

Right to health and access to health services

14th Session of the UN Open-ended Working Group on Ageing

Submission April 2024

Answers of the German Institute for Human Rights to the guiding questions for the normative framework of the 14th session of the Open-ended Working Group on Ageing:

Right to health and access to health services

Definition

1. How is the human right of older persons to the highest attainable standard of physical and mental health defined in the national and local legislation in your country? If definitions are not available, how should such rights be defined considering relevant existing national, regional and international legal frameworks?

Germany, as a member state of the Covenant on Economic, Social and Cultural Rights (ICESCR), recognizes the Covenant as a federal law, incorporating Article 12 which outlines measures to ensure the right to the highest attainable standard of health. The Committee on Economic, Social and Cultural Rights also advises the inclusion of the recommendations 1 – 17 from the International Plan of Action on Ageing (General Comment No. 6)¹ to effectively fulfill the rights of older persons.

Article 35 of the Charter of Fundamental Rights of the European Union stipulates that everyone living in the European Union has the right of access to preventive health care and medical treatment in accordance with national legislation and practice.

In German constitutional law, there is no explicit provision for a “right to health”. While Article 2 (2) of the Basic Law (Grundgesetz, GG) protects the right to life and physical integrity, it does not specifically address health. However, some state constitutions, such as that of Hesse, mention the right to health (“Human life and health, [...] are inviolable”).² It is above all the welfare state principle (Art. 20 para. 1 GG), which requires the state to establish “a sustainable health and health insurance system”.³ In 2012, Germany adopted “healthy aging” as its seventh national health goal, defining it not only as a mere

¹ Committee on Economic, Social and Cultural Rights (1995): General Comment No. 6, p. 113, paras. 34-35, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=INT%2FCESCR%2FGEC%2F6429&Lang=en.

² Hessischer Landtag (1946): „Verfassung des Landes Hessen“: S. 2, https://hessischer-landtag.de/sites/default/files/dateien/2022-12/02_Verfassung%20%282%29.pdf [own translation by the German Institute for Human Rights].

³ Study “The right to health, a comparative law perspective” in Germany, European Parliamentary Research Service, p. 5, [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/698770/EPRS_STU\(2021\)698770_DE.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/698770/EPRS_STU(2021)698770_DE.pdf).

absence of illness but also as physical and mental performance, subjective health, life satisfaction, independence and self-determination in lifestyle choices.⁴

Furthermore, Germany in its development cooperation policy supports and contributes actively to the “Agenda 2030”. SDG 3 of the agenda aims to ensure a healthy life for all persons of all ages and promote their well-being, however older persons are not explicitly mentioned.

2. The human right to health encompasses both access to health care and attention to the material and other conditions which are necessary for its full enjoyment. What provisions have been made to ensure that older persons enjoy access, on an equal basis with others, to social protection, adequate water and sanitation, adequate housing and to health education?

According to the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG), discrimination based on age is forbidden both in employment and everyday transactions. Nevertheless, there are exceptions to age-related unequal treatment.

Older persons who are aged 65 years and older and are permanently unable to support themselves from their own income are entitled to basic security benefits according to the German Social Code (SGB XII). The amount of basic income support is calculated from the difference between the individual's needs and the allowable income (e.g. pension). The scope of the benefits includes the relevant standard requirement, reasonable expenses for accommodation and heating, any additional requirements and the payment of health and long-term care insurance contributions.⁵

The Housing Assistance Act (*Wohnraumförderungsgesetz* – WoFG) is intended to help older persons, among other groups in vulnerable situations, to find accommodation. The federal government is also supporting private owners and tenants who – regardless of income and age – can apply for grants or loans to remove barriers in residential buildings as part of the “Age-appropriate renovating” program (KfW).⁶

The Federal Centre for Health Education (*Bundeszentrale für gesundheitliche Aufklärung*) regularly publishes free reports on the topic of active and healthy ageing for older persons on its website.⁷ The “Ageing in Balance” program has also published several brochures with information on promoting physical activity for older persons.⁸

Scope of the right

3. What are the key normative elements of the human right of older persons to the enjoyment of the highest attainable standard of physical and mental health?

Please provide references to existing standards on elements including but not limited to:

a) Prohibition of all forms of discrimination against older persons on the basis of age, alone or combined with other grounds, in all matters related to health.

⁴ National health goal „healthy ageing“, published by the ministry of health, 2012, p. 13, https://gvg.org/wp-content/uploads/2022/01/Gesund_aelter_werden_2012_lang.pdf.

⁵ Bundesministerium für Arbeit und Soziales (BMAS) (2023): „Grundsicherung im Alter“: <https://www.bmas.de/DE/Soziales/Rente-und-Altersvorsorge/Fakten-zur-Rente/Grundsicherung-im-Alter/grundsicherung-im-alter.html>.

⁶ Bundesministerium für Familie, Senioren, Frauen und Jugend (Stand 2021): “Nationaler Bericht Bundesrepublik Deutschland”, Berlin: <https://www.bmfsfj.de/resource/blob/191664/42143860dccc2c1950290b5296b3c45b/nationaler-bericht-20-jahre-zweiter-un-weltaltenplan-deutsch-data.pdf>.

⁷ Gesund & aktiv älter werden (Stand 2024): <https://www.gesund-aktiv-aelter-werden.de/>.

⁸ Gesund & aktiv älter werden (Stand 2024): „Bewegungsprogramme“: <https://www.gesund-aktiv-aelter-werden.de/fachinformationen/bewegungsprogramme/>.

In the Declaration of Geneva of 2017, doctors pledge “not to allow considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, sexual orientation or social status, or any other factor, to come between [their] duties or [their] patient”. The Geneva Pledge thus restricts the freedom and right of doctors under the professional code of conduct of the German Medical Association to refuse treatment.⁹

In addition, the freedom and right to refuse treatment is restricted by the General Equal Treatment Act (AGG). This expressly prohibits discrimination on the basis of age in the establishment, performance and termination of civil law obligations (Section 1, Section 19 AGG). Direct discrimination exists if a person is, has been or would be treated less favourably than another person in a comparable situation on the grounds of age.

b) Provision of promotive, preventive, curative, rehabilitative and palliative health facilities, goods and services, as well as health care and support, including on aspects such as quality of care, long-term and palliative care and support.

The Act to Strengthen Health Promotion and Prevention (*Präventionsgesetz – PräVg*) improves the basis for cooperation between social insurance institutions, federal states and local authorities in the areas of prevention and health promotion. The Act also further developed early detection examinations at all age groups and regulated important immunization protection measures.

According to the provisions of the Intensive Care and Rehabilitation Reinforcement Act (*Intensivpflege- und Rehabilitationsstärkungsgesetz – IPReG*), effective since 2020, the health insurance fund will no longer independently verify the medical necessity of geriatric rehabilitation prescribed by contract doctors. Instead, they are obligated to abide by the specialist's assessment. This is supposed to avoid the onset of the need for long-term care, emphasizing the initiation of all appropriate prevention services at an early stage.

c) Availability, accessibility, acceptability and quality of health facilities, goods and services as well as health care and support, including aspects such as quality of care, long-term and palliative care and support.

The German social security system, including its health insurance scheme (*Gesetzliche Krankenversicherung*), is grounded in the SGB, which ensures the availability of comprehensive healthcare services. This includes ensuring that health services are available for everyone and encompasses a broad spectrum of medical treatments.

The Federal Joint Committee (*Gemeinsamer Bundesausschuss*, G-BA) sets standards for medical care, ensuring that treatments are evidence-based and of high quality. The Institute for Quality and Efficiency in Health Care (IQWiG) evaluates the benefits and harms of medical interventions to inform policy and practice.

Apart from that, with the National Dementia Strategy, the Federal Government, led by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth and the Federal Ministry of Health, is working with over 70 stakeholders to improve the living conditions of people with dementia and their relatives.

⁹ Bundesärztekammer (Stand 2021): „(Muster-)Berufsordnung-Ärzte der Bundesärztekammer“, https://www.bundesaerztekammer.de/fileadmin/user_upload/_old-files/downloads/pdf-Ordner/Recht/_Bek_BAEK_MBO-AE_Online_final.pdf.

d) Exercise of older persons' legal capacity on an equal basis with others, including the ability to make an informed consent, decisions and choices about their treatment and care.

The exercise of legal capacity is protected by provisions of the German Civil Code (BGB). According to Section 630d of the German Civil Code (BGB), the treating party is obliged to obtain the patient's consent before carrying out a medical procedure, in particular an intervention on the body or health. The practitioner is also obliged to inform the patient of all circumstances relevant to consent. The information must be provided by the practitioner or by a person who has the necessary training to carry out the measure, in good time so that the patient can make a well-considered decision about consent and in a way that is comprehensible to the patient (§ 630e BGB).

If a person lacks the legal capacity to consent to or refuse medical treatment because of an illness or disability, the competent court (*Betreuungsgericht*) can appoint a legal representative to assist them in making necessary decisions (§ 1814 (1) BGB). The representative is expected to respect and fulfill the person's wishes. A substitute decision is only made if the person cannot act with assistance. In 2023, a new care law was passed, which aims to strengthen the self-determination of the people receiving care and prioritize their wishes. Under no circumstances may the carer make decisions without the consent of the person receiving care.¹⁰ However, in its recent concluding observations from October 2023, the UN Committee on the Rights of persons with disabilities was concerned that German guardianship law does not eliminate all forms of substituted decision-making and recommended that Germany replace them with forms of supported decision-making.¹¹

According to § 1827 civil code, decisions and choices about treatments can also be made through an advance directive (*Patientenverfügung*). This document specifies that instructions for certain medical measures are binding if they clearly and reliably express the will of the patient for a specific life and treatment situation. The Federal Consumer Service Center provides an accessible legal tech tool that facilitates the creation of such a binding advanced medical directive, while also outlining its associated risks and consequences.¹²

e) Access to prompt and effective remedies and redress when older persons' right to health is violated.

Patients who are discriminated against on the basis of the characteristics listed in the General Equal Treatment Act (AGG), including age, can assert claims for injunctive relief, removal, damages and compensation under the AGG.

There are also several channels for resolving complaints outside of court. One point of contact is the Independent Patient Counselling Service Germany (*Unabhängige Patientenberatung Deutschland – UPD*), a non-profit organization dedicated to offering patients neutral and independent advice on their rights.¹³ Moreover, statutory health insurance funds serve as a primary point of contact for their members. They are legally obliged to inform their policyholders and must offer them support through information, counselling and appropriate services. Additionally, hospitals nationwide are required by the Patients' Rights Act to establish a patient-orientated complaints management system. This includes

¹⁰ Bundesministerium der Justiz (BMJ) (Stand 2023): „Rechtliche Betreuung“: https://www.bmj.de/DE/themen/vorsorge_betreuungsrecht/rechtliche_betreuung/rechtliche_betreuung_node.html.

¹¹ UN, Committee on the Rights of Persons with Disabilities (2023): Concluding observations on the combined second and third periodic reports of Germany, UN Doc. CRPD/C/DEU/CO/2-3, 3 October 2023, paras. 25-26; <https://undocs.org/CRPD/C/DEU/CO/2-3>.

¹² Verbraucherzentrale (Stand 2024): „Selbstbestimmt - Patientenverfügung online erstellen und vorsorgen“: <https://www.verbraucherzentrale.de/patientenverfuegung-online>.

¹³ Verbraucherzentrale Bundesverband (Stand 2024): „Unabhängige Patientenberatung“: <https://www.vzbv.de/unabhaengige-patientenberatung>.

setting up complaints channels, informing patients on site about these services and processing concerns quickly and transparently.

If there has been a breach of the duties specified in the professional code of conduct of the medical profession, patients can submit a complaint to the Medical Association. If there is sufficient evidence, an out-of-court arbitration procedure can be initiated. The arbitration centers serve to reach an amicable solution out of court and through legal and medical examination

State obligations

4. What are the measures that should be undertaken by the State to respect, protect and fulfil the human right of older persons to the highest attainable standard of physical and mental health, regarding the normative elements as provided above?

States must undertake a comprehensive approach that addresses various dimensions of healthcare and wellbeing. It should be guided by normative elements such as accessibility, quality, acceptability, and availability, as outlined in international human rights treaties like the ICESCR.

Special consideration

5. What special measures and specific considerations should be considered in developing the normative content on older persons' right to health?

- States should advocate for a binding international convention on the rights of older persons, in which the right to health and access to health services of older persons are defined.
- States must guarantee the right to the highest attainable standard of health (Article 12 ICESCR).
- States must ensure non-discriminatory access to health services.
- States must enact discrimination laws that list age as a ground of discrimination in order to prevent age discrimination in the health care system.
- States must create the necessary framework conditions so that older persons can exercise their right to health.
- States are required to provide a legal framework as well as complaints bodies judicial opportunities to ensure that older persons can fully enjoy their right to health and that they can fully exercise their rights.
- States must ensure physical and financial access to health services for older persons.
- States must ensure that older persons gain sufficient, age-friendly and accessible information on the health services and benefits they are entitled to.
- States must emphasis on preventative measures to maintain health and well-being in older age, including vaccination, regular screening, and health education.
- States must provide specialized and human-rights based training for healthcare workers in geriatrics and gerontology to ensure older persons receive appropriate care and that their human rights are respected at any time.
- States must leverage technology to improve access to health information and services for older persons, while ensuring digital literacy programs are provided.
- States must strengthen health-care systems and social protections to advance the well-being and resilience of all, including older persons.
- States must ensure that a process for the preparation of right-to-health impact assessments before major health-related policies are finalized and that arrangements for ensuring participation in the formulation of health policies are given.

- States must formulate national policies, strategies and plans of action to launch and sustain primary health care as part of a comprehensive national health system and which include older persons as a priority group when it comes to providing of health care services.

6. How should the responsibilities of non-State parties such as private sector be defined in the context of the human right to health of older persons?

Generally, a State's obligation to protect human rights includes ensuring that non-State parties do not infringe upon human rights. With respect to health, States should, for instance, adopt legislation or other measures ensuring equal access to health care provided by third parties.

The Charter of the United Nations declares that one of the purposes of the United Nations is promoting respect for human rights, and international human rights treaties envisage a particular role for United Nations bodies and specialized agencies in their implementation. For instance, the World Bank, the International Monetary Fund, and United Nations specialized agencies, such as the United Nations Children's Fund (UNICEF), are requested to cooperate effectively with States parties on the national implementation of all rights.¹⁴

Businesses can affect the right to health in several ways. Companies marketing pharmaceutical products or medical equipment may contribute positively to the enjoyment of the right to health but may also make health care more difficult to access or afford, for instance by keeping the price of medicines, such as those for HIV/AIDS treatment, high. Extractive and manufacturing industries may also indirectly infringe upon the right to health by polluting water, air and soil. The Committee on Economic, Social and Cultural Rights has underlined that States must protect against pollution or contamination by private companies and assess their impact on the environment.¹⁵

In general, non-State parties should be held to standards that ensure the contribution to the public good, especially in terms of offering services that are affordable and accessible to older persons. Partnerships between the private sector, government, and non-profit organizations to improve health related issues need to be supported. The government should ensure robust regulatory frameworks are implemented to oversee the quality of health services provided by the private sector, preventing discrimination against older persons. With many older persons requiring long-term care, defining the role of private providers is crucial.

Implementation

7. What are good or promising practices and main challenges faced by your country in the adoption and implementation of the normative framework on the human right to health of older persons?

Germany generally integrates international human rights commitments into its legal and policy frameworks. Comprehensive policies that address specific considerations for access to care, quality of care, and the rights of older persons within the healthcare system were developed. Additionally, Germany supports the participation of older persons and advocacy groups in the development and implementation of health policies, following a participatory approach.

¹⁴ Office of the High Commissioner of Human Rights (2008): "The Right to Health – Fact sheet No. 31": <https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-31-right-health>.

¹⁵ John Ruggie for the UN Human Rights Council (2007): "A/HCR/4/35 - Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises": p. 8, paras. 20, <https://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other>.

One of the main challenges is ensuring consistency across the federal structure. Each federal state (*Bundesland*) has significant autonomy in health policy, which can lead to variations in the quality and accessibility of healthcare for older persons. Furthermore, the evolving health needs of an ageing population require ongoing policy innovation and flexibility. Another challenge can be seen in the translations of legal and policy frameworks into everyday healthcare.

In the 2023 European Dementia Monitor, Germany secured the fourth position. Factors such as the availability and affordability of care and therapies, the prioritization of the topic of dementia in politics and research and offers that are dementia-sensitive or are intended to raise awareness of dementia were taken into account. Germany notably stood out for its extensive research collaborations and for a broad political debate on the topic of dementia.¹⁶

¹⁶ Nationale Demenzstrategie (2024): „Deutschland rückt auf Platz 4 im Europäischen Demenz Monitor“: <https://www.nationale-demenzstrategie.de/aktuelles/artikel/deutschland-rueckt-auf-platz-4-im-europaeischen-demenz-monitor>.