

Comment by the Committee on the Rights of Persons with Disabilities (CRPD) to the First public Draft General Comment of the Subcommittee on the Prevention of Torture (SPT) on article 4 of the Optional Protocol to the Convention against Torture (OPCAT)- 11 April 2023

Introduction

1. The Committee on the Rights of Persons with Disabilities (the Committee) welcomes the opportunity to comment on the first public draft general comment of the Subcommittee on Prevention of Torture (SPT) on article 4 of the Optional Protocol to the Convention against Torture (OPCAT).
2. The deprivation of liberty of persons with disabilities is a critical and prevalent human rights situation. However, the specific manifestation and circumstances of this deprivation of liberty, and the harmful treatment that occurs through deprivation of liberty is not always recognised or understood within the framework of OPCAT by State Parties, national preventive mechanisms (NPMs) and other relevant actors.
3. Disability has long been an exception for the application of human rights and fundamental freedoms, with rights being denied or diminished on the basis of perceived or actual impairment. This denial and diminishment of rights is often seen as benevolent, protective, and necessary, because of the ableist perception that reduces people with disabilities to objects of care, treatment and protection.
4. The Committee's experience is that State Parties, NPMs and other relevant actors are not always cognisant of the fact that care, treatment and protection regimes deprive persons with disabilities of their liberty based on actual or perceived impairment and expose them to mental and physical harms that can constitute torture and ill-treatment. This includes involuntary mental health detention, deprivation of liberty in social care institutions and indefinite detention in forensic psychiatric facilities and prisons as the result of justice diversion provisions ('unfit to stand trial' and 'incapacity for criminal responsibility').
5. The Committee is also aware that there is lack of clarity with regard to practices perpetrated by State and non-State actors, including charities, professionals and families that are viewed as benign, therapeutic or necessary management techniques but that deprive persons with disabilities of their liberty and inflict harms that can constitute torture and ill-treatment. This includes chemical, physical and mechanical restraints, shackling, seclusion, experimental treatment and non-consensual medical treatment and interventions. These practices take place in a range of settings including the family home and community locations, psychiatric facilities, disability and aged care institutions, group homes, religious communities, and schools and educational institutions.
6. People with disabilities are vastly over-represented in the traditional understanding of places of deprivation of liberty, such as prisons, juvenile justice facilities, police detention and immigration detention. However, the specific needs of persons with disabilities, such as reasonable accommodation and accessibility measures are often not identified or provided, and disability is not viewed as a core indicator or element in monitoring activities.
7. The experience of deprivation of liberty of persons with disabilities is shaped by State Party law, policy and practice. This can be through explicit legislation, such as mental health laws, through overarching policy frameworks, such as funding policies for social care institutions, and practice that enables deprivation of liberty,

such as failing to prohibit shackling and other restrictive practices. It is important to note that even where there are legislative or administrative measures to legitimise deprivation of liberty of persons with disabilities based on impairment, the CRPD recognises this as a violation in and of itself.

8. The Convention on the Rights of Persons with Disabilities (CRPD) is the thematic treaty that applies human rights in the context of disability. The standards and principles of the CRPD underpin the understanding of deprivation of liberty and places of detention for persons with disabilities and the understanding of how torture and other cruel, inhuman or degrading treatment or punishment (torture and ill-treatment) manifests for persons with disabilities.

9. The human rights model of disability is embedded in the CRPD and requires the recognition that disability is a social construct, that impairment is one aspect of human diversity, and that impairment should never be the basis for the denial or diminishment of human rights. [reference GC 6, para 9]

10. It is essential that the general comment of the SPT engages with the CRPD to ensure a comprehensive and disability inclusive understanding of places of deprivation of liberty and to ensure that State Parties, NPMs and other relevant actors understand the specific torture and ill-treatment practices experienced by persons with disabilities.

CRPD, deprivation of liberty and torture and ill-treatment

11. The Committee notes that the draft general comment does not refer to the CRPD or engage with the Committee's jurisprudence. However, the CRPD contains a specific article, article 15, *Freedom from torture or cruel, inhuman or degrading treatment or punishment*. Article 15 harmonises the legal standards of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) with the CRPD, the specialist treaty with regard to the experience of torture for persons with disabilities. Article 15 reaffirms the absolute prohibition of torture for persons with disabilities, including all the elements relating to redress and reparations contained in article 14 of CAT. It also obligates State Parties to take all necessary measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture and ill-treatment.

12. Throughout all aspects of the mandate of the Committee on the Rights of Persons with Disabilities, article 15 enables the Committee to apply the principles and standards of CAT and OPCAT to the specific situation of persons with disabilities. The Committee is explicit in seeking information from State Parties regarding ratification of OPCAT, the establishment of NPMs, and the scope and functions of NPMs in monitoring disability specific places of detention and identifying specific torture and ill-treatment practices experienced by persons with disabilities.

13. The Committee has developed General Comments and Guidelines that assist interpretation of the CRPD in various areas, including in recognising places of detention and practices that occur within these places that constitute torture and ill-treatment:

- General Comment No. 1 (2014) on equal recognition before the law reaffirms the right of persons with disabilities to be recognised as persons before the law [para 11]. Article 12 of the CRPD, *Equal recognition before the law* is central to autonomy, personal decision-making and the exercise of legal capacity, and it is central to the exercise of all human rights. It requires State Parties to replace substitute decision-making regimes, such as guardianship and financial management systems with supported decision-making systems to ensure that legal capacity is not denied to persons with disabilities and that support is provided for the exercise of legal capacity.

14. The denial of legal capacity facilitates detention in a broad range of institutional settings against the will of persons with disabilities and through the consent of substitute decision-makers, violating articles 12 and 14 of the CRPD. [para 40 General Comment 1]. It also exposes persons with disabilities to treatment, interventions and practices without their consent or through the consent of substitute decision-makers in violation of articles 12, 15, 16, 17 and 25 of the CRPD.

- Detention in institutional settings is also addressed in General Comment No. 5 (2017) on living independently and being included in the community and the “Guidelines on deinstitutionalisation, including in emergencies”. [ref] The General Comment and Guidelines elaborate on obligations contained in article 19, *Living independently and being included in the community*, with the aim of ensuring that persons with disabilities can exercise personal and individual choice and control across all areas of life. Institutionalisation of persons with disabilities constitutes discrimination and is a form of violence. [DI Guidelines, para 6]

15. Many persons with disabilities have been presumed to be unable to live independently, or the support to live independently is not available or is tied to particular living arrangements [General Comment para 1]. Although there may be no legal or administrative order, the lack of support compels persons with disabilities to remain in living situations that deprives them of their liberty and subjects them to harmful practices. This form of disability-specific detention can occur in family homes and in institutional arrangements, including social care institutions, psychiatric institutions, long-stay hospitals, nursing homes, secure dementia wards, special boarding schools, child welfare institutions, group homes, rehabilitation centres, forensic psychiatric settings, albinism hostels, leprosy colonies, religious communities and other congregated settings. [para 15 Guidelines]

- The “Guidelines on the right to liberty and security of persons with disabilities” [ref] elaborate on the understanding of obligations under article 14 of the CRPD, *Liberty and security of person*. The Guidelines reaffirm that deprivation of liberty based on the grounds of actual or perceived impairment is discrimination [section B]. Article 14 does not permit any exceptions, even if additional criteria, such as deeming a person dangerous to themselves or others, is used to justify the deprivation of liberty. It is common for legal and policy frameworks within State Parties to authorise detention, often indefinitely, and to allow treatment against the will of persons with disabilities in mental health facilities, forensic psychiatric facilities, prisons and in social care institutions.

Recommendations

16. The Committee looks forward to ongoing engagement with the SPT on the development of this general comment, and to provide our expertise in relation to the CRPD and deprivation of liberty of persons with disabilities. In relation to the first draft general comment, the Committee makes the following recommendations:

17. The general comment should:

- provide a comprehensive concept of places of deprivation of liberty that is disability inclusive in order to ensure that care, treatment and protection regimes for persons with disabilities are recognised within this concept;
- recognise that persons with disabilities are over-represented in the traditional understanding of places of deprivation of liberty, that their specific needs, such as reasonable accommodation and accessibility measures are often overlooked, and that this recognition requires disability to be incorporated as a core indicator or element in monitoring activities;

- recognise that deprivation of liberty for persons with disabilities is underpinned by violations of human rights, such as the denial of legal capacity, institutionalisation and deprivation of liberty based on impairment, which are not neutral, legitimate or necessary; and monitoring needs to reflect this context, including monitoring steps taken by State Parties to address these violations;
 - reflect the broad and inclusive concept of places of deprivation of liberty and facilitate referrals from persons with disabilities and their representative organisations to inform the monitoring of places of detention and State Party visits.
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