Written Contribution - Austrian Ombudsman Board

AUSTRIAN
OMBUDSMAN BOARD

Introduction:

Since 1977, the Austrian Ombudsman Board (AOB) has been a highest organ and independent in the performance of its duties as stipulated under Austrian constitutional law. Any person affected by maladministration by authorities can file a complaint. As of 1 July 2012, the AOB has an additional mandate under Austrian constitutional law to protect and promote human rights. This mandate tasked the AOB with the responsibility of an independent authority under article 16 paragraph 3 CRPD and with the responsibilities within the scope of the National Preventive Mechanism in accordance with OPCAT.

At any time, the AOB can independently undertake unannounced visits to facilities and programmes designed to serve persons with disabilities. For this purpose, the AOB has set up six Commissions with 58 members, which are pluralistic in their composition, to undertake these visits. Additionally, persons with disabilities who are professional peer counsellors can assist the Commissions during their monitoring and control visits. Interpreters can also accompany them and persons experienced in non-verbal and/or facilitated communication. Since 2012, 454 visits in sheltered workshops or residential facilities for persons with disabilities as well as 151 visits to psychiatric hospitals have been carried out.

For monitoring the Commission members are vested with comprehensive powers. They have the right to access all rooms and areas of the visited facilities, can view all documentation and conduct conversations in a protected, non-coercive and anonymous atmosphere with residents, patients, family members and employees of the institutions.

If the results raise concerns in respect of human rights, the ombudspersons initiate investigative proceedings and gather statements from the competent supervisory authorities and/or the competent highest administrative entities. After completing an investigative proceeding, an official determination of maladministration can be made and publicly reported to the National Council and/or the Diets (with the exception of Vorarlberg). The AOB also participates in a weekly programme on Austrian state television where it discusses its work with representatives of public authorities. We pay close attention to ensure that there are no reports about persons with disabilities but that they present their concerns themselves, with assistance as needed.

In addition to the six Commissions, a Human Rights Advisory Council has been established and advises the AOB in the determination of general investigative focal points, the definition of investigative standards and prior to issuing determinations of maladministration and recommendations. The members were nominated by Federal Ministries and by NGOs and have wide-ranging experience. In the establishment of its preventive activities regarding the protection and promotion of human rights, experts from the Council of Europe were assisting the AOB. As far as OPCAT is concerned, the AOB is part of several NPM networks (eg. South East Europe NPM network, the network of German speaking NPMs etc) and also cooperates with international partners. The AOB sends a written report about its preventive work to the SPT once a year.

Since 2009 the AOB also hosts the headquarters of the International Ombudsman Institute (IOI), the only global organisation promoting the ombudsman concept worldwide, fostering mutual exchange among its more than 190 member institutions. Over the last years the IOI has put a special focus on preventive human rights work in its training modules and thus contributed to the teaching of NPM staff in many countries.

Summary:

Despite some progress in various areas the rights of persons with disabilities are still not uphold in a sufficient way in Austria. In its report, the AOB tries to draw a comprehensive picture of the problem areas persons with disabilities have to face. Some examples are as follows:

Persons with disabilities are not just portrayed as “poor victims with deficiences”, as a study of the AOB showed, they also cannot enjoyed the rights they are given. Although, the Federal Act *Equal Treatment of Persons with Disabilities Act* guarantees in theory the accessibility to all publicly available goods and services still many premises, including doctor’s offices, are not barrier-free accessible.

Self-determination in all areas of life, including sexuality, is still not granted within and outside institutional settings. This ranges from taking own decisions in everyday life to forced measures of deprivation of liberty. Deinstitutionalisation and the granting of personal assistance to enable a self-determined life are still underdeveloped. Especially persons in psychiatric hospitals are predominately controlled by others.

Regarding the unjustified use of restrictions of liberty, the AOB observed many insufficiencies and identified the several risk factors like staff shortages, high personnel turnover, the size of facilities, lack of support for the pedagogical personnel, unapt building structures, insufficient possibilities to retreat, missing psychiatric diagnosis, inapt treatment concepts, lack of occupational and therapeutic possibilities as well as lack of communication.

When accessing the regular labour market persons with disabilities still face discrimination. After being found to have a “performance capability” of less than 50% the usual support mechanisms cannot be applied. Instead, they are put in occupational therapy workshops where they receive only pocket money. Although equality among children is prescribed by the Austrian constitution, children with disabilities still face, in many instances, rejection in nurseries or schools and often referred to special institutions.

However, also positive steps have been taken. Children with disabilities are included in the Nursing and Residential Homes Act, net beds have been prohibited, the 2nd Adult Protection Law amended the legal guardianship model comprehensively, the Detention of Mentally Ill Offenders Act has been released, a pension scheme for victims of child abuse in children’s homes has been created and the Monitoring Committee’s independence enhanced.

General principles

The German translation of the Convention on the Rights of Persons with Disabilities incorporated into Austrian law was changed by the Austrian parliament in 2016. The current text was agreed on between parties involved, after an intense participation of civil society groups had taken place. Inter alia the changes concerned the introduction of the expression “Inklusion” instead of “Integration” as well as the translation of “living independently”. It has been changed to the more accurately reflection of the meaning of the particular concept.

In Austrian law and in particular among its various regional laws of the *Bundesländer* differing concepts and definitions of disability still exist. However, some *Bundesländer* changed their legal definition of disability and tried to adopt a wording, which is supposed to meet the UN-CRPD demands. However, it is still inherent in the Austrian federal system that an undue fragmentation of policies can be found. Since the *Bundesländer* are, to a large part, providers of social services for persons with disabilities, differing regulations can be found in the various regions. To put it differently, the way rights of persons with disabilities are met in Austria varies from region to region. With a view on the overlapping issues and responsibilities between the federal and the regional governments or parliaments the situation is not only confusing but also prone to enable legal loopholes with a view to persons with disabilities.

Equality and non-discrimination (Art. 5)

In principle, the protection of persons with disabilities against discrimination should be well established in Austrian law as the prohibition of discrimination is codified in the Austrian constitution. However, as the Committee rightly pointed out in its concluding observations in 2013, the only remedy available to victims of discrimination based on disability is, with the exception of employment law, financial compensation. To give an example, the Federal Act of *Equal Treatment of Persons with Disabilities* (*BehindertengleichstellungsG*) regulates that all publicly available goods and services must be accessible in a barrier-free way. The law provided for a 10-year transition period for private shops or restaurants and the provision is, in principle, a big step forward for the removal of barriers to equality and non-discrimination.

However, the period ended in December 2015 but still many premises are not barrier-free and the protection against discrimination has its flaws. With a view to existing barriers, public authorities do not monitor the fulfilment of the obligations according to the law, but persons with disabilities themselves are forced to initiate discrimination procedures for each location. Even if the relevant authority determines a case of discrimination on the grounds of access

barriers only a financial contribution can be granted. The claimant cannot enforce the removal of the barrier. The Austrian Ombudsman Board (AOB) is still receiving numerous complaints regarding the lack of a barrier-free environment.

A further aspect of discrimination is the cliché-like way persons with disabilities are portrayed in most Austrian media. A study conducted by the AOB showed that disabilities are mostly described as deficiencies as well as causes for suffering and misery. Abilities of persons with disabilities and the reporting of environmental barriers are eminently underrepresented in the media coverage. In course of a NGO workshop hosted by the AOB civil society representatives for persons with disabilities expressed clearly that the common media coverage discriminates against persons concerned.

With a view to discrimination in the context of abortion law, there has been no further public discussion about the changing of the law. Under Austrian law, a foetus still may be aborted up to the onset of birth, if serious damage to the health of the foetus can be expected.

Women with disabilities (art. 6)

Women in general face a higher risk to become victims of violence and abuse than men do. The AOB co-organized a university lecture series called “1 out of 5” tackling the problem of women’s exposure to risks of violence. In course of this series, it was stressed that women with disabilities are particularly vulnerable due to combined discrimination factors.

The AOB and its Commissions focus more intensively on the challenges women with disabilities have to face in institutions and to detect in particular factors for indirect discrimination. Recently, the AOB examined, for example, the approach to sexual self-determination in institutions. While some institutions completely ignore this issue as irrelevant others focus rather on male perspectives with the aim to calm male clients with disabilities and lower potential risk of aggression. The AOB therefore continuously stresses the importance and the equal right to sexual self-determination for female and male persons with disabilities especially in institutions.

However, during visits of the AOB Commissions institutions could also be identified which uphold the right of sexual self-determination for women and men in a sufficient way. With a view to transgender or intersex persons, the AOB did not come across any person concerned in the institutions visited.

Children with disabilities (art. 7)

The AOB has been confronted with numerous complaints of families whose children with disabilities are discriminated against. Although equality among children is prescribed by the Austrian constitution, children with disabilities still face, in many instances, rejection in nurseries, schools, sports associations, youth groups and the like. Parents are often referred to special institutions for children with disabilities. The lack of a barrier-free environment, liability issues, shortage of individual support and lack of knowledge result in separation and hinder inclusion.

Furthermore, the AOB detected a lack of sufficient job qualification programmes for children with disabilities under 18 years of age. Especially children with multiple disabilities have in many cases practically no chance to enter the primary or mainstream labour market. If persons with disability are "classified" with a capacity to work of less than 50% they are excluded from the regular support programmes of the federal unemployment agency. This means that those minors cannot enter regular apprenticeships or jobs. The classification is based on medical diagnosis and individual deficits rather than abilities and chances. The AOB regards the classification scheme as arbitrary and rigid.

To promote equality, special institutional structures for children with disabilities should be reduced and inclusive education structures further promoted. In this context, the AOB wants to stress that many of the "special institutions" and "special schools" for children with disabilities offer good services through highly engaged personnel. Furthermore, many parents also wish their kids to be educated or looked after in special institutions. Nevertheless, existing discriminatory structures and separation of children are consolidated through the promotion of those institutions.

Structural deficits exist also in both the outpatient and inpatient areas of child and adolescent psychiatry regarding the care provided. Countrywide there is a need of 670 to 1089 – depending on the calculation - treatment beds based on the bed benchmark for the child and adolescent psychiatry whereas only 370 beds are actually in place. This inadequate care situation causes extreme pressure in some child and adolescent psychiatry wards. The lack of beds results in extended waiting times and shortened stays with frequent overcrowding. The treatment of patients among others suffers from permanent high stress levels of personnel. Furthermore, the low care density resulted, e.g. in the year 2015, in 191 children and adolescents having to be admitted to adult inpatient psychiatry in one *Bundesland*.

The grave consequences of the insufficient care situation culminated in the rape of a 13-year old patient by an adult patient in a psychiatry ward for adults in 2018. The analysis of the circumstances is still ongoing during the passing of the submission deadline of this report.

In any case it is absolutely necessary and urgent to increase the bed capacity for children and adolescents as quickly as possible.

Also the view of the general public in Austria towards children with disabilities is of concern for the AOB. In the abovementioned media study conducted by the AOB it could be shown that children with disabilities are predominantly portrayed as “poor victims” and recipients of charity activities. Extended awareness-raising to change old-fashioned views and pictures is therefore still important.

Positive developments took also place since 2013. Austrian lawmakers took an important step towards better protection of children with disabilities against unlawful deprivation of liberty. The Nursing and Residential Homes Act regulates measures of deprivation of liberty in the context of persons with disabilities. The Act grants special protection and regulates the legality to apply means of deprivation of freedom. Prior to its introduction, there was no comparable legal protection in this area.

The law prescribed that if restrictions are carried out, the so-called Residents’ Representatives who are specially trained professionals, must be informed by the institution. They are entitled to visit homes without prior announcement and to assess the restriction. They can request a court review of the legality of the measure.

However, before the recent change of law the regulations were only applicable to old people’s homes, nursing homes, homes for the disabled and other facilities in which “at least 3 mentally ill or mentally disabled persons could be cared for”. Homes for juveniles under the supervision of youth welfare authorities were exempted from those regulations.

In course of OPCAT-visits in youth institutions, the AOB realized that children in certain institutions did not enjoy the same level of protection as adults due to this legal loophole. After intensive lobbying by the AOB and the Residents’ Representatives the law had been amended and all institutions for minors under the supervision of the youth welfare authorities are now included in the scope of the Act. As an additional advantage even non-age-appropriate restrictions of children without disabilities in youth welfare institutions can be monitored more easily.

Awareness-raising (Art. 8)

As mentioned under Art. 5 and 7 the importance and need for further awareness raising to fight prejudices against persons with disabilities, to promote equality and to create a countrywide consciousness of the rights of persons with disabilities in Austria are obvious.

The AOB views the promotion of a comprehensive deinstitutionalisation as one of the most important steps for awareness-raising. It would be an important result of an overall paradigm shift. Enabling persons with disabilities to live independently and being included in the community would certainly increase awareness for equality and result in positive perceptions towards persons with disabilities.

Accessibility (Art. 9)

Barrier-free accessibility cannot be taken for granted in Austria even though law prescribes full accessibility in public buildings. Numerous complaints about the lack of accessibility in public facilities triggered an awareness-raising initiative by the AOB with the goal to highlight problem areas. Public debates, open forums and conferences in cooperation with media representatives were organized.

However, the AOB observed on many occasions that some operators and even public authorities have misconceptions of disability and barrier-free accessibility. One supervisory authority argued, for example, that, contrary to the observations and opinion of an AOB Commission, an accommodation was barrier-free. In the respective home wheelchair users could only use exits with the help of staff providing mobile ramps. The residents were therefore dependent on the assistance from personnel every time they wished to exit the location.

A lack of barrier-free accessibility is also evident in other inappropriate layouts and furnishings in many institutions and facilities for persons with disabilities including the absence of elevators, non-accessible doors, too high reception counters or cloakrooms or sanitary facilities, which are unsuitable for wheelchair users.

However, not just facilities for persons with disabilities are concerned. As mentioned above, all places, goods, services and information, which are intended for the public, must be fully accessible and barrier-free as prescribed by law. For public federal buildings, the deadline was extended by another four years until the end of 2019.

Under the Federal Act on the Equal Treatment of Persons with Disabilities *(Bundes-Behindertengleichstellungsgesetz)*, buildings, public transportation and communication systems are deemed accessible if "they are accessible and usable for persons with disabilities in the generally customary way, without particular difficulty and without assistance".

The accessibility requirement refers to physical barriers. However, shops, restaurants or medical practices can often be reached only by means of steps, ramps that are too steep or elevators that are too narrow for a wheelchair. In addition, barriers on public streets, e.g. high kerbs, pavements that are too narrow or lack a guidance system for the blind are theoretically prohibited. An important area also concerns frequently existing barriers in communication, e.g. texts with complicated wording that are difficult to understand, films without closed captioning and the absence of translations into sign language.

A significant limitation of the legal provisions is the rule that only compensation for damages must be paid, if the existence of a barrier has been determined. There is no obligation to eliminate the barrier itself. The AOB – like many other human rights bodies – advocates for an entitlement to the removal of barriers, which must be enshrined in the law. The AOB also criticises the further extension of the deadline to ensure accessibility in public federal buildings. Complaints about the lack of accessibility in public institutions are a perennial issue for the AOB. Persons with disabilities are affected by the lack of accessibility in hospitals, day care centres for children, retirement and nursing homes, and other public buildings, for example.

Furthermore, the *Federal Act on the Equal Treatment of Persons with Disabilities* is only applicable for matters ruled by federal law. Within the realm of competence of the *Bundesländer* the law only applies to private contract law matters (e.g. buying goods in a shop). The laws of the *Bundesländer* vary from each other. Each *Bundesland* has its own building code with varying regulations. Furthermore, some *Bundesländer* passed anti-discrimination laws. However, those are also varying, which is inherent to the federal structure of Austrian legislation. Consequently, AOB Commissions visited institutions for persons with disabilities, which did not fulfil barrier-free accessibility criteria even after 2016.

The AOB also emphasised that the right to have access to free or affordable health care must be available to persons with disabilities to the same extent and in the same quality as to those without disabilities. The AOB has demanded a rapid improvement of the current inadequate situation. Most doctors' offices are not or only partly accessible and not

sufficiently equipped with facilities for persons disabilities. Better information and awareness-raising about accessible entries to doctors' offices as well as on equipping doctors' offices for the needs of persons with disabilities is therefore needed.

Furthermore, many complaints about poor accessibility at railway stations and the lack of facilities for persons with disabilities on trains have been brought to the AOB attention.

The AOB is also frequently faced with complaints about communications barriers and has been able to achieve success in some areas: for example, upon recommendation by the AOB, the provision of a sign language interpreter free of charge in interactions with social security institutions has been enshrined in the law. The AOB has been demanding an improvement of offerings for hearing- and visually impaired persons by public television (ORF) for a long time. It has also been advocating so-called telephone relay centres that enable hearing- and language-impaired persons to speak on the telephone with hearing and speaking persons.

Equal recognition before the law (art. 12)

After intense criticism on the legal guardianship model a new law, the 2nd Adult Protection Law (*2. Erwachsenenschutzgesetz*), regulating adult protection had been passed and came into force on 1 July 2018. The AOB was intensely involved in the revision of the law within the framework of regular meetings, working and discussion groups.

It contains essential principles and regulations, which include self-determination at the core, thorough clarification of support requirements by adult protection associations, more rights for affected persons and their relatives, a temporary regulation as a matter of principle that is reflected in a hierarchical support structure. The objective is to maintain the autonomy of every person for as long as possible, to support persons concerned occasionally with their affairs and to refrain from making decisions without first consulting them. To this end, four hierarchical forms of representation were planned depending on the level of support the person needs. Close relatives are included in an appointment procedure.

In future, lawyers and notaries can only take on more than 15 representations if they are registered in the "List of specially qualified lawyers and notaries". A pre-requisite is the guaranteed quality of support through adequate staffing with qualified personnel. Professional chambers manage and monitor the list. The continued necessity of adult representation for the affected persons must be examined every three years.

Furthermore, the courts are important stakeholders in adult protection. The paradigm shift intended by the law requires amongst others an intensive cooperation with the adult protection associations, which require the corresponding staffing and equipment.

The AOB hopes that with the coming into force of the Adult Protection Law many of the previous complaint cases will no longer occur.

In previous years, mostly affected persons or their close relatives contacted the AOB. Predominantly, criticisms were aimed at the legal guardianship itself, expert opinions obtained to this end as well as too little influence of family members when professional legal guardians were appointed. Many persons complained that not enough money was provided, even when high income, pensions and savings were available. There were complaints that legal guardians made arbitrary decisions regarding the property of the affected persons. Restrictions to the way those affected were accustomed to living their lives resulting from the legal guardianship were also the subject matter of complaints.

Many complainants criticised the derogatory treatment they felt they received from law firms acting as professional legal guardians. It was perceived, for example, as humiliating to have to “chase” pocket money because some guardians did not pay money for weeks to their clients or could not be reached during holiday periods. Complaints were also filed because of the failure to comply with the prescribed monthly contact. The reason for this neglect was suspected amongst others to be the large number of legal guardianships taken on, in particular by law firms specialised in this field.

The desperation of the affected persons was often obvious for the AOB during in-person contacts with them or their close relatives. Persons, who due to illness could not file an application with the relevant court regarding an individual legal guardian or the performance of their legal guardianship role, were unable to change a situation that they did consider unacceptable. Concerned persons, such as relatives, friends and neighbours, had no standing before the court and therefore had no right to file an application.

After the passing of the new law, the AOB will continue to articulate the concerns of the people – attentively and dedicatedly – and urge for evaluation of the law in due time.

Liberty and security of the person (art. 14)

Hospitals and psychiatric wards

The deprivation of liberty in hospitals and psychiatric wards is strictly regulated by law but reality shows that in practice the AOB discovered several structural deficits.

The Austrian Supreme Court decided, for example, in a landmark decision that security personnel without medical and/or nursing training is not permitted to participate in the restriction or deprivation of liberty. They are not authorised to assist in restraining patients or carry out any physical activities such as holding on to patients to prevent them from leaving the ward. The involvement of security services in care activities is therefore impermissible. Nevertheless, the AOB and its Commissions observed, that security services are deployed for care purposes in several institutions.

In one *Bundesland* employees of the house fire brigade were called in regularly to help in the event of an escalating situation. In another hospital security personnel was regularly charged with the transfer of patients from the outpatient area to the locked area. In one case, even a security employee accompanied an eleven-year-old patient to the locked ward even though his mother was present.

In another *Bundesland* patients who might harm themselves or others were transferred from hospital to a psychiatric hospital. They were escorted by the police only and put in handcuffs. Transfers to other hospitals are still often carried out without patients being accompanied by doctors or psychiatrically trained personnel in this *Bundesland*. Similar practices were also observed in other regions in Austria.

Measures that restrict freedom must be specially prescribed by the attending physician, documented and reported immediately. The involuntary placing of patients must also be reported immediately to the patient advocacy or competent court. The Supreme Court stipulated that these notifications must be submitted immediately without exception. The AOB, however, observed that some hospitals did not comply with this legal provision.

Measures that restrict freedom are also only permissible if they are applied as a means of last resort to avert danger to the life or health of the patient or others, if they support medical treatment or care, and if they are not inappropriate. A measure that restricts freedom can thus not be justified with organisational, personal or business-related reasons. An involuntary placement without a doctor's certificate is only permitted in the event of imminent danger.

Public safety officers are obliged in general to bring a person, who they consider requires involuntary placement reasons, to a doctor or to call a doctor. If the doctor certifies that the conditions for involuntary placement are given, the police must bring the person affected to a psychiatric ward or organise the same. Only in the event of imminent danger can the police bring the person affected to a psychiatric ward without a medical examination and doctor's certificate.

In reality, however, the exception is becoming the rule. In rural areas in particular it can be observed that the relevant qualified doctor for examinations and certificates pursuant to the Hospitalisation of Mentally Ill Persons Act is often not available. In some regions, it is becoming increasingly difficult to fill permanent positions or to find municipal or district doctors.

Police officers have made it clear in interviews with the AOB Commissions that it is extremely stressful for them to have to decide autonomously whether a person displaying behavioural disorders is suffering from an illness, which, due to the risk of acute and considerable harm to themselves or others, justifies the involuntary placement in a psychiatric hospital. It also happens that the originally perceived escalation eases during the forced hospitalisation and that doctors in the psychiatric ward do not see a reason for admitting the person. This repeatedly causes conflict between all of those involved and questions the legitimacy of state actions in this area.

Another point of criticism was the fact that, as observed by the AOB, restraints sometimes are not carried out in a suitable environment but in e.g., hallways of the locked area of the ward.

In general, psychiatry patients deplored, in many confidential interviews with AOB Commissions, the unwillingness to speak after traumatising experiences. Debriefings are currently not widespread. The AOB recommended therefore informing patients and involving them in the decision making processes. The AOB is convinced that the necessity to explain, justify and offer support during and after the exercise of coercive measures is vital. Conducting interviews on equal footing and dealing with the experiences of mentally ill patients in a respectful manner not only reinforces the self-esteem of the patients and their compliance in availing of psychiatric care services, it also supports questioning internal organisational processes and methods.

Currently it is not possible to compare involuntary hospitalisation or forced interventions on a national level due to a lack of relevant data and research. The AOB would like to see the

introduction of benchmarking for coercive measures in psychiatric clinics. This would improve transparency considerably and be of key importance in both quality management in hospitals and in terms of safeguarding human dignity and the legal status of patients. The AOB in line with the Committee for the Prevention of Torture repeatedly demanded an anonymised central register for recording measures that restrict freedom. Such a register could contribute to an effective and systematic prevention strategy aimed at reducing such measures. Since many medical facilities are reluctant to introduce such a register, the AOB demand a change in the law.

A growing matter of concern is the intercultural care of patients which is becoming increasingly difficult throughout the country. Language barriers in particular cause communication problems, which can have a negative effect on the care situation and the medical treatment of patients. For this reason, video interpreting systems have been installed in some medical facilities in order to professionalise the basic framework for interviews and facilitate translation in several languages. The AOB recommended the continuous expansion of video interpreting services in hospitals.

Another matter of concern are medication-based measures that restrict freedom in psychiatric hospitals. Calming down patients by way of medication in the psychiatric context is subject to the Hospitalisation of Mentally Ill Persons Act regarding medical treatments. These regulations trigger the judicial protection of patients who are affected by such treatments. After visits in psychiatric hospitals, the AOB Commissions have additionally raised the question to what extent sedation within the area of application of the Hospitalisation Act should be considered as medication-based restriction of freedom and must therefore be documented separately and reported. In practice this does not occur. Patient advocates are only notified when restraints are used and can then access medical histories of the affected patient. Physicians in psychiatric wards and clinic managers are of the opinion that medication-based interventions, even against the will of the persons affected, are not restrictions of freedom or they are not applied to restrict freedom, but are rather a necessary part of psychiatric treatment. They state that this is why the Hospitalisation Act provides for special regulations for medical treatment including special curative treatment.

In contrast, the AOB, in line also with CPT recommendations, emphasises that excited or violent patients, who are subjected to a medication-based measure, should in principle enjoy the same protective measures as patients who are subjected to other forms of restriction of

freedom. Therefore, medication-based restrictions of freedom in psychiatric hospitals should be recorded in central registers for such measures and patient advocates should be notified.

Facilities for the detention of mentally ill offenders and follow-up care facilities

The monitoring of the living conditions of persons who were mentally ill when they committed criminal offences and were deprived of their liberty for special preventive reasons is at the core of the AOB human rights mandate. A court may order that "preventive measures" be taken with respect to these persons – in addition to or in place of the punishment. It depends on whether said persons could be held accountable for their actions at the time of the crime.

"Preventive measures" are ordered for an indefinite period of time. They are to be carried out for as long as their purpose requires. This does not preclude life-long detention and is precisely why placement of persons in facilities for the detention of mentally ill offenders is particularly sensitive from a human rights perspective. Any encroachment on personal freedom may only continue for as long as "necessary". One may only be deprived of personal freedom "if and to the extent that this action is not disproportionate to the purpose of the measure" (Art. 1 (3) of the Federal Constitutional Act on the Protection of Personal Liberty). However, due to the secluded detention and special situation for the detainees their legal protection is not always guaranteed. The AOB, therefore, demands for years that improvements in this regard have to be provided by the law and implemented.

The AOB observed serious deficiencies, which included a lack of treatment alternatives, placement among regular prisoners, overly long detentions due to a lack of after-care facilities, too few experts and a lack of quality standards for the preparation of expert opinions. Persons being held in detention frequently told the AOB that they desired more transparency and information regarding decisions to loosen prison rules.

Based on these observations, the AOB demanded a fundamental, in-depth reform: facilities for the detention of mentally ill offenders should be made more treatment-oriented and humane. In June 2014, the Federal Minister established a working group for this task. More than 40 experts from different areas of detention in facilities of the penitentiary system and detention of mentally ill offenders participated in this working group, including a representative of the AOB. At the beginning of 2015, the group submitted a 96-page final report with a requirements catalogue.

Based on the working group's proposals and recommendations, some organisational improvements were made to better assign prisoners with mental health care needs to

facilities where they can receive the best possible treatment. Nevertheless, it took two and a half years before the draft of the Detention of Mentally Ill Offenders Act (*Maßnahmenvollzugsgesetz*) was presented before the public.

The Federal Minister acknowledged that the detention of mentally ill offenders is embedded in criminal law. The criminal courts have full jurisdiction: from temporary imprisonment to a complete refusal to imprison. In the future, persons will be placed into modern forensic therapeutic centres, which will offer care and treatment. The long-outdated designation of the persons detained in these facilities as “mentally disturbed” is now abandoned. Instead, the draft speaks of “criminal offenders with serious mental disorders”. According to the authors of the draft, more than 90% of the working group’s recommendations from 2014 will be implemented if it becomes law.

However, some items in the draft do not meet the AOB expectations. One relates to the assessment by which such measures will be imposed on persons. To increase the accuracy of the measures imposed is one of the goals of this draft. However, this objective cannot be reached solely by utilising an expert in clinical psychology in addition to an expert in psychiatry, “if necessary”. Therefore, examination by experts in psychiatry and clinical psychology should be mandatory.

Another item relates to the demand that such measures may be imposed on juvenile criminal offenders only for a limited period of time, which was rejected.

Furthermore, there is no legal protection that meets the requirements of the Hospitalisation of Mentally Ill Persons Act (*Unterbringungsgesetz*) for persons held in custody or in facilities for the detention of mentally ill offenders who are restrained or placed in isolation. The Hospitalisation of Mentally Ill Persons Act provides that the patient advocate should represent a person affected by restrictions on his or her freedom.

The Federal Ministry shared these concerns and promised that this deficiency would be eliminated by the Detention of Mentally Ill Offenders Act. This law will provide the same legal protection for persons placed in therapeutic centres as for persons placed in medical facilities. The AOB is generally pleased that patient advocates will also be responsible for prisoners with mental health care needs in the future. However, it is unfortunate that the legal protection provided under the draft of the Detention of Mentally Ill Offenders Act is not as extensive as under the Hospitalisation of Mentally Ill Persons Act.

Under the draft of the Detention of Mentally Ill Offenders Act, the institutions need not notify the patient advocate of all restrictions. This would make the work of the patient advocates difficult if not impossible. The patient advocates can only represent a person and assist him or her in making objections if the patient advocate knows of the restriction.

Other places for persons with disabilities

Beside psychiatric institutions, similar problems can be observed in other places for persons with disabilities.

Although modern pedagogics for persons with disabilities are strongly orientated towards self-determination, empowerment and a life according to the normalisation principle, measures that restrict freedom are regularly carried out in residential facilities and workshops in Austria.

Structural barriers, but also the use of mechanical, electronic or medication-based restrictions of freedom, are repeatedly observed by the AOB Commissions. The legal framework for those measures is laid out in the Nursing and Residential Homes Residence Act.

According to the legal rules, *inter alia,* thorough documentations of restrictions of freedom must be carried out and the Residents' Representatives must be notified. However, reality shows that documentations are often inadequate and the legally stipulated notifications of the Residents' Representatives are often neglected or insufficient.

As prescribed by law the least severe measure has to be taken and the application needs to be documented. The AOB found repeatedly shortcomings in several institutions and reported cases to the Residents' Representatives. Furthermore, it recommended appropriate trainings for personnel. However, in practice problems are usually complex, in particular with regard to potential medication-based measures, which restrict freedom.

Mental disorders and barriers might accompany severe disabilities to communication. When assessing psychiatric symptoms specific living conditions must be taken into consideration, because persons with severe multiple disabilities have considerably fewer possibilities to control basic aspects of their life themselves. The heightened sensitivity of persons with cerebro-organic disorders to adverse effects and their disguise as "mental disorders" requires expertise and experience of prescribing psychotropic medication. The AOB

therefore recommends that general practitioners should not carry out the assessment and prescription.

The AOB also observed that necessary treatment plans from medical experts with explicit therapy objectives are often unavailable. Documentations of the detailed course of therapy are also missing in many instances. Clients who attract attention by raging, hitting others, injuring themselves repeatedly or destroying objects are usually assessed as aggressive and dissocial and many employees in residential facilities often experience those residents under the influence of psychotropic medication. Those medications are regarded as problem-solving universal remedy. Grey areas emerge between attending doctors and facility staff about who has to take decisions on which measures should be taken.

The AOB demands that the existence of a pedagogical framework, within which the professional treatment and therapeutic support take place, should be a condition for the use of psychotropic medication in persons with disabilities.

AOB Commissions repeatedly described problems with PRN medication, which potentially restricts freedom without sufficient medical description of the indication for its use. Descriptions like “disruptive behaviour” or “restless activity” are used in prescriptions but fall short of a necessary exact description of indication. From the AOB point of view, it can certainly be assumed that in many cases external factors rather than behaviour, which could potentially harm the client or others, are causal in perceiving which alternatives there are to restricting freedom. Since individual physicians, who can act independently, need to prescribe PRN medication the responsibility for proper descriptions lies, primarily, in their hands.

The AOB Commissions also came across time-out-rooms in several facilities. While the use of time-out-rooms is not completely prohibited by law, the AOB noted at several occasions the misuse of time-out-rooms and unjustified cases of deprivation of liberty. In line with CPT recommendations, the AOB stressed vis-à-vis institutions and authorities that placing persons in time-out rooms without accompanying measures is not necessarily a milder measure than restriction of freedom by way of medication or mechanical means or other restrictions and may never be used as punishment.

The AOB Commissions identified the following risk factors for the (unjustified) use of restrictions of liberty in Austria. Those are staff shortages, high personnel turnover, the size of facilities, lack of support for the pedagogical personnel through additional professional services or expertise, unapt building structures, insufficient possibilities to retreat, missing

psychiatric diagnosis of behavioural disorders, outdated or non-individualised treatment concepts, lack of occupational and therapeutic possibilities as well as lack of communication.

Freedom from torture and cruel, inhuman or degrading treatment or punishment (Art. 15)

Net beds

In its concluding observations, the Committee recommended to abolish the use of net beds in psychiatric hospitals and institutions. The prohibition of net beds also had been demanded for by the AOB for many years. In July 2014 the Federal Ministry of Health, finally, prohibited the use of psychiatric intensive beds (net beds) as well as other "cage-like beds" by way of a decree.

After having visited institutions were net beds were originally still used, AOB Commissions could confirm that the decree had been implemented by the responsible owners and operators.

In one hospital, the AOB Commission observed that due to intensive ward-internal preparations and working groups, a number of alternatives to forced placement in net beds had been implemented. The hospital was trying to act proactively to de-escalate situations and to offer patients more opportunities for dialogue. According to concurring statements, the flexible cooperation of the care teams with the doctors was working. However, in several wards, the requested equipment (e.g. motion-sensitive floor mats, low-profile beds) had not yet been completely delivered in a timely manner. Despite the occasionally noticeable scepticism about being able to deal with the new challenges, a setting has been created under difficult framework conditions and existing space constraints that could prevent an increase of measures that restrict freedom and sustainably improve patient care.

This can be recognised as an achievement and a success.

Inhuman or degrading treatment in facilities – clients neglect; lack of self-determination

The AOB also analysed whether positive state obligations regarding the protection against torture, inhuman or degrading treatment are fulfilled in Austria. These become relevant in cases when the physical or psychological well-being and integrity of persons with disabilities depend on state activities, regardless of whether an endangerment is caused by the state or a private entity.

The AOB observed on several occasions massive restrictions of self-determination and privacy, the repeated use of derogatory language, sanction systems with the aim of absolute submission, social isolation as well as conditions which did not counter neglect. The AOB labelled these measures and omissions as degrading behaviour. In the view of the AOB, there could be a simple rule of assessment for the question of whether a restricting measure is justified. Every measure that does not have a therapeutic goal – or in the case of minors a justified educational one – must generally be rejected. This would bring about a reversal in the burden of proof to the disadvantage of facilities.

In contrast to the principle of self-determination and the ability to take one's own decisions regardless of the extent of illness or disability, under Austrian civil law various decisions are made by legal guardians. That might lead to a situation where persons with disabilities cannot freely choose or even end their stay in an institution or facility. The system of legal guardianship has been changed recently and the future will show if persons with disabilities will be able to take their own decision under the new model of supported decision-making.

However, in the past the AOB visited facilities where the human rights of the persons living there were not respected and the cases raise questions about structural deficits and ineffective controls.

In one case a couple offered residential, round-the-clock care to persons with disabilities. The facility was not barrier-free, inadequately equipped and very small. Privacy rights were constantly infringed. There were no separate toilets and no visual protection in toilets and bathrooms. The overall hygiene situation was disastrous. The AOB Commission encountered among others a deaf man with spastic paralysis who was wrapped in a dirty woollen blanket up to his face and "placed" on a small sofa. No care documentation was being maintained, no individual needs plans, documentation regarding diagnoses, doctor's reports or doctor's letters were available at the facility. Most residents had previously undergone treatment in psychiatric facilities and their contact with persons outside the facility was limited. For most of the individuals, who received care, the courts had assigned legal guardianship to lawyers. These lawyers had drawn up "rental agreements" with the association and handled all financial matters.

The authorities denied their responsibility and took the view that there were no legal grounds for intervention. The facility did not receive public funding and according to the authorities' grounds for intervention were not fulfilled in such family-type living arrangements for persons

under legal guardianship. The only remaining option for the persons under legal guardianship would have been to submit a petition to the relevant court requesting a change of guardian.

However, most persons living in this facility were not able to or lacked the resources to file such a petition.

Another case of grave neglect was detected by a AOB Commission involving a man and a woman with serious mental impairments. They lived in a partially assisted living and housing facility. The house was in a remote area far away from the next village or town. The remote accommodation had been deliberately chosen by the providers in order to ban the client from shopping and pursuing her hoarding behaviour. The male client, who had previously lived in solitude for decades without water or electricity supply, had been provided with a construction site trailer to live in. The trailer had been especially installed for him. No state-of-the-art care concept with aligned pedagogical, medical and therapeutic measure was created for either of them and care was limited to weekdays from 7:00 am to 1:30 pm. The AOB found a case of neglect since the residents were not mentally stable enough to help themselves.

In an institution for young girls and women with severe psychiatric illnesses, the AOB Commission found that the rehabilitation concept was completely unsuitable and critical from a human rights perspective. Residents were prohibited to have any contact to the outside world in the first months after admission. They were not allowed to use their mobile phones. If telephone calls or writing letters was allowed it was monitored by staff. Clients had no formal possibility to lodge complaints. Care personnel determined the suitability of clothing and eating outside mealtimes was strictly prohibited. Psychotherapeutic treatments or psychiatric controls were not offered or carried out for the clients.

In another case the AOB examined an officially approved living facility for persons with disabilities. The building was not barrier-free accessible. Due to a shortage of space, nine people did sleep in rather simply occupy beds situated in communal rooms, corridors or passageways. Furthermore, the privacy of children, women and men were infringed in an inhuman and degrading manner. None of the residents' toilets was situated in a closed-off location; all the toilets were in an open setting adjacent to showers or baths. In none of the bathrooms, it was provided for visual protection. Toilets were used while other residents were being washed within a confined space. There was no gender separation for bathrooms and gender-specific care as a component for the prevention of violence had not even been considered. The Commission had serious doubts particularly regarding the efficiency of

authorities' supervision and the standards and quality requirements, which the facility had had to meet in the past.

The facility was unable to show the Commission any developmental level assessments, current needs plans or individual care plans. It did not prepare or implement any plans based on current therapeutic approaches. Unfortunately for the residents, there was essentially not enough staff with appropriate qualifications in care and therapeutic methods. The AOB Commission found that fundamental communication and stimulation for clients were not sufficiently provided for. Many of the residents responded to the lack of communication options and the lack of activities with a highly aggressive behaviour and with behavioural abnormalities. Staff responded to such behaviour by taking measures, which restrict freedom, rather than by offering more specific care or the opportunity to pursue activities. The AOB made it clear to the supervisory authority that all processes would need to be modified in order to ensure prevention of torture and violence and comply with the CRPD.

In a facility for adolescents with mental illnesses, clients were not being offered psycho-education or medication training, even though suicidal actions had occurred. The necessary conditions for coping with the mental illness were thus being refused for the residents. Furthermore, clients were also confronted with derogatory comments by staff. They were told that they were not able to do anything meaningful or that they were "whiners". On girl was called by the head of the institution a "nymphomaniac who would have sexual intercourse with every man in the place if she could". Residents also had no say in what went on and had little scope to organise their leisure activities. During interviews residents also complained about strict disciplinary measures. The AOB informed the supervisory authority about the degrading treatment and inapt environment.

A further indicator for the lack of self-determination and consequently the risk of degrading treatment is the approach to sexuality at institutions and facilities. At numerous residential homes, the AOB Commissions found deficits in this regard. Many institutions and facilities lack pedagogical concepts regarding sexual education. It is often not ensured that support will be provided regarding exploration or experience of sexuality and issues surrounding masturbation, relationships, contraception and parenthood.

The AOB also stressed the importance of victims' support in the event of violent behaviour. In one institution staff claimed not to have been sufficiently prepared for the admission of clients who needed psychiatric treatment and were inclined to impulsive, aggressive

outbursts and aggression towards others. There was no clear concept on how to deal with those situations and no victim support in this facility.

Furthermore, no suitable quality standards for effective victim support actually exist throughout the *Bundesländer.* In several institutions visited by the AOB, staff was not sufficiently trained in the prevention of violence, which should be an absolute prerequisite for working in such institutions.

Only few shared accommodations are willing to admit clients with a high potential for violence. Such clients are often passed from one facility to another, instead of creating stable conditions with increased staffing in institutions. Consequently, clients might become homeless. In one facility clients were even suspended for violent incidents as a punishment and became homeless for some time.

Following recommendations of the AOB the Federal Ministry for Labour, Social Affairs, Health and Consumer protection carries out a research study "violent behaviour, sexual abuse and persons with disabilities". In course of the research residential homes, sheltered workshops and places of forensic commitment should be examined and the situation regarding violence and sexual abuse analysed. The study is still ongoing and the results have not been released yet.

But the AOB also observed positive examples. In one institution, for example, a guideline for violence prevention had been drafted with the clients' participation. Supervision, proper training and implemented de-escalation concepts, proper environment and other factors contributed to no or low violence incidence and many other institutions.

The AOB also demanded the application of the standards prescribed in the "Istanbul protocol", since it found out that the protocol was hardly known among hospital operators. At the recommendation of the AOB, the Federal Ministry of Health informed all owners and operators of hospitals in Austria about the Istanbul Protocol and requested that they ensure its implementation.

Another positive development concerns the compensation for children who suffered from child abuse in children's homes. Following criminal proceedings and examinations, a pension scheme for victims had been established by the Austrian parliament. According to the Pensions for Victims of Children's Homes Act persons who have reached the retirement age or persons who are in early retirement due to health, restrictions are entitled to a pension for victims of children's homes if they fulfil all of the eligibility criteria. Persons who receive

permanent minimum benefit due to incapacity for work are equal to recipients of an own pension. The Pension Commission had been established within the AOB.

First experiences with the new Act showed that there was a loophole regarding persons with disabilities. Persons who, due to a disability, are unable to work in the primary employment market have no right to their own pension (e.g. an invalidity pension). They often have no right to minimum benefit as they live in a family group, receive an orphan's pension including compensatory allowance or are fully cared for within the framework of services for persons with disabilities. Under the original regulation, this group of persons would therefore have to reach the legal retirement age in order to receive a pension for victims of children's homes. Accordingly, the law Act had been changed and under the new ruling persons with disabilities can equally claim a pension as persons who reached the retirement age.

Living independently and being included in the community (Art. 19)

Deinstitutionalisation

The size of numerous institutions, visited by AOB Commissions, gives rise to doubt that the right to make choices and community-based support are ensured and that concepts of deinstitutionalisation are being progressively implemented. The impression is reinforced by the fact that residents are often placed far away from their hometowns. Even though a centralisation of homes might provide some selective advantages in the overall management of care, "normality" for clients is lost as a result in those facilities.

Placements in rooms with multiple beds, a lack of privacy, pocket money that is "managed", care and outdoor walks that are scheduled are just some of the restrictions that residents must often accept in large-scale facilities. Furthermore, it is far more difficult, to maintain personal relationships with family or friends when residents are transferred to homes, which are further away from their hometowns. Usually individual needs and wishes can be better addressed in community-based accommodations.

At several occasions care staff confirmed that some clients could live more independently in, for example, training apartments, if more places had been available.

An example for the limitation of independence is often the institution's approach to sexuality. Sexual needs in homes are often viewed as disruptive. This is particularly the case when no private rooms or pedagogical concepts relating to sexuality are available. At least one case is reported of a resident in a large-scale institution who received psychotropic drugs to reduce

his sexual urge to masturbate. Accordingly, the resident was not able to practice his sexuality with sufficient self-determination. In another facility a female resident expressed her wish to have a child. However, the management denied her right and took the stand that the fulfilment of this wish was considered not to be possible.

Although there still are numerous facilities of significant size in Austria, some bigger facilities were closed or concrete plans developed to create smaller, decentralised living units. Nevertheless, the AOB found that there is a particular lack of comprehensive overall concepts for deinstitutionalisation. Although the concept of personal assistance must be further developed in cooperation between the Federal Government and the *Bundesländer* according to the National Action Plan on Disabilities, personal assistance has still not been expanded as*, inter alia,* an alternative to institutional care.

In addition, it seems that it is not fully accepted in Austria that persons with disabilities should individually be able to choose a way of living, which is suitable for them, and have to receive the necessary support and services to do so. There seems to be a differentiation between "serious" or "slight" disabilities. However, also persons who require a great deal of assistance have the right to a self-determined life in their own residence. Furthermore, the AOB considers it necessary to raise awareness about the fact that persons with disabilities - after spending years in large-scale institutions – often need time and support to figure out their individual needs. Insecurities about changing environments need to be eliminated and alternatives to current situations shown.

Moreover, psychiatric wards and facilities have been closed following a reform of the psychiatric system. However, the existing system of extramural care is overwhelmed in some areas. Especially for clients who need more support an allocation outside a hospital or psychiatric ward can prove difficult. It is urgently necessary to provide more support throughout Austria with regard to residential facilities for persons with chronic mental disorders, particularly those diagnosed with schizophrenia with pronounced symptoms, co-morbid disorders or a forensic history and for people with psycho-mental developmental impairments who frequently display psychiatrically relevant episodes. Overall, it is about creating flexible framework conditions that enable those persons affected to live their lives as independently as possible. This includes work and occupational opportunities that have a positive effect on the disorder as well as on social integration and quality of life.

Personal assistance

For many persons with disabilities comprehensive personal assistance is an essential tool to enable them to live independently and to take part in society in a self-determined way. However, personal assistance is not yet offered in a sufficient way throughout Austria. To master everyday life and leisure, personal assistance is currently granted by the *Bundesländer* under different conditions and for different time periods. These services are not offered nationwide and are not needs-oriented. Furthermore, there is no binding legal entitlement to receive personal assistance and rather few persons receive it. Persons with learning difficulties are still often precluded from such services.

The AOB came across cases where persons with disabilities got there minimum care-taking demand covered (cooking, dressing and personal hygiene). However, they wished to get the proper support to lead and independent self-determined life besides getting there most basic needs covered. One client could not even go for a walk with his assistant personnel since costs were not covered. Furthermore, 24 hour nursing with a rather narrow framework of services cannot replace a proper personal assistance scheme. If self-determination and living independently is taken seriously personal assistance schemes need to be massively extended. The services should be regulated by nationwide standardisation and persons with learning difficulties should get the same access like persons with physical impairments.

The AOB demands for a long time that comprehensive deinstitutionalisation and the granting personal assistance schemes need to go hand in hand.

The AOB could also identify the problem of expulsion and restraining orders for persons with disabilities who live in facilities and acted violently towards other residents. The legal protection for domestic violence is strong in Austria. However, applied strictly to persons with disabilities it shows some difficulties. Perpetrators who act violently might receive restraining orders for the premises the live. They might get expelled from facilities without receiving necessary support and bear the risk of getting homeless. The fact that no institution or facility is obliged to take an expelled person with disability in is aggravating the problem. The AOB delivered questions to the Human Rights Advisory Board and ask for a statement.

Education (Art. 24):

Children with disabilities and chronically ill children are confronted with special challenges in coping with every-day life in Austria. Kindergardens and schools often feel reluctant to admit them. Even those children, who need little or no assistance (e.g. asthma, diabetes or

epilepsy patients) but rather an understanding for their individual situation, face opposition quite often. One reason for the reluctance is, beside the lack of knowledge, often liability concerns.

The AOB initiated and organised a parliamentarian symposium dealing with those issues and released a publication with a collection of lectures and essays thereafter. Following broad discussions, a change of law had finally been put forward. The Education Reform Act 2017 enables now certain medical activities carried out by teachers to be finally recognised unequivocally as official duties. If teachers make mistakes, the state rather than the teacher is primarily liable by way of public liability as employer.

The AOB also identified problems regarding the accessibility to school buildings and the allocation of support staff. Many difficulties result from the complicated allocation of responsibilities as well as from a lack of personal assistance, especially in the private school sector. The AOB considers that the legal uncertainty accompanying this problem should be eradicated by the creation of explicit regulations for the support of personal assistance in the entire school sector together with legal entitlements for the individuals affected.

However, currently special schools for children with disabilities are not only still in place but are also in demand among many parents. For the time being, the AOB cannot see any substantial governmental initiative to reduce the number of children in those schools or to abolish them at all.

Employment (Art. 27)

Linking the “living and the working environment”

It is a fact that persons with disabilities face discrimination when accessing the regular labour market in Austria. But when it comes to programmes designed to help persons with learning difficulties and/or disabilities to enter or re-enter the professional world, there are additional barriers. The situation is particularly difficult for persons with learning disabilities or chronic psychiatric illnesses who are already living in an institutional environment and, in the realm of work, have been integrated into the world of occupational therapy workshops.

One of the programmatically defined objectives is to help individuals transition from this protected world into the regular labour market or the intermediate labour market (with occupational projects or integrative operations). Nevertheless, in practice those objectives are not achieved often enough. There are various causes. One is that residential

arrangements and arrangements regarding working in sheltered workshops are often handled by the same entity, which means that the two areas are very closely intertwined.

In all of the *Bundesländer*, the AOB Commissions observed in the course of visits that residential places in facilities and sheltered workshops attended by clients are often closely interlinked. In many cases, residential homes and day workshops are operated by the same operator organisation; in some cases, both types of facility are actually in the same building or directly adjacent.

Even though the organisations which support residential structures and those which support work structures exclusively for persons with disabilities are not identical, there are many regions in Austria where one can basically find only one residential home and one-day structure available. There are no options or freedom of choice.

If residential places are usually interlinked with having to perform work at a shelter workshop operated by the same organisation, it is fair to assume that there is at least implicit pressure to attend that workshop. This is true especially because in many cases residential facilities are unstaffed or staffed with reduced personnel during the day and residents therefore feel the pressure to attend those workshops during the day.

Commissions frequently observed that clients often lack social contact with the outside world and move in closed social circles. If an operator organisation offers a residential place as well as a day structure, the individual in question lives within a very narrow control system. Within this closed system, power relations and unilateral dependencies are pre-programmed, even though the goal should be to prepare clients for the regular or intermediate labour market and therefore ultimately see them depart.

The AOB demands, that the *Bundesländer*, which largely bear the costs and the provider organisations themselves need to acknowledge their obligations and be willing to break up organisational links between residential structures and work structures. These are structural problems, which exist independently of concrete situations. Persons with disabilities are often very satisfied with their circumstances, though in view of their socialisation they may not be familiar with any other type of experience.

<u>Pocket money in occupational therapy workshops</u>

The Commissions completed numerous visits to day-care centres and workshops for persons with disabilities. Persons whose “performance capability” under Austrian social

insurance law ranges between very low to just under 50% of the “performance capability” of a non-disabled person work in these facilities. Regardless of the scope of the work performed by the individual persons, such occupations are not deemed employment relationships. Under current law, the activity is primarily in the interest of those employed to work and serves as “education and upbringing” and “treatment”.

Activity in the workshops is not qualified as employment under social insurance law Therefore these individuals are not covered by social insurance based on their activity. They do not acquire any independent pension entitlement. They receive other insurance benefits from entitlement under the minimum benefit system, from orphan pensions, etc. They do not receive any wages under social insurance law for their work, but receive only pocket money amounting to an average EUR 65 per month. The criteria for the calculation of the amount of the pocket money are often not transparent and, in any case, are not uniform.

The AOB presumes that employment in the current form does not conform to the provisions of the CRPD and a reform of the current legal situation and practice is necessary. The goal must be to ensure the means of earning a living beyond current social welfare or the set-up of the minimum benefit system (i.e. without taking assets into consideration and without recourse regulations). Persons with disabilities working in (sheltered) workshops should be entitled to regular wages and acquire entitlement under statutory social insurance. Transition solutions here will probably be unavoidable, but the elimination of public transfer payments must not be a financial disadvantage for the persons affected.

It was also reported to the AOB that some workshops, which take on external jobs, generate surpluses while the workers do not profit directly from this. In such cases, a “wage” in the form of pocket money runs the risk of being equal to exploitation of the individual workers.

At the same time, integration into normal jobs must be driven forward. The prerequisite for this would be, for example, an expansion of personal assistance services specifically, but not exclusively, for persons with learning disabilities.

The AOB has repeatedly criticised that in some facilities the offerings barely go beyond “occupational therapy”. Inclusion into “normal jobs” does often not occur, because care staff views such jobs as practically unattainable.

In addition, the requirements for operator organisations in one *Bundesland* do not even include the promotion of inclusion into “normal jobs” as mandatory. However, integration into

normal jobs should be adequately promoted and wages in day-care centres or occupational workshops should guarantee entitlements under social insurance law.

On the positive side, the AOB Commissions were able to identify many institutions, which have a great dedication to support clients in order to enter the primary employment market. One facility has maintained contact to regional companies for many years. As a result, clients at least have access to marginal employment.

Classification as being unfit for work

The Public Employment Service Austria has the legal mandate to prevent and eliminate unemployment by ensuring the employment of all persons available to the market in as far as possible. Nevertheless, an increasing number of very young persons with impairments who were certified as incapacitated based on a medical report contacted the AOB because of the associated lack of access to the offers and services of the Public Employment Service Austria.

An abstract diagnosis-related and deficit-oriented assessment of the incapacity of young adults with disabilities to work is applied. If a person is found to have a "performance capability" of under 50% the usual support mechanisms of the Public Employment Service cannot be applied. It is also no longer possible to complete a (part) apprenticeship.

The lack of support opportunities for this group of persons leads to a situation where the wishes and skills of those affected in terms of employment in the primary or secondary labour market are currently neither taken into consideration nor do they have to be supported and sponsored by the Public Employment Service Austria. The division of competence between the Federal Government and the *Bundesländer* make the situation for this group of people even more difficult.

In order to reduce unemployment by at least 20% by 2020, "persons with disabilities" should be recognised at the Public Employment Service Austria as a separate target group of specific support programmes. Furthermore, the AOB demands reforms in order to rectify problems in connection with the premature determination of incapacity to work.

The roughly 23,000 persons in Austria whose "performance capability" is less than 50% and who are occupied in a daily structure or workshop should receive real wages. There should be a shift from the current pocket money for the work in occupational therapy workshops to the general labour market.

National implementation and monitoring (Art. 33)

In autumn 2017 the national parliament introduced a legal “inclusion package”. New regulations regarding the Independent Monitoring Committee were introduced, guaranteeing the Monitoring Committee enhanced independence from governmental bodies through new structures. The Independent Monitoring Committee, which was incorporated in the Ministry of Social Affairs, will be supported by a newly founded association which receives a budget at its own disposal. The association can hire its own personnel and establish its own office structure independently from any ministerial influence. The members of the Independent Monitoring Committee itself will continue to be unpaid experts volunteering for its important work.