



VOLKSANWALTSCHAFT

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Chairwoman

Contact:
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Date:
Vienna, 15 March 2013

Dear Mr Courtis,

in my capacity as present Chairwoman of the Austrian Ombudsman Board (AOB) and on behalf of the fellow members of the AOB Peter Kostelka and Gertrude Brinek I thank you for informing the AOB about the public consultation on the human rights of older persons following Human Rights Council Resolution 21/23. The AOB gladly takes the opportunity given to National Human Rights Institutions of submitting written information and sharing views and good practices regarding this topic. Please find enclosed the respective statement.

The Austrian Ombudsman Board has been independently monitoring and controlling Austria's entire public administration since 1977 by order of the Federal Constitution. The establishment of the Austrian Ombudsman Board and its legal provisions are based on article 148a to 148j of the Austrian Federal Constitution (B-VG) and the Federal Law on the Austrian Ombudsman Board (Volkasanwaltschaftsgesetz 1982 - VolksanwG) which you find enclosed for your information. As of 1 July 2012 the AOB furthermore acts as National Preventive Mechanism within the OPCAT regime. Its mandate now explicitly includes the protection and promotion of human rights. In implementation of article 16 para 2 of CRPD the AOB is also responsible for the effective monitoring of all facilities and programmes designed to serve persons with disabilities.

The Annual Reports of the AOB, which contain a special human rights and anti-discrimination section are available on the institution's website. For the full German version please see

<http://volksanwaltschaft.gv.at/berichte/berichte-bund>; for the summary in English
<http://volksanwaltschaft.gv.at/berichte/internationale-berichte>.

If you need any further information or documentation, please do not hesitate and contact Ms Ulrike Grieshofer, Head of the International and Communication Unit (ioi@volksanw.gv.at, Tel: +43 1 51 505 203).

Sincerely,



Terezija Stoisits

Enclosures

Written information submitted by the AOB

Art 148a-148j Austrian Federal Constitution (B-VG) – unofficial translation

Federal Law on the Austrian Ombudsman Board (Volksanwaltschaftsgesetz 1982) - unofficial translation

AOB Annual Report 2012 – (German version only, not to be distributed before 12 April 2013; English version available in April 2013)

Public consultation on the **Human rights of Older Persons** following the
Human Rights Council Resolution No 21/23

Information provided by the Austrian Ombudsman Board

1. Information on the main challenges related to promotion and protection of the human rights of older persons at the country level.

In the international context, the Austrian health care and social system is characterized by a very high supply level. Comprehensive social health insurance coverage is a major feature of the Austrian health care system. With a few exceptions, every citizen in Austria is covered by social security. Nevertheless, structural deficits remain and pose a risk to human rights. Some of the challenges in this regard are:

- Anchoring the right to extensive information with regard to public support services and different means of nursing and care; anchoring the right to choose among adequate housing and care options
- Taking into account the needs of older persons regarding auxiliary means (e.g. hearing devices, wheel chairs, writing aids, sign language interpreters) and how to provide support with respect to the financing and the use of such appliances.
- Ensuring self-determination and helping people to help themselves concerning preventive and conducive measures (there is no exhaustive guarantee to prevention and rehabilitation)
- Enhancing the status and position of people in need of help and care; improving protection against physical and mental violence, protection from degrading treatment and neglect
- Providing extensive information about medical and health care measures (protection from inadequate health care or nursing, e.g. prevention of incorrect medication; protection from deprivation of liberty that is not indicated)
- The right to terminal or palliative care is not legally anchored in Austria.
- There is no uniform and country-wide concept to provide comprehensive barrier-free accessibility. Public and private suppliers do not show sufficient consideration for the demo-

graphic development and the fact that it is inevitable that mobility becomes limited in old age. There is a lack of uniform and obligatory provisions demanding the implementation of barrier-free access and the – equally important – elimination of existing barriers.

2. Information on constitutions or legislation explicitly forbidding discrimination on the basis of old age, and on the existence of specific bodies which protect against age discrimination or are mandated to protect and promote the rights of older persons.

Human rights of older persons as a part of the universal human rights regime are protected by the Austrian Constitution and individual laws. The European Convention on Human Rights has the same status as the Constitution. Austria recognizes its obligations under the main human rights treaties under international and European law which naturally include direct or indirect references to human rights of older persons. As foreseen in article 25 of the Charter of Fundamental Rights of the European Union the European Union calls on Member States to recognize and respect “the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life”.

According to article 23 European Social Charter (not anchored in the Austrian Constitution) Austria committed itself to adopting or encouraging appropriate measures to ensure social rights of elderly persons with regard to participation, independence and self-determination.

Since 1 July 2012, the constitutional mandate of the **Austrian Ombudsman Board** (AOB) explicitly includes the promotion and protection of human rights. The AOB and its six expert Commissions represent the National Preventive Mechanism according to OPCAT. In implementation of article 16 para 3 CRPD the AOB is also responsible for the effective monitoring of all facilities and programmes designed to serve persons with disabilities. The actual human rights monitoring is carried out by expert Commissions set up by the AOB. On behalf of the AOB these Commissions perform (unannounced) on-site visits. Together with the AOB the Commissions act as National Preventive Mechanism to ensure compliance and implementation of the UN conventions.

The human rights mandate includes human rights monitoring of all institutions and facilities where people with and without disabilities are in danger of being particularly helpless against abuse, inhumane treatment and measures that deprive them of liberty. In practice, more than 4,000 public and private organizations and facilities fall within the remit of the AOB. The mandate of the AOB in this regard includes, for example, correctional institutions, police sta-

tions, psychiatric facilities and facilities for persons with disabilities and extends to homes for the elderly and long-term care facilities.

The six expert Commissions which perform the on-site visits on behalf of the AOB comprise of seven members each and are led by a Chairperson renowned in the field of human rights. The members of the Commissions contribute their expertise and capacities from various fields (i.e. law with a human rights focus, psychiatry, nursing, etc). The Human Rights Advisory Council was established as a consultative body to the Austrian Ombudsman Board in human rights matters. It advises the AOB particularly in determining general monitoring priorities as well as prior to determining a case of maladministration or making a recommendation.

The AOB together with its Commissions and in cooperation with the Human Rights Advisory Council scrutinizes the principle of anti-discrimination as a universally recognized part of the protection of human rights. The monitoring activities of the AOB are therefore dedicated *inter alia* to ensuring human rights of older people. The AOB follows the Comments of the Committee on Economic, Social and Cultural Rights regarding the prohibition of discrimination on the grounds of gender, racial or ethnic background, disability, financial situation or any other status.

The work of the AOB both in its capacity as an *ex post* control body regarding the public administration as well as National Preventive Mechanism under OPCAT and monitoring authority under CRPD is guided by international standards laid down in the UN human rights conventions and established by its committees as well as the standards drawn up by the European Committee for the Prevention of Torture (CPT). With regard to human rights of older persons the AOB follows the “European Charter of rights and responsibilities of older people in need of long-term care and assistance”.

Various references to age and older persons can be found in the CRPD which Austria signed on 30 March 2007 and ratified on 26 September 2008. Article 25b mentions the right to health regarding older persons while article 28 para 2b talks about the right to an adequate standard of living. As an independent monitoring authority in implementation of article 16 para 3 CPRD the reference to age-sensitive measures of protection against exploitation, violence and abuse in this article is of particular importance to the AOB. Even though ageing cannot be equated to a disability, many older persons are persons with disabilities. The CPRD thus covers their human rights in this regard. During the on-site visits the Commissions scrutinize whether persons with disabilities are adequately and safely accommodated and that there is a sufficient number of staff available. Clear guidelines and safeguards for cases of deprivation of liberty

are indispensable. The AOB and its Commissions also focus on measures to ensure equal access to justice and public services.

The **Austrian Ombud for Equal Treatment** (*Gleichbehandlungsanwaltschaft*) is an independent state agency that seeks to ensure the right to equality and equal opportunities and to combat discrimination. The statutory basis for the work of the Ombud for Equal Treatment is the **Federal Equal Treatment Act**, Federal Law Gazette No. 100/1993 (Bundes-Gleichbehandlungsgesetz). The Equal Treatment Act prohibits discrimination on the grounds of Gender, Ethnicity, Religion, Belief, Sexual Orientation and Age. The Ombud for Equal Treatment provides advice, support and information in equality issues. It consists of three independent parts with respect to their legal competences. One of the three parts is in charge of equal treatment irrespective of Ethnic Origin, Religion or Belief, Age or Sexual Orientation in Employment and Occupation. Section 13 Equal Treatment Act explicitly prohibits discrimination on the grounds of age in employment and occupation.

The **Federal Senior Citizens Advisory Council** (*Bundesseniorenbirat*) was established by the Federal Act on the Promotion of the Interests of the Older Generation or **Federal Senior Citizens Act**, Federal Law Gazette No. 84/1998 (Bundes-Seniorengegesetz). Its main task is to represent the interests of the older generation vis-à-vis political decision-makers at a national level. The Federal Senior Citizens Advisory Council makes proposals for social, economic, health policy, housing policy and cultural measures in senior citizens' policy. It draws up a long-term senior citizens' plan including proposals for financing the implementation of the plan and makes statements on draft bills and regulations which might affect the interests of senior citizens (section 11 para 2 line 2 of the Federal Senior Citizens Act). The **Senior Citizens Council** (*Seniorenrat*) is the umbrella organization of senior citizens' organizations. With the same rights as the legal representative bodies of employees, business people and farmers in all matters it is the official representative body of older people in Austria. This ensures that the representation of the interests of older people at national level has the same legal rights and status as that of other groups. Senior citizens' rights to co-determination have thus been extended into the following areas: the active design of future senior citizens' policy in Austria, the Commission of Experts on Pension Reform, the autonomous administration of the social insurance institutions and the Advisory Council of the Federation of Austrian Social Insurance Institutions.

Further bodies that might be of specific relevance to older people are the **Patients' Advocates** (*Patientenanwaltschaf*ten). They offer assistance and represent patients with

regard to their concerns in matters of health, hospitals and nursing homes in the nine Federal *Laender*.

3. Information on specific national legislation, national policies, strategies and plans of action adopted to ensure the equal enjoyment of rights by older persons, particularly in the areas of prevention and protection against violence and abuse, social protection, food and housing, employment, legal capacity, access to justice, health support, long-term and palliative care.

In Austria, the right to liberty as a fundamental right is anchored in the **Constitution**. Article 5 para 1 of the European Convention on Human Rights 1958 was elevated to constitutional status by Federal Constitutional Law, Federal Law Gazette No 59/1964. According to article 2 para 1 **Federal Constitutional Law on the Protection of Personal Liberty**, Federal Law Gazette No 684/1988 (Bundesverfassungsgesetz über den Schutz der persönlichen Freiheit) a person may be deprived of his/her personal liberty only in the cases and in accordance with the procedure prescribed by law.

Article 7 para 1 Federal Constitutional Law (Bundes-Verfassungsgesetz, B-VG) sets forth that all nationals are equal before the law and that privileges based upon birth, sex, estate, class or religion are inadmissible. No one shall be discriminated against because of his/her disability. As foreseen in this article, the Republic (Federation, *Laender* and municipalities) is obliged to ensure the equal treatment of disabled and non-disabled persons in all spheres of everyday life. Based on article 7 Federal Constitutional Law barrier-free accessibility is to be implemented country-wide.

In Austria, there are national laws such as the **Nursing Home Residence Act**, Federal Law Gazette No. 11/2004 (Heimaufenthaltsgesetz, HeimAufG) and the **Hospitalisation Act**, Federal Law Gazette No. 155/1990 (Unterbringungsgesetz, UbG) which stipulate in detail the requirements of measures depriving a person of his/her liberty in nursing homes, homes for the elderly, facilities for people with disabilities, hospitals and psychiatric facilities. It is worth mentioning that deprivation of liberty under these federal laws is only admissible if both the substantial as well as the formal criteria stipulated in the two acts are fulfilled. Deprivation of liberty in institutions with regard to older persons, persons with disabilities or people in need of care may never be justified on organizational grounds or deficiencies (e.g. lack of staff, structural defects, or inadequate infrastructure). Deprivation of liberty by electronic or mechanic means or medication can be considered only as a last resort. Turning to such measures in a

concrete situation requires, among other factors, that the mental disease or disability poses a severe threat to the health or life of the person concerned.

The conditions and terms with respect to housing in homes for the elderly are *inter alia* laid down in sections 27b to 27i **Consumer Protection Act**, Federal Law Gazette No 140/1979 (Konsumentenschutzgesetz, KSchG) as well as in the nursing home acts of the Federal *Laender*. The relevant provisions in the Consumer Protection Act stipulate certain aspects of nursing home contracts subject to civil law. According to section 27d para 3 Consumer Protection Act these contracts shall contain provisions regarding the patient's personal rights (e.g. right to privacy, right to respect of his/her correspondence, right to political and religious self-determination, freedom of expression, assembly and association, right to contact with the outside world, right to equal treatment and prohibition of discrimination, right to adequate medical treatment, right to individual clothing).

The Austrian **Tenancy Act**, Federal Law Gazette No 520/1981 (Mietrechtsgesetz, MRG) refers to housing for older persons in its section 12 which governs special apartments for older persons. Apartments have to fulfill three prerequisites to qualify as a "senior citizen apartment": the individual apartments and the common areas of the building must cater to the needs of older persons; there is basic supply of social services for older persons to the tenant, and at the time of concluding the rental contract the tenant must be 60 years or older. Section 12 para 3 Tenancy Act excludes the right of family members to take over the rental contract. It is thus more attractive for limited-profit housing associations to offer such apartments to senior citizens. Section 30 para 7 Tenancy Act restricts the landlord's right to terminate the lease while the tenant is temporarily absent due to illness or rehabilitation.

Two provisions of the Austrian **Penal Code**, Federal Law Gazette No 60/1974 (Strafgesetzbuch, StGB) contain special provisions providing particular protection for defenseless people. Section 92 Penal Code particularly penalizes persons who cause physical or emotional pain to another who is defenseless due to his/her delicate health, illness or mental disability. Under section 205 Penal Code, those who - taking advantage of the situation - sexually abuse a defenseless person face a sentence of imprisonment between six months and five years.

The **Federal Ministry for Labour, Social Affairs and Consumer Protection** aims at raising awareness about the occurrence of violence and abuse concerning older persons by publishing brochures and folders. In 2009 the Ministry started a **series of brochures** regarding this topic which are published yearly on the International Day of Violence against Older People. In 2009 the folder was dedicated to "Recognizing Violence. Questions and Answers on Violence

Against Older People". It talks about the various faces of violence towards older persons, such as financial exploitation, restricting a person's free will, manipulation during the drawing up of wills, neglect, mental cruelty and physical violence. In 2010 the Ministry published a folder on "Recognizing Violence. Questions and Answers about Dementia and Violence" dealing with the challenge that dementia represents for those suffering from this disease and their environment. A lack of knowledge about the condition and its consequences leads to misjudgments, false hopes and excessive demands being placed on people, which can escalate and trigger acts of violence. The third folder was published in 2012 and covers the topic of "Recognizing violence. Older Persons in Institutions" showing the living conditions of older persons in medical and social institutions and the danger of abuse in such institutions. The Federal Ministry for Labour, Social Affairs and Consumer Protection conducted a survey in order to gain a quantitative estimate of the problem of violence against older people, to obtain a systematic overview of details about individual forms of violence, and to reveal the possibilities for the establishment and networking of counseling services in Austria. 247 experts in Austrian counseling and advisory facilities were surveyed. Another major focus is a study comparing different concepts and measures worldwide regarding the prevention and intervention in case of occurrence of violence. In order to improve consulting services concerning abuse towards older people the Federal Ministry together with NGOs conducts trainings for advisers and counselors in senior citizens organizations.

As foreseen in section 11 para 2 **Federal Senior Citizens Act**, Federal Law Gazette No 84/1998 (Bundes-Seniorengegesetz) a **long term senior citizens plan** was adopted by the Federal Senior Citizens Advisory Council, the Government and the National Assembly. This Federal Plan aims at guaranteeing and improving the quality of life of older persons in Austria. The Federal Plan „Ageing and Future. Federal Plan for Senior Citizens“ is based on a comprehensive scientific analysis and was drafted in cooperation with all relevant social stakeholders (Federal Ministries, Federal *Laender*, Austrian Association of Municipalities, Austrian Association of Cities and Towns, Senior Citizens Council). The centerpiece of the Federal Plan are goals and recommendations in 14 areas (participation, economic situation, employment, health, education, older women, generations, housing and mobility, care and nursing, social security, media, discrimination and violence, migrants, infrastructure).

As regards the labor market, the Austrian Public Employment Service (AMS) specially focuses on the integration of older, unemployed women. Individuals receive free counseling if they are at risk of losing their job e.g. due to health problems.