Preventing ill-treatment in the Municipal Health and Care Services

Deprivation of liberty does not only occur when people are held in police custody, are imprisoned, or subjected to restrictive measures at an institutional level. Individuals may also be subjected to restrictions that amount to deprivation of liberty by health and care services. In the spring of 2021, the NPM published its first reports from two sectors that we have not previously examined: nursing homes for the elderly and homes for adults with developmental disabilities.

The NPM Mandate and the Municipal Health and Care Services

Prisons, police custody facilities, immigration detention centres, and closed psychiatric wards in mental health care institutions are facilities that obviously fall under the NPM mandate and where determining de facto deprivation of liberty is a simple task. However, the NPM mandate covers all places where a person experiences - or may experience - some form of restriction that prevents their freedom of movement. Although a formal administrative decision on restrictive measures may not be in place, some individuals may in reality be subjected to such extensive restrictions that their situation in practice amounts to deprivation of liberty. Short-term detention with significant use of coercion may also amount to deprivation of liberty.

Deprivation of liberty covers more than the obvious situations where persons are held in police custody, are imprisoned or are subjected to a decision regarding detention in an institution.

From a NPM visit to a nursing home for people with developmental disabilities. Photo: NPM

In nursing homes, decisions regarding admission or deprivation of liberty may sometimes be issued without the patient's consent.[1] Coercion may also be used when providing necessary health services to individuals who do not themselves have the capacity to provide consent and who oppose the provision of care.[2] There is no legislative basis for placing a person with developmental disabilities into a home, including group homes. However, the Norwegian *Municipal Health and Care Services Act* allows for the use of coercion as part of the treatment and care plans for persons with developmental disabilities. In practice, residents in nursing homes and persons with developmental disabilities in care homes may be subjected to extensive restrictions in their daily lives,[3] such as locked doors and measures restricting movement. Other factors may also impact the residents' freedom and ability to make their own decisions about where and how they want to live. In some cases, restrictions are grounded in a legal decision, while in other cases, the restrictions are implemented in practice without a decision.[4]

With this in mind, and following a review of information obtained from relevant non-governmental organisations, the NPM visited two nursing homes and three homes for adults with developmental disabilities in 2020. Reports from these visits were published in the spring of 2021.[5] The reports are presented in more detail in Chapter 3. In the autumn of 2021, we visited nine additional care homes for adults with developmental disabilities in the municipalities of Hamar and Kristiansand. During the pandemic period in 2020 and 2021, we have thereby carried out NPM visits to 14 homes in five municipalities.

Human Rights Responsibilities for Municipalities – Risk Factors

In Norway, municipalities are responsible for providing all residents with necessary health and care services.[6] Similar to all other public authorities, municipalities have human rights obligations and many of their legal responsibilities intersect with these rights.[7]

1 The Norwegian Patient and User Rights Act, Chapter 4A.

2 The Norwegian Patient and User Rights Act, Chapter 4A-3.

3 Guddingsmo, H., «Da må jeg spørre Boligen først!» - Opplevelsen av selvbestemmelse i bofellesskap ["Then I'll have to ask the Care Home first!" – Perceptions of individual autonomy in group homes] in J. Tøssebro (Ed.), (2019), *Hverdag i velferdsstatens bofellesskap [Everyday life in the group homes of the welfare state]* (page 78–94), Scandinavian University Press.

4 See, *inter alia*, Norwegian Official Report (NOU) 2019: 14 *Tvangsbegrensningsloven [Norwegian Act Relating to Reduction of Coercive Measures]*, Chapter 6.5, page 150 et seq.

5 Høyås Residential Elderly Care and Rehabilitation Centre in Nordre Follo Municipality, Åsgårdstrand Nursing Home in Horten municipality and homes for adults with developmental disabilities in Drammen Municipality.

6 Norwegian Act relating to municipal health and care services, etc. (Norwegian Health and Care Services Act), Section 3-1. Norwegian National Human Rights Institution (2021): *Kommuner og menneskerettigheter [Municipalities and human rights]*, Chapter 3.

7 Constitution of Norway, Article 92.

Persons who are deprived of their liberty depend on the authorities to safeguard their rights. When a person is deprived of his or her liberty, the threshold is lower for acts, or omissions, to be considered a violation of the prohibition against torture, cruel, inhuman, or degrading treatment.[8] A combination of factors may result in human rights violations when someone is deprived of their liberty, including disproportionate use of coercive measures, inadequate protection against violence and abuse, or providing inadequate treatment and care services.

Elderly residents in long-term placements in nursing homes have considerable needs in terms of care. As such, residents are entirely dependent on staff fulfilling their basic human rights.[9] In some cases, safeguarding elderly residents' basic needs and rights may represent a risk of violating the prohibition against inhuman or degrading treatment.[10] Many persons with developmental disabilities are also dependent on staff support to exercise their autonomy and to enjoy an adequate standard of living. At the same time, many may experience difficulties in communicating their needs and voicing their opinion when something is not working or is contrary to their wishes. The cognitive impairment will often entail communication and expressions through behaviour and this behaviour may be perceived as problematic by their surroundings. Historically, challenging behaviour has frequently been met by coercive measures.[11]

In the following, we highlight some risk factors that we examined during our visits to nursing homes and homes for adults with developmental disabilities.

Individual Autonomy and Participation

Persons with developmental disabilities and elderly residents in nursing homes have the same rights to autonomy over their own lives as all other people.[12] Any restriction of this fundamental right must be based on legislation, assessed on an individual case by case basis, and be necessary and proportionate. Effective safeguards must be established to prevent abuse and discrimination.[13]

For the opportunities for participation and individual autonomy to be genuine, information about rights, complaint mechanisms, procedures, and other matters must be provided in a comprehensible manner that is adapted to the individual's ability to receive such information.[14] Lack of participation may lead to an increase in the use of coercive measures against the resident.[15] For individuals who have difficulties in communicating and expressing themselves, this risk may be greater than for others and additional due diligence is therefore required.

During the visits, we have focused on how participation and individual autonomy are facilitated and how relatives and legal guardians are involved to safeguard the rights and participation of residents.

8 UN Special Rapporteur on Torture, Report to the UN Human Rights Commission, 23 December 2005, E/CN.4/2006/6, paragraphs 34–41 and the ECtHR's judgement in Bouyid v Belgium. 28 September 2015, application no. 23380/09.

9 UN Human Rights Committee, General Comment no. 20, paragraphs 2 and 5, cf. paragraph 11. UN Covenant on Civil and Political Rights, Article 7 and the UN Human Rights Committee, General Comment no. 20, paragraphs 2 and 5.

10 See the ECtHR's judgement in Kudla v Poland, 2000, application no. 30210/96, paragraph 94, the CPTs Recommendations 2020, paragraph 6, UN Human Rights Committee, Recommendations to Germany, 2004, CCPR/CO/80/DEU, paragraph 17 and the UN Committee Against Torture, Recommendations to Ireland, 2017, CAT/C/IRL/CO/2, paragraph 35.

11 NOU 2019: 14 pages 71–72.

12 Article 102, first paragraph, first sentence of the Constitution of Norway, Article 8 of the European Convention on Human Rights (ECHR), Article 17 (1) of the UN International Covenant on Civil and Political Rights (ICCPR) and Article 3, cf. articles 12, 14, 15, 17, 22 and 25 (d) of the UN Convention on the Rights of Persons with Disabilities (CRPD). The United Nations Principles for Older Persons of 1991, Principle no. 14. Recommendations by the Council of Europe 2014, no. 9–13.

13 ECHR, Art. 8 (2); EMDs judgement in A.M.V. v. Finland, 2017, (53251/13), paragraphs 69–73.

14 See the Norwegian Patient and User Rights Act, Section 3-5 and IS-2015-10 point 2.2.4. See also articles 19 and 21 of the CRPD.

15 Berge, K. og Ellingsen, K.E., (2015), Selvbestemmelse og bruk av tvang og makt. En studie på oppdrag fra Barne-, ungdoms- og familiedirektoratet, [Autonomy and the use of coercive measures. A study commissioned by the Norwegian Directorate for Children, Youth and Family Affairs], Norwegian National Institute on Intellectual Disability and Community (NAKU); IS-2015-10, paragraph 4.4.2

The NPM visited Åsgårdstrand Nursing Home in December 2020. Photo: NPM

Use of Coercive Measures

An important component of individual freedom is to be able to make decisions regarding oneself and one's own body. This is often referred to as the right to privacy and includes both physical and psychological privacy.[16] The use of coercive measures is a violation of the right to privacy and involves a risk of inhuman or degrading treatment. Therefore, human rights have placed strict conditions on the use of coercive measures.

Both staff and management must be well-acquainted with the legal requirements governing the use of coercive measures. There must be no uncertainty regarding who has the responsibility for drafting and approving the decision. Staff members must also have good knowledge of how coercive measures shall be implemented in the most humane manner possible and have an awareness of how to prevent the use of coercive measures.

The municipality shall have a designated person with professional responsibility (an overall specialist manager) who is to be informed of all administrative decisions regarding the use of coercion or restrictions made against persons in nursing homes and persons in homes for adults with developmental disabilities. This is to ensure the quality, legality and offer a general overview of the use of coercive measures in the municipality.

We have examined whether and how coercion is used in nursing homes and in relation to persons with developmental disabilities, whether coercion is documented and whether such measures are legal. We have also reviewed the role of the County Governor in relation to the use of coercion. This is especially relevant for persons with developmental disabilities, where the County Governor has an important due process function.

The Right to Healthcare

The right to equal healthcare services is stated as a national goal in Norwegian legislation and in the Government's strategies.[17] The right to equal physical and mental health services is also enshrined in several of the human rights conventions to which Norway is bound, including Article 12 of the UN International Covenant on Economic, Social, and Cultural Rights, which is incorporated into Norwegian law through the Norwegian *Human Rights Act*.[18]

16 The right to liberty and privacy follow from, *inter alia*, the Constitution of Norway, articles 93, second paragraph, 94, first paragraph, first sentence and 102, first paragraph, first sentence, the ECHR, articles 3, 5 and 8, the ICCPR, articles 7, 9, 10 and 17 (1) and the CRPD, in particular articles 3, 14, 15, 17 and 22.

17 See, *inter alia*, the statutory objectives in the Norwegian Health and Care Services Act, the Norwegian Specialist Health Services Act and the Norwegian Public Health Act. See also the Norwegian Directorate of Health, 20 August 2020. *Gode helse- og omsorgstjenester til personer med utviklingshemming (høringsutkast) [Good health and care services for persons with developmental disabilities (consultation draft)],* Chapter 1.

18 Act of 21 May 1999 no. 30: Act relating to the strengthening of the status of human rights in Norwegian law (Norwegian Human Rights Act).

Many residents in nursing homes and homes for persons with developmental disabilities cannot be expected to be able to personally communicate their needs for medical examinations or follow-up care. For example, they may have difficulties conveying ailments and identifying signs or symptoms of disease. This may result in a risk of failure to detect the need for healthcare. Very many people have complex needs and are also dependent on care from mental health services.

During our visits, we examined capacity and competence relating to the follow-up of residents' health, their access to health services, and the use of medications.

Protection from Violence and Abuse

The municipality shall be especially attentive to the fact that patients and users may be subjected to, or at risk of being subjected to, violence or sexual abuse. The municipality must facilitate the health and care services to be capable of preventing and identifying violence and sexual abuse.[19]

Residents in nursing homes and homes for persons with developmental disabilities are especially vulnerable to violence and abuse. Abuse and violence have a considerable impact on the individual resident's quality of life and are linked to several serious health problems. Research and other documentation of incidents show that abusive conduct towards residents in nursing homes and homes for persons with developmental disabilities also occurs in Norway.[20]

A noticeboard from one of the institutions we visited. Photo: NPM

Individuals working with elderly persons or persons with developmental disabilities should know how violence and abuse can be identified, reported, and handled.[21] In both nursing homes and homes for adults with developmental disabilities, we have examined whether adequate procedures are in place to safeguard residents against violence, aggression, and abuse committed by other residents or staff members.

19 Norwegian Health and Care Services Act, Section 3-3a.

20 Grøvdal, Y. (2013), *Mellom frihet og beskyttelse? Vold og seksuelle overgrep mot mennesker med psykisk utviklingshemming – en kunnskapsoversikt [Between freedom and protection? Violence and sexual abuse against persons with developmental disabilities – a review]* (Report 2/2013), Oslo: Norwegian Centre for Violence and Traumatic Stress Studies. Botngård, A., Eide, A.H., Mosqueda, L. et al. (2020): *Elder abuse in Norwegian nursing homes: a cross-sectional exploratory study*. BMC Health Serv Res 20, 9. and Malmedal, W., Ingebrigtsen, O. & Saveman, B.I. (2009). *Inadequate care in Norwegian nursing homes, as reported by nursing staff*. Scandinavian Journal of Caring Sciences: 23 (2): 231–242.

21 Recommendations by the Council of Europe 2014, Article 18. Norwegian Directorate for Children, Youth and Family Affairs (2014), *Retningslinjer ved seksuelle overgrep mot voksne med utviklingshemming [Guidelines relating to sexual abuse against adults with developmental disabilities]*. See also the accompanying guide to the Guidelines, also issued by the Norwegian Directorate for Children, Youth and Family Affairs in 2014.