

**Written submission by the Estonian Patients' Advocacy  
Association  
& the Mental Disability Advocacy Center  
to the Universal Periodic Review Working Group  
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With respect to Estonia**

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## Introduction

### Interest and expertise of the authors

The Estonian Patient Advocacy Association (EPAA) is a non-profit NGO (reg.80071184), founded in 1994. EPAA's primary aim is to advocate for human and civil rights of health and social care service users. For the past 16 years EPAA has advocated for the rights of more than 18 000 clients, carried out educational work about patients' rights for nearly 16 000 different beneficiaries, raised a number of systemic issues on different levels and influenced decision making in Estonian health and social care system on behalf of service users. EPAA together with MDAC also litigates for the rights of mental health service users in guardianship and civil commitment issues before courts in Estonia and the European Court of Human Rights. The Mental Disability Advocacy Center (hereinafter "MDAC"), is an international NGO based in Budapest that advances the human rights of children and adults with actual or perceived intellectual disabilities or psycho-social (mental health) disabilities, and has been working in Estonia since 2001.

EPAA and MDAC respectfully submit the following written comments concerning Estonia for consideration by the Human Rights Council (hereinafter "the Council") at its 10th Session of Universal Periodic Review.

### Summary of the report

This report provides the Council with information about the human rights situation of some of the most vulnerable and marginalised people in Estonia, namely, persons with mental health disabilities. The report will lay out anomalies in the legal and institutional framework, and additionally focus on human rights on the ground covering violations of the rights of persons with mental health disabilities including those deprived of their liberty in psychiatric institutions and forensic units, and the failure to provide reasonable accommodation to persons with disabilities. Appendix 1 contains a list of recommendations which the Council may like to propose to the Estonian Government.

### **Civil commitment (Involuntary hospitalisation) of persons with mental health problems**

1. Estonian mental health law permits admission without consent to a psychiatric hospital where there has been no comprehensive risk assessment of the individual concerned nor of any concrete danger posed. Furthermore, there is no tool for assessing one's capacity to give informed consent for admission and treatment.
2. For example, in an EPAA and MDAC case currently pending before the European Court of Human Rights (*S.S. v Estonia*, Appl no.17779/08), the Applicant was detained in a psychiatric hospital on a court order based on assessments which did not comprehensively evaluate the risk she posed. Rather, the assessments exclusively considered allegations that she had been aggressive towards her partner and had placed her child in danger by leaving home with her child, while ignoring the Applicant's own accounts that she was a victim of domestic violence, any aggression towards her partner was an act of self-defence and leaving home with her child was an effort to remove herself and her child from a volatile environment. Furthermore, it was argued that the Applicant lacked capacity to give consent whereas there is no assessment tool or method to evaluate capacity to give informed consent under Estonian health regulations.
3. There is no clear and consistent legislation or practice enabling persons who are unlawfully detained under civil law (civil commitment cases), including in

hospitals or social welfare institutions, to seek redress and compensation for this detention (in contrast to clear legislation on unlawful detention in criminal cases).

4. EPAA and MDAC lodged a case before the European Court of Human Rights regarding the unlawful deprivation of liberty in a social welfare institution of a woman who had been deprived of her legal capacity and who had been denied participation in those proceedings (*M.V v Estonia*, Appl no. 21703/05, 7 October 2008). As a result of a friendly settlement decision concluded by EPAA and MDAC's client and the Estonian Government, Estonia was required to amend its legislation on remedies for unlawful deprivation of liberty in civil commitment cases, including the award of compensation. Although this agreement was concluded in 2008, the Government has failed to undertake such reform, and it has not provided clear rules on the right to receive compensation in the case of unlawful placement in social welfare institutions.
5. These situations indicate a failure to comply with Article 9, paragraph 5 of the ICCPR, which guarantees an enforceable right to compensation for unlawful deprivation of liberty.

### **Treatment in detention**

6. Persons with disabilities who are deprived of their liberty and serve their time in prison face major obstacles accessing healthcare and obtaining treatment and care following operations. They are deprived of their right to rehabilitation services, despite the fact that this is guaranteed under Estonian law for prisoners with disabilities.<sup>1</sup> Even if a prisoner has a rehabilitation plan, it is difficult and in some cases impossible to receive services according to the plan due to lack of adequate facilities and failure to establish the necessary services within prisons.
7. In Estonia, following reform of the healthcare system in 2002, all healthcare and rehabilitation services are provided by private institutions. The state only provides regulations on how this must be organised. Hence, persons in state care, such as prisoners, cannot access rehabilitation services.
8. In response to questions raised by EPAA on these issues, the Ministries of Justice and Social Affairs have admitted that there are no rehabilitation institutions (which are all private institutions) which would offer their services for people with disabilities deprived of their liberty in prison. Therefore the health of imprisoned people with disabilities deteriorates considerably. The failure to provide adequate medical assistance to these detainees is a violation of the obligation to treat detainees with humanity and respect for the inherent dignity of the human person (article 10 of ICCPR). The failure to provide rehabilitation facilities is a clear breach of paragraph 3 of this article, which highlights that the aim of detention must be reformation and rehabilitation of the detainee. Furthermore this situation amounts to discrimination based upon disability.
9. EPAA has one client, Mr V, who is a prisoner with physical disabilities and uses a wheelchair. Many specialist doctors have examined him and advised that he

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<sup>1</sup> Subclause 2.1 of clause 1 of Health services organisation act says that: This Act applies to the organisation of the provision of health services in prisons with the specifications resulting from the Imprisonment Act. Section 49(1) of Imprisonment Act says that: Health care in prisons constitutes a part of the national health care system. Health care in prisons shall be organised pursuant to the Health Care Services Organisation.

should receive physiotherapy. At first, they refused to note this into his prison medical file, but after the intervention of EPAA, they finally officially prescribed therapeutic exercises. However, in the prison there is no one to assist him to do these exercises. Upon another intervention from EPAA, Mr V was transferred to the prison hospital, but there he received no physiotherapy. Clearly, no provision of reasonable accommodation has been made for his detention, in violation of Article 14 (right to liberty and security) of the UN Convention on the Rights of Persons with Disabilities (CRPD).<sup>2</sup>

## Access to justice

10. A person who has committed a crime while in a state of 'mental incompetence' is dealt with under section 393 of the Estonian Code of Criminal Procedure,<sup>3</sup> which allows the court to order an assessment of their psychiatric condition and their ability to participate in the court hearing.<sup>4</sup> When a court-appointed psychiatrist carrying out this assessment concludes that the individual is not fit to take part in their own hearing, it is often the case that the judge automatically follows their opinion, and as a result individuals are denied any participation in their criminal hearing at the very outset, without having the possibility to even meet the judge.
11. Moreover, the individual concerned may not even be aware that criminal proceedings have been initiated against them because they are not informed of this, and in many cases they do not receive the court ruling resulting from the proceedings which may entail forensic treatment. Although a lawyer paid by the state is usually appointed to defend the individual in question, it is quite common for the lawyer not to personally meet the individual. Subsequently, a lawyer cannot adequately represent the client's rights and interests in the court case. Often they do not file an appeal at the individual's request and frequently fail in fulfilling their professional duty with due diligence.
12. The Estonian Code of Criminal Procedure, and specifically chapter 16 on forensic treatment, does not provide guarantees to prevent these abuses. These shortcomings in Estonian criminal law and practice have been challenged and taken up with the Office of Legal Chancellor and with the Ministry of Justice. Both authorities have accepted that the current situation present risks for the violation of the procedural rights of persons with psychiatric illnesses. The Ministry of Justice has addressed issues of the availability of state paid legal aid and the quality of this service in a study carried out in 2007,<sup>5</sup> and in studies on the speed and management of placement to coercive treatment of persons with mental health

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<sup>2</sup> The Estonian Government has signed the CRPD on 25 September 2007, and is preparing to ratify.

<sup>3</sup> Section 393 of the Estonian Code of Criminal Procedure states:

Commencement of proceedings for administration of coercive psychiatric treatment.

If a person commits an unlawful act in a state of mental incompetence or if he or she becomes mentally ill or feeble-minded or suffers from any other severe mental disorder after the court judgment is made but before he or she has served the full sentence, or if it is established during pre-trial proceedings or court proceedings that the person suffers from one of the aforementioned conditions, criminal proceedings with regard to the person shall be conducted pursuant to the provisions of this Chapter.

<sup>4</sup> Section 400(4) of the Code of Criminal Procedure

<sup>5</sup> "Availability of state appointed lawyer and quality of state paid legal services" - available only in Estonian

[http://www.just.ee/orb.aw/class=file/action=preview/id=33504/m%E4%E4ratud+kaitsja+k%E4ttesaa+davus+ja+kvaliteet\\_KPO+\\_2\\_.pdf](http://www.just.ee/orb.aw/class=file/action=preview/id=33504/m%E4%E4ratud+kaitsja+k%E4ttesaa+davus+ja+kvaliteet_KPO+_2_.pdf).

problems in 2008.<sup>6</sup> According to the conclusions of these studies, it was evident that the fair trial rights of mental health patients under Article 14 of the ICCPR (right to a fair trial) and Article 13 of the CRPD (access to justice) were violated, however the Estonian Government has not yet remedied this situation.

13. While Patients undergoing coercive treatment are entitled to regular reviews to assess their continued need for treatment, there are no guidelines or rules on violence and risk assessment, nor is the creation of these guidelines envisaged. With respect to the reviews, the experts appointed for this assessment are doctors who work in the same hospital where the patients are treated. This places patients at a substantial disadvantage as the expert cannot be considered impartial. As stated by the European Court of Human Rights, "by appointing the respondent's [hospital] employees as experts, the domestic courts placed the applicant at a substantial disadvantage *vis-à-vis* the respondent hospital. Therefore, the principle of equality of arms has not been complied with. Accordingly, there has been a violation of Article 6§1" (*Shulepova v Russia*, Appl no. 34449/03, 11 Dec 2008, §§69-70).
14. EPAA and MDAC urge the UPR Working Group to ensure that the Government amends law and practices to ensure a person's participation in their own criminal hearing and the right to be informed of these proceedings. The current situation violates the procedural guarantees for a fair trial contained in Article 14 of the ICCPR and access to justice in Article 13 of the CRPD.
15. Subsection 2 of section 204 of Estonian Code of Civil Procedure provides that:  
*2) If the court has doubts regarding the active civil procedural legal capacity of a participant in a proceeding who is a natural person, the court may demand that the person provide a doctor's opinion to such effect, or to order an examination. If the person refuses to comply with the court's orders or the documents submitted fail to remove the doubts of the court, the court shall initiate proceedings for appointing a guardian for the participant in the proceedings. If initiation of proceedings for appointment of a guardian for a plaintiff is not permissible for the plaintiff of other petitioner or appellant, the court shall refuse to hear the petition or appeal.*
16. Based on this provision a civil court may initiate a procedure to appoint a legal guardian to a person who is a party to a civil dispute in court when, in the court's opinion, the person is not competent enough to represent him/herself in court. There are more proportionate and less restrictive alternatives which could be put in place. These include the introduction of systems of supported decision-making (see Article 12 of the CRPD) or encouraging the person to file an application to receive legal aid paid by State.
17. The usual practice is that a psychiatrist assesses the person to determine their competence in representing themselves in court, and the court usually extends the request for assessment to all areas of the individual's life well beyond their capacity to participate in civil proceedings. Based on EPAA's observations over several years, most psychiatrists have insufficient knowledge of legal procedures and no training to assess the person's functional capacity to participate in civil procedures. Usually relatives without any legal education or specialist knowledge

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<sup>6</sup> Study of Ministry of Justice, 2008, available only in Estonian.

[http://www.just.ee/orb.aw/class=file/action=preview/id=39634/Ps%FC%FChikah%E4iretega\\_isikute\\_sundravile\\_suunamise\\_kiiruse\\_ja\\_korralduse\\_anal%FC%FCs\\_B.Tammiste%2C\\_H.Kaingx.pdf](http://www.just.ee/orb.aw/class=file/action=preview/id=39634/Ps%FC%FChikah%E4iretega_isikute_sundravile_suunamise_kiiruse_ja_korralduse_anal%FC%FCs_B.Tammiste%2C_H.Kaingx.pdf).

are appointed as the legal guardians in these kinds of cases. This kind of practise has become common in Estonian courts.

18. On the basis of several recent examples, it would appear that courts' application of this legislative provision results in prolonging proceedings and without legitimate cause: Two years ago, a client withdrew a civil claim before the Harju County Court and informed the court about this action in writing. As there was no communication from the court, she assumed that her case was closed. However, in July 2009, two years after she had had any contact with the court, she received in the post a ruling stating that the court had initiated a procedure to appoint her a guardian. The court ordered that she undergo a psychiatric assessment, an order which she complied with. The psychiatric report stated that the woman was in a good state of mental health and reported that there were no grounds to refer this case to a psychiatrist. Eventually, another judge of the same court terminated this case in a written procedure stating that no grounds existed to appoint her a guardian.<sup>7</sup>
19. In another case before the Harju County Court two years ago,<sup>3</sup> a man was a party in civil proceedings about debt payments and had agreed to a payment schedule with the other party. He had told the court that among the reasons for him being in debt was that he had suffered from depression. For two years, the man diligently made his monthly payments and believed that the court case had been terminated. In July 2009, he received a notification from the court that it had decided to initiate a procedure to appoint him a guardian. According to the psychiatric assessment which he underwent, he was fully responsible for his actions and was evaluated as able to participate in the civil proceedings. Based on this assessment, an opinion submitted by the local government in his support, and a written submission on his own behalf, the Harju County Court terminated the proceedings<sup>8</sup>.
20. In a further case, EPAA and MDAC lawyer represented an elderly woman who was a plaintiff in civil proceedings concerning a property matter. Despite the fact that she benefitted from professional legal representation, the court doubted the woman's competence in the civil proceedings and she was subjected to a psychiatric assessment ordered by the court in view of being appointed a legal guardian. On 12 November 2009, the Tallinn Circuit Court concluded that "the existence or lack of active capacity to participate in civil proceedings cannot be identified based on a psychiatric assessment only."<sup>9</sup>
21. Subjecting someone involuntarily to a psychiatric assessment and appointing a legal guardian without any real necessity in terms of legal standing, instead of making available State legal aid may constitute an unlawful interference with person's privacy.<sup>10</sup> This practice may also have a negative impact on the conduct of the trial and result in the person being thus deprived of the right to represent themselves and being represented against their will and inadequately, in breach of Article 14 of the ICCPR.

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<sup>7</sup> Civil case no 2-09-28965, Harju County Court, 14 September 2009.

<sup>8</sup> Civil case no 2-09-31593, Harju County Court, 26 November 2009.

<sup>9</sup> Civil case no 2-06-38636, Tallinn Circuit Court, 21 January 2009.

<sup>10</sup> Although the aim of the provision referred to above is to check a person's active civil procedural legal capacity only, the court subjects to psychiatric assessment all aspects of persons' life. Moreover, the most recent practice of first instance courts is to order an assessment to be conducted by a psychiatrist and a psychologist making the possible interference with person's private life even more extensive and intrusive.

## Political participation

22. Estonian law stipulates that if an adult is restricted of their legal capacity and a guardian is appointed to manage the person's affairs, then the adult loses their right to vote.<sup>11</sup> This provision conflicts with the newly amended Estonian Family Code which states that a legal guardian should be appointed only for managing the affairs of the person that is considered necessary.<sup>12</sup> These restrictions in the right to vote are based exclusively on the legal capacity status of a person and do not take account of their actual capacity to make decisions on political matters. Moreover, the law does not require any understanding of political issues from people who are formally deprived of their legal capacity as a precondition for them to enjoy their right to vote. This leads to a clearly discriminatory situation in which restrictions imposed on a person's political rights have no other justification than that person's mental disability.
23. EPAA and MDAC bring the UPR Working Group's attention to clear international and European consensus on this matter which protects the right to vote of people with disabilities, including those deprived of their legal capacity. The CRPD expands on this basic right of the ICCPR by setting out in great detail the specific components of political rights. Article 29(a) of the CRPD requires States Parties to "guarantee to people with disabilities political rights and the opportunity to enjoy them on an equal basis with others," and goes on to list the ways in which States Parties must provide reasonable accommodation in order not to act in a discriminatory way. Recently, the European Court of Human Rights unanimously concluded that automatic disenfranchisement of people under guardianship was unjustified and in violation of the right to vote protected under Article 3 of Protocol No. 1 to the European Convention on Human Rights (see *Alajos Kiss v. Hungary*, Appl no. 38832/06, 20 May 2010).
24. The Council of Europe's Commissioner for Human Rights Thomas Hammarberg has added his weight to this startling democratic gap. He has said recently, "persons with mental health and intellectual disabilities should have the right to vote in elections and stand for election. Though this is stated clearly in the UN Convention [on the Rights of Persons with Disabilities] (Article 29), individuals in a number of European countries are excluded. Being deprived or restricted of their legal capacity they have been denied these rights as well. This has further exacerbated their political invisibility".<sup>13</sup>
25. EPAA and MDAC invite the UPR Working Group to remind the Estonian Government that the right to take part in public affairs should not be removed from people with disabilities – indeed people with disabilities should be encouraged to be politically active so as to advocate for their rights and to hold politicians accountable.

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<sup>11</sup> Section 526(5) of the Estonian Code of Civil Procedure.

<sup>12</sup> Section 203(2) of the Family Law, entered into force on 1 July 2010.

<sup>13</sup> Viewpoint of the Commissioner, "Persons with mental disabilities should be assisted but not deprived of their individual human rights", 21 September 2009, available at <http://www.commissioner.coe.int>

## Appendix 1 - Recommendations

In light of the above, EPAA and MDAC would like to assist the UPR Working Group by suggesting that it makes the following recommendations to the Estonian Government to enable the Government to take appropriate measures, in full consultation with people with disabilities and their respective organisations (see Art; 4(3) UN Convention on the Rights of Persons with Disabilities), to bring law, policy and practice in line with the requirements of the UN body of human rights law and standards:

1. Amend legislation to give meaning to informed consent in Section 11(3) of the Mental Health Act. Ensure that no one's liberty is deprived without statutory criteria being met, including a comprehensive risk assessment.
2. Ensure that people with disabilities who are detained are not subjected to discrimination on the basis of their disabilities. Specifically, ensure that prisoners with disabilities have adequate access to healthcare, including treatment, rehabilitation and therapy services in accordance with their needs.
3. Amend legislation to provide an enforceable right to compensation for persons unlawfully detained under civil commitment laws, including in hospitals and social welfare institutions.
4. Provide sufficient guarantees to persons deemed mentally unfit to participate in criminal proceedings brought against them.
5. Provide effective legal representation to persons with mental disabilities in both civil commitment proceedings and criminal proceedings. Establish a system of monitoring to ensure that legal representatives meet with and represent the rights and interests of their clients who are detained on the basis of their mental disability.
6. Decrease conflicts of interest by abolishing the court practice of appointing experts to evaluate a forensic patient's continued need for treatment, from the same hospital in which the patient is detained.
7. Amend the Code of Civil Procedure to end the practice of courts subjecting civil parties to psychiatric assessments for the purpose of legal standing. Call for an end to guardianship being used when the State should instead provide civil legal aid to parties in civil proceedings and support for people who need help in making decisions.
8. Abolish the automatic denial of the right to vote for persons deprived of their legal capacity.