Report of the Austrian Ombudsman Board
(Volksanwaltschaft)

to the National Council (Nationalrat) and to the Federal Council (Bundesrat)

Covering the 2005 Calendar Year

(Abbreviated English Version)

Preface

The present volume is a very abbreviated version of the original report compiled in German and consists of a general section, which describes the activities of the three members of the Austrian Ombudsman Board. In the following some cases involving human rights shall be mentioned.

The Ombudsman Board decided to add a special chapter on human rights to the annual reports beginning with the report on the year 2001. In this context also the present report deals with legal problems relating to human rights which the Ombudsman Board had to solve in 2005 when assessing complaints about administrative misconduct and infringements of legal provisions by federal and state authorities. So throughout the years a comprehensive mosaic about the human rights situation in Austria shall be created.

This report is submitted not only to the National Council but also to the Federal Council in accordance with the amendment to Art. 148d of the Federal Constitutional dated 13/8/1997, Federal Law Gazette 1997/87.

Both the original report written in German and the English translation are available free of charge from the Office of the Austrian Ombudsman Board (*Volksanwaltschaft*).

Ombudsman Mag. Ewald Stadler
Ombudsman Rosemarie Bauer
Ombudsman Dr. Peter Kostelka

Vienna, April 2006

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1 Engagement and activity of the Austrian Ombudsman Board (AOB)

1.1 Development of activities

16 133 engagements led to 6 569 investigative proceedings.

The AOB was engaged in 16 133 cases in the 2005 calendar year. 10 796 of the grievances concerned the administration sector. Investigative proceedings were instigated in 6 569 cases. Official proceedings were not yet completed or else the complainants still had means of legal recourse (legal assistance) open to them in the remaining 4 227 cases of grievance (comp. Art. 148a of the Federal Constitution [*Bundes-Verfassungsgesetz*]). ***Ex officio*** proceedings were launched in 69 cases.

	2004	**2005**
Contacts	16 189	**16 133**
Administration (Federal & provincial administration)	10 745	**10 796**
Investigative proceedings	6 502	**6 569**
Federal administration	4 107	**4 044**
Provincial & district administration	2 395	**2 525**

Activities

Federal administration investigative proceedings

	Year 2004	Year 2005
Federal Chancellor´s Office	19	19
Federal Ministry of External Affairs	25	23
Federal Ministry of Education, Science and Culture	154	163
Federal Ministry of Finance	282	237
Federal Ministry of Health and Women's Affairs	321	399
Federal Ministry of Internal Affairs	338	330
Federal Ministry of Justice	987	883
Federal Ministry of National Defence	67	52
Federal Ministry of Agriculture, Forestry, the Environment and Water Management	190	223
Federal Ministry of Social Security, Generations and Consumer Protection	783	759
Federal Ministry of Transport, Innovation and Technology	513	482
Federal Minister of Economics and Labour	426	472

Federal administration total	4 105	4 042

Provincial and district administration total	2 397	2 525

File code	Investigative proceedings according to assignment area	2004	2005
	Assignment area of Ombudsman Dr. Peter Kostelka		
BKA	Chancellor	19	**19**
SV	Federal Minister of Social Security, Generations and Consumer Protection (Social Affairs area)	752	**706**
SV	Federal Minister of Health and Women's Affairs (health and accident insurance area)	292	**343**
SV	Federal Minister of Economics and Labour (Labour Exchange Office area)	211	**251**
JF	Federal Minister of Social Security, Generations and Consumer Protection (families area)	31	**53**
GU	Federal Minister of Health and Women's Affairs (health area)	29	**56**
V	Federal Minister of Transport, Innovation and Technology (transport area)	478	**446**
AA	Federal Minister of External Affairs	25	**23**
	Provincial and district administration	508	**567**
	Subtotal Ombudsman Dr. Peter Kostelka:	*2 347*	***2 464***
	Assignment area of Ombudsman Rosemarie Bauer		
FI	Federal Minister of Finance	282	**237**
LF	Federal Minister of Agriculture, Forestry, the Environment and Water Management (agriculture and forestry area)	175	**202**
U	Federal Minister of Agriculture, Forestry, the Environment and Water Management (environment area)	15	**21**
WF	Federal Minister of Education, Science and Culture (science area)	75	**95**
HWG	Flooding Act [*Hochwassergesetz*]	0	**0**
	Provincial and district administration	1 271	**1 221**
	Subtotal Ombudsman Rosemarie Bauer:	*1 818*	***1 776***
	Assignment area of Ombudsman Mag. Ewald Stadler		
WA	Federal Minister of Economics and Labour	215	**221**
WA	Federal Minister of Transport, Innovation and Technology (Federal roadways, patent affairs and road-tax sticker areas)	35	**36**
I	Federal Minister of Internal Affair	338	**330**
J	Federal Minister of Justice	987	**883**
LV	Federal Minister of National Defence	67	**52**
UK	Federal Minister of Education, Science and Culture (education area)	79	**68**
VORS	Chairman's scope of competence	0	**2**
	Provincial and district administration	616	**737**
	Subtotal Ombudsman Mag. Ewald Stadler:	*2 337*	***2 329***
Total		6 502	**6 569**

1.2 Completed cases

7 891 investigative proceedings concluded

A total of 7 891 investigative proceedings were concluded in the year under review. A **formal recommendation** was required in 10 especially grave cases, a **formal declaration of grievance** in 16 cases. In one case, the Ombudsman Board had to make an appeal against an ordinance.

Completed cases	2004	**2005**
Grievance justified / objection	877	**845**
Grievance unjustified / no objection	3 626	**3 499**
Grievance impermissible	844	**1 025**
Grievance withdrawn	589	**654**
AOB not competent	1 425	**1 682**
Not suitable for treatment in terms of business rules and regulations	193	**159**
Formal declaration of grievance	6	**16**
Formal declaration of grievance and Recommendation	21	**10**
Appeals of ordinance	0	**1**
Total completions	7 581	**7 891**

1.3 Contacts with citizens and authorities regarding investigative proceedings in 2005

Contacts with citizens and authorities	2004	**2005**
Appointment dates	251	**260**
Visits	1 984	**1 986**
Information service	8 831	**8 570**
Written correspondence with complainants	19 664	**19 556**
of which outgoing letters to complainants	9 247	**9 026**
incoming letters from complainants	10 417	**10 530**
Written correspondence with authorities	11 453	**10 149**
of which to certified executive organs and authorities	5 975	**5 228**
from certified executive organs and authorities	5 478	**4 921**

1.4 Information service

Apart from the appointment dates public office hours, people seeking advice and assistance could visit the Board's information service in person daily from 8:00 a.m. to 4:00 p.m. or contact the information service by telephone at the Vienna number 01/515 05 ext. 100.

toll-free service number

In addition, a toll-free service number (0800/223 223) with direct-dial option to all extensions was set up on September 14, 2001.

Of the total of 8 570 telephone and personal contacts with the information service, 4 227 regarded administration.

many civil-law problems

The AOB was not competent to deal with the remaining 4 343 cases, which concerned mainly civil-law problems among private individuals. The largest number of these problems regarded family-law problems, mainly in connection with divorces and the consequences of divorces such as maintenance, child custody and visiting rights regulations.

1.5 Participation of the Ombudsman Office in the processing of petitions and citizens' initiatives presented to the National Council. (Art. 148a paragraph 3 B-VG (Austrian Federal Constitution))

Within the reporting period, the Ombudsman Office received 6 submissions from citizens' initiatives and 24 petitions from the Committee on Petitions.

The Ombudsman Office delivered the following opinion on citizens' initiative No. 28 concerning the issue "The deaf and the hard of hearing demand equivalent service from the Austrian Broadcasting Corporation "ORF" - anyone who pays 100 per cent of the fees, must be entitled to a 100 per cent service":

The Ombudsman Office received a number of complaints regarding the lawfulness of collecting licence fees from deaf and hearing-impaired people. Both socio-political and constitutional concerns may be raised against the discontinuation of exemption of recipients of public assistance benefits from paying licence fees irrespective of their income as well as against the obligation of deaf and hearing-impaired persons (which is subject to this petition) to pay the full licence fees pursuant to the 2003 Finance Act, Federal Law Gazette I 71/2003:

According to the legal materials, the law was amended on 1.1.2004 to establish social equity. In this connection, the Ombudsman Office referred to the report, submitted by the Federal Minister for Social Security, Generations and Consumer Protection in February 2005, on the social situation 2003-2004, which described disabled persons as people facing persistent poverty. At present, approximately 8,000 totally deaf people live in Austria. Another 10,000 to 15,000 are hard of hearing or have become deaf to a degree where communication, even not with acoustic hearing aids, merely via the ear is hardly possible.

The obligation to pay fees, however, is not connected with the watching and listening to television programmes, but with the operativeness of television equipment at the viewer's home. Therefore, deaf or seriously hearing-impaired people have to pay, like all other owners of television equipment, the full licence fees if their net household income exceeds the amount fixed by law. This seems to give rise to concerns from an equality perspective, since ORF provides only insufficient access to its programmes to sense-impaired people. Still only few parts of the television programme can be consumed by hearing-impaired people and information not received recoverable via radio. Approximately equal and barrier-free access to television programmes would have to be provided by increasing the number of progammes with subtitles, a daily ZIB 1 programme in sign language etc. A criterion to be taken into account in this respect is the public law responsibility of the Austrian Broadcasting Corporation to guarantee compliance with the principles laid down in Section 1 paragraph 3 ORF-G (Federal Act on the Broadcasting Corporation). In this respect, the Ombudsman Office

makes express reference to Section 5 paragraph 3 ORF-G. This provision requires the corporation "to design the television information programmes (Section 3 paragraph 1) in conformity with technical developments and economic feasibility in such a way that they may be more easily followed by people who are deaf or whose hearing is impaired". *The status quo is that the percentage of deaf and hearing-impaired persons who are able to use the programmes is still very low. Nevertheless, they have to pay 100% of the television licence fees. This is discriminatory.*

These concerns were also raised by the Constitutional Court a few months ago which took the opportunity to institute proceedings to examine the legality of the relevant provision in the Fernmeldegebührenordnung (Annex to the Federal Act on Telecommunication Charges). In its decision of the 11th of June 2005, B 463/04-17, B 740/04-15 the Court confirms the opinion of the Ombudsman Office raising preliminary concerns from an equality perspective as to the duty of deaf or seriously hearing-impaired persons, who are unable to make full use of television programmes, to pay the full licence fees.

The situation of blind and visually impaired persons, from whom exemption from licence fees for television equipment has been withdrawn, is to be judged in a similar way, since only homes and associations for blind people have been granted exemption from paying licence fees.

*Article 7 paragraph 1 B-VG (Federal Constitution) provides equal treatment of handicapped and not handicapped people in all areas of daily life. No one shall be discriminated against because of his/her disability. Likewise, the Bundes-Behindertengleichstellungsgesetz (*Federal Act on Equal Treament of Disabled Persons *is meant to eliminate discrimination of disabled people enabling them to equally participate in society. This purpose must be observed also in the field of broadcasting.*

Therefore, the Ombudsman Office supports the calls of the "Interessengemeinschaft Sehen und Hören" (Community of interests Watching and Listening).

1.6 Evaluation of laws - Legislative suggestions by the Ombudsman Office

According to the existing practice, the Ombudsman Office took part in the evaluation of draft bills, including drafts of the following federal acts:

- Preparation of a federal draft act amending the 1994 Trade and Industry Code, the Act on Dangerous, Unhealthy and Noxious Establishments for boiler units and the Mining Act (Trade Law Amendment Act) (VA 6100/4-V/1/05)

- Preparation of a federal draft act amending the Social Insurance Act, the Commercial Social Insurance Act, the Farmers Social Insurance Act and the Civil-Servant Health and Employment Accident Insurance Act (2005 Social Insurance Amendment Act - SVÄG 2005) (VA 6100/5-V/1/05)

- Preparation of a federal draft act amending the Schools Organisation Act, the 1985 School Lessons Act, the 1985 Compulsory Education Act, the School Education Act, the Agricultural and Forestry Federal School Act, the 1983 Grants to School Pupils Act, the 1992 Student Support Act, the Federal School Inspectorate Act and the Act on the documentation of education (2nd School Reform Package 2005) (VA 6100/6-V/1/05)

- decision of the National Council of the 19th of October 2005 concerning a federal act adopting the Federal Act on the Establishment of the "Familie & Beruf Management GmbH" Corporation and amending the 1967 Family Relief Act (486/BNR) (VA 6100/7-V/1/05)

1.7 Events, symposia, seminars with the Ombudsman Office

1.7.1 General

The Ombudsman Office is enshrined in public consciousness as a grass-roots parliamentary control body. This is due to the fact that the institution was provided with full constitutional guarantees of independence and has provided low-key grievance control for everybody free of charge since 1977. Representative polls show that the Ombudsman Office as an administration controlling body is known to the great majority of the Austrian population and enjoys its confidence. As a consequence, further "ombudsman offices" with special areas of responsibility were created by federal and Land laws in order to preserve and secure the interests of certain groups of people and to provide information and support to them (including patients' ombudspersons, children's and youth's ombudspersons, wildlife ombudspersons, nursing standards law officers, care and equality ombudspersons, animal welfare ombudspersons etc.). Apart from that, there are other non-governmental bodies acting as insurance and newspaper ombudspersons, bank ombudspersons etc. which adds to the "ombudsman jungle" so that potential complainants will soon be unable to find their way through it.

The Ombudsman Office is interested in a good basis for dialogue and cooperation with those governmental control bodies and institutions under public law that are responsible for preserving certain public interests and confronted with similar problems and structural defects in their daily contact with people. The aim of contacts is therefore to exploit institutional synergies and, where appropriate, to launch joint initiatives.

In 2005, there were informal meetings with the following institutions:

- On 27.4. and 24.6.2005, upon invitation of the Ombudsman Office, the newly appointed animal welfare ombudspersons of the Federal Laender met at the Ombudsman Office. In cooperation with Univ. Prof. Dr. Bernhard Raschauer procedural issues of the Animal Welfare Act as well as the possibilities of a cooperation in this field were discussed in detail.

- A meeting of children's and youth's ombudsperson was scheduled for 27.9.2005 in Linz in which the discussion focused on the status of implementation of the UN Children's Rights Convention.

- In connection with the meeting of the working group of patients' ombudspersons taking place in St. Pölten on 18.11.2005, issues regarding the Patient Injury Compensation Fund and the 2005 Health Care Reform were discussed.

1.7.2 Interdisciplinary meeting on the status of unborn children at the Ombudsman Office on 19.12.2005.

On 19.12.2005, a meeting was held upon invitation of the competent ombudsman Mag. Ewald Stadler on the status of unborn children. The meeting was the result of a decision taken by the Ombudsman Office in which the compulsory excursion of children in the fourth grade of a lower secondary school to a Viennese abortion clinic, managed in accor-

dance with economic principles gave rise to complaint. This decision, for which Mag. Stadler is responsible, has triggered some positive reactions from the jurisprudence and was presented to an interested audience. The core of this decision is that, under present law, pregnancy interruption is illegal also within the first three months (Section 97 paragraph 1 StGB (Penal Code)) and that there is no "right to abortion".

In the course of this event questions on the beginning and the protection of life were discussed from a medical, legal, philosophical and theological perspective. Ombudsman Mag. Stadler managed to bring together recognised experts in these disciplines as lecturers: Univ.-Prof. Dr. Lukas Kenner (medicine, Vienna Medical University), deputy to the head of the Bioethics Commission of the Federal Chancellery, Univ.-Prof. Dr. Günther Pöltner (philosophy, University of Vienna) and Suffragan Bishop Univ.-Doz. Dr. Andreas Laun. An especially valuable contribution was made by the present doyen of the Austrian Civil Law, em. Univ.-Prof. Dr. Dr. h.c. mult. Franz Bydlinski who clarified the legal aspects of the subject under discussion. DI Claudia Brandhuber reported on the stunning experiences she made as a welfare worker committed to the protection of life.

The meeting was aimed at giving a description of the current discussion in the respective disciplines and at exchanging information and experiences between people working for the protection of unborn children, be it on a honorary or on a professional basis. Last but not least, the positive personal commitment of so many people, which in public discussion is unfortunately very often misrepresented, enjoyed great appreciation.

1.8 International contacts

International Ombudsman Institute

The Ombudsman Office has intensified its international activities. On the one hand, the number of European ombudsman facilities has strongly increased within the last ten years and therefore also the need for exchange of experiences and networking at an international level, on the other hand, the Ombudsman Office is a relatively "old" institution in Europe and therefore often addressed by "younger" institutions. The Ombudsman Office considers the fact that ombudsman Dr. Peter Kostelka was appointed vice-president of the International Ombudsman Institute and chairman of its European region (cf. **report 2004**, p. 27) as a sign of appreciation, since it also emphasizes its task to develop further the ombudsmanship as an additional parliamentary control body. The European region of the International Ombudsman Institute plays a key role. This is not only due to the fact that Europe has by far the largest number of members, but also because it is the first contact point for the Latin-American and South-American region. In particular, as regards training initiatives for employees of ombudsman institutions and human rights commissions in South America, experts from among the European members are high in demand.

European Ombudsman Institute

The Ombudsman Office will, of course, continue to be an active member of the European Ombudsman Institute based in Innsbruck. A variety of regional ombudsman offices form part of this association which offers a platform to its members. Due to an amendment of the articles of association in the autumn of 2005 the present focus of scholarly work is meant to be further deepened via the various ombudsman institutions.

The Ombudsman Office is convinced to be able to essentially contribute to developments at an international level. Such conviction is not only based on its (comparatively) long existence, but also on the expertise it has gained as provincial ombudsman office for seven federal provinces as well as on the experience it gained in the public relations field with the ORF programme "Ombudsman - Equal Rights for Everyone". The Ombudsman Board considers it to be necessary also from an institutional perspective to promote the exchange of thoughts and experiences and therefore to provide insight into how things are dealt with at an international level.

Ombudsman Conference in Vienna 2006

The Ombudsman Office expresses its gratitude in particular to the Austrian Parliament which has always welcomed and supported its international activities when dealing with its reports in committees and the plenary assembly. Thanks to this support it has become possible to organise a meeting of the European ombudsman institutions in Vienna from 11th to 13th June 2006. It will be the biggest event ever organised by the Ombudsman Office since staging the World Conference of the International Ombudsman Institute (IOI) in 1992.

Activities

Research project of the University of Vienna

Within the framework of this conference the first (preliminary) results of a comparative study of the University of Vienna (Univ.-Prof. Dr. Kucsko-Stadlmayer) on the European parliamentary ombudsman institutions will be presented. The study is supported by the Ombudsman Office. This research project will be completed in 2007 and is meant to form the basis for further discussions on legal aspects between the institutions in cooperation with the Ombudsman Office. The Ombudsman Office considers it as valuable support with respect to its efforts to provide assistance to younger ombudsman institutions in Central and Eastern Europe.

Council of Europe

In accordance with the recommendations and decisions of its organs (cf. Committee of Ministers: No. R (85) 13; Resolution (85) 8; No. R (97) 14; Resolution (97) 11; Resolution (99) 50; Parliamentary Assembly: Recommendation 1615 (2003); Congress of Local and Regional Authorities (CLRAE): Resolution 80 (1999); Recommendation 159 (2004); Resolution 191 (2004], on the establishment and tasks of ombudspersons in the member states and their role in the protection, spreading and further development of human rights, the **Council of Europe** organised the **9th round table meeting** (March 2005) **of the European Ombudsmen and the Commissioner for Human Rights of the Council of Europe** in Copenhagen. The discussions focused on the handling of convicts and the right to privacy.

Before and after this meeting the Ombudsman Office took part in a seminar and symposium staged on the occasion of the **50th anniversary of the Danish Ombudsman** (topic: The Ombudsman between Legislation, Administration and Citizen - The Development of the Ombudsman Concept").

European Union

On the basis of Article 5 of the rules governing the **Ombudsman of the European Union** (decisions of the European Parliament as of 9.3.1994 and 14.3.2002), according to which the ombudsman is supposed to look for possibilities of cooperation with the ombudspersons of the EU member states, insofar as it appears appropriate to him/her and provided that the rights of the complainants are better preserved, the Ombudsman of the European Union organised the **"5th Seminar for Ombudsmen of the EU member states"** in The Hague (September 2005). The discussion focused on the general topic “The Role of Ombudsmen and Similar Institutions in the Implementation of EU law". The possibilities of cooperation between the individual member states and the European Ombudsman and the European Commission, which receives a lot of complaints which do not fall within a specific jurisdiction or the handling of which would make the involvement of the national ombudsman institutions expedient or desirable, were subject of intense discussions. The majority of the participants took the view that an institutional integration would interfere with the independence of the (national) parliamentary ombudsman institutions.

UNDP

There are also plans to strengthen cooperation between the International Ombudsman Institute (IOI) European Region and the **United Nations Development Programme (UNDP)**. The latter organises international "round table" conferences on a periodical basis for ombudsman institutions in Eastern Europe and the Community of Independent States. On the basis of contacts between representatives of the UNDP and ombudsman Dr. Kostelka as vice-president of the IOI, letters on a possible cooperation were exchanged and the UNDP invited the Ombudsman Office to take part in the **"6th UNDP International Round Table Conference**" (November 2005), where employees of the Ombudsman Office as international experts had to draw up working documents and give speeches on the following topics: "Discrimination - the role of the Ombudsman" and the "Relationship between Ombudsman and Jurisdiction".

EUNOMIA

In connection with the **EUNOMIA programme** of the Greek Ombudsman Institution, implemented in cooperation with the Council of Europe, experts were invited to Lemos-Prespa (June 2005) to take part in the **"Capacity-Building Seminar for Southeast European Ombudsman Institutions"** to give speeches on the "Handling of Environmental Cases by the Ombudsman". In this seminar ombudspersons and employees of ombudsman institutions from Greece, Albania, Macedonia, Bosnia-Herzegovina, Kosovo, Montenegro, Voivodina, Catalonia and Austria as well as representatives of NGOs worked out possibilities of addressing and examining environmental issues (complaints) on the basis of actual cases. The Ombudsman Office welcomes such international case studies, since they provide the possibility to compare working methods and point out differences and commonalities alike.

Visits to the Ombudsman Office

On the occasion of his visit in Austria (February 2005), the **Ombudsman of the Czech Republic** was particularly interested in discussing with his Austrian colleagues issues regarding the drawing up of reports, their submission to Parliament and the actions taken there on the basis of these reports. Other issues included the organisation of office days of the Ombudsman Office in the Laender as well as the implementation of the EU discrimination directives in Austria.

During a visit to Vienna (June 2005), the Ombudsman Office and the **Ombudsman of the Slovak Republic** agreed to cooperate more closely in the future, which is facilitated by the geographical closeness. Two employees of the Slovak Ombudsman paid a study visit of several days to the Ombudsman Office (October 2005) and there are plans to send employees of the Ombudsman Office to the Slovak Ombudsman Office. It is planned to make such exchange of officers possible also in the future.

Activities

When visiting Vienna (May 2005), the **Ombudsman of the Republic of Poland** gave a speech on his experiences, in particular in connection with his assignment to (judicially) assert citizens' rights.

The Ombudsman Office was pleased to welcome the (newly appointed) **Ombudsman of Catalonia** (June 2005).

The Ombudsman Office would like to express its gratitude to its colleagues for taking part in a discussion with the lecturers from the Ombudsman Office.

A **delegation** of staff members from the **Ministry of Public Administration and Local Self Government** of the **Republic of Serbia** visited, within the framework of a programme of the European Agency for Reconstruction (EAR), the Ombudsman Office in April 2005 and brought the draft of an act on the establishment of an ombudsman institution in the Republic of Serbia up for discussion.

Visits by the Ombudsman Office

In autumn 2005, the Ombudsman Office followed an invitation of the **Ombudsman of Albania** to a working meeting. Apart from the exchange of views at an institutional level, there was the opportunity to discuss the working methods of extrajudicial control bodies.

Upon invitation of the **Ombudsman of South Tyrol** (October 2005) ombudsman Dr. Kostelka gave a speech on the topic "Ombudsman Offices in Europe" and focused, in particular, on questions concerning the establishment of "special ombudsmen". He also followed an invitation of the **Catalan Ombudsman** and gave a speech on the topic "Ombudsman and Federalism" on the occasion of the 20th anniversary of the Catalan Ombudsman Institution.

1.9 Public Relations Work

Since 1996, the Ombudsman Board has maintained a Website containing comprehensive information about its activities at http://www.volksanwaltschaft.gv.at. In April 2000, the Ombudsman Board began publishing its reports to legislative bodies on the Website, including those dating back to 1998.

In 2005, 189,000 visitors logged a total of 795,000 hits on the Ombudsman Board's Website.

The following Websites received the most hits:

"The Ombudsmen"	18,406 Hits
"Function and Responsibilities"	12,132 Hits
"Appointment dates"	16,370 Hits
"Reports"	7,996 Hits

The visitors came from the following countries:

Austria	643 601 Hits
Germany	64 057 Hits
USA	26 962 Hits
Sweden	23 377 Hits
Switzerland	4 395 Hits
Japan	3 047 Hits
Hungary	2 253 Hits
Poland	2 218 Hits
United Kingdom	2 104 Hits
France	1 974 Hits

Since April 1, 1997, the Ombudsman Board has held the following email address:

post@volksanwaltschaft.gv.at

Complaints may be submitted through an online form. 1,657 visitors submitted a complaint using the online form, while 792 sent an e-mail directly to the Ombudsman Board.

Activities

The Ombudsman – Equal Protection for All under the Law

The ORF (Austrian Broadcasting Company) reinstated its series “The Ombudsman – Equal Protection for All under the Law” in January 2002. The show, in which the Ombudsmen discuss particularly noteworthy cases, immediately garnered a very positive response despite a slot in the broadcast schedule on Saturdays at 5:45 pm that typically has small audiences.

The 41 broadcasts in 2005 achieved an average market share of 33.5 percent (compared to 36,5 percent in 2004) with an average audience of 420,000 viewers (compared to 464,000 viewers in 2004). Thus, published television ratings show that the series counts among the most-watched shows on ORF 2 on Saturdays, even in households with cable or satellite service.

Period: January 1, 2005 – December 31, 2005

Annual Ratings			
Target Group	Average Gross Rating Points in %	Average Gross Rating Points in Thousands	Market Share in %
Adults aged 12+	6.1	420	33.5

Source: Teletest: Austria (all households)

2 Fundamental Rights Section

2.1 Introduction

While the human rights system has been characterised since the end of the Second World War by the efforts to create human rights standards, we are now increasingly facing the challenge of driving their implementation forward effectively, of improving cooperation and our reaction to reports of international control bodies and of promoting human rights education.

The free "right of complaint" and the fact that administrative authorities must justify their actions vis-à-vis an independent controlling body enables the Ombudsman Office to enter into a dialogue with them in matters involving fundamental rights. Only if administrative authorities are forced to justify their actions on a regular basis in the light of the postulate of human rights, they will take the second step and be not only reactive, but proactive as far as fundamental rights are concerned. In 2006 the Ombudsman Office will submit to Parliament for the fourth time a "fundamental rights part" in which examination procedures involving human rights are given special attention to.

Since the network of international law, community law and national instruments for the control and overcoming of discrimination is becoming tighter and tighter, examination procedures conducted in 2005 that are worth discussing under special aspects will be outlined separately in this part of the report. Examinations are to be extended by cooperation with NGOs which can provide rich illustrative material. The main goals of the action programme of the EU and the Council of Europe for combating discrimination are to make the fighting against racism a central task of European policy and to encourage the building of a partnership between the European institutions and all national key players, both at the governmental and at the non-governmental level. The Ombudsman Office welcomes such initiatives for several reasons:

The discrimination directives of the EU oblige the member states to ensure that all persons who consider their rights as being infringed by the non-application of the principle of equality can assert their rights. Apart from the courts which have jurisdiction in the case of judicial proceedings, Article 13 of the "Directive on Racism" provides the establishment of one or more independent authorities which are to receive complaints, carry out procedures, give recommendations, carry out research on discrimination and perform proactive public rela-

tions work. Article 13 of the Directive on Racism expressly refers to the fact these authorities may be part of an independent institution which has jurisdiction in matters concerning the protection of human rights and the rights of individuals at the national level. From this perspective it becomes obvious that the Ombudsman Office as a national ombudsman institution has to provide for a recognised, independent, free and low-key contact point for victims of discrimination and that it has furthermore to ensure that any "discrimination not based on objective grounds" by organs of the executive itself or by its refusal to effectively combat such discrimination with all means available is to be seen as maladministration for the purposes of Article 148 a B-VG.

Efforts to get a better understanding of questions of discrimination merely on the basis of the relevant EU directives and their implementation at the national level appear to be very difficult due to the high complexity of the matter also from a legal point of view. On the one hand, there is no case law of the bodies controlling compliance with the norms of the ECHR - as in the case of discrimination on account of age or in the case of positive measures for the promotion of social or professional integration of disabled persons where Article 14 ECHR does not apply. On the other hand, prohibited indirect discrimination, in most cases, only emerges through opinions from other research disciplines, significant statistical data etc. and has to be supported separately.

The Additional Protocol No. 12 was added to the ECHR to extend the scope of protection against discrimination and opened for signature on the 4th of November 2000. Article 1 paragraph 2 of the 12th Additional Protocol sets forth a general, comprehensive rule of equal treatment to be observed by public authorities (including law courts, legislation and public administration). Only upon ratification of this Additional Protocol, violations in Austria could be reported to the national courts and, if necessary, to the European Court of Human Rights in Strasbourg as violation of constitutional rights. Austria has signed this Additional Protocol, but not yet ratified it.

Apart from that, international cooperations of the EU and the Council of Europe with European ombudsman institutions show that the protection against discrimination, which is provided by an independent Parliament and could be strengthened in the future, is an important element. For approximately fifty years the United Nations Development Programme has entered into partnerships with governments, control bodies and people in more than 170 countries to find out which practical skills they need to pass on the knowledge available

there to other people. The UNDP Center in Bratislava has approached the Ombudsman Office as head office of the IOI Europe and has expressed its wish and shown interest in a long-term transfer of know-how in cooperation with ombudsman institutions in the CIS states. Ombudsman Dr. Kostelka and a staff member of the Ombudsman Office have laid the foundation for a trustful dialogue at the "VI. UNDP International Roundtable for Ombudsman Institutions in Eastern Europe and the Commonwealth of Independent States", scheduled for November 2005 in Prague, by the "Guideline – how to handle cases in discrimination" on the one hand and by their presentations on the other hand.

The Ombudsman Office, however, is just at the beginning of facing challenges for which it needs the goodwill and the support of the National Council and the Federal Council from an organisational and budgetary perspective.

2.2 The Ombudsman Office has encouraged the drawing up of a documentation of all treaties not yet ratified by Austria which involve human rights.

According to Article 50 B-VG, treaties amending laws or the Constitution may only be concluded with the approval of the National Council, and in specific cases additionally with the approval of the Federal Council. Pursuant to the provisions of the Federal Ministries Act, government bills are drawn up, as a rule, before parliamentary proceedings and the subsequent adoption of a resolution by that department which is competent ratione materiae.

The Ombudsman Office takes the view that this legal situation is basically expedient, because it ensures that the legal experts of the respective department are in charge of preparing the bill. It should be added in this connection that any treaty, at least potentially, involves fundamental rights, because fundamental and human rights, which (must) apply in all areas of a legal system, form a cross-section subject matter. Against this background, the lack of a central documentation of treaties which involve fundamental rights and which the Republic of Austria has not (yet) ratified must be seen as a grievous loophole from the point of view of judicial policy, since it prevents members of Parliament from getting a picture of which treaties have been signed by the Republic of Austria which involve human rights. Furthermore, the expertise of the competent departments of the federal ministries is not as high as that of the Federal offices specialising in monitoring observance of fundamental rights, so that there is the danger that the fundamental rights aspects of treaties, the signing and ratification of which are under discussion, are not taken into account appropriately.

Therefore, the Ombudsman Office suggests creating a central documentation, either in the Legal Service of the Federal Chancellery or in the Foreign Ministry, of all treaties involving fundamental rights which have not (yet) been ratified by the Republic of Austria.

2.3 Fundamental requirements of constitutional democracy in the Federal Constitution (Articles 18 and 129 ff. B-VG)

2.3.1 Obligation to pay the costs in administrative proceedings despite legal aid (VA S/79-SOZ/05; BD/450-SV/05)

Pursuant to Sections 47ff. VwGG (Administrative Court Act) (VwGH) in connection with Section 1 paragraph 2 of the VwGH-Aufwandersatzverordnung 2003 (Decree of the Federal Chancellor concerning the lump-sum determination of amounts to be reimbursed in respect of expenses incurred in proceedings before the VwGH), people seeking legal protection have to reimburse expenses to the authority succeeding in the proceedings before the VwGH in the amount of € 381.90 or - in the case of a hearing before the VwGH - in the amount of € 794.90, although they have been granted legal aid by the VwGH. The result is that people threatened by poverty waive the right to enforce their claims before the VwGH, exclusively because, although having been granted legal aid, they cannot afford to take the cost risk to be borne by them alone.

The Ombudsman Office has expressly pointed out in detail in the fundamental rights part, in its **27th report (p. 259 et seqq.) to the National Council and the Federal Council**, that the imposition on citizens seeking legal protection and threatened by poverty of a duty of reimbursement in the case of dismissal of their complaints which, despite the granting of legal aid, the VwGH had not considered as unpromising, would represent an unreasonable financial burden to them. The legal situation criticised then by the Ombudsman Office has not only not improved over the past years from the perspective of the people concerned, but deteriorated insofar as the expenses to be reimbursed to the successful authority for the advance of the costs of the proceedings have been raised sharply from € 41.00 to €51.50, those for pleadings from € 291.00 to € 330.40 and those for judicial hearings from € 378.00 to € 413.00.

On the basis that legislation has to provide sufficient legal protection (cf. VfSlg. 14.702/1996) the Ombudsman Office maintains its view, in particular in relation to decision of the Constitutional Court of 15.12.2005, B 266/04, according to which the legislator exceeds "the discretion conferred upon him by the Constitution, if a charging system makes

access to legal protection unreasonably difficult and thereby compromises its actual effectiveness", that it is not compatible with the rule of law of the Constitution, if the legal protection devices required under the Constitution, which according to the grounded case law of the Constitutional Court (VfSlg. 11.196/1986) must have a minimum of actual effectiveness for the individual seeking legal protection", can, as a matter of fact, only be exploited by people earning a certain amount of money of disposing of certain assets.

Therefore, the Ombudsman Office suggests anew amending Section 61 VwGG to the extent that the granting of legal aid encompasses also the right to claim compensation for the expenses to which the successful authority is entitled. An alternative would be to amend Section 48 paragraph 2 VwGG to the extent that the claims granted to the authority under this provision are not adjudged to it in case legal aid has been granted.

2.4 Right to a Fair Trial (Article 6 ECHR)

2.4.1 Unreasonable procedure

The Ombudsman Office has pointed out in the fundamental rights part of the **27th and 28th reports to the National Council and the Federal Council** (p. 263 et seqq. and p. 304 et seq.) that a large part of the complaints that the Ombudsman Office considered as founded concern delays of proceedings. The Ombudsman Office has outlined in the 27th report to the National Council and the Federal Council that limits to the admissible duration of administrative proceedings can be deducted from both the rule of law laid down in the Constitution and Article 6 ECHR which of course applies only to civil rights and criminal proceedings.

Also in the previous year the Ombudsman Office has observed on various occasions that the danger of erosion of the rule of law through denial of justice with respect to applications within a reasonable period of time poses a big state organisational problem throughout the whole administration. The following individual cases are intended to illustrate this situation:

2.4.2 Imposition of fees after 6 or 8 ¼ years (VA BD/152-V/05)

In connection with the imposition of fees on two occasions Mr. A. turned to the Ombudsman Office. The complainant submitted the provisional rulings of Austro Control of 21.3.2005 to the Ombudsman Office with which fees in the amount of € 526.73 and fees in the amount of € 492.20 were imposed upon him on 17.12.1966 and 6.4.1999, respectively, for the verification of a specified aircraft.

In its more recent case law the Constitutional Court takes the general view that the principle that "the legal system must provide adequate and efficient legal protection" (sic! VfSlg. 14.702/1996) can be deducted from the rule of law principle. The purpose of legal protection devices required under constitutional law "is to provide a certain minimum of actual efficiency to persons seeking legal protection" (cf. VfSlg. 11.196/1986, 16.772/2002 and many more).

In its case law the Constitutional Court has not ruled yet on the requirements to be deducted from the rule of law regarding the duration of administrative proceedings. In the context of the above-mentioned case law there is no doubt that also in the light of the actual efficiency of legal protection required under the rule of law and aiming at preserving and guaranteeing a factual position, the admissible duration of administrative proceedings is subject to constitutional limits:

If, for constitutional reasons, it is not justifiable to charge a complainant generally with all consequences of a potentially illegal administrative decision until the complaint has been finally disposed of, it can even less be justified to delay the completion of administrative proceedings over years thereby completely negating the principle of legal certainty, which emanates from the rule of law principle, at the law application level.

It should therefore be noted that the requirement of factual efficiency of legal protection under the rule of law encompasses a claim to discharge a legal remedy within a reasonable period. The reasonableness of the length of proceedings is therefore to be assessed also from a rule of law perspective according to the circumstances of the individual case. In this connection, the actual and legal complexity of the respective case, the conduct of the complainant and the authority in the proceedings as well as the importance of the matter for the party are to be taken into consideration. Legislation is obliged to create an authority structure which is able to guarantee the completion of administrative proceedings within a reasonable time. An authority may therefore never justify unreasonable procedures irrespec-

tive of the reasons that may have caused such delay (labour shortage, organisational changes, shift of competences, unexpected case load etc.).

In view of these principles, the present **complaint** appears to the Ombudsman Office to be clearly **lawful**, since a period of 6 or even 8 ¼ years between the verification of an aircraft and the imposition of the fees provided for such measure can by no means be justified.

2.4.3 Further cases of unreasonable procedure

In the proceedings VA BD/204-V/05 an administrative decision of the Independent Administrative Tribunal in Vienna of 18.5.2005 was submitted to the Ombudsman Office which dismissed a complaint lodged on 18.6.1997.

The Ombudsman Office considered the **complaint** to be **justified**, because it found the fact that the Vienna Independent Administrative Tribunal required almost 8 years to adjudge the inadmissibility of a complaint absurd.

In the proceedings VA BD/469-V/04 the Ombudsman Office has observed that the Governor of Upper Austria had failed to decide on two appeals lodged in a transport matter against decisions of the district administrative authority in Gmunden of 16.7.2003 within 18 months. It was the same case with a decision of the district administrative authority in Gmunden on an application for the restoration of the original legal position of the complainant who had lodged this application on 16.7.2003.

The Ombudsman Office managed to have both appeals and the application for the restoration of the original position discharged by the competent authorities. The **complaint** turned out to be **justified**, because the Ombudsman Office could not find in the proceedings before it any grounds for the justification of proceedings lasting longer than 1 ½ or even 1 ¾ years.

2.4.4 Court proceedings (VA BD/157-J/05, BMJ-A960.116/0002-Pr7/2005)

In February 2005 N.N. lodged a complaint with respect to the long duration of maintenance proceedings regarding her son Florian and her daughter Katrin. In the case of her minor son Florian, an application for raising the child's maintenance dating back to 2001 was still pending. As to Katrin, such application had been lodged in July 2004 which was still pending. Both cases were pending at the district court Ybbs.

The Ombudsman Office has established that the application for raising the maintenance contributions for the minor son Florian, represented by the youth welfare agency, was re-

ceived at court on the 19th of December 2000. The applicant's father was heard via judicial assistance by the district court Liesing and asked for separate summons by the district court Ybbs for purposes of clarifying his level of income. On the 12th of March, the adjudicatory officer requested information about the father's income from his employer and requested the father in writing to submit income tax returns and decisions. The applicant's father asked by telephone for an extension of the set term so that the file was scheduled for the 1st of May 2001. Lateron, the file was rescheduled for the 10th of June 2001. On the 2nd of November 2001 a request for transfer of files was received which was complied with by court order of 11th of July 2002. At the same time, the applicant was requested to give his opinion on the results of the investigation, which was received on the 5th of August 2002. Lateron, the file was not kept up-to-date. Consequently, the district court Ybbs stopped investigations in the matter. Only on the 16th of February 2005 - after 2 ½ years of deadlock - the next step was taken, namely requesting the employer of the applicant's father to provide information about the father's income level.

The application for raising the maintenance for the minor daughter Katrin, represented by the youth welfare agency, was received at court on the 27th of July 2004. The applicant's father lived in Germany and had to be heard via judicial assistance. The letter rogatory was received for dispatch by the court office only on the 27th of January 2005 and dispatched on the 31st of January 2005.

The Federal Minister for Justice justified in its position statement "the regrettable delays in both proceedings" with the excessive work of the competent adjudicatory officer, who is highly committed to her work and performs her work accurately and conscientiously, but also works for another district court and is not present at the district court Ybbs every day.

In the present case, there has been a factual deadlock in the proceedings before the district court Ybbs of half a year, i.e. from the receipt of the application for raising the maintenance contributions for the minor daughter Katrin on the 27th of July 2004 to the dispatch of the letter rogatory on the 31st of January 2005.

In the other proceedings concerning the application for raising the maintenance contributions for the minor son Florian there has been a factual deadlock of more than half a year lasting from the receipt of the application on the 19th of December 2000, the father's request for extension of deadline to the presentation of documents and scheduling of the file for the 1st of May 2001 and then for the 10th of June 2001 to the receipt of the request for transfer

of files of the youth welfare agency on the 2nd of November 2001. Then, a court order was issued, which complied with the request of the youth welfare agency, only on the 11th of July 2002, meaning a further deadlock of more than 8 months. After the 5th of August 2002 the file was not kept up-to-date for a period of 2 ½ years.

Only after the Ombudsman Office had started examination proceedings, supervisory measures were taken to accelerate the completion of both proceedings. If the excessive work of the adjudicatory officer is given as reason for the serious deadlocks in both proceedings, the supervisory organs are to be blamed for not having redressed this grievance a long time ago. According to the Ombudsman Office the multiple deadlocks in two proceedings of the district court Ybbs were due to a violation of the duty of care by the competent authorities which might have serious consequences and therefore reflect a **grievance** in the administration of justice (VA BD/157-J/05).

2.5 Lawful judge (Article 83 paragraph 2 B-VG)

2.5.1 Asylum procedure lasting more than 23 years (VA BD/263-I/04, BMI 71.095/33-III/5/05)

In 1982, a Turkish citizen filed an application for asylum. The security services for the federal province Vorarlberg dismissed the application in 1983. The Ministry of the Interior decided upon the appeal against this decision of the security services in 1993. After the decision had been overruled by the Administrative Court it took the Ministry of the Interior another 2 years to decide upon the case. After new court proceedings before the Administrative Court, the Independent Federal Asylum Tribunal (UBAS) assumed jurisdiction in the case at the beginning of 1998. It overruled the decision of the security services for the province in 2003 and referred the case back to the Independent Federal Asylum Office. The Federal Minister for the Interior successfully appealed against this decision. Thus, the UBAS had to decide the case. It finally allowed the application for asylum in October 2005.

Section 73 AVG (General Administrative Procedure Act) sets forth the obligation to hand down a decision. Applications made by parties and appeals must be decided without unnecessary delay, not later, however, than six months after the date they had been received. Apart from the fact that the Federal Ministry of the Interior could not give any plausible explanation for the long duration of the first appellate proceedings (10 years), reference to excessive workload of the authority cannot release the authority from its obligation to hand down a decision nor exclude any fault for the purposes of Section 73 paragraph 2 AVG (VwSlg. 5155 A/1959, VwGH 18.4.1979 2877/78 et.al.).

Apart from this provision at the ordinary law level, which lays down a right to demand the processing of an application in the form of an (appealable) administrative decision, it must be pointed to Article 83 paragraph 2 B-VG which provides the entitlement to a lawful judge. The Constitutional Court considers the term "judge" to mean any state authority, i.e. also administrative authorities (for the first time in VfSlg. 1443/1932). According to the case law of the Constitutional Court, the entitlement to a lawful judge is violated by a decision of an administrative authority if the authority claims jurisdiction in a matter that is conferred by law to another authority or if it declines its jurisdiction in an unlawful manner and therefore denies a decision on the merits (VfSlg. 14.590/1996 et.al.). In the present case the Federal Ministry of the Interior failed to hand down an appealable decision. Consequently, the complainant could not enforce his legitimate interests via an appeal (complaint to the supreme courts).

It should be mentioned in this connection that after the complaint had been allowed and the administrative decision reversed by the Administrative Court, the proceedings before the Federal Ministry of the Interior had "only" lasted 1 ½ years. The complainant, however, was forced to lodge a complaint regarding undue delay of proceedings to the Administrative Court before this decision. It remains unclear to what extent this complaint has motivated the appellate authority to hand down a decision.

The Ombudsman Office ascertained that an overall duration of almost 23 years of the asylum procedure is absolutely unacceptable. While these proceedings were characterised by several proceedings before the Administrative Court, the most serious delays are imputable to the Federal Ministry of the Interior as appellate authority.

After the case had been referred back to the UBAS by the Administrative Court, the proceedings were pending 4 ½ years before this authority. When taking up its business in 1998, the UBAS, however, had inherited a great number of "burdens" and was forced to clear the backlog first. Due to the extreme length of the earlier proceedings, the submissions of the Federal Minister for the Interior in his official appeal, according to which the UBAS "contrary to *[its] obligation to conduct proceedings efficiently had failed to make inquiries in the matter" and "such duration of proceedings […] could only be considered as 'denial of justice'*", are not comprehensible in view of the procedural delays in its own sphere.

2.6 Principle of Equal Treatment (Article 7 B-VG, Article 2 Basic Law "StGG")

2.6.1 Execution

2.6.1.1 Dismissal of applications for exemption from license fees without giving substantial reasons (VA BD/123-V/04, 305-V/04, 76-V/05 et.al.)

Applications for exemption from licence fees for broadcasting reception equipment are regularly dismissed by 'GIS via administrative decision stating without further reasons that the ascertained household income exceeds the amount limit under which exemption would be granted.

According to the settled case law of the Constitutional Court an administrative decision is defective on a constitutional level if it is based on statements which have no value as supporting reasons (cf. VfSlg. 16.334/2001, 16.439/2002 und 16.607/2002). Such administrative decision violates the constitutional right of equality of all citizens before the law.

As outlined in the **28th report of the Ombudsman Office to the National Council and the Federal Council** (p. 323 et seq.), the decisions of the GIS deny any claims based on the fact that statutory requirements are not met, whereby it remains unclear on which determinations of fact the decisions of GIS are based. The Constitutional Court considers such pseudo-reasons as violation of the right of all citizens to be equal before the law.

In its **recommendation** of 9.7.2004 the Ombudsman Office established that the outlined practice of GIS forms an administrative **grievance**. At the same time, the Ombudsman Office **recommended** to the Federal Ministry of Finance to provide that GIS changes the way it reasons decisions to the extent that both the statutory requirements of Section 58 paragraph 2 and Section 60 AVG of 1991 and those emanating, according to the Constitutional Court, from the constitutional right of all citizens to be equal before the law are observed.

Although the Federal Ministry of Finance has guaranteed in its letter of 7.9.2004 to implement this recommendation, GIS has not been able, by the editorial deadline of this report, to include a reasoning in those decisions which do not fully make allowance for the point of view of the party that complies with the provisions of the AVG and the requirements of the principle of equality. Repeated requests of the Ombudsman Office to the Federal Ministry of Finance concerning the progress made regarding the necessary adaptation of the EDP

system have remained unanswered since February 2005 despite several queries (!) which itself represents a (further) administrative **grievance**.

Since the execution of laws and court rulings of supreme courts must not depend on fiscal considerations and since the unconstitutional state of affairs, described above, has not ceased for more than 1 ½ years after the said **recommendation** of the Ombudsman Office, the latter will continue, with all instruments available, to urge GIS to perform its sovereign tasks in conformity with the Constitution and the relevant laws.

2.6.1.2 Lack of determining transitional periods in the change of curricula - Vienna Medical University (VA BD/10-WF/05, BMBWK-10.355/0021-III/4a/2005)

Mr. N.N. addressed the Ombudsman Office stating that he and a group of another 50 students had begun to study dentistry at the Vienna Medical University prior to the coming into force of the new curriculum for the diploma course in dentistry in 2002 (N 202) and completed the first course under the curriculum applicable until then (N 201).

In the course of this amendment to the curriculum in 2002 there had been changes in the structure of the course and serious changes in the teaching and exam methods.

There had been further amendments to the curriculum in 2003 and 2004.

Nevertheless, none of the amendments had provided transitional periods for those students who had begun their studies under the "old" curriculum.

The Vienna Medical University had informed about the fact that certain courses and exams of the second and third course would be "offered" only until a specified deadline date.

According to the affected students this deadline would be too short to be able to complete the second course in time.

If, however, the course was not completed in time, the result for the affected students would be that, due to the automatic integration of the affected students into the new curriculum, all exams they had taken so far including the completion of the first course would not be credited for the further course of their studies.

In this connection, the Ombudsman Office opened a review procedure in the course of which the information given by the student turned out to be correct.

In the course of the review procedure there were discussions between the Vienna Medical University and representatives of the students.

In the course of these discussions it was agreed to extend the period available for taking the exams accordingly, thus enabling the affected students to take the remaining exams in time without being integrated into the new curriculum. The university referred to these extended deadlines as "concession".

The grievance in question was in effective terms removed, but the complainant, however, did not seem to be pleased to depend on the university's "concession" with respect to the determination of adequate transitional periods.

The Vienna Medical University, on the other hand, took the view that legislation did not provide for a transitional period in the said cases and that the provision for such period with respect to the changes in the curriculum was not required by law.

According to the Ombudsman Office the legal situation was as follows:

1. Pursuant to Section 80 paragraph 2 (and Section 80a paragraph 2) UniStG (University Studies Act) students who had begun their studies before the coming into force of the curricula pursuant to this federal act, were entitled, from the coming into force of the respective curriculum pursuant to this federal act, to complete each of the individual courses which they had not yet completed by the coming into force of the new curriculum within a period corresponding to the duration of studies provided by law plus one semester.

   Section 124 paragraph 1 of the Universities Act (applicable in this area) in force since 1st of January 2004 provides that the respective curricula, as amended by the 1st of October 2003, shall be further applicable to the diploma courses introduced at the universities on the 1st of October 2003. Furthermore, this provision sets forth that these curricula may be amended. Sections 80 and 80a UniStG shall "apply mutatis mutandis".

   Should existing courses be replaced by baccalaureate, master or doctorate courses pursuant to Section 54 paragraph 1 of the Universities Act, the respective curricula shall

provide for transitional provisions analogous to Section 80 paragraph 2 and Section 80a paragraph 2 UniStG.

2. These provisions were interpreted by the Vienna Medical University and the Federal Ministry for Education, Science and Culture to mean that a transitional period expressly provided by law and/or the express legal duty to integrate such transitional periods into the curricula applies only to such new curricula which had been introduced from the commencement of the respective curriculum according to the University Studies Act (Section 80 paragraph 2 and Section 80a paragraph. 2 UniStG) and/or which had replaced existing courses pursuant to Section 54 paragraph 1 Universities Act.

   According to the university the (old) curriculum N 201 had been introduced on the basis of the University Studies Act and later amended.

   According to the Vienna Medical University and the inspectorate a "mere" change in this curriculum legislation had not provided explicitly for a transitional period for students falling under the old curriculum N 201, nor had an explicit obligation been established, to include, in view of the "mere" change in such curriculum, adequate transitional provisions in the curriculum.

   If not provided otherwise in the respective curriculum, any change in the curriculum would have to be applied directly to all students upon its coming into force. According to the Federal Minister for Education, Science and Culture the legislator had assumed, when enacting the Universities Act, that the universities would adopt adequate transitional provisions on a voluntary basis and therefore without being forced to do so by the legislator in the case of changes in curricula like the one in question. In most cases transitional provisions had been adopted, in a few cases, however, there had been "complications".

3. According to the Ombudsman Office the afore-mentioned interpretation of the law had been arguable.

   However, the legislator obviously considered it as necessary, when enacting the provisions of Section 80 paragraph 2 and Section 80a paragraph 2 UniStG and Section 124 paragraph 1 of the Universities Act, to provide adequate transitional provisions for those students who had begun their studies before the coming into force of a new curriculum pursuant to these federal act.

The legislator's view was that the students should be protected with respect to the exams taken in reliance on the applicable curriculum when the new curriculum came into force.

The question of protection of legitimate expectations relates to the individual's right (deducted from the equal protection principle) to be protected against later changes of the legal foundation on which he/she bases his/her life.

Also curricula, i.e. ordinances form part of this foundation.

The protection of such "vested rights" is, however, subject to restrictions, since it would otherwise be virtually impossible to change the legal situation.

According to the case law of the Constitutional Court not every aggravation of an existing legal situation is per se inadmissible; under certain circumstances, however, transitional provisions must be provided (cf. e.g. VfSlg 13177, VfSlg 15.523).

The Ombudsman Office is of the opinion that the necessity, assumed by the legislator, to protect legitimate expectations with respect to the above provisions of the University Studies Act and the Universities Act, does not only apply in the case of an introduction of new instead of existing courses pursuant to Section 124 paragraph 1 in connection with Section 54 paragraph 1 of the Universities Act, but also in the case of "mere" changes in adopted curricula if, in particular with respect to serious changes in the structure of the course and/or the teaching and examination methods, exams taken became considerably "worthless" with respect to the further course of the studies upon the coming into force of the changes in the curriculum.

With respect to the requirement to interpret legal provisions in conformity with the Constitution, the Constitutional Court therefore deducted, on the basis of the current legal situation, an obligation of the universities to provide for adequate transitional periods in such cases.

In order to provide legal certainty and thus increased legal protection for students as well as a consistent implementation practice, Section 124 paragraph 1 of the Universities Act should be amended to the extent that the universities are obliged to adopt adequate transitional provisions in the respective curriculum also in the case of mere changes in curricula which have the aforesaid implications on taken exams.

The Federal Minister for Education, Science and Culture informed the Ombudsman Office that its recommendation would be subject to an examination procedure in the course of the next amendment of the Universities Act.

2.6.1.3 Different consideration of maintenance obligations in the calculation of study grants - Federal Ministry of Education, Science and Culture (VA BD/87-WF/05, BMBWK-10.355/0002-III/4a/2006)

N.N. addressed the Ombudsman Office declaring by decision of the Study Grant Authority he had been granted a study grant in the amount of € 249.00 per month.

This study grant would be too low, insofar as his/her father's maintenance obligations vis-à-vis his ex-wife had not been taken into account in the calculation of the grant.

Although the applicant's father had been obliged by a divorce degree to pay monthly maintenance to his ex-wife on the basis of a statutory maintenance obligation, this maintenance would, so the Study Grant Authority, due to the current legal situation, not lower the assessment base for the maintenance his/her father could be expected to pay to him/her.

In this connection, the Ombudsman Office established the following:

1. Pursuant to Section 31 StudFG (Student Support Act) the maintenance an applicant could reasonably claim from his/her parents, which lowered the study grant, would depend on the assessment base for the purposes of Section 32 StudFG.

   The assessment base comprised the income and certain deductible amounts for persons for whom either the student, one of his/her parents or his/her spouse paid maintenance under an act.

   Section 32 paragraph 1 subparagraphs 1-5 StudFG enumerates these persons exhaustively. In the first instance, this provision refers to children up to the age of 19.

2. A parent of a person who has completed the 18th year of age and for whom maintenance is paid by virtue of law is entitled to a deductible amount only if this person is considered to be a relative pursuant to Section 123 paragraph 4 ASVG (General Social Insurance Act) or favourably self-insured in public health insurance pursuant to Section

76 paragraph 2 subparagraph 2 ASVG or receives study grant (Section 32 paragraph 2 subparagraph 4 StudFG).

This means that deductible amounts are granted in the case of children of the student, of the parents or of the student's spouse, who are entitled to maintenance, since they go to school or undergo vocational training and/or are unable to earn their living through no fault of their own.

These requirements, however, are not met in the case of maintenance obligations vis-à-vis a divorced spouse.

The non-granting of such deductible amounts by the Study Grant Authority was therefore founded in law in the present case.

3. The Ombudsman Office engaged the Federal Ministry of Education, Science and Culture with this problematic and pointed out, with respect to the outlined legislation, that a statutory maintenance obligation pursuant to Section 66 et seqq. of the Marriage Act, which is to be performed e.g. by one parent vis-à-vis a divorced spouse, will reduce the parents' ability to pay maintenance, as it must be assumed in the cases laid down in Section 32 paragraph 2 StudFG.

   Other than in these cases, the Student Support Act does not provide corresponding deductible amounts in the case of a statutory maintenance obligation vis-à-vis a divorced spouse.

   The Ombudsman Office could not see any objective reasons for the unequal treatment of statutory maintenance obligations vis-à-vis certain relatives compared with those vis-à-vis divorced spouses with respect to the ability to pay maintenance and thus with respect to the maintenance that (the parents) could be reasonable expected to pay to the applicant for a study grant.

   For these reasons, there were concerns as to any infringement of the principle of equality (Article 7 of the Federal Constitution, Article 2 of the Basic Law) with respect to the non-observance of statutory maintenance obligations vis-à-vis the divorced spouse in the Student Support Act.

   Since the Ombudsman Office is not entitled to appeal to the Constitutional Court with respect to a judicial review, the Federal Minister for Education, Science and Culture

was requested to declare whether an initiative for amending the Student Support Act has been taken into consideration.

The Federal Minister for Education, Science and Culture thereupon informed the Ombudsman Office that the proposal to take maintenance obligations vis-à-vis former spouses into account in the calculation of the assessment base for maintenance, that could be reasonably expected to be paid, appeared to be justified.

Therefore, there were plans to amend the Student Support Act on the next occasion and to support a resolution in Parliament in this connection.

4. In the present case, the Federal Minister advised to file an application for study support according to Section 68 of the Student Support Act.

   According to this provision the competent Federal Minister is entitled, within the private sector administration of the state, to grant financial support and/or benefits in kind to students in the case of social hardship or particularly difficult study conditions.

2.6.1.4 "Expensive" and "inexpensive" abstracts from the criminal records; Exemption from fee – objectively justified – municipality of Schärding (VA BD/147-FI/05, municipality of Schärding Pol-5-1324-05-Si.)

N.N. lodged a complaint with the Ombudsman Office stating that she had had to pay a fee of 28.10 euro for obtaining an abstract from her criminal records. In contrast, a good friend of hers had had to pay only approximately € 15 for one abstract from the criminal record.

The Ombudsman Office examined the case and came to the conclusion that the said unequal treatment was had been founded in law. Accordingly, in the case of an application for an excerpt from the criminal record, fees for written requests (Eingabengebühr) in the amount of € 13.00, certificate fees in the amount of € 13.00 – and administrative charges in the amount of € 2.10 (Verwaltungsabgaben) have to be paid in cash or – if there is such possibility – by means of alternative forms of payment (Austrian Bankomatkarte / credit card) upon submission of the application.

If, however, the application for an excerpt from the criminal record is filed online by means of the Austrian "Citizen Card" (Bürgerkarte), only fees in the total amount of € 15.10 have to be paid due to an amendment of the Law on Duties.

The reason for this is an amendment of the 1957 Law on Duties according to which filed papers include submissions and enclosures, official copies, protocols, invoices and certificates, however, submissions and enclosures only if not submitted electronically by means of the Citizen Card. The amendment came into force on the 1st March 2004. It shall cease to be effective on the 31st of December 2006.

The legal materials (252 Federal Law Gazette XXII. legislative period 65) state that the use of the Citizen Card function and the instrument connected with it for filing electronic applications (e.g. the official forms available on the website "help.gv.at") makes public administration much simpler thereby leading to economies. Therefore, it does not only appear to be objectively justified, but even necessary to pass on a part of these economies to the citizens/enterprises in the form of an exemption from fees, last but not least also in order to motivate them to make more use of this new path of communication". For this reason, a time limit has been set until the 31st of December 2007 for the introduction of e-government.

The legislator was clear about the costs arising in connection with the acquisition and use of the Citizen Card. On page 3 of the of the Supplements 252 XXII. legislative period the following passage can be found: "*To citizens and enterprises which opt for the use of the Citizen Card, no costs except those for the acquisition of the infrastructure accrue - which however do not accrue in the case of signing by means of a mobile phone - and, in any case, costs for signature administration by the certification provider in the form of an annual fee".*

It remains doubtful, whether is it really "objectively justified" - as the legislator thinks - to favour citizens who make their submissions via a Citizen Card, since "motivation" can only be a factor where a citizen has a Citizen Card.

2.6.2 Application for weapons pass – Discrimination on the basis of sex (VA BD/11-I/05, BMI 404.203/7-III/3/05)

A female legal apprentice had applied for the issuance of a weapons pass and had filed a complaint with the Ombudsman Office, to point out that certain statements made by the

public security services for the province of Lower Austria in the appellate proceedings had not been objective but discriminating.

The proceedings were basically about establishing a need for possessing a firearm. The applicant (appellant) based her application on the fact that in her profession she would often provide legal aid. In particular, foreign offenders would often threaten defending counsels, whereby in particular male offenders with a Muslim background would not show any respect to a female defending counsel.

Since the question, whether a need for carrying a firearm exists, is an essential precondition for granting a permit, the security services had to make thorough inquiries in this respect in the appellate proceedings and had sent a letter to the appellant within the framework of these inquiries in which it explained that general statements of the above kind could not constitute a need for the purposes of the Firearms Law. It must be possible "to solve such problems within the law-firm by assigning such problematic cases to other substitutes, e.g. male substitutes".

The Ombudsman Office realises that this statement has not been used as factual grounds in an administrative decision, but that it merely aimed at motivating the appellant to specify as precisely as possible the extent of danger to which she would react by means of a weapon.

Nevertheless, as the appeal had pointed out, the authority had made a differentiation on the basis of sex without providing a proper justification for it.

The examination procedure of the Ombudsman Office clarified that the public security services for the provinces of Lower Austria did not have the intention to discriminate women.

The Federal Ministry of the Interior took this complaint as an incentive to remind of a cautious use of language and made the general statement that any discrimination on the basis of sex was unacceptable. The Federal Ministry of the Interior emphasized that it was important to choose words in a neutral and unambiguous way and that, especially in the light of Article 14 of the ECHR and Article 7 of the Federal Constitution and Article 13 of the EU Treaty a gender-neutral use of language with respect to official documents was deemed necessary.

The Ombudsman Office considered this position statement made by the Federal Ministry of the Interior to be sufficient and did not take any further measures.

2.7 Rights of the home (Article 9 Basic Law; Article 8 Human Rights Convention)

2.7.1 Assistance of foreign officials in house search Delay in procedure - determination of grievance

Mrs. N.N. lodged a complaint with the Ombudsman Office on the length of proceedings in the case of the complaint she had lodged on the 19th of March 2004 against the preliminary appellate decision of the Principal Customs Office Graz by way of the Independent Finance Board, Klagenfurt office, as well as on the house search performed in consultation with foreign officials on the 18th of March 2003.

I. As to the length of proceedings before the Independent Finance Board

The Ombudsman Office obtained in its examination procedure an opinion from the President of the Independent Finance Board (UDFS) on the 29th of July 2005 and inspected the files of the UFS, Klagenfurt office.

The following facts were established accordingly:

On the 15th of February 2002, Mrs. N.N. filed a request with the Principal Customs Office ("Hauptzollamt" - HZA) Graz, Department for Excise Taxes and Monopolies for the granting of a permit for an open alcohol warehouse pursuant to Section 31 paragraph 3 of the Alcohol Tax Act.

The requested permit was granted by decision of the 4th of March 2002 pursuant to Section 31 paragraph 3 in connection with Section 33 of the Alcohol Tax Act.

On the 27th of February 2003, the Hauptzollamt (HZA) Vienna informed the HZA Graz, Department for Excise Taxes and Monopolies that an information had been lodged with the Vienna Regional Court for Criminal Matters on the 11th of April 2000 charging N.N. with the intentional evasion of taxes or duties.

On the 23rd of March 2003, the HZA Graz revoked by decision, with immediate effect, the permit for the open alcohol warehouse pursuant to Section 36 paragraph 2 in connection with Section 25 paragraph 2 subparagraphs 1 and 5 of the Alcohol Tax Act.

The appeal brought by N.N. against the revocation of the permit on the 5th of December 2005 was dismissed by a preliminary appellate decision of the HZA Graz of the 23rd of Feb-

ruary 2004 pursuant to Section 85b paragraphs 2 and 3 and Section 85f. of the Federal Law relating to Additional Provisions for the Implementation of European Community Customs Law "Zollrechts-DurchführungsG."

The complaint lodged by N.N. on the 19th of March 2004 against the preliminary appellate decision of the HZA Graz of the 23rd of February 2004 on the revocation of the permit for operating an open alcohol warehouse pursuant to Section 31 paragraph 3 in connection with Section 33 of the Alcohol Tax Act was submitted on the 29th of March 2004 by the HZA Graz to the UFS, Klagenfurt office, Zollsenat 3 (K).

The decision of the UFS as appellate body, Customs Board 3 (K), by which the complaint was dismissed as unfounded and which stated that the revocation of the permit for an open alcohol warehouse had been based on Section 36 paragraph 2 in connection with Section 25 paragraph 2 subparagraph 1 and Section 31 paragraph of the Alcohol Tax Act was adopted on the 2nd of November 2005.

The **complaint** regarding the length of the proceedings of the 19th of March 2004 turned out to be **justified**, since the time limit for adopting a decision laid down in Section 311 of the applicable provisions of the Federal Tax Code (BAO) had been by far exceeded.

The reason given by the President of the UFS, namely the argument that urgent older files taken over from former Revenue administrations (Finanzlandesdirektionen) had to be processed before deciding the appellant's case, does not justify the delay in proceedings, imputable exclusively to the UFS which exceeded the six-month time limit, provided in the BAO, for adopting a decision so that the duration of the proceedings as a whole was twenty months.

II. As to the assistance of foreign officials in a house search

In connection with this complaint the Ombudsman Office obtained an opinion from the Federal Ministry of Finance of the 12th of May 2004 to which an opinion of the Principal Customs Office in Vienna as fiscal offence prosecution authority of first instance of the 23rd of April 2004 was enclosed together with the respective criminal records, as well as opinions of the Federal Ministry of Finance of the 19th of August 2004, of the 10th December 2004 and 25th February 2005.

Furthermore, the Ombudsman Office inspected the criminal records of the Vienna Regional Court for Criminal Matters.

The following facts were established:

Criminal tax procedures have been pending against N.N. at the Vienna Regional Court for Criminal since 2000.

By decision of the 20th of April 2000 the Court ordered the Principal Customs Office (HZA) and the tax authority (FA) for the 1st district, Department for Criminal Affairs, pursuant to Section 197 of the Law on Tax Offences to perform further investigations.

An intermediary report of the HZA Vienna dated 27th of February 2003 to the Vienna Regional Court for Criminal Matters set out the present outcome of the investigations, further house searches and/or the opening of accounts were requested and ordered by the Court.

By house search warrant, issued by the Vienna Regional Court for Criminal Matters on the 12th of March 2003, the Court ordered, with respect to the criminal case against N.N. pursuant to Section 22 FinStrG, the HZA Vienna as fiscal offence prosecution authority of first instance to perform a house search at N.N.'s and her parents' residence and other household premises and to seize all evidence, in particular correspondence, accounting documents, electronically stored data etc. concerning unlawfully imported goods.

By fax, dated 13th of March 2003, from the Norwegian liaison office of the Norwegian Royal Embassy (not contained in the criminal file of the Vienna Regional Court for Criminal Matters) to the customs investigation service of the HZA Vienna as fiscal offence prosecution authority of first instance, the Norwegian-Swedish liaison officer for Customs Affairs in Austria informed the HZA Vienna "that customs officers from Malmö in Sweden had declared their wish, if possible ... to participate in the house search scheduled for 18.03.2003 (if the

alleged offer remained in custody)."B.B. and A.A. were notified as candidates who would arrive on the 17th of March 2003 and leave on the 19th of March 2003.

In the house search scheduled for the 18th of March between 14.00 and 17.00, the HZA Vienna was assisted by the Swedish investigation officers A.A. and B.B., the Norwegian-Swedish liaison officer for Customs Affairs in Austria and a secretary to the embassy as interpreter.

The assistance by foreign officials in the house search and/or the granting of permission by the Federal Minister for Justice pursuant to Section 59 paragraph 1 of the Law on Extradition and Judicial Assistance (ARHG) on activities of foreign organs in Austria is not on record.

Hitherto, N.N. has not been finally indicted, nor has the Vienna Regional Court for Criminal Affairs scheduled a main hearing. Likewise, the HZA Vienna has not yet completed its final report.

The **complaint** was **justified** for the following reasons:

Sections 139 to 142 of the Code of Criminal Procedure on house searches provide neither a participation of foreign officers nor an oral permission by the investigating judge.

The regulations laid down in the Federal Law relating to Additional Provisions for the Implementation of European Community Customs Law, in particular its Chapter G on international customs cooperation and inter-governmental official assistance, referred to in the opinion of the Federal Ministry of Finance of the 10th of December 2004, cannot change this fact. Pursuant to Section 109 paragraph 2 of the this Law, arrests, house and physical searches are expressly exempt from mutual administrative assistance in customs matters.

Likewise, investigations and procedural acts performed by foreign organs on Austrian territory on the basis of the Law on Extradition and Judicial Assistance are inadmissible pursuant to Section 59 paragraph 1 of this Law. The competent foreign judge, public prosecutor and other persons involved in the proceedings including their counsels, however, are to be permitted to participate in mutual assistance activities if this appears to be necessary for duly processing the letter rogatory. The services to be performed by foreign organs require the permission of the Federal Minister for Justice, except in cases of cross-border observations.

The assistance of the HZA Vienna by foreign investigation officers and a secretary to the embassy as interpreter in the house search on the 18th of March 2003 violated N.N.'s constitutional rights laid down in Article 9 of the Basic Law and Article 8 of the ECHR.

III. In its meeting on the 27th of January 2006 the Austrian Ombudsmen and their senior officers concluded that the duration of the proceedings before the UFS and the assistance of foreign investigation officers and a secretary to the embassy as interpreter in the house search performed by the HZA Vienna constituted administrative **grievances** for the purposes of Article 148a paragraph 1 of the Federal Constitution.

2.7.2 Illegal house search, press release vs. presumption of innocence (VA BD/269-I/05, BMI 6506/1642-II/1/c/05)

A complainant against whom criminal proceedings on suspicion of embezzlement had been pending before the Public Prosecution Department Ried i.I. and the Regional Court Ried i.I. (the applicant had been finally discharged from the criminal charge) addressed the Ombudsman Office and lodged a complaint about a house search and a press release of the public security services of the province of Upper Austria in which, according to the complainant, findings had been made contrary to the presumption of innocence.

As a first step, the Ombudsman Office referred the complaint to the Federal Ministry of the Interior. The Federal Ministry of the Interior informed the Ombudsman Office that the police office in Schardenberg had lodged an information against the complainant and applied for a house search warrant with respect to the address X lane. The competent judge had ordered the aforesaid search of the address stated in the information. On the basis of this order, the officers had searched the complainant's residence.

In this connection it should, however, be mentioned that the address of the searched residence is not X lane, but Y road According to the Federal Ministry of the Interior, the complainant had lived at the address X lane by the time the information had been lodged. Between application and execution of the house search warrant the complainant had moved (to Y road). The officers had assumed that the searched residence had been the address X lane.

The result was that the house search and the seizure performed by the police had not been covered by the judicial house search warrant, because this warrant had entitled the police officers only to perform such official acts at the address X lane.

Consequently, the complainant's constitutional rights laid down in Article 9 Basic Law and Article 8 ECHR had been violated. Furthermore, the complainant's constitutional right laid down in Article 5 Basic Law had been violated by the seizure which, due to the unlawfulness of the house search, had been performed without legal basis.

As to the press release it could be established that it had not been covered by the "Media Decree" of the Federal Ministry of the Interior. As the Media Decree correctly points out, the presumption of innocence must be observed (also) when providing information.

Most "findings" in the press release had been written in indicative mood. It is obvious that this is at variance with the presumption of innocence. The fact that the press release was titled with "suspicion" makes no difference in this respect. The press release therefore violated the complainant's constitutional right laid down in Article 6 paragraph 2 ECHR, according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Further inquiries by the Ombudsman Office in this case are still pending. The complete result of the examinations will be likely to be presented in the next report.

2.8 Right to respect for private and family life (Article 8 ECHR)

Excerpt from the 27th report of the Ombudsman Office to the Vienna Provincial Parliament (2005)

2.8.1 Inspection of anamnesis must be granted to families under certain circumstances (VA W/164-GES/05)

Mrs. Z. lodged a complaint with the Ombudsman Office stating that she was not allowed to inspect the anamnesis of her spouse, who had died in the Otto Wagner Hospital on 7.2.2004, by the hospital which referred to the medical duty of secrecy.

In its landmark decision of 25.5.1994, 1 Ob 550/84 the Supreme Court had ruled that the management body of a hospital "has to process an heir's (relative's) request for inspection

of the anamnesis of a deceased person to the extent, that - unless a positive declaration of intent of the deceased exists - it shall examine whether a presumptive approval of the deceased vis-à-vis the person that requests inspection can be assumed. Accordingly, a decree had been issued to all bodies of the Vienna Hospital Association stating that inspection should be granted and copies of the anamnesis of a deceased person provided to other persons, if these persons had a lawful interest and the deceased patient had probably approved the inspection.

The Ombudsman Office shares the Supreme Court's legal opinion, whereby it should be added that the European Court of Human Rights has deducted in its latest case law from Article 8 ECHR (cf. European Court of Human Rights 30.10.2001, Pannullo vs. Forte and European Court of Human Rights 12.11.2002, Ploski) that the right to respect for private and family life must be observed beyond death so that the relatives of the deceased enjoy certain rights after his/her death.

In the present case, the grievance could be remedied by granting inspection of the anamnesis of her deceased spouse to the complainant.

3 Action to combat discrimination

3.1 Discrimination based on ethnic origin

3.1.1 Diversity Management for employees of the Austrian Federal Railways regarding the protection against racist statements (VA BD/173-V/05)

An Austrian citizen born in Nigeria addressed the Ombudsman Office with a complaint stating that over the past three years, in which he had been working for the Austrian Federal Railways, colleagues had made racist statements vis-à-vis him on various occasions.

In 1972, Austria ratified the Convention on the Elimination of All Forms of Racial Discrimination (CERD). This Convention commits Austria and its authorities "to prohibit and to eliminate all forms of racial discrimination and to provide for effective remedies against acts of racial discrimination".

The European Convention on Human Rights and Fundamental Freedoms, enjoying constitutional rank in Austria, prohibits discrimination on the basis of race or national origin.

In the course of the implementation of the two EU anti-discrimination directives 2000/43 and 2000/78, the Federal Equal Treatment Act (GlBG) has been amended. It prohibits discrimination based on ethnic origin inside and outside of work. Pursuant to Section 21 GlBG it constitutes prohibited discrimination if a person is harassed in connection with his/her employment on the basis of his/her ethnic origin and/or if the employer fails in a culpable way to provide for adequate remedy of this situation. The same applies to the public sector pursuant to Section 16 of the Federal Equal Treatment Act (B-GlBG).

In the course of its examination procedure the Ombudsman Office requested the Federal Austrian Railways Holding to clarify which measures had been taken by the Austrian Federal Railways in view of the incidents reported by the affected persons. It further requested information about how the Austrian Federal Railways generally handle cases in which employees reported to be victims of racial violence. Furthermore, the Ombudsman Office recommended respective training of employees.

In view of these accusations, the Austrian Federal Railways informed the Ombudsman Office that all employees of the respective location had been instructed involving the works council to refrain from any racist statements. Moreover, work shifts had been changed,

since the accusations had concerned mainly a specific shift. Since no names had been disclosed, no disciplinary measures of the racist acts could be taken.

The Ombudsman Office was assured that, as a consequence of this incident, measures would be taken to prevent their recurrence. In particular, the Austrian Federal Railways announced, due to the intervention of the Ombudsman Office, to use the strategic "Diversity Management" Programme provided for 2006 also to sensitise executives and employees for racist conduct.

3.2 Discrimination based on illness or disability

3.2.1 Prohibition to use public transport in the case of compulsorily notifiable disease (VA BD/30-GU/05)

*As a consequence of the wish expressed by the then member to the National Council, Mag. Herbert Haupt, in the discussion on the **27th report of the Ombudsman Office** to the Plenary of the National Council, the Ombudsman Office examined **ex officio** the transport conditions of public transport undertakings. Not only the Vienna Public Transport Department and the "Verkehrsbund Ost Region" (a union of all Viennese and peripheral public lines that controls the rates and time tables) generally exclude persons suffering from a compulsorily notifiable contagious disease from transportation - irrespective of whether there is a danger for other users of the transport services. In the present case, there is need for action.*

In its **ex officio** examination procedure, the Ombudsman Office compared the relevant regulations for the carriage of passengers and scrutinised as to whether they are based on proper justification or of an excessive nature and therefore discriminating. Only in cases where there is a risk that other passengers or drivers contract a disease in public service vehicles, an exclusion of diseased persons from carriage is justified. In the case of some diseases, such as hepatitis C, which is contagious only in case of blood contact, the excessive character of transportation bans becomes apparent.

In order to systematically clarify which diseases bear an actual risk of contagion in public transport vehicles, the Ombudsman Office obtained a medical opinion from the head of the Vienna Institute for Microbiology and Hygiene, Univ.-Prof. Dr. Günther Wewalka. This opinion sets out that only in the case of pulmonary tuberculosis there is a direct risk of contagion for carried persons. In the case of all other existing and compulsorily notifiable infectious diseases there is no direct risk potential in means of public transport, taxis, leased

cars etc. The Ombudsman Office is therefore of the opinion that an exclusion of all these persons from carriage in public service vehicles on the basis of legal provisions and/or transport conditions constitutes a discrimination on the basis of a disease.

According to the established practice of the Constitutional Court, the constitutional principle of equal treatment, laid down in Article 7 of the Federal Constitution, implies the constitutional obligation, binding on the legislator, to enact only legal provisions that are objectively justified. The right to not be excluded from using public service vehicles for illegitimate reasons is also guaranteed by Article 8 ECHR (which sets forth the right to respect for one's private life) in connection with the principle of equal treatment laid down in Article 14 ECHR. Furthermore, unjustified and discriminating provisions can constitute also an infringement of human dignity pursuant to Article 3 ECHR and Section 16 Civil Code. In connection with patients' rights, this means that no patient is to be discriminated on the basis of a disease or the suspicion of a disease.

The Federal Government seems to have considered this issue in a similar way by providing in its ministerial draft to a Bundes-Behindertengleichstellungs-Begleitgesetz (364/ME 22. GP) that the excessive formulation of the personal transport requirement "physical and mental aptitude" is restricted in the public transport sector to a wording that reflects an aptitude required for the respective activity.

The examination procedure of the Ombudsman Office with respect to the carriage of people with diseases in public service vehicles is intended to show that there are regulations not only in relation to public undertakings, but also in other areas where people with diseases and disabilities are excluded from public life for illogical reasons.

The Ombudsman Office addressed the competent Federal Minister for Transport, Innovation and Technology and the Chief Executive Director of the Wiener Stadtwerke (Vienna Public Utilities) and recommended an amendment of the transport conditions, such as, in particular of

- Section 12 paragraph 4 and Section 14 paragraph 2 of the Rail Transport Act,
- Section 14 of the Straßenbahn-Verordnung (Tramway Ordinance),
- Section 3 of the Transport Code for Non-Scheduled Transport of Passengers,

- Section 3 of the Kraftfahrliniengesetz-Durchführungsverordnung (Motor Vehicle Lines Ordinance),
- and clause D.1.d. of the transport conditions of the Vienna Public Transport Department and the Verkehrsbund Ost-Region

3.2.2 License fees for deaf and hard of hearing people (VA BD/66-V/05, 272-V/05, 332-V/05 and 287-V/05)

Before the coming into force of the 2003 Finance Act (Federal Law Gazette I No. 71/2003) "deaf or virtually deaf people" were exempt from license fees for television reception equipment. According to the legal situation, created by the 2003 Finance Act, only homes for deaf people or seriously hearing-impaired people are exempt from license fees for television reception equipment, whereas the exemption for deaf or seriously hearing-impaired persons depends on the level of the net household income.

According to the established practice of the Constitutional Court, the legislator in not entitled to create other than objectively justifiable differentiations. (cf. for example *Öhlinger,* Verfassungsrecht [2005] marginal number 761). Statutory differentiations comply with the Constitution only if they can be justified by objective differences in facts. Consequently, the outlined unequal treatment of homes for deaf or seriously hearing-impaired people, who are exempt from license fees, and the affected persons themselves, whose exemption depends on whether the net household income exceeds the standard rate, fixed for the granting of compensatory supplements to households with one or more persons, by not more than 12%, is to be deemed in line with Constitution only if the different legal situation is based on objective grounds.

It also follows from the principle of equality that material differences in facts must lead to different regulations (cf. *Öhlinger,* Verfassungsrecht [2005] marginal number 764 with reference to VfSlg. 12.641/1991). Accordingly, the question arises whether it can be justified that deaf or seriously hearing-impaired people must fulfil the same requirements for obtaining an exemption from license fees as healthy people, although the former, due to their handicap, are not able to use the not free public broadcasting services in, at least approximately, the same way as healthy people.

By decision of 11.6.2005, B 463/04, the Constitutional Court examined the constitutionality of the constitutionally problematic wording in Section 48 paragraph 2 subparagraph b of the Fernmeldegebührenordnung (Law on Telecommunication Charges), whereby it, for the time

being, assumes a violation of the principle of equality by the current legal situation for the reasons outlined above.

3.2.3 Risks and/or "inconvenience" by disabled persons using trains or trams?

Mr. N.N. has suffered from the Down Syndrome since his birth. With enthusiasm and regularity he spends his time at the station, observes what is going on and travels short distances. Some passengers, however, felt bothered by his behaviour. Complaints were lodged which caused the stationmaster to declare a ban to use trains of the Austrian Federal Railways and the rail substitute services.

The Austrian Federal Railways informed the Ombudsman Office that, due to N.N.'s behaviour, passengers and the movements' inspector had been disturbed. Above all, however, N.N.'s presence in the platform area would represent a risk for his own safety.

The Ombudsman Office advocates discrimination-free use of means of public transport by handicapped people. At the same time, the Ombudsman Office acknowledges that risks in the platform area must be excluded as far as possible. The question of whether the behaviour of a disabled person bothers other persons, is very sensitive. It can only be dealt with by developing a better understanding for the special needs and behaviour of handicapped people.

Pursuant to its transport conditions, the Austrian Federal Railways are entitled to exclude persons who bother other persons with their behaviour from lingering on its premises. Such exclusion, however, can only be justified for objective reasons and must not amount to discrimination on account of a mental disease or mental impairment. This follows from the prohibition of discrimination laid down in the Bundes-Behindertengleichstellungsgesetz (Federal Act on Equal Treatment of Handicapped People) which applies also to the provision of public services.

The same approach is reflected in the Charter of Fundamental Rights of the European Union. Its Article 21 comprehensively prohibits discrimination; Article 26 of this Charter aims at integrating handicapped people and expressly acknowledges the right of handicapped people to measures securing their self-reliance, their social and professional integration and their participation in public life.

Upon recommendation of the Ombudsman Office, the contact person of the Austrian Federal Railways for handicapped people issues and Mr. N.N. and his family tried to find an acceptable solution. Finally, the Austrian Federal Railways offered to provide for a "leisure assistant" who would accompany Mr. N.N. on his journeys on a regular basis. Outside these times, however, Mr. N.N. should not linger on the station premises, since the station staff might be disturbed. For his own safety and for the safety of others, N.N. is not allowed to linger in the platform area.

The Ombudsman Office welcomes the decision of the Austrian Federal Railways to not immediately make use of its right of exclusion, but to seek a solution in cooperation with the persons involved which, on the one hand, satisfies the wishes and needs of handicapped people, as far as this is possible, and which does not disturb the station staff in its work and avoids inconvenience to other persons and any risks on the other hand.