



VOLKSANWALTSCHAFT

Annual Report

of the Austrian Ombudsman Board
to the National Council
and the Federal Council

2012

International Version

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Preface

Since 1 July 2012, the Austrian Ombudsman Board (AOB) is also competent for preventive monitoring: It is now part of its mandate to monitor and control all institutions and facilities, in which persons with and without disabilities may be helpless and at risk of abuse, inhuman treatment and measures that restrict their freedom. This investigative mandate means that a total of more than 4,000 public and private institutions and facilities will be monitored and controlled by the AOB. The Austrian Ombudsman Board shall assume these duties as the National Preventive Mechanism (NPM) jointly with the Commissions that it has established.

While the new competences are consistent with the previous duties of the Austrian Ombudsman Board, they are also expanding the range of competences significantly; therefore, a reorientation of the AOB was required. It was necessary to create new networks and the cooperation with international organisations became an even greater priority. The exchange of information with other groups and experts from various disciplines (for example, medicine, nursing sciences, psychology) have changed not only the work environment of the Austrian Ombudsman Board but the substance of its work as well.

This report describes the previous activities relative to preventive monitoring and control and provides information about the investigations undertaken in the period under review. For the first time other stakeholders have the opportunity to voice their opinions in a report of the Austrian Ombudsman Board: The Human Rights Advisory Council as an advisory body and the six Commissions of the AOB, which commenced their work mid-year 2012 and which are undertaking monitoring and control activities on an ongoing basis.

The protection of fundamental rights was always a central priority in the Austrian Ombudsman Board's ex-post control activities. The violation of human rights was always considered the most egregious form of maladministration on the part of authorities. The new mandate of the Austrian Ombudsman Board now ranges from preventive to ex-post monitoring and control of human rights and the rights of persons with disabilities. This significantly increases the opportunities to protect human rights.

We would like to thank the Federal Ministries and other federal, regional and municipal bodies for their willingness to cooperate during the past year.

Our particular thanks go to the employees of the Austrian Ombudsman Board, the Commissions and the Human Rights Advisory Council, who formed an integral part of this process of change to which they all contributed actively and significantly and embraced their new competences with a great deal of commitment.



Gertrude Brinek



Terezija Stojsits



Peter Kostelka

Vienna, June 2012

Introduction

This Annual Report differs from the previous ones in that it describes and documents the impact of a major change.

Since 1 July 2012, die AOB has undertaken the responsibility of monitoring and controlling public and private institutions and facilities where freedom is or can be restricted. This mandate under Austrian constitutional law enables the broad-based establishment of the National Preventive Mechanism (NPM) in Austria. It is based on the Act on the Implementation of the OPCAT (*OPCAT Durchführungsgesetz*), which implemented the UN Optional Protocol of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

AOB's new competences

At the same time, the AOB received a mandate to monitor and control institutions and facilities as well as programmes for persons with disabilities. These controls will enable the prevention of all forms of exploitation, violence and abuse. The third new area of competence covers the in itinere and observatory monitoring of the conduct of the agencies empowered to exercise administrative power and compulsion.

These additional functions of the AOB are already reflected in concrete results of its work. The law, which was adopted in December 2011, mandates that the expert Commissions of the AOB are to be charged with these new monitoring and control competences. In the first half of the year, the six Commissions already carried out more than 100 visits. Particular focal points were visits in police detention centres, correctional institutions, retirement and nursing homes, psychiatric institutions, as well as the monitoring of (forced) returns. In some cases, there were initial indications that human rights were not being protected. The AOB has already initiated the appropriate investigative proceedings.

Commencement of monitoring and control activities

The commencement of monitoring and control activities was preceded by intensive preliminary work and a host of organisational measures. The reorientation of the AOB was underpinned by three guiding principles:

Three guiding principles of the AOB

The new competences, some of which were assumed from the former Human Rights Advisory Board of the Federal Ministry of the Interior,

should be organised in such a way that a certain continuity is preserved while, at the same time, visible changes are being effected.

The hitherto existing ex-post control should be integrated with preventive monitoring and control in order to guarantee that human rights are protected as comprehensively as possible. This approach underpins the AOB's claim of being the "Human Rights House of the Republic of Austria".

The National Preventive Mechanism (NPM) is implemented through the collaboration of the AOB with the Commissions it has established. But this can work only when civil society is integrated accordingly and sees that it is a worthwhile endeavour to commit oneself to this new mechanism for the protection of human rights. Civil society is prominently represented by NGOs in the Human Rights Advisory Council.

Higher budget due to expansion of competences

In the second half of 2012, the AOB had an additional budget of EUR 1,947,000 to fulfil its new competences. The increased expenditure can be explained on one hand by the activities of the members of the Human Rights Advisory Council and the Commissions who are entitled to remuneration and reimbursement of travel expenses. Furthermore, increased personnel are required for additional administrative tasks and there are also expenses resulting from the AOB's obligations under OPCAT, for example, the mandatory cooperation with international bodies, such as the UN Subcommittee on Prevention of Torture.

Priority of ex-post control unchanged

Despite the newly assumed competences, the importance and priority of ex-post control for the AOB have not changed. In 2012, around 15,600 complaints were received; the AOB receives about 63 complaints each working day. In order to put these figures into proportion, it should be recalled that, when the AOB was established, the assumption was that it would receive 1,500 complaints per year.

Trends in complaints

One item that has remained the same in recent years is that most of the complaints and investigations refer to the sector of social affairs. More than one quarter of all initiated investigations fall into this particularly sensitive area. The high percentage of complaints in the area of internal security is also significant. This development has emerged in recent years and is due to the large number of complaints dealing with the law on aliens and asylum law. This year has seen an increase in the number of complaints concerning the judiciary, in particular regarding the penal system. This is probably due to the initial visits by the Commissions and the reports in the media about the new competences of the AOB.

When dealing with complaints, the AOB always endeavours to resolve them promptly. On average, the AOB informs the parties involved within 44 days whether maladministration was determined. The average investigation duration was reduced by five days compared to the previous year.

In 2012, a total of around 9,300 investigations were completed; maladministration was found in 16% of the cases. Despite the challenges that the reorganisation of the AOB created for its employees, there was an increase of 10% in the number of completed investigations compared to the previous year.

The present report provides detailed information about the events and concrete results of the AOB's work that have been summarised here. It should be emphasised that the AOB has been delighted to undertake its new competences. Despite the time-consuming organisational changes, it has not neglected its already existing competences, but has even improved its performance. Nevertheless, six months after undertaking its new competences and creating completely new networks, it has by no means attained a status that is satisfactory for all the parties involved. If the AOB employees, its Commissions and the members of the Human Rights Advisory Council view the results thus far as an incentive and the previous cooperation as a good beginning, its development towards becoming the "Human Rights House of the Republic of Austria" will make rapid progress.

Preventive monitoring and control as a development process

Overview of the AOB

Legal mandate

Expansion of
competences as of
1 July 2012

Since 1 July 2012, the AOB has also assumed preventive monitoring duties: Monitoring and control of public and private institutions and facilities where persons are or can be detained is now within its remit. Its remit also includes institutions and facilities as well as programmes for persons with disabilities in order to prevent any form of exploitation, violence or abuse. The observatory and in itinere monitoring of the exercise of direct administrative power and compulsion by police, including but not limited to manifestations and (forced) returns, are included in the new competences; the AOB has assumed these from the previous Human Rights Advisory Council, which was part of the Ministry of the Interior.

It is the responsibility of the AOB to charge the expert Commissions it has established with the actual execution of monitoring and control activities. A total of more than 4,000 institutions and facilities have to be inspected. This includes, for example, correctional institutions, psychiatric institutions, retirement and nursing homes, crisis centres and facilities for persons with disabilities. The AOB will perform its new duties jointly with the Commissions as the National Preventive Mechanism (NPM).

Implementation of
UN human rights
conventions

The basis for the expansion of its competences are two significant UN human rights conventions under which the Republic of Austria has committed itself to human rights guarantees and international standards: The UN Optional Protocol of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) of 18 December 2002, as well as the UN Convention on the Rights of Disabled Persons (CRDP).

Compliance with
international guide-
lines

The AOB and the Commissions are bound by international standards in the execution of their new competences. This gives rise to the necessity and obligation on the part of the AOB to cooperate closely with international organisations, such as the UN Subcommittee on Prevention of Torture (SPT). This cooperation will ensure that experience is shared on an international level. Additionally, the AOB must publish an annual NPM Report and send it to the SPT in Geneva.

What has remained the same is the constitutional mandate to perform ex-post control that the AOB has been engaged in since 1977, which is linked to the right of any citizen to submit a complaint to the AOB regarding alleged maladministration by the federal administration. Every sovereign administrative act for which the federal administration is competent, as well as its actions as holder of private rights, are subject to mal-administration monitoring by the AOB. This corresponds to the AOB's duty to investigate every permissible complaint, to review it and to inform those involved of the result of the investigation, as well as of any measures that may have been initiated.

Furthermore, the AOB is entitled to undertake ex-officio investigations of suspected cases of maladministration. From 1988 on, the AOB has been additionally tasked with helping to handle petitions and initiatives of citizens' action groups that are addressed to the National Council. It is also authorised to file petitions before the Austrian Constitutional Court to review the legality of a regulation issued by a federal agency.

Reorganisation of the AOB

In December 2011, the Austrian Parliament adopted the Act on the Implementation of the OPCAT (*OPCAT Durchführungsgesetz*). This act contains the provision that the expansion of the AOB's competences enters into force as at 1 July 2012. Therefore, only six months remained for the organisational restructuring and the establishment of the new institutions.

In order to enable the necessary organisational adjustments during this tight timeframe, the AOB solicited bids from experienced organisational consultants and awarded a contract that stipulated the following objectives: (1) furnish a current-state analysis detailing the strengths and improvement potential of the existing organisation; (2) address problem areas using project teams and, using this information, develop suggestions for adjustments and/or changes in the organisation; (3) provide support in the implementation of the new work and organisational structures. These measures concerned the hitherto existing organisational and work methodologies of the AOB and provided the basis for the integration of newly hired employees.

Complementary organisational consulting

Considerable parts of the new organisation were developed by internal project groups. Employee teams worked on possible improvements to internal work processes, as well as protocol standards for preventive

Internal projects prepare reorganisation

monitoring and control. The results of the first group's work led to an optimisation of work processes that created the prerequisite for the new system of work organisation. The second project group submitted a summary of all of the internationally accepted investigative standards and compared these results with the standards appropriate in our culture.

Inclusion of the
NGOs

In a subsequent step, work schedules were developed to establish the new institutions (Commissions and Human Rights Advisory Council) as efficiently and effectively as possible. Before the decision regarding the number, size and areas of competence of the Commissions could be taken, the Human Rights Advisory Council had to be established. The Human Rights Advisory Council consists of the chairperson and deputy chairperson who are appointed by the AOB and 32 additional members and substitute members (16 representatives of NGOs and 16 representatives of Ministries and *Laender*). For the AOB it was clear from the outset that NGOs needed to be included as early and as comprehensively as possible in the formation process of the Human Rights Advisory Council. Therefore, the AOB offered the NGOs the opportunity to determine the eligible organisations themselves.

Appointment of the
Commissions

The appointment of the Commissions was a process that took many weeks. The three members of the AOB had to select the six Chairpersons of the Commissions from more than 100 applicants. More than 600 persons applied to work on the AOB Commissions. The members of the Human Rights Advisory Council also attended these hearings. The AOB views this unexpectedly high number of applications as an expression of interest in being involved with the new competences.

Development of a
new concept for
reports

The reorganisation also required an overhaul of the entire information management process. Vis-à-vis external parties, this includes the AOB reports. For example, the present report has been restructured and part of it, namely the chapter on preventive monitoring and control (see page 35), has been executed such that it will be submitted to the UN Subcommittee on Prevention of Torture (SPT) in Geneva as the NPM Report.

Structure of the AOB

The structure of the AOB corresponds only partially to the classic structure of a public agency as it is headed by three members. Each year, a different member becomes the new chair. At the beginning of each term of office, the members of the AOB agree on the allocation of duties within the scope of which the members' areas of competence are defined. In order to be able to carry out the tasks in their respective areas of competence, each member is assigned staff. The individual areas of competence are operationally managed by a Chief of Cabinet. The AOB had a total of 90 employees in 2012.

Three areas of competence

The administration assists the areas of competence. In addition to the customary duties for an organisational unit of this kind (budget, public services law, IT, secretarial pool), an administration office has been set up, which is competent for the preparation of all decisions by the AOB and which provides the necessary technical and organisational support. The information service and the secretariats of the members of the AOB are the points of contact for citizens. An OPCAT-Secretariat has been newly established; it will provide administrative support for the Commissions.

Support by the administration

Duties involving international issues and communications have been centralised in one organisational unit. Since 2009, the General Secretariat of the International Ombudsman Institute (IOI) has been part of this unit. The IOI is an independent, unpolitical, international organisation that promotes the worldwide sharing of information and experience between ombudsman institutions.

International issues and communications

The new Act on the Implementation of the OPCAT provided for the establishment of a Human Rights Advisory Council as an advisory body to the AOB. It advises the members of the AOB in determining general investigative focal points and prior to issuing determinations of maladministration and recommendations. The chairperson of the new Human Rights Advisory Council and her deputy were appointed by the AOB. The 32 members and substitute members were delegated on the basis of parity by non-governmental organisations and Federal Ministries; the *Laender* all together delegate one representative and one substitute member.

Human Rights Advisory Council as an advisory body

In order to handle the new competences relative to human rights, the AOB has formed six Commissions with a total of 48 members for whom this work will be a secondary job. The Chairpersons and

Six Commissions conduct visits

the members of the Commissions were appointed by the AOB. The Commissions conduct visits throughout Austria on behalf of the AOB and observe (forced) returns and manifestations. The collaboration between the Commissions and the AOB ensures the National Preventive Mechanism (NPM).

Facts and figures

Investigations of public administration

In 2012, 15,649 persons contacted the AOB with a concern. This means that on average the AOB receives around 63 complaints each working day. In 60% of all complaints that referred to concrete actions or omissions by public authorities (7,048 cases), the AOB initiated investigations. Another 4,700 complaints fell into the AOB's area of competence; however, there were insufficient indications of maladministration. 3,900 complaints were outside the AOB's mandate; nevertheless, the AOB provides support in these cases as well. It provides information and offers advice about further advisory and/or counselling services.

63 complaints per day

Key Figures	2012	2011
Complaints regarding administration	11,748	12,331
Investigative proceedings	7,048	7,287
Federal administration	4,529	4,665
Regional/municipal administration	2,519	2,622
Handled without investigative proceedings	4,700	5,044
Complaints outside AOB mandate	3,901	3,908
TOTAL number of handled complaints	15,649	16,239

The AOB's area of competence covers all public administration, i.e. all authorities, administrative bodies, agencies and departments whose duty it is to implement federal law. The AOB carried out a total of 4,529 investigative proceedings in matters involving federal administration.

4,529 investigations of federal administration

As was the case in previous years, the majority of complaints related to the sector of social affairs. More than one quarter of all of the initiated investigations was in respect of this area for which Ombudsman Peter Kostelka is competent. Errors in the assessment of entitlement to care and nursing allowances, problems with the granting of pensions, sick pay, childcare allowances or unemployment benefits are existential questions for many people and require a quick clarification of

Most of complaints in the sector of social affairs

the complaints. The AOB contacts all public social insurance carriers and offices of the Public Employment Service Austria (AMS) directly; furthermore, it is sometimes necessary to also involve the Federal Ministry of Labour and Social Affairs.

Initiated investigative proceedings regarding federal administration authorities in 2012 – focal points*	2011	%
Federal Ministry of Labour, Social Affairs and Consumer Protection	1,246	27.53
Federal Ministry of the Interior	1,116	24.66
Federal Ministry of Justice	678	14.98
Federal Ministry for Transport, Innovation and Technology	393	8.68
Federal Ministry of Finance	312	6.89
Federal Ministry of Economy, Family and Youth	282	6.23
Federal Ministry of Agriculture, Forestry, Environment and Water Management	195	4.31
Federal Ministry for Education, Arts and Culture	85	1.88
Federal Ministry of Science and Research	75	1.66
Federal Ministry of Health (excl. health and accidental insurance)	59	1.30
Federal Ministry of Defence and Sports	45	0.99
Federal Chancellery	21	0.46
Federal Ministry of European and International Affairs	19	0.42
TOTAL	4,526	100.00

*Three cases did not fall into the remit of any of the Ministries and are therefore maintained as files to be handled by the Chairperson of the AOB

Administration of the judiciary: Number of complaints rose slightly

In 2012, 678 complaints regarding the judiciary were addressed to the competent Ombudswoman Gertrude Brinek; this was 15% of all investigative proceedings. This means that the number of complaints rose slightly compared to the previous year (2011: 646). The AOB's remit covers administration of the judiciary, the Public Prosecutor's Office, the penal system and investigations of delays in court proceedings. Numerous complaints related to court rulings by the independent judiciary, which are not within the mandate of the AOB.

Ombudswoman Terezija Stoisits recorded 1,116 complaints from the internal security sector in the year under review. This means that while there was a slight decline in the number of complaints compared to the previous year (2011: 1,306), 25% of all investigations pertained to this sector – a percentage that was only slightly lower than in the sector of social affairs. This development has emerged in recent years and is due primarily to the large number of complaints dealing with the law on aliens and asylum law. Complaints did not relate solely to matters involving the Federal Ministry of the Interior and agencies subordinate to it, but primarily concerned the Asylum Court.

25% of all complaints involved the internal security sector

In addition to the federal public administration, the AOB also monitors administration of the regional and municipal authorities in seven of the federal Laender. Only the Laender of Tyrol and Vorarlberg have their own regional ombudsman boards. In 2012, the AOB conducted a total of 2,519 investigative proceedings of regional and municipal government administration. In comparison to the previous year, the number of investigated cases in these sectors has declined by 3.9 % (2011: 2,662).

Not surprisingly, Vienna, the most populous *Land* by far, has the highest percentage of investigative proceedings (37%), followed by 20% of the cases in Lower Austria, while Styria and Upper Austria had 13% and 12% of the cases respectively. Compared to the previous year, only Vienna experienced a significant increase in complaints.

Investigative proceedings in Vienna rose significantly

New investigations of regional and municipal government administration	2012	2011	Change in %
Vienna	924	848	9.0
Lower Austria	493	570	-13.5
Styria	338	365	-7.4
Upper Austria	309	328	-5.8
Carinthia	191	184	3.8
Salzburg	136	164	-17.1
Burgenland	128	163	-21.5
TOTAL	2,519	2,622	-3.9

Focal points in the federal *Laender*

As in recent years, in investigative proceedings at the regional and municipal level, various thematic focal points predominate: Most of the complaints relate to youth welfare and social welfare. As the number of cases investigated by Ombudsman Peter Kostelka shows, the increase in complaints in this area continued unabated in 2012 (617 compared to 558 in 2011). 602 cases were in respect of problems in the areas of regional planning and building law and were therefore addressed to Ombudswoman Gertrude Brinek. Problems surrounding the execution of citizenship law were focal points of the investigative activities undertaken by Ombudswoman Terezija Stoitsits

Complaints relative to regional and municipal government administration - focal points	2012	%
Social welfare, youth welfare	617	24.49
Regional planning and housing, building law	602	23.90
Municipal affairs	371	14.73
Citizenship, voter register, traffic police	249	9.88
Finances of the <i>Laender</i> , regional and municipal taxes	158	6.27
Health care systems and veterinary sector	127	5.04
Regional and municipal roads	122	4.84
Education systems, sports and cultural matters	89	3.53
Office of the <i>Land</i> Government, public services and compensation law for regional and municipal employees	47	1.87
Agriculture and forestry, hunting and fishing laws	45	1.79
Trade and industry; energy	44	1.75
Nature conservation and environmental protection, waste management	32	1.27
Transport and traffic on regional and municipal roads (excl. traffic police)	14	0.56
Science, research and the arts	2	0.08
TOTAL	2,519	100.00

Shorter duration of investigations

In the year under review, a total of 9,315 investigated cases were resolved, i.e. 11% more than in the previous year. The number of cases where maladministration was ascertained also increased from 1,041 (2011) to 1,519 (2012) and was therefore at 16.3% in 2012. On

average, the AOB informed the parties involved within 44 days whether maladministration was determined. This means that the average investigation duration was reduced by five days compared to the previous year.

In 1,362 cases, the complaint fell within the AOB's area of competence, but there was no reason to initiate an investigative proceeding. In these cases, the AOB provided additional information, including legal information. 1,311 cases were outside the scope of the AOB's mandate. However, the AOB endeavoured to provide support in these cases as well. It contacted the relevant authorities and identified possible approaches for a potential solution for the complainants. In 643 instances, the complaint was withdrawn.

Information outside of the investigative mandate

Under the Austrian Federal Constitution, the AOB can initiate investigative proceedings ex-officio if it has concrete suspicions regarding maladministration. As was the case in the previous years, the members of the AOB made use of this right, initiating 58 ex-officio investigative proceedings (2011: 54).

58 ex-officio investigative proceedings

Resolved complaints relative to regional and municipal government administration	2012	2011
No maladministration found	4,306	4,163
Maladministration on the part of the authorities	1,519	1,041
Investigative proceeding currently inadmissible (administrative proceeding still ongoing)	1,362	1,217
Complaints outside the AOB mandate	1,311	1,177
Complaint retracted	643	647
Complaints not suitable for handling (per the relevant regulations)	167	128
Cases which the Board jointly determined a case of maladministration and issued a recommendation	7	3
Challenges to regulations	0	1
TOTAL	9,315	8,377

Monitoring and control activities within the scope of the National Preventive Mechanism

133 visits since September 2012

In 2012, 133 monitoring and control visits were carried out within the scope of the National Preventive Mechanism. When analysing the figures for monitoring and control activities, it must be taken into consideration that the Commissions only began with their visits in mid-September. Initially, it was necessary to work on team building and to develop work methodologies. A workshop was held to teach the fundamental legal principles of the AOB's new competences and to develop a common understanding of the investigative standards.

Preventive monitoring & control 2012	Visits and investigations of institutions & facilities	Monitoring of the exercise of direct administrative power and compulsion
Vienna	25	21
Burgenland	3	
Lower Austria	24	1
Upper Austria	16	4
Salzburg	3	0
Carinthia	6	0
Styria	8	2
Vorarlberg	4	0
Tyrol	13	3
TOTAL	102	31
<i>(of which un-announced)</i>	<i>88</i>	<i>6</i>

Almost 80% of the cases were visits to facilities where people are being detained. The main focus was on police stations and departments and penal institutions. Of the total of 102 visits, 88 were unannounced.

The detailed statistics show the following distribution: 39 police stations and departments, 17 correctional facilities, 4 youth welfare facilities, 9 institutions and facilities for persons with disabilities, 20 retirement and nursing homes and 13 psychiatric departments in hospitals and medical facilities were visited.

In itinere observation of (forced) returns and manifestations comprised 31 cases, of which one fifth was unannounced. The greatest number of monitoring and control visits took place in Vienna, followed by Lower and Upper Austria.

Budget and personell

In 2012, the AOB had a budget of EUR 9,278,000. This amount includes the budget increase that was necessary due to the expansion of competences as at 1 July 2012 as a result of the Act on the Implementation of the OPCAT.

Budget increase due to new competences

EUR 4,925,000 (2011: EUR 4,022,000) were available for personnel expenses and EUR 4,353,000 (2011: EUR 2,578,000) for material expenses. The material expenses include facilities, advance payments of salaries, expenses stemming from statutory obligations (for remuneration of members and pensions of former members of the AOB, as well as pensions for widows of former members of the AOB), as well as other expenses.

A budget of EUR 1,947,000 was provided for the second half of 2012 for fulfilment of the new competences. Of this amount, around EUR 574,000 were budgeted for reimbursement and travel expenses for Commission members and around EUR 50,000 for the Human Rights Advisory Council; EUR 100,000 were made available for workshops for the Commissions, the AOB staff employed in the OPCAT section and expert opinions.

Federal budget estimate of the AOB*	
2012	2011
9.278	6.600

Personell expenses	
2012	2011
4.925	4.022

Material expenses	
2012	2011
4.353	2.578

* in millions of Euros

15 new permanent positions

In order to be able to fulfil the additional competences, in 2012, the AOB was allocated 15 new permanent positions and had a total of 74 permanent positions in the federal personnel budget (2011: 59 permanent positions). This means that the AOB is the smallest supreme body of the Republic of Austria. With part-time staff, persons working reduced weekly hours, administrative internships and staff posted from other local and regional authorities, 90 persons on average are working at the AOB. The 48 members of the six Commissions as well as the 34 members and the substitute members of the Human Rights Advisory Council do not count as AOB staff members.

Citizen-friendly communication

Communication with the Public

- 213 consultation days with about 1,100 personal contacts
- 7,567 people contacted the AOB personally or by phone
- 15,036 people wrote to the AOB
- 26,232 documents comprised the AOB's correspondence
- 10,825 letters & e-mails were sent to government authorities
- 90,000 hits were registered on the AOB website

Citizens appreciate straightforward contact

These figures lead one to assume that broad segments of the population evidently welcome the fact that it is very easy to contact the AOB personally, by phone or in writing. The members' consultation days in the *Laender* are also very popular. Citizens have the opportunity to speak to a member of the AOB personally about their matter of concern. In the year under review, 213 consultation days with more than 1,000 personal discussions were held. Compared to the previous year, fewer consultation days were held (2011: 276); the decrease was due to the many tasks that had to be completed within the scope of the reorganisation of the AOB. In accordance with the demographics, the largest number of consultation days was held in Vienna (52).

Consultation days	2012	2011
Vienna	52	74
Burgenland	14	21
Lower Austria	32	41
Upper Austria	27	28
Salzburg	24	19
Carinthia	21	24
Styria	21	36
Vorarlberg	8	8
Tyrol	14	25
TOTAL	213	276

For more than ten years, the television programme *Bürgeranwalt* ("Advocate for the People") has had high viewing figures, proving to be an important platform for the issues handled by the AOB. On average, each week around 308,000 households follow the efforts of Ombudspersons Gertrude Brinek, Terezija Stoisits and Peter Kostelka, who address the population's everyday problems with Austrian authorities and work to find a solution.

Television programme *Bürgeranwalt* on ORF is very popular

The Internet is being increasingly utilised as a point of contact for the AOB. The growing number of visitors shows clearly that the AOB's Internet presence is popular and is perceived as informative. In the past year, the AOB website was accessed around 90,000 times. The online complaint form was downloaded 986 times. This is an indication that people appreciate the unbureaucratic access to the AOB.

The AOB website gets 90,000 hits

Events

As was the case in previous years, the AOB organised numerous events in order to communicate with citizens and members of national and international organisations, as well as experts. The year 2012 saw the emergence of an additional, new focal point: The AOB undertook particular efforts to include civil society in the formation of the newly established Human Rights Advisory Council. In February, the members of the AOB invited more than 100 NGOs to an informational event in order to familiarise them with the new Act on the Implemen-

Inclusion of civil society

tation of the OPCAT. This initiated a dialogue with civil society about the composition of the Human Rights Advisory Council and the competences of this body.

Formal launch event
in Parliament

On 10 July 2012, the collaboration with the newly established Human Rights Advisory Council and the Commissions was acclaimed in the first official ceremony. National Council President Barbara Prammer and the members of the AOB issued invitations to a formal launch event in the Austrian Parliament. Chairperson Terezija Stoisits and Ombudspersons Peter Kostelka und Gertrude Brinek introduced the new competences undertaken by the AOB. Subsequently, the newly established Human Rights Advisory Council was introduced by its Chairwoman Renate Kicker and Deputy Chairwoman Gabriele Kucsko-Stadlmayer. Subsequently, the constitutive meetings of the Commissions were held.

Information on the
new competences

Within the scope of many events and meetings, the AOB provided information about its new competences and deepened its relationships to important international institutions and Austrian control bodies. There have also been numerous work-intensive visits to regional offices by AOB executives. The purpose of these informational events was to discuss the impact of the new competences and investigative activities on the *Laender* and to consult on cooperation possibilities.

Collaborations with
professional associations

Among the many working meetings, the meetings with institutions and professional associations that have comparable competences as the AOB or are pursuing similar objectives were especially notable. For example, cooperation possibilities were discussed with associations covered by the Act for Legal Trusteeship for Associations, Patients and Inhabitants of Homes and Institutions as well as with children and youth advocates and collaboration agreements were formed. The purpose was to prevent duplication of activities (for example, by coordinating visits) and improve the effectiveness of the participating bodies by engaging in information-sharing on an institutional basis.

Forum for sharing of
expert knowledge

The AOB, however, also provides a forum for the sharing of expert knowledge. An example is the "*Fachgespräch Staatsbürgerschaft*" (expert discussion on citizenship), which took place in September 2012 and was organised jointly with the Counselling Centre for Migrants. Around 40 experts from federal and regional authorities, as well as representatives of various sciences and civil society, discussed access to citizenship compared to other European countries and current developments in Austrian citizenship law. With events of this kind, the AOB is fulfilling its legal mandate to cooperate with the sciences.

Training and continuing education

During the year under review, the AOB conducted a number of continuing education events and trainings in order to ensure an optimum performance of the new competences.

In the period from November 2011 to March 2012, AOB executives put on a series of lectures for all its employees that provided information about the forthcoming expansion of competences and explained the impact and the legal background thereof. The lectures focused on the AOB's obligations under OPCAT, the position of the AOB as a National Institution for the Promotion and Protection of Human Rights, as well as the investigative standards. Additionally, they provided an initial overview of the customary international procedures of commissions when undertaking preventive monitoring and control.

Continuing internal education

The topic of another internal training course was the reporting system. As the new competences of the AOB also impacted the AOB's reports, a number of adjustments were necessary. In November 2012, three one-day writing workshops were conducted for AOB experts to establish the new reporting standards in house.

On 14 and 15 September, the AOB conducted a kick-off workshop for the Commissions, the purpose of which was primarily to provide some basic knowledge regarding the fundamental legal principles of the National Preventive Mechanism and to develop a basic common understanding of the applicable investigative standards. National and international experts spoke about monitoring and control visits in care facilities, psychiatric institutions and prisons. The focus was on the individual phases of the monitoring process.

Kick-off workshop for the Commissions

In early November, there was another custom-tailored training module for the Commissions that was held jointly with the Council of Europe. The primary objective of this shadow monitoring was to enable the sharing of experience and knowledge at the international level. Six internationally recognised experts accompanied the Commissions during their visits of three selected facilities. The module was divided into three sections: joint planning of the visits, the visits themselves as well as debriefing and concluding evaluations. This form of training was another important step in ensuring that international standards are complied with when conducting visits.

Shadow monitoring in cooperation with the Council of Europe

Due to the very positive feedback, further training modules are already being planned for 2013. A particular focus will be to continue to standardise the methodological approaches and deepen the common understanding of the National Preventive Mechanism. A corresponding continuing education concept is being developed.

The members of the AOB take stock

Ombudswoman Terezija Stoitsits

The new work of the AOB began as of 1 July 2012. The six Commissions established within the AOB began their work and are visiting public and private institutions and facilities where persons are being detained. All matters that fall within the area of authority of the Ministry of the Interior are in my area of competence. Therefore, I was able to take advantage of the longstanding activities and experience of the former Human Rights Advisory Council and the earlier Commissions. From the very beginning, it was important to me to utilise this knowledge and to take up recommendations that have not yet been implemented.

Commissions investigate since 1 July 2012

During their visits in the first six months, the Commissions focused on the areas they were familiar with from earlier reports: Police detention centres, observation of forced returns, observation of the exercise of administrative power and compulsion as well as police stations. The visits of the police detention centres have made it clear that many of the demands expressed by the former Human Rights Advisory Council continue to be relevant today and are still awaiting implementation. I therefore made this my first focus in this area and submitted suggestions for improvements to the Ministry of the Interior.

Focus of visits in the area of authority of the Ministry of the Interior

In addition to the challenges presented by the new competences, I would like to emphasise how important the previous activities of the AOB have been to me. The ex-post control of public administration continues to be an indicator of how well the administration is working. For more than 35 years, the AOB has been a yardstick for both citizens on one hand and public administration on the other. Because of its perseverance and determination, it has been able to effect both improvements in enforcement of the law and of legislation itself. The continuing numbers of complaints confirm that the AOB has not only been accepted by the population, but is also being actively utilised. As an ombudswoman, I am glad to see this and it confirms how useful the work of the AOB is.

A focus of ex-post control continues to be the Asylum Court. It is true that this year the number of complaints has declined in comparison to 2011, but nevertheless, the situation for asylum seekers continu-

Asylum Court is still in arrears

es to be unsatisfactory. They have been waiting for many years for decisions. In 2012, the AOB found a total of 382 cases of maladministration due to inaction on the part of the Asylum Court. In almost all of the cases that have been pending before the Asylum Court since 2012, the Asylum Court was not able to refer the AOB any procedural steps it had taken. I am afraid that cases, which have been pending for “only” one year will go on for years. Many asylum seekers who contacted the AOB in 2010 or 2011 have again complained this year about the duration of the proceedings. The Asylum Court was able to report investigations or proceedings only rarely. The need of the individuals involved to learn their status is justified. This need must be met. In the future, proceedings before the Asylum Court – from 1 January 2014, before the Federal Administrative Court – must be concluded within a reasonable period of time. After more than four years, this objective which was set out by the political parties in 2008 when the Asylum Court was established must finally be achieved.

Closure of small primary schools destroys social structures

In the area of education, it was especially important for me this year to support small compulsory schools, including in the media by way of the *Bürgeranwalt* television programme. Primary schools are within the purview of the *Laender*. The secondary schools build on this education. Whether properly functioning schools, for example in Carinthia or Styria, are closed, is often only a question of cost for the *Laender* and the municipalities. For students and their parents, however, it is a question of a well-functioning social structure and maintaining the community. Established structures are impaired or even destroyed. Motivation to acquire better and higher education will not prosper – or will prosper only with considerable difficulty – on a foundation like this one. The political concept of closing schools to save costs should be urgently reconsidered.

I very much enjoy taking the opportunity of talking about the AOB in schools. Young people are interested in the activities of the AOB, especially within the scope of the school subject “Political Education”. Parents usually know that complaints about school-related matters can be submitted to the AOB, but the directly affected students generally do not. Besides, they are the complainants of the future. In addition to any personal benefit, their future complaints to the AOB will also pinpoint possible adverse developments in public administration.

Obstacles for persons with disabilities

Education is one of the most important pillars of our society. It must be made available and be accessible to everyone. In my view, this fundamental right is not always accessible for persons with disabili-

ties. Inclusion in the school system is often talked about, but there is a great deal of work ahead of us so that it will benefit everyone. Everyday life is not always easy for disabled persons. For example, the Theus Temple in the Vienna *Volksgarten* was expensively renovated, but it has no disabled access. Or the grab handles in the washroom of a police station were forgotten when it was renovated. Of course I address these cases and demand improvements. Legislators took an important step forward with the regulation on ID cards for persons with impaired mobility in the Austrian Road Traffic Act. A legislative amendment made this ID card accessible for more persons with disabilities. The Federal Social Welfare Offices will ensure a uniform enforcement of this legislation in the future.

For me, in addition to ex-post control of public administration, the AOB's monitoring of legislation plays a central role. Unfortunately, the AOB's legislative recommendations are acted upon far too rarely. A tenacious perseverance is often required to achieve improvements to legislation. The AOB's reports clearly show that recommendations must be repeated year after year. That is why it makes me particularly happy that significant improvements in citizenship law appear to be on the horizon. In the Annual Report 2011, the AOB addressed this subject in great detail and summarised all of the suggested recommendations, some of which had been made repeatedly for years. Then things began to stir. The political arena took up some of the items and signalled its willingness to discuss them. Finally both politicians and the Ministry of the Interior held out the prospect of a major amendment of the Citizenship Act that is supposed to contain almost all of the recommendations for improvement made by the AOB. Thus, the persistence of the AOB should soon be rewarded to the benefit of many citizenship applicants.

Legislative recommendations are very important

Ombudswoman Gertrude Brinek

The AOB as a complement to the system of judicial protection

From the very beginning, the AOB was set up as a complement to the existing multi-faceted system of judicial protection. And this is precisely why the AOB is particularly called upon to see people not only as subject to the law, but holistically as persons and personalities with their individual worries and problems. And this is also how the AOB is viewed by the population. One of the results of this is the large number of requests for help that go beyond the confines of the AOB's mandate.

I have been very pleased to note that my task as a mediator between the population and legislation and law enforcement is seen as a valuable contribution, including in professional circles.

Perceptions about the work of the justice system

In seminars and workshops, I have been able to describe what kind of impression the work of the justice system makes on people. It is my responsibility to give the experts involved qualified feedback. I can summarise this with two impressions that were reinforced in the past year. On one hand, many of the parties involved in a court proceeding have a huge knowledge deficit about the process and bases for court rulings. False expectations collide with ununderstandable legalese. On the other hand, there is the growing feeling that only those cases are given the proper attention that are reported in the media and that "minor" cases fall by the wayside.

Improvements in the area of family law

For the area of family law, I hope that the new regulations about child custody and the increased inclusion of children's advocates will be accepted by the affected families and will contribute to an improvement overall.

There continued to be numerous questions and complaints about legal guardianship. It remains to be seen whether potential solutions for this growing social issue can be found in the near future.

Taxation of additional pensions from Germany

The recipients of – usually small – additional pensions from Germany were completely caught off guard. Not only are they facing sometimes substantial demands for retrospective payment of the tax on pensions that was introduced in Germany in 2005, but they need assistance regarding the examination of the pension statements and additional information on how they should handle these tax liabilities that are perceived to be "double taxation". Discussions between the Federal Ministry of Finance and the German tax authorities are currently ongoing.

As expected, the number of complaints regarding the penal system has increased. This is a reflection of the initial visits undertaken by the AOB Commissions and reports in the media about the AOB's new competences as the National Preventive Mechanism.

Due to our distribution of tasks and duties, the majority of my investigated cases concerned building and regional planning law. The numerous complaints made it obvious that in this area, theory and practice, wishful thinking and reality are often poles apart. The many ways that enforcement of an abatement order can be delayed or frustrated for years drive the affected neighbours to a state of desperation. At the same time, people are expressing the desire for a greater individualisation of the law. The legislators are called upon to enable that all of the personal ideas of the building owner be realised, and this contradicts the equal demands for protection by the State against individual errors.

Building and regional planning law between theory and practice

It was an important issue for me to intensify contacts with educational facilities – both schools and universities. After several lectures in schools within the scope of “Political Education” classes, I was invited by the Working Group of Professors of Political Education, Law and Economy to speak about the competences of the AOB and to promote increased cooperation.

Intensive cooperation with educational facilities

The cooperation with the Medical University of Vienna was especially gratifying. For example, I was able to explore the experience of insurance expert witnesses with participants of a university course on medico-actuarial science. It became clear that the problem areas in the international German-speaking regions are quite comparable.

The expansion of competences that was initiated in 2012 has motivated my staff and me to expand our perspective regarding the concerns that people have.

Ombudsman Peter Kostelka

Looking back at the almost twelve years during which I had the honour of being responsible for the organisation and in particular for my area of competence, I can state with a clear conscience that the AOB is in the midst of dynamic development. It was originally constituted for the purpose of “ex-post control of alleged maladministration”. There was widespread agreement that undertaking only selective, system-compatible changes would not produce improved “access to justice” nor create an objective interest in the legality of actions by public administration. The perception of what kind of guarantees a State that considers itself to be a so-called state under the rule of law must provide in order to increase the efficiency of its system of judicial protection has changed since then. The process toward comprehensive protection against discrimination – both at the European level and in Austria – is well under way, but it is not finished by far. And the AOB sees this in its day-to-day work.

Protection and promotion of human rights

Much of what we have initiated in the area of preventive monitoring and control – with substantial assistance from our staff – would not have been possible without extended and well-founded preparation. A crucial aspect is that even prior to the Act on the Implementation of the OPCAT we understood our mandate to monitor and control maladministration to be very broad – and inclusive of our obligations under international law as part of the legal system. Knowledge of the normative nature of the international commitments that Austria has undertaken was made a core part of the ex-post control sector as a benchmark. The good contacts that the AOB has maintained for years to the Council of Europe and – through the IOI General Secretariat – to ombudsman institutions worldwide have been very helpful in our National Preventive Mechanism activities, especially in the development phase. I continue to view the new competences as challenging. They are, however, the consistent continuation of a path that this institution had already gradually developed in the past.

It is not enough for good governance to be merely efficient, but it must also be highly effective and must – with respect to its dealings with people – be accompanied by communication where both parties are on equal footing. Ombudsman institutions are able to do this and must remain believable and approach others proactively, without putting up barriers. The television programme *Bürgeranwalt*, which was resumed in 2002, the free telephone hotline and the consultation

days throughout the *Laender* make a significant contribution to this process. At the international level, I have also with deep conviction supported all the initiatives that can be summarised under the slogan “the AOB goes international”. The objective of this international commitment by the AOB is primarily to make it possible for ombudsman institutions in the new democracies and the countries that are in the process of becoming states governed by the rule of law to fulfil their duties that are especially important in these countries.

The same applies to both the activities of the AOB and to enforcement: “Justice must not only be done, it must also be seen to be done.” In this respect, I can report the most diverse efforts in my area of competence.

For example, we assisted a man who had developed concepts for the barrier-free provision of telecommunications services but who had not been able to find a contact person at the Ministry level. Neither the Federal Ministry for Transport, Innovation and Technology nor the Federal Ministry of Labour, Social Affairs and Consumer Protection deemed itself to be the proper authority. This hurdle was overcome by way of the amendment of the Telecommunications Act. In early July 2012, the Federal Ministry for Transport, Innovation and Technology had an initial discussion with the Austrian Association of the Deaf and the Austrian Association of the Blind and Visually Impaired to conduct a needs assessment. A pilot operation of a deaf relay centre was initiated. The results of the evaluation are still pending. New technologies for assisted communication, which are already available in other European countries, must still be developed.

Assistive technologies

Persons who are in difficult situations are in particular danger of experiencing massive interference in areas of their lives that are protected by the Constitution can be easily demonstrated using the example of a health programme that is subsidised by the Public Employment Service Austria. Anyone who wished to participate had to consent to a comprehensive disclosure of his/her health information to all of the main public social insurance carriers, including various offices of the Public Employment Service Austria, and had to waive most of their patient confidentiality as well. In the meantime, the Federal Ministry of Labour, Social Affairs and Consumer Protection has addressed the AOB’s concerns regarding data protection and privacy and has ensured that participation in this project is voluntary. As opposed to the initial fears of the complainants, there are no sanctions.

Programme for the unemployed undermines data protection

Access to family
benefits

Families from other countries for whom legislators have complicated access to family benefits have difficulty asserting their rights even when they meet the requirements. An administrative practice that has been stipulated as unlawful by the AOB prevents this access although the rulings of the Independent Financial Tribunal coincide with the AOB's viewpoints. Most recently, some partial successes have been achieved in favour of those entitled to subsidiary protection, but otherwise all of the available remedies to correct maladministration determined by the AOB have been exhausted (see p. 80).

Amendment realized

Referring to a recommendation made by the AOB, Art. III (1) (3) of the Introductory Act to the Administrative Procedure Acts 1991 was revised so that now more efficient prosecution and punishment of discriminatory practices should be possible. In the future namely, the parties involved no longer need to prove that they had been penalised with regard to their access to public assets and services "solely" due to their ethnic origin.

Preventive monitoring and control - Protection & promotion of human rights

The new competences of the AOB

With the Act on the Implementation of the OPCAT (*OPCAT Durchführungsgesetz*) dated 10 January 2012, *Federal Law Gazette (BGBl.)* I No. 1/2012, the AOB's competence under constitutional law has undergone its greatest expansion since its establishment in 1977.

Three new competences of the AOB

The title of the law describes only part of the new competences. Up to now, as a parliamentary ombudsman institution, the AOB was primarily occupied with ex-post control of public administration. Since 1 July 2012, as National Preventive Mechanism (NPM), the AOB's mandate under the UN Optional Protocol of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 18 December 2002 (OPCAT) includes preventive monitoring and control of all public and private institutions and facilities where persons are or can be detained. This duty has been extended to include the monitoring and control of institutions and facilities as well as programmes for persons with disabilities in accordance with the UN Convention on the Rights of Persons with Disabilities 2006. The third new area of competence covers the in itinere and observatory monitoring of the conduct of the agencies empowered by the State to exercise administrative power and compulsion. It is the duty of the AOB to charge the Commissions it has established with the actual execution of these tasks. A Human Rights Advisory Council has been established as a purely advisory body.

The AOB was included in the legislative process from the very beginning and the individual provisions have been coordinated with it. In accordance with international requirements, the drafts prepared by the Legal and Constitutional Service of the Federal Chancellery were also discussed with representatives of non-governmental organisations (NGOs), which were invited to comment on them prior to deliberations in Parliament.

Law discussed with NGOs

Organisational implementation

- Preliminary work** In accordance with the common understanding of this institution – positioning the AOB as the “Human Rights House of the Republic of Austria” – the members of the AOB began with the preliminary work for the necessary organisational changes as early as autumn 2011. The AOB was advised by University Professor Stefan Titscher. In numerous internal events, the entire staff was informed about the new competences and the international framework conditions that had to be adhered to. Two project groups focused on the concrete requirements for business to be conducted as smoothly as possible and on compiling the international and national standards necessary for the fulfilment of the duties.
- Human Rights Advisory Council** After the official publication of the Act on the Implementation of the OPCAT in January 2012, the members of the AOB designated Renate Kicker to be the Chairwoman of the Human Rights Advisory Council and Gabriele Kucsko-Stadlmayer to be the Deputy Chairwoman. The Federal Ministries were requested to name their members and substitute members. In February, the AOB invited more than 100 NGOs, which are dedicated to the protection of human rights, to an informational event. The AOB offered NGOs the opportunity to determine the organisations, which are eligible to nominate members and substitute members of the Human Rights Advisory Council, themselves. The AOB provided organisational support in this process. In its first meeting on 11 April 2012, the designated Human Rights Advisory Council began to discuss the AOB’s draft for its Rules of Procedure (ROP).
- Formation of the Commissions** Concurrently, the AOB publicly advertised the positions of Chairpersons of the Commissions, as well as additional Commission members. The members of the AOB fixed the number of Commissions at six, each Commission consisting of eight members. The AOB received more than 600 applications for the position of member of a Commission. There were statutory regulations to be complied according to which each Commission must be chaired by a “person who is recognised in the sector of human rights”. Overall, the AOB had to ensure that the Commissions were “independent, interdisciplinary and pluralistic“. After several applicant interviews conducted by the members of the AOB in consultation with designated members of the Human Rights Advisory Council, the members of the Commissions were appointed on 11 July 2012.

The legal parameters for fulfilling the new competences were created with the official publication of the Rules of Procedure of the AOB, its Commissions and the Human Rights Advisory Council (ROP of the AOB 2012) on 13 July 2012, *Federal Law Gazette (BGBl.)* II No. 249/2012, and the allocation of duties of the AOB, its Commissions and the Human Rights Advisory Council (Allocation of Duties of the AOB 2012) published on the same date, *Federal Law Gazette (BGBl.)* II No. 250/2012.

Implementation for regional administration

So far, it was up to the *Laender* to entrust monitoring and control of regional and municipal government administration to the AOB or to set up their own regional ombudsman boards. Due to the obligations of the Republic of Austria under international law to implement OPCAT, the options were restricted. The *Laender* were obligated to either entrust the new competences under the Act on the Implementation of the OPCAT to the AOB or to entrust their own institutions with these responsibilities by 31 December 2012.

Eight *Laender* entrust competences to the AOB

With the amendment to the Regional Constitution (*Landesordnung*), *Regional Law Gazette (LGBl.)* No. 147/2012, the *Land* of Tyrol declared the AOB to be competent “for the control and monitoring duties required for the protection and promotion of human rights”. The regional ombudsman board continues to be competent for monitoring and control of maladministration in the regional administration. Vorarlberg, on the other hand, entrusted these duties to its regional ombudsman board. It is therefore possible that there may be overlap in some of the competences, particularly in the monitoring and control of retirement and nursing homes, as the measures that restrict freedom are within the federal area of authority under the Nursing Home Residence Act and the Compulsory Admission Act. The AOB and the Commission that is competent for Vorarlberg have already begun discussions regarding cooperation and coordination of their activities.

The AOB offered to familiarise the administrative departments of the regional governments with the new competences. As these offices also have monitoring and control competences, possible ways of collaboration will be discussed in advance in order to prevent duplication of activities

Competences of the AOB

Monitoring and control of institutions and facilities in accordance with OPCAT

OPCAT It is the duty of the AOB and the Commissions it has established to monitor and control all venues where persons “are deprived or can be deprived of their freedom as a result of a decision by a government agency or at its behest or with its explicit or implicit agreement” (see Art. 4 OPCAT). Due this broad mandate, the AOB is assuming a figure of more than 4,000 public and private institutions and facilities, which are to be visited, monitored and controlled by the Commissions on a regular basis either with or without prior notification.

Questions regarding jurisdiction with respect to youth welfare

Several *Laender* expressed doubts about the authority of the AOB with respect to socio-pedagogical facilities operated by youth welfare authorities. It should be noted, however, that the Constitutional Committee of the National Council determined during its deliberations that „socio-pedagogical facilities where measures under youth welfare law are being implemented are also subject to the jurisdiction of the AOB in this context”. In its statement, the AOB also pointed out that measures by a government youth welfare authority that restrict the residents’ freedom must be classified pursuant to Art. 5 of the European Convention on Human Rights and/or Art. 2 of the Federal Constitutional Act on the Protection of Personal Freedom. This is also consistent with the relevant international commentaries on the UN-Convention against Torture (CAT) that also consider care homes, children’s homes, foster homes, homes for the young and other family residences as encompassed under the OPCAT mandate.

Basic services and benefits for asylum seekers

The AOB has also approached the Human Rights Advisory Council with the question of whether facilities providing a basic level of social services for asylum seekers are in and of themselves subject to monitoring and control. In the opinion of the AOB, jurisdiction exists only if, in the case of unlawful acts of detention, it must be presumed that there is explicit or at least implicit agreement on the part of the competent authorities.

Monitoring and control of institutions and facilities as well as programmes for persons with disabilities

Part of the AOB's mandate is to visit and/or inspect institutions and facilities as well as programmes for persons with disabilities. The aim is to prevent any form of exploitation, violence and abuse (see Art. 16 (3) of the UN Convention on the Rights of Persons with Disabilities, CRDP). Based on the discussion that led to the final wording of the provision in the UN Convention, the AOB presumes that it has jurisdiction over those institutions and facilities where special treatment is provided for persons with disabilities and/or if they are especially geared towards persons with disabilities. This applies, for example to inclusion kindergartens and classes.

UN Convention on the Rights of Persons with Disabilities

The scope and meaning of the terms "exploitation, violence and abuse" in Art. 16 (3) of the UN Convention on the Rights of Persons with Disabilities cannot be answered definitively. The Convention itself does not contain an authentic interpretation of these terms. Furthermore, at this time there are no general comments by the UN Committee on the Rights of Persons with Disabilities. In any case, the prohibition against "any form" of exploitation, violence and abuse makes the area of applicability especially large. Therefore, the AOB has referred back to additional international UN and Council of Europe documents.

In its memorandum of understanding, the organisation Austrian Initiative for Independent Living (*Selbstbestimmtes Leben Initiative Österreich, SLIÖ*) agreed to "extensive portions" of the statements set out by the AOB. It referred specifically, but not exclusively to the past remarks of the Independent Monitoring Committee for the Implementation of the UN Convention on the Rights of Persons with Disabilities that was established within the Federal Ministry of Labour, Social Affairs and Consumer Protection that has dealt comprehensively with this subject. Additionally, the Austrian Initiative for Independent Living suggested including peer counsellors in the activities of the Commissions. The AOB made the memorandum of understanding available to the Commission and pointed out the possibility of consulting additional experts.

In itinere monitoring of acts of compulsion

Monitoring of acts of compulsion

As far as the police are concerned, the in itinere monitoring and control of the conduct of agencies empowered to exercise administrative power and compulsion was hitherto within the remit of the Human Rights Advisory Council, which had been established as part of the Ministry of the Interior pursuant to Section 15a of the Law Enforcement Bodies Act. Now this competence has been included in the mandate of the AOB and the Commissions it has established. In this area, the AOB can take advantage of the experience of the previous Human Rights Advisory Council. In accordance with a decree issued by the Federal Ministry of the Interior, the AOB is informed specifically, but not exclusively with respect to targeted campaigns, major raids, major events, assemblies, as well as forced returns by air or land. Additionally, the AOB receives reports from the Association of Human Rights Austria (*Verein Menschenrechte Österreich, VMÖ*) about their observations of police conduct during forced returns by charter plane. The AOB is also informed about any allegations of abuse against police authorities, as well as with respect to any deaths or suicide attempts in police custody. A six-month observation period was agreed with the Federal Ministry of the Interior in order to determine if the Commissions have received all the necessary information.

Personell and financial resources

Budgetary provisions

An adequate budget

Every treaty state that has ratified the OPCAT is obligated under international law to provide its NPM with sufficient funds. The AOB initially based its budgetary planning on the expenditure for the previous Human Rights Advisory Council pursuant to the Law Enforcement Bodies Act, which, however, had significantly fewer duties to fulfil than the current NPM. Merely the number of institutions and facilities that are to be monitored and controlled has quadrupled to more than 4,000. The AOB anticipates that the number of visits and investigations by the Commissions will increase to around 700 as a result of the expanded mandate. All Commission members receive financial compensation for their activity, and are reimbursed for travel and accommodation costs.

On top of this are the expenses for other AOB obligations that result from the OPCAT. In particular, the AOB is now obligated to

work together with international bodies, such as the UN Subcommittee on Prevention of Torture, and to provide it with a report each year. Within the scope of its mandate, the AOB must also participate in evaluation proceedings with respect of the enactment of general legislation by the Federal Government and the *Laender*. As the National Preventive Mechanism, the AOB has the special duty of cooperating with the scientific community, academia and educational institutions, as well as providing information to the public about its activities.

As a body that manages its own budget, the AOB must manage and bear all of its personnel and material costs. Therefore, the National Council took into consideration the increased staff requirements for the additional administrative tasks.

In total, the AOB was allocated 15 additional permanent positions and had a budget for the second half of 2012 of EUR 1,947,000. For 2013, expenditures in the amount of EUR 2,960,000 have been budgeted in the 2013 Federal Finance Act for fulfilment of the new competences. The AOB is proceeding on the assumption that the current budget is quite sufficient.

Increased personnel requirements

Commissions of the AOB

The members of the AOB decided to establish six Commissions, each consisting of eight members. This corresponds to the minimum number of Commissions required under the law. After hearing the Commissions, they were structured according to regional criteria (ROP of the AOB 2012, *Federal Law Gazette (BGBl.)* II No. 250/2012). Along the regionally highly differentiated number of institutions and facilities to be monitored and controlled can result in unequal work loads for the Commissions. This was taken into consideration when distributing the budget available for the Commissions. Likewise, the monitoring and control activities can result in a need for cross-regional Commissions or Commissions that are structured according to objective criteria. It was agreed with the Commissions to wait until more information was available and, if needed, to revise the ROP of the AOB in 2013

Six regional Commissions

Commission 1	Commission 2
Tyrol/Vorarlberg	Salzburg/Upper Austria
Chairwoman: Karin TREICHL	Chairman: Reinhard KLAUSHOFER
Commission members	Commission members
Susanne BAUMGARTNER Sepp BRUGGER Elif GÜNDÜZ Max KAPFERER Lorenz KERER Monika RITTER Hubert STOCKNER	Markus FELLINGER Wolfgang FROMHERZ Katalin GOMBAR Esther KIRCHBERGER Robert KRAMMER Renate STELZIG-SCHÖLER Hanna ZIESEL
Commission 3	Commission 4
Styria/Carinthia	Vienna (districts 3 - 19, 23)
Chairwoman: Angelika VAUTI-SCHEUCHER	Chairman: Ernst BERGER
Commission members	Commission members
Klaus ELSENSOHN Odo FEENSTRA Daniela GRABOVAC Ilse HARTWIG Sarah KUMAR Silke-Andrea MALLMANN Erwin SCHWENTNER	Andrea BERZLANOVICH Sandra GERÖ Helfried HAAS Christine PEMMER Petra PRANGL Nora RAMIREZ-CASTILLO Walter SUNTINGER
Commission 5	Commission 6
Vienna (districts 1, 2, 20 - 22) Lower Austria (political districts Gänserndorf, Gmünd, Hollabrunn, Horn, Korneuburg, Krems, Mistelbach, Tulln, Waidhofen a.d. Thaya, Zwettl	Burgenland/Lower Austria (political districts Amstetten, Baden, Bruck a.d. Leitha, Lilien- feld, Melk, Mödling, Neunkirchen, Scheibbs, St. Pölten, Waidhofen a.d. Ybbs, Wr. Neustadt, Wien Umgebung
Chairman: Manfred NOWAK	Chairman: Franjo SCHRUIFF
Commission members	Commission members
Susan AL JAWAHIRI Lisa ALLURI Harald P. DAVID Marijana GRANDITS Sabine RUPPERT Maria SCHERNTHANER Hans Jörg SCHLECHTER	Karin BUSCH-FRANKL Süleyman CEVIZ Corina HEINREICHSBERGER Siroos MIRZAEI Cornelia NEUHAUSER Elisabeth REICHEL Karin ROWHANI-WIMMER

Human Rights Advisory Council

The Human Rights Advisory Council has been established as the AOB's advisory body. Its responsibility is to advise the AOB with respect of its new competences, including but not limited to the determination of general investigative focal points and prior to issuing determinations of maladministration and recommendations. Furthermore, it can make suggestions to the AOB on how to ensure a unity of action and investigative standards. The Human Rights Advisory Council consists of the chairperson and deputy chairperson (both appointed by the AOB) and 32 additional members and substitute members who are delegated on the basis of parity by the Ministries, *Laender* and NGOs.

established as advisory body

Human Rights Advisory Council		
Chairwoman: Renate Kicker		
Deputy Chairwoman: Gabriele Kucsko-Stadlmayer		
Name	Function	Institution
Mathias VOGL	Member	Federal Ministry of the Interior
Konrad KOGLER	Supstitute member	Federal Ministry of the Interior
Anna SPORRER	Member	Federal Chancellery
Brigitte OHMS	Supstitute member	Federal Chancellery
Gerhard AIGNER	Member	Federal Ministry of Health
Irene HAGER-RUHS	Supstitute member	Federal Ministry of Health
Christian PILNACEK	Member	Federal Ministry of Justice
Gerhard NOGRATNIG	Supstitute member	Federal Ministry of Justice
Billur GÖKAL	Member	Federal Ministry of Defence and Sports
Karl SATZINGER	Supstitute member	Federal Ministry of Defence and Sports
Helmut TICHY	Member	Federal Ministry for European and International Affairs
Ulrike NGUYEN	Supstitute member	Federal Ministry for European and International Affairs
Hansjörg HOFER	Member	Federal Ministry of Labour, Social Affairs and Consumer Protection
Alexander BRAUN	Supstitute member	Federal Ministry of Labour, Social Affairs and Consumer Protection

Waltraud BAUER, Government of Styria	Member	Representation of the <i>Laender</i>
Shams ASADI, Municipality of Vienna	Supststitute member	Representation of the <i>Laender</i>
Heinz PATZELT	Member	Amnesty International Austria in collaboration with SOS Children's Villages
Barbara WEBER	Supststitute member	Amnesty International Austria in collaboration with SOS Children's Villages
Bernd WACHTER	Member	Caritas Austria in collaboration with <i>VertretungsNetz</i>
Susanne JAQUEMAR	Supststitute member	Caritas Austria in collaboration with <i>VertretungsNetz</i>
Martin SCHENK	Member	Diakonie Austria in collaboration with <i>Volkshilfe</i>
Erich FENNINGER	Ersatzmitglied	Diakonie Austria in collaboration with <i>Volkshilfe</i>
Michael FELTEN	Member	Pro Mente Austria in collabortaion with HPE
Angelika KLUG	Supststitute member	Pro Mente Austria in collabortaion with HPE
Bernadette FEUERSTEIN	Member	Austrian Initiative for Independent Living
Martin LADSTÄTTER	Supststitute member	Austrian Initiative for Independent Living
Philipp SONDEREGGER	Member	<i>SOS Mitmensch</i> in collaboration with <i>Integrationshaus</i> and <i>Asyl in Not</i>
Nadja LORENZ	Supststitute member	<i>SOS Mitmensch</i> in collaboration with <i>Integrationshaus</i> and <i>Asyl in Not</i>
Barbara JAUK	Member	Violence prevention centers: <i>Verein für Gewaltprävention, Opferhilfe und Opferschutz</i> (Graz, Styria) in collaboration with <i>Gewaltschutzzentrum</i> Salzburg
Renate HOJAS	Supststitute member	Violence prevention centers: <i>Verein für Gewaltprävention, Opferhilfe und Opferschutz</i> (Graz, Styria) in collaboration with <i>Gewaltschutzzentrum</i> Salzburg
Katrin WLADASCH	Member	ZARA (Association for civil courage and anti-racism work) in collabortaion with <i>Neustart</i>
Roland MIKLAU	Supststitute member	ZARA (Association for civil courage and anti-racism work) in collabortaion with <i>Neustart</i>

Investigative proceedings in the year under review

Investigative focal points

While taking the AOB's general investigative focal points into consideration, it is the duty of the Commissions to proceed so that all areas are covered seamlessly as a matter of routine. Due to this statutory requirement, the National Preventive Mechanism must fulfil its competence equally with regard to all the duties with which it has been charged. Additionally, however, investigative focal points should be defined in order to ensure that the available capacities are utilised as efficiently and effectively as possible.

Seamless and routine procedures

In accordance with the NPM, the intensity with which the Commissions pursue their duties is decisive for the determination of the investigative focal points. Merely the specification how many of the available financial resources should be spent, for example, for the investigation of the various types of institutions and facilities does not, in and of itself, indicate, what the delegations should focus on during their visits. The purpose of the visit is therefore determined by the defined issue to be investigated and the relevant international and national standards for this issue. It should also be kept in mind that the Commissions should develop a uniform methodology for how they proceed and their approach with regard to content. This is the only way to ensure that the subsequent evaluation of their on-site observations and findings is possible.

Subject, standards and methodology are decisive

For the initial phase of the NPM, the members of the AOB and the Commissions decided to first of all visit the largest and most important institutions and facilities of the respective regions. In this context, the Chairpersons of the Commissions expressed the desire that the AOB suggests issues regarding the penal system based on its previous handling of individual complaints.

The performance of urine and drug testing in penal institutions was mutually agreed as the issue to be investigated. During recent years, there have been repeated complaints that these tests are not conducted with the necessary respect or with optimum protection of the privacy of the test subject. The AOB made the criteria, which it intends to use subsequently to evaluate the determinations it has made, available to the Commissions in advance. In particular, it asked the Commissions

Initial investigative focal point

to ascertain when urine and drug tests are ordered in correctional institutions as well as where – and especially – how they are conducted.

Previous reports showed that there is a need for improvement that should not be ignored in order to exclude human rights violations in the future to the greatest possible extent. A number of investigative proceedings were initiated with the Federal Ministry of Justice in accordance with the Commissions' observations.

Human Rights Advisory
Council advises the
NPM

The members of the AOB will define several investigative focal points for 2013 jointly with the Chairpersons of the Commissions. During this process, suggestions by the Human Rights Advisory Council, which advises the AOB with regard to determining general investigative focal points, will be taken into account

Investigation in numbers

The development phase of the National Preventive Mechanism

Kick-off workshop

In the constitutive meeting on 10 July 2012, the AOB and the Commissions decided that the first activities would not begin until after a joint kick-off workshop, which took place in mid-September. The primary objective of the kick-off workshop was to provide some basic knowledge regarding the fundamental legal principles of a National Preventive Mechanism. At the same time, the goal was to develop a common understanding of the applicable investigative standards and to develop a keener awareness of the competences of the Commissions and the AOB.

Shadow monitoring

Additionally, in November the AOB organised a shadow monitoring training module in collaboration with the Council of Europe. In this three-day seminar, the NPM shared its initial experiences with six experts from the Council of Europe. The methodology for preparing monitoring and control visits, conducting visits in six selected institutions and analysis of the findings were at the forefront of the training. Not least because of the extremely positive feedback by the Commission members, additional seminars of this kind are planned with international participants.

Monitoring and control activities in numbers

An overview of the 133 cases investigated by the Commissions shows that the first months were defined by the set-up and development of the NPM. Around 23.5% concerned the in itinere observation of forced returns and manifestations. With regard to the first institutions and facilities visited, the focus was on police departments and prisons

Direct administrative power and compulsion

	Forced returns	Manifestations raids / events
Vienna	17	4
Burgenland		
Lower Austria	1	
Upper Austria	3	1
Salzburg		
Carinthia		
Styria		2
Vorarlberg		
Tyrol		3
TOTAL	21	10
<i>(of which unannounced)</i>	4	2

Types of institutions and facilities

	Police	Ret. + nur.h.	YW	Inst. f. disabl.	Psych. depts.	CIs	BAR.
Vienna	9	7	2	3	3	1	
Burgenland	2	1					
Lower Austria	7	5		4	3	5	
Upper Austria	12		1		1	2	
Salzburg	1	1				1	
Carinthia	2			2	1	1	
Styria	2	1	1		1	3	
Vorarlberg	2					2	
Tyrol	2	5			4	2	
TOTAL	39	20	4	9	13	17	
of which unannounced	36	19	4	7	10	12	

Legend:

Ret. + nur.h.	= Retirement and nursing homes
YW	= Youth welfare
Inst. f. disabl.	= Institutions and facilities for persons with disabilities
Psych. depts	= Psychiatric departments in hospitals and medical facilities
CIs	= Correctional institutions
BAR.	= Barracks

Procedure of monitoring and control visits

Visit programmes

Visits from September 2012

As the NPM, the AOB is obligated by law to visit places of detention on a regular basis and it is its duty to charge the Commissions it has established with this task. The Chairpersons of the Commissions must prepare visit programmes in accordance with the ROP. As the monitoring and control visits did not begin until mid-September 2012, a period of time until the end of the year was agreed with the members. The visit programmes enable the AOB to provide advance information to the Commissions about its previous observations during investigations of individual complaints. At the same time, they represent important information for the AOB, which comparable types of institutions and facilities should be visited Austria-wide.

The visit programmes are, however, not carved in stone, if for no other reason than that each Commission must fulfil all three new competences within the limits of its allocated budget. Furthermore, the Commissions must have the necessary flexibility to undertake “ad hoc” visits in urgent cases or to act for the AOB upon its request in the AOB’s ex-post control of public administration.

Inclusion of experts possible

Apart from their activities within the scope of the defined investigative focal points, the Commissions themselves determine the subject of their visit and the size of the delegation. It is at their discretion to include additional experts insofar as this seems necessary due to the type of institution or facility or the selected subject of the visit. In any case, a concluding discussion must be conducted with the management of the facility, the documented content of which is to be sent to the management of the home, the head of the public agency or the management of the facility upon its request. In the course of their work, the Commissions must show consideration for the requirements of the operation of the institution or facility, especially as the visits are generally unannounced.

The Commissions’ observations are recorded in the visit reports that are provided to the AOB, which reviews them and uses them as the basis for its decision as to whether this is a case of maladministration. The Human Rights Advisory Council advises the AOB during this process.

Reports of the Commissions

Familiarization phase

The first half of the year was defined by the familiarization phase. The six Commissions consist of both experienced members and new members who are serving on such a commission for the first time. Therefore, it was necessary to work on team building and to develop work methodologies. The shadow monitoring training, which was conducted jointly with the Council of Europe, brought sweeping and important insights for the Commissions' work. Therefore, the Commissions welcomed the fact that the AOB intends to conduct other thematic workshops.

Familiarization phase

The teamwork between the Commissions and the AOB is a decisive factor for their success as the NPM. In the joint meetings of the AOB members and the Commission Chairpersons, a very good and cooperative modus operandi was developed within an extremely short time. It was important for the Commissions that they have the necessary flexibility during their visits in order to be able to react to the situations they were confronted with on-site. Besides, they did not want to lose valuable time with excessive requirements regarding the gathering of information about the institutions and facilities. A reporting tool was jointly developed that can be applied equally to various types of institutions; it simplifies the AOB's process of evaluating the reports by the Commissions.

The further work on the creation of a database that will be available to all the Commissions should be completed quickly. In this database, the Commission members will not only be able to access all visit reports, but also the international and national documents that are necessary for preparation and the human rights assessment.

Many of the first visits were organised as inaugural and introductory visits and combined with a "pilot monitoring visit" that enabled the Commission members to get to know new areas, such as institutions and facilities for persons with disabilities, youth welfare facilities, psychiatric institutions and correctional facilities. Based on the experience of the prior Human Rights Advisory Council in the Federal Ministry of the Interior, the Commissions know that it is necessary to build a relationship of trust with the management of the facilities. This is the only way to enable the solution of observed shortcomings immediately on site. The Commissions found a fundamental willingness to cooperate among their counterparts. The most frequent reaction during the visits can be described as "sceptical curiosity". Occasionally,

Inaugural visits

the delegations encountered attitudes on the part of the managers of the institutions and facilities that ranged from mistrustful to hostile.

It became obvious during the initial visits that conducting the visits requires a larger number of Commission members. For certain institutions and facilities, in particular for those for persons with disabilities, the inclusion of peer counsellors is necessary.

The AOB's collaborations

In this context, the list of relevant professional associations that the AOB provided to the Commissions is a valuable aid. The AOB is also grateful to the associations governed by the Legal Trusteeship for Associations, Patients and Inhabitants of Homes and Institutions Act and to the children and youth advocates for their willingness to cooperate. Based on the cooperation agreements that have been executed, the Commissions now have access to competent contact persons in these institutions. The contacts with NGOs have also provided valuable information.

Observations made by the Commissions

The following will provide an overview of the Commissions' observations thus far. On several occasions, the initial assessments of the reports by the Commissions resulted in the initiation of investigative proceedings by the AOB, which have not yet been concluded.

Monitoring and control of institutions and facilities in accordance with OPCAT and Art. 16(3) of the UN Convention on the Rights of Persons with Disabilities

Correctional institutions

In the year under review, the Commissions conducted investigations of a total of 17 correctional institutions. With the exception of the defined investigative focal point of the conduct of urine and drug testing, the Commission delegations did not have any additional thematic parameters. The comparison of the visit reports, however, shows that the Commissions observed the same problems Austria-wide during these initial, generally unannounced visits.

Structural problems and personnel shortages

Some of these problems seem to be of a structural nature and the result of shortages of corrections personnel. The UN Subcommittee on Prevention of Torture (SPT) had already mentioned the long hours inmates are held in their cells with some concern. A lack of financial

resources for activity programmes was increasingly noted, as well as phased out educational and work opportunities as a result of workshops and trade enterprises that had been closed.

Deficits in medical care seem to be particularly alarming. The Commissions determined independently of one another that the presence of a doctor in correctional institutions at night or on weekends and often even during the afternoons is not ensured. As a result, emergency decisions in crisis situations are made by medical laypersons and adequate medical care of suicidal inmates is not guaranteed. As far as any correctional or therapeutic treatment is concerned, due to a lack of resources, no psychotherapy or sociotherapy is available, leaving only psychopharmacological treatment. Therefore, the inmates are largely left to their own devices. In the meantime, the Federal Ministry of Justice has been notified of these observations. The AOB views adequate medical care of prisoners who have gone on a hunger strike as particularly urgent.

Investigative proceedings initiated

To the extent that the Commissions observed deficits in the living conditions of the inmates that could be quickly remedied, such as a defective socket or the inadequate ventilation of rooms, the prospect of a prompt remedy was held out by the management of the facility in the concluding discussion. Insofar as the Commissions found that treatment of the prisoners by the correction officers was committed and respectful despite the shortage of resources, they mentioned this fact in their concluding discussions.

In late August, the AOB received several complaints, according to which prisoners had been abused in the course of a drug raid in the correctional facility in Feldkirch. Upon the AOB's request, the Commission competent for this region conducted an ad-hoc visit within one week. The AOB's investigative proceeding in this regard has not yet been concluded. Likewise still ongoing is an investigation by the local Public Prosecutor's Office which has jurisdiction and was involved by the management of the facility after the allegations became known.

Ad-hoc visit upon the AOB's request

Police agencies

Conditions in police detention centres

From the beginning of their activities until the end of the year, the Commissions conducted 39 visits to police agencies. The majority of the visits was to police stations and police detention centres. Police detention centres are prisons where primarily detainees awaiting forced returns and prisoners serving an administrative penalty are being held. The conditions in these police detention centres were always subject of criticism by NGOs and by the former Human Rights Advisory Council. The AOB Commissions also found that these confinement conditions often had structural problems, which applied, for example, to the practice of day release, inadequate work and occupational opportunities, questions regarding health care, supervision of high-security cells and access to information and legal advice. Training and supervision of the personnel was also an important issue for the previous Human Rights Advisory Council.

The AOB evaluated the Commissions' reports received thus far and has initiated comprehensive investigative proceedings. The objective is to develop framework conditions for confinement in police detention centres that is consistent with national and international human rights standards. Recommendations will be made to the Federal Ministry of the Interior based on these findings. The AOB also sees room for improvement in the detention regulations that govern the conditions in police detention centres.

Access to medical records

During their visits to police detention centres, several Commissions were not allowed to access or given only limited access to the medical records of the detainees by the management of the detention centre. Therefore, one of the Commissions was not able to view the medical records of a detainee on hunger strike until he had provided his consent. In other cases, the Commissions were given access to medical records of detained persons or persons awaiting forced returns; however, they were prohibited from making copies of the documents or from subsequently transmitting documents.

Thereupon, the AOB contacted the Federal Ministry of the Interior to find a solution that ensures comprehensive access to medical records by the Commissions. At the time of the editorial deadline of this report, a result had not yet been achieved in this regard.

Protection of victims of human trafficking

During an investigation in the police detention centre Klagenfurt (Carinthia), the suspicion arose that a woman from the Ukraine could be a victim of human trafficking. This suspicion was confirmed after

the woman was questioned by officers of the State Office of Criminal Investigation. In light of this visit, the competent Commission recommended that a good practice guideline for dealing with suspected victims of human trafficking be developed for police officers and training on the subject of “human trafficking” be intensified, thus building on recommendations made by the previous Human Rights Advisory Council, which had dealt with this subject in great detail.

In late June 2012, the former Human Rights Advisory Council published a report on the subject of identifying and protecting victims of human trafficking. It submitted recommendations to the Federal Ministry of the Interior on how to expand support and protective structures Austria-wide, a good practice guideline for police officers and guidelines on how to identify these victims. According to the Federal Ministry of the Interior, some measures have already been or will be implemented.

One can say that the Commissions have already reached some conclusions that are consistent with observations made by the former Human Rights Advisory Council. Therefore, some of the AOB’s ex-officio investigative proceedings are dealing with problems that this Human Rights Advisory Council was not able to resolve. In any case, the AOB would like to continue to engage with these issues to further the protection and promotion of human rights.

Continued engagement with issues handled by former Human Rights Advisory Council

Support facilities for asylum seekers

The failed visit by a Commission to a support facility for asylum seekers led to a dispute about the scope of the mandate of the NPM. Federal support offices have been set up at the reception centres East in Traiskirchen (Lower Austria) and West in Thalham (Upper Austria), which are part of the Federal Asylum Office. Asylum seekers receive care and support there. In the opinion of the Federal Ministry of the Interior, the federal support facility East cannot be classified as a place of detention. According to the Ministry, it must be differentiated in which building on the site the asylum seekers are located and what stage of the asylum proceedings they are in. This was the reason why the Federal Ministry of the Interior ordered that the AOB Commission be denied access to this facility.

Place of detention?

The AOB will have to examine the Federal Ministry of the Interior’s interpretation of law from the perspective of whether asylum seekers in the federal support facility East are subject to legally inadmissible acts of detention.

Using the example of the Saualm (Carinthia) as a controversial, privately operated facility that provides a basic level of services, the AOB has defined throughout the *Laender* that the operators of such facilities are not permitted to undertake measures depriving asylum seekers of freedom or to specify such measures in house rules, etc. If unlawful measures depriving them of freedom are nevertheless undertaken and the competent supervisory authority is aware of these practices without taking action against them, or if it could have become aware of these practices, if it had undertaken proper supervision and exercised its authority, then establishments providing a basic level of social services in the *Laender* would also have to be classified as places of detention under Art. 4 of the OPCAT.

Facilities for health and social services

46 investigations Up until the end of the year, 46 investigations of social institutions took place: 20 facilities for the elderly and the aged, 9 facilities for persons with disabilities, 4 children's and youth welfare facilities, and 13 psychiatric hospitals or departments.

High willingness to cooperate Without exception, the Commissions met with a willingness to cooperate. It should be highlighted that the Commissions can attest that the personnel – across all the different types of institutions and facilities – showed expertise and professionalism, as well as empathetic treatment of the persons under their care.

Urgent need for action in a facility for minors After being notified by NGOs, a Commission visited a facility for unaccompanied minors twice within three weeks. It was determined that three care-givers working 24-hour shifts were alternately responsible for 17 (occasionally 20) minors aged 8 to 18. The facility is set up for the care of ten minors and was devised to be a temporary solution. One of the adolescents has, however, already lived in this facility for an entire year. Overcrowding and a shortage of personnel, the long working hours and the lack of a sociopedagogical concept have resulted in unacceptable conditions for everyone involved. Additional factors are that intake case histories have not been taken and no therapy in the native languages of the minors is available, although obvious trauma symptoms and attachment disorders were observed. There are reports of self-mutilation and violence-prone incidents. An emergency report to the AOB recommended an immediate increase in personnel and the creation of more care capacity that corresponds to customary standards in youth welfare. The AOB took immediate action.

A problem area that the activities of the Commissions have confirmed is the placement of younger patients with mental disorders and/or persons with multiple disabilities in geriatric centres and retirement or nursing homes. In a senior citizens' home, a Commission came across a 53-year-old man who is under guardianship, but has unrestricted mobility. He stated to the Commission that he rarely leaves his room and has no interest in contact with others. The psychiatric after-care that the Commission believes to be necessary cannot be provided by this institution. It was recommended to specify other possibilities to the 53-year-old and his legal guardian in order to enable the freedom of choice with regard to housing required under human rights law. In another case, a Commission found that persons under the age of 50 needing increased care were living in a geriatric centre. This Commission also recommended that the AOB take action.

Inadequate freedom of choice with regard to housing

Numerous problems that the Commissions found in homes were due to a shortage of resources, During shift changes the employees do not have sufficient time for information sharing and briefings or for supervision. Due to personnel shortages, the residents of the homes are subject to restrictions, for example, therapy kitchens are used too rarely or persons with mobility impairments cannot get daily assistance to use the gardens that have been landscaped for dementia care. Inadequate psychological care, particularly with regard to end-of-life care, was also observed.

Resource shortages

A common issue were the menus that cannot be categorised as balanced and that can result in malnutrition. In one case, the sole alternative to a meat-based diet were sweet dishes. In one psychiatric clinic, the excessively small servings were criticised.

Malnutrition

With regard to a group home for dementia patients, part of which was in a completely separate building, a Commission questioned its safety, as personnel was never present during the night in one part of the facility, even though the facility guarantees the 24-hour presence of qualified care personnel (orderlies) in both residential wings in its contracts. The initiation of an investigative proceeding was recommended.

Safety risks

In several facilities, inadequate accessibility for persons with disabilities was found. In the case of one facility for senior citizens, for example, the thresholds at the access to the showers and at the exits to the terrace were too high and the corridors too dark. The doors could not be opened automatically so that access for persons in wheelchairs was almost impossible without assistance.

Inadequate accessibility

Nursing Home
Residence Act

In the assessment of the question whether measures restricting the freedom of these persons are “suitable”, “absolutely necessary” and “reasonable” to avert hazards and/or whether the hazards could have been averted by means of alternative, more benign measures, the Commissions found significant differences in the culture of how the law is applied. Statutory obligations were interpreted differently and not pursued with the same vigour. Furthermore, when examining the psychopharmacological medications that were prescribed, the Commissions found that some prescriptions could not be explained based on the diagnosis. This subject area will be pursued in depth by all the Commissions and the AOB.

Psychiatric institutions

The Commissions determined further that the SPT recommendation [see SPT/Inf (2010) 5, margin no. 139] to set up a central register, in which all restrictions on freedom in psychiatric institutions be recorded centrally according to type, reason and duration, was not carried out seamlessly. This also applies with respect of the use of cage beds that, according to the opinion of the SPT, must be phased out as a means of depriving agitated patients in psychiatric institutions and nursing homes of their freedom [see SPT/Inf (2010) 5, margin no. 134]. In Western Austria, their use has already been discontinued for some time. Institutions in Eastern Austria sometimes use them frequently – as was determined – and additionally use security services. The AOB will investigate this matter.

In itinere monitoring of coercive acts

In 31 cases, the Commissions observed the conduct of authorities that are empowered to exercise direct administrative power and compulsion. The Commissions specifically, but not exclusively attended forced returns, manifestations, major events and targeted campaigns.

Role of the Association
of Human Rights Austria
during forced returns

As a result, the Commissions often criticised the conduct of the representatives of the Association of Human Rights Austria. They are called in by authorities – in various roles – in the case of forced returns. They also found the assistance provided by a representative of the Association of Human Rights Austria to a man being deported as inadequate. The representative of the Association of Human Rights Austria did not even note the man’s request for clothing and toys for his children.

The Association of Human Rights Austria was requested by the Federal Ministry of the Interior to accompany forced returns by way of charter

flights as an “independent human rights observer”. Furthermore, the Association of Human Rights Austria is active in providing legal advice, in the assistance of persons being detained pending their forced return and in repatriation counselling of aliens.

The Human Rights Advisory Council that was active within the Federal Ministry of the Interior until the end of June 2012 criticised that solely the Association of Human Rights Austria that has been entrusted with the observation of forced returns by air. Furthermore, it was alleged that the concurrent exercise of different tasks within the scope of the same official act leads to a conflict between the tasks. The former Human Rights Advisory Council recommended that other institutions and persons be assigned as human rights observers. Role conflicts, such as the concurrent use as interpreter and human rights observer should, in any case, be avoided. The Federal Ministry of the Interior did react to these recommendations; however, some questions have remained unresolved.

Prompted by the observations of the Commissions and the criticism by the former Human Rights Advisory Council, the AOB initiated an ex-officio investigative proceeding about the role of the Association of Human Rights Austria in forced returns.

During the observation of a forced return from Vienna to Lagos, the question of the scope of the Commissions’ rights arose. The case involved a charter flight by Air Italia which was being carried out within the scope of FRONTEX with the participation of seven other European countries. At the Vienna International Airport, the AOB’s delegation wanted to enter the passenger area for the flight, which was not yet ready for boarding, because it had observed an altercation – apparently with police involvement. The members of the delegation were prevented from doing so by a member of the deportation team. Therefore, the delegation could not fulfil its duty of observing the exercise of direct administrative power and compulsion by police. It should be clarified – for future cases as well – whether the Commissions may accompany persons being deported during the flight. After all, the reason for the establishment of the former Human Rights Advisory Council was the death of Marcus Omofuma, whom a police officer had „restrained“ on the airplane.

Access to the airplanes
by the Commissions

In this case, the AOB contacted the Federal Ministry of the Interior in order to come to a common understanding of the scope of the rights of the NPM as quickly as possible.

Transfer of an asylum seeker to Hungary

In light of an individual complaint regarding a pending forced return of an asylum seeker to Hungary, the AOB has been vigilantly following the reports about Hungary since January 2012.

Apart from this investigative activity that was initially on a case-by-case basis, a Commission visited an Afghan family in the family housing in the Zinnergasse. The planned forced return of the family of five to Hungary had previously failed because the mother had suffered a self-inflicted injury. The family stated that it had entered Austria via Hungary and had spent one month in detention pending forced return. Their cell had not had any furnishings and their sick children had not received any medical attention. The father related that his brother had been transferred from Hungary to Serbia as part of a chain of deportations. The Commission stated that it considered the (planned) forced return of the family to Hungary alarming.

Reports from international NGOs gave rise to doubts that the Hungarian asylum system offers sufficient protection. According to a report by the UNHCR from October 2012, asylum seekers who have travelled via Serbia are at risk of a chain of deportations to Serbia. According to the UNHCR, Serbia is not deemed a safe third country (i.e. a country outside the EU). The Federal Ministry of the Interior considers a general ban of deportations to Hungary unnecessary; however, it emphasised that the situation for asylum seekers in each EU member country is evaluated if necessary.

Reports of the human advisory council

The new Human Rights Advisory Council's understanding of its role

Advisory function

The Human Rights Advisory Council is a new body with an advisory function to assist in the fulfilment of the competences with which the AOB, as the National Preventive Mechanism (NPM), has been charged; these competences include the prevention of torture and abuse in Austria, prevention of any form of exploitation, violence and abuse in institutions and facilities, as well as programmes that have been established for persons with disabilities. Its legal foundation is in the Act on the Implementation of the OPCAT, which builds on already well-known structures. The model for this advisory body was the Human Rights Advisory Council that had operated within the Federal Ministry

of the Interior until the end of June 2012; it had the responsibility of addressing any structural inadequacies within the police force in order to safeguard human rights and to recommend countermeasures to the Federal Minister of the Interior. The AOB's Human Rights Advisory Council not only bears the same name but it is comparable to the former Human Rights Advisory Council of the Federal Ministry of the Interior in its composition of representatives of the Federal Chancellery and several Ministries, as well as NGOs. It is in part staffed with the same persons. This continuity ensures that the valuable experience of the former Human Rights Advisory Council, especially with regard to collection of data and the setting of standards concerning the security authorities, will be carried forward to the new body.

Activity profile of the Human Rights Advisory Council

The purpose of the Human Rights Advisory Council is to contribute by way of its advisory activities to the proper wording of recommendations by the AOB when maladministration has been determined and to help ensure that the AOB can properly utilise its options for action. It is also the task of the Human Rights Advisory Council to advise the AOB in defining investigative focal points to be applied as a top priority Austria-wide during preventive monitoring and control of institutions and facilities, in which persons are detained or where measures restricting their freedom can be implemented, as well as in the monitoring and control of institutions and programmes for persons with disabilities. Concurrently with defining these investigative focal points, the investigative standards that are to be applied by the Commissions and their visiting delegations as monitoring bodies of the AOB must be set out in advance. The intention is to guarantee consistent action. As a forum for dialogue for representatives of human rights organisations and the relevant Ministries, the Human Rights Advisory Council has the potential of adapting international human rights standards and incorporating them into national investigative standards. The uniform investigative standards then become the benchmark for the Human Rights Advisory Council when it advises the AOB in the determination of maladministration and a guideline for the assessment of whether the provided recommendations can attain the predefined human rights standards.

Recommendations
for investigative focal
points and standards

Annual report of the Human Rights Advisory Council

The constitutive meeting of the Human Rights Advisory Council took place on 11 April 2012 in order to ensure the entry into force of the Act on the Implementation of the OPCAT on 1 July 2012 and to enable the appointment of the members as of this date. Furthermore, this made it possible to guarantee the Council's right to be heard with regard to the appointment of the Commission members and with respect of the enactment of its own rules of procedure.

Participation in the selection of the Commission members

The Council was heard prior to the appointment of the Chairpersons of the six Commissions in a meeting of the Human Rights Advisory Council on 14 May 2012. At this meeting, the two chairwomen of the Human Rights Advisory Council reported on the hearings, which had taken place with regard to the applications that were on the shortlist and which it had actively participated in upon invitation of the AOB. The Human Rights Advisory Council took note of the AOB's recommendation that ensued after consultation with the two chairwomen of the Human Rights Advisory Council. The members of the Commissions were appointed using a similar process. One of the two chairwomen and one additional member or substitute member of the Human Rights Advisory Council took part in the hearings. At the meeting of the Human Rights Advisory Council on 18 June 2012, it took note of the AOB's recommendation, which was adopted after consultation with the members and the substitute members of the Human Rights Advisory Council and with the Chairpersons of the Commissions who had been present at the hearings. The Chairpersons of the Commissions also attended this meeting. They introduced themselves to the entire Human Rights Advisory Council and responded to questions.

Right of the substitute members to attend meetings

The hearing of the Human Rights Advisory Council with regard to its own ROP, which is an integral part of the AOB's and the Commissions' ROP, was conducted by way of written statements regarding the draft submitted by the AOB. This draft was discussed at the Human Rights Advisory Council's meeting on 14 May 2012 and accepted by consensus between the AOB and the Human Rights Advisory Council.

It is especially worthy of attention that the concurrent and equal participation of members and substitute members in the deliberations of the Human Rights Advisory Council was incorporated into the ROP upon the suggestion of the Human Rights Advisory Council. This is intended to specifically, but not exclusively ensure that all non-governmental organisations, which participated in the process of self-nomination and, due to the excessive number, could, in some cases,

not be appointed as a member but only as a substitute member can attend all the meetings. Only the voting rights shall remain the exclusive prerogative of members.

Initial deliberations by the Human Rights Advisory Council regarding the investigative focal points of the Commissions' investigations shall take place at the Human Rights Advisory Council meeting on 10 July 2012, in which the members and substitute members will be invited to submit suggestions in written form. They were discussed within the "Investigative Focal Point" working group on 13 September 2012. An already existing catalogue of thematic focal points was discussed at the Human Rights Advisory Council's meetings on 4 October 2012 and 6 December 2012. A list of focal points that was revised in light of the previous discussions will be prepared in early 2013.

Initial deliberations regarding investigative focal points

Additional activities in the period under review

Training and continuing education

Cooperation with the Council of Europe

A shadow monitoring training module was carried out in cooperation with the Council of Europe. The Council of Europe has extensive and long-standing expertise in the area of monitoring and control of places of detention in accordance with the European Convention for the Prevention of Torture (CAT). Jointly with international experts, the Commission members and AOB employees visited six selected institutions and facilities. This seminar gave the participants the opportunity to coordinate and develop the modalities for preparatory work, the visits themselves and the processing of the findings in accordance with international standards. Due to the very positive reactions of the Commission members, the cooperation will be continued.

Cooperation with the Council of Europe

Currently, the AOB, jointly with the Chairpersons of the Commissions, is developing a continuing education programme for 2013. Several workshops that address special topics are planned in order to further harmonise the work of the six Commissions and the collaboration with the AOB.

Continuing education plan for 2013

Cooperation with NGOs

Cooperation with civil society is not only required by law, but it is also very important for the effectiveness of the AOB's work.

This cooperation has been institutionalized by the inclusion of representatives of NGOs in the Human Rights Advisory Council. As an advisory body, the Human Rights Advisory Council is also a forum for information sharing between representatives of Ministries and non-governmental organisations. A result of this collaboration is, for example, the definition of investigative focal points and is therefore an essential factor in deciding which institutions and facilities and which subject areas will be selected by the expert Commissions of the AOB.

Furthermore, the cooperation with NGOs is crucial because, due to their wide experience, they are able to point to possible maladministration and thus provide an important impetus for monitoring and control visits. The AOB is endeavouring to ensure this collaboration by way of cooperation agreements, thus putting the sharing of information on an effective basis that provides reliable expectations.

Going beyond its statutory mandate, the AOB views itself as a forum for sharing information with and among non-governmental organisations. The creation of a proper platform is being planned.

Public relations

The AOB is obligated by law to inform the public about its new competences and especially about the results of its work. In addition to the classic ways of providing information via the website and publishing informational folders, the AOB is aiming to establish a greater degree of cooperation with the Political Science faculties at institutions of higher learning. The purpose is to place a greater emphasis on the importance of protecting human rights as an essential part of a democratic system.

Ex-post control: Investigations of public administration

Anti-discrimination

General Information

The AOB has a mandate under Austrian constitutional law to protect and promote human rights. Although all human rights have equal value and/or are coequal, protection against discrimination has particular significance. Fundamentally, prohibited discrimination and the realisation of human rights exclude one another. This is the reason why the AOB is dedicating an entire chapter of this report to this topic.

Within the scope of its investigative activities, the AOB has encountered discrimination due to disabilities, gender, sexual orientation, as well as nationality or ethnic origin. In this chapter, a number of exemplary cases will be presented in detail. There is, however, potential for improvement at the legislative level as well. The AOB's recommendations and Austria's international obligations will be discussed in the following.

In addition to United Nations human rights conventions, it is primarily the EU regulations and the Council of Europe's European Convention on Human Rights that define Austria's obligations with regard to protection against discrimination at the international level. The European Convention on Human Rights prohibits discrimination only in conjunction with the granting of rights set out in the Convention. A general prohibition of discrimination was agreed in the 12th Additional Protocol which, however, has not yet been ratified by Austria.

At the EU-level, it is the EU Charter of Fundamental Rights and three directives that primarily regulate protection against discrimination. The Charter contains a general prohibition against discrimination that all member states must comply with when implementing EU law. In 2000, the EU created a framework for minimum requirements by way of the Directive on Equal Treatment Irrespective of Racial or Ethnic Origin, as well as the Directive on the Implementation of the Principle of Equal Treatment for Men and Women in Occupational Social Security Schemes. This was expanded in 2004 by way of the Directive on Equal Treatment of Men and Women in the Access to

Recommendations for improvement of statutory framework conditions

Obligations in respect of protection against discrimination

EU Charter of Fundamental Rights and EU directives

and the Supply of Goods and Services. Despite these achievements, as determined by the Commission, the European legal framework in respect of protection against discrimination is still incomplete. There are differences between types of discrimination within and outside of the area of employment. In the protection against discrimination, any ranking is inadmissible. Therefore, Austria must implement the minimum EU requirements on one hand and on the other, also work on the guarantee of a comprehensive protection against discrimination.

International points
of criticism

The situation regarding protection against discrimination in Austria was recently analysed in three international reports: In 2010, by the European Commission against Racism and Intolerance; in 2011, within the scope of the Universal Periodic Review of the UN Human Rights Council and in 2012, by the Commissioner for Human Rights who was appointed by the Council of Europe. The main criticisms were aimed at the high degree of fragmentation of anti-discrimination legislation, the varied levels of protection for the respective groups, the many different institutions, inadequate building laws and building codes with regard to accessibility, insufficient entitlement to the removal of discriminating barriers, as well as long periods of transition for the implementation of accessibility in public buildings. It was also criticised that there were no possibilities for interpleader action in proceedings as were the framework conditions for financial assistance for children with special needs, especially with regard to schools, which were deemed inadequate. In particular gender discrimination, discrimination due to ethnic origin, age and religion were also viewed critically. It was recommended to institute higher compensation for damages in the case of injuries and to collect data relevant to cases of discrimination.

AOB sees need for
action regarding legis-
lation

Since autumn 2012, draft legislation has been under consideration for amendments to the Austrian Equal Treatment Act, the Equal Treatment Commission and Ombudsman Act, the Employment of Disabled Persons Act and the Federal Equal Opportunities for People with Disabilities Act. These amendments are intended to remedy existing inadequacies in legislation for protection against discrimination. Although the recommended changes are steps in the right direction, the AOB sees additional need for action in the current draft legislation and other regulations, similarly to, for example, the Litigation Association of NGOs against Discrimination or the Independent Monitoring Committee for the Implementation of the UN Convention on the Rights of Persons with Disabilities.

A basic problem is the fragmentation of protection against discrimination legislation in numerous, different federal and *Laender* laws. As a result, the legal situation is not only confusing, but there is the risk that different levels of protection against discrimination are created, depending on the protected area. This is apparent, for example, in the provisions of Section 31 of the Austrian Equal Opportunities Act, which differentiates between gender, religion and world view, age and sexual orientation on one hand and ethnic origin on the other. Although it is the intention of the planned amendment to extend protection against discrimination with regard to the criteria of religion, world view, age, and sexual orientation and to adapt it to that of other criteria, such as gender or ethnic origin; however, the risk of different levels of protection will continue to exist.

Fragmentation and different levels of protection

This becomes apparent within the scope of the topic of disabilities. The purpose of the UN Convention on the Rights of Persons with Disabilities – the equal enjoyment of all human rights and fundamental freedoms, as well as protection against discrimination – must be incorporated in all political policies and agendas. Equal treatment of persons with disabilities has, however, not been harmonised with other legislation and guidelines, but is regulated by way of its own standards of protection and has therefore been separated from other prohibitions of discrimination. This is not unproblematic with regard to multiple discrimination and its enforcement under the law. In any case, the uniform regulation of the prohibition of discrimination would be positive in respect of the equality of the protected attributes. Specific aspects of the various groups can all be taken into consideration, even in a single, uniform law.

The area of disabilities is regulated separately

Dialogue forums between government representatives and NGOs should be set up by law. As inclusion is not a subject that can be dealt with in isolation, but must be considered in all political areas, a joint, institutionalised dialogue within the meaning of the UN Convention on the Rights of Persons with Disabilities and with the purpose of combating all forms of discrimination would be desirable. In this context, the AOB would like to note that it considers a regular exchange of ideas and information with the Monitoring Committee to be worthwhile in order to be able to properly fulfil its expanded mandate as an independent supervisory agency for the purpose of preventing the exploitation, violence or abuse of persons with disabilities.

Dialogue forums are necessary

As the EU Commission has determined, in order to achieve true equal treatment of persons with disabilities, we need not only prohibitions

Adjustment of care allowances for inflation

but positive measures as well. Currently, more than 500,000 people in Austria need full-time care. Care allowances are meant to contribute to the ability to lead as self-determined a life as possible. As they are not adjusted for inflation, care allowances are increasingly not fulfilling this purpose. For some time, the AOB has been demanding adjustment of the care allowance that is guaranteed under the law, in order to give those affected greater equality.

Clear rules for personal assistance

The AOB also finds that legal certainty is lacking in the area of personal assistance. Financial support for those affected is currently often a question of good will. Under the UN Convention on the Rights of Persons with Disabilities, for example, children and adolescents may not be excluded from the general educational system due to a disability. Therefore, the AOB welcomes the acceleration of inclusive education that is provided for in the draft of the National Action Plan for Persons with Disabilities. However, the procedures for a successful and sensible integration must be made more concrete and more comprehensive.

Entitlement to the removal of barriers

Another important step would be the entitlement to the removal of barriers, suspension of discrimination and/or fulfilment of equal treatment obligations. Currently, persons with disabilities can demand compensation for damages but not the creation of an environment that is free of discrimination.

Barrier-free construction

This is specifically, but not exclusively inadequate, because people have been aware of the problems arising from insufficient structural accessibility or the absence of structural accessibility for a long time. The societal attitude shift and the demographic development are changing the demands with regard to constructed space. As defined by the Federal Disability Equality Act and the UN Convention on the Rights of Persons with Disabilities, constructed space should be accessible and usable for everyone in the generally customary way, without particular difficulty and without assistance. Accessible planning and construction is no longer limited solely to impaired motor skills (and has not been for a long time), but it also includes sensory perception, cognition and anthropometry. The challenge confronting modern architecture is to embrace and make room for social diversity. This is precisely where creativity is needed – creativity that uses its theoretical knowledge to develop new spatial and technical solutions. The focus should be on recognising the needs of the various user groups, analysing them and integrating them into both the early conceptual planning phase and the detailed plans. As the primary basis of any planning, the well-founded understanding of the subject and current

scientific insights must be at the forefront. In German-speaking countries outside of Austria, there are very ambitious research projects that are dealing with key issues relating to the future (e.g. evidence-based planning and construction in the health care sector). At the scientific level, Austria seems to have some catching up to do. An Austria-wide evaluation of existing construction regulations that builds on the results of research would be a first step towards progress.

A class-action lawsuit would be a particularly important instrument to remove barriers. Even under the current government bill, only the Austrian Working Group for Rehabilitation can file a class-action lawsuit pursuant to the Federal Equal Opportunities for People with Disabilities Act. Thus far, this has never occurred. An expansion of the standing to sue to other organisations is therefore urgently needed; likewise, additional possibilities for interpleader action by qualified organisations in proceedings.

Class-action lawsuit is necessary

For other protected groups, there are no possibilities for a class-action lawsuit at all. A class-action lawsuit is necessary if no affected party is willing to undertake a lawsuit, but the discrimination is “publicly” apparent. This would be the case for discriminating advertisements or General Terms & Conditions. The right to a class-action lawsuit should be a key item in the amendment to equal treatment law.

Penalties and compensation for damages make sense theoretically in order to prevent discrimination. Under the current draft law, compensation for damages should be effective, commensurate and serve as a deterrent. This demonstrates the correct intention of the regulation and its orientation towards EU law; however, without parameters and decision-making guidelines, it will be very difficult for courts to find a consistent approach. It would therefore make sense to define measurement criteria for all areas of discrimination and to introduce minimum compensation for damages.

Penalties and compensation for damages

The AOB also recommends increasing and/or introducing a penalty range under the Austrian Equal Treatment Act and the Employment of Disabled Persons Act to more than 360 euros, expanding the group of persons entitled to file complaints, widening the area of prohibition to include all goods and services, creating a registry of administrative penalties and granting qualified organisations the legal standing of a participating party. As demonstrated in the presentation of the individual cases below, there has already been an amendment to the penalty provisions of the Introductory Act to the Administrative Procedure Acts 1991 after the AOB demanded improvements.

The AOB's recommendations

Sufficient resources for the Equal Opportunities Commission;

The planned reduction in size of the Civil Senates is basically a positive step for the acceleration of the proceedings before the Equal Opportunities Commission. It is, however, questionable if this measure will suffice to shorten the length of the proceedings and encourage persons seeking legal recourse to file a complaint. The basic prerequisites are sufficient financial and personnel resources. Furthermore, the AOB recommends a comprehensive obligation to publish court rulings on the Equal Opportunities Commission website, which could also illustrate differences of opinion between the Equal Opportunities Commission and the courts.

The following AOB investigative proceedings show that in 2012, there were improvements in the enforcement of existing laws, but that there are still shortcomings. The AOB was confronted with various topics, including inadequate accessibility, gender-stereotypical assignment of roles in job application procedures, sex changes of transgender women, discrimination with regard to family benefits for foreigners and discrimination due to sexual orientation.

Discrimination due to illness or disability

Discrimination due to aptitude tests which are not barrier-free

There is no doubt that aptitude tests, which are not barrier-free, and inadequate conditions, such as the available time, represent prohibited discrimination

Mr. N. was diagnosed with spastic diplegia that had been present since birth. He is also visually impaired. Mr. N. applied at the Federal Ministry of Labour, Social Affairs and Consumer Protection for a job as administrative intern, which had been explicitly put out to tender for the severely disabled in accordance with the Employment of Disabled Persons Act. He was invited to take an aptitude test; however, the test results did not reflect his knowledge and capabilities, as the test procedure was not barrier-free.

Test results not taken into consideration

The Federal Ministry of Labour, Social Affairs and Consumer Protection stated in this regard that Mr. N.'s application documents did not show that he was visually impaired. In such cases, the aptitude test was naturally not used, they said. Therefore, it was clear that the negative test results would not be considered in the further selection process.

Even though this resolved the concrete case, the fundamental question arises of why aptitude tests that are not barrier-free are still being used at all in (and outside of) the Civil Service.

The UN Convention on the Rights of Persons with Disabilities prohibits discrimination of persons with disabilities, in particular when applying for a job (Art. 5 and 27 leg. cit.). Section 7b of the Employment of Disabled Persons Act also contains such a protection against discrimination.

Protection against discrimination

There are statutory regulations for the Civil Service that (seemingly) take account of protection against discrimination. Under the Civil Service Job Tender Act, an aptitude test does not have to be administered if a permanent position has been explicitly put out to tender for the severely disabled. In accordance with Section 9 (4) of the Aptitude Test Directive, consideration should be shown with regard to disabilities of applicants insofar as this is not inconsistent with the purpose of the test.

Regulation for the Civil Service

The Federal Ministry of Labour, Social Affairs and Consumer Protection considers that now protection against discrimination has been implemented.

The AOB, however, is of the opinion that effective protection against discrimination during testing procedures cannot be ensured by way of exemptions. Only barrier-free testing procedures ensure that factors, which are not relevant to personal aptitude are blocked out. If this were the case, this would be a confirmation for persons with disabilities – as it would be for everyone else – that they need to note only those circumstances in their applications that qualify them in accordance with the requirement profile of a job that has been put out to tender.

Individual case: VA-BD-SV/0560-A/1/2012

Barrier-free access to telecommunications services

Telephone relay centres enable persons who cannot hear or speak to use the telephone. As opposed to many other countries, such services are not yet available in Austria. After a conflict of jurisdiction between the Federal Ministry for Transport, Innovation and Technology and the Federal Ministry of Labour, Social Affairs and Consumer Protection that has gone on for years, the former is now taking initiative.

Telephone relay centres enable barrier-free telephone use

A telephone relay centre enables hearing- and speech-impaired people to communicate by telephone with hearing and speaking people. Telecommunications services can thus be used equally by disabled and non-disabled persons. Barrier-free telephone use is often needed in everyday life and in emergency situations it can be lifesaving. Currently, hearing- and speech-impaired people cannot use the emergency call system in Austria.

This possibility is not available in Austria at present. For years, the Federal Ministry for Transport, Innovation and Technology and the Federal Ministry of Labour, Social Affairs and Consumer Protection could not agree which one is competent for this matter. Mr. N., who has been advocating the establishment of such a system in Austria has also had to deal with this negative conflict of jurisdiction.

Jurisdiction of the Federal Ministry for Transport, Innovation and Technology

The Federal Ministry for Transport, Innovation and Technology declared in a statement to the AOB that it has jurisdiction, which had previously not existed but which has become clearly defined due to the newest amendment of the Telecommunications Act. Section 17 of the Telecommunications Act now states that a directive of the Federal Ministry for Transport, Innovation and Technology can require that persons with disabilities be enabled to take advantage of telecommunications services to the same extent as users who are not disabled. Furthermore, under Section 20 of the Telecommunications Act, a connection to all emergency call numbers must be guaranteed for disabled users as well.

Pilot operation

In early July 2012, the Federal Ministry for Transport, Innovation and Technology had an initial discussion with the relevant interest groups, such as the Austrian Association of the Deaf and the Austrian Association of the Blind and Visually Impaired to conduct a needs assessment. The Austrian Association of the Deaf initiated a pilot operation

of a deaf relay centre; as of the end of the year, the Federal Ministry for Transport, Innovation and Technology had not yet received an analysis of the results. The results and experiences gained during this pilot operation will be the basis for possibly issuing a directive.

The AOB welcomes these first steps towards barrier-free telecommunications services and will continue to observe the progress being made.

Assistive technologies and supported communications – as the foundation of a self-determined life and full and equal participation in society – are human rights. They must be developed, offered and made widely available in accordance with the UN Convention on the Rights of Persons with Disabilities.

Individual case: VA-BD-VIN/0060-A/1/2012

Increased family allowance granted for metabolic disorders for the first time

Due to an amendment of the Assessment Ordinance of the Employment of Disabled Persons Act, the metabolic disorder phenylketonuria was granted the same status as celiac disease. As a result, receipt of an increased family allowance in comparable areas of life is guaranteed for all persons affected.

The Annual Report 2011 described the case of a five-month-old boy who is suffering from the metabolic disorder PKU. This requires a life-long low-phenylalanine diet. This is a diet that uses a protein substitute made from specially prepared compounds that contain all protein building blocks with the exception of phenylalanine. The strict adherence to the diet means a major psychological and social burden for the parents of children suffering from PKU. Every intake of food must be precisely planned in advance.

Dramatic effects on lifestyle

Although in the opinion of many experts, PKU has even more dramatic effects on the lifestyle of the person affected than celiac disease, up to now it was given a low level of disability of only 30% (Assessment Ordinance of the Federal Ministry of Labour, Social Affairs and Consumer Protection, *Federal Law Gazette [BGBl.]* II No. 261/2010, Item 09.03.01). The AOB considered this as objectively unjustified.

Regulation amended

A reaction to criticism by the AOB was expressed within the scope of an evaluation of the Assessment Regulation by the Federal Ministry of Labour, Social Affairs and Consumer Protection: PKU was granted equal status as celiac disease so that parents of children suffering from PKU received the increased family allowance for the first time.

Individual case: VA-BD-JF/0121-A/1/2011

Gender discrimination

Discrimination in filling a leading position of a regional Public Employment Service Austria office

Gender-stereotypical assignment of roles in job application procedures are not harmless offences but human rights violations.

Allegation of gender discrimination

Ms. N. contended vis-à-vis the AOB that she had been discriminated against because of her gender in the application procedure for a leading position in a regional office of the Public Employment Service Austria Burgenland.

She is a civil servant in the Public Employment Service Austria, a private company providing public services, and since 1983, she has been working as a consultant in a directly adjacent organisational unit. On 7 January 2009, she applied for a leading position that had been put out to tender by way of an internal announcement. In her application, Ms. N. noted that she had experience in project management, including in the sector of advancement of women. She was the only woman among the total of four applicants.

Review Commission recommendation

The Review Commission expressly noted that all four persons fulfilled the tender requirements. Based on the standard preference rule in favour of female candidates when all candidates are equally qualified made standard in the Federal Equal Opportunities Act, the Commission recommended entrusting Ms. N. with the leading position.

Regional Board of Directors awarded the position to the man

After a hearing, however, the Regional Board of Directors of the Public Employment Service Austria decided unanimously on 6 February 2009 to entrust the management of the regional office to a male candidate.

Ms. N. then requested an expert opinion from the Federal Equal Opportunities Commission. In her petition, she stated specifically, but not exclusively that at the hearing on 6 February 2009 on the topic

of “Women and Advancement of Equality” she was asked by a representative of the Chamber of Commerce and Industry why women could not find their fulfilment in raising children. As she was the only woman among the candidates, she could only assume that the male candidates were not asked this question.

After a more detailed examination, it was determined in the expert opinion dated 21 January 2010 that the rejection of Ms. N.'s application was a violation of the preferential treatment guarantee for the advancement of women pursuant to Section 11c of the Federal Equal Opportunities Act and of the equal treatment guarantee pursuant to Section 4 (5) leg. cit.

Equal Opportunities Commission agreed with Ms. N.

It was disappointing for Ms. N. that after the expert opinion had been issued, no one was willing to talk to her about it. She wanted to find out in what way an out-of-court settlement of the financial damages could proceed. In her opinion – and in the opinion of the Federal Equal Opportunities Commission – she had suffered damages. Ms. N. asserted compensation for damages in the proceeding due to having been discriminated against. This compensation for damages results from solicitor’s fees and the difference between her current monthly salary and the salary that she would have received if she had been hired for the management position of the regional office.

Ms. N.’s petition was rejected by way of a notice by the federal office of the Public Employment Service Austria dated March 2011 and later by way of the decision on the appeal by the Federal Minister of Labour, Social Affairs and Consumer Protection dated September 2011. The justification was that there was no discrimination present in this case. The grounds given were that, after conducting a new review, Ms. N. was considered the worst qualified of the four candidates due specifically, but not exclusively, to the following considerations: “While Ms. N. is familiar with the labour market in the region on a general level, her knowledge, in comparison to the candidate who was ultimately chosen and who has worked for many years and in a variety of ways in the XY area of competence, must be considered as more limited.”

Claim for damages denied

By way of an ex-officio investigative proceeding, the AOB wanted to assist Ms. N. in her efforts for a quick, out-of-court financial settlement despite an already pending proceeding before the Austrian Constitutional Court. It was viewed as a possible case of maladministration, as the Public Employment Service Austria – in its Plan for Equal Treatment and Advancement of Women 2008–2012 – had given itself the objective of opening up more opportunities for women when

Federal Ministry defends action taken vis-à-vis the AOB

filling leadership positions. In addition to the statutory obligation to advance women in the event they are underrepresented – this is clearly the case in the Public Employment Service Austria in Burgenland where there is one female regional office manager and six male managers – the tender criterion “knowledge of the regional labour market” cannot be understood to mean that inevitably every other application that is not from a member of the current staff must be viewed as lower ranking. Still, the Federal Minister defended his decision and stated with regard to the discriminating remark alleged by Ms. N. in her appeal petition, which had been made during the hearing, that this remark is not to be found in any of the documents available.

Austrian Constitutional Court determines violation of equality

The Austrian Constitutional Court, to whom Ms. N. addressed her complaint, took a completely different position. In its ruling on 27 June 2012, it determined that Ms. N.’s right of all citizens to equality before the law, which is guaranteed under the Austrian Constitution, had been violated. Obviously, the Austrian Constitutional Court is presuming that in a tort litigation pursuant to Sections 18a and 20 (3) of the Federal Equal Opportunities Act every investigating public agency must pursue ex officio all indications pointing to possible discrimination.

Austrian Constitutional Court sees arbitrariness

According to the grounds for the cited ruling, Ms. N. alleged in her appeal that the question was asked during the proceeding, why women could not find their fulfilment in raising children. The fact that this remark had been made was never disputed either in the administrative proceeding or in the preliminary proceeding before the Constitutional Court and had been explicitly confirmed in the expert opinion of the Federal Equal Opportunities Commission. Nevertheless, the Federal Ministry of Labour, Social Affairs and Consumer Protection neglected to deal with this question, which the Austrian Constitutional Court characterised as yet another deficiency of the proceedings that extends into the constitutional sphere.

AOB demands that procedural methods adhere to the Constitution

In light of this ruling, the AOB demanded that both the Federal Ministry of Labour, Social Affairs and Consumer Protection and the Public Employment Service Austria amend all contradictory procedural guidelines.

Both the Federal Ministry of Labour, Social Affairs and Consumer Protection and the Public Employment Service Austria assured the AOB that in the meantime appropriate steps had been taken and that negotiations were being conducted regarding an out-of-court settlement in respect of the amount of Ms. N.’s claim for damages.

An extremely bitter aftertaste remains, because the course of the proceedings and the openly demonstrated stereotypical patterns of justification – despite the many contrary avowals that have been proclaimed – make it clear in this exemplary case how difficult it is for women, even in a (divested) Civil Service unit, to attain a leadership position. It requires great power of endurance to be in a still valid employment relationship and to have to fight for a claim for damages against the employer in a legal dispute that continues for years.

Bitter aftertaste

Individual case: VA-BD-SV/1018-A/1/2011

Breast augmentation operations for transgender persons

Breast augmentation operations for transgender women can be medically indicated. In such cases, this should be covered by the Public Regional Health Insurance Offices.

Two transsexual complainants contacted the AOB because the Vienna Public Regional Health Insurance Office had rejected an assumption of costs for breast augmentation operations several times. In both cases, there were expert opinions that attested that underdeveloped breast growth could no longer be expected to change under the influence of hormone treatments and that this caused massive psychological problems.

The Vienna Public Regional Health Insurance Office took the point of view that such operations basically fall into the area of cosmetic surgery and the situation is comparable to genetic women who have small breasts.

The AOB could not comprehend this approach to the subject nor the cross-the-board exclusion of benefits. Rather, it had the opinion that a claim to a medically indicated anatomical approximation had already been considered as guaranteed due to previous decisions. After having had sex reassignment surgery, both complainants had undergone hormone therapy. As it was nevertheless impossible to achieve approximate gender alignment, existing alternatives to unsuccessful treatments were necessary. This was particularly the case if not performing this surgery was harmful to their health.

Medically indicated

After another examination, the Vienna Public Regional Health Insurance Office undertook to cover the costs for both operations. In the statement of grounds, reference was made to the German Federal Social Court, which assesses bra size A as the benchmark for covering costs within the scope of gender reassignment surgery.

The Association of Social Security Institutions, which was contacted with regard to a standardisation of such issues, considers generally valid rules for the assumption of costs to be unnecessary. It informed the AOB that these are individual cases that required that the overall picture and medical-psychological topics be part of a resolution and this could not be adequately represented by way of statutory provisions.

No matter how difficult the relevant considerations are, a non-discriminatory approach to medical services can only exist if it remains undisputed and there are evaluation criteria that build on the premise that such questions do indeed fall into the catalogue of services covered by statutory health insurance.

Individual case: VA-BD-SV/0818-A/1/2012;
see also Annual Report 2011, VA-BD-SV/742-A/1/2011

Discrimination based on nationality or ethnic origin

The AOB welcomes the expansion of the prohibition of discrimination in administrative criminal law

An amendment of the law that came into force on 1 September 2012 implemented a recommendation by the AOB and created more efficient prosecution and punishment of discriminating practices.

VA criticises inadequate protection against discrimination

For a long time, the AOB has been pointing out the inadequate implementation of the prohibition against discrimination based on ethnic origin with regard to access to public places and public services.

As previously reported, in its collective decisions taken in 2007 and 2011, the AOB determined that there was maladministration on the part of the authorities insofar as the inconsistent and inefficient enforcement of Art. III (1) (3) of the Introductory Act to the Administrative Procedure Acts 1991 could not fulfil Austria's international,

Community law and national commitments regarding the combating of discrimination. These recommendations also referred to the restrictive interpretation of the prohibition against discrimination that cannot comply with international and Community law requirements in respect of protection against discrimination.

For example, cases of Turkish men being denied access to discotheques or advertisements that offer jobs or housing for Austrians only were not adequately prosecuted and punished. In accordance with the observations of the AOB and many NGOs, this is also a reason why affected persons seldom make complaints to the authorities despite having experienced discrimination and why the few proceedings that are initiated are often dismissed without any penalties.

Therefore, the AOB has already directed a recommendation twice to the Federal Government to ensure that the prohibition of discrimination based on ethnic origin is consistent Austria-wide and is enforced effectively.

An amendment of the law came into force as at 1 September 2012. Referring to a recommendation made by the AOB, Art. III (1) (3) of the Introductory Act to the Administrative Procedure Acts 1991 was revised so that now more efficient prosecution and punishment of discriminatory practices should be possible. In future namely, the parties involved no longer need to prove that they had been penalised with regard to their access to public assets and services “solely” due to their ethnic origin.

New legal situation
enables more efficient
prosecution

The AOB hopes that this – in addition to other necessary measures, such as training of government agency employees and information campaigns – will contribute to a significant improvement of protection against discrimination relative to access to public assets and services.

Individual case: VA-ST-LAD/0007-A/1/2010

Unjustified termination of family benefits for families from other countries

When a residence permit expires, the family allowance and child care benefits are no longer paid. This is the case even if the persons affected have properly applied for an extension of their residence permit and are thus lawfully residing in Austria.

Families do not receive benefits for months

Several foreign families contacted the AOB, because they had not received a family allowance for their children for months. As a result, the families found themselves in an extremely difficult financial situation. For parents of small children, it is an additional hardship that child care benefits and the associated health insurance protection are also discontinued.

The reason for this is the Austria-wide administrative practice of discontinuing family benefits when the residence permit expires. Family allowances and child care benefits are paid only retrospectively, once the new residence permit has been obtained. This is the case even though the persons affected had applied to the proper settlement authority for an extension or a change in purpose of their residency in a timely manner and had submitted the confirmation thereof to the Tax Office.

Residency during extension procedure is lawful

This procedure does not correspond to current law: Non-Austrian citizens are entitled to a family allowance when the child and the parent who applies for it are residing lawfully in Austria in accordance with Sections 8 and 9 of the Settlement and Residence Act. This applies mutatis mutandis to child care benefits. Section 8 of the Settlement and Residence Act cites all the types of residence permits for foreign nationals. Section 9 of the Settlement and Residence Act regulates the documentation regarding residence for citizens of EU countries. Almost all residence permits are initially granted for a limited period of time. Extension of the respective residence permit must be applied for prior to expiration of its validity. Then the applicant continues to reside “lawfully in Austria without prejudice to provisions of the Aliens Police Authority until the legally effective decision regarding the application has been made” (Section 24 (1) of the Settlement and Residence Act).

Entitlement to family benefits continues

The legislators wanted to make it clear that foreign nationals continue to reside in Austria legally, even if the decision relative to the extension application is still pending. They retain their status temporarily. The expired residence permit thus continues to provide the

associated rights, including the entitlement to a family allowance and child care benefits. The family benefits must continue to be provided on an ongoing basis.

The Independent Financial Tribunal shared this opinion. In several decisions, it has ruled that ongoing entitlement to family benefits persists for the duration of the extension procedure under the aliens' law.

On 24 August 2012, the AOB decided to issue a finding of maladministration. In this finding, a recommendation was made to the Federal Minister of Economy, Family and Youth to grant the family allowance and child care benefits during the duration of the extension procedure under the aliens' law provided that the other requirements had been met.

AOB issues
recommendation

The Federal Ministry of Economy, Family and Youth has unfortunately not yet adopted this recommendation; it stated that it was not possible to waive the formal requirement of a current residence permit. This is intended to avoid unnecessary recovery of payments and ensure economical and efficient enforcement.

This argument misjudges the current legal situation. Therefore, the AOB recommends to all persons affected to appeal against the decision of the Tax Office and to request submission to the Independent Financial Tribunal. If and insofar as the Tribunal maintains its established ruling practice, measures will be introduced at the parliamentary level. The AOB has exhausted all of the means at its disposal to remedy the maladministration it has ascertained.

Individual cases: VA-BD-JF/0059-A/1/2012, VA-BD-JF/0105-A/1/2011,
VA-BD-SV/1218-A/1/2011

The less favourable treatment of beneficiaries of a subsidiary protection in respect of family benefits

The AOB addressed the issue of less favourable treatment of beneficiaries of a subsidiary protection, the temporary obligation to provide benefits under provisions of EU law, as well as with the problem of so-called “posthumously born children” and unobjective limitations of benefits.

Less favourable treatment of beneficiaries of a subsidiary protection

The AOB pointed out the less favourable treatment of beneficiaries of a subsidiary protection in comparison to persons eligible for asylum; most recently in the Annual Report 2011. Beneficiaries of a subsidiary protection receive family benefits only if they are gainfully employed and are not receiving the basic level of social services (Section 3 (4) of the Family Allowance Act 1967, Section 2 (1) (5) (c) of the Child Care Benefit Act).

“Family review” is unlawful

In the reporting year, the AOB criticised the so-called “family review” that is applied in everyday practice when the family receives basic level of social services: Even if the applicant or the child is not receiving the basic level of social services, but another family member is, payment of a family allowance is rejected. This contradicts the wording of Section 3 (4) of the Family Allowance Act 1967 and is unlawful (Independent Financial Tribunal 12.4.2010, RV/3463-W/09).

Notional entitlement is not sufficient

The AOB also spoke out against an administrative practice, according to which the mere entitlement to the basic level of social services excludes payment of a family allowance. According to the clear wording of Section 3 (4) of the Family Allowance Act 1967, only the actual receipt of the basic level of social services is the decisive factor. It cannot be based on a notional entitlement, which does not result in an actual receipt of the basic level of social services (thus also ruled by the Independent Financial Tribunal 4.3.2010, RV/0490-I/09 among other rulings).

Assistance from the minimum benefit system is not grounds for exclusion

Finally, the AOB again expressed to the Federal Ministry of Economy, Family and Youth that benefits provided by the needs-based minimum benefit system must not be considered similar benefits. In accordance with the current legal situation, only receipt of the basic level of social services can exclude payment of a family allowance; from the AOB’s perspective, an extension to the minimum benefit system must be rejected.

In the year under review, the Federal Ministry of Economy, Family and Youth again commented on these legal questions and, ultimately, agreed with the AOB's view with regard to all items. The revenue authorities were instructed by way of a multi-address message to proceed in accordance with the following principles:

Federal Ministry of Economy, Family and Youth agrees

- Receipt of the basic level of social services is to be verified only with regard to those persons who have applied for a family allowance (rejection of the so-called "family review").
- Only the actual receipt of the basic level of social services is relevant; it will not be verified if a (notional) entitlement exists or would exist.
- Granting of benefits under the needs-based minimum benefit system will not be equated with receipt of the basic level of social services.

Furthermore, the AOB continues to uphold its recommendation that, with regard to receipt of family allowances, beneficiaries of a subsidiary protection receive equal treatment as persons eligible for asylum. The Federal Ministry of Economy, Family and Youth continues to reject this fundamental recommendation.

AOB upholds its recommendation

In the year under review, several Austrian stepfathers contacted the AOB, as the family allowance for their foreign stepchildren had been cancelled under reference to the decision of the European Court of Justice in the "Slanina" legal matter (26.11.2009, case no. C-363/08). According to this decision, the stepfather's gainful employment in Austria could not constitute an entitlement to a family allowance, because only that country is competent where the biological father is employed.

Stepfathers – European Court of Justice "Slanina" decision

The AOB had spoken out against this viewpoint already in the Annual Report 2011. After repeated correspondence, a statement was finally received from the Federal Ministry of Economy, Family and Youth after one and a half years. It states that the topic is currently being discussed in the Administrative Commission in Brussels in order to enable the member states to share their experience. The objective is enforcement that is uniform throughout Europe to the greatest possible degree. It is, however, impossible to estimate how long discussions will last.

Federal Ministry of Economy, Family and Youth refers AOB to EU level

Temporary obligation to provide benefits

Nevertheless, the Federal Ministry of Economy, Family and Youth agrees with the AOB's viewpoint that any difference of opinion between the EU member states may not be played out at the expense of families. The Tax Office is therefore being advised, in the event of conflicts of jurisdiction, to apply the requirements under EU law (Section 6 (2) jointly with Section 60 (4) of the EU Regulation 987/2009), according to which that country, in which the family is living, must temporarily grant family benefits after two months. This also applies when extensive investigations between entities in two member states are necessary and last for many months (e.g. in order to determine the amount of a benefit; see recital no. 10 of the Regulation 987/2009). In the AOB's experience, this is currently not being complied with by the authorities.

"Posthumous children"

As was the case in the previous years, in some cases the AOB was able to clarify that it was so-called "posthumous children" within the meaning of Section 3 (5) of the Family Allowance Act 1967 that were at issue. This means that the entitlement to a family allowance and child care benefits exists from the date of the birth (respectively, from the arrival in Austria) and not from the date of the later granting of a residence permit. In the concrete case of a Chinese girl, it must be noted that the regulation also includes stepchildren.

Time limitations of family allowances

There continue to be occasionally unjustified time limitations of family allowances for persons who are not Austrian citizens. During the year under review, for example, the Tax Office granted a French citizen a family allowance for her newborn daughter only for 23 months, although she has had her permanent residence and centre of vital interests in Austria for 15 years, jointly with her Austrian life partner and father of the child. As a result of the AOB's intervention, the family allowance has now been time limited until the daughter's majority.

Individual cases: VA-BD-JF/0016-A/1/2011, 0073-A/1/2012, 0065-A/1/2012, 0057-A/1/2011, 0130-A/1/2011, 0015-A/1/2011, 0005/1/2011, 0041-A/1/2012, 0089-A/1/2010, 0102-A/1/2012, 0036-A/1/2012, 0022-A/1/2012, 0007-A/1/2012, 0026-A/1/2012, VA-BD-SV/1265-A/1/2011

Discrimination due to sexual orientation

Prohibition against donating blood for risk groups

A study was conducted on behalf of the European Commission in order to clarify the effects of risky sexual behaviour by blood donors in respect of the safety of blood transfusions. According to this study, there is currently no information available that would provide a reason to change the current recommendations.

In Annual Report 2010, the AOB reported on the case of two men who felt discriminated against because homosexual men were generally prohibited from donating blood.

The European Commission had a study conducted on this subject in order to scientifically clarify the effects of risky sexual behaviour by blood donors in respect of the safety of blood transfusions. The results became available in April 2012. In October 2012, a corresponding resolution was discussed in the Council of Ministers of the Council of Europe, but had not yet been adopted.

Risk Behaviour Study

The Federal Ministry of Health affirmed the position that it continued to be the decisive factor for them to not view certain groups of persons as a particular risk but to determine and evaluate individual risk behaviour. The study shows that there are currently no epidemiological data that appear to support a change in the existing recommendations.

No change

The efforts of the Federal Ministry of Health to achieve impartiality and objectivity should be applauded.

Individual case: VA-BD-GU/0047-A/1/2009

Labour, social affairs & consumer protection

Health programme for the unemployed undermines data protection

The Constitution recognises the particular sensitivity of health data. Within the scope of the “fit2work” programme that was established for the unemployed and other persons, unclear care agreements were used. As a result, the fundamental right to data protection and privacy was obfuscated. By signing up for this programme, all the participants had agreed to a comprehensive disclosure of their health-related information.

Referral of an unemployed man to a health programme

Mr. N. had been unemployed for a long period of time and was receiving emergency financial aid from the Public Employment Service Austria. Due to his age, but for health reasons as well, Mr. N. had not been able to find a suitable employment, despite sending innumerable job applications to various companies. During an appointment with the Public Employment Service Austria, his adviser offered him the opportunity to participate in the “fit2work” health programme at ÖSB-Consulting GmbH (hereinafter: ÖSB). Initially, the offer sounded promising.

Alarming care agreement

The disillusionment began when Mr. N. went to see the ÖSB. The ÖSB gave him an agreement to sign that was titled “Care Agreement and Consent Declaration fit2work Case Management”. The disturbing thing was that Mr. N. was supposed to consent to a comprehensive disclosure of his health information to all of the main public social insurance carriers, including various branch offices of the Public Employment Service Austria and the Federal Social Welfare Office, and also had to waive most of his patient confidentiality. As far as the details were concerned, the “Care Agreement” was very contradictory. Text passages regarding health care services were inseparably mixed in with consent declarations regarding disclosure of data; in another places, “confidentiality” was mentioned. The agreement did not make it clear what applied and what did not apply.

Mr. N. contacted the AOB und requested clarification as to whether he had to accept such an agreement. In addition, the unsure, unemployed man wanted to know whether the Public Employment Service Austria could cancel his emergency financial aid if he were to reject the agreement with ÖSB.

The AOB immediately contacted the Federal Ministry of Labour, Social Affairs and Consumer Protection, the main office of the Federal Social Welfare Office and ÖSB. The AOB's main message was as follows: This "care agreement" undermines the fundamental right to data protection and privacy. The confusing structure of the agreement obfuscates the rights of the party involved and thus erodes guarantees provided under the Constitution. Insofar, the refusal to sign such an agreement cannot justify a cancellation of unemployment benefits or emergency financial aid.

AOB initiates comprehensive investigation

The point of origin of the AOB's legal evaluation was the Labour and Health Act, which presumes that participation in health programmes and, in particular, consent to disclosure of health information is based on a voluntary action. The participating authorities and ÖSB must clearly point out this legal situation. The written care agreement for a health programme must specifically, but not exclusively contain unambiguous (!) information about those rights of potential participants. The AOB made it clear that the fulfilment of this duty of clarification is the basic requirement that a consent to disclosure of personal information can become legally effective at all.

Insufficient clarification and circumvention of data protection and privacy guarantees

The AOB emphasised two additional points: On one hand, sections of the agreement that refer to the provision of care services must be clearly separated from consent declarations regarding the use and disclosure of personal data. And on the other hand, one would have to phrase the cited consent declarations in such a way that a differentiated treatment of consents is possible: The participants in the health programme should, for example be able to permit use of personal information by ÖSB, but prohibit disclosure to other parties in whole or in part. This is the only way to ensure that the individual can profit from the health programme, while at the same time retaining authority over his/her private sphere.

AOB demands changes

From the AOB's perspective, the fundamental right to data protection and privacy in the present context dictates that the Federal Ministry of Labour, Social Affairs and Consumer Protection, as the highest authority in the administration of the labour market, and all other cooperation partners of ÖSB must ensure that care agreements are worded in such a way that all participants of the current health programme are actively in a position to assert their right to data protection and the preservation of their private sphere.

Federal Ministry of
Labour, Social Affairs
and Consumer Protec-
tion concedes

It was gratifying that the Federal Ministry of Labour, Social Affairs and Consumer Protection agreed with the AOB's arguments and informed that AOB that the "care agreement" that was objected to may no longer be used for health programmes governed by the Labour and Health Act. In future, the care agreement will be clearly separate from the consent declarations under data protection law. Furthermore, the parties involved will receive a written clarification of their rights. The Federal Ministry also ensured the AOB that unemployed persons who refuse to participate in programmes governed by the Labour and Health Act, for example "fit2work", do not need to fear any sanctions, such as a time-limited cancellation of financial benefits. In any case, the principle of voluntary participation that is enshrined in the Labour and Health Act would contradict a cancellation of unemployment benefits or emergency financial aid.

Individual case: VA-BD-SV/0808-A/1/2012

Finances

Treatment of disabled employees in the Federal Ministry of Finance

The first collective report about the implementation of the planned measures regarding integration of disabled employees was now made available.

The section titled "Treatment of disabled employees in the Federal Ministry of Finance" in the Annual Report 2011 reported that the agreed evaluation reports about the integration of persons with disabilities in the Federal Ministry of Finance had not been prepared. A "collective report" had been promised by the Federal Ministry of Finance.

Collective report
now available

This "collective report" was now provided. It presented the integration efforts that the Federal Ministry of Finance had hitherto undertaken (protection against discrimination, structural accessibility, education, employment, employability, awareness and information). This report had been decided upon by the department heads and the Central Committee. It was agreed to prepare another evaluation report in three years.

Individual case: VA-BD-FI/0253-B/1/2010, BMF-410101/0087-I/4/2012

Interior

Inadequate investigations prior to deportation to Hungary

In 2011, NGOs reported on serious shortcomings in the Hungarian asylum system. The danger of inhuman or degrading treatment in accordance with Section 3 of the European Convention on Human Rights could not be excluded. Despite unclear reports, the Federal Police Directorate Vienna wanted to transfer an asylum seeker to Hungary. The European Court of Human Rights stopped the deportation by way of an emergency order.

The EU Dublin II Regulation regulates the competence for the examination of applications for asylum within the EU. Fundamentally, that member state has jurisdiction through which the asylum seeker enters into the EU.

In January 2012, an asylum seeker who had entered Austria via Hungary was supposed to be transferred back to Hungary. While in detention, he filed a second asylum application and alleged that deportation to Hungary is not permitted due to the risk that Section 3 of the European Convention on Human Rights (Prohibition of inhuman or degrading treatment) would be violated. As a result of an emergency order issued by the European Court of Human Rights, the planned transfer was not carried out.

According to the newest rulings of the European Court of Justice and the European Court of Human Rights, a transfer is not permitted under the Dublin II Regulation if it is known that there are systemic weaknesses in the asylum procedure and that as a result there is a danger of inhuman or degrading treatment of the asylum seeker. The practice of the asylum authorities of the host country must be carefully examined (European Court of Human Rights dated 21.1.2011, No. 30696/09, European Court of Justice dated 21.12.2011, No. C-411/10 and C-493/10).

The AOB examined the reports about Hungary that were available to the Federal Police Directorate Vienna in January 2012 as well as the determinations in the country documentation. The conclusions of some of the cited sources contradicted the reports of well-known NGOs and the UNHCR with regard to serious shortcomings in the Hungarian asylum system. The AOB reached the conclusion that the Federal

Does a proper asylum system exist in Hungary?

Federal Police Directorate should have examined

Police Directorate Vienna should have obtained supplementary reports in order to clarify the practice of the Hungarian asylum authorities. It should have addressed the potential violations of fundamental rights with greater care.

Additionally, the AOB repeated its suggestions to include information about possible judicial protection remedies before the European Court of Human Rights in the information summary about the purpose of detention pending deportation (see Annual Report 2011, p. 149 et seqq.)

Individual case: VA-BD-I/0012-C/1/2012, BMI-LR2240/0169-II/3/2012

Federal Asylum Office disregards the right to private and family life

In several family proceedings under the Asylum Act, the Federal Asylum Office refused and/or prevented entry into Austria of family members and intervened in the right guaranteed by the Constitution of private and family life being respected pursuant to Section 8 of the European Convention on Human Rights.

Duty to protect on the part of the State

Section 8 of the European Convention on Human Rights obligates the state to effectively respect family life (Austrian Constitutional Court dated 27.6.2008, case no. 246/07). "Family" includes all family members connected by way of blood relationship, marriage or adoption who are actually living together or whose relationship consists of a dependent relationship.

The Asylum Act enables family members of persons who are eligible for asylum or beneficiaries of a subsidiary protection to file an application for entry into Austria at an Austrian embassy or consulate abroad. Family members must be given visas for entry if the Federal Asylum Office informs the embassy that family members will probably be given the same protection as the reference person.

Pursuant to the Asylum Act, only the wife or husband, unmarried, minor children and parents of a minor, illegitimate child fall under the term "family members". With regard to spouses, the marriage must have already existed in their home country.

The application for entry into Austria made by the wife of an Afghan man who was a beneficiary of a subsidiary protection was rejected in late 2011. The field office of the Federal Asylum Office in Eisenstadt (Burgenland) did not doubt the marriage, which had taken place in the Russian Federation, but the fact that they had actually lived together as a family in Afghanistan. The authorities criticised that the marriage had never been legally recognised in Afghanistan. The family had not been able to live together on a permanent basis either in the Russian Federation or in Afghanistan.

Wife not recognised as a family member

The AOB shared the viewpoint of the European Court of Human Rights that male-female relationships based on a legal marriage are included in the area of applicability even if individual characteristics that are typical for life as a family are missing (European Court of Human Rights dated 28.5.1985, Abdulaziz, 9214/80, in line with the aforementioned ruling, Constitutional Court dated 24.11.2000, 2000/19/0216). According to the ruling, the refusal to allow the wife to enter Austria prevents the restoration of the family unit and represented inadmissible interference in their family life.

It is gratifying to note that after the conclusion of the investigative proceedings, the Federal Ministry of the Interior confirmed family status of the wife and the uniform application to similar cases.

Ministry admitted mistake

In another family proceeding, the wife and four children of an Afghan man who was the beneficiary of a subsidiary protection were permitted to enter Austria. The Austrian Embassy in Islamabad had refused to grant him a visa in April 2011, as the field office of the Federal Asylum Office in Eisenstadt presumed that he had reached majority.

The authorities referred globally to the inauthenticity of Afghan documents and did not examine the submitted passport, which confirmed that the child was a minor. An expert opinion regarding determination of his age was obtained in Pakistan; however, it did not correspond to the standards applicable in Austria.

Inadequate investigation of the child's age

As, in the view of the AOB, the expert opinion could not remove doubts regarding the actual age, the Federal Asylum Office should have presumed his minority in favour of the applicant. The AOB recommended that this be taken into consideration in the ongoing proceedings.

In July 2010, the wife and three children of a man from Ethiopia who was the beneficiary of a subsidiary protection applied for family re-

Longer wait for clarification of DNA analysis

unification. The embassy recommended in early August 2010 that a DNA test be conducted to prove paternity. The Federal Asylum Office did not explain this possibility to Mr. N. until mid-May 2011 and gave him a deadline of 1 September 2011. The Austrian Embassy did not inform the Federal Asylum Office of the receipt of the sample kit nor of the additional procedure. Therefore, on 2 September 2011, the Federal Asylum Office made a negative predictive decision.

On 2 February 2012, the family again applied for entry into Austria. At the end of May 2012, the DNA analysis expert opinion was received by the Federal Asylum Office and proved paternity. The Austrian Embassy in Addis Ababa was instructed in July 2012 to issue visas to the three children.

No instruction provided
about DNA analysis

In another family proceeding, the AOB determined an intervention that violated Section 8 of the European Convention on Human Rights, as the Federal Asylum Office did not provide information about the possibility of DNA analysis to prove the family status. It is true that the Somali man who was eligible for asylum was instructed accordingly within the scope of a family reunification in 2009, however, not during the new proceeding in 2011 that pertained to other children.

Individual cases: VA-BD-I/0062-C/1/2012, BMI-LR2240/0702-III/5/2012;
VA-BD-I/0099-C/1/2012, BMI-LR2240/0391-II/3/2012; VA-BD-I/0127-C/1/2012,
BMI-LR2240/0437-II/3/2012; VA-BD-I/0274-C/1/2012, BMI-LR2240/0398-III/5/2012

Duration of the proceedings before the Asylum Court – efficient system of judicial protection?

Since 2010, the complaints regarding the duration of the proceedings before the Asylum Court have significantly increased. In 2012, the number of complaints fell for the first time. It is clear from the concerns of the parties involved that they finally want to know where they stand. The system of judicial protection can only be efficient if the proceedings are concluded within a reasonable period of time.

Almost all the complaints referred to the duration of the proceedings. In a few cases, asylum seekers requested an investigation of the decisions by the Asylum Court. As the AOB cannot investigate court decisions, these persons received explanations. 481 complaints referred

to new proceedings pending before the Asylum Court. 23 complaints referred to old proceedings that had been assumed by the Independent Federal Asylum Senate. The Asylum Court concluded a total 144 of 717 investigative proceedings from 2011.

The number of complaints went down from 717 in 2011 to 538 this year. Particularly, there were fewer complaints regarding old proceedings. In 2011, around 20% of the investigative proceedings referred to old proceedings; in 2012, this figure fell to less than 5%. Therefore, it can be concluded that the reduction of old proceedings, which – according to the intention of the legislators was supposed to have been completed by the end of 2010 – has been largely successful. The Asylum Court has described the number of still pending old proceedings as “a few hundred”. However, there are still 19 investigative proceedings from 2004, 2005, 2006 and 2007 that have not been concluded, in other words, they have been pending for five to eight years (!).

Few complaints about old proceedings

There were few changes with regard to complaints about new proceedings. Some of these proceedings have been pending since the Asylum Court was established (1 July 2008). In most of the investigated complaints, the Asylum Court has not taken any steps – during a period of up to four and a half years. 21 complaints referred to proceedings that had been pending since 2008, 40 to proceedings pending since 2009, 131 to proceedings pending since 2010, 204 to proceedings pending since 2011 and 90 to proceedings pending since 2012. Many of the complaints had been filed by Afghan citizens.

The AOB can inform numerous asylum seekers only that the Asylum Court could not provide an estimate regarding the conclusion of the proceedings. Nevertheless, after some time has passed, they again contact the AOB and again request that an enquiry be made. In numerous cases from 2011, the AOB contacted the Asylum Court ex-officio. In 186 investigative proceedings from 2011 and 2012, the Asylum Court was not able to report on any judicial proceedings or the conclusion of a proceeding.

Many delays in new proceedings

The AOB contacted the Asylum Court for the first time in November 2010 regarding a proceeding that had been pending since July 2009. It held out the vague prospect of a decision in late 2011/early 2012. According to their estimate at the time, all complaint proceedings should be decided upon on the average within the statutory deadlines by this point in time. In December 2011, the AOB enquired on the progress of the proceedings. The Asylum Court only pointed out the general backlog. In the proceeding, the Asylum Court had not taken

any steps for the period of one year since the first enquiry. Other enquiries by the AOB in April and October 2012 had the same result. Thus, the proceeding has been pending for three and a half years without the Asylum Court having undertaken even a single procedural step. This investigative proceeding represents many other cases.

Inadequate assistance by the Asylum Court

Unfortunately, the cooperation with the Asylum Court is flawed. The Asylum Court responds to enquiries by way of form letters without going into the individual case. Subsequently, enquiries in cases where the AOB had received a form response were again answered with just such a form letter. Proceedings, in which the Asylum Court had held out the prospect of a judicial proceeding or the conclusion of a proceeding – albeit within a longer time frame – are merely designated as “not yet concluded” in the case of an enquiry. The Asylum Court does not provide reasons why originally made promises are not kept. The AOB regrets this development deeply, as it presumes that the Asylum Court should also be interested in an improvement of the situation.

System of judicial protection is not efficient

The Austrian Constitutional Court presumes that the legal system must provide an efficient system of judicial protection (Collection of decisions of the Austrian Constitutional Court 14.702/1996). Institutions providing judicial protection are included in the fundamental principles of the Constitution. The Asylum Court is such an institution providing judicial protection that had been established under constitutional law. However, the Austrian Constitutional Court also requires a minimum of actual efficiency to benefit persons seeking legal recourse (Collection of decisions of the Austrian Constitutional Court 11.196/1986 and many more). This means that the Asylum Court must handle a petition within a reasonable period of time. Proceedings of such length do not meet these requirements. It is not merely a matter of a few proceedings, but a significant percentage of them.

Systemic deficiencies?

Therefore, systemic deficiencies must be presumed, for example, too few personnel or structural deficits in the distribution of cases. The Asylum Court has said that despite the increase in complaints, the number of pending proceedings has gone down. Nevertheless, from the AOB’s perspective, there is reason to fear that the backlog will be passed on to the Federal Administrative Court, which will have jurisdiction from 1 January 2014.

Individual case: VA-BD-I/1004-C/1/2011, AsylGH-AsylGH 100.920/0775-Präs/2011; VA-BD-ASY/0437-C/1/2012, AsylGH-AsylGH 100.920/0706-Präs/2011 and many others

Justice system

No fees for copies made by the parties themselves

Since 1 January 2012, there are no fees when parties make copies themselves without needing any court infrastructure, i.e. use their own devices, such as scanners or digital cameras.

In its Annual Report 2011, the AOB addressed the problem of copying costs and pointed out that charging fees when the parties themselves make copies without utilising court infrastructure (e.g. paper, toner, electricity, etc.) by way of their own devices (e.g. scanners, digital cameras, etc.) while there are no fees for merely accessing the files, violates the principle of equality.

In December 2011, the Constitutional Court rescinded the statutory fee provisions as inconsistent with the principle of equality. The rescission was supposed to become effective as of 30 June 2012. By way of the Second Stability Act 2012 that came into force retrospectively as of 1 January, no fees will be charged for copies made by the parties themselves.

Discriminatory security check

A search for medications by a security service during checks at the entrance to a court building is not permitted. This is within the competence of the security police.

Ms. N. wanted to attend a proceeding of the Regional Court Salzburg within the scope of an educational event. As she entered the courthouse together with a group of students, she was questioned by an employee of a security service, who was checking those accessing the building, with regard to the medications in her purse and her illnesses. She complained that she was questioned in front of the other visitors.

The statement that was obtained from the Federal Ministry of Justice admitted that the employee of the security service had overstepped his supervisory duties and had not treated Ms. N. properly.

Supervisory duties
were overstepped

Under the provisions of the Court Organisation Act, the justice system is required to guarantee safety in court buildings by way of security checks. The checks are to be limited to whether persons who are entering a court building or are present therein are carrying a weapon. In order to fulfil this task, the security guard is authorised and obligated to require persons to show him any items they are carrying. Luggage and clothing may be searched by hand – with the greatest possible consideration and discretion.

It is not permitted to search for medications or drugs; this is within the competence of the security police.

The employee of the security service overstepped his duty that is established by law. He discriminated against Ms. N. with his questions regarding the medications she was carrying and her illnesses and violated her rights.

Court apologises and promises additional training

The AOB has taken favourable note that the President of the Court of Appeal Linz, within whose competence the authorisation of security services lies, promptly apologised in written form to Ms. N. and pointed out the necessity of additional training of its employees to the security company.

Individual case: VA-BD-J/0268-B/1/2012, BMJ-99003093/0001-Pr3/2012

Economy, family and youth

Access to Theseus Temple in Vienna not barrier-free

After its complete renovation, since 2012, the Theseus Temple is used as exhibition space during summer but does not offer a barrier-free access. Is the UN Convention on the Rights of Persons with Disabilities being disregarded?

Utilisation as a venue for exhibitions

A wheelchair user who wanted to visit an exhibition in the Theseus Temple and found the access was not barrier-free contacted the AOB. The Federal Ministry of Economy, Family and Youth explained, that the *Burghauptmannschaft* (responsible for conservation aspects and building maintenance) had renovated the building, which is protected as a historic monument, between 2008 and 2010. Since 2012, it has been used by the Museum of Fine Arts for temporary exhibitions.

When the renovation was being planned, barrier-free access was discussed. Due to the big height differential between ground level and entrance level, it would have been necessary to install a 16-meter-long ramp. According to information provided by the Federal Ministry of Economy, Family and Youth, the Austrian Federal Office for the Care of Monuments had rejected this project. The Federal Ministry of Economy, Family and Youth did not cite the reasons for the rejection.

Did Office for Care of Monuments reject ramp?

Due to the intervention by the AOB, a discussion took place in October 2012 with representatives of the Museum of Fine Arts, the Federal Office for the Care of Monuments, the *Burghauptmannschaft* and the Austrian Working Group for Rehabilitation. They discussed a transportable and temporary structure (ramp or lift) to make the exhibition area accessible. The search for a solution has not yet been concluded.

Team of experts is looking for a solution

In light of the UN Convention on the Rights of Persons with Disabilities, the fact the accessibility was neglected as described above is open to criticism. The AOB will monitor this matter.

Individual case: VA-BD-WA/0099-C/1/2012

International activities

International ombudsman institute (IOI)

Headquarters
in Vienna

Since 2009, the AOB has been the home of the General Secretariat of the International Ombudsman Institute (IOI). The IOI links more than 155 independent ombudsman institutions from more than 90 countries in the African, Asian, Australasian and Pacific (APOR), European, Caribbean and Latin America, as well as the North American Region. The members are institutions that monitor and control public administration on the national, regional and/or local level.

IOI World Conference

The 10th World Conference of the IOI took place in Wellington, New Zealand, in November 2012. This important international conference was hosted by the New Zealand Ombudsman to mark the occasion of the 50-year anniversary of the ombudsman institution in New Zealand. Around 300 participants from more than 70 countries took advantage of this opportunity to share their experiences and opinions, especially with regard to the focus of the conference: “Speaking Truth to Power – The Ombudsman in the 21st Century”.

Wellington Declaration

Another topic at the World Conference was the support of ombudsman institutions, which are being prevented from carrying out their independent activity by political pressure – in the case of Malawi, this actually went as far as a brief incarceration of the ombudswoman – or budgetary cuts. Therefore, the member organisations represented in Wellington unanimously adopted the “Wellington Declaration” in order to send a clear signal against these (cost-cutting) policies that result in the curtailment of citizens' access to the rule of law.

IOI reform

In the four years since the IOI General Secretariat relocated its headquarters to Vienna, the activities of this international organisation have been increasingly expanded. The extensive reform of the IOI By-Laws has been a particular focus in the last year. A comprehensive draft of the By-Laws was prepared under the committed leadership of Dame Beverley Wakem (IOI President and Chief Ombudswoman of New Zealand). The main emphasis of the reform was on a more inclusive direction of the IOI, while at the same time developing clearly worded membership criteria. Other important components of this reform are a greater involvement of the member organisations in the Institute's decision-making processes and making the activities of the

IOI more sustainable by extending the terms of office of the officials. After a transparent consultation process, which included all the members of the IOI, the General Assembly in Wellington adopted the final draft of the By-Laws with a clear majority of 96.3%.

While there were practically no trainings up to 2009, the training offerings for the staff of ombudsman institutions has been greatly increased worldwide. In September 2012, due to lively demand, the IOI General Secretariat again hosted an ombudsman training that brought 36 interested participants from ombudsman institutions in 23 different countries to Vienna. Well-respected trainers from the Queen Margaret University (QMU) in Scotland presented an interactive workshop on how to deal effectively with complaints. In 2012, with assistance from the City of Vienna, the IOI gave subsidies to financially weaker institutions. Staff members from ombudsman institutions from Sierra Leone, Botswana, Pakistan, Ukraine and Lithuania were thus able to participate in this highly valuable training. For 2013, four additional IOI trainings have been scheduled (including locations in Africa and Asia).

Expansion of training offerings

Funding from the IOI membership fees can not only provide financing for trainings in Austria, but can also subsidise (supra)regional projects organised by IOI member institutions. For example, using an innovative training tool, a webinar (an Internet-based seminar) has been developed in the North American Region on the subject of how to deal properly with complaints by persons from different generations. A series of trainings on effective complaint management and conduct in difficult situations surrounding complaints, which was organised by the institutions in Hong Kong and Macao in May 2012, was directed toward participants from the APOR Region. Additionally, the IOI enabled simultaneous interpretation into French of a training about dealing with difficult complainants, held by the Forum of Canadian Ombudsman (FCO) in November 2012 in Montreal.

(Supra)regional projects

In his function as IOI General Secretary, Ombudsman Peter Kostelka signed a Memorandum of Understanding in November 2012 with the International Anti-Corruption Academy (IACA), which is headquartered in Laxenburg. A jointly organised training focused on anti-corruption will be offered to IOI members in fall 2013.

Cooperation with the IACA

In the area of science and research, the IOI was able to take an important step closer to its goal of making comparative analyses of ombudsman institutions worldwide available for everyone on the IOI website. After the study about European ombudsman institutions that was

Science and research

published by Gabriele Kucsko-Stadlmayer in 2008, a research project initiated by the IOI, which is dedicated to a comparative analysis of ombudsman institutions in the APOR Region, was concluded in collaboration with the Ludwig Boltzmann Institute for Human Rights (BIM). The next part of the series of studies will concentrate on Asia. The thematic focus is on an analysis of the legal principles, how they are embedded in the political system, as well as an analysis of the mandates of the respective ombudsman institutions.

International organisations

- Council of Europe During his three-day visit in Vienna, the Human Rights Commissioner for the Council of Europe, Nils Muižnieks, met with members of the AOB. He showed an interest in details regarding the expansion of the competence of the AOB and, in this context, gathered information about the basic elements of how human rights protection is implemented in Austria.
- ICC / OHCHR After its reaccreditation, the AOB, as a National Human Rights Institution (NHRI), is represented on the International Coordinating Committee (ICC) of National Human Rights Institutions with a B-status. In this function, it has regularly made its expertise on areas that are relevant to human rights available, particularly to the European Group of the ICC. Furthermore, upon invitation of the OHCHR, the AOB has spoken out extensively regarding the review of the country report for Austria in respect of the implementation of the Convention on the Elimination of All Forms of Racial Discrimination (CERD).
- OSCE In late 2012, the Handbook for NHRIs on Women's Rights and Gender Equality by the OSCE/ODIHR came out. The AOB actively participated in this project, contributing to information sharing in this field.
- FRA Every year, the European Fundamental Rights Agency (FRA) organises a meeting of the National Human Rights Institutions of the EU member states. The AOB was also represented at one of these annual meetings which took place in April 2012 in Vienna. Additionally, the AOB also took advantage of the opportunity to participate in a follow-up meeting of the Fundamental Rights Platform (FRP). In 2012, the AOB provided input for a handbook about the accreditation of National Human Rights Institutions, which was published by FRA.

In September 2012, the members of the AOB met with Barbara Bernath, the Director of Operations of the Association for the Prevention of Torture (APT) for a discussion. Discussions centred around the development process of the Austrian National Preventive Mechanism and the AOB's new competences. The visit provided an excellent opportunity to intensify the cooperation with the APT.

APT

Bilateral contacts

The AOB views itself as a partner of newly established ombudsman institutions; it was therefore glad to assist the Parliamentarian North-South Dialogue project within the scope of its cooperation with the Parliament of Mozambique. The main topic of the visit by the members of Parliament was the desire to advance the establishment of an ombudsman institution in Mozambique. In his function as Secretary General of the IOI, Ombudsman Peter Kostelka has encouraged the sharing of experience with member institutions in Africa. Furthermore, he has established contact to the African Ombudsman and Mediators Association (AOMA). In June 2012, the Vice-President of the African Region of the IOI confirmed the appointment of José Imraimo Abudo as Ombudsman of Mozambique.

Assistance

In September 2012, Ombudswoman Brinek hosted a member of the National Human Rights Commission in Togo (*Commission Nationale des Droits de l'Homme* – CNDH). As the CNDH has recently begun its duties as the designated NPM in Togo, the visitor was interested in the AOB's experience in this area. It was especially valuable for him to receive detailed information on the extensive preparatory measures necessary for this work.

Since 2009, the AOB is also the headquarters of the General Secretariat of the International Ombudsman Institute (IOI); it takes advantage of this "dual function" in various discussions and information sharing with international colleagues. In March 2012, a delegation of the Petition Committee of the Diet of Saxony visited the AOB in order to get an overview of the diverse duties of the AOB. In October 2012, representatives of the Thai ombudsman institution held discussions with the AOB that included future in-depth cooperation with the IOI. A staff member of the Norwegian Organisation for Asylum Seekers (NOAS) met with the AOB in November 2012. AOB experts provided information about the expansion of AOB's competence and its monitoring activities, as well as the integration of civil society into the

Meetings

Human Rights Advisory Council. In December 2012, AOB members hosted a delegation of the Korean Anti-Corruption and Civil Rights Commission and provided the visitors with deeper insights into the competences and functions of the AOB.

International conferences

European Ombudsman

In 2012, the AOB was represented at various international conferences. In October 2012, Ombudspersons Brinek and Kostelka participated in the 8th Regional Seminar of the European Network of Ombudsmen in Brussels. The two main topics of discussion were the settlement of disputes for ombudspersons and communication with citizens. An expert represented the AOB at the 8th Liaison Seminar of the European Network of Ombudsmen, where the European Citizen Action Service, the handling of investigative proceedings and the reorganisation of ombudsman institutions were discussed. December 2012 saw the 5th Fundamental Rights Conference on the subject of “Justice in times of austerity – challenges and opportunities for the access to justice”. An AOB staff member participated in this conference, which was organised by FRA in collaboration with the European Parliament.

NPM project organised by the Council of Europe

Within the scope of the European NPM project, an AOB staff member attended a workshop in March 2012, which took place in Geneva and was organised by the Council of Europe, the Swiss NPM and the National Committee on the Prevention of Torture. The two-day workshop addressed the monitoring of the risk of abuse during forced returns and included discussions on how monitoring can contribute effectively to the prevention of abuse and torture. In June 2012, a follow-up event took place in Belgrade, which was organised by the Council of Europe in collaboration with the Serbian NPM. An AOB expert attended this event.

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The unabridged version of this Annual Report of the Austrian Ombudsman Board to the National Council and the Federal Council is available in German and can be found on the Website of the Austrian Ombudsman Board.

