

**Input to the call for contributions by the mandate of the Independent Expert on the enjoyment of all human rights by older persons on “Older persons deprived of their liberty” by BAGSO, the German National Association of Senior Citizens’ Organisations**

1. What are the **key human rights risks and violations** affecting older persons deprived of their liberty, considering different intersectional factors<sup>1</sup>?

Older persons in need of care - especially those living in institutions - have a particular risk of being affected by human rights violations, such as abuse / sexual violence; psychologically, be it through direct or indirect support of loneliness and isolation, through neglect, insults, etc.

In connection with acts of violence against older people in need of care, measures involving deprivation of liberty occur. These include measures that impair people's freedom of movement against their will by means of devices, materials, objects or medication, and this impairment cannot be overcome without outside help.

Such manifestations of deprivation of liberty are:

- Mechanical restraints (bed rails, application of straps, plug-in tables, application of body restraints)
- Confinement of the person (closing off an area/room, complicated locking mechanisms on doors, high-mounted or complicated knobs, secured lifts)
- Sedating medication (sleeping pills, psychotropic drugs)
- Taking away necessary aids (shoes, glasses, crutches, walker)

The right to freedom, independence and self-realisation, which also exists for people with chronic diseases and people with disabilities, is often set against the protection of those affected, e.g. from falls. However, this supposed prevention of falls is not effective; on the contrary, the lack of exercise contributes to muscle atrophy, which further increases the risk of falls. A brochure published by the Bundesinteressenvertretung für alte und pflegebetroffene Menschen (BIVA), a

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<sup>1</sup> Any social factors such as gender, sex, race, ethnicity, indigenous identity, disability, sexual orientation, gender identity, religion, social status, place of origin and immigration status.

member association of BAGSO, highlights the problems of this balancing act between the need for protection and the deprivation and restriction of liberty.<sup>i</sup>

With regard to advancing digitalisation, one should keep in mind the danger of unauthorised surveillance, e.g. attaching digital technologies without the consent of the persons concerned, be it to their bodies or rooms.

2. Please provide **figures and data** on older persons deprived of their liberty. Has the number of older persons deprived of their liberty increased or decreased over the past decade?

Current figures and data on measures involving deprivation of liberty are - as far as is known - not available.

Figures are given in a printed matter by the German Bundestag from 2017.<sup>ii</sup> The German Police Academy (lead: Prof. Görgen) has been working on this topic for a long time. The number of unreported cases is known to be high, among other things because the topic is tainted with taboos and there is a lack of awareness that such measures are to be classified as acts of violence. As far as is known, no valid data is available, so comparisons with previous years are probably not very meaningful.

In a report published by the ZQP in 2015 (Violence Prevention in Care), figures from 2012 are mentioned. However, in the meantime they are likely to be outdated in view of the public discussion, court practice in authorisation procedures according to § 1906 German Civil Code (BGB) and projects on the topic (e.g. Redufix, Werdenfelser Weg – see below).

3. What kind of **specific measures** have been taken and implemented concerning older persons deprived of their liberty in the context of **the COVID-19 pandemic**?

This is about the balancing act between protection against infection on the one hand and rights to freedom/quality of life on the other. In the course of the pandemic and its development, insights have emerged into the dangers and risks posed to older people by contact restrictions, quarantine and isolation. Policymakers have learned from this and are trying to weigh up the risks between benefits and harms in government orders. In particular, the priority vaccination of older people and the compulsory vaccinations of care workers served to protect older people.

BAGSO issued a legal opinion on the legality of visiting and curfew restrictions in care facilities for older people during the pandemic. According to this expert opinion,

curfews including a quarantine order after returning from stays outside the facilities constitute particularly serious encroachments on the fundamental rights of freedom of movement (Art. 11 German Basic Law (GG)) and general freedom of action (Art. 2 para. 1 GG) as well as - depending on the purpose of the stay outside the facilities - possibly also other fundamental rights such as the protection of marriage and family (Art. 6 GG), the freedom of religion (Art. 4 GG), the freedom of assembly (Art. 8 GG) or the freedom of profession (Art. 12 GG). This also applies if the prohibitions are not directly directed against the persons concerned, but against the home operators or emanate from them.

4. Could you give us an **overview on the national and local legal frameworks** which prevent and protect older persons deprived of their liberty from human rights violations? Are there effective and available national monitoring and accountability mechanisms? Please provide a detailed answer with supporting information/documents.

The use of custodial measures represents a considerable encroachment on the constitutionally protected liberties of every individual. There is strict legal protection for this in Germany. They are only permissible in narrowly defined exceptional cases and for the protection of the persons concerned (e.g. averting significant damage to health due to illness or disability; urgently needed medical treatment, the purpose of which the person concerned cannot see due to illness or disability). Furthermore, the measure must be proportionate.

If a person is deprived of his or her liberty against his or her will or otherwise deprived of his or her right to personal freedom of movement, this initially classifies as a criminal offence of deprivation of liberty (§239 of the Criminal Code).

Measures that deprive people of their liberty must always be approved by a judge (§1906 of the German Civil Code). This also and especially applies to measures similar to accommodation (e.g. restraints close to the body or the use of a bed rail). Judicial authorisation can only be omitted in exceptional cases (e.g. the person to be restrained is capable of judgement and consents; the person to be restrained is immobile; an acute danger is to be averted for a short time).

Deprivation of liberty measures are to be distinguished from measures restricting liberty, which are considered to be an intervention of low intensity and duration. These do not require authorisation.

The use of psychotropic drugs can also be considered a measure involving deprivation of liberty and is subject to authorisation if they are used without a clearly defined and documented medical indication.

5. Please share examples of **good practices** on how to ensure that older persons deprived of their liberty can exercise their human rights.

Within the framework of the training of care professionals and helping professions, the topic of "violence in care" and the legal framework for measures involving deprivation of liberty are subjects of training. There is also a wide range of qualification measures and literature on the topic. Here, too, the problem lies not in awareness but in implementation. This also applies to support in exercising the human right to freedom. The constitutional state of Germany has a system of legal aid options available for this (e.g. lawyer support by way of counselling assistance, complaint/notification to authorities, police and public prosecutor's office, professional associations, etc.). In the case of inpatient care, complaint channels must be prescribed by law and made transparent. In the domestic sphere, insight and thus intervention is difficult and the grey area is large. People with dementia are considered to be the largest risk group.

Within the framework of care law, a procedural approach, the so-called "Werdenfelser Weg", was developed with the aim of reducing the use of custodial measures in care facilities. Central to this is the training of specialised procedural guardians who have not only legal but also nursing expertise in the field of measures involving deprivation of liberty.<sup>iii</sup>

From 2004 to 2006, a model project on the reduction of restraints close to the body was carried out, funded by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth. The aim of the Redufix project was to achieve a reduction in near-body restraint through targeted interventions without negative consequences for the residents (e.g. fall-related injuries or the administration of psychotropic drugs). Only nursing homes for older people in which at least five residents were affected by near-body restraint were eligible to participate. In principle, all residents deprived from or restricted in liberty within the facilities were included in the project.

### **About BAGSO**

BAGSO, the German National Association of Senior Citizens' Organisations, represents the interests of older generations in Germany. It stands up for active, healthy and selfdetermined ageing in social security. BAGSO is an umbrella organisation of about 125 civil society organisations that are run by or work for older people.

In a colourful and diverse society, BAGSO promotes a differentiated image of old age. This includes both the various opportunities arising from longer lives as well as times of vulnerability and the need for care. BAGSO calls on politicians, society and businesses to offer conditions that allow for a good and dignified life in older age – in Germany, Europe and worldwide.

At the United Nations, BAGSO is actively involved in the development of a UN Convention for Older People. BAGSO is also a member of the Global Alliance for the Rights of Older People (GAROP), an international alliance of over 200 civil society organisations that advocates for the rights of older people.

BAGSO's Secretariat for International Policy on Ageing provides information on current international developments in ageing policy and contributes the interests of civil society to international processes.

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<sup>i</sup> <https://www.biva.de/dokumente/broschueren/Freiheitsentziehende-Massnahmen.pdf>

<sup>ii</sup> <https://dserver.bundestag.de/btd/18/131/1813176.pdf>

<sup>iii</sup> <http://werdenfelserweg-original.de/>