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Dear Mr. Magazzeni,

As Chairman of the Austrian Ombudsman Board I would like to thank your institution for the kind invitation to provide a stakeholder submission in the framework of the UPR Review on Austria that is scheduled for January 2011.

Please find attached the submission that highlights several areas, but due to page constraints cannot offer a full and comprehensive picture of the human rights situation in Austria. For this reason an extended documentation on human rights cases of the Austrian Ombudsman Board is attached to this communication as well.

For further information please do not hesitate to contact Ms. Christine Stockhammer, Head of the International Unit of the Austrian Ombudsman Board (christine.stockhammer@volksanw.gv.at)

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P. Kostelka'.

Dr. Peter Kostelka

I. General Remarks

1. The Austrian Ombudsman Board (AOB) **welcomes the opportunity to provide input** for the UPR Review on Austria that is scheduled for 17 to 28 January 2011. The following remarks highlight several areas, but due to page constraints cannot offer a full and comprehensive picture of the human rights situation in Austria.
2. The **AOB monitors Austria's entire public administration** since 1977 by order of the Federal Constitution. It checks the legality of decisions by authorities and examines possible cases of maladministration in the public administration thus exercising public control to serve the rule of law and democracy. The AOB consists of three members who are elected by Parliament for a term of six years and can be re-elected once. The members are independent according to the Constitution. They cannot be voted out of office, recalled or divested of their office. The ombudspersons are sworn in by the Federal President.
3. As an administrative review body, the **AOB constantly has to deal with specific issues and considerations of fundamental rights**. In practice, administrative action can sometimes be classified as questionable from a constitutional point of view, in some cases even opposing fundamental rights. At the same time, administrative matters are generally considered to be not particularly sensitive regarding the respect of fundamental rights. This is the reason why the AOB traditionally provides a platform for an in-depth discussion on the status and effectiveness of fundamental rights at the international and national level. In recent years, the Ombudsman organized numerous events with respect to fundamental rights and dealt critically with national legislation and enforcement practice. This specific commitment is also reflected in the 'B' status accreditation that the AOB holds as an independent National Human Rights Institution.
4. Since 2001, the Austrian Ombudsman Board has been adding a **specific chapter on human rights to its annual reports**. This report section deals with legal problems relating to human rights that the AOB had to solve when assessing complaints about administrative misconduct and infringements of legal provisions by public authorities. Cases touching upon the fundamental constitutional requirements of the Federal Constitution are also considered as are complaints on the principle of equality, data protection and the right to respect for private and family life. Different aspects of discrimination, such as discrimination based on religion, nationality or ethnicity, are covered as well.
5. These general observations by the AOB are on **the agenda of the respective Parliamentary committee**, and form an important basis for further action. By compiling these human rights sections over the past couple of years, the AOB screened the fundamental rights situation in Austria and successfully illustrated that there was no legally regulated area of life that from the outset

can be examined separately from fundamental rights as administrative practice unfortunately sometimes suggests.

6. In taking these steps, the AOB aims to implement a **long-term strategy regarding administrative action and tradition** in Austria: Specific attention is paid to human rights aspects in the AOB investigative proceedings in order to enhance the knowledge and awareness of fundamental rights and related national judgments and rulings by the European Court of Justice and the European Court of Human Rights. In case that there is a margin of discretion for administrative authorities, which is related to human rights aspects, the AOB proactively demands that an appropriate administrative action be carried out.

7. This strategy is **based on long-lasting experience**: In an overwhelming majority of cases, the growing importance of fundamental rights and guarantees enshrined therein cannot be traced back to official procedures leading to amendments of the Austrian Constitution, but it is rooted in changes regarding the interpretation of fundamental rights related to norms and case law. Following these changes, the AOB is committed to broadening the application of fundamental rights in administrative practice to the greatest extent possible and, whenever this proves to be possible, supports an interpretation where the fundamental rights aspect of a norm has the strongest possible legal effect.

II. Specific Concerns

Racial discrimination – tight legal framework but problematic reality

8. **Legal protection against racial discrimination** has been enshrined in the Austrian Constitution for a long time. Despite a tight legal framework, xenophobic attitudes towards migrants and members of ethnic minorities are quite common among the population. In a 2007 report, Council of Europe Commissioner for Human Rights, Thomas Hammarberg, prompted Austria to develop comprehensive political measures against racist and xenophobic behavior aimed at all levels of society.

9. In a follow-up to this report, the **AOB thoroughly examined Austrian authorities with regard to the application of the provision that protects against racial discrimination** and gave recommendations to improve the protection against discrimination. The AOB *ex-officio* investigative proceedings were based on an Austrian NGO's campaign against racist and discriminatory job and housing advertisements in the media. In 2005 ZARA, an organization devoted to civil courage and anti-racism work, examined print and online media with respect to non-discrimination in job and housing advertisements. In only two weeks, more than 100 discriminatory advertisements were found, for example: "We are looking for a shop assistant in a shoe store. Only Austrian." Or "Apartment for rent. Only natives please".

10. The cases of racial discrimination were reported to the police, but ZARA was not a party in the following proceedings and therefore did not receive information from the authorities on the outcome of the charges. The AOB therefore started an *ex officio* investigation to find out how the authorities dealt with the charges and with alleged violations of the prohibition of discrimination. The case at hand is also a good example to demonstrate how the AOB and NGOs can coordinate their different tasks and responsibilities and how they can benefit from each other.

11. In the investigation, all proceedings instituted within the last one and a half years in respect of racial discrimination were examined. 112 files were thoroughly analyzed and compared. The comprehensive investigation showed that the **authorities did not follow a pattern in the application of the prohibition of discrimination**. Violations of the prohibition of discrimination were often considered as minor offences and, consequently, were not adequately prosecuted or penalized.

12. The AOB came to the conclusion that through these inconsistent and partly ineffective administrative actions Austria did not comply with its international, EC and national obligations in the fight against discrimination. Consequently, the members of the AOB officially declared this a case of maladministration and **advised the bodies of the Federal Government to make sure that an effective prohibition of discrimination would be uniformly implemented all over the country**. Furthermore, in compliance with the latest Austrian country report of the European Commission against Racism and Intolerance (ECRI), the AOB suggested that stronger protective measures against discrimination on the grounds of nationality be adopted and narrow interpretations of the definition of discrimination be strictly avoided.

13. As a response the Austrian Government as well as the Viennese Municipal Government took **action to enhance the protection against racial discrimination**. The AOB hopes that these measures ensure that a uniform and efficient protection against racial discrimination will be implemented nationwide. A change of public attitude and awareness cannot be expected until public authorities cease to consider violations of the prohibition of discrimination as “minor offences” and make sure that such offences are efficiently prosecuted and penalized. The AOB will continue to monitor this area in the future.

Minority rights – Bilingual place-name signs in Carinthia

14. One of the most pressing minority rights issues in which the AOB has been actively involved in the past couple of years concerns the question of **bilingual place-name signs in Carinthia, which has been unresolved for so many years**.

15. In 2005 the **Constitutional Court overturned a directive by the Carinthian Administrative District Authority Völkermarkt** as it was violating the law. The Court obliged local authorities to install bilingual place-name signs in the communities of Ebersdorf/Drveša vas and

Bleiburg/Pliberk. Both the then Governor of the State of Carinthia Jörg Haider and the current Governor Gerhard Dörfler announced that they wished to prevent bilingual place signs that had been deemed proper under the Constitution by the Constitutional Court. On 8 February 2006 the “displacement and reinstallation” of monolingual place-name signs was carried out in the presence and with the help of both officeholders.

16. Based on a complaint by the AOB to the Constitutional Court in 2006, the Court again overturned the directive issued by the Administrative District Authority Völkermarkt as violating the law, which had been the basis for this “place-name sign displacement”. The **obligation to install bilingual place-name signs, however, was still not complied with**. The subsequently issued directives by the local authorities for Ebersdorf/Drveša vas, Bleiburg/Pliberk and Schwabegg/Žvabek provided the place names in Slovenian only on additional signs beneath the monolingual place-name signs. Again, the Constitutional Court ruled in December 2007 that the installation of place names in Slovenian on additional signs violated the law. Despite these rulings, the additional signs in these municipalities were now “screwed into” the place-name signs.

17. The AOB initiated an official investigative proceeding in order to bring its misgivings to the attention of the Constitutional Court. In the opinion of the AOB, this form of signage does not comply with the principle, which can be derived from the law relative to ethnic/national groups and minorities, that German designations and designations in the language of the ethnic/national group and/or minority be coequal and not be used in a discriminatory way. Therefore, the **AOB again filed a complaint with the Constitutional Court** to overturn the respective directives of the local authorities.

Prohibition of torture – conditions in Austrian prisons

18. In 2008 and 2009 complaints were directed to the AOB concerning **conditions in Austrian prisons**, among them the Stein prison situated in Lower Austria in the city of Krems and the Garsten prison situated in Upper Austria near the city of Steyr.

19. The investigative proceeding that the AOB opened led to the result that some inmates had to share a cell designed as a single cell with a second inmate. In some of these cells, the **toilets are only separated from the rest of the room by a dividing wall and a curtain**. In November 2008, in the Stein prison 72 inmates had to live with at least one further person in a cell, which was originally designed for one single person and in which the toilet area was only separated from the rest of the cell by a wall and a curtain. In Garsten, 25 persons were being housed two inmates per cell, 19 were housed three inmates per multiple inmate cell and 12 were housed four inmates per multiple inmate cell, in which the toilet area was not properly separated.

20. Regarding the situation in Stein the **Federal Ministry of Justice** stated that double occupancy of cells designed as single cells occurred only in one wing of the Stein prison. As the Stein

prison is overcrowded and necessary renovation work is taking place at the same time, avoidance of double occupancy in cells designed as single cells is only possible once the refurbishment work is completed. The Federal Ministry of Justice stated that in Garsten a structural remodelling of the multiple inmate cells, in which the toilet area is separated from the main area of the cell only by way of a curtain is not possible in the short term, primarily for budgetary reasons.

21. Austrian regulations (namely the *Strafvollzugs-Gesetz 2009*) stipulate that **prison inmates are to be accommodated in rooms that are simply and functionally furnished**. The previously mentioned separation of toilet facilities clearly offers neither visual nor acoustic protection for inmates. In the opinion of the AOB, prisoners using these toilet facilities are unacceptably deprived of any possibility of retreat and suffer an invasion of their privacy. It is in this spirit that the AOB came to the conclusion that the accommodation previously described constituted a **case of maladministration**. Even if the AOB by no means wished to imply that prisoners were subjected to demeaning treatment, case law of the European Court of Human Rights should be referred to, which is based on minimum standards for prison conditions. This result of the AOB investigative proceeding is also in line with German court rulings on similar cases.

22. The federal **legislator responded to the criticism of the AOB** and amended the respective federal law, which now stipulates that “detention facilities have to have separate toilet facilities. Detention facilities, where more than one prisoner is to be accommodated, must have structurally separated toilet facilities.” The AOB will continue to monitor the application of this new legal obligation. Regarding the Garsten prison, the Federal Ministry stated that it was the long-term goal to equip all multiple inmate cells with a properly separated toilet area. The AOB was promised that renovation would begin in 2010.

Prohibition and prevention of torture – OPCAT implementation

23. The **Work Programme of the Austrian Federal Government** for the 24th Legislative Period foresees that the implementation of the UN Optional Protocol to the Convention against Torture (OPCAT) should be started “without delay”. In this document, the Federal Government also stipulates that in the future the AOB should act as the National Preventive Mechanism (NPM).

24. The **AOB explicitly welcomes the Federal Government’s Work Programme** and the preparation work that is currently underway to establish the necessary constitutional framework and the legal provisions that are necessary to comply with the OPCAT obligations. From the beginning, the AOB has supported the government’s efforts in this matter and it will continue to offer its cooperation within the limits of its mandate in order to **contribute to a successful and quick implementation**.

Austrian Ombudsman Board, Vienna, 12 July 2010