



Report of Various Size – Fieldwork research (FRANET)

Criminal Detention in the EU – Conditions and Monitoring

Country Report Germany

FRANET Contractor: German Institute for Human Rights
Author: Eric Töpfer
Review: Petra Follmar-Otto
Final Submission: June 2018

DISCLAIMER: This document was commissioned under contract as background material for a comparative analysis by the European Union Agency for Fundamental Rights (FRA) for the project 'Criminal Detention – Conditions and Monitoring'. The information and views contained in the document do not necessarily reflect the views or the official position of the FRA. The document is made publicly available for transparency and information purposes only and does not constitute legal advice or legal opinion.

Introduction

The German criminal justice system knows several forms of detention: pre-trial detention (*Untersuchungshaft*), criminal detention of adults (*Freiheitsstrafe*) and of juveniles (*Jugendstrafe*) in prisons, preventive detention of criminals who are deemed being a risk for the public even after they have served their sentence (*Sicherungsverwahrung*), and custodial sanctions as an alternative for the nonrecovery of a financial penalty (*Ersatzfreiheitsstrafe*), detention pending extradition (*Auslieferungshaft*). The practical execution of all these types of detention are named *Justizvollzug*. Forensic commitment in closed psychiatric facilities (*Maßregelvollzug*) is also part of the criminal justice system but does not fall under the category of *Justizvollzug*. Not part of the criminal justice detention regime is civil confinement (*Zivilhaft*), youth arrest (*Jugendarrest*), military penal detention (*Strafarrest*) and the detention of migrants for return procedures (*Abschiebehaft*). Though special facilities exist for these latter forms of detention, most of them are also executed in German prisons (*Justizvollzugsanstalten*, JVA).

In 2006, the power to regulate criminal detention was transferred to the *Länder* in the context of a “federalism reform” (*Föderalismusreform I*). Before this date criminal detention was solely regulated by the federal **Prison Act (Strafvollzugsgesetz)** which was adopted in 1976.¹ Meanwhile, all 16 *Länder* have legislated for their own prison acts. Several of the new prison acts were drafted along a **Model State Prison Act (Musterentwurf zum Landesstrafvollzugsgesetz)** adopted by the *Länder* ministers of justice on 23 August 2011,² others are significantly influenced by the old federal act. The federal act is still in force, thus, governing areas of criminal detention that are not regulated by *Länder* law, such as remedies for prisoners. In addition to their prison acts, most of the *Länder* have adopted specific acts on criminal detention of youth, pre-trial detention and preventive detention. In total, **more than 50 Länder acts** regulate criminal detention along with the federal Prison Act.

Below the level of legislation, the German prison system is regulated by legal ordinances (*Rechtsverordnungen*), administrative regulations (*Verwaltungsvorschriften*), institution rules (*Hausordnungen*) that exist for each prison and, on a personal level, by the prison plan (*Vollzugsplan*) for each prisoner.

According to official statistics, Germany’s prison system could accommodate 73,603 prisoners. On 30 November 2017, 64,351 individuals were detained in one of the 180 German prisons (*Justizvollzugsanstalten*, JVA).

German prison population on 30 November 2017 ³

Type of detention	Total number of inmates	Female inmates
Criminal detention of adults (<i>Freiheitsstrafe</i>)	40,144	2,333
Juvenile detention (<i>Jugendstrafe</i>)	3,591	138
Pre-trial detention (<i>Untersuchungshaft</i>)	13,963	736
Preventive detention (<i>Sicherungsverwahrung</i>)	547	1
Custodial sanction (<i>Ersatzfreiheitsstrafe</i>)	4,580	418

¹ Germany, Prison Act (*Strafvollzugsgesetz*), 16 March 1976. English version available at: https://www.gesetze-im-internet.de/englisch_stvollzg/englisch_stvollzg.html.

² Germany, Model State Prison Act (*Musterentwurf zum Landesstrafvollzugsgesetz*), 23 August 2011. Available at: <https://www.regierung-mv.de/serviceassistent/download?id=43753>.

³ Statistisches Bundesamt (2018), *Bestand der Gefangenen und Verwahrten in den deutschen Justizvollzugsanstalten nach ihrer Unterbringung auf Haftplätzen des geschlossenen und offenen Vollzugs jeweils zu den Stichtagen 31. März, 31. August und 30. November eines Jahres*, Wiesbaden, pp. 5-7. Available at: www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/BestandGefangeneVerwahrtePDF_5243201.pdf;jsessionid=F763B5D731DF05235A194F37B115C6B5.InternetLive?__blob=publicationFile.

Other	1,526	93
Total	64,351	3,719

Given the diversity and complexity of the regulatory regimes governing detention in criminal justice, we focus in the following on the criminal detention of adults (*Strafvollzug*) regulated by the prison acts. Where possible, information on pre-trial detention is added. Not covered is preventive detention (*Sicherungsverwahrung*): though it belongs to the overall *Justizvollzug* system it is not criminal detention (*Strafvollzug*) but a special form of forensic commitment (*Maßregelvollzug*). Information on the special case of juvenile detention is only provided in table 6.

1. Cell space
<p>a) What is the national standard for cell space available to prisoners in m²? Is it regulated by any legal instrument, such as a legislative act, internal prison regulations, manuals, policy papers etc.?</p> <p>b) Please indicate whether there are different standards applicable to different detention regimes (for example, if applicable in your jurisdiction: open, semi-open, closed etc.).</p> <p>c) Please, provide a link to the National Preventive Mechanism's reports from the reference period (1 January 2015 to 1 May 2018, if no report is available for this period, please provide a link to the most recent one) and whether there are any recommendations regarding this aspect (please provide the exact quotation in the national language and if official translation is available – in English). These reports can be found on the web-page of the National Preventive Mechanism. For ease of reference a list of links can be found here: https://apt.ch/en/list-of-designated-npm-by-regions-and-countries/</p>
<p>Please cite any relevant sources</p>
<p>Section 144 para 1 of the federal Prison Act⁴ states:</p> <p><i>“Rooms in which prisoners spend the night and their leisure time, as well as common rooms and visiting rooms, shall be comfortable or otherwise equipped in a manner meeting their purpose. They shall have a sufficient cubic content of air and, for reasons of health, shall have sufficient heating and ventilation, floor space and size of windows.”</i></p> <p>Though Section 144 para 2 of the act authorises detailed regulation by means of a legal ordinance (<i>Rechtsverordnung</i>) to be adopted by the Federal Ministry of Justice (<i>Bundesministerium der Justiz</i>) and the Federal Council (<i>Bundesrat</i>), this had never happened. Only non-binding recommendations on the construction of prison facilities, adopted on 3 October 1978, suggest a standard of single cells to be sized at least 9 sqm.⁵</p> <p>The Federal Constitutional Court (<i>Bundesverfassungsgericht</i>) has decided several complaints on the size of cells but avoided to set a clear standard. Rather the court decided that it depends on the overall situation if human dignity is violated, e.g. on factors such as times out of cell, duration of detention in a specific cell and space reserved for sanitary facilities. However, in the light of this reasoning the Court made difference between prison cells and pre-trial detention.⁶</p>

⁴ Germany, Act Concerning the Execution of Prison Sentences and Measures of Rehabilitation and Prevention Involving Deprivation of Liberty – Prison Act (*Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung – Strafvollzugsgesetz*), 16 March 1976. Available at: <https://www.gesetze-im-internet.de/stvollzg/index.html#BJNR005810976BJNE003600314>. English version dated from 2013 available at: https://www.gesetze-im-internet.de/englisch_stvollzg/index.html.

⁵ Pollähne, H. (2017): 'Teil II § 93 LandesR' in: Feest J. et al. (eds.), *Strafvollzugsgesetze. Kommentar*, Köln, p. 759.

⁶ Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) (2011), 1 BvR 409/09, 22 Februar 2011, paras. 29-31; Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) (2016), 2 BvR 566/15, 22 March 2016, para. 27.

The minimum standard imposed by the National Agency for the Prevention of Torture (*Nationale Stelle zur Verhütung von Folter*), Germany's National Prevention Mechanism, when visiting prison and pre-trial detention facilities is 6 sqm per single cell, excluding toilet space, or 7 sqm including toilet space. In cells for more than one person, any additional person needs to be provided with 4 sqm:

*„Ein Einzelhaftstraum hat mindestens eine Grundfläche von sechs Quadratmetern exclusive des Sanitärbereichs aufzuweisen. Für den Fall, dass der Sanitärbereich nicht abgetrennt ist, ist etwa ein Quadratmeter für den Sanitärbereich zu addieren, sodass die Gesamtfläche mindestens sieben Quadratmeter beträgt. Bei Mehrfachbelegung muss eine Fläche von vier Quadratmetern für jede weitere Person exclusive des Sanitärbereichs hinzukommen.“*⁷

„A single-occupancy cell should have floor space of at least six square-metres, excluding the sanitary area. In cases where the sanitary area is not partitioned, approximately one further square metre should be added for that area, giving a total floor space of at least seven square metres. For multiple-occupancy, a further four square metres of floor space must be added to this figure for each additional person, excluding the sanitary area.“⁸

Many *Länder* copy-pasted Section 144 of the Prison Act into their state prison acts without determining the space of the cell in more detail.⁹ The only exception is Baden-Württemberg where it is legally regulated that new prisons shall be built with single cells sized at least 9 sqm, and multi-person cells sized at least 7 sqm per person; older prisons must provide double cells with at least 4.5 sqm or larger cells with at least 6 sqm space.¹⁰

Administrative regulations (*Verwaltungsverordnungen*) that detail the cell space are rare.¹¹ In Bavaria an administrative regulation calls on planners to design single cells with a ground size of at least 9 sqm, excluding toilet space.¹²

According to the Thuringian Ministry of Justice, the size of cells in open detention regimes can be smaller as sanitary facilities are not located in the cells but at the prison hallways.¹³

The National Agency for the Prevention of Torture (*Nationale Stelle zur Verhütung von Folter*), Germany's National Prevention Mechanism, repeatedly reported that inspectors found prisoners in cells sized below their standard, for instance, when they visited the JVA Passau in Bavaria in 2016 where several single cells sized

⁷ Nationale Stelle zur Verhütung von Folter, 'Standards für Justizvollzugseinrichtungen', Wiesbaden, p. 1. Available at: http://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Standards/Standards_fuer_Justizvollzugseinrichtungen.pdf.

⁸ National Agency for the Prevention of Torture (2016), *Annual Report 2016*, Wiesbaden, p. 15. Available at: https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Annual_Report_2016_NationalAgency.pdf.

⁹ Pollähne, H. (2017): 'Teil II § 93 LandesR' in: Feest J. et al. (eds.), *Strafvollzugsgesetze. Kommentar*, Köln, p. 752.

¹⁰ Section 7 para 2 and 3 of the Baden-Württemberg Prison Act (*Justizvollzugsgesetzbuch*):

„§ 7 (2) In Justizvollzugsanstalten, mit deren Errichtung vor Inkrafttreten dieses Gesetzes begonnen wurde, haben Gemeinschaftshafräume bei Doppelbelegung eine Nettogrundfläche von mindestens 4,5 Quadratmetern, bei einer höheren Belegung mindestens sechs Quadratmeter je Gefangener oder Gefangenem aufzuweisen. Für An- und Zubauten bei Anstalten nach Satz 1, mit deren Errichtung nach Inkrafttreten dieses Gesetzes begonnen wurde, gilt Absatz 3 entsprechend.

§ 7 (3) Bei Justizvollzugsanstalten, mit deren Errichtung nach Inkrafttreten dieses Gesetzes begonnen wurde, ist im geschlossenen Vollzug eine Einzelunterbringung der Gefangenen zur Ruhezeit zugrunde zu legen. Einzelhaft - räume haben eine Nettogrundfläche von mindestens neun Quadratmetern, Gemeinschaftshafräume von mindestens sieben Quadratmetern je Gefangener oder Gefangenem aufzuweisen.“

¹¹ Pollähne, H. (2017): 'Teil II § 93 LandesR' in: Feest J. et al. (eds.), *Strafvollzugsgesetze. Kommentar*, Köln, p. 759

¹² The Administrative Regulation (*Verwaltungsverordnung*) on Article 167 BayStVollzG states:

„Einzelhafräume für den Aufenthalt während des Tags und während der Nacht sollen so geplant werden, dass diese unter Berücksichtigung der WC-Kabine eine Bodenfläche von mindestens neun Quadratmetern haben.“

¹³ Email from Ministry of Justice of the State of Thuringia, 13 June 2018.

9.54 sqm where occupied by two prisoners,¹⁴ or in 2015 when they visited the JVA Bruchsal in Baden-Württemberg where single cells sized 9 sqm, including a toilet only separated by a curtain, were occupied by two prisoners.¹⁵ In its most recent report, published on 12 June 2018, the Agency reported to have found cells sized below this standard in Traunstein in Bavaria and in Karlsruhe and Stuttgart in Baden-Württemberg.¹⁶

2. Sanitary Facilities

- a) What is the national standard with regard to access to toilets? Are these located in cells? If not, do prisoners have access to these facilities without undue delay, even during the night? Do these facilities offer privacy to prisoners who use them?
- b) What is the national standard with regard to access to regularly cleaned shower/bathing facilities? How often is this access provided? Do these facilities offer privacy to prisoners who use them?
- c) Is the provision of cleanly sanitary facilities regulated by any legal instrument such as a legislative act, internal prison regulations, manuals, policy papers etc.?
- d) Please indicate whether there are different standards applicable to different detention regimes (for example, if applicable in your jurisdiction: open, semi-open, closed etc.).
- e) Please, provide a link to the National Preventive Mechanism's reports **from the reference period** (1 January 2015 to 1 May 2018, if no report is available for this period, please provide a link to the most recent one) and whether there are any recommendations regarding this aspect (please provide the exact quotation in the national language and if official translation is available – in English). These reports can be found on the web-page of the National Preventive Mechanism. For ease of reference a list of links can be found here: <https://apt.ch/en/list-of-designated-npm-by-regions-and-countries/>

Please cite any relevant sources

Apart from general provisions that cells should be designed “in a manner meeting their purpose”, transferred from Section 144 of the federal Prison Act to state legislation, no legal regulations exist on toilets and sanitary facilities.

According to decisions of the Federal Constitutional Court (*Bundesverfassungsgericht*) toilets in multi-person cells need to be completely separated and extra-ventilated.¹⁷ For single cells the court denied the need for a separated toilet. However, in case of non-separated toilets in single cells, the court declares that prison staff need to respect the privacy of inmates by knocking on the cell door before entering.¹⁸

The National Agency for the Prevention of Torture applies this standard during the visits of its inspectors. Moreover, the National Agency recommends that video surveillance of toilet facilities – except in the case of so-called “especially secured detention rooms” (*besonders gesicherter Hafträume*) – should use privacy-respecting technologies, such as “pixelation” of video images:

¹⁴ Nationale Stelle zur Verhütung von Folter (2016), *Jahresbericht 2016*, Wiesbaden, p. 33. Available at: www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Jahresbericht_2016_Nationale_Stelle.pdf.

¹⁵ Nationale Stelle zur Verhütung von Folter (2016), *Jahresbericht 2015*, Wiesbaden, p. 31. Available at: www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Jahresbericht_2015_Nationale_Stelle.pdf.

¹⁶ Nationale Stelle zur Verhütung von Folter (2018), *Jahresbericht 2017*, Wiesbaden, p. 54. Available at: https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/JAHRESBERICHT_2017_Nationale_Stelle.pdf.

¹⁷ See, for instance, Gemany, Federal Constitutional Court (*Bundesverfassungsgericht*) (2011), 1 BVR 409/09, 22 February 2011.

¹⁸ Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) (2007): 2 BvR 939/07, 13 November 2007, paras. 12 and following.

„Hafräume, in denen mehr als eine Person untergebracht ist, müssen nach Rechtsprechung des Bundesverfassungsgerichts über eine vollständig abgetrennte und gesondert entlüftete Toilette verfügen. [...] Grundsätzlich ist die Intimsphäre an allen Orten, an denen freiheitsentziehende Maßnahmen vollzogen werden, zu schützen. Dies kann bei videoüberwachten Hafräumen etwa durch eine Verpixelung des Sanitärbereichs auf dem Monitor erreicht werden. Allenfalls bei einer Unterbringung“¹⁹

„According to the case law of the German Federal Constitutional Court, prison cells accommodating more than one person must have a completely separated toilet with separate ventilation. [...] Privacy must be protected in all places where people are deprived of their liberty. For prison cells with CCTV monitoring, this can be achieved, for instance, by pixelating images of the sanitary areas on the monitors.“²⁰

Legal regulation does only provide for the obligation of prisoners to “support” hygiene measures but this does not mean that daily access to showers is warranted. The Higher Regional Court Hamm decided in 2016 that a prisoner should have the opportunity to clean his body with warm water at least four times per week.²¹ According to the standard of the National Agency for the Prevention of Torture any persons who wishes to do so should have the option to shower alone. Moreover, even in common showers at least one shower should be partially separated:

„Personen, denen die Freiheit entzogen ist, müssen die Möglichkeit haben, auf Wunsch alleine zu duschen. Unabhängig davon ist in Gemeinschaftsduschräumen zumindest eine Dusche partiell abzutrennen.“²²

“Persons who have been deprived of their liberty should be given the opportunity to shower alone if they wish to do so. Beyond that, at least one shower should be partitioned off in communal shower rooms.”²³

The National Agency for the Prevention of Torture reports violations of these standards in its recently published annual report 2017: Prison cells in Stuttgart and Karlsruhe in Baden-Württemberg lacked fully separated toilets although multiple persons were accommodated. The Agency claims that Section 8 II of Book I of the Baden-Württemberg Prison Code violates constitutional law as it provides for the accommodation of multiple persons in such cells if these persons agree in a written form. The Agency argues that human dignity is not disposable.²⁴

3. Time out of cell

- a) What is the national standard set for time per day/week spent by prisoners outside of their cells:
 - a. Outdoors (within the boundary of the prison)?
 - b. Indoors in the common area?
- b) Are sports or other recreational and educational facilities available to prisoners? If so what types?
- c) Is time spent in cells regulated by any legal instrument, such as a legislative act, internal prison regulations, manuals, policy papers etc.?

¹⁹ Nationale Stelle zur Verhütung von Folter, ‘Standards für Justizvollzugseinrichtungen’, Wiesbaden, pp. 1 and 3. Available at: http://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Standards/Standards_fuer_Justizvollzugseinrichtungen.pdf.

²⁰ National Agency for the Prevention of Torture (2016), *Annual Report 2016*, Wiesbaden, pp. 15-16. Available at: https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Annual_Report_2016_NationalAgency.pdf.

²¹ Pollähne, H. (2017): ‘Teil II § 93 LandesR’ in: Feest J. et al. (eds.), *Strafvollzugsgesetze. Kommentar*, Köln, pp. 764-765.

²² Nationale Stelle zur Verhütung von Folter, ‘Standards für Justizvollzugseinrichtungen’, Wiesbaden, p. 3. Available at: http://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Standards/Standards_fuer_Justizvollzugseinrichtungen.pdf

²³ National Agency for the Prevention of Torture (2016), *Annual Report 2016*, Wiesbaden, p. 16. Available at: https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Annual_Report_2016_NationalAgency.pdf.

²⁴ Nationale Stelle zur Verhütung von Folter (2018), *Jahresbericht 2017*, Wiesbaden, p. 54. Available at: https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/JAHRESBERICHT_2017_Nationale_Stelle.pdf.

- d) Please indicate whether there are different standards applicable to different detention regimes (for example, if applicable in your jurisdiction: open, semi-open, closed etc.).
- e) Please, provide a link to the National Preventive Mechanism's reports **from the reference period** (1 January 2015 to 1 May 2018, if no report is available for this period, please provide a link to the most recent one) and whether there are any recommendations regarding this aspect (please provide the exact quotation in the national language and if official translation is available – in English). These reports can be found on the web-page of the National Preventive Mechanism. For ease of reference a list of links can be found here: <https://apt.ch/en/list-of-designated-npm-by-regions-and-countries/>

Please cite any relevant sources

National standards setting time per day/week spent by prisoners outside their cells do not exist: Relevant regulation only stipulates that the prison management issues "institution rules" (*Hausordnungen*) on the "formation and organisation of the daily prison routine" (Section 100 of the Model State Prison Act).²⁵ This includes the regulation of mandatory working hours, leisure time and night's rest.

As structural conditions in terms of architecture, staffing, or labour supply differ significantly the management should be in a position to respond accordingly by tailored institution rules: In the JVA Tegel in Berlin, for example, time of confinement (*Einschluss*) is from 7:45 pm (respectively 9 pm for another category of prisoners) to 6 am on weekdays and 4:45 pm to 9:05 am on weekends.²⁶ In the JVA Fuhlbüttel in Hamburg, indoor time is from 6:30 pm to 5:45 am on weekdays and from 6:30 pm to 7:45 am on weekends.²⁷

In open detention regimes the cells may not be locked over night.²⁸

Section 64 of the Prison Act stipulates that "a prisoner who does not work in the open air shall be given an opportunity to stay in the open air for at least one hour per day, weather permitting at the fixed time". Section 65 para. 2 of the Model State Prison Act sets a minimum standard of one hour to stay in the open air. This standard was adopted by most *Länder*, though *Länder* such as Bavaria, Hamburg or Lower Saxony have done so – as in the Prison Act – with the reservation that the weather permits outdoor activities, or for prisoners who work outdoors.²⁹

Sport and educational facilities shall be available for prisoners according to Section 67 of the Prison Act and Section 54 of the Model State Prison Act; and most *Länder* have adopted identical or similar provisions. The prison management is responsible for the actual implementation, e.g. the establishment and equipment of gyms or libraries. *Länder* governments have issued non-binding guidelines or recommendations on minimum implementation standards, such as the "Framework Concept for Prisoners' Sport in Prisons of Baden-Württemberg" (*Rahmenkonzept für den Gefangenensport im baden-württembergischen Justizvollzug*) issued by the Ministry of Justice of Baden-Württemberg. What is actually available differs significantly depending on

²⁵ See also Section 161 II of the Prison Act: „The institution rules shall contain in particular the regulations regarding 1. visiting hours, frequency and duration of visits, 2. working hours, leisure time and night's rest, and 3. the possibilities of making requests and complaints or for applying to a representative of the supervisory authority.“

²⁶ JVA Tegel (2018), *Hausordnung*, Berlin, pp. 29-30. Available at: www.berlin.de/justizvollzug/_assets/jva-tegel/service/hausordnung-jva-tegel-stand-07-02-2018.pdf.

²⁷ JVA Fuhlbüttel (2011), *Hausordnung*, Hamburg, p. 35. Available at: www.hamburg.de/contentblob/3382236/d7aecc309d81906a2d5c5291da928374/data/justizvollzugsanstalt-fuhlsbuettel-hausordnung.pdf.

²⁸ See, for example, Germany, Senate Administration for Justice, Consumer Protection and Antidiscrimination of Berlin (*Senatsverwaltung für Justiz, Verbraucherschutz und Antidiskriminierung Berlin*) (2018), Verwaltungsvorschriften zu § 16 des Berliner Strafvollzugsgesetzes (Offener Vollzug), Section 1, Available at: [Senatsverwaltung für Justiz, Verbraucherschutz und Antidiskriminierung Berlin \(2018\), Verwaltungsvorschriften zu § 16 des Berliner Strafvollzugsgesetzes \(Offener Vollzug\).](http://www.senatsverwaltung-berlin.de/justiz/verwaltungsverfahren/verwaltungsverfahren-zu-16-des-berliner-strafvollzugsgesetzes-offener-vollzug)

²⁹ Lesting, W. (2017), 'Teil II § 65 LandesR' in: Feest et al. (eds.), *Strafvollzugsgesetze. Kommentar*, Köln, pp. 562-563.

the spatial conditions of each prisons. From Rhineland-Palatine it is reported, that all prisons employ staff with a sport trainer license (*Sportübungsleiter*). Several prisons use sport also a means for special therapeutical treatment or in the context of anti-violence training, or they offer sport programmes tailored for older prisoners or obese persons. Moreover, the prisons organise sport festivals or competitions on a regular basis, sometimes even in cooperation with prisons in other *Länder*.³⁰

Outdoor time or lacking options for recreational activities were no issue for the National Agency for the Prevention of Torture in its annual report for 2015 and 2016. In the annual report for 2017 the Agency reported that in prisons in Traunstein (Bavaria) and Karlsruhe (Baden-Württemberg) the prison cells were only opened for one hour per day, thus, prisoners who do not work were detained the other 23 hours of the day in small cells. The Agency recommended to open cells for a longer time and make leisure activities available.³¹

4. Solitary confinement

- a) What is the national standard set regarding solitary confinement? Is it regulated by any legal instrument, such as a legislative act, internal prison regulations, manuals, policy papers etc.?
- b) Please indicate whether there are different standards applicable to different detention regimes (for example, if applicable in your jurisdiction: open, semi-open, closed etc.).
- c) Please, provide a link to the National Preventive Mechanism's reports **from the reference period** (1 January 2015 to 1 May 2018, if no report is available for this period, please provide a link to the most recent one) and whether there are any recommendations regarding this aspect (please provide the exact quotation in the national language and if official translation is available – in English). These reports can be found on the web-page of the National Preventive Mechanism. For ease of reference a list of links can be found here: <https://apt.ch/en/list-of-designated-npm-by-regions-and-countries/>

Please cite any relevant sources

Both the Prison Act (Sections 88 and 89) and the Model State Prison Act (Section 78) offer standards on solitary confinement (*Absonderung*), according to which solitary confinement is only admissible if necessary to avert threats inherent in the prisoner's person, which could mean the risk of jailbreak, violence against her/himself, violence against other persons or things or suicidal tendencies. Such provisions were adopted by all *Länder* except Hamburg and Hesse, where solitary confinement can also be ordered to maintain the institutional order of the prison or the prevent liberation by external supporters.³²

Usually, solitary confinement is to be ordered by the prison director and the prison doctor needs to be consulted in advance, the necessity of the measure has to be assessed on a regular basis; prisoners in solitary confinement have to be observed with special attention; more than three days of confinement need to be reported to the supervisory authority and more than 30 days of confinement per year need to be approved by the supervisory authority.³³

Apart from this, neither a maximum duration nor the actual arrangements of solitary confinement are detailed by the *Länder* prison acts. Commentators note that solitary confinement shall only isolate prisoners from other inmates but is not meant for their total isolation. Thus, contacts to prison staff and external visitors are to be maintained. Moreover, it does neither mean a suspension of the right to stay in the open air for at least one hour per day nor a suspensin of the right to have access to newspapers and television.³⁴

³⁰ Email from Ministry of Justice of the State of Rhineland-Palatine, 12 June 2018.

³¹ Nationale Stelle zur Verhütung von Folter (2018), *Jahresbericht 2017*, Wiesbaden, p. 56. Available at: https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/JAHRESBERICHT_2017_Nationale_Stelle.pdf.

³² Goerdeler, J. (2017), 'Teil II § 78 LandesR' in: Feest et al. (eds.), *Strafvollzugsgesetze. Kommentar*, Köln, pp. 644-645.

³³ Ibid.

³⁴ Ibid.

Besides solitary confinement as special security measure (*besondere Sicherheitsmaßnahme*), the isolation of prisoners can also be ordered to enforce discipline: so-called *Arrest* in accordance with Sections 86 II and 87 III of the Model State Prison Act. Arrest must only be ordered in cases of serious or repeated misconduct. The maximum duration is four weeks. Before an arrest is executed a doctor needs to be consulted; and arrested prisoners are to be under medical supervised. The *Länder* of Brandenburg and Saxony have abandoned solitary confinement by arrest.³⁵

The National Agency for the Prevention of Torture recommends the following standard on solitary confinement:

*“Um die negativen Auswirkungen der Einzelhaft auf die psychische und physische Gesundheit der Betroffenen zu mildern, ist ihnen ausreichend Gelegenheit zu angemessenem menschlichen Kontakt (beispielsweise durch erweiterte Besuchszeiten) und zu sinnvoller Betätigung zu geben. Auch sind Betroffene regelmäßig psychiatrisch/psychologisch zu betreuen. Dies sollte in einem der Gesprächssituation angemessenen und vertraulichen Rahmen stattfinden.”*³⁶

“To mitigate the negative consequences of solitary confinement on the mental and physical health of the person concerned, sufficient opportunity for appropriate human contact (e.g. extended visiting times) and to engage in purposeful activity is to be provided. Those placed in solitary confinement are also to be regularly visited by a psychiatrist/psychologist. These meetings should be conducted in an appropriate and confidential environment.”³⁷

In its recent annual report the National Agency for the Prevention of Torture reported that the arrest cell (*Arrestraum*) in the prison of Traunstein (Bavaria) had no windows and was located in the cellar. Moreover, people under arrest have only access to the Bible or the Quran, if they want to read. Therefore, the Agency claimed that arrest in Traunstein prison violated human dignity.³⁸ About the special security ward (*Sicherungsstation*) at the Tegel prison in Berlin the Agency reported that inmates could neither work nor were leisure activities available although solitary confinement was ordered sometimes for a period of several months.³⁹

5. Access to healthcare

- a) What is the national standard with regard to access to medical services in prisons? (*E.g. do prisoners have prompt access to medical services within prisons or externally? Do prisoners have access to dentists and opticians?*)
- b) Are there any special provisions relating to the provision of specialist care? (*E.g. for long-term diseases, for sick and elderly prisoners, the mentally ill, drug addicted prisoners etc.*)
- c) Is access to healthcare in prisons regulated by any legal instrument, such as a legislative act, internal prison regulations, manuals, policy papers etc.?
- d) *Please indicate whether there are different standards applicable to different detention regimes.*
- e) *Please, provide a link to the National Preventive Mechanism’s reports from the reference period (1 January 2015 to 1 May 2018, if no report is available for this period, please provide a link to the most recent one) and whether there are any recommendations regarding this aspect (please provide the exact quotation in the national language and if official translation is available – in English). These*

³⁵ Walter, J. (2017), ‘Teil II § 86 LandesR’ in: Feest et al. (eds.), *Strafvollzugsgesetze. Kommentar*, Köln, pp. 692-694.

³⁶ Nationale Stelle zur Verhütung von Folter, ‘Standards für Justizvollzugseinrichtungen’, Wiesbaden, p. 3. Available at: www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Standards/Standards_fuer_Justizvollzugseinrichtungen.pdf.

³⁷ National Agency for the Prevention of Torture (2016), *Annual Report 2015*, Wiesbaden, p. 15. Available at: https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Annual_Report_2015_National_Agency.pdf.

³⁸ Nationale Stelle zur Verhütung von Folter (2018), *Jahresbericht 2017*, Wiesbaden, p. 55. Available at: https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/JAHRESBERICHT_2017_Nationale_Stelle.pdf.

³⁹ *Ibid.*, pp. 55-56.

reports can be found on the web-page of the National Preventive Mechanism. For ease of reference a list of links can be found here: <https://apt.ch/en/list-of-designated-npm-by-regions-and-countries/>

Please cite any relevant sources

Whereas the Prison Act (Sections 56 to 66) regulated prisoners' access to healthcare services quite detailed, the Model State Prison Act (Section 62) simply states that prisoners are entitled to access „necessary, adequate and appropriate medical services“, considering the principle of efficiency and in line with the general standards of the German public health insurance system (gesetzliche Krankenversicherung) in accordance with Book V of the Social Code (*Sozialgesetzbuch V*). No differences exist between closed and open detention regimes in this regard.

The prison acts of most *Länder* follow this model. Thus, prisoners enjoy, in principle, the same access to healthcare as the majority of citizens who are covered by public health insurance. This includes both medical screenings and medical treatment. As citizens who are not deprived of their liberty, prisoners have to contribute to the costs of medical screenings and treatments in accordance with Book V of the Social Code although they earn less money by their mandatory work.

Some exceptions exist due to specific legal regulations: In North Rhine Westphalia, for instance, such healthcare access is only warranted if not in conflict with the “characteristics of the criminal detention regime” (Section 45 I of the Prison Act North Rhine Westphalia) without specifying instances when access to healthcare can be restricted; and in Bavaria and Lower Saxony the prison acts explicitly regulate access to dental services.⁴⁰

Medical service are usually provided in prisons by prison doctors (*Anstaltsärzte*) or in special prison hospitals (*Vollzugskrankenhäuser*). Apart from general provisions that medical care has to be warranted, no further details are regulated by law, except in Bavaria, Lower Saxony and Saxony-Anhalt and Schleswig-Holstein, where the prison acts stipulate that prisons must usually employ full-time prison doctors.⁴¹ Bavaria even lists the tasks of the prison doctors (Section 179 of the Bavarian Prison Act). In the other *Länder*, the services of the prison doctors are regulated by administrative regulations and service regulations for the medical service in prisons.⁴²

Access to healthcare was not an issue for the National Agency for the Prevention of Torture in its annual reports for 2015 and 2016. In its Annual Report 2017 the National Agency reports shortages of medical staff for two of the five prisons that were visited in this year: In the prison of Traunstein (Bavaria) a doctor came only once a week to hold a clinic for a few hours. In the prison of Karlsruhe (Baden-Württemberg) paramedics were not available during night shifts.⁴³

6. Special measures in place to protect juvenile prisoners.

- a) Are there any legal instruments, such as a legislative act, internal prison regulations, manuals, policy papers etc. regulating the separation of juvenile prisoners from adults? (e.g. a separate juvenile ward, or part of the building, canteen, common area etc.?)

⁴⁰ Lesting, W. (2017), 'Teil II § 62 LandesR' in: Feest et al. (eds.), *Strafvollzugsgesetze. Kommentar*, Köln, p. 526.

⁴¹ Lesting, W. (2017), 'Teil II § 98 LandesR' in: Feest et al. (eds.), *Strafvollzugsgesetze. Kommentar*, Köln, p. 795.

⁴² See, for example, the Service Regulation of North Rhine Westphalia: Dienstordnung für das Gesundheitswesen in den Justizvollzugsanstalten des Landes Nordrhein-Westfalen, 29 September 2010, available at: <http://www.jvv.nrw.de/anzeigeText.jsp?daten=922&daten2=Vor#inhalt>.

⁴³ Nationale Stelle zur Verhütung von Folter (2018), *Jahresbericht 2017*, Wiesbaden, p. 57. Available at: https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/JAHRESBERICHT_2017_Nationale_Stelle.pdf.

- b) What age category falls under this specific juvenile prison regime?
- c) Please indicate whether there are different standards applicable to different detention regimes (for example, if applicable in your jurisdiction: open, semi-open, closed etc.).
- d) Please, provide a link to the National Preventive Mechanism's reports **from the reference period** (1 January 2015 to 1 May 2018, if no report is available for this period, please provide a link to the most recent one) and whether there are any recommendations regarding this aspect (please provide the exact quotation in the national language and if official translation is available – in English). These reports can be found on the web-page of the National Preventive Mechanism. For ease of reference a list of links can be found here: <https://apt.ch/en/list-of-designated-npm-by-regions-and-countries/>

Please cite any relevant sources

On 31 May 2006, the Federal Constitutional Court decided that the regulation of juvenile detention by the Federally Harmonised Administrative Regulation for the Juvenile Detention Regime (*Bundeseinheitlichen Verwaltungsvorschriften für den Jugendstrafvollzug*) was unconstitutional: the court called for legal regulation. Since then, all Länder have adopted special juvenile detention acts (*Jugendstrafvollzugsgesetze*) or have regulated this area of detention by specific chapters of their general prison acts.

Accordingly, juvenile detention or youth penalty (*Jugendstrafe*) is organised in special juvenile detention facilities (*Jugendstrafanstalten*, *Jugendanstalten* or simply *Justizvollzugsanstalten*). However, in particular female juvenile offenders are usually accommodated in special departments of women prisons due to their small number.⁴⁴

The age categories falling under the juvenile detention regime is determined by Section 1 I of the Youth Court Act (*Jugendgerichtsgesetz*): Juvenile detention is ordered by youth courts against juveniles aged from 14 to 17 years (*Jugendliche*) or adolescents aged from 18 to 20 years (*Heranwachsende*) “if, as a result of the harmful inclinations demonstrated by the juvenile during the act, supervisory measures or disciplinary measures are not sufficient for the purposes of supervision or if such a penalty is necessary given the seriousness of the juvenile’s guilt.” (Section 17 II of the Youth Court Act). According to Section 17 I of the Youth Court Act, “youth penalty’ shall mean deprivation of liberty in a facility provided for its execution”. The minimum duration shall be six months, the maximum duration is ten years in cases of serious criminal offences.

Juvenile detention was the thematic focus of the annual report 2016 of the National Agency for the Prevention of Torture: The Agency noted that the visited detention facilities were well staffed and that the prison staff is trained for interaction with young offenders in most *Länder*. Moreover, specialists such as social workers or psychiatrists reported good cooperation with the ordinary prison staff. However, the Agency recommended improvements to protect the privacy of juvenile prisoners, e.g. special security cells (*besonders gesicherte Hafträume*), shower rooms and during strip searches.⁴⁵

7. Special measures in place to protect prisoners from violence

- a) Are any special measures in place to protect prisoners against violence, including sexual violence? (E.g. are prisoners supervised by prison staff? Are there emergency call buttons? Do guards receive training in de-escalation? Do prisoners have access to a complaints mechanism?)
- b) Are there any special measures in place to protect LGBTI prisoners, who are particularly vulnerable to violence/sexual violence?
- c) Are these measures regulated by any legal instrument, such as a legislative act, internal prison regulations, manuals, policy papers etc.?

⁴⁴ Walkenhorst, P. (2010), ‘Jugendstrafvollzug’, *Aus Politik und Zeitgeschichte*, No. 7/2010 (15. Februar 2010), p. 24.

⁴⁵ Nationale Stelle zur Verhütung von Folter (2016), *Jahresbericht 2015*, Wiesbaden, pp. 28-30. Available at: www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Jahresbericht_2015_Nationale_Stelle.pdf.

- d) Please indicate whether there are different standards applicable to different detention regimes (for example, if applicable in your jurisdiction: open, semi-open, closed etc.).
- e) Please, provide a link to the National Preventive Mechanism's reports from the reference period (1 January 2015 to 1 May 2018, if no report is available for this period, please provide a link to the most recent one) and whether there are any recommendations regarding this aspect (please provide the exact quotation in the national language and if official translation is available – in English) These reports can be found on the web-page of the National Preventive Mechanism. For ease of reference a list of links can be found here: <https://apt.ch/en/list-of--designated-npmby-regions-and-countries/>

Please cite any relevant sources

In 2006, The Federal Constitutional Court claimed that legal provisions must exist which protect prisoners against violent assaults.⁴⁶ The Model State Prison Act stipulates that “harmful consequences of detention is to be counteracted” (Section 3 IV), which is also meant to protect prisoners from health risk, and it provides for a “nonviolent climate” in prisons through “security and order” (Section 72 I). No differences exist between closed and open detention regimes in this regard.

The *Länder* of Baden-Württemberg and Brandenburg explicitly mention that prisoners are to be protected against violence in their prison acts, and other *Länder* prison acts have copied the provision on a “nonviolent climate” from the model act. A key instrument to enforce order and protect prisoners from violent prisoners are the so-called special security measures (*besondere Sicherungsmaßnahmen*), among others, solitary confinement (see above). Another instrument to deescalate violent conflicts and maintain the prison order is the relocation of prisoners which is provided for in all *Länder* prison acts.

However, more detailed regulation or guidance does not seem to exist. From Baden-Württemberg it was reported that some prisons have special “protection departments” (*Schutzabteilungen*) for the accommodation of vulnerable or threatened prisoners. It was also reported that prisoners at risk can also be relocated to another prison for their own protection.⁴⁷ Rhineland Palatine reported that staff is trained in conflict management and de-escalation techniques in order to detect and prevent risks of violent confrontations among prisoners. In case of violence among prisoners, the prison management should call for an investigation under supervision of the public prosecution authority and consider sanctions in each case on an individual basis.⁴⁸

The National Agency for the Prevention of Torture has not yet issued standards or recommendations on the protection against violence in general or of vulnerable groups in particular.

8. Responsible authorities

- a) What authority is responsible for the provision of additional information requested under Article 15 of the EAW Framework Decision? (Please specify whether there a central authority deals with these requests, if yes, please provide contact details, such as the name of the institution, a website, physical and email addresses, and a telephone number. In the absence of a central authority, who deals with those requests?)
- b) What authority is responsible for monitoring conditions of detention and putting forward recommendations?

Please cite any relevant sources

⁴⁶ Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) (2006), 2 BvR 1673/04, 31 May 2006, para. 57.

⁴⁷ Email from the head of the unit on criminal detention at the Ministry of Justice and for Europe Baden-Württemberg, 30 May 2018.

⁴⁸ Email from Ministry of Justice of the State of Rhineland-Palatine, 12 June 2018.

According to the Unit for International Penal Law, European and Multilateral Cooperation of the Federal Ministry of Justice and for Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*) the competent authorities to provide additional information requested under Article 15 of the EAW Framework Decision are the public prosecution authorities who have issued an EAW. Thus, it is an individual authority in each case. If requests are sent by chance to the SIRENE unit at the Federal Criminal Police Office (*Bundeskriminalamt*), the unit acts only as a kind of “mailbox” that is dispatching requests to the responsible public prosecution authorities.⁴⁹

Several authorities exist in Germany for the supervision and monitoring of detention conditions of prisons: The *Länder* **ministries of justice** are responsible for the executive oversight of the prison systems. All prisons have to establish **advisory prison councils** (*Anstaltsbeiräte*) composed of members of public who shall exercise functions of internal supervision and quality control as well as reporting to the public from inside the prison. In North Rhine Westphalia the office of a **Prisons and Probation Ombudsman** (*Justizvollzugsbeauftragter*) was established who is the “main point of contact for inmates and prison staff, as well as for any persons affected by the prison system”.⁵⁰ He can be addressed with confidential complaints and suggestions.⁵¹ Finally, the **National Agency for the Prevention of Torture** that was established in 2008 as German National Prevention Mechanism is monitoring the German prison system through visits and inspections.⁵²

⁴⁹ Information provided by the head of the Referat II B 4 of the Federal Ministry of Justice and for Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*). Phone call, 12 June 2018.

⁵⁰ Graebisch, C. (2017), ‘Teil II § 103 LandesR’, in: Feest, J. et al. (eds.): *Strafvollzugsgesetze. Kommentar*, Köln, pp. 819-836.

⁵¹ <http://www.justizvollzugsbeauftragter.nrw.de/>

⁵² <https://www.nationale-stelle.de/home.html>