



International Covenant on Economic, Social and Cultural Rights Examination of the fourth periodic report of Austria (E/C.12/AUT/4)

Statement by the Austrian Ombudsman Board

Since 1979, the Austrian Ombudsman Board (AOB) controls and monitors the public administration of the Federal Government and its activities as holder of private rights and, in line with the constitution, is independent in the exercise of its office. The three ombudspersons are appointed for a fixed period of six years, can have their positions renewed once, and cannot be dismissed. As a constitutional supreme body, the Austrian Ombudsman Board is not bound by directives or orders from legislative or executive bodies and one of its tasks is the *ex-post* control of the Austrian administration. Anyone – irrespective of whether they are an Austrian citizen or a foreigner – can file a complaint about maladministration, particularly if it also involves a violation of human rights. The AOB's mandate extends to the federation, the *Laender* (with two exceptions) and the municipalities as sovereign and private entities as well as private persons entrusted with public duties and under state supervision. Hence, the mandate of the Austrian Ombudsman Board also extends to health care services in hospitals, public transport, care services, public utilities, municipal planning, schools etc.

The concept of maladministration entails more than the mere violation of a law and it is certainly beyond dispute that every violation of human rights represents a case of maladministration. The Austrian Ombudsman Board does not require a complaint to be lodged by an aggrieved party in order to act; where there is suspicion of maladministration it can bring investigative procedures *ex officio* of its own volition.

On 1 July 2012 the Austrian Ombudsman Board received a further constitutional mandate to undertake preventive monitoring and control. To further the protection of human rights, it took on the role of an independent authority in accordance with Art. 16 (3) of the Convention on the Rights of Persons with Disabilities (CRPD) and of the National Prevention Mechanism in accordance with Art. 3 and 4 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

The Austrian Ombudsman Board can visit and investigate places of detention as well as facilities and programmes for persons with disabilities at any time, independently and without prior arrangement. Such institutions include, for example, prisons, correctional institutions, barracks, retirement and nursing homes, assisted group homes, institutions and facilities for persons with disabilities, hospitals and psychiatric departments, children's and youth welfare institutions, kindergartens and schools. To this end the AOB has established six Commissions of a pluralist make up. These Commissions report their findings to the ombudspersons and make suggestions for improvement serving to ensure that human rights are guaranteed.

The Commission's members' rights to investigate are comprehensive. They have right of access to all rooms and areas of the institutions and facilities they visit, can examine all documentation and hold conversations with inhabitants, patients, family members and employees of the institutions in a protected, non-coercive and anonymous atmosphere. In the framework of preventive and *ex-post* control or procedures, the Austrian Ombudsman Board has a comprehensive right to obtain information from responsible parties, to examine files and to question all individuals involved. No administrative body may invoke official secrecy in dealings with the Austrian Ombudsman Board. At the same time all involved parties are given the opportunity to hold confidential talks with the Austrian Ombudsman Board.

In addition to the six Commissions, the Austrian Ombudsman Board has established a Human Rights Advisory Council that advises the AOB on determining investigative focal points and investigative standards, as well as prior to issuing determinations of maladministration and recommendations. Its members were nominated both by the federal ministries and by NGOs and can draw on a wide base of scholarly and practical experience.

Should the results of investigations raise concerns regarding the upholding of human rights, the ombudspersons invite the supervisory authority or the responsible supreme administrative bodies to respond. After the conclusion of an investigative proceeding, maladministration can be noted

officially and reported publically to the National Council or the Diets (with the exception of Vorarlberg). The Austrian Ombudsman Board also appears as a guest in a weekly television programme of the Austrian state broadcaster in which it discusses its work with representatives of various authorities.

The Austrian Ombudsman Board is supported in establishing its preventive activities for the protection and promotion of human rights by experts from the Council of Europe, who are also on hand as trainers.

Generally speaking, the Austrian Ombudsman Board can not only note cases of maladministration but also make recommendations to the supreme administrative bodies, apply to set deadlines for procedures, report to the National Council, the Federal Council and the Diets (with two exceptions), make applications to the Constitutional Court, issue statements on bills and draft ordinances, advise on amendments to or the passing of laws and report to human rights institutions such as the UN committees or the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

Apart from the Human Rights Advisory Council, the Austrian Ombudsman Board maintains close cooperation with civil society. Due to the possibility of largely informal contact with citizens, in many cases non-governmental organisations (NGOs) approach the AOB and provide information, suggest/recommend investigative procedures and represent individual complainants.

The independence of the Austrian Ombudsman Board was confirmed, for example, in the report of the European Commissioner for Human Rights on Austria, and the European Union Agency for Fundamental Rights stressed in its report on Austria that the Austrian Ombudsman Board is an institution with a fixed mandate to protect and promote human rights.

The situation in Austria with regard to economic, social and cultural rights is discussed in greater detail below.

The situation in Austria:

It must be noted that social human rights are for the most part without constitutional status in Austria. This is due to the fact that the wording of the Federal Constitutional Law goes back to 1920, making the original constitutional text one of the oldest in Europe. In recent decades there

have repeatedly been campaigns to establish social rights in the constitution; however, they have all failed. The Austrian law-makers did not opt for a solution on the level of constitutional law but opted for a solution on the level of general federal laws or laws of the *Laender* for the provision of social rights. This was due to matters of law enforcement, among others. However, with regard to placing social human rights on an equal footing with civil and political human rights, the Austrian Ombudsman Board advocates the addition of social human rights to the Constitution.

In this context the Austrian Ombudsman Board also stresses that it advocates the signing and ratification of the UN Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, in which the possibility of complaints procedures for individuals or persons is set out as a standard.

Some problematic areas regarding the realisation of the UN Covenant are outlined below. The Austrian Ombudsman Board stresses, however, that a large part of its work concerns economic, social and cultural rights and that an exhaustive representation of all the relevant areas is not possible here. The AOB thus attempts to mention the most important points. Since several of the topics overlap, the findings are not structured according to individual rights but according to subject matter. Likewise, the omission of an area does not imply that it should be considered beyond criticism.

Needs-based minimum benefit system:

In 2011 193,276 people drew from the needs-based minimum benefit system (social welfare). That means an increase of 16,208 people on the figures for 2010. The amount of women drawing benefits stood at 40%, men 33% and children 27%, most of the recipients of benefits living on their own. Due to the federal structure of Austria's needs-based minimum benefit system, the securing of livelihood is regulated differently across the individual *Laender* and the provision of financial assistance for people living in poverty varies according to each *Land* despite the level of need being the same. As a first step, uniform minimum standards were at least agreed by the federal government and the *Laender*. However, there are still variations in the level of benefits provided, and this is difficult to comprehend for those affected.

In disregard of the agreements concerning minimum standards, one *Land* has introduced the concept of *Angehoerigenregress*, stipulating that if the parents and/or the children of the person receiving benefits are obliged to provide maintenance, they must compensate social welfare

authorities for any minimum benefit or social welfare payments. The Austrian Ombudsman Board is deeply critical of this.

An examination of the education of those receiving benefits shows that at the end of September 2012, benefits were drawn by 23,214 persons educated up to school-leaving age and by only 924 persons with an academic education. The question also arises whether the steadily increasing number of people with an extremely low income, who, moreover, almost always have a low level of education, is increasingly relying on the needs-based benefits system as a partial means of income. Such a development would certainly be worrying. The AOB thus considers it expedient to establish through investigations to what extent structural problems in the labour market and schools are being concealed through the needs-based minimum benefit system in order to present decision-makers a basis for their decisions concerning areas fundamental to the future development of our society. A study from 2011 showed that in many cases receivers of needs-based minimum benefit are essentially capable of work, but for a variety of reasons are not “job ready”. Further studies examining the underlying reasons on a national basis are required.

At the same time, the Austrian Ombudsman Board is highly critical of the tendency for people with disabilities to be financially disadvantaged in relation to other recipients of needs-based minimum benefits. This occurs because the calculation of the minimum standards includes welfare benefits that are supposed to cover the greater need caused by the recipient’s disability. In one *Land*, an amendment is being put forward that envisages reducing the minimum standards for adults with disabilities by 25%. The Austrian Ombudsman Board vehemently opposes this proposal.

Moreover, the Austrian Ombudsman Board continues to observe calculation errors, excessively long processing or delays in payments in the provision of needs-based minimum benefits. This is far from ideal given the precarious situation of the persons affected, many of whom are not aware of their legal entitlements. The needs-based minimum benefits system should eradicate hardship and prevent its development. When it comes to social welfare law, it thus should be considered a core task of law enforcement to ensure that applications and appeals are dealt with as swiftly as possible.

Care:

People who require on-going care are entitled to a lump-sum care and nursing allowance. This should partially cover the costs of care-related additional expenditure. The aim is to provide peo-

ple dependent on care a certain level of independence, the opportunity to remain longer in their own homes and to live a life that is as self-determined as possible. However, the care and nursing allowance has not been adjusted for many years and therefore serves its purpose less and less.

Additionally, persons dependent on care living in nursing homes in Austria have to contribute to the cost of the care they receive. Principally, this involves using the current earnings – including the care and nursing allowance – and the assets of the person receiving care. If that does not cover the costs of staying in a home, in one *Land* the children, parents and spouse of the person receiving care are also obliged to contribute financially in accordance with their financial means. The Austrian Ombudsman Board is highly critical of this approach to recovering care and nursing costs.

Work for persons with disabilities:

There are approximately 20,000 persons with disabilities working in Austria in the context of occupational therapy. This form of work does not have the status of gainful employment; rather it is a method of working with persons with disabilities. The persons with disabilities working in these workshops do not receive wages for their work. Instead, in the majority of cases they receive a very small amount of pocket money – even though some institutions can generate surplus revenues. Furthermore, in some cases pocket money is not received in its entirety by the persons with disability, but by their parents. The Austrian Ombudsman Board sees in this low remuneration the very real danger of the exploitation of persons with disabilities who are thereby unable to pay into an independent old-age pension scheme. For the AOB there is no question that work performed must be remunerated according to its actual value and there must be equal pay for equal work. Additionally, the fact that there are no alternatives to working in institutions solely for persons with disabilities or to transitioning from school to such an institution is not in line with Article 27 of the UNCRDP (the equal right to work and employment) and is also in violation of the International Convention on Economic, Social and Cultural Rights.

Persons with disabilities only have accident insurance for these activities. Protection in the form of health insurance is normally provided on the basis of other types of claims (co-insurance, minimum benefit system etc.). Persons with disabilities undertaking this form of employment cannot claim from the public pension scheme. The right to claim from the title of a public pension scheme is so important because the welfare regime immediately demands any savings from pocket money, small inheritances and wages earned through marginal employment etc. that exceed the

amount deemed untouchable assets in order to cover costs. This means that persons with disabilities who receive transfer payments such as minimum benefits can never improve their living conditions through their own efforts.

But persons with disabilities also encounter difficulties or are unduly disadvantaged in their attempts to pursue employment in the regular labour market. Persons with disabilities attempting to gain employment in the general labour market irrevocably lose their entitlement to transfer payments. Any attempt to work in the free labour market thus entails a great deal of risk.

And according to Austrian insurance law, even if a person with prior occupational disability pursues employment and takes out self-insurance in the form of health insurance or pension insurance (since there is no compulsory insurance), the services received from this self-insurance are not taken into consideration if he or she claims a disability pension. That is, in order to claim a disability pension (as opposed to an old-age pension), persons with prior occupational disability have to have worked for ten years in the primary labour market to have a chance of permanently securing their livelihood independent of their family status or their family's financial means.

In contrast, employees who enter the labour market fully able to work and subsequently become permanently unable to work can claim a disability pension after as little as five years' compulsory insurance.

A further problem is the fact that orphans' pensions are only provided beyond the policy holder's eighteenth birthday if the holder pursues certain training or has a prior disability. Persons with disabilities who do not wish to be categorised as having prior occupational disability, try to participate in the general labour market and pursue specific training tailored to their disabilities run the risk of not receiving the same support in the form of an orphan pension as non-disabled persons in the same position would. A concrete definition of what constitutes a school education fulfilling the requirements for claims, including those made after the age of eighteen, is not outlined by the relevant law.

Work and accommodation for asylum seekers:

The Austrian Ombudsman Board also considers the situation of asylum seekers with regard to economic, social and cultural rights to be problematic. In the course of several investigative proceedings the Austrian Ombudsman Board has recognised that the reception conditions for asylum

seekers are insufficient and in some cases in violation of the basic principles of human rights. In several cases the accommodation of asylum seekers in organised premises for housing applicants (in contrast to private flats chosen by the asylum seeker) is insufficient with regard to infrastructure, hygiene, provisions, psychological support and access to education. The Austrian Ombudsman Board also considered the opportunities for asylum seekers to lodge complaints or assert their (human) rights to be inadequate. The situation varies, however, between *Laender*. The federal structure of Austria and the partial obligations of the *Laender* to provide basic social services mean that it is crucial that uniformly binding standards are developed.

The reception conditions are also inadequate regarding the provision of private (individual) accommodation chosen by asylum seekers. They receive a capped allowance covering food, rent, clothing and pocket money that remains far below the minimum subsistence level (minimum income) as set out by the law-makers for Austrians and residence permit holders (except for asylum seekers). Particularly the services offered to minors, especially for food, are insufficient. Since the minimum existence level represents a minimum standard for human life and since human rights are universal, egalitarian and indivisible, the Austrian Ombudsman Board considers it necessary to adjust the system of reception conditions in accordance with the needs-based minimum benefit system.

Apart from these issues, the Austrian Ombudsman Board considers it to be imperative from a human rights perspective that asylum seekers are given the opportunity to earn their livelihood through employment. Asylum seekers have no access to the labour market during proceedings for admission to the asylum proceedings and for the first three months after admission to the asylum proceedings. Thereafter, while they theoretically have access to the labour market, in practice this is extremely restricted. These opportunities exist for a limited time only, being restricted to harvest and seasonal work subject to fixed quotas: The work is only available if no Austrians or foreigners with access to the labour market are prepared to do it, or if it involves non-profit activities that are rewarded with a merely nominal sum. If asylum seekers find employment in spite of the many obstacles placed before them, their income is deducted from the amounts provided under the reception conditions or they are released from those services. This also means that they lose their accommodation and can only apply for reception conditions for asylum seekers after their employment has ended (e.g. after a harvest lasting a maximum of six weeks). This involves a great deal of bureaucracy and the risk that they will end up living in different accommodation. Additionally, any savings from income earned must be spent. Hence, quite apart from restricted access to the labour market, there are practically no incentives to pursue even temporary legal employment.

Generally, but particularly considering the sometimes very long duration of asylum proceedings (the figures as of 1 January 2011 reveal that almost 4,000 proceedings took over five years) and the fact that the reception conditions remain under the minimum subsistence level, access to the labour market is absolutely imperative.

Accessibility for persons with disabilities:

Despite great efforts to create a barrier-free environment, this has not been achieved in any relevant area such as construction, communications, information, transport, personal assistance etc. For example, the transitional periods for adapting public buildings for barrier-free access extend in some cases to several decades. In many cases there is a lack of awareness on the part of public administrators concerning the extent of the obligation to create a barrier-free environment. Hence, persons with disabilities are sometimes restricted in their participation in educational events, cultural life or benefitting from the achievements of scientific progress as well as a productive working environment, the highest level of health or the continuous improvement of living standards.

A topic the Austrian Ombudsman Board considers to be of the highest importance is the creation of a centre for persons with disabilities issues that provides comprehensive information on the full spectrum of help on offer, forwards applications to the providers in question and coordinates procedures. Due to the federal structure of Austria and the fragmented areas of responsibility in disability care, applications for financial support not only require great efforts on the part of applicants (who must make up to five applications) but also cause them a great deal of uncertainty. The regulations concerning personal assistance are not uniform throughout the *Laender* either. Regulations do not apply to physically and mentally disabled persons equally and legal entitlements are generally not provided. A working group was formed on this issue, but has yet to present concrete results. In particular, the Austrian Ombudsman Board calls for the legal entitlement to personal assistance for persons with mental and physical handicaps currently excluded from receiving personal assistance throughout Austria.

Retirement and care homes, facilities for persons with disabilities, youth welfare facilities:

The Commissions of the Austrian Ombudsman Board have visited over 400 facilities until now. Although the controls also found exemplary facilities, the AOB documented cases of maladministration and numerous violations of human rights.

The most common problems relating to social rights concerned:

- Overbearing and patronising treatment – little respect for the self-determination, autonomy or potential for development of persons with disabilities;
- Deficiencies in the documentation of medical treatment and care and medical disclosure standards;

Commissions discovered cases of psychotropic drugs being prescribed without documentation of the appropriate psychiatric diagnosis. But apart from prescription of psychotropic drugs, the Commissions found cases of inadequate medical documentation in residential homes and other facilities for persons with disabilities.

- A lack of accessibility, grave constructional deficiencies, a lack of access to outdoors and poor hygiene standards;

Commissions established, for example, that there was acute overcrowding in one facility. 30 residents had to use a common room designed for 17 people at the same time. Other residents for whom there was no more place had to have their food in bed. Generally, in many facilities structural barriers lead to great limitations for the residents, which the AOB criticises in the context of the realisation of appropriate housing conditions.

- Placement of young persons in inappropriate facilities, see below;
- Insufficient opportunities for complaint or inadequate responses to them;
- A lack of opportunities to participate in decision-making processes;
- Inadequate therapeutic concepts;
- Minimal financial rewards in daily workshops, see above;
- A shortage of personnel and inadequate qualifications;

For example, residents rarely have the opportunity to choose their doctor and receive second opinions. Personnel shortages also mean insufficient support for residents' mobility.

After opening investigative proceedings, in several cases the Austrian Ombudsman Board was able to bring an end to substandard practices and to improve the human rights situation of residents or patients. For example: facilities were closed, deficiencies in building structures or hygienic problems (mould) were eradicated, resident mobility increased, house rules were re-drawn and published in EasyRead versions etc.

Residential choices and inappropriate placements:

One problem is the often fundamental lack of freedom of choice facing persons with disabilities, senior citizens or children and adolescents. The Austrian Ombudsman Board has repeatedly criticised this in its reports. For example, the AOB considers it unacceptable to house adolescents with psychiatric illness and / or people with multiple disabilities in retirement and nursing homes. In Vienna alone, approximately 350 chronically ill persons with disabilities live in geriatric centres even though they are still under the age of 60. The Austrian Ombudsman Board has opened investigative proceedings.

Regarding the increasing decentralisation of psychiatric care, the Austrian Ombudsman Board recognises that there has indeed been a reduction in the number of beds at large psychiatric hospitals and a regionalisation of care. However, experts have reported to the AOB that there are not enough adequate facilities for patients with chronic mental illnesses or mentally disabled persons. The Commissions have repeatedly encountered cases of inappropriate placement of residents. In these cases the persons concerned have fewer opportunities for personal development and have no freedom of choice concerning their housing.

Experts inform the Austrian Ombudsman Board that residents requiring “more intensive forms of care” in particular have difficulties receiving placements in appropriate facilities. On one hand, places in psychiatric hospitals are being cut, which has led to a rise in the demand for supplementary care clinics, assisted group homes and residential homes. On the other hand, these reports observe that with the extensive privatisation of care facilities there is the tendency for providers to give preference to patients who are easy to care for. Moreover, experts observe that facility concepts and existing offers are seldom reviewed and that less attention is paid to meeting residents’ personal needs and way of life. It is suspected that especially for persons with chronic mental illnesses the availability of appropriate care is insufficient.

In one documented case a patient with active schizophrenic psychosis has been living in a locked ward since 1967 and is housed in a two-bed room. He has to accept a new roommate on an almost weekly basis and hardly has any privacy. The Austrian Ombudsman Board has initiated investigative proceedings.

In another facility there was a complete lack of a pedagogic concept and the development potential of the adolescents was severely restricted. As a consequence, service contracts with this facility were cancelled and the Austrian Ombudsman Board initiated investigative proceedings.

Housing for the homeless:

In one *Land* the Austrian Ombudsman Board examined whether homeless foreigners were accepted in overnight shelters for the homeless. It was found that there was a disproportionate number of persons without Austrian citizenship. At the same time, it was also ascertained that many foreigners had to be turned away from shelters. According to EU law, social welfare is to be granted EU citizens who were employed or self-employed in Austria, long-term foreign nationals with rights to residence as well as a number of other cases. Examining whether the requirements are fulfilled is not an easy task for the social services, yet it must be performed quickly to ensure necessary and efficient protection of lives. Other foreigners who have been in Austria legally for more than three months are at the mercy of the arbitrary decisions of the service workers they encounter. The Austrian Ombudsman Board raises the question as to whether every homeless person living in Vienna is granted access to homeless shelters and related facilities. From the perspective of human rights obligations, this is imperative.

Rehabilitation of children:

In Austria there is a shortage of places in rehabilitation centres for children and adolescents forced to spend a long time in hospital due to chronic or life-threatening illnesses. There are hardly any specialist rehabilitation centres for children and adolescents and these shortages extend to acute rehabilitation as well as further treatment in hospitals and clinics. While all responsible institutions advocate the establishment of such facilities, plans have not been realised, mainly for financial reasons. Additionally, while health insurance carriers are obliged to implement rehabilitative treatment, the persons affected have no individual legal entitlement to benefits.

Children and young people with psychiatric disorders or diagnoses:

Psychiatric disorders in children and adolescents are often overlooked or trivialised. This is compounded by an acute shortage of care. Roughly 20% of children and young people under 18 have psychiatric disorders, and around half of them require treatment. The list of disorders is headed by anxiety disorders, followed by various kinds of depression. Further disorders are anorexia nervosa

or bulimia nervosa, attention deficit disorder, psychoses, developmental disorders such as spelling deficits or autism spectrum disorders, conduct disorder and attachment disorders.

There are only twelve specialist doctors in the public health system offering primary medical care for approximately 258,000 children and young people. In four *Laender*, minors can only be treated by *Wahlaerzte* (doctors with special agreement within the health system). That is particularly tragic for patients with severe chronic illnesses, since many parents cannot afford private treatment. The number of hospital beds in the child and adolescent psychiatry sector also lags far behind the stipulated standards. The Austrian Health Structural Plan (*Oesterreichischer Strukturplan Gesundheit – ÖSG*) very clearly expresses the need for one child and adolescent psychiatry ward for every 300,000 of the population. However, in most *Laender* there are presently only about half the number of hospital beds the ÖSG stipulates should be designated for child and adolescent psychiatry. The minimum number of beds is only available in Carinthia.

Youth welfare in Austria offers only very little specialised care in the field of social therapy or social psychiatry for minors who cannot live with their parents. In Vienna, the federal capital with a population of over 1.7 million, there are for example only 30 such places. If fast and immediate treatment is not available for the persons concerned, they could be seriously affected by lifelong negative impacts.

Health care for persons with disabilities:

The danger that people with intellectual disabilities do not receive adequate medical attention exists outside of homes too. Some health care facilities in Austria are still not sufficiently equipped to deal with this type of patients with regard to specific symptoms and unfamiliar behaviours. Accessibility is particularly called for not only in terms of structural accessibility but also with regard to communication (see above).

Problems with the premature ending of treatment for adolescents:

Adolescents can only be housed in youth welfare facilities until they have reached the age of 18 (the age of majority). They must then leave their familiar institutions and are supposed to be in a position to lead an independent life. It is particularly at this stage of their lives that many adolescents become stable, and in many cases further care after they have reached the age of 18 would be desirable in order not to endanger the success of the care provided.

Schools:

The right to inclusive education has still not been realised for many people in Austria. Along with a lack of structural accessibility, many difficulties result from a complicated allocation of responsibilities as well as from a lack of personal assistance, especially in the private school sector. The AOB considers that legal uncertainty accompanying this problem should be eradicated by the creation of explicit regulations for the support of personal assistance in the entire school sector together with legal entitlements for the individuals affected.

Public and private radio:

The public broadcaster offers subtitles for approximately 60% of its channels (ORF 1 and ORF 2). However, subtitles are offered for only around 5% of the programmes on the channels ORF Sport+ and ORF 3, a specialist channel for cultural and informational programmes. Translations into Austrian sign language are offered for only 3.7% of the programmes on ORF 2.

The three large Austrian private channels ATV, Puls 4 and Servus TV provide neither subtitles nor translation into sign language.

The Austrian Ombudsman Board considers it imperative that a broader and more comprehensive service be offered by both public and private broadcasters.