

Enhancing Procedural Rights of Persons with Intellectual and/or Psychosocial Disabilities in Criminal Proceedings: Exploring the Need for Actions

Key Findings of the Austrian National Report

Austria
Boltzmann Institute Human Rights
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1. National policies and legal framework

1.1. Legal framework

1.1.1. General overview of criminal proceedings in Austria

The criminal procedure is regulated in the “Criminal Procedure Code” (Strafprozessordnung, StPO). It consists of three stages: the **pre-trial proceedings** lead by public prosecutors and under the involvement of police, the **main proceedings** before a court, and the **appeal proceedings**.¹

The criminal proceedings begin as soon as the public prosecutor or the police start the investigation proceedings² due to an initial suspicion.³ The court is in charge of reviewing and controlling the investigations. On the prosecutor’s request, the judge can decide on certain measures, such as pre-trial detention or preventive detention for the purpose of a forensic medical assessment.⁴

The public prosecutor can request deprivation of liberty for compulsory medical treatment based on § 21 para. 1 criminal code (StGB) (legal incapacity at the time of offence due to psychosocial or intellectual disabilities) or based on § 21 para. 2 criminal code (StGB) (legal capacity at the time of offence, but psychosocial or intellectual disabilities) as a final judgement of the criminal procedure.⁵

1.2. Relevant national legislation concerning procedural safeguards for persons with intellectual and/or psychosocial disabilities

Austrian national laws do not provide a consistent legal definition for the terms “intellectual and/or psychosocial disabilities.” Where they refer to persons with intellectual and psychosocial disabilities (in the following „beneficiaries“), the language is often stigmatising and discriminatory.⁶ Furthermore, there exists no legal definition of “vulnerability” as mentioned

¹ Bundesministerium für Justiz, Der Ablauf eines Strafverfahrens – Von der Straftat bis zur Anklage, 2012 (Ministry of Justice, Criminal Proceedings), <http://justizinfo.justiz.gv.at/html/index.php?module=93a0b8dc-7638-4a2d-a54a-e8012ea9c760> (accessed 10 March 2017).

² § 1 para. 2 StPO; RV 181 BlgNR XXV. GP, Erläuterungen, 2.

³ Initial suspicion, „ when there are certain indications which (can) lead to the assumption that a crime has been committed” § 1 para. 3 StPO.

⁴ Wessely, S. 52. §§ 20 para. 1, 101 para. 1 StPO.

⁵ §§ 429 para. 1, 437 StPO.

⁶ However, the draft law protecting persons with psychosocial or intellectual disabilities (Erwachsenenschutzgesetz) shows that improvements are on their way. The expression “disabled person” is replaced by “adult having appointed support or affected person”. The Equality Act (concerning disabled persons) (Behindertengleichstellungsgesetz) as well as the Law on (the Protection of) Disabled Persons (Bundesbehindertengesetz) defines the term “Disability” in the context of the Law on (the Protection of) Disabled Persons (Bundesbehindertengesetz) as a “*physical, mental,*

in the EC Recommendation.

Despite the lack of a consistent definition, specific laws include safeguards for beneficiaries:

- **Arrest Act** (Anhalteordnung, AnhO): It regulates the rights and duties of arrested persons during custody/detention at the police and contains provisions regarding the person's physical and mental capability for detention.⁷
- **Code of Criminal Procedure** (Strafprozessordnung, StPO): It provides specific safeguards concerning the right of access to a lawyer/ legal representative⁸ and third parties such as relatives and/or persons of trust.⁹ It equally explains under which conditions a person with disabilities can be arrested in police custody or involuntarily committed as well as in which facilities the detention should be conducted.¹⁰
- **Penal Services Act** (Strafvollzugsgesetz, StVG): It states the guidelines and principles for imprisonment, deprivation of liberty for compulsory medical treatment¹¹ and preventive detention for the purpose of forensic medical assessment.¹²
- **Police Act** (Sicherheitspolizeigesetz, SPG): Although not the core legal act for this study, the Police Act should be mentioned. During the time of the first police intervention it is not always clear if a criminal proceeding will follow. Depending on the pursued aim, the acts of the police are based on SPG (averting of an acute danger) or StPO (securing an effective criminal proceeding). The SPG includes some special provisions concerning arrest and detention¹³ of beneficiaries as well as communication and contact with third parties like persons of trust.¹⁴

1.3. Policies and programmes targeting procedural rights of persons with intellectual and/or psychosocial disabilities

1.3.1. Education and Training

Raising awareness of intellectual and/or psychosocial disabilities through specific training is part of the curriculum of the basic two-year police education. It is equally included in the operational trainings where police officers learn how to act in case of exceptional dangerous and difficult situations.¹⁵ In addition to the basic curriculum, there exist also advanced training courses at the "Austrian Academy for Security". A five-day seminar on people with psychiatric diagnoses includes also a practical day in a psychiatric hospital. Furthermore, there exists an

cognitive, or developmental condition which is not temporary and that impairs, interferes with, or limits a person's ability to engage in certain tasks or actions or participate in typical daily activities and interactions in society."

⁷ § 7 AnhO.

⁸ §§ 61, 429 para.2, 430 para.3, 431 StPO.

⁹ §§ 160, 433 StPO.

¹⁰ §§ 429 para. 4; 430 para.1, 438 StPO.

¹¹ §§ 165f StVG.

¹² § 429 para. 4 StPO.

¹³ §§ 45, 46 para.1 und 2 SPG.

¹⁴ § 47 SPG.

¹⁵ SIAK, Lehrplan zur Grundausbildung, 2012, Bundesministerium für Inneres (curriculum für basic education, Federal Ministry of Interior), http://www.polizei.gv.at/lpd_docs/940.pdf, (accessed 02 March 2017), pp. 13, 41.

e-learning module on dementia.¹⁶ However, according to interviewed representatives of the judiciary, there is, still a need for enhanced training and awareness raising amongst police enforcement personnel.¹⁷

In contrast to the police, **judges** or **public prosecutors** are currently not receiving any training on how to deal with people with intellectual and psychosocial disabilities. Capacity building is primarily done by exchanging with colleagues.¹⁸ The interviewed experts identified a clear need to strengthen competences and empathy when interacting with beneficiaries.¹⁹

The one-year education curriculum for **prison officers** focuses on human dignity.²⁰ Besides this, there are subjects such as psychology, psychiatry, social work, counselling and human rights.

1.3.2. Good Practice

Although it still needs more awareness raising through training, the **increasing inclusion of mental health organisations and organisations supporting families** of the beneficiaries should be highlighted as a positive development.²¹

In Vienna, the police introduced “**case conferences**” (“Fallkonferenzen”) which aim at finding joint solutions together with all stakeholders (psychiatrists, doctors, judges, health and psychological support services (PSD), police, social workers etc.) on how to handle best the cases of beneficiaries.

2. Legal and practical implementation of the Recommendation

2.1. Appropriate assessment mechanisms for identifying vulnerabilities

2.1.1. Identified gaps and shortcomings

2.1.1.1. Assessment by the police

If a person’s behaviour indicates the existence of an intellectual or psychosocial disability linked with a high likelihood of danger for him-/herself or others²² it is up to the police to decide

¹⁶ Expert_Interview_5_AT (21 Feb. 2017).

¹⁷ Expert_Interview_1_AT (25 Oct. 2016).

¹⁸ Expert_Consultation_10_AT (28 Feb. 2017).

¹⁹ Expert_Interview_2 (9 Nov. 2016).

²⁰ Verordnung der Bundesministerin für Justiz über die Grundausbildung für die Verwendungsgruppe E2b im Bereich der Justizanstalten BGBl. II Nr. 124/2006 (regulation of the Ministry of Justice about the basic education for group E2b).

²¹ Expert_Interview_3 (29 Nov. 2016).

²² VwGH 26.Juli 2005, 2004/11/0070.

during the first contact in the actual situation whether and when a doctor should be consulted.²³ The police are not required to do a medically sound assessment of a potential disability.²⁴ A reasonable assumption of the existence of the latter is sufficient.

Interviews with beneficiaries concerning the competence of the police to identify intellectual or psychosocial disabilities vary. A higher level of identification exists for disabilities that are more apparent. However, if it is less or not visible, the identification competence tends to be lower and depends on the individual sensibility and knowledge of the respective police officer involved. This non-identification often translates into challenging situations during interrogations, as police officers may at times feel provoked by behaviours that are related to the disability of the beneficiary.²⁵ There is a strong need to improve the competency and strengthen the capacity of the police to identify vulnerabilities, ideally already during the first contact.

2.1.1.2. Assessment by the judiciary

If the vulnerability of the beneficiary is not identified until the person is brought before the **judge** and the person's behaviour during the pre-trial hearings indicates symptoms of psychosocial or intellectual disabilities, the judge himself/herself may either collect proofs by a medical expert opinion or require the public prosecutor to get an expert opinion.²⁶

The identification of vulnerability proved to be particularly problematic for cases with judges (or prosecutors) on standby duty (Journaldienst). This can be explained to the immense time pressure of their work.²⁷

2.1.1.3. Assessment by other stakeholders

In some cases, a suspect's vulnerability is only identified after the decision on pre-trial detention has already been taken. In this phase, penitentiary staff plays a crucial role. So far, no institutionalised procedure on how to handle such situations exist and action is rather taken pragmatically. Usually the prison officer informs the judge informally about the situation.²⁸ Representatives of penitentiary staff reported that the arrest report occasionally contains some information on the behaviour of the arrested person at the police station but does usually not provide enough information to get a clear view of the situation. The lack of information often complicates the process of identifying potential disabilities.²⁹ As with the police, the identification depends again very much on the respective prison officer's competence to identify the vulnerability.³⁰

²³ § 46 SPG.

²⁴ UVS Steiermark 17.Juni 1996, 20.3-12/95. OGH 27.Februar 2001, 1 Ob 251/00v.

²⁵ Expert_Interview_5 (21 Feb. 2017).

²⁶ §104 para.2 StPO.

²⁷ National Roundtable (15 Dec. 2016).

²⁸ National Roundtable (15 Dec. 2016).

²⁹ National Roundtable (15 Dec. 2016).

³⁰ National Roundtable (15 Dec. 2016).

In a range of cases, the vulnerability is also identified by the health and psychological support service when they detect that there exists a guardian for the beneficiary.³¹

2.1.1.4. Assessment by medical experts

- **After the first contact with the police**

The police doctor or the public medical service doctor who is contacted by the police has to do the medical examination and to give an opinion on whether the person should be brought to a psychiatric hospital.³²

Police doctors are, however, mainly general practitioners who are not necessarily trained in psychiatry. This poses considerable practical problems. Furthermore, there exists a shortage of police doctors, especially in rural areas.³³

- **During police custody**

Police doctors need to examine every arrestee at the latest within 24 hours after his/her admission with regard to his/her physical and mental fitness for detention.³⁴ If a person shows visible signs of psychosocial disabilities³⁵ while being transported to the police station or at the police station, a medical examination has to be undertaken in any case prior to the arrest.³⁶

Also in the case that a seemingly healthy person states in the police questionnaire that he/she has a psychosocial disability, the police has to promptly ensure a medical examination by a psychiatrist or organise the transfer to a psychiatric hospital.³⁷ Furthermore, medical examination by a specialised doctor is required if the medical history indicates that the arrestee might be at the risk of suicide.³⁸

The interviews with Austrian beneficiaries revealed that six out of eleven persons did not undergo a medical assessment by a doctor at the police station.³⁹

- **Assessment by prison doctors**

As soon as a person is brought to prison, he/she has to undergo a medical examination again

³¹ National Roundtable (15 Dec. 2016).

³² VwGH, 27. November 2001, 200/11/0320; OGH, 27. Februar 2001, 1 Ob 251/00v; UVS Vorarlberg, 25. Juli 1994, 2-003/92; Hamlich, § 8 Rz. 11. Including health and psychological support services, crisis intervention centres or doctors specialised in psychiatry. In certain situations homes for handicapped or nursing wards to which the Act on the Protection of Personal Freedom in special Health Care Homes (Heimaufenthaltsgesetz) applies, could offer alternatives. See Koppensteiner und Zierl, (Hrsg.), S. 20f.

³³ National Roundtable (15 Dec. 2016).

³⁴ § 7 para. 1 und 3 AnhO.

³⁵ Andre und Vogl, § 7 Z. 1.

³⁶ RL BMI-OA1300/0010-II/1/b/2006, 1.10.2. § 7 para.2 AnhO.

³⁷ Only if there are clear indications that the statement is wrong, this does not apply.

See Directive for police doctors, 20.02.2006, BMI-OA1300/0011-II/1/b/2006, 1.10.1., 1.10.4.

³⁸ Ministerial Decree (Mol).

³⁹ Interview_Benef._1-15_AT.

within 24 hours.⁴⁰

In the Viennese “Josefstadt”, a prison with a special medical unit, every arrestee is usually examined by a general practitioner. Psychiatric experts are only consulted if certain indications exist. This includes information provided by the arrestee or by the arrest report or reports by medical experts or prison officers that reveal signs of psychosocial disabilities.⁴¹ The Ministry of Justice (MoJ) has issued guidelines for prison doctors that contribute to the early identification of psychosocial disabilities.⁴²

- **Assessment by psychiatric experts**

In case that prosecutors or investigative judges perceive a potential vulnerability, they request court-appointed and certified psychiatric experts to elaborate an expert opinion.⁴³ In practice, however, only very few psychiatric experts are available and no quality controls of the expert opinions exist, although they have a huge impact on the outcomes of the proceedings.⁴⁴ The law states that provisions on the examination by psychiatric experts and expert opinions also apply to persons with intellectual disabilities. Psychiatric expert opinions alone are, however, not adequate and pertinent for persons with intellectual disabilities.⁴⁵

From a psychiatric point of view, it was criticised that still no professorship for forensic medicine exists in Austria.⁴⁶

2.1.2. Good practices

No good practice identified

⁴⁰ J. Pont und R. Wool, Ein Leitfaden für den Gefängnisarzt – Richtlinien für Ärzte, die Gefangene betreuen, Wien, 2016, <http://interna.humanesrecht.com/sites/interna.humanesrecht.com/files/Leitfaden%20fuer%20den%20Gefaengnisarzt.pdf>, S. 13, (13.02.2017).

⁴¹ PB 2015, Band „Präventive Menschenrechtskontrolle“, S. 99.

⁴² Pont und Wool, S. 29.

⁴³ See Hauptverband der allgemein beeideten und gerichtlich zertifizierten Sachverständigen Österreichs, *Allgemeine Verhaltensgrundsätze*, 2016, http://www.gerichts-sv.at/sr_allg_verhaltensgrund.html, (17.11.2016), *Verhalten bei Erstattung von Befund und Gutachten*, 2016, http://www.gerichts-sv.at/sr_verhalten_befund.html, (17.11.2016). See also §§ 429 para. 2 Z.2. StPO, 439; Nimmervoll, *Haftrecht*, S. 291.

⁴⁴ Expert_Consultation_10 (28 Feb. 2017).

⁴⁵ Expert_Consultation_9 (30 Jan. 2017).

⁴⁶ Advisory Group Meeting (27 April 2017).

2.1.3. Recommendations

2.1.3.1. Police and judiciary

- In addition to the already existing trainings for the **police**, further measures should be taken to **continue enhancing their competence for identifying vulnerabilities**. This should go along with enhanced professionalism among colleagues that allows them to voice suspicion of vulnerability without fearing to be eventually reproached by their colleagues.⁴⁷
- Furthermore, it is strongly recommended to introduce mandatory **training for judges and public prosecutors**. **Trainings should** include up to date information on the regulations for persons with intellectual and psychosocial disabilities and on the UN Convention on the Rights of Persons with Disabilities (UNCRPD). Advanced trainings are equally required for **lawyers**.
- In order to ensure early identification of a suspect's vulnerability, the police and the public medical service doctor should **explicitly ask** at the very beginning of the proceedings whether the person has a guardian or receives support by institutions for people with disabilities, organisations for self-representation or benefits of assisted housing facilities. During the Austrian Roundtable the experts also suggested the establishment of an **independent instance** (e.g. social workers or psychologists at the police station) to facilitate the identification of a suspect's vulnerability.⁴⁸

2.1.3.2. Medical experts

- Especially in rural areas there is a need for an increase in the number of police doctors. This can be ensured for example through obliging all general practitioners doctors with a public health insurance contract to work as a public service doctor for a certain amount of time.
- All police doctors and public service doctors should undergo **obligatory trainings** in the area of psychiatry.

2.1.3.3. Assessment by psychiatric experts

- To ensure the professional quality of expert opinions, **remuneration schemes** need to be levelled and **quality controls** introduced. A **professorship** for forensic medicine, ideally in cooperation with the university hospital, would sustainably contribute to quality improvement.⁴⁹

⁴⁷ Expert_Interview_1 (25 Oct. 2016).

⁴⁸ National Roundtable (15 Dec. 2016).

⁴⁹ See Bundesministerium für Justiz, Arbeitsgruppe Massnahmenvollzug – Bericht an den Bundesminister für Justiz über die erzielten Ergebnisse, Wien, 2015 (report of expert group involuntary commitment), <https://www.justiz.gv.at/web2013/file/2c94848a4b074c31014b3ad6caea0a71.de.0/bericht%20ag%20ma%C3%9Fnahmenvollzug.pdf> (14.02.2017), expert_interview_3 (29 Nov. 2016).

- In cases that concern persons with intellectual disabilities, **additional pedagogical and psychological expert opinions** should be heard. Furthermore, it would be desirable that judges communicate with services for people with disabilities, organisations for self-representation or with the facilities for assisted housing.

2.2. Appropriate safeguards during pre-trial phase (arrest, police custody, pre-trial detention, court hearings)

2.2.1. Identified gaps and shortcomings

2.2.1.1. Police

If a person is brought to a psychiatric hospital, the police/law enforcement authority has to notify a family member or relative of the beneficiary. The latter may be a person who lives in the same household or cares for the beneficiary or, if such a person is not known, family members such as children, spouses or parents have to be informed.⁵⁰ If the person is taken into police custody, the suspect has the right to notify a person of trust about the arrest. The law, however, does **not require a mandatory presence of a person of trust at that moment in which a person is** brought to the police or pre-trial hearings.⁵¹

According to the interview data, it seems that guardians (in case they exist) are rarely notified and family members are only informed on the beneficiary's request.

- **Right to information**

A person suspected of a criminal offence, has to be promptly informed of his/her rights in criminal proceedings.⁵² This concerns particularly the right to have a lawyer present from the first police questioning onwards as well as the right to refuse to testify.⁵³

The legal instructions must be given promptly right after arrest and be provided **in written format**.⁵⁴ The law states, that the instruction has to be provided in a "comprehensive manner" taking the „special personal needs“ into account.⁵⁵ However, the Austrian information leaflet for arrestees is currently not easily understandable and equally not accessible in an accessible format. The Code of Criminal Procedure (StPO) does not further define the meaning of „special needs“ during the proceedings, nor does it specify which measures should be taken.⁵⁶

⁵⁰ § 30 SPG „Rechte des Betroffenen bei der Ausübung von Befugnissen“ und §§ 4 ff RLV. Expert_Interview_4 (14 Dec. 2016).

⁵¹ § 171 para 4 Z 2 lit.a StPO.

⁵² If a person has to go to a police questioning, it is mandatory that the summon includes the information about the his/her rights as a suspect § 50 StPO (§ 153 para.2 StPO.). §§ 49, 164 para.1 StPO.

⁵³ §§ 49, 50 StPO.

⁵⁴ § 171 para.4 iVm 50 StPO.

⁵⁵ § 50 para.1 und 2 StPO.

⁵⁶ See. Recommendation on the Right to Information, rec. 26.

Interviews with beneficiaries revealed that in most cases they did not understand the legal instructions given by the police. This is particularly problematic because by signing the protocol, the suspect confirms to have understood his/her rights which may actually not always be the case.⁵⁷ In those case when a caretaker (e.g. a social worker) was present during the interrogation he /she could help to explain and support the beneficiary. In some cases, it was also reported that the police made a particular effort to explain the rights to the beneficiary. Nevertheless, the currently existing information leaflet seems to be too complex to be understood (by anyone) in stressful situations and individual explanations by the police are not consistently given.⁵⁸

Furthermore, the police have to inform the person about his/her right to medical assistance and his/her right to promptly notify or to have notified a legal representative, a person of trust and/or a lawyer from his/her arrest.⁵⁹

- **Right to access to a lawyer**

Generally, the presence of a lawyer during police questioning is not mandatory.⁶⁰ It is also possible to waive one's right to a lawyer. A waiver has to be documented and can be withdrawn any time during the criminal proceedings.⁶¹ However, in some cases there exists an obligation to be represented by a lawyer.⁶² One of these cases is a procedure where precautionary measures depriving a person's liberty could be taken. In this case, the presence of a lawyer is mandatory for the entire proceedings (including the police questioning), even without the consent of the person accused.⁶³ However, only the absence of a lawyer in the main trial renders the proceeding void.

In practice, the right to access a lawyer (even in the form of a stand-by lawyer) is only rarely invoked during the proceeding before the police. The quality of the support given by stand-by lawyers differs.⁶⁴

Interviews with experts and beneficiaries have clearly indicated the necessity of a mandatory presence of a lawyer from the first police questioning onwards throughout the whole proceedings.

- **Right to medical assistance**

Police custody: Police doctors are usually general practitioners with additional trainings.⁶⁵ The lack of their adequate psychiatric qualification often leads to shortcomings in the subsequent medical assistance. Particularly the countryside suffers from a lack of police doctors and

⁵⁷ OGH, Beschluss vom 11. Nov. 2015, 15 Os 112/15g.

⁵⁸ Expert_Consultation_4 (28 Oct. 2016).

⁵⁹ Expert_Consultation_4 (28 Oct. 2016); Art. 4 para. 7 PersFrG.

⁶⁰ ERBV 25 B1gNR 22. GP 86; vgl. Soyer/Schuhmann § 61 Rz 44.

⁶¹ §§ 59 para. 1, 50 para.3 StPO.

⁶² § 61 para.3 StPO.

⁶³ § 61 para.3 StPO.

⁶⁴ Expert_Interview_2 (9 Nov. 2016). Expert_Interview_4 (14 Dec. 2016).

⁶⁵ This contradicts the legal requirements, Halmich § 8 para. 9.

psychiatrists which often results in the fact that the police needs to bring suspects directly to the next hospital for the medical examination.⁶⁶

An interviewed NGO expert mentioned that he/she did not experience any case in which a profound medical examination of the beneficiary took place before or during police questioning.⁶⁷

Forensic units in hospitals: Due to a lack of financial resources, the forensic units do not have enough capacities to ensure adequate support. Psychiatric hospitals increasingly rely on the use of security personnel in conflict situations, which considerably enhances the risk of escalating situations.⁶⁸

- **Recording of questionings**

Audio-visual recording during questionings is allowed but not mandatory. Recording should be done when no lawyer is present and when it is expected that he/she will not be able to participate at the trial. In these cases the law provides for the possibility to do audio-visual recording to enhance the procedural safeguards.⁶⁹

In practice recording still rarely takes place. To improve this situation all (main) provincial police stations have recently been equipped with a special room for audio-visual recording.

- **Deprivation of liberty**

No gaps identified.

- **Privacy**

The data exchange between the police and the judiciary happens via a system called electronic judicial exchange („elektronischer Rechtsverkehr“). It stores data and transports them in a way that they are not accessible for third persons.

A suspect's medical data are protected in a way that the assessment of the police doctor is put in a sealed envelope and handed over to the police officer who accompanies the beneficiary to the assessment by the specialised doctor.⁷⁰

Discussions and interviews with stakeholders indicated that **it is often difficult to balance the protection of personal data against the need to be informed on a suspect's disabilities to ensure adequate procedural safeguards.**

⁶⁶ Expert Interview 1 (25.10.2016) Expert Interview 3 (29.11.2016), Expert Interview 5 (21 Feb.2017).

⁶⁷ Expert Interview_4 (14 Dec.2016).

⁶⁸ National Roundtable (15 Dec. 2016).

⁶⁹ § 164 para.2 StPO; Vogl in Fuchs/Ratz, WK StPO, 241.Lfg, § 97 Rz 1. § 165 StPO.

⁷⁰ Expert Interview_5 (21 Feb.2017).

2.2.1.2. Prosecutor

No gaps identified.

2.2.1.3. Investigative Judge

- **Right to information**

Suspected or accused persons have also to be informed about their rights before court hearings.⁷¹ Additional persons may be present during the questioning. If the judicial database (Register Verfahrensautomation, Justiz, VJ) indicates that a guardian is appointed, the latter has to become involved in the proceedings.⁷² A guardian who is entrusted with all matters of the beneficiary has the right to attend all questionings of the beneficiary during the investigation phase as well as the trial concerning the decision on deprivation of liberty.⁷³ The guardian needs to be provided with all relevant procedural documents.⁷⁴

- **Right of access to a lawyer**

Throughout the proceedings concerning precautionary measures, the beneficiaries need to be represented by a lawyer. The latter can file requests to the benefit of the beneficiary, also against the beneficiary's will.⁷⁵

As soon as the judge has decided on pre-trial detention or preventive detention for the purpose of forensic medical assessment, representation by a lawyer is mandatory for every accused person.⁷⁶ The court decision on pre-trial detention needs to include the information that the person accused has to be represented by a lawyer during the complete duration of pre-trial detention as well as about the possibility to resort to legal aid by an appointed lawyer.⁷⁷

- **Right to medical assistance**

Expert and beneficiary interviews revealed a frequent lack of medical assistance during detention. Furthermore, Vienna's major prison (Josefstadt) cannot accommodate female patients with psychosocial or intellectual disabilities. This results in the fact that they often end up in normal prisons and do not receive adequate medical treatment.

Independently of the existence of the elements of §§ 21 para 1 and para 2 Code of Criminal Procedure (StPO) (mental incapacity or mental capacity) criminal courts may also refer already detained persons, who show signs of potential psychosocial disabilities, for observation to

⁷¹ § 164 StPO. Kirchbacher/ Rami, § 174 StPO, Rz. 4.

⁷² OGH 9.4.2002, 11 Os 181/01.

⁷³ Is equal to the legal representative (OGH 15 Os 16/90 SSt 61). OGH 9.4.2002, 11 Os 181/01.

⁷⁴ § 431 para.1 StPO.

⁷⁵ §§ 61m para.1 Z.2, 429 para.2 Z.1, 436 StPO.

⁷⁶ § 61 para.1 Z.1 StPO.

⁷⁷ § 174 para.3 Z. 7 StPO.

psychiatric hospitals for the time of pre-trial detention if the prison does not provide for adequate facilities.⁷⁸

- **Recording of questioning**

Audio-visual recording of questioning seems to be rarely done. In some cases, however, the law requires recording, in particular when a person cannot be brought to the pre-trial detention trial due to health problems. The person is then questioned via video conference.⁷⁹

Recording can also be used in the proceedings on precautionary measures in case that a person is not able to take part in the court hearing due to his/her health conditions.

- **Deprivation of liberty**

It is possible that persons with intellectual or psychosocial disabilities can be detained, provided that additional conditions are fulfilled.⁸⁰ In general, every measure depriving a person of his/her liberty has to be proportionate, necessary and justified.⁸¹

- **Privacy**

There are difficulties balancing the need for data protection and timely notifications of the existence of a guardian. Judges often face difficulties in getting information about the existence of a guardian. In practice, this is often also delaying the notification of the guardian.

2.2.1.4. European Arrest Warrant

No gaps identified.

⁷⁸ § 50 Krankenanstalten- und Kuranstaltengesetz (KAKuG); §§ 182ff StPO; § 71 StVG; OGH 7 Ob 107/14g, Zak 2014, 313 = RdM 2014, 333 (Kopetzki) = JBl 2014, 813. §§ 429ff, 435ff; Nimmervoll, Haftrecht, S. 297. (Hospital and health care law).

⁷⁹ §§ 172 para.1 and 3 STPO.

⁸⁰ Art. 14 CRPD.

⁸¹ Art. 1 PersFrG.

2.2.2. Good practices – Pre-trial phase

See case conferences described above.

No further good practices were identified.

2.2.3. Recommendations for the pre-trial phase

2.2.3.1. Police

• Right to information

- The law does not explicitly list alternative formats for the legal instructions such as braille, large-print or easy-read documents. These options might be implied when it says that the legal instructions should be given in a „comprehensive manner“ taking into account the „special personal needs.“ However, it would be desirable to concretise this legal provision and to provide the accused with a right to get the information leaflet in a barrier free format. Additionally, the information leaflet should be revised and drafted in a more easily understandable language.
- The police or investigative judge should be held to explain the key points also orally.
- Every person suffering from an intellectual or psychosocial disability should be accompanied by a person of trust during the police questioning.

• Right to access to a lawyer

- It is strongly recommended to ensure that the beneficiary is represented by a competent lawyer trained for working with persons with intellectual and psychosocial disabilities. As mentioned above, legal representation should be mandatory for every person from the first police questioning onwards. Once the vulnerability is identified, specially trained lawyers should be mandated with the case.
- Research has shown that in practice many beneficiaries benefited of legal aid. It is highly recommended to revise the legal aid scheme and to ensure that criminal proceedings are accompanied by legal aid lawyers who are trained in criminal law and on the needs of the beneficiaries.

- **Right to medical assistance**

- It is strongly recommended to ensure advanced training in psychiatry for **police doctors and public service doctors**.⁸²
- Expert and beneficiary interviews indicated the need for improvements of **medical assistance while deprived of liberty**. It is necessary to provide sufficient human resources, modern facilities allowing for various activities and disposing of the capacities to guarantee single rooms and separate areas for women, men and juveniles.
- Adequately trained doctors should examine the mental condition of every person brought to detention. A **thorough examination** also includes that there is enough time to grasp the situation of the person involved. A few questions on a checklist are not enough to ensure this.
- It is highly recommended to **form crisis intervention teams** composed of nurses and doctors in psychiatric or forensic units to deescalate conflicts instead of hiring security staff that escalates the situation even more.

- **Recording of questionings**

- The legal framework should require that **audio-visual recording** becomes a consistent practice. To ensure data protection, the recorded data should be accessible for all parties involved in the criminal proceedings but they should not be allowed to copy them and take them with them. Only if a lawyer is present at the questioning should it be possible to deny audio-visual recording.

- **Deprivation of liberty**

No further recommendations, see above.

- **Privacy**

No further recommendations, see above.

2.2.3.2. Prosecutor

No further recommendations, see above.

⁸² Expert Interview 1, 3, 5.

2.2.3.3. Investigative Judge

- **Deprivation of liberty**

In order to avoid preliminary detention, resources for follow-up care in forensic day-care facilities should be increased.⁸³

No further recommendations

2.2.3.4. European Arrest Warrant

No further recommendations

⁸³ National Roundtable (15 Dec. 2016).

2.3. Safeguards during the trial phase (hearings, judgement)

2.3.1. Identified gaps and shortcomings

If the prosecutor requests the deprivation of liberty for preventive measures, the application has to be brought before the court which has jurisdiction in the criminal proceedings. The competent court decides on the case and whether a deprivation of liberty for preventive measures is adequate and necessary.

A social worker who was present during a beneficiary interview reported that the judge was very open and empathic in the preliminary talks. However, during the trial, he/she completely changed the attitude and showed very restrictive views and posed suggestive questions.⁸⁴

For most beneficiaries the situation of the trial was very challenging; many of them reported similar experiences which will be summarised below.

- **Right to information**

Since the accused person should already have been instructed about his/her rights during the investigation proceedings in the pre-trial phase, the subsequent instruction during the trial is less comprehensively regulated. However, also before the trial the accused needs to be informed about his/her right to remain silent.⁸⁵ Besides this, the law does not provide for any further obligation to legally instruct the accused person during the trial or the proceedings on deprivation of liberty for compulsory medical treatment.⁸⁶

A major challenge for the beneficiaries during the trial was to follow and understand the fast and highly technical legal language. They could usually not follow (even the social workers had difficulties), and understand the proceedings so that they could not make informed decisions.

- **Right to access to a lawyer**

There are huge gaps with regard to the legal representation of the beneficiaries, in particular when they are not detained or the proceedings are not aimed at deprivation of liberty for compulsory medical treatment. If this is not the case, and the crime is sanctioned with less than 3 years of imprisonment, beneficiaries may actually represent themselves.⁸⁷

According to the law accused persons may file a request for legal aid if they are blind, deaf or "in some way disabled."⁸⁸ The problem is though that this is only optional. If not required by

⁸⁴ Interview_Benef._6_AT.

⁸⁵ Interview_Benef._6_AT; Vgl. Kirchbacher, K, WK-StPO § 245 StPO Rz 24.

⁸⁶ OGH, 15 Os 112/15g. Vgl. Kirchbacher, K, WK-StPO § 245 StPO Rz 27.

⁸⁷ § 61 para. 1 Z.2 and 5 StPO.

⁸⁸ § 61 para. 2 Z.2 StPO.

the beneficiary or his/her legal representative, legal aid cannot be granted ex officio in cases unless legal representation is obligatory. In case that legal aid is granted, the beneficiary gets a state-appointed lawyer whose qualification does not even need to be criminal law.⁸⁹ Overall there exist, thus, no sufficient safeguards to ensure the beneficiaries' right to access to a lawyer in a comprehensive way.

- **Right to medical assistance**

To participate in a trial the accused needs to be physically and psychologically able to negotiate. If there are doubts about this capacity the court hearing cannot be held or must be adjourned.⁹⁰

In proceedings on deprivation of liberty for compulsory medical treatment of beneficiaries who were incapable to take criminal responsibility in the moment in which the crime was committed, the court hearings may be done in the absence of the beneficiary if they cannot participate at the hearings in any foreseeable time or if the participation would entail severe health risks. In some cases the questioning of the beneficiary may even be partly or fully omitted.⁹¹

- **Recording of questioning**

Audio-visual recording of questioning during court hearings is not mandatory.

- **Privacy**

Court proceedings are usually open to public.⁹² There exist only few exceptions to this principle which need to be justified by special reasons.⁹³

The interview data showed that some hearings were public, others not. In some cases even the media was present.

- **Judgement**

The interviews showed that five out of 11 beneficiaries **did not understand** the meaning of the verdict and the consequences of deprivation of liberty for compulsory medical treatment. The judges did not explain the verdict. Therefore, they were only grasping the meaning afterwards through explanations from their lawyers, social workers, doctors or other staff working in forensic units.

⁸⁹ National Roundtable (15 Dec. 2016).

⁹⁰ OGH, RS0097914.

⁹¹ § 430 para. 5 StPO.

⁹² §§ 228, 430 StPO.

⁹³ § 228 StPO.

2.3.2. Good practices

An NGO representative reported that he/she would always contact the courts beforehand to inform them about that fact that a person has a guardian in order to allow the court to take all necessary measures. According to his/her experience the courts take this information into account.

2.3.3. Recommendations for trial-phase

- In the expert discussions, it was repeatedly highlighted that juvenile criminal law could serve as an example for ensuring procedural safeguards for beneficiaries in many areas.
- It is recommended to have judges specialised on persons with intellectual and psychosocial disabilities who can deal with these cases in a more professional way and decrease thus the courts' dependency on expert opinions.⁹⁴ These judges should equally dispose of adequate skills and professional experience.⁹⁵
- It is recommended to include specialised lay judges (e.g. educators/teachers) in the proceedings.⁹⁶

- **Right to information**

- To ensure that all parties understand the proceedings, judges and prosecutors should be held to use easily understandable language and refrain from technical legal language.
- Psychosocial support during the proceedings should not only be provided for victims but also and to the same extent for accused persons who suffer from intellectual and psychosocial disabilities. To this end, patient lawyer's networks and guardians' networks should be provided with more personnel resources. They are already cooperating with the courts, are specifically trained and could play a more important part in the proceedings.⁹⁷

- **Right to access to a lawyer**

- The legal aid scheme should be reformed in a way that it ensures that only criminal lawyers take over criminal cases and that they are trained for dealing with the beneficiaries.⁹⁸

No further recommendations.

⁹⁴ Expert_Consultation_AT (30 Jan. 2017).

⁹⁵ National Roundtable (15 Dec. 2016).

⁹⁶ National Roundtable (15 Dec. 2016).

⁹⁷ National Roundtable (15 Dec. 2016).

⁹⁸ National Roundtable (15 Dec. 2016).

- **Judgement**

- It is highly recommended to take the beneficiaries needs into account when proclaiming the verdict and to use a simple and respectful language. Additionally, the caretakers and persons of trust should be present and support the beneficiary in understanding the verdict and in managing the situation.
- „Social networks conferences“ (Sozialnetzkonferenz) is a good practice example that aims to support the reintegration of detainees and released prisoners through an integration plan that involves the community and social environment of the detainee or prisoner. This could also be applied in order to reduce the deprivation of liberty of persons with psychosocial or intellectual disabilities. So far the conference is mainly used for conditioned indulgence of deprivation of liberty for compulsory medical treatment.⁹⁹ The goal is to increase the number of indulgencies through early therapy and decrease the time of detention.¹⁰⁰

2.4. Remedies

2.4.1. Identified gaps and shortcomings

According to the jurisdiction of the Austrian Supreme Court, the violation of the obligation to instruct the beneficiary does not entail nullity of the judgement. This results in a situation where evidence that was gained without properly informing the accused of his/her rights might be used during the proceedings.¹⁰¹ In the adjudicated case, the Supreme Court refused to accept the nullity of a police questioning protocol of a severely intellectually disabled suspect whose severe intellectual disability was also attested by an expert opinion. The arguments that the legal instruction was not given in a comprehensible way, that he could not understand the legal instructions and that he had no legal representation were rejected. The expert even doubted whether he would have been able to understand the content if it would have been provided in easy reading language. The court of first instance used the police protocol with the argument that the accused had signed the police protocol confirming that he had understood the content and that there were no contrary indications.¹⁰²

⁹⁹ § 45 StGB.

¹⁰⁰ Neustart, Concept for a pilotproject called „Sozialnetz-Konferenz“ with beneficiaries, Wien, 2015, https://www.ris.bka.gv.at/Dokumente/Erlaesse/ERL_07_000_20150320_BMJ_S638_022_0001_IV_1_2015/Beilage_A_-_Konzept_Sozialnetz-Konferenz_NEUSTART.pdf (Stand 09. Februar 2017). gem. § 47 StGB.

¹⁰¹ OGH 14 Os 130/97 EvBL 1998/72, RS0108848.

¹⁰² OGH, Beschluss vom 11. Nov. 2015, 15 Os 112/15g.

2.4.2. Good practices

No good practices identified.

2.4.3. Recommendations for remedies

- In order to guarantee the safeguards for beneficiaries, it is necessary to ensure the presence of a lawyer from the first police questioning onwards. In cases, where police protocols are used as evidence despite the absence of a lawyer, these verdicts should be null and void. This would ensure that questionings without the presence of a lawyer cannot be used against an accused. As it is often difficult to identify the vulnerability of a person, all police questionings should be only done with a mandatory presence of a lawyer. This would ensure adequate protection of the rights of all suspected or accused persons.¹⁰³

¹⁰³ Advisory Group Meeting (27 Apr. 2017).

3. Recommendations

3.1. General Recommendations

- One of the biggest gaps in criminal proceedings concerns the different treatment of persons with psychosocial and intellectual disabilities. The latter lack substantial safeguards and are often taken in pre-trial detention. Due to a lack of adequate alternatives they frequently end up in forensic units of prisons. It is utterly required to ensure adequate safeguards for persons with intellectual disabilities and to provide alternatives to detention and imprisonment.
- National laws should be revised, stigmatising and discriminatory language abolished and the conformity with the UNCRDP ensured.¹⁰⁴
- Research has shown that the quality of cooperation between different stakeholders depends primarily on the personal commitment and connections of the involved representatives of the authorities. Co-operations are rarely institutionalised and happen usually on a case by case basis. The Austrian National Roundtable was a very successful event that brought many valuable results. It could be used as a permanent forum for cooperation and exchange which could be organised periodically focusing on different burning topics. It could equally be linked to the already existing regional conferences / jour fixes of the psychosocial support network.

3.2. Recommendations of the beneficiaries

For most of the beneficiaries it was not so easy to address concrete recommendations. During the interviews they voiced however critical issues and wishes which will be summarised in the following:

➤ **Accessibility of information**

Information concerning the rights and duties of the suspects and accused are hardly ever communicated in an accessible format (e.g. easy language). Some beneficiaries also reported that they had difficulties following during the questioning and the trial. This may be related to the legal language, the velocity of speaking, the challenging situation and the disability, which all together would require a particular communication style.

All information given to the beneficiaries should therefore be provided in accessible formats. This would increase the chances that beneficiaries can adequately follow the proceedings and take informed decisions. Furthermore it would be desirable to provide psychosocial support throughout the whole criminal procedure.

¹⁰⁴ See also AG Maßnahmenvollzug (work group deprivation of liberty for compulsory medical treatment).

➤ **Support by persons of trust**

Beneficiaries highlighted the positive effect of receiving support by persons of trust (caretakers, guardians, NGOs, lawyers or family members). Most of them wished to be supported throughout the whole proceedings (from the first questioning until the verdict). They noted that they would feel safer and not so alone.¹⁰⁵ It would also be desirable that someone would prepare them for the trial.¹⁰⁶

➤ **More preparation time with the legal aid lawyer**

Most of the beneficiaries criticised that the preparation time with their legal aid lawyers was too short or even non-existing. Some of them saw their lawyer only shortly before the trial, could hardly discuss the case and did not feel well represented.

Legal aid lawyers should therefore invest more time in the preparation with their clients to get a better picture of the case, to explain legal issues in an understandable way and to prepare the beneficiary for the process. In particular, beneficiaries should be informed about the meanings and the consequences of involuntary commitment.

➤ **More time for psychiatric expert opinions**

The beneficiaries that have undergone a psychiatric expert assessment reported that the latter took between 10 and 45 minutes. Many were wondering to which extent such a short time would suffice to judge their state of health in an adequate way.

Thus, medical and psychiatric experts should take sufficient time for assessment talks. Furthermore, they should avoid copying text parts from other assessments - a practice frequently found.

➤ **Medical assessment**

One beneficiary recommended a medical examination by a specialist before the first questioning explaining that the capacity to concentrate would vary according to the medication and the actual phase of the disability. The interviews revealed that some persons were questioned when they were under the severe impact of medication.

¹⁰⁵ Beneficiary Interview 5.

¹⁰⁶ Beneficiary Interview 9.