

NGO Thematic Alternative Report
on
the Rights of Migrants and Persons with Disabilities
to the Human Rights Committee

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Participating Organizations:

- Duroo – Association for Public Interest Law
- Children with Disabilities Rights Network
- Disability and Human Rights in Action
- Disability Discrimination Act of Solidarity in Korea
- Dongcheon Foundation
- Education for People with Disabilities, aALLda
- Korea Refugee Rights Network
- Korean Disability Forum (KDF)
- Network of Accessible Environments for All

Contact Details:

- Jeanie KIM (jkim@duroo.org) Duroo – Association for Public Interest Law
- Dahye JEONG (dhjeong@duroo.org) Duroo – Association for Public Interest Law

1. Background

As the Human Rights Committee has highlighted in its decisions, general comments, and previous recommendations, Article 9 of the International Covenant on Civil and Political Rights (“Covenant”) applies to all cases when a person is deprived of their liberty, including not just criminal cases, but also preventive detention in the name of immigration control, individual protection, and public safety. Furthermore, Article 10 of the Covenant applies to all persons deprived of liberty by law and the power of the country, including people detained in correction centers; hospitals, in particular psychiatric hospitals; immigration detention facilities; and other institutions. In sum, the State Party must take action to uphold the principles of the Article in all agencies and institutions that detain people under the country’s jurisdiction. Lastly, according to Article 2(3) of the Covenant, the Korean government, as the State Party, must implement effective remedies for victims who were unjustly deprived of liberty.

Nevertheless, in the Republic of Korea, marginalized communities —such as migrants and persons with disabilities—face involuntary and arbitrary detention in (1) immigration detention facilities; and (2) psychiatric hospitals. The government fails to ensure humane treatment of detained individuals in either setting. In so doing, the government denies detained persons the rights guaranteed by the Covenant, thus exposing detained individuals from marginalized groups to discrimination and unjustifiable restrictions of their liberty. With this Report, we call on the Human Rights Committee to reaffirm the duty of the Korean government to guarantee the rights in the Covenant for all people in the Republic of Korea, including migrants and persons with disabilities, without discrimination.

2. Immigration Detention

The current Immigration Act defines the de facto detention of foreigners with deportation orders in immigration detention centers as “protection.” This Act allows indefinite detention under the provision that a person who received a deportation order can be “protected” until “the time when deportation is implemented.”¹ As detention is the government’s only means to execute an involuntary deportation order, the sole outcome of a deportation order is detention. Strict regulations are applied to foreigners detained in immigration detention centers: Foreigners can access only certain areas and are prohibited from moving in and out of a detention room freely.

While holding people under these conditions, the Korean government maintains its position that this “protection” system applies only to foreigners with a deportation order, who rather than remain detained, can choose to leave the country at any time. According to this rationale, the government’s argument is that, although held in detention centers, these individuals are not “detained,” and thus, their indefinite detention cannot constitute arbitrary detention. Furthermore, the Immigration Act has no separate provision restricting either (1) the government from detaining migrant children; or (2) the maximum time period for which a child may be detained. As a result, when parents are subject to forcible deportation, babies and children tend to be detained alongside their parents.²

When a person is detained for a period of more than three months, the Minister of the Justice reaffirms the detention every three months; however, safeguards such as regular monitoring by an independent agency (e.g., the judiciary) and a maximum detention period do not exist. Given the lack of safeguards, on March 2023, the Constitutional Court ruled that the immigration detention system of the Republic of Korea is unconstitutional.³ Nevertheless, so far the Ministry of Justice has failed to discuss revising the Immigration Act, continuing to detain even children.

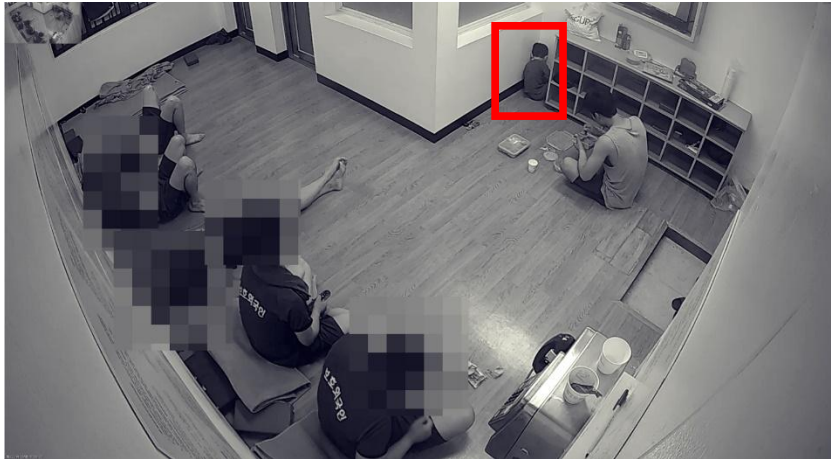
A significant area of potential rights violations arise from the lack of procedures to assess the necessity of detention and the vulnerability of persons detained. Given the lack of exceptions to detention, all people—including persons with disabilities, pregnant women, parents with children, and migrants children—are detained. Furthermore, long-term detention is applied to people whom the Korean government is not able to deport, such as (1) stateless persons; (2)

¹ Immigration Act, Article 63 (Detention of Persons Subject to Deportation Orders, or Release from Detention) (1). It is impossible to immediately repatriate a person subject to a deportation order out of the Republic of Korea when (a) the person has no passport; (b) no means of transportation is available; or (c) another specific reason. In that case, the head of a Regional Immigration Service may detain the person in any detention facility until he or she can repatriate the person.

² On April 2023, a Mongolian father and his 3-year-old child were detained together at the Hwaseong Immigration Detention Center and were forcibly returned to their country later. On May 2023, a mother and her 6-year-old child were detained at the Suwon Immigration Office.

³ 2020Hun-Ka1, 2021Hun-Ka10 (consolidated) Case on Detention of Deportees with No Upper Time Limit, On March 23, 2023, the Court, in a 6-to-3 opinion, held that Article 63, Section (1) of the Immigration Control Act nonconforming to the Constitution. Section (1) allows the government to detain a person under a deportation order without setting a maximum time limit on the detention period. The Court explained that the provision violates both the rule against excessive restriction and the principle of due process of law, thus infringing on the physical freedom of the detainee. <https://english.court.go.kr/site/eng/ex/bbs/List.do?cbIdx=1143>

those who cannot be issued a passport; and (3) individuals who are on trial.⁴



(Photo: CCTV capture of a child hiding in the corner, refusing the adult meal served by the Hwaseong Immigration Detention Center)

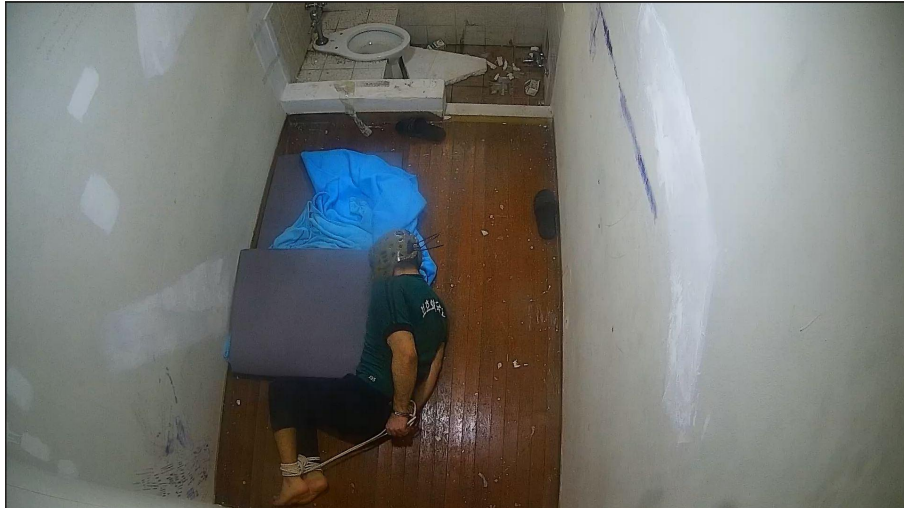
1) Excessive detention in an isolation room and use of physical restraints in immigration detention centers

Officials working in immigration detention centers continue to use physical force against foreigners for the alleged purpose of maintaining order. But, in reality, officials use force as a de facto punishment, relying on a provision that “in emergency situations to prevent injuries to themselves or to others, isolation or using restriction tools are possible”⁵ to justify their actions. After disclosing that officials had tortured a detainee in the Hwaseong Immigration Detention Center—the so-called “hog-tying” case⁶—the government revised the guidelines intended to protect detained foreigners; however, the revised guidelines are themselves concerning, expanding the types of permissible restraints and still permitting officers to tie down a detainee’s limbs. Furthermore, the condition, method, and process for detention in an isolation room and the use of restraints are detailed only in a closed internal regulation that has not been released to the public. As such, monitoring of the application of these regulations is impossible.

⁴ Voice of America, South Korean Activists Urge Better Treatment of Asylum-seekers, 2 January 2022, <https://www.voanews.com/a/south-korean-activists-urge-better-treatment-of-asylum-seekers/6378557.html>

⁵ Immigration Act, Article 56-4 (Exercise of Coercive Force)

⁶ The Korea Times, Migrant human rights groups denounce excessive use of force at immigration detention center, 29 September 2021, https://www.koreatimes.co.kr/www/nation/2023/08/113_316207.html



(Photo: CCTV capture in the Hwaseong Immigration Detention Center in 2021 when officials restrained a migrant using the inhumane torture tactic, known as “hog-tying.”)

2) Failure to file criminal charges against a public agency and provide compensation to the victim tortured in the immigration detention center

Regarding the case in which government officials used “hog-tying” to torture a detainee in 2021, the National Human Rights Commission of Korea (NHRCK) recognized and the Ministry of Justice admitted the facts of the human rights violation.⁷ However, starting May 2021, every four to five months, the Korean Ministry of Justice, an offender of this case, filed a criminal complaint three times against the victim, charging him with “obstruction of justice.” Additionally, in September 2021, the Ministry of Justice issued a press release that claimed that the reason for torture was the victim’s behavior, including dozens of victim’s pictures in the release.⁸ The government has never issued an official apology, compensated the victim, or punished the offenders.

Conclusion & Recommendations

1. The State Party should revise the current Immigration Act to permit detention only as a last resort for the shortest possible period.
2. To comply with the General Comment No. 35 and the UN Global Study on Children Deprived of Liberty, the State Party should categorically ban detention of children, parents with children, pregnant women, and refugees.
3. The State Party should improve living conditions in immigration detention centers to meet international standards. Furthermore, the government should ensure these standards continue to be met by establishing regular, independent monitoring.

⁷ Add news article

⁸ Press release of the Ministry of Justice, “Use of protective detention tools is inevitable measure to prevent self-injury and for safety of a detained foreigner.” 29 September 2021, https://viewer.moj.go.kr/skin/doc.html?rs=/result/bbs/183&fn=temp_1632905387021100

4. The State Party should immediately stop efforts to file criminal complaints against the victim of torture in the immigration detention center. The governments should create a strategy to prevent recurrence and provide compensation for damages and restitution to the victim.

3. Detention in ports of entry

1) “Non-referral decision” on applicants for refugee status

Unlike applying for refugee status after entering Korea, ‘when submitting an application for refugee status in [Korean] airports,’ an applicant for refugee status will be subject to a pre-screening assessment known as a “referral assessment.”⁹ The Immigration Act provides that the government may refuse to refer an applicant for a referral assessment only in the exceptional case in which there is “incontestably groundless”; yet, in practice, the government has decided against referring more than half of applicants for a referral assessment, effectively barring these individuals from the asylum process.¹⁰ In 2019, the government allowed only 6.9% of applicants to take this preliminary assessment. For the last five years, on average, only 44.3% of refugee status applicants were permitted to proceed to the referral assessment.

2) Meals and living facilities in airports

After receiving a non-referral decision, foreigners must stay at a “departure waiting room” in the airport for the duration of any additional legal process or until their deportation. The government does not provide housing; instead, the Korean Immigration Office manages these designated airport rooms. During a legal case on a “non-referral decision,” the government has detained people at the airport for at least three months and at most fourteen months. Although high number of applicants are expected, the government has not allocated a budget to departure waiting rooms for necessary items such as adequate meals and hygiene. For example, currently only one meal per day is served—an airline inflight meal. For breakfast and dinner, just bread and drinks are served.

As a departure waiting room has no sleeping facilities, all refugee applicants must sleep on the same flat bench with blankets. The departure waiting room is very small and can become overcrowded. In such instances, the only other option many people have is to live and sleep near flight gates—where lights are on for twenty-four hours a day.

⁹ Article 6 of the Refugee Act

¹⁰ As recently reported, officials in some cases have chosen not to refer the applicant for an assessment because the applicant allegedly (1) mentioned an incorrect date during the interview, which was classified as “presentation of false documentation”; (2) failed to provide sufficiently detailed facts of their case, which was determined to be “a case without clear reason”; and (3) failed to explain fully whether the civil war in their home country was on-going, which was determined to be “a case without clear reason.”



(Photo: Applicants for refugee status staying at a departure waiting room at the Incheon Airport)



(Photo: Refugee family living in front of the flight gate No. 46 at the Incheon Airport¹¹)

3) Detention of children, pregnant women, and persons with disabilities in ports of entry and departure

Given that providing adequate meals and hygiene is impossible in the departure waiting rooms, all children, pregnant women, and persons with disabilities who are detained at airports in Korea are categorically neglected. Furthermore, departure waiting rooms are arranged only by sex; no extra facility is available for children and families with children. Therefore, children are detained together with adults who are not part of their family. During long-term detention, in addition to the risk of becoming malnourished and developing health conditions, children are deprived of the right to education. For example, an Angolan family who had applied for refugee status with four children (nine, seven and five-years old at that time) stayed at the Incheon Airport for 287 days from 2018 to 2019. During that time, children were not provided

¹¹ The Hankyoreh, Angolan family stuck in Incheon Airport for six months as they seek refugee status, 21 June 2019, https://english.hani.co.kr/arti/english_edition/e_international/898849.html

with a place to shower; instead, they showered in public restrooms. The government did not provide any daily necessities to the children, such as meals as they stayed at the transfer zone. Lastly, the children stayed at the airport where lights were always on. This treatment gravely infringed on the rights to health, education, protection, and privacy of these four children.

Conclusion & Recommendations

1. The State Party should stop abusing the referral assessment procedure at ports of entry and end long-term detention for asylum seekers at airports. The State Party should ensure the right to apply for refugee status for all applicants.
2. The State Party should routinely monitor whether people detained at airports are being detained for shortest period possible. The State Party should ensure applicants are treated in a humane manner.
3. The State Party should arrange a separate living facility outside of airports for possible asylum seekers who inevitably will be detained for an extended time at airports

4. People with Disabilities

1) Legalizing involuntary hospitalization: forced hospitalization and consented hospitalization

Although the Mental Health Act was recently revised,¹² forced hospitalization¹³ is still legal. The forced hospitalization procedures neither adequately consider the interests of persons with disabilities nor provide sufficient opportunities for persons with disabilities to express their opinion. In particular, the newly introduced “consented hospitalization”¹⁴ (hospitalization by consent) provisions are being criticized by civil society because these hospitalizations, while deemed by the government as voluntary, are involuntary hospitalization in practice.¹⁵ Persons with severe disabilities who have difficulty expressing opinions without assistance are being hospitalized through “consented hospitalization,”¹⁶ which is categorized in the government’s statistics as voluntary hospitalization.¹⁷ Per the government’s statistics, the rate of involuntary hospitalization has fallen to around 30%; yet, in practice, involuntary hospitalizations account for more than half of all hospitalizations.¹⁸ The UN Committee on the Rights of Persons with Disabilities (CRPD) has expressed concerns that Korea’s forced hospitalization procedures violate the liberty and security of persons with disabilities. CRPD further recommended repealing the provisions of the Mental Health Act that allow for the involuntary deprivation of liberty on the grounds of impairment and perceived dangerousness to themselves or others.¹⁹

2) Insufficient management of the protection process in psychiatric detention

The government introduced a process to assess a person’s suitability for hospitalization, but that process is flawed. For example, the examination period lasts for one month, but during this time, a person may be involuntarily hospitalized without any assessment. Furthermore, the regulations on qualification and condition of committee members for the examination as to legitimacy of admission²⁰ to examine and an examination period etc. are insufficient. As the result of this new examination process, the committee found that only 1.41% of cases were not

¹² Act on the Improvement of Mental Health and the Support for Welfare Services for Mental Patients

¹³ Under the Mental Health Act, there are several types of forced hospitalizations including hospitalization by legal guardians (Article 43), hospitalization by administrative bodies (Article 44), and emergency hospitalization (Article 50).

¹⁴ According to the Article 42-2 of the Mental Health Act, consent of the person’s legal guardian is required upon receipt of an application for discharge from a person who has been voluntarily hospitalized.

¹⁵ The Social Focus, “Reality of ‘consented hospitalization’ disguised as ‘voluntary hospitalization’”. Nov. 2, 2020 <https://www.socialfocus.co.kr/news/articleView.html?idxno=8819>

¹⁶ Decision by the NHRC on the petition No. 22 Jinjung 0364300 (Sept. 28, 2022), Case of 12-year-old child hospitalized forcibly is problem occurred regardless of age.

¹⁷ When compiling statistics, the government has two categories of hospitalization cases: (1) “voluntary hospitalization,” which includes voluntary hospitalizations (Article 41) and consented hospitalization (Article 42); and (2) “involuntary hospitalization”, which includes hospitalizations by legal guardians (Article 43), hospitalizations by administrative bodies (Article 44), and emergency hospitalizations (Article 50).

¹⁸ National Center for Mental Health, (2021), National Mental Health Statistics 2020, 35p.

As of 2020, the rate of involuntary hospitalization was 33.6% of all hospitalizations, but if the rate were to include consented hospitalization, the percentage of forced hospitalizations may be as high as 56%.

¹⁹ CRPD/C/KOR/CO/2-3, Para 32 (a), (b).

²⁰ Article 46 of the Mental Health Act

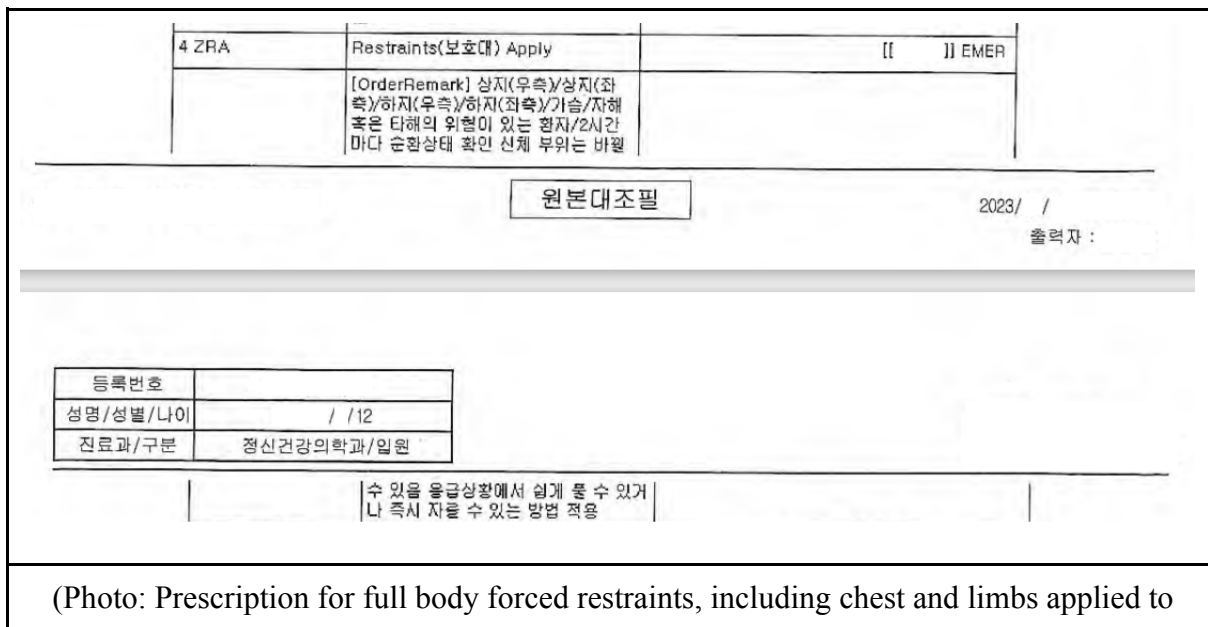
suitable for hospitalization, a figure low enough to raise concerns about whether the committee is approving hospitalization without appropriate consideration.²¹ Rather than creating a process to ensure hospitalization is used as a last resort for shortest time period possible, the current system’s shortcomings create the possibility to abuse psychiatric detention.

3) Violation of the right to access to counsel

Persons with disabilities hospitalized in a closed ward of a psychiatric hospital may only meet family and guardians at the discretion of a psychiatric doctor.²² Due to this standard, a psychiatric doctor may control—or completely deny—the time and manner in which hospitalized persons may meet with anyone, including lawyers. As such, a hospitalized person’s right to access to a lawyer is not legally safeguarded. In certain circumstances, restricted access to a lawyer could violate the rights to a fair trial, such as (1) when a person with a disability has been detained under forced hospitalization and is suspected of crime; or (2) when he or she needs judicial remedies such as an appeal for protection of personal safety.

4) Involuntary “treatments” violate the right to liberty

Treatment forced on persons with disabilities who are already involuntarily hospitalized leads to severe infringement of their liberty. Facts show that doctors have ordered the use of full body physical restraints of not only of adults, but also of a 12-year-old child with a disability.²³



²¹ National Assembly Research Service (Nov 25, 2021), ‘Problems and improvements of a hospitalization suitability examination system – based on design and operation of laws and systems and effectiveness analysis’

²² Article 74-1 of the Mental Health Act

²³ See below photo of a prescription of 12-year-old child involuntarily hospitalized.

12-year-old child)

Description:

Restraints Apply

[Order Comments] upper limb (right) / upper limb (left) / lower limb (right) / lower limb (left) / chest / patient is perceived dangerous to themselves or others / check circulation status every 2 hours and part of body to which forced restraints have been applied can be changed. Apply the forced physical restraints in a way they can be untied or cut easily in an emergency situation.

4) Abuse of forced hospitalization system to hold children with disabilities

Investigative agencies, such as the police, abuse the forced hospitalization system to detain children with disabilities who commit crimes but are under the age of 14, and thus, under Korean law, may not be arrested.²⁴ In practice, investigative agencies circumvent this restriction by forcibly hospitalizing those children, essentially placing them in detention-like conditions. Through this practice, cases arise in which the government infringes rights of those children.²⁵ For example, there are instances in which child-care institutions hospitalized or sought to hospitalize children in psychiatric hospitals on the grounds that children showed behavioral problems.²⁶

5) Reckless detention of children with adults, education rights infringement, and lack of statistics on children with disabilities

No procedure or system exists that considers the unique characteristics and best interests of children held in hospitals. No mechanism ensures the rights of children are respected in determining the duration of their forced hospitalization. As the unique characteristics of children, such as age and development status, are not considered at any stage, children who are forcibly hospitalized are held with non-parental adults. Furthermore, the system leads to severe infringement on a child's right to education. When children are forcibly hospitalized, they accrue unauthorized absences from school, which impacts their ability to return to the school they were attending prior to their detention. Nor can the child access alternative education; as children are held in closed wards, teachers are not able to provide classes in the facility.

Although the Mental Health Act does not specify the lowest age in which a child may be forcibly hospitalized,²⁷ cases of forced hospitalization of children under 14-years old have been

²⁴ According to the Article 50 of the Mental Health Act, investigative agencies like police may forcibly hospitalize (emergency hospitalization) a person in a psychiatric hospital with consent of a medical doctor when the person is presumed to be mentally ill and is highly likely to harm themselves and others.

²⁵ The Indigo, April 11, 2023, "Youngsan Police Station investigates a student with developmental disability on charges of murder of aunt, and this case was appealed to the NHRC".

<https://theindigo.co.kr/archives/47757> (last accessed 2023.8.31)

²⁶ Decision by the NHRC on the petition No. 18 Jikgwon-0000200 (May 9, 2018).

²⁷ Mental Health Act

confirmed.²⁸ However, the government does not provide data on children 14-years old and younger, obstructing any effort to assess the nature and extent of forced hospitalizations of young children.

Additional data gaps limit the possibility of developing policy around or monitoring child hospitalizations. According to the statistics provided by the government, in 2021, 4,754 children aged 15 to 19 were hospitalized in psychiatric hospitals.²⁹ However, this data shows only the total number of hospitalizations. The data does not identify the types or the period of hospitalization, substantially hindering efforts to fully monitor and analyze the rights of children held in hospitals.

Conclusion & Recommendations

1. The State Party should review the type of hospitalization without consideration of opinion of persons with disabilities in the Mental Health Act. In particular, the government should repeal “consented hospitalization”—incorrectly classified as voluntary hospitalization— as it fails to reflect the intention of persons with disabilities.
2. The State Party should strengthen a control system for involuntary hospitalization by introducing provisions on the examination period, composition of the committee member, and the method and system to determine hospitalization suitability to ensure that the system protects in practice the liberty and rights of persons with disabilities.
3. The State Party should ensure the right to access to a lawyer for forcibly hospitalized people. The State Party also should prohibit forced hospitalization as a substitute for criminal detention of children with disabilities.
4. The State Party should introduce legal standards that minimize measures such as forced “treatments” that severely restrict the liberty of persons with disabilities in order to protect the liberty and safety of forcibly hospitalized persons with disabilities. It should conduct regular inspection and monitoring to ensure compliance with legal standards.
5. The State Party should improve the system to ensure hospitalization conditions appropriately consider the age, sex, and developmental status of forcibly hospitalized children with disabilities. On a regular basis, the State Party should produce the statistics to identify the current status of forcibly hospitalized children with disabilities.

²⁸ The Hankyoreh, Mar. 28, 2023. “Tragedy of aunt who takes care of nephew as if her own child... was there blind spot caused by Covid 19?”

https://www.hani.co.kr/arti/society/society_general/1085547.html (last accessed 2023.8.30)

²⁹ Korean Statistical Information Service, “Current status on ages of patients hospitalized in psychiatric institutions sorted by types and location of institutions (2017)”
https://kosis.kr/statHtml/statHtml.do?orgId=117&tblId=DT_920023_B007&conn_path=12 (last accessed 2023.8.30) (the most current available data is for 2021).