

**Questionaire: The right to liberty and security of persons with disabilities in The Netherlands**

**1. Introduction**

The Special Rapporteur on the rights of persons with disabilities disseminated a questionnaire on the right of liberty and security of persons with disabilities. In this brief document the Netherlands Institute for Human Rights (NIHR) will answer some of the questions posed in the questionnaire. Unfortunately the NIHR is not able to answer all of the questions, because it does not possess the necessary data or detailed information.

**2. Information on legislation and policies to ensure and protect**

In The Netherlands two bills are pending before the Senate on the provision of involuntary health care, amongst others to persons with disabilities. Both laws have already been approved by the House of Representatives.

Firstly, there is the Law on Care and Compulsion psychogeriatric and intellectual disabilities (Wet zorg en dwang). Main issues in this bill are that it accepts the use of involuntary care when the behaviour of a patient leads to serious disadvantage to him or herself or to others; and that it entails clear treatment regulations for people that receive restrictive measures at home.

Secondly, there is the Law on Compulsory Mental Health Care (Wet verplichte ggz). The main issues in this bill are that compulsory interventions are clearly secured as last resort option, that it creates more rights and joint decision making for patients and his/her family, that it introduces the possibility of compulsory care at home and that after care constitutes a regular element of the treatment.

With regard to article 14 CRPD The Netherlands has made the interpretative statement that: ‘The Kingdom of the Netherlands recognizes that all persons with disabilities enjoy the right to liberty and security of person, and a right to respect for physical and mental integrity on an equal basis with others. Furthermore, the Kingdom of the Netherlands declares its understanding that the Convention allows for compulsory care or treatment of persons, including measures to treat mental illnesses, when circumstances render treatment of this kind necessary as a last resort, and the treatment is subject to legal safeguards.’

**3. The exercise of legal capacity**

In 2016 the NIHR commissioned two researchers of the Vrije Universiteit Amsterdam (VU)to conduct a three-month research. Aim of the research was to look into the compliance of the CRPD and the European Convention on Human Rights (ECHR) with the current and proposed legislation on representation of legally incapacitated persons in the Netherlands. Below is the summary of the research findings.[[1]](#footnote-1)

‘The main focus in the research was on article 12 of the Convention, which entails the right to equal recognition before the law, along with the General Comment on article 12 as formulated by the CRPD Committee. As for compliance between the ECHR and the Dutch current and proposed legislation the most relevant articles were the articles 6 and 8 of the ECHR together with the relevant jurisprudence of the European Court of Human Rights (ECtHR).

Studying the two international human rights frameworks resulted in a number of standards that were used to assess some of the existing and proposed regulations.

The existing and proposed regulations in Dutch Family Law and Health Law that were scrutinised, consisted of

* the three measures of adult guardianship ('curatele', 'beschermingsbewind' and 'mentorschap'*)* as specified in Book 1 of the Civil Code
* Continuing Powers of Attorney instruments (CPA, in Dutch ‘levenstestament’)
* a bill on patient’s rights and medical treatment (Wgbo)
* a bill on involuntary admission into psychiatric hospitals (Wet Bopz)
* and the bills WvGGZ and WZD, aimed at replacing the Bopz.

The emphasis in analysing these regulations was on provisions dealing with legal capacity, mental capacity and representation.

Now that the Netherlands has ratified the CRPD it needs to enhance supportive arrangements for persons with a handicap. Priority must be given to provisions that support them in making decisions for themselves and respect their autonomy to a maximum.

The Convention does impose a greater emphasis on systems of supported decision-making and provisions such as CPA’s. Adult guardianship measures that effect the legal capacity, can only be applied as a last resort. And when applied, the Convention urges those involved to maximise the possibility for the person concerned to decide for himself, which is especially relevant when the person concerned has the mental capacity to make the actual decision by himself.

Applying an adult guardianship measure under current Dutch legislation automatically results in loss or limitation of legal capacity. This mechanism is incompatible with the principles of the Convention, more specifically with the requirements that can be derived from article 12 of the Convention.

With regard to the measure of plenary adult guardianship, the *curatele*, the question arises whether this measure is still needed within the overall scheme of supportive and protective measures available in the Netherlands. Empirical research is required to answer this question and could also provide tools for adjusting the current measures of adult guardianship.

The researchers also conclude that more attention must be given to the regulation of CPA’s and in particular to provisions on supervision and a periodical review.

The Convention formulates the obligation to honour and protect a handicapped person’s autonomy as much as possible as well as to guarantee the respect of his rights, his will and his preferences.

In many of the provisions that were investigated, a representative is not authorized to act on behalf of the person concerned, until it has become evident that the person concerned is lacking the necessary mental capacity to act for himself. According to the Convention assessment of mental incapacity needs to be well regulated. Because of the same relevance regulations on supporting persons and representatives are required dealing with questions such as who can act as representative and who cannot, and what standard must be used. The investigated current and proposed regulations partially met the requirements and obligations that follow from article 12 of the Convention. Some striking differences between the investigated provisions emphasize the need for a more general provision that should apply in all care situations, where there may be a person with disabilities lacking the mental capacity to decide for himself and where a supporting person or a representative may be needed.

Except for some minor points the Dutch adult guardianship measures turn out to be in conformity with the human right standards that can be derived from the articles 6 and 8 ECHR as well as the jurisprudence of the ECtHR.

Violation of these standards could occur in situations where the court dealing with the request for ordering an adult guardianship measure, decides not to hear the person concerned. Vigilance is also required regarding the special position given to the partner and next of kin in the Code of Civil Procedure. They are positioned as stakeholders and as a result of that as a rule they are informed on submitted requests with regard to ordaining an adult guardianship measure. This provision could be in conflict with the provision of article 8 ECHR where the right to respect for privacy of the person concerned is guaranteed.’

The NIHR has convened a round-table on these findings with peer workers, family members, care and guardianship professionals and civil servants. The NIHR seeks to trigger a public debate on the question whether the current systems of representation needs to be adapted.

Utrecht, The Netherlands, May 30, 2017.

1. See <https://mensenrechten.nl/publicaties/detail/37181> for the research report in Dutch. [↑](#footnote-ref-1)