sickness benefit.²² The plaintiff had amongst other arguments pleaded that she, who works in a sheltered occupation, has a severe reduced physical or mental functional capacity, therefore cannot obtain or maintain occupation on normal terms in the labour market and cannot use offers after any other legislation. Furthermore depriving her of her right to sickness benefit actually means that she as a salary earner according to the rules on sheltered occupation will never be able to obtain the legal position that other salary earners have according to the sickness benefit act. She pleaded that this difference in legal positions was due to her disability and that such a treatment in relation to the sickness benefit act implied differential treatment in violation of the directive 2000/78/EC. The

¹⁷ Consolidated act no. 727 of 07.07.2009 *om kompensation til handicappede i erhverv m.v. [On compensation to disabled persons in occupation]*

¹⁸ Administrative order no. 730 of 08.07.2009 *om kompensation til personer med handicap i erhverv m.v. [On compensation to disabled persons in occupation]*

¹⁹ Act no. 253 of 07.04.2004 *om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v [amending act on prohibition against differential treatment in the labour market]* and Act no. 1417 of 22.12.2004 *om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.[amending act on prohibition against differential treatment in the labour market]*

²⁰ Preparatory work to Act no. 1417 of 22.12.2004 *om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v. [amending act on prohibition against differential treatment in the labour market]*, Folketingstidende p. 2704

²¹ Western High Court judgment of 23.09.2009, V.L. B-0792-08

²² Act no. 563 of 09.06.2006 *om sygedagpenge [Act on Sickness Benefit]*

Western High Court found that sheltered occupation is a social measure and therefore does not fall under the scope of the directive. As such the fact that the plaintiff cannot receive health benefit is not a violation of the directive.²³

- [46]. There is no general protection against discrimination of persons with a disability outside the labour market. However if the Draft Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation is adopted one can imagine that legislative steps must be taken in order to implement the directive correctly. It is likely that similar to cases inside the labour market then cases outside the labour market are depended on a concrete and individual assessment of whether a mental disorder or intellectual disability is a disability under the scope of an anti-discrimination legislation.
- [47]. *Reasonable accommodations*: Section 2(a) of the Act on Prohibition against Differential Treatment in the Labour Market etc. obliges the employer to adapt the workplace in order to accommodate the employment of people with handicaps, unless this will place a disproportionate burden on the employer. The duty of reasonable accommodation applies only when the handicapped applicant has the necessary qualifications to do the job if the accommodations are made. At the evaluation of whether the burden of the employer is disproportionate it is taken into consideration whether the public administration covers some or all of the expense. National law does not define what would be a disproportionate burden. In the end it will be for the courts to decide.
- [48]. It follows from the Act on Prohibition against Differential Treatment in the Labour Market etc. section 1, subsection 3 and section 2(a) that a lack of adaptation of reasonable accommodation would constitute indirect discrimination. It follows from the preparatory work to the act that it already follows from the rules regarding health and safety at work, that employers must arrange permanent places of work in consideration of persons with disabilities. The obligation to adapt imposes however a series of new commitments which do not follow from the Working Environment Act²⁴. It is clear from the comments to the Act on Prohibition against Differential Treatment in the Labour Market, that the definition of the individual employer's obligation to make the adjustment will depend on a concrete assessment in each case of the need for adaptation and of the burden that lies on the employer after the public has paid its compensatory measures. The fact that it can be required that the employer reschedules tasks and work patterns, shows that there will be accommodation obligations that cannot be compensated by the public.
- [49]. Also as regards the obligation to adapt to a reasonable extent, leaving the Member States wide margin of appreciation to implement the Employment Directive. Neither the preparatory work to the Act on Prohibition against Differential Treatment in the Labour Market etc or the Employment Directive provides further guidance as to when the employer is obligated to make reasonable accommodations and when it will be considered to constitute a disproportionate burden on the employer. It is the opinion of the Danish Institute for Human Rights that the relatively high level of compensatory measures from the public administration will lead to that high demands regarding reasonable accommodations can be made to an employer.²⁵
- [50]. A case from the Eastern High Court involved a visually impaired architect A, who was employed at the Heritage Agency of Denmark [Kulturarvsstyrelsen]. Due to his impairment A was unable to carry out inspections on his own. In 2005 A was dismissed due to budget reductions and A claimed that the dismissal was in violation of the Act on Prohibition against Differential Treatment in the Labour Market. The Eastern High Court found that in the light of the budget reductions it was permissible for The Heritage Agency to prioritize employees who were able to perform assignments on their own. Judging employees based on their flexibility was therefore an objective criteria pursuing a legitimate aim. The issue of reasonable accommodation was considered by the courts. Negative treatment of an

²³ The plaintiff won the case in the city court –City Court of Horsens Judgment of 28.04.2008, BS 55-99-1090/2006. The plaintiff has now applied for leave to appeal to a third instance.

²⁴ Consolidated act no. 268 of 18.03.2005 om arbejdsmiljø [on Working Environment]

²⁵ Danish Institute for Human Rights, *Personer med funktionsnedsættelse i Danmark, report no. 3, 2005*

employee because he needs proportionate measures of reasonable accommodation is in violation of the Act on Prohibition against Differential Treatment in the Labour Market etc. The City Court and a majority of the Eastern High Court of Denmark found that A would need assistance from an architect in order to carry out inspections and that this would impose a disproportionate burden on the employer. A dissenting judge in the Eastern High Court found providing A with reasonable accommodations was not proven to be a disproportionate burden. The Eastern High Court found no violation of the Act on Prohibition against Differential Treatment in the Labour Market.²⁶

- [51]. The Danish Institute for Human Rights is the specialised equality body on race and ethnic origin according to article 13 in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. This is part of the mandate of the Danish Institute for Human Rights. There is however no specific mandate in relation to other discrimination grounds.

²⁶ Eastern High Court of Denmark, Judgment of 05.03.2008, A vs. The Heritage Agency of Denmark, Weekly Law Journal (U.2008.1450Ø)

4. Specific Fundamental Rights

[52]. The European Convention on Human Rights has been implemented into Danish legislation and is thus applicable before the Danish court for persons with mental disorders or intellectual disabilities as well as everyone else. Furthermore Den Danske Grundlov [*The Constitution*] contains provisions on some of the fundamental rights mentioned in the current section, confer below. The constitution however contains no provisions directly specified at persons with mental disorder or intellectual disabilities.

[53]. **The Right to life**

[54]. The right to life is not specifically protected in the Danish constitution, but can be said to some extent to be protected through section 237 of the Danish Criminal Code, which prohibits manslaughter. Persons with mental disorder or intellectual disabilities are protected on the same legislative level as other citizens.

[55]. Occasionally incidents occur which give rise to public debate on how the Danish police handle confrontations with persons with mental disorders.

[56]. In the “7-Eleven Case” two police officers shot and killed a man with a mental disorder who was acting aggressively in a convenience store while being armed with a knife and a club. The police officers tried to arrest the man but ended fatally wounding him in what the court found to be self defence. The police officers were charged with violence leading to death and for causing imminent danger for the life and health of others but were acquitted at the City Court of Frederiksberg on 07.09.2007.²⁷

[57]. A report on the use of firearms by police officers concludes that in several cases where police officers use lethal force a person with a mental disorder is involved. The report concludes that Danish police officers could gain from additional training on how to interpret the reactions of persons with mental disorders in situations where these react violently and irrationally. Lack of training can endanger the lives of police officers and might lead to the accidental killing of suspects.²⁸

[58]. To the best of our knowledge no further case law is available.

[59]. **The right to freedom from torture or cruel, inhuman or degrading treatment or punishment**

[60]. The Danish Constitution contains no explicit prohibition against torture or degrading treatment or punishment. The Danish Criminal Code does not contain a provision against torture either but it is considered an aggravating circumstance if violations of the Penal Criminal amounts to torture, confer section 157a. The Danish legislation protects persons with mental disorder or intellectual disabilities to the same extend as other citizens.

[61]. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has in its latest report on Denmark expressed serious concern about the prolonged use of physical immobilisation of psychiatric patients in Denmark.²⁹ The committee experienced patients who had been physically immobilised for up to 6 days at a time and in one case, a patient had been restrained to a bed for 6 months.

²⁷ Denmark/ Justitsministeriet, *Betaenkning nr. 1507 om behandling af klager over politiet 2009*

²⁸ Denmark/Politiets Videnscenter, *Politiets anvendelse af skydevåben – En tværfaglig analyse af perioden fra 2002-2006, 2007*

²⁹ The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Government of Denmark on the visit to Denmark from 11 to 20 February 2008, 2008*

[62]. The committee experienced a new form of physical immobilisation, whereby the patient's arms were attached to a belt and the feet attached to each other by straps, thus permitting the patient to walk around while remaining physically restrained. The committee found this treatment degrading and was subsequently informed by the Danish authorities that the form of physical immobilisation in question was not provided for in Danish legislation and was therefore illegal.

[63]. To the best of our knowledge no case law concerning the right to freedom from torture is available.

[64]. The right to freedom from exploitation

[65]. The Danish constitution contains no provisions on the right to freedom from exploitation.

[66]. The Danish Criminal Code contains provisions which specifically protect persons with mental disorders or intellectual disabilities from sexual exploitation. Section 218 of the Criminal Code penalizes exploitation of a person's mental disorder or intellectual disability to procure extra-marital sexual intercourse with that person. Section 219 penalizes taking advantage of employment at inter alia hospitals for treatment of mental disorders or persons with intellectual disabilities to have sexual intercourse with a resident of the same institution.

[67]. In the case U2004.2847Ø³⁰ a man was sentenced to prison for two years for having taken advantage of a woman's mental disorder in order to have sexual intercourse with her. He had furthermore raped another woman with mental disorder. The two women were awarded a compensation for 40.000 DKK and 60.000 DKK.

[68]. The right to liberty and security

[69]. Section 71 of the Danish Constitution protects the personal liberty. No Danish subject shall, in any manner whatsoever, be deprived of his liberty because of his political or religious convictions or because of his descent. Subsection 2 and 3 states, *inter alia*, that a person shall be deprived of his liberty only where this is warranted by law and a person who is taken into custody has the right to be brought before a judge within twenty-four hours.

[70]. A person who suffers from insanity due to a mental disorder or condition which is comparable to this, when committing a criminal offence can not be punished, confer section 16 of the Danish Criminal Code.

[71]. Other measures than punishment can however be applied according to section 68. For instance the court can decide that the person should be under supervision, take residence at a specific facility, accept psychiatric treatment or be placed at a mental hospital. According to section 70 of the Criminal Code it is also possible to place a person in preventive detention if the person is guilty of homicide, robbery, violence, rape or similar serious crimes. The person must also be considered a danger to the life or health of others and preventive detention should be deemed necessary to prevent this danger.

[72]. Persons within the scope of section 68-70 can be detained for a specified period or indefinitely, cf. sections 68a and 69a. It is however the responsibility of the public prosecution to ensure that measures according to section 68-70 are not upheld longer than necessary. In the Supreme Court case U2007.2224H³¹ a man was admitted to a mental hospital indefinitely for having committed aggravated assault and threatened an employee at a detention facility.

[73]. According to section 5 of the Act on Coercion in Psychiatry a person can be committed to a mental hospital if he or she suffers from a mental disorder, and it would be **undefensible** not to detain the person in question with a view to treatment because the person presents a danger to him or herself or others or the chance for a successful treatment is considerably impaired if the person is not

³⁰ Eastern High Court of Denmark, judgment of 10.08.2004

³¹ Supreme Court Judgment of 29.05.2007

committed. The consent of patients should however if possible be obtained before coercion is applied, confer section 3 and 4.

[74]. The right to fair trial

[75]. There are no legal guarantees specifically provided to persons with mental disorder or persons with intellectual disability – these persons are covered by the ordinary legislation. To the best of our knowledge there is no available case law.

[76]. The right to privacy, including the access to one's own confidential medical records

[77]. Section 72 of the Danish Constitution stipulates that the home is inviolable. The protection covers house searches, seizure and examination of letters and other documents and breach of the confidentiality of the post, telegraph and telephone. Interference with this protection requires a Court order unless particular exception is warranted by Statute.

[78]. Patients have the right to access to their own medical records. A hospital is upon request obligated to inform the patient of which information concerning the patient is registered, the purpose of the registration, the recipients of the information and accessible information on the source of the information registered, cf. section 37 of the Health Act. According to section 37, subsection 2 the right to access can however be restricted in consideration of the patient or the private interest of others.

[79]. Subsection 2 is inter alia applicable for patients with mental disorders if the prospect of recovery due to an ongoing treatment makes it necessary to deny a request for access to the medical records. Access to medical records can also be denied if relatives have supplied information without the knowledge of the patient and the grant of access could damage the relationship between the patient and the relatives.

[80]. To the best of our knowledge no case law is available.

[81]. The right to marry, to found a family and to respect of family life

[82]. Persons with mental disorders or intellectual disabilities have the right to marry and found a family. Persons who are under guardianship and are deprived of legal competence according to the Act on Guardianship are required to obtain the consent of the guardian, confer section 3 of the Marriage Act.³² To the best of our knowledge no case law is available.

[83]. The right to have children and maintain parental rights

[84]. Persons with mental disorders or intellectual disabilities have the right to have children and maintain parental rights. It is however possible to place a child in foster care without the consent of the parents or the child if there is an obvious risk that the health or growth of the child is seriously impaired due to an insufficient care or treatment of the child, cf. section 58 no. 1 of the Service Act. The fact that a parent suffers from a mental disorder or intellectual disability is in itself not enough to justify the removal of a child. Removal requires that the condition of the holder of the custody has a negative impact on the child's health or growth. Both the present and future condition of the child should be taken into account when deciding on the removal of a child. In the case U2004.1977V³³ the reason for upholding a forced removal was no longer present since the mother who suffered from a mental disorder had expressed her intention of leaving the caring of the child to the grandmother.

[85]. The right to property

³² Consolidated Act no. 38 of 15.01.2007 om ægteskabs indgåelse og opløsning (Ægteskabsloven)[on marriage and divorce (The Marriage Act)]

³³ Western High Court of Denmark, Judgment of 20.04.2004

- [86]. Section 73 of the Danish Constitution protects the right to property. According to section 73 a person can only be ordered to surrender his or her property if public interest requires so. Interference with the right to property must be in accordance with Danish legislation through expropriation and requires full compensation. Persons with mental disorders or intellectual disabilities have the same protection as other citizens. They can however have a guardian appointed and be deprived of their legal competence if they are deemed unable to administrative their financial relations, cf. section 6 of The Act on Guardianship. For instance a woman was deprived of legal competence in the Eastern High Court case U2007.2742/1Ø.³⁴
- [87]. **The right to vote**
- [88]. Section 29 of the Danish constitution regulates the right to vote. Danish citizens who are 18 years or above and who have a permanent address in Denmark have the right to vote at Folketingsvalg [*Parliament elections*].³⁵ Persons with mental disorders or intellectual disabilities who have been deprived of their legal competence according to section 6 of the Act on Guardianship do not have the right to vote at parliament elections, confer section 1 of the Act on Parliament Elections.
- [89]. Persons with mental disorders or intellectual disabilities who are allowed to vote can receive assistance when doing so. Act on Parliament Elections, Act on election of Danish Members to the European Parliament and Act on Municipality and Regional Elections were recently amended so that all persons with disability have the right to designate a person of their own choice to assist them when voting.³⁶ It follows from the amendment act that in each of the three legislations a provision will be introduced from which follows that help with the secret ballot is done by two returning officers or polling officials. The voter can also choose to receive assistance by a person by his or hers own choice together with one returning officer or polling official.
- [90]. To the best of our knowledge no case law is available.

³⁴ Østre Landsret [Eastern High Court] decision of 02.07.2007

³⁵ Confer also section 1 of Act no. 145 of 24.02.2009 on Valg til Folketinget (Folketingsvalgloven) [Act on Parliament Elections]

³⁶ Consolidated Act no. 144 of 24.02.2009 om kommunale og regionale valg [on Municipality and Regional Elections], Consolidated Act no. 145 of 24.02.2009 om valg til Folketinget [On Parliament Elections] and Consolidated Act no. 143 of 24.02.2009 om valg af danske medlemmer til Europa-Parlamentet [on election of Danish Members to the European Parliament]

5. Involuntary placement and Involuntary Treatment

- [91]. **Report to the Government of Denmark on the visit to Denmark carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)**³⁷
- [92]. The focus of the visit of CPT was on the use of immobilisation,. As matter of considerable concern the CPT remained seriously concerned about the prolonged use of physical immobilisation of psychiatric patients (fiksering). Patients were found to have been immobilised by attaching them to their bed (or to a bed in a specially equipped room, designed to minimise stimuli) by means of an abdominal belt and at times additionally with straps to the ankles and wrists. An immobilised patient remained attached in this manner throughout the day and night, including during meal times. Patients could be released to use the lavatory or be required to urinate into a bed pan while remaining attached. When released to go to the lavatory or taken to a shower room, some patients continue to wear an abdominal belt.
- [93]. The CPT found examples of certain patients had been physically immobilised for up to 6 days at a time. The CPT found extreme cases of patients having been restrained to the bed for one, four and six months because of violent behaviour.
- [94]. Pursuant to the Law on the Deprivation of Liberty and coercion in psychiatry, physical immobilisation can only take place in so far as it is necessary to prevent a patient from placing himself or others at risk, harassing or seriously verbally abusing other patients, or causing significant material damage. In the CPT's opinion, this formulation opens the door to abuse. In particular, the law does not stipulate that the application of physical immobilisation should stop as soon as the danger of causing harm has ceased to exist and does not set limits on the duration of the measure. Further, no provision is made for another independent assessment of the need to keep a patient immobilised beyond the one envisaged at the expiry of the first 48 hours. The CPT was also very concerned by the provision according to which only immobilisation lasting for more than 24 hours is reported in a special protocol (as opposed to all cases of immobilisation).
- [95]. CPT stated that as a general rule, a patient should only be restrained as a measure of last resort: an extreme action applied in order to prevent imminent injury or to reduce acute agitation and/or violence. In the view of CPT the use of immobilisation should not replace proper psychiatric treatment and care. Furthermore, it should not be a substitute for proper staff resources.
- [96]. The CPT *recommended* that the Danish authorities reviewed the legislation and practice of immobilising psychiatric patients as a matter of urgency and that the Danish authorities strived to reinforce staffing levels in the psychiatric establishments visited. Hospital and that efforts should be made to improve the continuous training of doctors and nurses. In addition a targeted introduction courses to the psychiatric health system and patients' rights should be made obligatory for all patient advisers.
- [97]. **Response of the Danish Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Denmark from 11 to 20 February 2008**³⁸

³⁷ CPT/Inf (2008) 26

³⁸ CPT/Inf (2009) 12

- [98]. The Danish Government informed CPT, that the public health medical officers of the National Board of Health have access to the data concerning coercion, including immobilisation, in every region. According to internal guidelines in the Board these data are controlled at least every three months to see if any patient in the region has been subjected to one of the following: 1) Immobilisation (uninterrupted) for more than 14 days, 2) immobilisation (cumulated) for more than 30 days, 3) straps (uninterrupted) for more than 5 days, or 4) straps (cumulated) for more than 10 days.
- [99]. The Government also informed CPT that the decision to use shielding has to be made by the physician after attending the patient. In addition the Government informed CPT that it follows by Section 31 and Section 32 of the Psychiatric Act that the physician after the 24 hours of shielding as a coercive measure must inform the patient about the basis for and purpose of the coercive measure and the possibility for filing a complaint to the Psychiatric Patients' Board of Complaints. Also a patient adviser will be assigned to the patient. Furthermore the patient can have the decision made by the Psychiatric Patients' Board of Complaints tried in a court of law.
- [100]. The Ministry of Health and Prevention did not find basis for establishing an absolute legal limit to the duration of immobilisation in connection with the amendment of the Psychiatric Act in 2006, as this might deprive psychiatric departments and staff of the means to undertake necessary measures for the protection of the patient concerned and other patients, should the patient's condition be unaltered at the expiry of the time limit. The ministry informed the CPT, that the nursing staff can at any time discontinue a physical immobilisation when restraint is no longer deemed necessary.
- [101]. In order to ensure high quality in the use of coercive measures and limit the duration of the immobilisations, the Ministry of Health and Prevention instead proposed that clear and uniform rules be laid down stipulating a minimum frequency of medical supervision and simultaneous assessment of whether the immobilisation should cease or continue.
- [102]. These rules were adopted, with the result that medical assessment of the immobilisation must now take place at least four times daily at evenly spaced intervals. The aim for the systematically increased medical supervision is to focus the awareness of doctors on whether the immobilisation should be maintained, and on the possibility of alternative treatment. The overall goal is to ensure that any compulsory immobilisation, in common with other forms of coercive measures, sanctioned by law, continues no longer than absolutely necessary.
- [103]. The decision to maintain immobilisation must moreover be subject to a special review if it is extended beyond 48 hours. This review is to be undertaken by a doctor who is not employed in the psychiatric department in which the measure is being enforced, is not responsible for treating the patient, and is not a subordinate of the doctor treating the patient. This measure will secure impartiality in relation to the evaluation of the need to continue the immobilisation.
- [104]. **Conclusions and recommendations of the Committee against Torture³⁹**
- [105]. The Committee notes with concern reports suggesting that a number of persons had been killed by Danish law enforcement officials over the past two years.
- [106]. Despite the measures taken to improve the living conditions and activities in asylum centres, in particular the conditions for asylum-seeking families with children, the Committee expressed

³⁹ Committee Against Torture (CAT), *Conclusions and recommendations*, CAT/C/DNK/CO/5
16 July 2007 Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/431/54/PDF/G0743154.pdf?OpenElement> (27.11.2009)

concern that unduly long waiting periods in asylum centres and the negative psychological effects of long term waiting and of the uncertainty of daily life on asylum-seekers⁴⁰.

[107]. The Committee noted with appreciation that the upper limit for solitary confinement of persons under the age of 18 is reduced from eight weeks to four weeks. Despite the amendments of the Administration of Justice Act to limit the use of solitary confinement in general, and in particular with respect to persons under the age of 18, the Committee remains concerned at the placement of persons in prolonged solitary confinement during pre-trial detention. It notes with particular concern that persons, including persons under the age of 18, suspected of offences against the independence and security of the State (chapter 12 of the Criminal Code) or against the Constitution and the supreme authorities of the State (chapter 13 of the Criminal Code) may be held indefinitely in solitary confinement during their pre-trial detention.

[108]. The Committee called for the State party should ensure respect for the principle of proportionality and establish strict limits on the use of solitary confinement. In addition, the State party was encouraged to increase the level of psychological meaningful social contact for detainees while in solitary confinement. Furthermore the Committee recommended that Denmark should limit the use of solitary confinement as a measure of last resort, for as short a time as possible under strict supervision and with a possibility of judicial review. Solitary confinement of persons under the age of 18 should be limited to very exceptional cases. The State party should aim at its eventual abolition.

5.1. Legal Framework

[109]. The existing legal framework was adopted in 1989⁴¹ and has been amended several times since. The recent revision took place in 2006⁴² and this act is in force today. The scope of the act is deprivation of liberty and other compulsory acts in connection with hospitalization and placement on psychiatric wards, which may only be decided in compliance with the provisions of the act. The overall aim of the act is to secure the legal rights of persons with mental disorder and to promote hospitalization and placements on a voluntary basis, cf. section 3. In addition section 4 stipulates that involuntary placement and treatment should be the last resort as the patients fully participation and consent must be sought by using all possible measures at hand.

[110]. The main purpose of the recent compulsory revision⁴³ was to secure a strengthening of the rights of persons with mental disorders in connection with the involuntary placement, including the aim of – in some areas – to reduce the element of force. The content of the proposals shall be seen in the context of the principal of “the least forceful measure”, cf. section 4. The compulsory revision was a result of an examination carried out by an independent analysis institution, which inter alia focused on the standard of the hospitals, the complaint system, registration and report on force.

[111]. List of some of the proposals, which were inserted in the act in 2006⁴⁴:

[112]. 1) The definition of the notion “force” was amended in order to align it with the notion of “force” in the act of health.

⁴⁰ Article 5.d.i of The eighteenth and nineteenth periodic report of Denmark concerning the International Convention on the Elimination of All Forms of Racial Discrimination, June 2009 Available at:

<http://www.um.dk/NR/rdonlyres/88888A4F-86F4-41D0-B715-F5723B2DCB73/0/18og19CERDrapportfærdig.doc>

⁴¹ Act no. 331 of 24.05.1989 *om frihedsberøvelse og anden tvang i psykiatrien [on deprivation of liberty and other coercion in Psychiatry]*

⁴² Consolidated act no. 1111 of 01.11.2006 *om anvendelse af tvang i psykiatrien [on the coercion in psychiatry]*

⁴³ Bill amending act on deprivation of liberty and other coercion in psychiatry and the administration of justice act (2005/1 LSF 140, presented on 25.01.2006.

⁴⁴ Proposed bill *om frihedsberøvelse og anden tvang i psykiatrien [on deprivation of liberty and other coercion in psychiatry]*, proposed 26.10.1988 by the Minister of Justice, Erik Ninn-Hansen

- [113]. The definition of “force” in the existing act at the time of the proposals was not clear-cut, since a voluntary placement could be based on passive “consent” from the patient, hence the consent of the guardians was not necessary to achieve before carrying out the “voluntary placement”. In the act of health on the other hand a placement could only be considered as voluntary if it was based on an “informed consent” by the patient. Otherwise the placement would be considered as involuntary, except if the persons were under 15 years, or did not - either temporarily or permanently - possess the ability to give a consent. For this group, consent from the custody holders, the guardian or nearest family members could be achieved.
- [114]. On this background the definition of “force” was amended and a placement will only be considered voluntary if it is based on “informed consent”. The uncertainty in the question of whether or not consent has been given by the patient had thus been minimised.
- [115]. 2) The obligation of offering the patient aftercare following involuntary placement and treatment.
- [116]. This obligation was inserted in the act with the overall aim of reducing the number of involuntary placements. The inspiration/recommendation derives from a national project on the degree of quality in the process of involuntary placement, which was carried out in 2005. The project concluded that systematic use of aftercare consultations following involuntary placement and treatment could lead to a decrease in the number of forced measures. The aftercare consultation shall include a systematic review of the process and a discussion on the patient's own experience and thoughts about the measures. The consultation shall result in a clarification of the process in order to gain the patient's understanding of the considerations behind the decision as well as an increased satisfaction with the health system. As a minimum at least one consultation shall be offered to the patient, but the need for more than one consultation is foreseen.
- [117]. 3) The obligation to reconsider the decision of forced immobilization minimum four times a day and the obligation of giving the competence to a superior medical doctor from another ward to decide on whether or not a decision of a forced immobilization, which has exceeded 48 hours, is valid cf. section 16 in government order no. 1499 of 14 December 2006.⁴⁵ The specific rules concerning involuntary placement, forced immobilization etc. is laid down in this order.
- [118]. This proposal relates to the aim of reducing the duration of involuntary placements in accordance with the principle laid down in section 21 in the proposal to the act, which stipulates that a pending placement as well as other forced measures must only last as long as it is necessary. The legislation does not stipulate a maximum duration of the forced immobilization but there is an overall condition of reconsidering the legality of these decisions on a continuous level.
- [119]. The proposed obligation to reconsider the decision four times a day consisted of an increased medical supervision in order to ascertain whether the forced immobilization shall be upheld or whether there are other alternatives.
- [120]. The proposed obligation of medical supervision in cases involving forced immobilization of more than 48 hours had the aim to ensure an unbiased decision on the necessity of the forced immobilization.
- [121]. Deprivation of liberty consists of either forced hospitalisation or forced transfer from an open to a closed psychiatric ward in order to give treatment to the patient. However, involuntary treatment may only be given in cases where the patient has been involuntarily committed to or detained in the psychiatric ward. Involuntary treatment is based on a separate decision made by the head medical doctor.

⁴⁵ Administrative order no. 1499 of 14.12.2006 *om tvangsbehandling, fiksering, tvangsprotokoller m.v. på psykiatriske afdelinger [on compulsory treatment, forced immobilization, forced records etc. on psychiatry wards]*

- [122]. The Danish legal framework does not organise involuntary placement without treatment. Involuntary placement shall always be executed with the purpose of treatment, cf. section 5 in the act.
- [123]. It follows from section 5 in the act that deprivation of liberty may be used with the aim of treating the disorder and to protect the patient him/herself and other people from harm caused by the patient.
- [124]. Pursuant to article 4 (5) in the act a patient shall – after termination of any type of forced measure – be offered one or several consultations. The consultation shall comprise of the following questions:
- the patients experience of the forced measure and the way it was carried out
 - the patients view on the reason for and purpose of the forced measure
 - the patients assessment of whether or not forced measures could have been prevented and how the matter should have been tackled
 - proposals from the patient as to how forced measures in a future perspective can be avoided
 - information on how the staff assessed the matter and the purpose of the measure
 - the effect and side effects, if any, of the forced measure, e.g. forced medical treatment
- [125]. No special regulation for involuntary treatment of children exists. However, the act makes a distinction between persons, who are below the age of 15 years and those who are older. As far as children under the age of 15 years are concerned, the main rule is that they are not able to give an “informed consent”. Hence the consent must be given by the custody holder, legal guardian or nearest family members. However if the child constitutes a danger for him/herself or other persons or if the child is injuring property considerably the child can be subject to forced measures, and the obligation to achieve consent would not apply, cf. section 1 (3) of the act.
- [126]. In addition, if the child is in a position where immediate action is necessary in order to save the child’s life, to secure the patients chances for survival or to secure an optimal result of the treatment, the health staff is entitled to start or to continue a treatment without achieving consent of the custody holder. The same rule applies vis-à-vis persons without the capacity to give consent.
- [127]. Rules concerning consent are laid down in the Act of Health chapter 5.⁴⁶ A child above 15 years of age is as a starting point able to give consent. However the custody holder must be informed and be involved in the decision, cf. section 17 in the Act of Health. If a child between 15-18 years is considered incapable of giving consent the custody holder can give his/her consent.
- [128]. It follows from section 18 in the act that as far as persons who do not have the ability to give consent or persons in guardianship are concerned, the consent can be given by respectively the nearest family members or the legal guardian.
- [129]. If the patient does not have any close family members or legal guardians the health staff is entitled to execute a planned treatment, if an unbiased professional in the health staff, gives his/her consent.
- [130]. A person can be sentenced to preventive detention if he is found guilty of for instance homicide, deprivation of liberty, serious crime of violence or rape⁴⁷ and it according to the nature of the committed crime together with information of the offender’s person including prior committed crimes must be presumed that he presents an obvious danger for others’ life, body, health and freedom and that the use of preventive detention instead of prison is required in order to prevent this danger cf. section 70 in the Criminal Code. It follows from a government order⁴⁸ that the provisions in the Act

⁴⁶ Act no. 546 of 24.06.2005, *Sundhedsloven [the health act]*

⁴⁷ The list is not exhaustive.

⁴⁸ Government order no. 892 of 14.12.1998, om personer indlagt på psykiatrisk afdeling i henhold til strafferetlig afgørelse [*about persons who are hospitalized on a psychiatry ward according to a criminal judicial decision*]

on Coercion in Psychiatry⁴⁹ applies to persons who are hospitalized to a psychiatric ward according to a judicial decision under section 68 or 69 in the Penal Code or section 765, 777 or 809, subsection 2 in the Administration of Justice Act.⁵⁰ Section 5-11, 21, subsection 2 and the provisions in chapter 10 on access to file complaints and judicial review of decisions on forced hospitalization, forced detention etc.

- [131]. If a defendant is sentenced to placement in an institution or in preventive detention according to the provisions in the penal code section 68-70 the court can appoint him/her with a guardian preferable a person that is a close relative to the defendant who together with the assigned council for the defendant are to assist him/her during the proceedings. If the defendant is convicted then the guardian must keep him-/herself informed about the state and condition of the convicted and see to that the placement and other measures are not extended beyond what is necessary. The guardianship ends when the measure or measures are definitively terminated cf. section 71 in the Criminal Code.

5.2. Criteria and Definitions

- [132]. As a starting point force must not be used before all possible steps have been taken in order to obtain the patient's consent. When the circumstances allow it the patient must have adequate time to think it over, cf. section 4, subsection 1 of the Act on the Coercion. It follows from section 5 in the act that forced hospitalisation to a mental hospital or being retained by force must only take place if the patient has a mental disorder or is in a state that is similar to this and it would be **indefensible** not to detain the person in question with a view to treatment because because:
- [133]. 1) it would be unjustifiable not to deprive the person of his/hers liberty in preparation for treatment because the prospect of recovery or a significant and crucial improvement of the condition otherwise will be considerably reduced
- [134]. 2) or the person poses an immediate and essential danger to him-/herself or others.
- [135]. If a person who is presumed to have a mental disorder does not seek the necessary treatment him-/herself, then close relatives have a duty to contact a doctor. Should the relatives not comply with this it then falls on the police to contact a doctor, cf. section 6, subsection 1. On the basis of the doctor's examination and received information the doctor assesses whether hospitalization on a psychiatric ward is necessary. If the patient opposes to hospitalization the doctor decides whether forced hospitalization (forced commitment to a mental hospital) is required cf. section 6, subsection 2. Forced hospitalization is required when the conditions in section 5 are met. The doctor then makes out a medical certificate, cf. section 6, subsection 3.
- [136]. The police then decide on the effectuation of the forced hospitalization and provide assistance to it, cf. section 7, subsection 1. The medical certificate made by the doctor regarding forced hospitalization must not be made by a doctor who is employed at the psychiatric hospital or on the psychiatric ward where the forced hospitalization is to take place, cf. section 7, subsection 2. Furthermore if a patient is being committed because he/she poses an immediate and essential danger to him-/herself or others then the doctor's examination that is the basis of the medical certificate must have been carried out within the last 24 hours. If the patient is being committed because the prospect of recovery or a significant and crucial improvement of the condition otherwise will be considerably reduced then the examination that is the basis of the medical certificate must have been carried out within the last 7 days ahead of the commitment, cf. section 7, subsection 3.

⁴⁹ Consolidated act no. 1111 of 1.11.2006, *om anvendelse af tvang i psykiatrien [on the use of force in psychiatry]*

⁵⁰ Consolidated act no. 1069 of 6.11.2008 *Retsplejeloven [administration of justice act]*

- [137]. Forced treatment must only be used in connection to persons who fulfil the requirements for detention by force in section 5, cf. section 12. It is however an obligation that effort has been made in order to obtain the patient's consent before forced treatment is carried out cf. section 3 of the act. The decision on forced treatment is made by a head doctor and at the same time this doctor makes a decision to what extent force can be used to implement the treatment, cf. section 12, subsection 4. More specific rules regarding forced treatment is laid down in an administrative order.⁵¹
- [138]. It is a requirement in the Act on Coercion in Psychiatry that force is not to be used before all steps have been taken in order to obtain the patient's voluntary co-operation and when the conditions allow it the patient must have adequate time to think it over, cf. section 4, subsection 1. It follows from section 4, subsection 2 that coercion must be in reasonable proportion to what is sought to be obtained by this and if less invasive measures are sufficient these must be used.
- [139]. It follows from section 3, subsection 1 of the act, that hospitalization, stay, and treatment at a psychiatric ward should as far as it is possible take place with the patient's consent. Furthermore the doctor must guide the patient on the purpose of the hospitalization, the stay and the treatment as well as the prospect of an improvement of the state of the patient's health, cf. section 3, subsection 2. The head doctor who is responsible for that treatment plans are made and that the patients are guided on the substance of the plan must continually seek to obtain the patient's consent of the implementation of the treatment plan, cf. section 3, subsection 3.
- [140]. The patient has the right to ahead of and in connection with the hospitalization to state his/hers personal wishes with regard to the treatment's form and content. This also applies to treatment without consent. The final organization of the offer of treatment must necessarily take place according to the clinical assessment on hospitalization and in connection to the making of the treatment plan. The expressions of the patient must be entered into the medical record and must as far as possible be included as a guide for the head doctor's reflections on treatment, even in cases where treatment without consent are considered. The patient must be informed that a situation may arise where it may be necessary to deviate from what has been pre-expressed, when the conditions for implementation of coercive measures are met.⁵²
- [141]. Regarding risk level of danger to the health or safety of the patient and/or to the public Act on Coercion in Psychiatry states that different measures of force can be implemented if a person poses an immediate and essential danger to him-/herself or others.

5.3. Assessment, Decision Procedures and Duration

- [142]. It follows from section 6, subsection 2 the Act on Coercion in Psychiatry that it is a doctor that on the basis of his/hers examination and received information whether hospitalization on a psychiatric ward is necessary.
- [143]. It is a doctor who has the authority to decide whether a person should be forced hospitalized to a psychiatric ward. This doctor must however not be employed at the psychiatric hospital or on the psychiatric ward where the forced hospitalization is to take place, cf. section 7, subsection 2. Here a different doctor will see to the hospitalization. This rule is made in order to make sure that the doctor

⁵¹ Administrative order no. 1499 of 14.12.2006 *om tvangsbehandling, fiksering, tvangsprotokoller m.v. på psykiatriske afdelinger [on compulsory treatment, forced immobilization, forced records etc. on psychiatry wards]*

⁵² Guidance no. 12 of 14.12.2006 *om forhåndstilkendegivelser, behandlingsplaner, eftersamtaler, obligatorisk vurdering ved tvangsfiksering, beskyttelsesfiksering, udskrivningsaftaler, koordinationsplaner, husordener og klagemuligheder mv. for patienter indlagt på psykiatriske afdelinger [on pre-expressions, treatment plans, follow-up conversations, obligatory assessment at forced fixation, protection fixation, discharge agreements, co-ordination plans, domestic routines, complaints possibilities etc. for patients hospitalized in psychiatry wards]*

under whose orders the patient is being committed and the doctor who receives the patient at the psychiatric hospital or ward independent of each other assesses whether forced hospitalization is legal.⁵³

- [144]. It follows from section 11 the Act on Coercion in Psychiatry that when the conditions in section 5 are no longer present the detention must be put to an end. This must happen regardless of whether the patient has given rise to the decision by submitting a request to be discharged or not. As part of the review of the forced detention the head doctor must on the 3, 10, 20 and 30 day after the forced detention was implemented and henceforth at least every 4 week as long as the detention is upheld control whether the conditions for the detention are still met, cf. section 21, subsection 2.
- [145]. If a placement started out as a voluntary placement and then becomes involuntary it is the opinion of the experts that the procedures that govern an involuntary placement must be carried into effect. It is a new situation and must be treated as such.
- [146]. If a patient is being committed (forced hospitalized) because he/she poses an immediate and essential danger to him-/herself or others then the doctor's examination, that is the basis of the medical certificate, must have been carried out within the last 24 hours. If the patient is being committed because the prospect of recovery or a significant and crucial improvement of the condition otherwise will be considerably reduced then the examination that is the basis of the medical certificate must have been carried out within the last 7 days ahead of the commitment, cf. section 7, subsection 3. The purpose is to avoid that forced hospitalizations are carried out on the basis of medical examinations that are not up to date. If the given deadlines not kept a new examination must be made.
- [147]. If forced hospitalization is because the patient poses an immediate and essential danger to him-/herself or others then the hospitalization must happen immediately, cf. section 9, subsection 1 of the Act on the Coercion in Psychiatric. If the patient is being committed because the prospect of recovery or a significant and crucial improvement of the condition otherwise will be considerably reduced then the forced hospitalization must happen as soon as possible within the time limit of 7 days that is mentioned in section 7, subsection 3.
- [148]. Forced treatment must only be used in connection to persons who fulfil the requirements for being retained by force in section 10, subsection 1, cf. section 12 of Act on Coercion in Psychiatry.⁵⁴ As mentioned earlier it is however an obligation that effort has been made to obtain the patient's consent before forced treatment is carried out cf. section 3 of the act. Decisions on the coercion treatment are made by a head doctor cf. section 12, subsection 1, 1 period.
- [149]. It follows from the Act on Coercion in Psychiatry section 12, subsection 2, that when applying forced medication only tested medicine in usual dosages and with the fewest side-effects must be used.
- [150]. Regarding electrostimulation it follows from the the Act on Coercion in Psychiatry section 12, subsection 3, that forced treatment with electrostimulation must only be effectuated if the patient fulfils the conditions of being retained by forced and if the patient is in an immediate or potential life-threatening condition.
- [151]. Psychosurgeries interventions require written consent from the patient cf. section 22, subsection 1 of the Act on Coercion in Psychiatry. Besides these interventions must only take place after a preceding approval from a medical council appointed by the Danish National Board of Health cf. subsection 2.

⁵³ <http://www.netpsykiater.dk/HTMgdf/tvang.htm>

⁵⁴ Regarding compulsory treatment, forced immobilisation, forced records etc. on psychiatry wards an administrative order elaborate on the use of these means cf. Administrative order no. 1499 of 14.12.2006 *om tvangsbehandling, fiksering, tvangsprotokoller m.v. på psykiatriske afdelinger [on compulsory treatment, forced immobilization, forced records etc. on psychiatry wards]*

As means of enforcing physical restraint only belts, hand- and footstraps and gloves must be used cf. section 14, subsection 1 the Act on Coercion in Psychiatry. It follows from section 14, subsection 2 that physical restraint must only be used as long as it is necessary in order to prevent that a patient either:

- 1) exposes him/herself or others to obvious danger of suffering injury to body or health
- 2) badgers (stalks) or in an other similar way gross violates a fellow patient or
- 3) destroys property wantonly in a non significant way.

The decision to physical restraint a patient is made by a doctor after he or she has attended the patient cf. section 15, subsection 1 the Act on Coercion in Psychiatry. A decision on whether besides belt are to be used hand- or footstrap must be made by a head doctor cf. section 15, subsection 2.

A patient who is physically restraint with a belt must have a permanent guard cf. section 16. This guard is a caretaker, a nurse or other qualified personnel, who does not at the same time have other tasks than taking care of the belt restrained patient, whom he or she is guarding. This supervision must be exercised accordingly with the patient's own wishes and with respect for the patient's dignity and self-esteem as well as the right to private life when this is not incompatibility with the safety of the patient.

A person, who is committed to a psychiatric ward, can be detained and if necessary with force be taken to another place in the hospital if the conditions in section 14, subsection 2 are fulfilled cf. section 17, subsection 1. According to the same provision persons who are detained can be submitted to force that is necessary in order to ensure their on-going presence at the ward. If it is crucial for the improvement of a very agitated patient's condition the doctor can decide that the patient if necessary with force is to have a sedative cf. section 17, subsection 2.

Personal alarm- and electronic tracking devices and special door locks can be used towards patients who suffer from dementia or similar conditions in order to prevent that a patient by leaving a psychiatric ward exposes him/herself or others to a significant risk of personal injury cf. section 17a, subsection 1. It follows from subsection 2 that personal alarm- and electronic tracking devices and special door locks must only be used after a doctor has attended the patient and made further decision on the use of a specific mean. Decision on the use of special door locks must as soon as possible be approved by a head doctor and all patients on the ward must immediately hereafter be informed of the decision cf. subsection 3.

By physical restraint for protection is meant the use of every mean that is used to prevent that a patient unintentionally exposes him/herself to considerable danger cf. section 18, subsection 1. It follows from subsection 2 that physical restraint for protection must only be used after a doctor has attended the patient and made further decisions on the use of a specific mean.

Locking of patients' wards can be used on patients who are placed in the Secured Ward under Psykiatrisk Center, Sygehus Vestsjælland [Psychiatric Center, Hospital Western Sealand]. cf. section 18a, subsection 1. It follows from subsection 2 that the locking of patients' wards can be used for treatment purposes if the purpose is to

- 1) establish the necessary fixed settings for the treatment of the patient or
- 2) shield the patients against to much stimulus

It follows from subsection 3 that the locking of patients' wards can also be used if it is necessary to prevent that a person

- 1) exposes others to obvious danger of suffering injury on body or health

- 2) badgers (stalks) or in an other similar way gross violates fellow patients or
- 3) destroys property wantonly in a non significant way.

Decisions on locking of patients' wards must be made by a doctor cf. subsection 4.

It follows from section 18b, subsection 1 that locking of patients' wards can take place for security reasons towards patients who are placed in Psykiatrisk Center, Sygehus Vestsjælland [Psychiatric Center, Hospital Western Sealand].

- 1) during the night
- 2) during the weekly conference and
- 3) during the daily treatments conference

Decision on locking of patients' wards is made by a doctor cf. subsection 2.

Personal shielding and locking of doors in wards are other measures regulated by law. By personal shielding one or more personnel are constantly located in the immediate vicinity of the patient cf. section 18c, subsection 1. It follows from subsection 2 that personal shielding which the patient does not consent to must only be used if it is necessary to prevent that a patient:

- 1) commits suicide or in another way exposes his/hers or others health to considerable suffering or
- 2) badgers (stalks) or in an other similar way gross violates fellow patients or others

Decision on personal shielding is made by a doctor after he/she has attended the patient cf. subsection 3.

Section 18e is a rule that applies to psychiatric wards generally and not only to the Secured Ward under the Psychiatric Centre, Hospital Vestsjælland. It follows from this that the doctor can decide on locking of doors in the ward - but not to patients' wards – towards:

- 1) patients who are detained according to chapter 3 of the law and
- 2) patients who are at risk of unintentionally exposing themselves to danger.

On the issue of reviews and appeals concerning the lawfulness of involuntary placement and/or involuntary treatment it as a starting point follows from section 31, subsection 1 the Act on Coercion in Psychiatry that before detention is carried out and other force is being used the patient must have received both an oral and written regarding the contemplated coercion, its content, reason and purpose. When it comes to physical restraint, use of physical force and locking of patients' wards cf. section 14-17 and 18a notification can in specific urgent cases be omitted. However the reason must be given afterwards cf. section 31, subsection 2.

By every use of coercion the patient must be informed about his/hers right to file a complaint over the intervention cf. section 33, subsection 1. The complaint does not have delaying effect cf. subsection 2. However complaint over forced treatment will have delaying effect unless immediate implementation of the treatment is necessary in order not to expose the patient's life of health to considerable danger or to prevent that the patient exposes others to danger of suffering injury on body or health cf. subsection 3.⁵⁵

⁵⁵ Further rules on notification and how to file complaints in connection to coercion in psychiatry is found in an administrative order cf. Administrative Order no. 1497 of 14.11.2006 om underretning og klagevejledning i forbindelse med anvendelse af tvang i psykiatrien [on notification and instruction on how to file a complaint in connection to the use of force in psychiatry]

A patient counselor can according to section 24 in the Act on Coercion in Psychiatry be appointed to anyone who is submitted to forced hospitalization, retention by force, forced treatment, physical restraint or force, physical restraint for protection, the use of personal alarm and electronic tracking devices, special locking of doors, personal shielding lasting non stop for more than 24 hours, locking of doors in the department and locking of the patient ward at the security ward at Psykiatrisk Center, Sygehus Vestsjælland [Psychiatric Center, Hospital Western Sealand].⁵⁶

Each *Statsforvaltning [regional state administrations]* have psykiatriske patientklagenævn [psychiatric patient complaints boards] cf. section 34 the Act on Coercion in Psychiatry.⁵⁷ The hospital authority must on request from the patient or the patient adviser file complaints to a psychiatric complaint board over forced hospitalisation, being retained by force, *tilbageførelse [being moved back]*, forced treatment, physical restraint, the use of physical force, physical restraint for protection, personal alarm- and electronic tracking devices and special door locks, personal shielding that lasts without interruption for more than 24 hours, locking of doors in the ward as well as locking of patients' wards at Psykiatrisk Center, Sygehus Vestsjælland [Psychiatric Center, Hospital Western Sealand].

When requested by the patient or the patient counsellor the *psykiatriske patientklagenævn [psychiatric patient complaints boards]* must bring their decision regarding forced hospitalisation, being retained by force, *tilbageførelse [being moved back]*, forced treatment, physical restraint, the use of physical force, physical restraint for protection and locking of doors in wards before the court cf. section 37, subsection 1.⁵⁸ The court will appoint a lawyer for the patient.

Furthermore decisions made by the *psykiatriske patientklagenævn [psychiatric patient complaints boards]* can be tried by the *Sundhedsvæsenets Patientklagenævn [patients complaint board of the public Danish Healthcare Services]*⁵⁹ if the decision concerns forced treatment, submission to physical force, personal alarm and electronic tracking devices, special locking of doors, personal shielding lasting non stop for more than 24 hours and locking of the patient ward at the security ward at *Psychiatric Center, Hospital Western Sealand* cf. section 38, subsection 1. If one of these interventions in a concrete case and considering the circumstances constitute detention then the legality of this must on request from the patient be brought before the court.⁶⁰ In a case from

In 2007 the Parliamentary Ombudsman was appointed by the Danish Government to be the national preventive mechanism under the OPCAT⁶¹. The core area for the OPCAT inspections will amongst other places be the psychiatric hospitals.⁶²

⁵⁶ Further rules regarding patient counselling can be found in Administrative Order no. 1495 14.12.2006 om patientrådgivere [*on Patient Counselling*]

⁵⁷ The procedures for the psychiatry patient complaints boards can be found in Administrative Order no. 1496 14. 12 2006, om forretningsorden for de lokale psykiatriske patientklagenævn [*on procedures for local psychiatry patient complaints boards*]

⁵⁸ It follows from the preparatory work that by inserting this section in the act in 2006 a critique from the Council of Europe was met.

⁵⁹ The procedures for the *Sundhedsvæsenets Patientklagenævn [patients complaint board of the public Danish Healthcare Services]* is found in Administrative Order no. 885, 04.11.2003 om forretningsorden for Sundhedsvæsenets Patientklagenævn [*on procedures for patients complaint board of the public Danish Healthcare Service*]

⁶⁰ Preparatory work to section 37, subsection 1.

⁶¹ UN Optional Protocol of 18.12.2002 to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment)

⁶² The OPCAT Tasks: General Principles see http://www.ombudsmanden.dk/OPCAT_en/

6. Competence, Capacity and Guardianship

[152]. Update of the second disability high level group report on implementation of the Un Convention on the Rights of Persons with Disabilities, June 2009.

Denmark ratified the convention on 24.07.2009.⁶³ Denmark has not signed or ratified the optional protocol to the convention. Socialministeriet [The Ministry of Social Affairs] is now in charge of the implementation of the directive. A 6 step implementation plan is identified.

1. Translation of the convention into Danish;
2. Consulting Danish ministries and relevant organizations in order to clarify whether there is a need to change Danish legislation when implementing the convention.
3. The ministry evaluates statements from organizations etc. and decides whether new bills or proposals for parliamentary decisions should be adopted by Parliament.
4. Parliamentary treatment.
5. Ratification and notification of the convention.
6. Establishment of a national monitoring mechanism.

The ministry informs that step 6 has been initiated.⁶⁴

[153]. Legal framework

[154]. The Danish act no. 1015 of 20.08.2007, *Værgemålsloven [Act on Guardianship]* makes provision for the management of affairs of persons with mental disorders or intellectual disabilities if they are unable to manage their own affairs and it is deemed necessary to provide such assistance, cf. section 5 of the Act on Guardianship.

[155]. Definition of “Competence” and “Capacity”

[156]. The terms competence and capacity are not specifically defined in Danish legislation. However in section 5 in the Act on Guardianship capacity means “at være i stand til at varetage sine anliggender” [The ability to attend to your affairs] and in section 6 competence means ”at kunne forpligte sig ved retshandler eller råde over sin formue” [To be able to engage in legal obligations or to dispose of your financial resources]. Capacity covers the ability to solve private day to day obstacles, to be able to engage in legal transactions as well as the ability to make decisions of a personal nature as for instance whether to move to an institution or to attend to the relations with a public authority. When estimating a persons capacity it is relevant whether the person is able to carry out tasks and duties which are normally expected of a grown up and able person.⁶⁵

[157]. Mental health related causes determining the incapacity of adults in Danish legal framework

[158]. *Mental incapacity* in the Act on Guardianship covers *sindssygdom [mental disorder]*, or *hæmmet psykisk udvikling [intellectual disability]* or other types of seriously weakened health, cf. section 5. *Sindssygdom* covers among other things dementia, Schizophrenia, paranoid psychosis, manic-depression. Neurosis and momentary mental derangement is not covered by the term.

⁶³<http://www.unhchr.ch/tbs/doc.nsf/22b020de61f10ba0c1256a2a0027ba1e/2c70bf41b1437c51c12572c9003b5259?OpenDocument> (03.11.2009). See also Administrative order no. 35 of 15.09.2009 of *FN-konvention af 13. december 2006 om rettigheder for personer med handicap [UN Convention of 13.12.2006 on the Rights of persons with disabilities]*.

⁶⁴<http://www.ism.dk/Temaer/sociale-omraader/Handicap/handicappolitik/FNs-handicapkonvention/Sider/Start.aspx> (03.11.2009)

⁶⁵ Denmark/Justitsministeriet, *Betænkning 1247/1993 om værgemål, 1993*, p. 126; see also Svend Danielsen, *Værgemålsloven – med kommentarer*, Jurist- og Økonomforbundets Forlag, 2006, p 87

- [159]. *Hæmmet psykisk udvikling* covers defects which affects the intellectual functioning. The defect is often congenital or appears at an early stage. For instance Downs syndrome is covered by this term.
- [160]. *Other types of seriously weakened health* covers various diseases. For instance it can include brain injuries, cerebral haemorrhage or cerebral atrophy.
- [161]. **Degrees of incapacity in Danish a legal framework**
- [162]. Guardianships should be adjusted to meet the needs of the person in question, cf. section 8 of the Act on Guardianship. Various degrees of incapacity are therefore recognized in the Danish legal framework. Guardianships can be established for persons who lack the capacity to attend to their affairs due to mental disorders or intellectual disabilities, cf. section 5. The guardianship can be limited to concern financial affairs, specific assets, personal affairs or specific matters. Persons covered by section 5 can also be deprived of their legal competence, if they are deemed incapable of maintaining their property, income or financial interests, cf. section 6.
- [163]. *Samværgemål [Co-guardianships]* can also be established for persons who do not suffer from a complete lack of capacity but who are in need of assistance in order to administrate their property or other economic affairs, cf. section 7. In this case guardianship is voluntary and decisions are made through agreement between the guardian and the person who is under co-guardianship.
- [164]. **Systems of protection of adults lacking capacity**
- [165]. *Guardianships*
- [166]. The Danish system protecting adults lacking capacity is Guardianship, which can be divided into guardianship (sections 5 of the act on Guardianship), guardianship with deprivation of legal competence (section 6) and co-guardianship (section 7).
- [167]. The different types of Guardianships mainly consist of the appointment of a guardian who represents and acts in the interest of the person who is under guardianship, cf. section 24 of the Act on Guardianship. The guardian must ensure that the property of the person who is under guardianship is preserved and remunerative, cf. section 25. Income should be for the benefit of the person who is under guardianship.
- [168]. Guardianship according to section 5 can be established for persons who lack the capacity to attend to their affairs due to mental disorders or intellectual disabilities. The guardianship adjusted to meet the needs of the person in question. Persons under guardianship according to section 5 are not declared incapable of managing their own affairs, but the guardian acts on behalf of the person in question in matters concerning the guardianship, unless otherwise is specified.
- [169]. Persons under guardianship according to section 5 can according to section 6 also be deprived of their legal competence thus being declared incapable of managing their own affairs. The person under guardianship will not be able to engage in legal transactions or dispose of his or her property. Deprivation of legal competence cannot be limited to concern specific assets or matters.
- [170]. Co-guardianship is established at the request of the person under guardianship and means that this person will make decisions together with the guardian. The co-guardianship can be adjusted to fit the needs of the person under guardianship and thus concern specific assets or matters. Persons under co-guardianship are not declared incapable of managing their own affairs. Co-guardianships are aimed at persons who need help administering their property or financial affairs due to inexperience, weak health or similar conditions.
- [171]. None of the above mentioned guardianships can be more extensive than necessary. Guardianship with deprivation of legal competence according to section 6 can for instance not be established, if the

interests of the person in question can be maintained under section 5, confer section 8. If conditions of relevance to a guardianship changes, the guardianship should also be adjusted, confer section 9.

[172]. *Administration of money*

[173]. Cash, stocks, bonds, mortgage deeds and other security papers which are covered by a guardianship must be managed by a trust department in a financial institution, which is approved by the Minister of Justice, cf. section 35 of the act on Guardianship.

[174]. The guardian administers real and personal property, payment in kind, amounts under 75.000 DKK and other assets not administered by a financial institution, cf. section 35 and administrative order no. 927 of 05.09.2006 *om værgemål [on Guardianships]*.

[175]. Conditions to be met in order to establish a guardianship according to Danish law

[176]. Guardianship according to section 5 requires:

- 1. that the person in question suffers from mental disorder or intellectual disability,
- 2. is deemed incapable of managing his or her own affairs, and
- 3. There is identified a need to establish a guardianship.

[177]. Deprivation of legal competence according to section 6 requires:

- 1. That the person in question is covered by a guardianship concerning financial matters according to section 5,
- 2. that deprivation of legal competence is deemed necessary in order to prevent the person from jeopardizing or considerably reducing his or her property, income or financial interests, and
- 3. that guardianship under section 5 is insufficient in securing the interests of the person in question.

[178]. Co-guardianship according to section 7 requires:

- 1. that the person in question is inexperienced, has a weak health or similar condition,
- 2. that the person needs help to administer his or her property or maintaining financial matters, and
- 3. that the person in question requests a guardianship.

[179]. Time limits

[180]. As a point of departure there is no time limit for guardianships established according to section 5-7 of the Act on Guardianship. Guardianships must however be adjusted according to the development of the needs of the person under guardianship, cf. section 9. If the mental condition, of the person under guardianship, which necessitates the establishment of a guardianship is temporary or if other reasons renders it necessary, the guardianship can be time limited.

[181]. If the conditions for establishing a guardianship is no longer present, the guardianship must be revoked, cf. section 10 of the act on Guardianship.

[182]. The state administrative bodies or the Danish courts can establish temporary guardianships, cf. section 21.

[183]. Requesting the placing of an adult lacking capacity

[184]. The following persons can request a guardianship to be established, adjusted or revoked, cf. section 16 of the act on Guardianship:

- The person under guardianship,
- his or her spouse, children, parents, siblings or other close relatives,
- the guardian or special guardian, cf. sections 47-50,
- *Kommunalbestyrelser [municipal council]*
- *Regionsråd [Regional councils]*
- The Commissioner of the Police

[185]. National authorities having jurisdiction

[186]. Decisions concerning establishment, change, termination etc. of guardianships according to section 5-10 of the act on guardianship is made by the regional state administrations, cf. section 13. If the administrative treatment of a case is considered inappropriate the regional state administrations can however decide to forward the case to the Danish courts. This could for instance be cases where the person who is requested placed under guardianship objects to the request, cf. section 13, subsection 2. Decisions concerning the deprivation of legal competence is always treated by the courts, cf. subsection 3.

[187]. The regional state administrations and the trust departments in financial institution mentioned in section 35 monitor a guardians handling of the guardianship and follow up on the measures decided by the courts and regional state administrations, cf. section 28. *Civilstyrelsen [The Civil Affairs Agency]* monitors the trust departments, cf. section 57 of Administrative order no. 927 of 05.09.2006 *om værgemål [on Guardianship]*.

[188]. The regional state administrations appoint and dismiss guardians, cf. section 14. When the courts treats cases concerning guardianships the courts can however make decisions concerning the guardians as well.

[189]. As mentioned above section 16 also enables certain persons to request changes or termination of the guardianship.

[190]. Appeal procedure

[191]. Decisions made by the regional state administrations according to sections 5 or 7-10 of the Guardianship act can be appealed to the Danish courts within 4 weeks after the notification of the decision, cf. section 22 of the Guardianship act. The same persons or bodies as mentioned in section 16 of the guardianship act can appeal according to section 22, cf. section 22, subsection 2. Appeals do not have a delaying effect on the decisions of the regional state administration unless the courts decide otherwise, cf. subsection 3. Decisions concerning deprivation of legal competence are made by the city courts and can be appealed to the High Courts of Denmark. In some situations a High Court judgment can be tried by The Supreme Court as well.

[192]. Decisions concerning the appointment and dismissal of guardians, cf. Sections 11 and 12 of the Guardianship act as well as decisions concerning the monitoring of guardians cannot be appealed to the courts. These decisions can however be tried by The Civil Affairs Agency. This is not directly stated in the Guardianship act. The Civil Affairs Agency is however a superior administrative authority to the regional state administrations and has the ability to issue instructions which are binding to the administrations.⁶⁶ Decisions made by the trust departments in financial institution can be tried by The Civil Affairs Agency, cf. section 58 of the Administrative Order on Guardianships.

[193]. Periodical review of decisions of incapacity and need of a guardian.

⁶⁶ Svend Danielsen, *Værgemålsloven – med kommentarer*, Jurist- og Økonomforbundets Forlag, 2006, pp. 315 and 381-382; see also *government circular no. 9609 of 11.10.2004 om Civilstyrelsen [on The Civil Affairs Agency]*

- [194]. According to section 28 of the Guardianship Act the regional state administration shall monitor the guardians' handling of the guardianships. According to section 16, subsection 2 the regional state administrations have the power to change or terminate guardianships on their own initiative. As mentioned above the persons or bodies mentioned in section 16 of the Guardianship act can request the establishment, change or termination of the partnership.
- [195]. The regional state administrations will react if they become aware of guardianships that need to be reviewed. If the regional state administrations are requested to review a decision they will also do so. They do however not proactively review decisions of incapacity or the need of a guardian and there is no formal system ensuring a periodical review. It is primarily considered the responsibility of the guardians to ensure that the guardianships are adjusted to meet the needs of the person under guardianship. Whether a decision of incapacity or the need of a guardian is reviewed therefore often depends on the guardian.⁶⁷

7. Miscellaneous

- [196]. Recently issues have been raised that it can be administratively decided that prisoners assessed to be endangering other prisoners due to violent behaviour can be placed in prolonged solitary confinement with no access to judicial review.

⁶⁷ Svend Danielsen, *Værgemålsloven – med kommentarer*, Jurist- og Økonomforbundets Forlag, 2006, pp. 189; See also Denmark/Familiestyrelsen, *Skarrildhusberetningen 1997*, available at: <http://www.familiestyrelsen.dk/foraeldremyndighed/publikationer/skarrildhus-1997-beretning-fra-det-familieretlige-kursus/> (27.11.2009)

Annexes-Case Law

In different Sections of the Guidelines, experts have been asked to refer to case law. Please present the case law reference in the format below

Case title	C-33-07
Decision date	15.08.2007
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	C-33-07, Ankestyrelsen [The National Social Appeals Board]
Key facts of the case (max. 500 chars)	A woman suffered from obsessive compulsive disorder, which led her to carry out extensive cleaning rituals. Among other things she used the washing machine 3 times a day and dried her clothes in her apartment which gave of a lot of moisture. She applied to the municipality in order to receive financial assistance to buy a drying machine. The question in the case was whether she was covered by the term nedsat psykisk funktionsevne [Reduced mental functional capacity] in the Danish Service Act.
Main reasoning/argumentation (max. 500 chars)	The woman was not entitled to services according to the Service Act since Obsessive Compulsive Disorder is not a permanent. The Board found that for instance medical treatment or cognitive therapy was available. Furthermore the Board found that her functional capacity was not reduced since the obsessive actions affected her actions but didn't affect her remaining functional capacity.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	When determining if an illness is covered by the term nedsat psykisk funktionsevne [Reduced mental functional capacity] in the Service Act it is relevant whether the person is suffering from a reduced functional capacity and whether the condition is permanent or treatable.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	A woman who suffered from obsessive compulsive disorder was not covered by the term nedsat psykisk funktionsevne [Reduced mental functional capacity] and thus not entitled to financial assistance according to the service Act.
Proposal of key words for data base	Reduced mental functional capacity, Obsessive Compulse Disorder, OCD,

Case title	C-17-03
Decision date	05.03.2003
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	C-17-03, <i>Ankestyrelsen [The National Social Appeals Board]</i>
Key facts of the case (max. 500 chars)	A man suffering from cat's cry syndrome applied for financial support for a personal assistant. The applicant's request was denied since the target group for that specific sort of personal assistant he applied for was persons with <i>sindslidelser [Mental disorders]</i> . The municipality emphasized that the applicant was in need of a well structured and predictable environment which could not be achieved with a personal assistant who was only present 15 hours a week.
Main reasoning/argumentation (max. 500 chars)	The applicant did not suffer from a mental disorder. He suffered from cat's cry syndrome which was considered a congenital, permanent and considerable reduced mental functional capacity.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Cat's Cry syndrome was not a mental disorder but a reduced mental functional capacity.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The applicant was not entitled to a personal assistant for 15 hours a week since there was no socioeducational aim.
Proposal of key words for data base	Cat's cry syndrome, Mental disorder, reduced mental functional capacity, personal assistant
Case title	U2004.1977V
Decision date	20.04.2004
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	<i>Vestre Landsret [Western High Court of Denmark]</i> , Judgment U2004.1977V of 20.04.2004
Key facts of the case (max. 500 chars)	A paranoid schizophrenic mother who had been admitted to a mental hospital had her daughter removed and placed in a child care institution in 2001. The daughter visited her grandmother every weekend and during vacations. In the beginning of 2004 the daughter was placed in the same foster care as her younger brother with the result that the daughter only saw her grandmother when she visited her mother. The

	daughter hadn't felt well since the placement in foster care but the close contact with her grandmother had had a positive impact on her.
Main reasoning/argumentation (max. 500 chars)	The Court found that the daughters close contact with her grandmother had a positive impact on her. The termination of the close relationship with her grandmother had a very negative effect on the daughter. The fact that the mother had expressed an intention of leaving the caring of the daughter to the grandmother meant that the reasons in for upholding the removal of the daughter were no longer present, confer the Service Act section 42. The daughter was therefore sent home.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Forced removal of children requires that the condition of the holder of the custody has a negative impact on the child's health or growth. Both the present and future condition of the child should be taken into account when deciding on the removal of a child.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The daughter was returned to the custody of her mother and grandmother
Proposal of key words for data base	Forced removal, Service Act,

Case title	A vs. Revacenter Horsens, Horsens Municipality (not official title)
Decision date	23 September 2009
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	V.L.B-0792-08, Vestre Landsrets 7. afdeling V.L.B-0792-08, Western High Court, Department 7
Key facts of the case (max. 500 chars)	The case concerned whether a person with an intellectual disability (psykisk udviklingshæmmet) fell under the scope of the Act on Sickness Benefit as well as the Act on Employment Contract. The plaintiff received national supplementary disability pension and worked in a sheltered occupation. She argued that due to her severe reduced physical or mental functional capacity, she could not obtain or maintain occupation on normal terms in the labour market and could not use offers after any other legislation. She argued that depriving her of her right to sickness benefit meant that she as a salary

	<p>earner according to the rules on sheltered occupation would never be able to obtain the legal position that other salary earners have according to the sickness benefit act. She argued that this difference in legal positions was due to her disability and that such a treatment in relation to the sickness benefit act implied differential treatment in violation of the directive 2000/78/EC.</p>
<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Western High Court found that sheltered occupation was a social measure which aim was to improve the quality of life for the plaintiff. It did therefore not fall under the scope of the employment directive and as such the fact that the plaintiff could not receive health benefit was not a violation of the employment directive.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>Sheltered occupation is a social measure and it does not fall under the scope of the employment directive.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The judgment is in favour of Revacenter Horsens, Horsens Municipality and the consequence is that the plaintiff cannot receive sickness benefit. NB: the plaintiff won the case at the city court and has now applied for leave to appeal to a third instance.</p>
<p>Proposal of key words for data base</p>	<p>Intellectual disability, sheltered occupation, sickness benefit, employment directive 2000/78/EC, discrimination</p>

<p>Case title</p>	<p>A vs. The Heritage Agency of Denmark (not an official title) Weekly Law Journal (U.2008.1450Ø)</p>
<p>Decision date</p>	<p>5 March 2008</p>
<p>Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])</p>	<p>U.2008.1450Ø Østre Landsret, 6.afdeling, B-413-07 Eastern High Court, Department 6, B-413-07</p>
<p>Key facts of the case (max. 500 chars)</p>	<p>A visually impaired architect A was employed at The Heritage Agency of Denmark. Because of his impairment A was unable to carry out inspections on his own. In 2005 A was dismissed due to budget reductions and A claimed that the dismissal was in violation of the Act on Prohibition against Differential Treatment in the Labour Market.</p>
<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Eastern High Court found that in the light of the budget reductions it was permissible for The Heritage Agency to prioritize employees who were able to perform assignments on their own. Judging employees based on their flexibility was therefore an objective criteria pursuing a legitimate aim.</p>

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The issue of reasonable accommodation was considered by the courts. Negative treatment of an employee because he needs proportionate measures of reasonable accommodation is in violation of the Act on Prohibition against Differential Treatment in the Labour Market etc.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The City Court and a majority of the Eastern High Court of Denmark found that A would need assistance from an architect in order to carry out inspections and that this would impose a disproportionate burden on the employer. A dissenting judge in the Eastern High Court found providing A with reasonable accommodations was not proven to be a disproportionate burden. The Eastern High Court found no violation of the Act on Prohibition against Differential Treatment in the Labour Market.
Proposal of key words for data base	Visually impaired architect, disability, reasonable accommodation, discrimination

Case title	U2004.2847Ø
Decision date	10.08.2004
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Judgment of 10.08.2004 by <i>Østre Landsret [the Eastern High Court of Denmark]</i> , case no. U2004.2847
Key facts of the case (max. 500 chars)	A man was accused of having sexual intercourse with two women with mental disorders. One case concerned the criminal offence of taking advantage of a persons mental disorder to engage into sexual intercourse, cf. section 218 of the Danish Criminal Code. The other case was a charge for rape, cf. section 216.
Main reasoning/argumentation (max. 500 chars)	The man was by the Eastern High Court of Denmark found guilty of rape of a person with mental disorder. Furthermore he was found guilty of having taken advantage of another woman's mental disorder in order to engage in sexual intercourse with her.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The accused was sentenced to prison for 2 years. The two women were awarded a compensation of 40.000 DKK and 60.000 DKK.
Proposal of key words for data base	Rape, exploitation of person with mental disorder

Case title	U.2007.2224H
Decision date	29.05.2007
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Supreme Court judgment of 29.05.2007, case no. U2007.2224H
Key facts of the case (max. 500 chars)	A man was accused of aggravated assault and battery by beating a man lying on the floor with a club. He was also accused of threatening an employee at an institution where he was being detained as a substitute for imprisonment. The accused had among other things threatened to shoot the employee and his family.
Main reasoning/argumentation (max. 500 chars)	The accused was considered guilty of the crimes of which he was accused but since he suffered from insanity caused by a mental disorder he was not punished. The Supreme Court instead decided that he should be admitted to a mental hospital without an upper time limit for the detention.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Supreme Court emphasised the character of the crime, the crime record of the accused and medical opinions concerning his lacking motivation for treatment.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The accused was admitted to a mental hospital for an indeterminate period of time.
Proposal of key words for data base	Insanity caused by mental disorder.
Case title	U.2007.2742/1Ø
Decision date	02.07.2007
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	<i>Østre Landsret [Eastern High Court of Denmark]</i> decision of 02.07.2007
Key facts of the case (max. 500 chars)	A woman was according to a medical evaluation incapable of handling her own affairs due to dementia. She would therefore be an easy victim of manipulation. Her children mutually accused each other of taking advantage of her financially.
Main reasoning/argumentation (max. 500 chars)	

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The court decided to temporarily establish a guardianship and deprive the woman of legal competence, according to section 21 of the Guardianship act, while awaiting a final judgment.
Proposal of key words for data base	Deprivation of legal competence