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ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES IN DENMARK

The Danish Institute for Human Rights has received your questionnaire regarding access to justice for persons with disabilities in Denmark. The Danish Institute for Human Rights has the following comments:

The Danish Act on Public Administration administers access to justice in regard to administrative decisions, while the Danish Administration of Justice Act administers access to justice in the judicial system. Both acts generally provide the same rights, obligations and use the same principles in regard to persons with disabilities and persons without disabilities. However, the Danish Administration of Justice Act contains some provisions that adapt the judicial proceedings to persons with disabilities. Furthermore, the Danish Guardianship Act and the Administration of Justice Act administers access to justice for persons under guardianship specifically. It is also noteworthy that the Danish Administration of Justice Act contains some general requirements that persons with disabilities are unable to meet if they are under guardianship in accordance with the Danish Guardianship Act. The different forms of guardianship in conjunction with the Danish Administration of Justice Act thus limit some persons with disabilities' access to justice.

The specific provisions that adapt the judicial proceedings to persons with disabilities, the provisions specifically regarding access to justice for persons under guardianship and the general requirements that exempt persons under guardianship's access to justice will be described in the following.

The answer to question no. 4 has been provided by the Danish Ministry of Justice and is attached to this letter. The Danish Institute for Human Rights has not within the deadline obtained any knowledge of training, education or legal aid programmes that include or concern the right of access to justice for persons with disabilities (question no. 2 b-d). Furthermore, it has not been possible to obtain an official translation of

all the provisions referred to in this letter. The provisions that have been obtained in an official translation are attached to this letter.

Representation in civil cases

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

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

A person placed under guardianship in accordance with the Danish Guardianship Act Section 6 will be represented by his or her guardian. The guardian is obliged to follow the rules in the Guardianship Act Section 26 (please view the Section on cases concerning guardianship below). Furthermore, the guardian is required to obtain consent from a person under guardianship in order to initiate judicial proceedings in the situations referred to in the Administration of Justice Act Section 257(2). For example, a guardian need the consent of the person placed under guardianship in order to initiate judicial proceedings concerning valid and legally binding agreements, which the person placed under guardianship have entered into.

Representation in criminal cases

Generally, in accordance with the Administration of Justice Act Section 729(a) and Section 730-735 a defendant can choose his or her own defense attorney. If the defendant does not choose a defense attorney an attorney will be appointed to the defendant under certain circumstances as described in Section 731-735. According to Section 732 the court appoints an attorney to a defendant if the defendant's person requires it, e.g. if the defendant is a child, has a mental disability or is a foreigner[1].

Witnesses

The Administration of Justice Act Section 168 sets out an obligation to give evidence as a witness in court unless the person concerned can be exempted or is excluded in accordance with Section 169-172(a) (please

[1] Act of 1978-06-08 no. 243.

view the attached provisions). However, it is presumed that persons incapable of giving reliable evidence cannot be required to witness[2].

In accordance with Section 149(5) (please view the attached provisions) a witness, a plaintiff or a defendant can be granted a sign interpreter if he or she is deaf or have a severe hearing impairment. Likewise, examination and proceedings involving a mute person will be conducted in writing and answers will, if requested, be delivered with the assistance of an interpreter. Deaf persons, persons with hearing impairment, deafened or mute persons also have access to assistance by a consultant with expertise in their disability during the court hearings.

Moreover, special provisions regarding questioning are applicable to persons with disabilities, cf. the Administration of Justice Act Section 183, 172(a) and 745(e)

Special provisions in terms of questioning can also apply to children under the age of 15 and persons with a disability in accordance with Section 183, 172(a), 731(a) and 745(e). For instance, the provisions provide the possibility to videotape the questioning outside the courtroom and use the videotape as an evidence, in which case the disabled person as a main rule is exempted from being questioned in court.

Jurors

In accordance with the Administration of Justice Act Section 69 it is, among others, a requirement in order to be elected as a juror that the person concerned does not have a mental or physical weakness. What kind of mental or physical weakness that lead to the exclusion of being a juror is not established neither in the Travaux Prépartoire nor in the administrative order. However, the High Court has found that a blind man could not act as a juror in a case concerning forgery[3].

The requirement, which exclude persons with a mental or physical weakness from becoming a juror, means that a person applying to be a juror has to be able to be a juror in all criminal cases with no exception.

A Working Group on the Election of Jurors recommended in a report that the election of a juror should not base itself on an individual evaluation of the juror's abilities. The working group based this recommendation on the principle of immediacy of evidence and the principle of orality. The Working Group also noted that the proceedings in a criminal trial can change and thereby exclude a juror with a disability who initially had been deemed eligible after an individual

[2] Gomard**,** *Civilprocessen*, 6. edition, 2007, p. 597 and U 1934 549.
[3] UfR 2004.1993 Ø.

evaluation. The Working Group found that the provision in place is not in violation with the UN Convention on the Rights of Persons with Disabilities.

Attorneys

In accordance with the Administration of Justice Act Section 119 a person is excluded from holding the Danish title "Advokat" (attorney) and thereby excluded to be authorised to practise law whether in Denmark, Greenland, The Faroe Islands or abroad if the person is placed under guardianship. Furthermore, Section 139 provides that an attorney can be forced off a case by the court if the attorney becomes ill.

Expert assessors

The Administration of Justice Act Section 93 provides that a person cannot function as an expert assessor while being under guardianship in accordance with the Guardianship Act Section 5, 6 and 7.

Cases concerning guardianship

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

Deprivation of financial responsibility and legal capacity is provided for in the Guardianship Act Section 6. A person is placed under such guardianship if the person is under full financial guardianship in accordance with Section 5, but still enter into legally binding agreements that are detrimental to the person. A person is therefore placed under such guardianship in order to prevent the person from exposing his or her assets, income or other economic interests of deteriorating substantially.

The less intrusive co-guardianship is provided for in Section 7. This guardianship requires that the person has requested the guardianship and need help to administer his or her assets or to handle other economic affairs due to inexperience, impaired health or similar problems. A person under such guardianship makes decisions along with his or her guardian. The guardian cannot make decisions without

the person under guardianship, and the person under guardianship keeps his or her legal capacity.

In accordance with the Guardianship Act Section 16 a request to establish, modify or terminate a guardianship can be made by the person under guardianship, this person's spouse, child, sibling or other family members, the guardian, the Municipality Council, the Regional Municipality Council, the Commissioner of the police district or the State Administration.

The State Administration decides whether a person should be placed under guardianship in accordance with Section 5 and 7, while the court decides whether a person should be placed under guardianship in accordance with Section 6. The State Administration's decision to place a person under guardianship in accordance with Section 5 or 7 and the State Administration's decision to modify or terminate a guardianship in accordance with Section 9 and 10 can be appealed to the court in accordance with the Guardianship Act Section 22 and the Administration of Justice Act chapter 43. The City Court's decisions to place a person under guardianship in accordance with Section 6 can be appealed to the High court in accordance with Section 13(3) and Section 466 of the Administration of Justice Act by the person who is placed under guardianship, the person who has requested a person to be placed under guardianship, the person who has appealed the State Administration's decision and the person under guardianship's guardian, spouse, child, parent, sibling or other family members.

According to the Guardianship Act Section 19 a person who is the subject of a case before the State Administration concerning guardianship in accordance with Section 5 and 7 can give written or oral evidence in the case, unless the person is unable to give meaningful evidence. When the court is to decide on whether a person should be placed under Section 6-guardianship the court must let the person give evidence unless the court assesses that it is not required.

The guardian must in accordance with the Guardianship Act Section 26 consult the person under guardianship before the guardian decide on important matters, unless the person under guardianship is under 15 years old, the person unable to understand the importance of the decision or consulting the person under guardianship cannot be done without significant difficulties.

Yours sincerely,

Nikolaj Nielsen

Teamleader, Disability, Equal Treatment

THE ANSWER TO QUESTION NO. 4 HAS BEEN PROVIDED BY THE DANISH MINISTRY OF JUSTICE

"I have examined the possibility of providing electronical information on data with respect to judicial or quasi-judicial procedures from the police computer systems (POLSAS).

POLSAS is a filing and case management system in which violations of law are filed in association with a code related to a specific offence. A code associated with the decision indicating the result of the criminal case is also registered. Thus, POLSAS can be applied for the purpose of obtaining information on the number of reports or the number of decisions related to a specific violation. However, it is not possible to extract data of a more detailed nature.

POLSAS does not contain information on one or more codes regarding access to judicial or quasi-judicial procedures. It is therefore not possible electronically to provide information on the participation of persons with disabilities in judicial or quasi-judicial procedures or information on remedies for persons with disabilities.

Additionally, it is not possible to extract information on persons with disabilities being convicted of a criminal offence. However, it is possible to provide information on the number of sentences in relation to sections 68-70 in the Criminal Code, as decisions related to these sections have a common code in POLSAS.

Section 68 concerns measures for persons who have been exempt from punishment with reference to Section 16 of the Criminal Code due to a mental disorder or persons who were slightly mentally retarded at the time of committing the act or a comparable condition.

Section 69 concerns measures for persons who were in a condition characterised by mental or behavioural retardation, impairment or disorder, although not the nature referred to in Section 16.

Section 70 concerns persons sentenced to safe custody in order to avert danger of imminent threat to the life, body,health or liberty of others.

The following statistics on cases concerning sections 68-70 have been extracted electronically from POLSAS:

Table 1: Number of decisions related to section 68-70 in the Criminal Code (special orders in lieu of prison sentence) for offences related to the Criminal Code.

	2011	**2012**	**2013**	**2014**	**2015**	**2016**
Special orders in lieu of prison sentence	3.272	3.416	2.759	3.355	3.170	3.637

The data in table 1 are updated the 30th of March 2017. The data are analysed based on information from POLSAS and processed in Qlikview, which is the management information system of the Prosecution Service. It should be noted that the data are dynamic and that the numbers may change due to corrections or delayed updates of the data in POLSAS, new convictions etc. The Director of Public Prosecutions Office has modified the data model of Qlikview, as part of the ongoing development of the management information system. The new data model has been applied since March 2016 in regards of the police districts and for the Director of Public Prosecutions Office since May 2016. The new data model has been applied in relation to the data in table 1. The data may therefore deviate from previous data based on the former data model. The Director of Public Prosecutions Office will apply the new data model in the future.""

TRANSLATED PROVISIONS FROM THE ADMINISTRATION OF JUSTICE ACT

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(1) The language of the proceedings is Danish. Where possible, the examination of persons who do not master the Danish language must be conducted with the assistance of a translator with a master's degree in translation (language for special purposes) or the like. In civil proceedings, however, the use of an interpreter may be dispensed with where neither party insists on calling in an interpreter and where the court believes that it has sufficient knowledge of the foreign language. Subject to the latter condition, the same applies to criminal proceedings, with the exception of trial hearings in the high courts.

(2) Documents drawn up in a foreign language must be accompanied by a translation which, if so demanded by the court or the opposing party, must be certified by a translator with a master's degree in translation (language for special purposes) or the like. However, the requirement for translation may be waived where both parties so agree and where the court believes that it has sufficient knowledge of the foreign language.

(3) Notwithstanding the provisions of subsections (1)-(2), a national of another Nordic country may submit documents drawn up in his own language. However, the court will cause the document to be translated into Danish where so demanded by the opposing party or deemed necessary by the court. At the request of a national of another Nordic country, the court must cause documents submitted by the opposing party to be translated into the relevant foreign Nordic language.

(4) The costs of interpretation in proceedings to which a national of another Nordic country is a party are payable by the Treasury. The same applies to the costs of translation under the provisions of subsection (3). The court may direct that such costs are to be refunded by the parties in accordance with the general provisions of this Act on costs.

(5) To the extent possible, proceedings involving and examination of deaf persons and persons with a severe hearing impairment must be conducted with the assistance of a qualified interpreter. To the extent possible, proceedings involving and examination of other hearing-impaired and deafened persons must at the request of the relevant person be conducted with the assistance of a qualified interpreter. As regards dumb persons, examination or proceedings may be conducted by written questions and answers or on request, where possible, with the assistance of an interpreter. In addition, deaf, hearing-impaired, deafened or dumb persons have a right to the assistance of a

consultant for deaf people, a consultant for hearing-impaired people or similar assistance during court hearings.

(6) No person may be called in to assist as an interpreter or sign language expert who would be disqualified under sections 60 and 61 from sitting as a judge in the proceedings. In addition, subject to the necessary modifications and unless otherwise provided for by this Act, the provisions applying to witnesses also apply to such persons.

(7) Interpretation may be conducted by use of video communication equipment if the interpreter's attendance at the same location as the party, witness or court-appointed expert would cause excessive difficulty for the interpreter and if interpretation by use of video communication equipment is found to be adequate. When an interpreter interprets for a party, a witness or a court-appointed expert attending by use of telecommunication equipment, the interpreter must where possible be at the same location as such party, witness or court-appointed expert. When an interpreter interprets for a suspect who is participating in a court hearing to decide on whether to extend the custody time-limit or other confinement measures under Part 70 by use of video communication equipment under section 748b(1), the court will direct where the interpreter is to be located.

169.

(1) Public servants and others holding public or comparable office may not without consent from the relevant public authority be demanded to give evidence about matters which, in the public interest, must be treated by them as confidential. As regards members of the Danish Parliament, consent must be obtained from the speaker of the Danish Parliament and the relevant minister.

(2) Where such consent is withheld, the court may, if the giving of evidence is found to be essential to the outcome of the case, order the relevant authority to state to the court the reasons for withholding consent. If the court then finds that the interest of maintaining confidentiality should yield to the interest of finding and presenting evidence, the court may direct that evidence is to be given. However, this does not apply if consent is withheld for reasons of national security, relations to foreign powers or a third party's life or health.

170.

(1) Where the giving of evidence would be against the wishes of a person having a right to confidentiality, persons bound by professional secrecy, such as ministers of religion of the Danish State Church or other religious communities, medical doctors, defence counsels, court mediators and lawyers, must not be demanded to give evidence about

matters having come to their knowledge in the course of the exercise of their functions.

(2) T he court may order medical doctors, court mediators and lawyers, excluding defence counsels in criminal proceedings, to give evidence where such evidence is deemed to be essential to the outcome of the case, and the merits of the case and its importance to the party concerned or to society are found to justify the giving of such order. In civil proceedings, such order may not be extended to include information which a lawyer has obtained during legal proceedings the conduct of which has been entrusted to him or in which his advice has been sought.

(3) The court may direct that no evidence is to be given about matters with respect to which the witness is subject to a statutory duty of confidentiality and the confidentiality of which is of material importance.

(4) The provisions of subsections (1)-(3) also apply to the assistants of such persons.

171.

(1) A party's related persons do not have a duty to give evidence as witnesses.

(2) Similarly, the duty to give evidence as a witness does not apply where the giving of evidence is deemed likely to:

(i) expose the witness to the penalty of the law or harm to his safety or welfare;

(ii) or expose the witness's related parties to the penalty of the law or harm to their safety or welfare;

(iii) or otherwise inflict significant harm on the witness or his related parties.

(3) However, in the circumstances referred to in subsection (1) and paras (ii) and (iii) of subsection (2), the court may order the witness to give evidence where such evidence is deemed to be essential to the outcome of the case, and the merits of the case and its importance to the party concerned or to society are found to justify the giving of such order.

(4) In addition, in the circumstances referred to in subsection (2)(iii), the court may order the witness to give evidence if the witness has taken steps as mentioned in section 754a, and the merits of the case and its importance to the party concerned or to society are found to justify the giving of such order.

172.

(1) Editors and editorial staff employed by a publication falling within the scope of section 1(i) of the Media Liability Act (medieansvarsloven) are not subject to a duty to give evidence about:

(i) the identity of the source of a piece of information or the author of an article or the identity of the person who has taken a photograph or otherwise produced a pictorial representation. If publication is made, it is a requirement for exemption from the duty to give evidence that the source, author, photographer or producer is not identified in the publication; and

(ii) the identity of persons shown in a picture or being mentioned where anonymity has been promised to such persons. If publication is made, exemption from the duty to give evidence will apply, provided that the identity of the relevant persons is not disclosed in the text.

(2) Editors and editorial staff employed by a radio or television broadcaster falling within the scope of section 1(ii) of the Media Liability Act (medieansvarsloven) are not subject to a duty to give evidence about:

(i) the identity of the source of a piece of information or the author of a work or the identity of the person who has taken a photograph or otherwise produced a pictorial representation. If the information, work, etc. is broadcast, it is a requirement for exemption from the duty to give evidence that the source, author, photographer or producer is not identified in the broadcast; and

(ii) the identity of participants who have been promised that they could participate without the risk of being identified. If the programme is broadcast, it is a requirement for exemption from the duty to give evidence that the relevant persons are not identified by name and that reasonable precautions have been taken to conceal their identity.

(3) Exemption from the duty to give evidence as provided for in subsections (1) and (2) is also available for others who have obtained knowledge of the identity of the source, the author or the participant by virtue of their relationship with the publication or its production or their relationship with the radio or television broadcaster or the production of the broadcast concerned.

(4) The provisions of subsections (1)-(3) apply correspondingly to the mass media falling within the scope of section 1(iii) of the Media Liability Act (*medieansvarsloven*).

(5) If the proceedings concern an offence of a serious nature which is punishable under the law by imprisonment for no less than four years, however, the court may order the persons mentioned in subsections

(1)-(4) to give evidence as witnesses if such evidence is deemed to be essential to the proper examination of the case, and the interest in finding and presenting evidence obviously overrides the need of the mass media to protect their sources.

(6) Similarly, the court may order the persons mentioned in subsections (1)-(4) to give evidence as witnesses if the proceedings concern a contravention of sections 152-152c of the Criminal Code (*straffeloven*). However, this does not apply if it may be assumed that the author or the source intended to disclose matters of importance to society.

172 a.

(1) A person who has been examined by video communications equipment under section 745e or section 183(3) does not have a duty to give evidence as a witness in court.

(2) In very exceptional circumstances, the court may order a person falling within the scope of subsection (1) to give evidence as a witness in court if such evidence is crucial to the determination of the case and it will not be sufficient for the person to be re-examined by use of video communication equipment.