# OPEN RESEARCH BEHIND CLOSED DOORS

## ASSESSING THE IMPACT OF COVID-19 MEASURES ON PERSONS WITH PSYCHOSOCIAL AND INTELLECTUAL DISABILITIES DEPRIVED OF LIBERTY

*An overview of practice in Austria, Germany and Italy*

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LUDWIG BOLTZMANN INSTITUTE Fundamental and Human Rights

# Open research behind closed doors:
## Assessing the impact of COVID-19 measures on persons with psychosocial and intellectual disabilities deprived of liberty

**Authors**
Nora Katona

*Ludwig Boltzmann Institute of Fundamental and Human Rights (Austria)*
Elisabeth Mayer
*External consultant for the Ludwig Boltzmann Institute of Fundamental and Human Rights*

**National partners**
*Associazione Antigone (Italy)*

*Ludwig Boltzmann Institute of Fundamental and Human Rights (Austria)*

*Selbst- und Interessensvertretung zum Maßnahmenvollzug (Austria)*

*Strafvollzugsarchiv (Germany)*

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## TERMINOLOGY

### Disabilities

*Intellectual disability:* learning difficulties, meaning that persons concerned might need longer time for cognitive activities, learn differently and need various individual support.[1]

*Psychosocial disability:* interaction between persons with disabilities and attitudinal and environmental barriers that hinder full and effective participation in society on an equal basis with others; including psychiatric disabilities and psychosocial challenges.[2]

**Preventive measures** all the forms of deprivation of liberty mentioned below

*Compulsory withdrawal treatment:* deprivation of liberty of persons with addictions in addition to the prison sentence.

*Preventive custodial measures:* deprivation of liberty of persons exempted or partly exempted from criminal liability to reduce 'their dangerousness'; used to cover forensic commitment and treatment in specialised facilities and clinics for forensic psychiatry.

*Preventive detention:* deprivation of liberty for criminally responsible persons[3] to reduce 'their dangerousness' instead of or after the prison sentence.

### Person concerned

A person with psychosocial and intellectual disabilities deprived of liberty in any aforementioned forms, including detainees and patients in specialised facilities and clinics for forensic psychiatry.

# 1. INTRODUCTION

## Why Open Research behind Closed Doors?

The COVID-19 pandemic has changed the way we interact and live in society. While it affects all of us, its impact is not the same for everyone. Although persons with psychosocial and intellectual disabilities deprived of liberty are overrepresented in prisons and 'disproportionately impacted due to attitudinal, environmental and institutional barriers that are reproduced in the Covid-19 response',[4] little research has been done on their situation during the COVID-19 pandemic.

Persons deprived of liberty are in a particularly vulnerable situation.[5] On the one hand, they depend on the state to ensure their health and well-being. However, containing an outbreak in such settings is extremely difficult due to the proximity of living (exacerbated by notorious overcrowding) as well as inadequate healthcare and hygiene provisions.[6] This is especially relevant during a pandemic, as closed institutions are considered 'hotbeds for infectious diseases'.[7] On the other hand, the restrictions placed on the persons concerned already before the outbreak of COVID-19 became even more restrictive.[8] Detention conditions worsened as the widespread suspension of visits and rehabilitative measures caused further isolation.[9]

There is no one-size-fits-all approach for managing the pandemic in closed institutions, and countries have responded differently to specific circumstances.[10] Moreover, the systems in which persons with psychosocial and intellectual disabilities are deprived of liberty varies widely among countries (*see information on country backgrounds*). In all their differences, it is a common challenge that the treatment of persons with psychosocial and intellectual disabilities deprived of liberty poses a challenge in most countries, even under regular conditions.[11] The current pandemic magnified and amplified these preexisting shortcomings.[12]

The present document discusses which challenges institutions encounter in the face of the COVID-19 pandemic in Austria, Germany and Italy and drafts recommendations on how to mitigate them to improve the situation of persons concerned.

## Methodology

This project was based on a strong participatory approach and is designed to involve relevant stakeholders from the very beginning. This includes persons who are not necessarily frequently part of research processes like experts by experience, in concrete persons concerned and their relatives. Experts by experience were an integral part of the research project and co-designed the project methodology and outcomes.

This report is mainly compiling the research findings from Austria, Germany and Italy. Due to the different systems, the possibilities to access institutions and carry out the research varied between the three countries. The following graph illustrates which areas are covered by this report:

| Country | Preventive custodial measure | Preventive detention | Compulsory withdrawal treatment |
|---|---|---|---|
| **Austria**[13] | sec 21(1) CC; Ministry of Justice (MoJ) | sec 21(2) CC; Ministry of Justice (MoJ) | sec 22 CC; Ministry of Justice (MoJ) |
| **Germany**[14] | sec 63 CC; Ministries of Health[16] (MoH) | sec 66 CC; Ministries of Health[16] (MoH) | sec 64 CC; Ministries of Health[16] (MoH) |
| **Italy**[15] | sec 199 to 222 CC; Ministries of Health (MoH) | sec 199 to 222 CC; Ministries of Health (MoH) | not applicable |

Each national partner organisation undertook desk research to understand better the situation of persons with intellectual and psychosocial disabilities who were deprived of liberty during the COVID-19 pandemic. The research addressed the situation in closed institutions between March 2020 and February 2021. In Austria and Germany, surveys were sent to the persons concerned and their relatives in September 2020.[17] In Italy, visits to prisons and REMs were carried out. Partners in each country further conducted qualitative interviews with practitioners, including facility management, lawyers, representatives of monitoring bodies and extramural facilities.[18] In parallel, national workshops took place in Austria and Germany to further discuss the preliminary findings and recommendations.[19] The findings were collected in national memos.[20]

## Country backgrounds

The systems have several aspects in common: the deprivation of liberty of persons with psychosocial and intellectual disabilities is based on the suspects assumed 'dangerousness' (i.e., dangerousness and risk of harming themselves or/and others) and with the aim of providing adequate treatment to reduce this 'dangerousness', often without a set time limit. To assess progress, persons concerned are heard ex officio by a court on an annual or biannual basis.

In **Austria**, preventive custodial measures may be imposed on persons because of their 'dangerousness' if they are not held criminally responsible for their offence. Instead, if a person with intellectual or psychosocial disabilities is held criminally responsible, they are subjected to preventive detention for parts of, instead of or after the prison sentence if still considered 'dangerous'.[21] A person can be held in a specialised detention facility, a designated part of a prison or the forensic-psychiatric department of a hospital – in all cases for an unset time.[22]

In **Germany**, persons exempted, partly exempted and/or, in case of addiction, not exempted from criminal liability are detained until they are no longer considered 'dangerous'. They are either held in clinics for forensic psychiatry or withdrawal centres. The latter accommodates persons with (substance) addictions, who are forced to undergo treatment in addition to their prison sentence for a set time. Finally, if held criminally responsible or partly exempted from criminal liability, persons with intellectual and psychosocial disabilities can be detained in an institution for preventive detention annexed to a regular prison in addition to their sentence without time limits.[23]

In **Italy**, persons with psychosocial and intellectual disabilities with no or diminished criminal responsibility, if considered to be 'dangerous', are accommodated either in extra-mural support programmes or in Residences for the Execution of Security Measures (REMs). Since 2014, the preventive custodial measures in REMs cannot exceed the length of the maximum sentence foreseen for the offence committed. Persons with pre-existing psychosocial disabilities who are criminally responsible are placed in prisons serving a prison sentence. Since April 2019, detainees who are criminally responsible with a supervening or pre-existing mental condition that is incompatible with prison can serve their sentence in home detention or in a healthcare facility (never in REMs) depending on their therapeutic needs.[24]

## 2. COVID-19 AND HUMAN RIGHTS IN CLOSED INSTITUTIONS

The Coronavirus had and still has an enormous impact on the situation of persons who are deprived of liberty. First, containing an outbreak in closed institutions is extremely difficult due to the proximity of living (exacerbated by notorious overcrowding). Consequently, relevant human rights mechanisms and NGOs called for a reduction of the population in places of detention, and indeed the number of detainees decreased practically all over Europe.[25] In **Italy**, the prison population decreased by 13,9 %. A trend that did not apply in **Austria** for persons with intellectual and psychosocial disabilities deprived of liberty.[26] Second, in addition to existing restrictions inheriting the deprivation of liberty, new ones were put in place to prevent the spread of the virus. Personal visits, and most social and rehabilitative activities (like group therapies, training or work), were reduced or suspended.[27] Time spent outside private rooms was reduced, and new arrivals were placed in quarantine for up to 14 days.[28] Hearings were delayed or held remotely, resulting in some cases in prolonged deprivation of liberty and difficulties to follow the hearing for some.[29] While access to a lawyer was upheld in most cases, its quality and frequency in some cases suffered from limited visiting hours and contact by remote means.[30]

Although many of these restrictions are crucial to prevent the spread of the Coronavirus, they interfere with fundamental rights (e.g., the right to liberty, the right to family life and the right to health) and significantly impact the well-being of persons deprived of liberty.[31] Thus, applied hygienic and restrictive measures need to be assessed in light of their proportionality and necessity considering the consequences for the persons concerned. Moreover, measures to mitigate the negative impact of restrictions should be introduced.[32] In the following, some rights affected by the measures to prevent the spread of COVID-19 will be given a closer look.

### 2.1 Right to liberty

#### Key aspects

» The aim of the deprivation of liberty of persons with intellectual and psychosocial disabilities must be therapy and rehabilitation

- » Suspension of rehabilitative measures and relaxations can result in prolonged deprivation of liberty
- » Relaxations were also upheld during the pandemic, by e.g. using tests, accompaniment of staff and prolonging long-term leaves

Deprivation of liberty must be the last resort and applied only if non-custodial measures are not applicable. Moreover, it always must be necessary, thus, proportional and can never be solely based on the disability of a person.[33] The deprivation of liberty of persons with intellectual and psychosocial disabilities is only lawful if it takes place in a hospital, clinic or another appropriate facility. The goal of the deprivation of liberty must be therapy.[34]

To regain their liberty, persons with psychosocial and intellectual disabilities have to prove the reduction of or control over their 'dangerousness'. [35] One step is standing the test of leaving the closed institution for a certain amount of time. It is an incremental process, where persons concerned are granted more and more relaxations of their deprivation of liberty if they master the previous steps successfully.

**PROMISING PRACTICE**

*In Austria, it was easier to have more long-term leaves in a row due to the change of competency in deciding about them (i.e., prison management instead of the court).*

Short and long-term leaves were restricted to prevent the spread of the Coronavirus in detention facilities and clinics. In **Austria** and **Germany**, they were suspended, with very few exceptions, during the first lockdown (approx. March-May 2020). Persons concerned were not allowed to leave the institution, even if they already had the approval to go on long-term leave. On the other hand, in **Austria**, most of those who had been on long-term leave when the lockdown occurred had their leave prolonged multiple times and, thus, could stay outside for longer than it would have been the case without COVID-19. However, it was a question of pure fortune whether the person was on leave at a specific date. Later, the restrictions on relaxations eased in **Austria** and **Germany** but were still reduced or under the supervision of

**PROMISING PRACTICE**

*In Germany, a reviewing court held that a person concerned had to be released since it was not his fault that not all levels of relaxations were implemented.*

staff who ensured compliance with hygiene and safety measures. In some institutions, persons concerned could go on day leave for work and exit the institution together with staff, especially if they were already close to release. After the first lockdown, long-term prison leaves were granted again. However, institutions and even wards used different strategies. In **Italy**, relaxations in REMs were reduced but not entirely suspended. In prisons, to lower the number of the prison population, existing measures (i.e., home detention and further relaxations in semi-freedom) were endorsed by a Decree. During the pandemic, around 1.000 detainees in semi-freedom (i.e., the persons spend the day outside the prison for work or educational purposes and re-enter at night or for the weekend) have been authorized to stay also the night and weekend at home, as long as they had a home. Other relaxation measures were suspended or limited. Overall, the halt or reduction of relaxations might lead to a more extended deprivation of liberty, as often these are prerequisites for (conditional) release.

**PROMISING PRACTICE**

*In Italy, some courts are paying compensations (or granting early release) for cases of detention in violation of Art. 3 ECHR (prohibition of torture and ill-treatment) even when detention conditions are due to the pandemic.*

In **Austria** and **Germany**, a person concerned is heard ex officio by a court, whether their deprivation of liberty is still necessary. In general, these hearings took place on time and were carried out via video conference.[36] In **Austria**, this usually meant that the person concerned and the institution representatives joined the hearing via video from the institution while judges, prosecutors and lawyers assembled in the courtroom. While some judges and some lawyers perceived video conferencing as a good option, most interviewees and persons concerned experienced this format as inadequate and having a negative impact on the outcome of the hearing. One reason mentioned is the low quality of technical equipment and internet connection within the institutions, which did not allow the persons concerned to follow the hearing well or see the judicial representatives. In **Germany**, the representatives of the institution and the person concerned had to share a screen and camera in some cases, with the consequence that the legal representative and the judge could not see all the participants at once.

## 2.2 Right to family life

### Key aspects

- Contact with the outside world is crucial for the well-being of persons deprived of liberty and their relatives
- Initially, visits by relatives were suspended due to COVID-19, making it necessary to find measures compensating for the suspended or limited visits

Under international law, although deprivation of liberty inevitably entails some limitations on a detainee´s private and family life, any interference with this right must be justified and detaining authorities must uphold the rights and protect the dignity of those deprived of liberty.[37]

To prevent an outbreak of the Coronavirus in closed institutions, most facilities restricted visits. In **Austria, Germany** and **Italy**, visits were banned entirely during the first lockdown. Later, visits resumed, but with several limitations. A glass pane separated relatives and persons concerned, and the number of persons per visits and the visiting hours were restricted. In most cases, only one or two persons were allowed to visit for 30 to 60 minutes. Consequently, some relatives, especially those pertaining to a risk group, did not take the long journey (note: often detention facilities are located far from the relatives' home town) for such a short amount of time. In **Germany**, the allowed frequency of receiving visits per person concerned varied widely from once a week to once a month. One **Austrian interviewee** explained similar limitations with the lack of staff to screen each visitor for symptoms.

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*In Italy, the calls were for free and the use of several platforms, including WhatsApp was enabled to facilitate contact with relatives.*

In order to compensate for the restriction on visits, several countries offered an increased number of phone calls, secured mobile phones and/or video calls. However, some persons concerned could not afford additional phone calls in **Austria** and **Germany** due to relatively high fees. Therefore, in **Austria**, in some cases, persons concerned were supported financially. Also in **Germany**, the costs were reduced or suspended in some places. In a few other cases, patients were allowed to use mobile phones. Even having been free of charge in all **three countries**, video calls, where actually

applied, posed other, new challenges to facility administration, staff, persons concerned and their relatives *(see below)*.

While these alternatives to visits offer ways to compensate for the regular visits, in **Austria, Germany** and **Italy**, persons concerned and relatives reported that the lack of closeness and physical contact was particularly straining. Especially for children who could not comprehend why they were not allowed to touch and during specific periods see their family member. This lack of contact can have long-term effects on the relationship between family members and the children's mental health.[38]

**KEY MESSAGES ON THE ROLE OF TECHNOLOGY:**

**Right to family life**

- The use of new technologies can bring about benefits since it can substitute time-consuming travel to a facility. Moreover, it can enable to see the relatives, including those living abroad, as well as the familiar surroundings and increase the exchange (e.g., through secured mobile phones).
- Detention facilities tend to possess a poor technological infrastructure, which prevents the accessibility/usability of new technologies in practice. To mitigate the negative impact of the limitations or bans on visits, the technical infrastructure needs to be available.
- Introducing technology permanently into the system of preventive measures poses the risk of substituting personal contact against the will of persons concerned. Technology should be applied in addition to regular visits and should not replace them.

**Contact with the courts and expert witnesses**

- The use of new technologies, especially video conferencing, can bring about benefits for judges, expert witnesses, and persons deprived of liberty. They can substitute travel to an institution or court. However, these tools need to be used with care, as not seeing persons in real can influence the perception of the person and circumstances. Thus, these new technologies can be useful for meetings, follow-up questions or hearings of small scale but should never replace the first personal contact or used in highly relevant hearings when the decision about the (prolonged) deprivation of liberty is at stake.

## 2.3 Right to information

### Key aspects

- Inclusive and transparent information can reduce tensions and increase the readiness to respect restrictions
- Information was sometimes available in writing or provided orally (e.g. in small groups)

Providing adequate information to persons deprived of liberty is key to counter their feelings of powerlessness and to ensure that they are aware of the existing regulations. Deriving from international standards, providing information about all matters necessary to adapt themselves to life when deprived of liberty is essential. It has to be ensured that the information is accessible and can be understood. Moreover, the persons concerned have the right to receive relevant information about the outside world as far as it is not necessarily restricted.[39]

Especially in such an unknown and unprecedented situation like the COVID-19 pandemic, it is crucial to comprehensively inform persons deprived of liberty. This includes providing information on common symptoms, the contagion risks, and measures to prevent contracting the Coronavirus. In **Austria**, staff and persons concerned themselves emphasised that protective measures were better accepted once it was noticed that persons outside closed institutions experienced similarly severe restrictions to their daily lives. Besides, persons concerned would rather adhere to the rules if they understood their use and necessity. In **Italy**, the lack of information given to family members on the prison conditions, paired with the increasing anxiety generated by the exchanges of information in chat groups created by family members, led to severe tensions. In line, providing adequate information transparently and respectfully has a de-escalating effect. It helps reduce uncertainty, fear, violence, and the conception of the measures as arbitrary excuses to worsen the detention conditions.

However, the range of whether and how persons concerned were informed varied widely between different institutions. In all **three countries**, some persons concerned reported that, especially in the initial stage, they had received no information at all or only when they proactively asked for it. In extreme, persons concerned only received information via the

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*In Austria, although not from the start, infographics explaining the relevant hygienic measures were translated in 17 languages by the Austrian Integration Fund (also available in some of the relevant institutions).*

*www.integrationsfonds.at/coronainfo*

media, especially in the initial phase of the pandemic. Others reported that the staff did their best to inform them and/or group therapy sessions were used to discuss the situation during the pandemic. In **Germany**, these discussion groups and conversations with staff were perceived as essential to explain the regulations to the persons concerned in a comprehensible way. This was crucial, specially to convey the information to persons concerned with limited cognitive abilities or knowledge of German, to reduce the amount of confusion and to reach those who have problems understanding written information (in German) and media coverage. Overall, in **all three countries**, staff working with persons deprived of liberty were impressed by the acceptance of and adherence to the regulations. In this context, the trust between staff and persons concerned is crucial.[40]

**KEY MESSAGE ON THE RIGHT TO INFORMATION:**

After the first lockdown, in Italy, riots broke out in more than 40 prisons. The staff of prisons where riots did not take place mentioned the constant information provided to persons concerned and their representatives during the emergency as the main reason. Similar reasoning was given in Austria by numerous stakeholders mentioning regular information exchange as an essential de-escalating factor.

### 2.4 Right to health

**Key aspects**

- Restrictive measures to prevent COVID-19 infections can affect the mental health of persons concerned negatively
- Tests allowed for a shorter time of quarantine necessary to prevent the spread of the Coronavirus
- Therapies took place with safety measures (e.g. glass panes, video calls)

The CRPD recognises the inherent dignity and autonomy of persons living with disabilities. The Convention explicitly refers to equal health care for all and mandates state parties to 'provide those health services needed by persons with disabilities specifically because of their disabilities'. This also applies to detention facilities or other closed institutions. This is even more relevant during the COVID-19 pandemic as persons concerned depend on the state to guarantee also adequate measures to protect their physical health. While quarantine in the context of the pandemic might have been necessary, international standards concretely regulate the limits. Moreover, deprivation of liberty for preventive measures must have a therapeutic function that foresees an appropriate and individualized therapy or treatment.[41]

The COVID-19 pandemic poses an enormous threat to the physical and mental health of persons with psychosocial and intellectual disabilities deprived of liberty. On the one hand, considering the overcrowding of detention facilities, including institutions for preventive measures, persons concerned cannot keep distance and reduce contacts. Besides, they depend entirely on the state to provide them with sufficient masks, hand sanitiser, clean water, soap or tests. On the other hand, the restrictive measures to protect their physical health, like the halt of therapies and leisure time activities, can have severe negative consequences for their mental health.

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*In Italy, the capacity of REMs is limited to 20 persons per institution. The small dimension of these facilities and their management by the healthcare system made it possible to react to the pandemic in a way that minimized the restrictions imposed on the patients and, more importantly, guaranteed the continuity of therapeutic treatments. Moreover, there are 30 REMs in Italy, which enables that persons are close to their relatives. An aspect that facilitates visits in times of pandemic. However, more facilities would be necessary to accommodate all persons fulfilling the requirements.*

Like most of the COVID-19 related regulations, the provision of protective measures such as facemasks, disinfectant and tests did not only vary between institutions in **Austria, Germany** and **Italy** but also over time. Initially, in several institutions, neither staff nor detainees were obliged to wear face masks; some did not even have a supply of masks. Later, persons concerned had to wear them outside of their rooms and when they were

in contact with staff and vice versa. However, some persons concerned reported that they did not get (sufficient) face masks and that the staff was not wearing them in their shared offices. According to them, physical distancing was not always practised due to lack of enforcement by the staff and lack of space. They expressed resentment and fear because they felt their health was not protected enough, particularly for those pertaining to a risk group. Others were pleased with the hygiene measures ensuring their safety. Furthermore, in **Germany**, the clinics handled the obligation for persons concerned to wear the mask very differently, ranging from the obligation to wear a mask on the ward to wearing it voluntarily. However, persons concerned had to wear masks during therapies, when walking around the courtyard and during visits in most clinics. This obligation was perceived as burdensome but also as necessary. In some facilities, persons concerned have not been given access to disinfectants for fear they might misuse them as a drug.

Within the first months of the pandemic, tests were hardly available in **Austria, Germany** and **Italy**. Therefore, neither staff nor persons concerned were regularly tested. Later, many facilities started testing the staff on a regular basis, as experts and persons concerned agree that persons coming from the outside are most likely to introduce the Coronavirus in the institution. In **Germany**, the staff was tested only in case of symptoms and, varying between institutions, visitors were asked to take a test. Especially in (forensic) aftercare, these tests can provide reassurance and reduce the staff's fears of posing a risk.

In most cases, persons concerned showing symptoms, were tested in **all three countries**. Moreover, every person arriving newly to a facility was put into quarantine. These separations were one of the main challenges for the system and often affected the organisation of the entire facility, reducing spaces for the other persons concerned and activities. Being in quarantine meant being separated for 14 days and spending up to 23 hours - 22 hours in **Italy** - a day in their room. In order to shorten this period, as soon as more tests were available, persons concerned were tested upon arrival and only had to stay in quarantine until they had a negative test result (two to five days). Persons in quarantine only had restricted,

if not suspended, access to therapies and social service. There were cases where persons concerned received compensations, such as the possibility to watch television or to smoke.

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*In Austria, to reduce the risk of large-scale transmissions, in some institutions, persons concerned were separated into groups living in the same units. Within these units they did not have to wear masks (as considered as one household) and could conduct activities together (e.g., sports, board games).*

In **Austria** and **Germany**, access to therapies has been restricted due to COVID-19. Mainly, group therapies were suspended or held in smaller groups. While the reduced number of persons per group enabled group therapies, it also resulted in a decreased frequency of and variety in such therapies. In **Austria** and **Germany**, in most cases, individual therapy sessions continued to take place with protective measures such as plexiglass, video calls and/or face masks. Generally, the restrictions on therapies were relaxed gradually after the first wave of COVID-19. In **Italy**, therapies never stopped in REMs and are hardly available also without pandemic in regular prisons.

In terms of leisure time activities, in some **Austrian** facilities yard exercise, sports and walks were stopped entirely or reduced significantly to a maximum of one hour a day. In other institutions the hours for yard exercise were extended to up to six hours a day. The offer of out- and indoor activities was sometimes upheld by reducing the number of participants or wearing masks. In **Germany**, most of the activities had to take place in the limited space of the ward. Gyms and cultural/social centres were closed to avoid joining persons concerned from different wards. In contrast, there were no relevant restrictions to indoor leisure time activities in **Italy** when they did not require external staff.

**PROMISING PRACTICE**

*Good practice from Lombardy: The vaccination campaign was run prison by prison, considering the entire prison community. Everyone who enters for any reason was entitled to the vaccine, without distinction: prisoners and administrators, penitentiary police and volunteers. The aim was to create pockets of immunity within closed environments.*

**KEY MESSAGE ON QUARANTINE:**
Under the current preventive regulations, it might be necessary to separate persons deprived of liberty. However, it should not take the form of isolation and 'restrictions (…) must be necessary, evidence-informed, proportionate (i.e. the least restrictive option) and non-arbitrary. The disruptive impacts of such measures should be actively mitigated, such as through enhanced access to telephone or digital communications if visits are limited.' (UNODC, WHO, UNAIDS and OHCHR, Joint statement on COVID-19 in prisons and other closed settings, 2020)

## 2.5 Monitoring

### Key aspects

- Monitoring closed institution is a major safeguard against torture and ill-treatment
- Especially when further restrictions are ordered, monitoring visits or adequate alternatives are of utmost importance
- In some countries, monitoring activities ceased during the pandemic, or visits took place under restricted conditions

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)[42] calls upon the Member States to establish National Preventive Mechanisms (NPMs) for the prevention of torture and other cruel, inhuman or degrading treatment or punishment in places of detention through monitoring.

Even if relevant human rights mechanisms urged member states to continue monitoring places of detention during the pandemic, the visits by monitoring bodies ceased during the first months of the pandemic in **Austria**.[43] From June 2020 the monitoring of places of detention resumed, but under restricted conditions. For instance, only two members of the NPM visited at a time and frequently they announced their visit. At the same time, the ombuds institution launched an investigation due to a cluster in one of the institutions responsible for preventive measures.[44] In **Germany**, specific questions were sent by the National Agency for the Prevention of Torture to the ministries in order to get an overview of the measures and develop

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*In Germany, the National Agency for the Prevention of Torture conducted interviews with staff and persons concerned via telephone or video conference as an alternative to visits. In addition, questionnaires were sent. Developments, measures, and procedures were monitored and documented.*

recommendations.[45] In **Italy**, also due to the riots, monitoring activities never fully stopped, but from March to May 2020 most of the monitoring bodies in fact suspended their activities and even the NPM drastically reduced its visits. While the principle of 'do no harm' requires monitoring bodies not to put persons concerned health at risk, the fact that places of detention are closed off more than ever and the separation of persons concerned became a standard practice to prevent the spread of COVID-19 *(see 2.4 Right to Health)* requires NPMs to be particularly attentive.

## 3. CONCLUSION

COVID-19 has certainly challenged persons working with or in the criminal justice system to an unknown extent. Especially in the initial phase, there was much of uncertainty on how to deal with this **unprecedented situation** as regulations from the responsible ministries sometimes changed weekly. While the coordination improved over time, there is still a need to develop a coherent strategy and guidelines for future pandemics. The respective deliberation should be informed by research. Thus, more in-depth research on the various regulations and their benefits and necessity as well as the collection of good practices, are required. However, often a major challenge in conducting research and making efforts to improve the situation of persons with psychosocial and intellectual disabilities who are deprived of liberty is the **lack of data and access for researchers to relevant institutions**. Especially in **Germany** and **Italy**, there are little to no numbers available on persons in preventive measures, and they are frequently excluded from statistics. A complicating factor is undoubtedly the **diversity of systems** in the countries.

In its diversity, the countries have in common that the pandemic highlighted and exacerbated existing challenges, most evidently overcrowding. In **Austria** and **Germany**, the numbers of persons admitted to preventive

custody measures or detention have been rising continuously. Reducing the **number of persons deprived of liberty** is key to guarantee that persons concerned receive therapy as provided for by law as well as to lower the risk of infection and mitigate the negative impact of protective measures during a pandemic. Therefore, there needs to be more research on how admission numbers could be reduced, how the number of releases could be increased and how potential alternatives to the current systems could be realised. The REM system in Italy could serve as a reference point.

In this context, the **socio-political framework** poses additional challenges. Not only is the stigmatization of persons with psychosocial and intellectual disabilities deprived of liberty twofold, for having committed a crime and for their disability, but their institutionalisation and treatment is often guided by a security approach rather than by a health care perspective.[46] Often there are also not enough after-care places available corresponding to the needs of the persons concerned, especially if the persons are additionally in a vulnerable situation, e.g., minors or elderly. This proves to be also challenging if the number of persons deprived of liberty should be reduced, like in the case of a pandemic.

In this light, the current pandemic represents a significant challenge in closed institutions. Despite several existing measures to mitigate the negative impact of restrictions, further efforts are necessary to ensure the protection of human dignity during pandemics. Also, behind closed doors.

# 4. RECOMMENDATIONS FOR ADMINISTRATIONS OF FACILITIES AND POLICYMAKERS

As highlighted, some of the existing challenges were magnified and highlighted by the COVID-19 pandemic. Therefore, to adequately address future pandemics some general challenges need to be tackled as well. In the following general recommendations will be displayed, followed by concrete recommendations concerning the COVID-19 regulations.

## General

1. To make informed decisions on the deprivation of liberty of persons with psychosocial and intellectual disabilities and improve their situation, we need to understand the status quo. Therefore, governments should transparently provide **data** on preventive measures, preferably disaggregated by personal characteristics as well as the place and duration of deprivation of liberty.
2. **Reducing the number** of persons in preventive measures is a prerequisite to ensure that adequate treatment can be provided. First, authorities should reassess laws and policies to ensure that the deprivation of liberty is used as a last resort and that alternatives are prioritised and applied more frequently. Besides, conditional releases should be reinforced by establishing **boards of expert witnesses of psychiatry** and other relevant areas of expertise (with extensive knowledge of the psychiatric support system) to share responsibility concerning the risk of recidivism.
3. Ensuring the right to health should be a top priority. By considering the broader context of the deprivation of liberty of persons with psychosocial and intellectual disabilities, there is a pressing need to **expand and improve the overall psychosocial support structure**.
4. The aim of preventive measures is not punishment but treatment. The involvement of health care personnel can best realise this aim. Consequently, the systems should be adequately equipped with **trained and qualified staff**.
5. The pandemic has once again proven the importance of **exchange and coordination** among the relevant stakeholders. The collaboration between the different professions, and preferably with relatives and persons concerned should be strengthened and institutionalised by establishing regular round tables and networks.

### COVID-19 related

1. Generally, it is key to put **the needs of the persons concerned** at the centre of any measure taken to prevent the spread of a pandemic in closed institutions. Therefore, the restrictions should be regularly checked for their continued necessity and proportionality by relying on the scientific state-of-art (e.g. WHO checklist) and regulations that also affect the general public as a point of reference. In addition, measures to mitigate the negative impacts of the regulations should be put in place.
2. Persons concerned should be prioritized for **vaccination** due to their vulnerable situation and be included in the high priority groups. It should be assessed on how far vaccinated persons can be exempted from restrictions.
3. In addition, testing would allow for **relaxations** (e.g. day and long-term leaves) to continue, at least to some extent. Further, whenever appropriate, rehabilitative measures that can take place within the facility, such as social skills training or psycho-educational groups, should be pulled forward to prevent a delay in the conditional release. The halt of relaxations should not be to the detriment of persons concerned, and it should be assessed which relaxations steps are absolutely necessary for conditional release.
4. **Video conferencing** should neither be used for main and annual hearings or hearings on the conditional release of persons with psychosocial and intellectual disabilities nor their assessment by expert witnesses. Instead, this technology should only be used for minor clarifications and exchanges.
5. **Visits** should be enabled by using safety measures and complemented by online alternatives. In addition, persons concerned with little income should be supported financially, or phone calls should be free of charge in general. It is recommendable to maintain the option of video calls and secured mobiles to contact relatives even after the pandemic since they offer some opportunities that personal visits lack (e.g. seeing relatives abroad, more relatives at once or familiar environments). By no means should video calls substitute personal visits against the will of the persons concerned.
6. **Video calls** should not only be offered in theory but also in practice. This means that facilities need to provide sufficient devices, adequate

technological infrastructure, and support from technology literate persons.

7. It is highly recommended to provide persons concerned with **detailed and inclusive information**. Doing so ensures that they can protect their health and understand and accept the sometimes drastic regulations better. The information should be available in accessible formats and in foreign languages. In addition, the information should be provided orally, especially if persons are illiterate, do not adequately speak the official language or might have cognitive difficulties in understanding written information. Also, relatives should be adequately informed.
8. **Testing** should take place wherever possible to significantly ease restrictions. It is essential that staff gets regularly tested. Additionally, testing persons entering the facility (e.g. relatives, therapist, social workers), in combination with face masks, would enable visits close to the usual setting. It should also be used to shorten the duration of quarantine to the minimum.
9. **Access to therapies** should also be upheld during the pandemic using adequate safety measures (e.g., tests, face masks, etc.) or by providing online alternatives. Resorting to remote therapy is only recommendable if the person concerned and therapist have already established a personal connection beforehand.
10. Facilities must uphold yard exercises and should ensure outdoor **activities**, such as walks or sports, wherever possible. To that end, it is recommendable to introduce a group system among persons concerned. Otherwise and/or additionally, the offer of indoor activities should be expanded (e.g. buying more books or board games), and online activities (e.g. training exercises or online courses) can be offered.
11. Due to the heightened risk of human rights violations, if additional restrictions are imposed and institutions are closed off during a pandemic, National Preventive Mechanisms should continue **monitoring** visits under safety provisions and consider the use of additional monitoring tools.
12. It is further recommended to focus on resources and look into good practices, lessons learned, and possible **positive side-effects** of the pandemic (e.g., the use of technology, easier and faster relaxation and longer leaves).

## ENDNOTES

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15 In Italy, 551 persons were in REMs (30 November 2020). At the same time, it is difficult to assess the number of people with psychosocial and intellectual disabilities in detention facilities since no official data is released. The old system hosted around 1.200 when it closed in 2007.
16 Of the federal states.
17 In Austria, 41 responses from persons concerned and 14 from relatives; in Germany, 22 responses from persons concerned and 7 from relatives.
18 In Austria, 10 interviews (3 lawyers, 4 facility management, 1 representative of the NPM, 2 representatives of extramural facilities) 1 focus group discussion with relatives (led by a relative); in Germany, 5 interviews (2 representatives of (extramural facilities) forensic aftercare, 1 lawyer, 1 relative and/ activist, 1 staff member/ therapeutic team); in Italy 3 experts, 2 prison staff in addition to the visits.
19 In Austria, 12 participants; in Germany, 6 participants in total.
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21 Sec 21 (1 and 2) Austrian Criminal Code.
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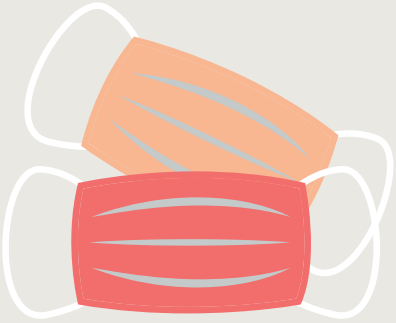

**Contact:**

**Ludwig Boltzmann Institute**
**of Fundamental and Human Rights**
Freyung 6, 1. Hof, Stiege II (Schottenstift)
1010 Vienna, Austria

**More information on the project is available here:**
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