# Consultation submissions as part of the preventive work

**Legislation in accordance with human rights standards is a pre-condition for preventing torture and inhuman treatment of people deprived of their liberty. This year, we have made several consultation submissions on draft legislation proposals and other guidelines from central government authorities, which affect the conditions for people who have been deprived of their liberty and who are subjected to force.**

Consultation submissions are an important measure to ensure adequate legislative processes and strong legal safeguards for people who have been deprived of their liberty. Our consultation submissions are based on findings and experiences from the visits we have conducted under the national prevention mandate to date. In 2019, we submitted four consultations covering several sectors under the NPM mandate.

## Inadequate evaluation of rules on the use of force in child welfare institutions

The Parliamentary Ombudsman made a consultation submission in July on the then Ministry of Children and Equality's draft of a new Child Welfare Act.[[1]](#footnote-1) Our comments concerned the proposal to create further legislation for child welfare institutions.

We pointed out that it was generally positive that the draft legislation proposal clarified the rights children and youth have during stays in institutions. However, we called for a more detailed assessment of the proposals on children’s rights and the use of force in light of Norway's human rights obligations. We recommended that the Ministry undertake a new assessment of the current regulation regarding rights and the use of force in child welfare institutions. The assessment should be based on Norway’s human rights obligations, with reference to international legal developments. It should also be assessed whether the existing regulations are practised as intended.

We also pointed out that the current rules on the use of force are not always complied with in practice, which indicated a need for clarification of the legislation. Findings from our visits indicate issues, such as that lack of compliance may be due to misinterpretations of the regulations.

In addition, we also commented on the specific proposals that the Ministry was asked to assess in its further work on the draft legislation proposal. For instance, the Parliamentary Ombudsman emphasised the following problematic elements in the proposal:

* the existing provision on the prohibition against solitary confinement used as punishment, treatment or as a corrective measure is to be removed
* the prohibition against force used as punishment, treatment or as a corrective measure is to be limited to ‘physical’ force, even if improper psychological pressure and threats can cause equally serious harm
* the regulations on the use of force in situations of acute danger refer to ambiguous rules based on the principle of necessity that is not included in the child welfare legislation
* the draft legislation proposal contains no minimum requirement for the use of solitary confinement in situations of acute danger
* the legal limits for restricting children’s freedom of movement inside and outside an institution are not clearly defined, including what constitutes illegal solitary confinement

## Important guidelines for detainees in need of medical help

In September, we made a consultation submission on the Directorate of Health's proposal for national guidelines for medical personnel relating to health services for detainees in police custody.[[2]](#footnote-2)

Several of the recommendations made by the National Preventive Mechanism (NPM) after visits to police custody facilities, are reflected in the draft guidelines. The draft emphasizes that doctors must not be involved in decisions concerning placing a person in custody. The submission also proposes measures to ensure that the duty of confidentiality is maintained when medical assistance is given to detainees, by ensuring that police personnel who escort the detainee are not present during examinations and treatment situations, for instance in the accident and emergency unit.

The Parliamentary Ombudsman emphasised how the proposal lacks national procedures for documentation and reporting cases of suspicion of disproportionate use of force or injury to the detainee caused by the police. One of the recurring findings from the NPM’s visits to places of detention, including police custody facilities, is that there is a lack of procedures in place for what medical personnel should do in cases of suspicion of disproportionate use of force or injuries caused by the police. Several of the accident and emergency units visited lacked a system to ensure that injuries to detainees were adequately documented in patient records, including photographic documentation. None of the accident and emergency units visited had any procedures in place for situations where it was suspected that injuries to a detainee was caused by the police.

In the consultation submission, we emphasised that documentation and reporting of injuries inflicted on persons deprived of their liberty are important legal protections and can reduce the risk of torture and inhuman treatment. We referred to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which recommends that thorough health examinations are carried out with documentation of suspicious injuries, and that such injuries are quickly reported in order to protect the detainees and ensure that an investigation is launched. Such procedures are lacking in Norway.

We also asked that medical personnel be given more information regarding the harmful effects of solitary confinement and how the health of persons in solitary confinement should be followed up.

## Critical to the proposal to use spit hoods in prisons

In September, we made a consultation submission regarding the Ministry of Justice and Public Security's proposal to amend the Execution of Sentences Act’s rules on coercive measures.[[3]](#footnote-3) One of the proposals involved introducing the use of spit hoods to the list of a legal coercive measures. Another proposal involved lowering the threshold for using coercive measures such as handcuffs and body cuffs.

A spit hood is a transparent hood that is pulled down over the head of the detainee, which covers the lower part of the face and prevents the person from spitting. In our consultation submission we noted that the Ministry had failed to consider that the use of spit hoods also entails the use of other restraints, such as hand cuffs or body cuffs, to prevent the detainee from removing the spit hood.

According to the Ministry, the basis for the proposal was the increasing problem of detainees spitting. However, no information was presented that demonstrated that this was a growing trend. The Ministry stated that spitting can entail a risk of infection, without outlining the type of infection referred to, or how great the risk is.

The Ministry suggested that the spit hood could be used on inmates placed in common areas while socializing with others, as a measure to prevent solitary confinement. The Parliamentary Ombudsman pointed out that it is unlikely that more meaningful human contact can take place by wearing a spit hood in addition to mechanical restraints such as handcuffs or body cuffs while interaction with other inmates. This can have a humiliating and dehumanising effect on the inmates and constitutes a clear risk of inhuman and degrading treatment.

We also criticised the Ministry’s failure to explain the risks linked to using a spit hood. An EU regulation on controlling the trade in items that can be used to inflict torture or inhuman treatment show that spit hoods pose a risk of choking. Several cases have been reported in other countries where people have died while wearing spit hoods, and where disproportionate use appears to have contributed to or caused the death.

We emphasised that having a hood pulled down over one’s head can contribute to a strong sense of fear, high levels of stress, a feeling of loss of control and a sensation of being choked. This particularly applies to people with serious conditions, such as psychosis, anxiety and phobias, such as claustrophobia. This is a particular cause for concern given that a high proportion of the inmates in Norwegian prisons have serious mental health issues, to a much greater extent than the rest of the population in general.

In addition to spit hoods, the Ministry also proposed lowering the threshold for the use of restraints such as hand cuffs and body cuffs. The Parliamentary Ombudsman disagrees with the Ministry that these restraints are less intrusive. A body cuff can restrict the inmates’ freedom of movement to the extent that they cannot walk or move their arms. The fact that the use of a spit hood entails both a hood and a mechanical restraint being placed on the inmate, indicates that this is a highly intrusive coercive measure.

We also expressed concern that the purpose of the proposed amendments was to prevent inmates being confined to their cells because it did not seem advisable to let the person spend time in common areas without wearing restraints. The Ministry’s proposal is inadequate for addressing the challenges of solitary confinement. The proposal to introduce the use of spit hoods and to lower the threshold for using other restraints indicate that a more holistic approach is necessary for creating prison conditions that prevent the need to use such intrusive measures. The Parliamentary Ombudsman pointed out that implementing measures to counteract the high degree of solitary confinement in prisons is now of urgent importance.

## Input to proposal on common rules on use of force in the health and care services

In December, the Ombudsman made a consultation submission on the Østenstad Committee’s draft legislation proposal on the use of force and interventions without consent in the health and care services (Norwegian Official Report 2019: 14 *Tvangsbegrensningsloven*).[[4]](#footnote-4) The comments were based on the Ombudsman’s statements in complaints cases and findings from visits to places of detention under the mandate of the NPM.

In the consultation submission, the Ombudsman called for a more detailed assessment of the threshold for applying involuntary treatment, such as forced medication and electroconvulsive therapy (ECT) in relation to human rights standards. Such questions were not sufficiently addressed in the report, particularly in light of international legal developments resulting in more stringent control of the use of coercive measures concerning persons with disabilities.

The Ombudsman pointed out that the legislation must ensure adequate protection against torture or other inhuman or degrading treatment. The legislation must also be in accordance with the prohibition against discrimination based on disabilities and the right to protect personal integrity and self-determination. The Ombudsman stated that the legislator is obligated to undertake a general proportionality assessment of new legislation that authorises such use of force.

The Committee suggested continuing the practice of forced medication. It is the opinion of the Ombudsman that the report did not substantiate a fair balance between the benefits such an intervention has and the harm it inflicts. This was specifically based on the lack of adequate knowledge of the effects of these treatment measures and the serious nature of such interventions. The Ombudsman also criticised the Committee’s proposal to legalise ECT without informed consent as a life-saving measure. The Ombudsman was critical of the fact that inadequate research meant that it remained unclear whether ECT is necessary to save lives, or whether other measures could prove just as effective.

In more general terms, the Ombudsman also called for the proposed draft legislation to clarify that any person deprived of their liberty still has fundamental rights. The Ombudsman also pointed out that the law is construed in a complex manner, making it difficult to understand both for the individual patient or user and for medical and care personnel. There is therefore a need to ensure that the legislation is written in a more accessible language.

The Ombudsman expressed concern over the Committee’s proposal that measures are only to be considered coercive if the patient shows resistance. The background for this concern is that many patients do not show resistance due to trauma, or because an unequal balance of power makes resistance seem futile. The Ombudsman was furthermore critical of the Committee’s proposal to make a lack of decision-making competence a key requirement for the use of force. This is problematic for reasons such as it being unclear how such assessments should be done and which criteria it should be based on.

The Committee also proposed rules on the use of force in emergency situations, including legally establishing health law rules for grounds of necessity and self-defence, and tightening the rules on particularly intrusive measures to prevent injury in emergency situations. The Committee’s proposal to phase out mechanical restraints within three years will, in the Ombudsman’s view, help to reduce the risk of inhuman or degrading treatment. Even so, the Ombudsman recommended that immediate measures be considered to ensure that the use of mechanical constraints on children ceased as quickly as possible. The Ombudsman also called for special legal safeguards to prevent long-term use of mechanical restraints. We also pointed out that it was doubtful whether the Committee's proposal to allow segregation to prevent injury (solitary confinement) in order to prevent damage to property is in accordance with human rights. The Ombudsman was also critical of the Committee’s proposal that only the act of being held to the ground by force should constitute a particularly intrusive measure.

With respect to segregation, we noted that several of the Committee’s proposals reflected findings from the Ombudsman’s visits. The Ombudsman noted that more stringent rules applied to the option of using segregation as a treatment measure, but that the proposal to lower the threshold for use of segregation out of consideration to others constituted a risk of more widespread use. Furthermore, the Ombudsman called for clearer guidelines on the practice of segregation, including setting limits for the use of force or for maintaining segregation. The Ombudsman also called for assessments of special legal safeguards to prevent long-time segregation, including limiting the allowed duration of segregation decisions.

The Ombudsman also made several other comments on topics such as, the proposal to introduce a duty to prevent the use of force, the right to limit visits and telephone use, use of house rules and the rules for case processing and control.

1. The Parliamentary Ombudsman's consultation submission on the draft new child welfare act, 22 July 2019. Read the whole consultation submission here: <https://www.sivilombudsmannen.no/wp-content/uploads/2019/07/Sivilombudsmannens-h%C3%B8ringsuttalelse-om-forslag-til-ny-barnevernlov.pdf> [↑](#footnote-ref-1)
2. The Parliamentary Ombudsman’s consultation submission on guidelines for medical services for detainees in police custody, 29 August 2019. Read the whole consultation submission here: <https://www.sivilombudsmannen.no/wp-content/uploads/2019/09/Sivilombudsmannens-h%C3%B8ringsuttalelse-om-veileder-om-helsetjenester-til-arrestanter-i-politiarrest.pdf> [↑](#footnote-ref-2)
3. The Parliamentary Ombudsman’s consultation submission on proposed amendments to the Execution of Sentences Act (use of spit hoods), 30 September 2019. Read the whole consultation submission here: <https://www.sivilombudsmannen.no/wp-content/uploads/2019/10/Sivilombudsmannens-h%C3%B8ringsuttalelse-om-forslag-til-endringer-i-straffegjennomf%C3%B8ringsloven-bruk-av-spytthette-mv..pdf> [↑](#footnote-ref-3)
4. The Parliamentary Ombudsman’s consultation response to Norwegian Official Report 2019: 14 *Tvangsbegrensningsloven*, 30 December 2019. Read the whole consultation hearing here: [https://www.sivilombudsmannen.no/wp-content/uploads/2019/12/Sivilombudsmannens-høringssvar-NOU-2019\_14-Tvangsbegrensningsloven.pdf](https://www.sivilombudsmannen.no/wp-content/uploads/2019/12/Sivilombudsmannens-h%C3%B8ringssvar-NOU-2019_14-Tvangsbegrensningsloven.pdf) [↑](#footnote-ref-4)