

# Child-friendly justice

From the Ombudsman's Perspective



*Special children's rights project of the  
Commissioner for Fundamental Rights  
of Hungary*

## Foreword

In Hungary today, approximately 200 000 children are registered as at risk and thousands of children are taken into child protection care. Tens of thousands of children and juveniles are in the criminal justice system and about 6000 children/year become victim of a violent crime. These are large numbers suggesting that these children (and their families) have already come into contact with the authorities, often with the judiciary - but how criminal, civil and administrative procedures and institutions can be adapted to the special situation, needs and terminology of children? How professionals in the justice system are prepared to deal with child victims, offenders, witnesses or children of parents in divorce. Under what conditions and how are children heard or interrogated, what awaits them at a police station, juvenile correctional center or in a penitentiary institution? How and from whom they may seek help and assistance in a closed institution if they have problems with one of the inmates or nurses or if they simply need information or legal and other type of advice? What are the perspectives of a young person who committed a fault due to his/her vulnerable situation which was sanctioned by the state exclusively/mostly with criminal law instruments?

Considering the innumerable relevant questions, choosing this topic was quite reasonable, although it should be noted that children intend to avoid any embarrassing administrative procedure. In Hungary thousands of children get in contact with the authorities in some way: whether as criminal offenders, victims or witnesses of a crime or as unaccompanied foreign minors caught in our country. When speaking about a particularly vulnerable individual with special needs like a child, these situations are often very difficult to manage under the current laws and procedures, and even if the written law provides adequate protection putting into practice these guarantees often meets obstacles.

In 2012, the Ombudsman, based on the Council of Europe's Guidelines on Child-friendly Justice, intended to explore the gaps between law and practice by conducting several inquiries with voluminous reports on the fulfillment of international obligations concerning child-friendly justice; victim protection with special emphasis on children; general evaluation of youth justice system (criminal, civil and administrative procedures) from the aspect of children's rights; mediation and other forms of restorative justice in the national practice; child-focused training of people working in the child protection system or in the justice system; situation of unaccompanied minors and on-the-spot visits to penitentiary institutions for juvenile offenders.

3 December 2012, Budapest

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## Acknowledgements

In the course of our activities we discussed several times our experiences with representatives of national civil organizations (Family Child Youth Association, Blue Line Child Crisis Foundation, UNICEF Hungarian Committee), international NGOs (Eurochild, Eurochips, International Juvenile Justice Observatory, Children's Rights International Network) and government officials from the National Institute of Criminology and the Crime Prevention Department of the National Police Headquarters, whom I should thank for their helpful cooperation.

Let me extend my special thanks to *Ms Regina JENSDOTTIR* and *Ms Gordana BERJAN* (Council of Europe), who made possible with their professional and financial support to organize the international conference titled "Child-friendly justice – from Hungary to Europe" at the 22nd November 2012 in my Office. Representatives of the European Commission, the Council of Europe, the UN CRC Committee and the EU Fundamental Rights Agency and highly recognized national experts attended this event.

Special thanks to *Ms Margaret TUIE* (European Commission), *Ms Veronica YATES* (CRIN), *Ms Ankie VANDEKERCKHOVE* (independent children's rights expert) and to *Ms Lilit DANEGHIAN-BOSSLER* (CoE) for contributing to our conference and to this booklet.

In addition, I would like to express my gratitude to the Ministry of Public Administration and Justice and to the Open Society Institute for their financial support offered for the project.

I would like to thank *dr. Mária HERCZOG*, president of Eurochild and Family Child Youth Association and member of the UN CRC Committee for assisting our work with her professional comments; to *dr. Ágnes FRECH* and *dr. András VASKUTI* as well for assisting the project with their outstanding expertise and experience as judges.

Last but not least, I would like to thank to all my colleagues who helped me with their devoted work to conduct successful inquiries within the children's rights project and thanks for the English translation of this work.

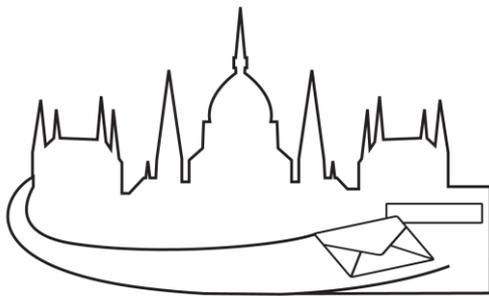
PROF. DR. Máté SZABÓ  
Commissioner for Fundamental Rights  
(2008-2013)

## 1. Introduction to the Commissioner for Fundamental Rights (ombudsman)

Since there is no special ombudsman for children's rights in Hungary the Parliamentary Commissioner for Civil rights acted as one on the basis of Art. 11 of Act XXXI of 1997 on Child Protection. From 2008 the commissioner fulfilled this role more effectively launching special, proactive method with annual children's rights projects concerning issues mentioned above. In 2008 the ombudsman concentrated on rights awareness-raising among children, in 2009 on children's right to protection against violence, in 2010 on family and children in care and in 2011 on children's right to the highest attainable standard of physical-mental health. The inquiries carried out and their results were published in project-books downloadable from our website.

The new Hungarian Basic Law (Constitution) and the Act CXI of 2011 on the Commissioner for Fundamental Rights (Act on CFR) entered into force on 1 January 2012. In accordance with the provisions of this act, the unified institution of the Commissioner for Fundamental Rights pays special attention to the protection of the rights of children, the rights of nationalities living in Hungary, the interests of future generations and the rights of the most vulnerable groups.

In accordance with the provisions of Art. 1 (2) of the Act on CFR "*In the course of his or her activities the Commissioner for Fundamental Rights shall pay special attention, especially by conducting proceedings ex officio, to the protection of a) the rights of children,*"



The work and the mandate of the Commissioner for Fundamental Rights and his Office are determined by the Article 30 of the Basic Law of Hungary and on the Act CFR. Following the relevant regulations, the Commissioner for Fundamental Rights is the legal successor of the Parliamentary Commissioner for Civil Rights, who ensures the effective, coherent and most comprehensive protection of fundamental rights

and in order to implement the Fundamental Law of Hungary.

The Commissioner for Fundamental Rights pays special attention to the protection of

- *the rights of children,*
- *the rights of nationalities living in Hungary,*
- *the rights of the most vulnerable social groups,*
- *the values determined as 'the interests of future generations' (so called "green issues").*

The Commissioner for Fundamental Rights gives an opinion on the draft rules of law affecting his/her tasks and competences; on long-term development and land management plans and concepts, and on plans and concepts otherwise directly affecting the quality of life of future generations; and he/she may make proposals for the amendment or making of rules of law affecting fundamental rights and/or the recognition of the binding nature of an international treaty.

The Commissioner surveys and analyses the situation of fundamental rights in Hungary, and prepares statistics on those infringements of rights in Hungary which are related to fundamental rights. Therefore, the Commissioner submits his/her *annual report to the Parliament*, in which he/she gives information on his/her fundamental rights activities and gives recommendations and proposals for regulations or any amendments. The Parliament shall debate the report during the year of its submission.

In the course of his/her activities, the Commissioner cooperates with organisations aiming at the promotion of the protection fundamental rights.

As a new mandate, the Commissioner for Fundamental Rights may initiate the review of rules of law at the Constitutional Court as to their conformity with the Fundamental Law.

Furthermore, the Commissioner participates in the preparation of national reports based on international treaties relating to his/her tasks and competences, and monitors and evaluates the enforcement of these treaties under Hungarian jurisdiction.

### **The mandate of the Commissioner for Fundamental Rights and the Deputies**

The Parliament elects the Commissioner for Fundamental Rights (by the proposal of the President of the Republic) and his/her Deputies for 6 years term. Any Hungarian citizen can be elected as Commissioner for Fundamental Rights or the Deputy-Commissioner, if he/she holds a law degree, has the right to stand as a candidate in elections of Members of Parliament and who also has outstanding theoretical knowledge or at least ten years of professional experience; furthermore he/she has reached the age of thirty-five years and has considerable experience in conducting or supervising proceedings concerning fundamental rights.

The mandate of the Commissioner and his/her Deputies is incompatible with any other state, local government, social or political office or mandate or any other gainful occupation, with the exception of scientific, educational, artistic activities.

The Commissioner and his/her Deputies have the right to immunity identical to that of Members of Parliament. The Commissioner for Fundamental Rights may be re-elected once.

The mandate of the Commissioner for Fundamental Rights and his/her Deputies' terminates

- upon expiry of his or her mandate,
- upon his/her death,
- upon his/her resignation,
- if the conditions necessary for his/her election no longer exist,
- upon the declaration of a conflict of interests,
- upon his/her dismissal, or
- upon removal from office.

### **Proceedings of the Commissioner for Fundamental Rights**

Anyone may turn to the Commissioner for Fundamental Rights, if in his/her judgement, the activity or omission of the public and/or other organs performing public duties (see: the exhaustive list below) infringes a fundamental right of the person submitting the petition or presents an imminent danger. When the person reporting has exhausted the available administrative legal remedies, not including the judicial review of an administrative decision, or if no legal remedy is available to him or her.

The list of organs:

- a public administration organ,
- a local government,
- a nationality self-government,
- a public body with mandatory membership,
- the Hungarian Defence Forces,
- a law-enforcement organ,
- any other organ acting in its public administration competence, in this competence,
- an investigation authority or an investigation organ of the Prosecution Service,
- a notary public,
- a bailiff at a county court,
- an independent bailiff, or
- an organ performing public services.

Inquiries into an organ performing public services may be carried out only in connection with its public service activities. Independently of its form of organisation, organs performing public services shall be the following:

- organs performing state or local government tasks and/or participating in the performance thereof,
- public utilities providers,
- universal providers,
- organisations participating in the granting or intermediation of state or European Union subsidies,
- organisations performing activities described in a rule of law as public service, and
- organisations performing a public service which is prescribed in a rule of law and the use of which is mandatory.

The Commissioner for Fundamental Rights *cannot inquire the activities* of the Parliament, the President of the Republic, the Constitutional Court, the State Audit Office, the courts, or the Prosecution Service (with the exception of the investigation organs of the Prosecution Service).

The Commissioner for Fundamental Rights can conduct *ex officio proceedings* in order to have such improprieties terminated as are related to fundamental rights and which have came up in the course of the activities of the authorities. Ex-officio proceedings may be aimed at the inquiry of improprieties affecting not precisely identifiable larger groups of natural persons or at a comprehensive inquiry of the enforcement of a fundamental right.



*In the course of his/her inquiries, the Commissioner for Fundamental Rights*

- may request data and information from the authority subject to inquiry on the proceedings it has conducted or failed to conduct, and may request copies of the relevant documents,
- may invite the head of the authority, the head of its supervisory authority or the head of the organ otherwise authorized to do so to conduct an inquiry,
- may participate in a public hearing, and
- may conduct on-site inspections.

The Commissioner may request a *written explanation, declaration, information or opinion* from the organisation, person or employee of the organisation having the *obligation to cooperate*.

The Commissioner for Fundamental Rights may turn to the *Constitutional Court* in accordance with those laid down in the Act on the Constitutional Court.

*Exceptional inquiry:* If, on the basis of the petition, it may be presumed that the activity or omission of the organ not qualifying as authority gravely infringes the fundamental rights of a larger group of natural persons, the Commissioner for Fundamental Rights may proceed exceptionally.

The Commissioner for Fundamental Rights submits his/her *annual report to the Parliament*, in which he/she gives information on his/her fundamental rights activities and gives recommendations and proposals for regulations or any amendments. The Parliament shall debate the report during the year of its submission.

In 2012, within the framework of the Children's Rights Project and following the agendas of the European Union, the Council of Europe, the European Network of Ombudspersons for Children (ENOC) and the special programme on the topic launched by the ministry of Public administration and Justice a Project on Child-Friendly Justice the Commissioner for Fundamental Rights acting as ombudsman for children's rights focused on problems concerning child friendly justice. Choosing this topic was very reasonable since thousands of children may get involved with justice systems, whether as victims, defendants, witnesses, at risk, taken into care or as criminal offenders. The *UN Convention on the Rights of the Child and the Council of Europe's Guidelines on child-friendly justice adopted in 2010* defines the protection of children's rights in the justice system.

Based on the above mentioned, this year the Ombudsman initiated ex officio, comprehensive inquiries into the following topics concerning child-friendly justice:

1. how does Hungary fulfil its international legal obligations concerning child-friendly justice in general
2. general evaluation of the justice system from the aspect of children's rights.
3. mediation and other forms of restorative justice, use of alternative sanctions
4. system of child victim support
5. evaluation of juvenile criminal justice system and the situation of unaccompanied minors – these inquiries were conducted in the framework of another project focusing on penitentiary institutions and temporary detention facilities.

*Child-friendly justice* means in Council of Europe frames that decisions are made about children in a way that respects their rights. Decisions should be made quickly, taking the child's age and needs into account, taking the child's views seriously and respecting his or her privacy.

Moreover since 2010 the Ombudsman has the honor being a national focal point of *the Council of Europe*, the most important regional human rights defending institution. The Council of Europe, based in Strasbourg (France), now covers virtually the entire European continent, with its 47 member countries. Founded on 5 May 1949 by 10 countries, the Council of Europe seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals.



The Council of Europe has a crucial leading role in defending children's rights, especially since the transversal programme "*Building a Europe for and with children*" was launched in 2006 in response to a mandate resulting from the Third Summit of the Heads of State and Government of the Council of Europe (Warsaw, 2005). The *Council of Europe's Strategy on the rights of the child 2012-2015* proposes a vision for the Council of Europe's role

and action in this field, taking into account the progress achieved during the previous policy cycles, the needs expressed by governments and the challenges identified by the international community.

In the current strategy the programme focuses on the following four strategic objectives:

1. *promoting child-friendly services and systems;*
2. *eliminating all forms of violence against children;*
3. *guaranteeing the rights of children in vulnerable situations;*
4. *promoting child participation.*

**In 2010, the Council of Europe has adopted the Guidelines on Child -friendly Justice** intended to enhance children's access to and treatment in justice. In the drafting process, it decided also to listen directly to children and young people. *This Guideline has been also the basis of the ombudsman's investigations.*

These are new rules that help Governments make sure that children are treated properly by and in the justice system. The rules apply to *everyone under 18 years*. They apply whenever children come into contact with the justice system, such as when they break the law, when their parents get divorced and when someone who has hurt a child is being punished. They are supposed to make sure that children's rights are protected whenever these decisions are made.

The child friendly justice's *basic principles* are

- **Participation** (governments must make sure that children know about their rights, and know how to get in touch with those that can help them. Children have the right to be heard in decisions that affect them, and adults must take children's views seriously.

- **Best interests of the child** (when decisions are being made about children, the most important thing is what is right for them. Officials must also listen to what children have to say. They should make sure that children’s rights are respected, and take into account all their needs. Judges usually take decisions about children, but they should be helped by others – like psychologists and social workers - who sometimes know children better)
- **Care and respect** (Children must always be treated with care and respect, taking into account that they are all different.)
- **Equal treatment – Non-discrimination** (Children must all be treated equally, even though they sometimes come from a different country, group or religion or speak a different language. Children who have disabilities, who are homeless or live away from home, who are Roma or have moved to another country, may need special help.
- **Rule of law** (Children have rights in the legal system; they should be treated fairly. If they are in trouble, they should have a lawyer and the court should take into account what the child did and what his or her needs are. Children have the right to complain about their treatment to someone who is independent and sees both sides.

**The justice system shall be child-friendly before, during and after legal proceedings, which means:**

**- Information and advice**

(1) Children and their parents should be given information about the child’s right to be treated fairly and properly. Children and their parents should be told what rules apply and what will happen. They should know what time the event (e.g. the court hearing) will take place, how long it will last and what it will be like. Children should learn how they can be protected and who can help and support them (e.g. a translator or other specialist);

(2) Information and advice should be explained to the child in a way that he or she can understand; it should take the child’s background into account;

(3) Children and their parents or lawyer should both receive the information directly;

(4) Legal information should be given to all children in a form that they can understand. Special information services for children, like freephone helplines and websites, should be set up;

(5) Where a child may have broken the law, the child and his/her parents should be told about what the child is said to have done, and what might happen next.

**- Protection of privacy**

(1) No one is allowed to print a child’s name, picture or anything personal about a child or his/her family in the newspaper or on the internet, etc.

(2) If children are being heard in court or some other official place only important people should be present;

(3) If a child tells an adult a secret, such adult cannot tell anyone unless they are afraid that the child might be hurt.

**- Safety**

Children should be protected from harm and when they have been hurt, especially by a parent or other family member, it is especially important to keep them safe. Everyone working with children should be checked to make sure they will not harm children.

### - Training

People who work with children should receive training on the needs of children of different ages. They should be trained to talk to children in a way that children understand.

### - Approach

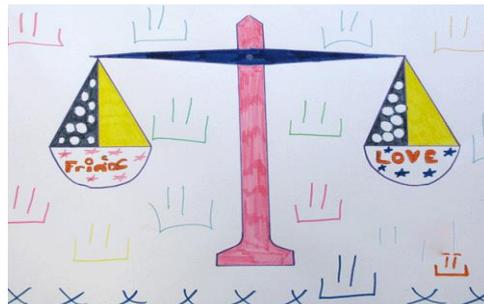
Everyone working with children must be careful to work together, to make sure that the right thing is done for each child.

### - Deprivation of liberty

A child should only be locked up (detained) where there is no other option. Children should never be detained because of their immigration status.

If a child is detained he or she should:

- be kept apart from adults, unless it is better for them to be together;
- enjoy all their rights, especially the right to contact their family and friends by having them visit or write to them;
- be able to attend school or take a course, practice their religion and have access to sports and leisure facilities;
- be prepared for their return home.



**The UN Convention on the Right of the Child (UN CRC) defines also legally binding obligations related to child-friendly justice, as follows:**

- **Art 1.** Every human being is a child under 18
- **Art 3.** In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration
- **Art 37.** Deprivation of liberty must be only a last resort resolution (for the shortest period)
- **Art 40.** The right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society

We have to mention here also the *10. General Comment of CRC Committee (2007)*, which states: the reaction given to an abuse of law made by a child shall be proportional with the age, maturity, necessities, circumstances of the children, and has to take into account the longterm interests of society (education, reintegration, not pure punishment)

## 2. Thomas HAMMARBERG:<sup>1</sup> Juvenile justice should be built on human rights principles

There is a popular perception that a large proportion of crimes in society are committed by teenagers and that juvenile delinquency on the whole is getting worse and worse. Indeed, some media promote this impression with vigour. The truth, however, is different.

In most European countries, teenagers are *not* dominant in the overall crime statistics. Also, juvenile crime rates remain more or less stable from year to year across our continent. This does not mean that the problem is insignificant. A worrying trend reported from several countries is that some crimes committed by young offenders have become more violent or otherwise more serious. This is a warning signal in itself. Moreover, the presence of even a relatively few young lawbreakers is a bad omen. Individuals who start a criminal career early on are usually not easy to reintegrate into normal life. That is one reason why it is necessary to discuss the problem of juvenile justice in depth.

There are two different trends for the moment in Europe. One is to reduce the age of criminal responsibility and to lock up more children at younger ages and for more offences. The other trend is – in the spirit of the UN Convention on the Rights of the Child – to avoid criminalisation and to seek family-based or other social alternatives to imprisonment. I am in favour of the second approach. In that I am supported not only by the UN CRC but also by the European Network of Children's Ombudspersons. In a statement 2003 no less than 21 national ombudspersons stressed that children in conflict with the law are first and foremost children who still have human rights. They proposed that the age of criminal responsibility should not be lowered but raised - with the aim of progressively reaching 18 and that innovative systems of responding to juvenile offenders below that age should be tried with a genuine focus on their education, reintegration and rehabilitation.

The Convention of the Rights of the Child – ratified by all European states - asks governments to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. The treaty does not spell out at which precise age the line should be drawn. However, the Committee monitoring the implementation of the Convention has expressed concern about the low age in several countries. There are a few states in Europe where criminal responsibility starts already at 12 and in some cases even earlier. Even with a 'soft' definition of the consequences of such responsibility I find these low age limits to be in contradiction with the spirit of the Convention. Though the message of the Convention is that criminalisation of children should be avoided, this does not mean that young offenders should be treated as if they have no *responsibility*. On the contrary, it is important that young offenders are held responsible for their actions and, for instance, take part in repairing the damage that they have caused. It is important to make a distinction between 'responsibility' and 'criminalisation'.

The question is what kind of mechanism should replace the ordinary criminal justice system in such cases. The procedures should recognise the damage to the victims and it should make the young offender understand that the deed was not acceptable. Such a separate juvenile mechanism should aim at recognition of guilt and sanctions which rehabilitate. It is in the sanction process that we find the difference to an ordinary criminal procedure. In juvenile justice there should be *no retribution*. The intention is to establish responsibility and, at the same time, to promote re-integration. The young offender should learn the lesson and never repeat the wrongdoing. This is not easy in reality. It requires

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<sup>1</sup>Commissioner for Human Rights in the Council of Europe 2006-2012

innovative and effective community sanctions. In principle, the offender's parents or other legal guardian should be involved, unless this is deemed counter-productive for the rehabilitation of the child. Whatever the process, there should be a possibility for the child to challenge the accusations and even appeal.

When working for the Council of Europe I learnt about an interesting procedure for "settlements" in Slovenia. There, a case of an accused juvenile can be referred to a mediator if this is agreed by the prosecutor, the victim and the accused. The mediator then seeks to reach a settlement which would be satisfactory to both the victim and the accused and a trial can thereby be avoided. Such methods of mediation and 'diversions' should be the rule rather than exceptional. One aspect should be further stressed: the importance of a *prompt response* to the wrongdoing. Delayed procedures – a problem in several European countries today - are particularly unfortunate when it comes to young offenders whose bad actions should be seen as a cry for immediate help. Prosecutors may have a role in securing that court procedures in these cases are as short as possible.

The UN Convention also asks for separate procedures for juveniles brought to court. These should be child-friendly and, again, the purpose is rehabilitation and re-integration rather than to punish for the sake of retribution. For this reason, there is a need for everyone involved, including judges and prosecutors, to be educated not only about the law but also about the special needs of children.

In two cases brought against the United Kingdom in 1999, the European Court of Human Rights considered it essential that a child charged with an offence should be dealt with in a manner taking „full account of his age, level of maturity and intellectual and emotional capacities, and that steps were taken to promote his ability to understand and participate in the proceedings.”

“In respect of a young child charged with a grave offence attracting high levels of media and public interest, this could mean that it would be necessary to conduct the hearing in private, so as to reduce as far as possible the child's feelings of intimidation and inhibition, or, to provide for only selected attendance rights and judicious reporting.”

A child in that situation is sometimes as much a victim as an offender. The social background is often tragic. This points at the immense importance of *early detection* and *preventive measures*. The judicial body is the last link of the chain, we should try to do everything we can to prevent cases coming that far.

Support to families at risk, decisive reaction on signs of domestic violence, social workers with outreach capacity, neighbourhood networks and a school which not only teaches but also cares for every individual child – these are key components of a preventive strategy. The young persons themselves should of course be involved in these efforts and not be considered as mere objects of socialization and control. Their well-being, in the immediate future and far ahead, should be the focus. All this will require some investment, but serious crimes at a later stage are much more expensive for society.

Arrest, detention and imprisonment of children should be used “*only as a measure of last resort and for the shortest appropriate period of time*”, as the UN Convention says. This is in the spirit of child rights, but we also know that depriving children of their liberty tends to increase the rate of re-offending. The only reason for locking up children is that there is no other alternative to handle a serious and immediate risk to others.

In the few cases when detention of minors is necessary, this should take place in specific and children-friendly establishments and separated from adult prisoners. Contact

with the family should be encouraged and facilitated, if that is in the best interests of the child.

In general, the conditions should be humane and take into account the special needs of an individual of that age. Full-time *education* is particularly essential. For each young offender there should be an individual programme of rehabilitation, a plan that should continue after the detention period with the support of guardians, teachers and social workers. If relations with the parents are impossible, foster parenting might be an alternative. In all this, the child him- or herself should have a say – this is not only a right but also more effective.

These are the principles developed within different parts of the Council of Europe, in cooperation with experts from different countries. The European Committee on Social Rights has argued for a higher age of criminal responsibility and the European Committee for the Prevention of Torture - which pays visits to places of detention - has expressed its concern about the imprisonment of children and their conditions.

With the objective of assisting further its member states, the Council of Europe has issued two important documents. One is the *European Rules on Juvenile Offenders Subject to Community Sanctions or Deprived of their Liberty* which complements the existing European Prison Rules. The other document is a set of European guidelines on child friendly justice which specifies reforms needed in order to make the system of justice truly more adapted to the needs of children, be they victims, witnesses or perpetrators.

These new rules and guidelines will hopefully influence the implementation of the agreed European and international standards. However, it is necessary to recognise that these norms on juvenile justice are not widely known and have not impressed on some of the discussions in member states where the cry for “tougher methods” has been heard. There is a need of raising awareness and educating the public on what measures actually work for everyone’s best interests.

The time has come to review our policies on juvenile justice all over Europe. Are they producing the results we want? Are they respecting the rights of the child? Are they building our future Europe?

### 3. Presentation of the annual children's rights project activities

The Ombudsman's activities related to children's rights are not limited to the utilisation of traditional means (conducting ex officio or upon complaint inquiries, giving opinion on draft legislation, submitting petitions to the Constitutional Court) but it requires a proactive rights protection activity based on legal instruments. Accordingly, Máté Szabó acting as special ombudsman for children's rights launched a special fundamental rights project in 2008 focusing on children's rights. The project aims at exploring the improprieties concerning children's rights and enhancing the enforcement of children's rights. The Commissioner continued this project related activity during his mandate focusing on a specific subject concerning the enforcement of children's rights each year.

In 2009 the ombudsman focused on children's protection against violence. Within the framework of this project, we paid special attention to the problem of violence in schools. In 2010 the Commissioner placed the role of the family into the focus of ensuring children's rights such as: children's right upbringing in the family and the role of the state in promoting it (by assistance) as well as the operation of the state provisions substituting families.

In 2011, the project on children's right focused on children's right to physical and mental health. This program was implemented together with the health care project titled Patient's rights and dignity in Health Care.

In 2012, the Ombudsman focused on – following the agendas of the European Union and the European Network of Ombudsperson for Children (ENOC) – child-friendly justice presenting the findings and results of his inquiries both at national and European level.

#### 3.1. Workshop activities

**The opening event of the project, titled "Justice with a Human Face – fundamental rights in and out" was organized in Office of the Commissioner for Fundamental Rights on April 24 2012, as a joint event of another project focusing on detainees' rights. Among the participants were the Attorney General, the secretary of state of the Ministry of Public Administration and Justice, representatives of the National Office of Immigration and Nationality, the Hungarian Helsinki Committee, UNICEF Hungarian Committee, child care professionals and psychologists addressing problems concerning minors in closed institutions, possible long-term effects of being in prison and the children's role in the different phases of criminal procedures.,**

The Ombudsman's colleagues presented the main findings of the reports on:

- the results of the comprehensive ex officio inquiry into the legal regulation on missing children;
- the results of inquiries carried out in several penitentiary institutions for juvenile offender carried out in Tököl, Kecskemét, Szirmabesenyő, Kecskemét cities;
- the results of the series of inquiries concerning the situation of unaccompanied minors in immigration detention;
- problems concerning the amendment of the Act on Minor Offences which was put on the agenda of the Constitutional Court, as well.

Due to the financial and professional support given by the Council of Europe's special program on children's rights, our Office had the possibility to present and discuss the findings of the inquiries carried out this year by the Ombudsman and to give publicity to more than 90 child care experts, police officers, judges, prosecutors, academics, and ministerial representatives (E.G. Attorney General, National Judicial Council, National Police Headquarters, representatives of relevant NGOs). Representatives of diplomatic missions also attended this event. In parallel with the conference, the Ombudsman inaugurated an exposition of children drawings titled "Equality through a child's eye".



1 Ms.Margaret TUIE (European Commission), Ankie VANDEKERCKHOVE (Council of Europe), Agnes LUX (Ombudsman Office), Bence RÉTVÁRI (Ministry of Public Administration and Justice), Máté SZABÓ (ombudsman), Barnabas HAJAS (Ombudsman Office)

The international conference titled "Child-friendly justice — from Hungary to Europe" was organized in the Office of the Commissioner for Fundamental Rights on 22 November 2012. As in previous years, we preserved the tradition of organizing the project's closing conference as part of the events celebrating the Universal Children's Rights Day in November.

In his opening remarks, **Máté SZABÓ ombudsman** emphasized that authorities, public institutions should be become child friendly in order to ensure real participation of children. This should be done not by copying adult institutions tailor made for children but with making the existing state institutions and administration more child-friendly and establishing a special ombudsman/constitutional court for the protection of children's right.

**Bence RÉTVÁRI, secretary of state of the Ministry of Public Administration and Justice** explained that in Hungary today, approximately 30 000 children die being a victim of abuse, and about 6 000 children under the age of 14 become victim of a crime. This has long term effects on children that may lead to become a multiple victim or a criminal offender or otherwise to get into conflict with the laws. He added that in 2012 the Ministry had set up a working group which has initiated a number of legislative changes concerning judicial procedures that have been enacted to protect children. As a result of this, several amendments were made to the Penal Code and Civil Code and children will receive greater

protection with the new Penal Code containing heavy penalties for offences against children. Sexual offences as a single category will come into being as a new factual case combining the factual cases of rape and sexual assault under the Penal Code currently in force. The wording of the provisions relating to crimes against sexual morality is changing significantly, sentences are becoming more stringent and, in the case of several offences (e.g. rape committed against a person not having completed the age of eighteen years), the need for a private motion will be done away with.

The lower minimum age of criminal responsibility (MACR) will not change under the general rule, and will remain 14 years. In the event of the commission of exceptionally grave crimes, the law permits the reduction of the MACR from 14 to 12 years in highly limited circumstances. These exceptionally grave cases include murder committed by minor children, when it is, under any circumstances, necessary to examine the perpetrator's sanity and to ensure the availability of professional treatment. It is important to stress that, in these cases, perpetrators over the age of 12 years will not receive a punitive sentence but will be subjected to measures, and only in cases involving gravely violent offences (e.g. homicide, grievous bodily harm or bodily harm resulting in death), and it is a further condition that sanity and accountability must be provable. Also in the future, these measures will not represent imprisonment but the court may order the perpetrator's education in a correctional facility. Education in a correctional facility will continue to remain the most serious sanction that may be imposed on perpetrators younger than 14 years. Furthermore, the Government also seeks to ensure a child-centred approach in authorities' administrative proceedings: in child protection cases these can be accelerated to halve their length, and authorities will be required to provide information to children in a form which is appropriate to their level of maturity.

After a number of amendments to the Act on Public Administration and Judicial Procedures, the Ministry of Public Administration and Justice is enforcing the basic rules of child-friendly public administration. The aim of the legislative changes is to ensure that more attention is paid to the special needs of children in various judicial proceedings, and that the interests of children receive greater protection in the course of judicial proceedings. He went on to say that the aim is to amend the legal system and various procedures in order to minimize the trauma for children. As an example he mentioned that summonses and information on hearings is being translated into 'the language of children', and that hearings are to be held at the nearest possible location. The Minister of Public Administration and Justice issued the new decree which regulates the introduction of special children friendly interrogation/interview rooms. Interview rooms designed for children – where young people's testimonies are recorded to avoid potentially trauma-inducing repetition in later stages of proceedings – were described by him as an important step forward. He said that there would be such child-friendly rooms in every county by the end of 2014.

The minister presented the Ministry's new website on child-friendly justice (<http://gyermekbarat.kormany.hu/>) and another recently launched website made for children "Jogos a kérdés" (<http://jogosakerdes.hu/>) which helps children to find their way in the labyrinth of law.

**Margaret TUTE**, European Commission coordinator for the rights of the child presented the EU's agenda on the rights of the child and the EU Victim's Directive which was effectively promoted by the Hungarian Presidency in 2011. **LiLit DANEGHIAN**, staff member of Council of Europe Directorate General of Human Rights presented the council of Europe's strategy on the rights of the child "Building a Europe for and with children". **Ankie VANDEKERCKHOVE**, former

**Flemish ombudsman for children's rights**, independent expert on children's rights presented to the Council of Europe's Guidelines on child-friendly justice. **Veronica YATES, director of Children's Rights International Network (CRIN)** presented the Campaign for Juvenile Justice which is dedicated to ending the practice of trying, sentencing, and incarcerating youth under the age of 18 in the adult criminal justice system. The campaign against "real criminals" involved in conflict with the law children about.

**Maria HERCZOG, president of Eurochild and the NGO Family Children Youth, re-elected member of the UN Children's Rights Committee** sent a video message explaining how the UN Convention on the Rights of the Child (UN CRC) reinforces the obligation to create a child-friendly justice. The four most important general principles in this regard are: 1 right to life and development; 2 the right to equal treatment - non-discrimination; 3 right to the protection against all forms of violence (which should be applied to the offender, as well); 4 and the most complicated: the children's right to be heard in all decisions that effect them. She explained that concerning Hungary a special problem to be examined is the lowering of the minimum age of criminal responsibility. As the General Comment No. 10 of the UN Committee on the Rights of the Child stated, although it is desirable to continue to increase the minimum age to a higher level, it is difficult to set a universally applicable age limit (they range from a very low level of 7 or 10), however this doesn't automatically means that these children will not necessarily be subject to a penal law procedure. It is more needed to have a pedagogical-, child-protection and social policy based approach to deal with child victims, perpetrators or witnesses. The question of age limit is also important when speaking about children's participation, their right to be heard (in Hungary age 14), but they should be actively involved in any process affecting them. Concerning age and maturity, it is very important that professionals do understand children and they are trusted – meaning the experts should “speak the same language” A good example is Switzerland, where professionals working with children receive an integrated training to be able to work as complementing each other and to interpret the same way some concepts like violence, exploitation or vulnerability. It should be repeatedly emphasized that prevention, diversion and application of restorative techniques render effective punishment, quick process and chances to integration. Prevention should start even before birth meaning that those who work to assist families should understand the way they can contribute to children's protection. Teaching conflict management and violence prevention to children in kindergartens and schools is important, as well.

**András VASKUTI, judge of the Curia** spoke about the actual challenges of child -friendly justice and gave a short presentation of the legal background concerning juvenile offenders. As for the new Act on Minor Offences, he claimed that the child-friendly judicial system is not enhanced by the new act since the legislator did not even thought about applying alternative forms of sanctions only imposing fines and confinement. Short time confinements cannot be executed with any kind of professional or educational programs. This might have several negative effects: 1 forming of criminal connections; 2 the juvenile offender identifies himself with the criminal offender 3 confinement might cause emotional crisis. It is expensive and contrary to international conventions (imprisonment always is a last resort), disproportion of sanctions (some minor offences might involve more severe sanctions than a crime). The Council of Europe Guidelines on Child-Friendly Justice emphasizes that treatment of children in justice should be realized through special courts, or chambers of courts, procedures and institutions including the police, the judiciary, the judicial system and the specialized agencies

of the attorneys' offices. He outlined the changes and recent situation in Hungary concerning juvenile justice system as follows:

1913-1951	Juvenile Courts in Hungary
1951-1962	Local courts with exclusive jurisdiction
1962-2011	County courts + local courts with exclusive jurisdiction
2011-	County courts + all local courts

*The latest proposal to amendment terminated the exclusive jurisdiction of local courts acting within the seats of county courts* because the legislature found that all local courts was able to fulfill specific requirements originally applied to local courts dealing with juvenile offenders. The amendment also aimed to speed up and make more uniform these procedures however the result is still questionable.

Concerning the lowering of MACR, Mr Vaskuti explained that offenders under the age of 14 are not punishable unless having committed (1) murder, (2) murder in the second degree, (3) assault, (4) robbery and (5) plunder. In these cases, the offender is punishable from the age of 12. Differentiating is necessary, however application of confinement against children is raises concerns. Maturity should be examined by psychologist not only between the ages of 12-14 but later on, as well.

Regarding confinement as a sanction for minor offences, the shortest time of confinement imposed by the law on a juvenile offender is of 3 days, the longest is of 30 days. The sanction of confinement should be applied if due to the offender's social, economic, private situation other type of sanctions would not be an effective preventive measure. In Mr. Vaskuti's view, the setting up of the so-called prior probation institution should be considered.

As a conclusion, due tot the reduction of the age of criminal responsibility to 12 years, it is even more urgent the establishment of courts for juvenile offenders where the following special rules apply:

- timing- compliance with the requirement of keeping the deadline (decision within 6 months)
- separation of children and juvenile offenders from other offenders
- separation of cases from other types of cases (except for the serial crimes)
- participation of teachers, child protection specialist in the procedure
- specially trained judges, prosecutors, lawyers acting in these procedures
- examining the responsibility of parents, environment, foster parents and teachers
- establish special rules of jurisdiction for procedures in case of (1) young adults committing a crime; (2) crimes committed against minors.
- special rules of procedure: exclusion of the public, prohibition of personal data disclosure.

**Szilvia GYURKÓ, children's rights project manager of UNICEF Hungarian Committee** presented international best practices concerning child-friendly justice, while **ÁGNES FRECH, judge, head of the working group on child friendly justice of the National Judicial Office** presented the court's concerns.

The results of the Ombudsman's inquiries were presented by staff members of the Office involved in these inquiries. Mentioning best practices, we projected a video on family group conferencing in Norway.<sup>2</sup>

### **3.2. Instruments beyond legal means**

#### **Being National Focuspoint of the Council of Europe**

In 2011 the Council of Europe appointed the Ombudsman to act as national focal point to the Ministry of Human Resources. As national focal point, the Ombudsman promotes at national level the role and activities of the Council of Europe and participates in national campaigns promoting and urging the ratification of international treaties. This gives us more possibilities as for the activities carried out in the field of protecting children's rights (a separate item on issues related to the Council of Europe was made on our website created for children). Council of Europe documents are considered as well during the Ombudsman's inquiries examining the fulfillment of international obligations.

#### **Participation in governmental working groups**

The Ombudsman continued his work in the monitoring committee of the Strategy "Making Things Better for our Children" set up by the Ministry of Human Resources and actively participated in the working groups on child-friendly justice and domestic violence set up by the Ministry of Public Administration and Justice.

#### **Participation at Telekom „Children's Island"**



As in previous years, in 2012 the Ombudsman's colleagues participated in the *Telekom Children's Island* setting up a tent jointly with UNICEF Hungarian Committee. Our programs aimed to raise awareness among children and their parents and enhance their legal consciousness by several games and competitions. We organized interesting and exciting games and quiz shows and prepared with informative programs for the parents, as well. In 2012, a board game – based on the handbook on children's rights titled *Small Compass* (Compasito) – was a great success just as the gigantic memory game using the graphics of our website made for children and the preparation of wooden spoon puppets of "right's fairies" and "right's goblins". This year - having regard to the unified Ombudsman Office – we prepared with games related to environmental rights and national minorities. Our experience is that during these games children raise several questions and share them easier with our colleagues.

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<sup>2</sup> See here the version of child perspective on family group conferencing:  
<http://www.youtube.com/watch?v=P8Zc8QjJV7Y>

In order to facilitate the direct channeling of children's opinion we set up two huge boards where children could write their questions addressed to the Ombudsman or send their messages to him.

### The Korczak Year

In 2012 Poland was celebrating the 100<sup>th</sup> anniversary of the setting up of The Orphans' Home and the 70<sup>th</sup> anniversary of the death of Janusz KORCZAK, the Polish-Jewish educator, children's author and paediatrician. To mark this occasion, a memorial tablet dedicated to Janusz Korczak, killed in the Treblinka extermination camp, was inaugurated in our Office on International Human Rights' Day, 10 December 2012. The honour guests and speakers of the event were H.E. Ilan MOR, Ambassador of Israel, H.E. Roman KOWALSKI, Ambassador of Poland, Zsolt NÉMETH, Secretary of State of the Ministry of Foreign Affairs of Hungary and Péter FELDMÁJER, President of the Federation of Hungarian Jewish Communities. At the ceremony Ambassador KOWALSKI thanked Ombudsman Máté SZABÓ for his initiative and presented to him the Gold Cross of Merit awarded by the President of Poland in recognition of his merits in strengthening human rights and developing Polish- Hungarian relations in this field. The Janusz Korczak memorial plaque has been placed in the hall named after him. The plaque was unveiled by Máté SZABÓ and H.E. Marek MICHALAK, Ombudsman for Children of Poland.



### International Day of the Deaf in September 2012

Celebrating the International Day of the Deaf, Ombudsman Máté Szabó delivered a welcoming speech to several thousands of participants on the large-scale *event organized by the Hungarian Association of the Deaf and Hard of Hearing on 29 September 2012*. During the day, the Ombudsman and his colleagues organized several programs raising human rights awareness and promoting minorities' rights and the protection of the rights of the most vulnerable groups.



In 2012, the issue of child-friendly justice was placed in the focus of the investigations. As being one of the national focal points of the Council of Europe in Hungary, the Office participated on high-level conferences such as the one organised by the European Commission and dedicated to the theme of missing children. It also took part on the **7<sup>th</sup> EU Forum on Children's Rights** and the Annual Conference of **Eurochild** (European umbrella organisation bringing together 100 members), on which conference our colleague participated as a rapporteur on the theme of family-group conference.

Our Office were actively involved in the work of the **European Network of Ombudspersons for Children** (ENOC). Enhancing the international character of the Office's project on children's rights, on 22 November 2012, the Office of the Commissioner for Fundamental Rights jointly organised the closing conference of the project with the Council of Europe. On this event, high-ranked representatives from the **European Commission**, the **Council of Europe** and the **United Nations Children's Fund** (UNICEF) attended.

#### **4. The Ombudsman's petitions to the Constitutional Court concerning children's rights**

**1) The Ombudsman submitted a petition to the Constitutional Court on the provisions concerning the confinement and detention of juvenile offenders.** The provision of the Minor Offences Act making it possible to order confinement and detention for minor offences is contrary to the Basic Law (Constitution) and the UN Convention on the Rights of the Child (UN CRC), which has been promulgated in Hungary. Since, in spite of previous warnings by the Ombudsman, the new Minor Offences Act, effective as of 15 April, still allows the above sanctions, the Commissioner for Fundamental Rights has requested the Constitutional Court to review certain provisions of the Act. Ombudsman Máté Szabó already established in November 2010 that the provision of the Regulatory Offences Act then in force, which terminated the prohibition of the confinement of juvenile offenders and even permitted that fines imposed on them be converted to confinement, was contrary to the right of children to care and protection, as well as to their right to liberty of the person. In the concrete case, three secondary school girls as part of a dare tried to steal some costume jewellery, and when the security guard of the shop noticed what they were doing, they claimed to regret what they had done and gave back the jewellery. The police took the fifteen years old girls to the police station, detained them for a day and a half and justified their proceedings with the amended regulations. As a matter of fact, in August 2010 Parliament did delete those provisions of the Minor Offences Act which in the case of juvenile offenders prohibited the imposition of confinement.

The Commissioner requested the Minister of the Interior to remedy the impropriety. He in turn informed him that the measure was justified, because otherwise law enforcement would lack the necessary means against offenders and that confinement contributed to the forming of the personality of young people. The Ombudsman did not accept this response and the Minister of the Interior promised that when drafting the new Act on Minor Offences the Ministry would, based on the experience gained in applying these measures, reconsider the rules on the confinement and detention of juvenile offenders.

Despite the Ombudsman's concerns, however, the new Minor Offences Act, effective as of 15 April 2012, continues to provide for the possibility of confinement and of converting

fines to confinement. The absurdity of the situation is shown by the fact that while only children over sixteen years may be sentenced to community service, children over fourteen may forthwith be sentenced to confinement. Since the legislator did not take steps to redress the situation which is contrary to fundamental rights, the Commissioner has initiated the review of the contested provisions of both the old and the new Act with the Constitutional Court.

In his petition Máté Szabó explains in detail that the concept introduced by the law-maker and retained in the new Minor Offences Act cannot be reconciled with either the provision of the Fundamental Law on the protection of the rights of children, nor with the international commitments undertaken by Hungary, and that it violates several provisions of the UN CRC. The Ombudsman repeatedly points out that in minor offence proceedings of persons under eighteen the application of short deprivation of liberty unnecessarily and disproportionately restricts the fundamental rights of the persons concerned. In the case of juvenile persons the restriction of personal liberty is harmful and may only be applied in serious cases and as a last resort. According to the Commissioner, in a democratic State under the rule of law it cannot be justified that to a short-term deprivation of liberty there is no alternative measure or instrument as restrains rights to a lesser extent, ensuring education and restoration instead of reprisal.

The Commissioner for Fundamental Rights requested the Constitutional Court to annul the provisions that make it possible to deprive of their liberty juvenile offenders who commit minor offences. At the same time the Commissioner has indicated that the annulment in itself would not completely remedy the existing impropriety; for that it would be necessary to adequately supplement the Act. Consequently, the Ombudsman has also requested that the Court establish that the present legal situation is contrary to an international treaty, as in the Minor Offences Act Parliament failed to lay down the exempting rules which would provide for the enforcement of the principles of the UN CRC, guaranteeing enhanced protection for minors.

*(The Constitutional Court refused it in 2013.)*

**2. The Ombudsman asked the Constitutional Court to revise the amendment of an act on possible law enforcement measures applicable in case of truancy.** According to the commissioner for fundamental rights the authorization to the police for the application of coercive measures against children under the age of 14 is an unnecessary and disproportionate restriction of rights, which can be even worse considering the basic deficiencies of the regulation and the risk of uncertain and arbitrary application. The ombudsman therefore asked the Constitutional Court for the urgent revision and the suspension of the entry into force of said provision.

In July 2012, the Parliament adopted the amendment of an act entering into force from 1 January 2013, which makes possible for the police to take measures against pupils younger than 14 who miss school without permission. Following previous consultation, the police may escort the child to the director, if he/she can not justify his/her absence. Credible permission may be issued by the school, the doctor and the parent of the student.

In the course of giving his opinion on the draft, commissioner Máté Szabó pointed out that the concept of preventing truancy by means of law enforcement measures is irrational, adverse and presents a disproportionate restriction of rights. The draft might have led also to several problems in practice: as an example, policemen are not able to judge whether the child's absence from school is justified or not. The ombudsman requested to delete from the

draft the possibility of applying law enforcement measures. This request was ignored by the Parliament, therefore the ombudsman asked the Constitutional Court for the urgent revision and the preliminary suspension of the entry into force of the provision.

The commissioner for fundamental rights has argued that the text of the amendment does not meet the requirements of legal certainty. Due to the incorrect codification it is not clear under what conditions the police will have the right to accompany the pupil to school. The legislator has not defined clearly in which periods of schooldays may such measures be taken, and how long may take previous consultations with the school, and thereby for how long may a pupil be restrained. The Ombudsman also had concerns over the exculpation provisions.

The ombudsman argues that the regulation generates a constant uncertainty both for parents and for children considering that several situations may happen when a pupil can not obtain a credible permission or loses it through no fault of his own. In his petition the commissioner noted that the application of law enforcement measures, the possibility of police measures is an unnecessary and disproportionate restriction of the right to self determination of children under the age of 14. Being taken to school by a police officer can be traumatic and humiliating experience, therefore, it can severely violate a child's right to dignity.

The ombudsman says that ensuring regular school attendance is the parents' responsibility and obligation. It is a parental discipline privilege to decide how to ensure school attendance and how to control it. The commissioner does not dispute that truancy is a serious problem, but, in order to prevent it, it is primarily the efficiency of the child protection signal system that needs to be improved.

*(The Constitutional Court refused in 2013.)*

Our activities on the protection of children's rights in numbers:

- On-the-spot inspections: **4** in penitentiary institutions for juvenile offenders; **1** concerning segregation (in Jászapáti), **1** (in a nationality school, still in process) **2** in Fót Children's Home;
- Questions/complaints sent via our webpage created for children: **126**;
- Events organized by Ombudsman: **5** (2 conferences, 1 inauguration of memorial plaque, 1 participation on Telekom Children's Island, 1 participation on International Day of Deaf event) ,
- Presentations made on events and conferences by the Ombudsman/staff: **27** (7 on conferences abroad);
- Participation of the Ombudsman/staff on international events, seminars: **42**
- Petitions to the Constitutional Court: **4**
- Recommendations in reports: **36**
- Participation in national working groups: Working Group on Child-Friendly Justice /Ministry of Public Administration and Justice/, Working Group on Domestic Violence /Ministry of Public Administration and Justice/; Working Group on Human rights /Ministry of Justice/, Monitoring committee of the Strategy of "Making Things Better for our Children"/Ministry of Human Resources
- Cooperations/partnerships: European Network of Ombudspersons for Children (full member); EUROCHILD (associate member); Blue Line Child Crisis Foundation (Kék Vonal Gyermekkrízis Alapítvány (Joint events in autumn 2012)

Our Children's Rights Facebook profile has been given a like in the greatest number by women from 25 to 34 years old (30 per cent); our profile picture has been renewed thanks to

the support given by the Soros Foundation - Open Society Institute, as of 2012 the first page of the UN Children's Rights Convention has been the hallmark of our page.

## ***5. Highlighted inquiries related to the project***

### ***5.1 Domestic application of mediation and other alternative conflict resolution mechanisms in relation to the children's rights***

Under the Child-Friendly Justice project, one of the highlighted areas was the domestic application of mediation and other alternative conflict resolution mechanisms.

The theme selection (the detailed inquiry of the child protection mediation) was justified by the experience gathered in the previous years, according to which the prolonged proceedings and the parents' fight has a significant harmful impact on the children. Concerning this, it does not need much reflection to see that every solution that shortens or avoids the proceedings of the authorities always serves the interests of the child.

In order to learn the regulatory environment and the problems, the Commissioner for Fundamental Rights has addressed the minister of public administration and justice, the minister responsible for social affairs, the Head of Hungarian Prison Service, the President of the National Judicial Office, the Social and Guardianship Office of the County Government Offices and a number of NGOs.

*Mediation* is a conflict resolution mechanism in which an independent third person, the mediator, assists the parties to work out an acceptable solution for them. The mediator's task is to contribute to the agreement impartially and conscientiously. The family members tend to comply with an agreement made this way more as it is the manifestation of their own will in contrast with the decision of a court or guardianship office where there are winners and losers. This mechanism comes from Anglo-Saxon countries and becomes more and more widespread in Europe due to a number of its advantages. Since the 1950s in the United States, the so-called parenting coordinator has been in place, their use is mandated by the courts.

*International experience* varies in countries (the Appendix of the report contains good foreign practices) *but its cost-efficiency, its quality of being solution centered, its quality of taking into consideration the most cardinal interests of the child* and involving the child in the decisions that affect him or her are definitely favourable and are to be applied in the affairs affecting children more and more extensively. Other alternative conflict resolution models can also be applied successfully and are to be applied. This is encouraged by certain important provisions of the international regulation (Article 3, 12 and 40 of the UN Children's Rights Convention)

The UN Children's Rights Committee adopted a detailed Comment in 2006 and proposed working out a special set of tools which considers children as partners. One of the possible methods for this, is the so called Family Group Conferencing. Besides the UN, the Council of Europe encourages the use of mediation as well. The European Convention on the Exercise of Children's Rights published in 1996 encourages its parties to use mediation or other processes to resolve disputes in order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children. The Council of Europe

recommendation on family mediation (1998 no r 98 1) details the relation of mediation and the judicial or other authorities in family legal questions.

*The Hungarian legislation in force seeks to acknowledge the importance of an agreement between the parties, however, procedural questions of this have not been worked out for the most part, except for certain legal areas such as labour law, consumer protection.*

The Act LV of 2002 on Mediation is generally about mediation in disputes arising in connection with civil property rights.

Special mediation which is important from children's perspective exists in the following three specific areas:

1. mediation in child protection and contact affairs,
2. mediation in educational affairs and
3. non-civil mediation, that is, not falling under the scope of the Mediation Act, criminal legal mediation

#### *1. Mediation in child protection and contact affairs*

The ombudsman asked questions from all county and capital social and guardianship offices on the following: number of proceedings, their success, their publicity, mediator qualification or claim to training, proposals worked out by practice.

According to the legal provision, if the parties wish to use child protection mediation in the guardianship proceeding for regulating or enforcing contact-keeping, the mediator has to be jointly appointed by the parties from the mediators admitted into a special register created for this purpose or the mediators admitted into the register maintained by the minister in charge of the judicial system. Both admissions into the registers have their own special rules, fees and qualification requirements. The qualification requirements for engaging in child protection mediation are set out in the respective government decree as well. Only a fraction of those experts are recorded *in the official mediator register*, who have participated in mediation training. At the same time, a number of people engage in family assistance or child welfare service or in associations who have mediator qualification, however, they are not recorded in the official register, as a consequence of which their assistance under guardianship proceeding may not be requested. Consequently, the parties who wish to use mediation, have to bear the inconvenience caused by travelling and the incurred costs also if a qualified mediator works in the territory where the parties reside.

On the basis of the received survey data of the guardianship offices, it is evident that it is a basic problem that the parties (and the wider public opinion) do not know properly the institution of mediation and therefore they are basically suspicious towards that. Most of the clients, even if they were open to this solution, cannot bear its costs, even if they have become aware of the possibility of mediation in the guardianship office.

On the whole, it can be established that though the guardianship offices that have answered consider mediation as an efficient tool, in most of the counties the number of mediation requested by one or both of the parties is rather small. The number of mediations launched and successfully completed is even smaller.

According to data, compared to the proceedings launched, the parties' attention has been raised in significantly less cases to the possibility of using mediation. One of the reasons for this is that the administrators in the guardianship offices do not know this process or other alternative dispute resolution in a way that they would be able to communicate this to the parties so that the parties could feel a genuine urge towards mediation. Nevertheless, the interest for the subject and openness was experienced in almost all counties on the basis of the answers. As an example, it should be highlighted that in one of the counties some administrators participated in the training at their own expense and in their free time and they use their experience gained in the training successfully in their work. The result of the training is manifested *in the increasing number* of the agreements between the parents as well.

The Commissioner has come to the conclusion that, though, it is not the duty of the guardianship office administrator conducting an administrative proceeding to mediate with the parties, as he or she has to make a decision after the administrative proceeding; but in order to have indeed as many processes launched as possible and in order to have them successfully completed, the administrators have to have suitable knowledge about mediation and other alternative mechanisms. Consequently, it is quintessential *to train experts*.

To sum up, *the use of mediation is hindered by the lack of information, the cost of the process, its optional nature and the abovementioned difficulties of reaching a qualified mediator*. There is no doubt that a growing role of the public sector is required for changing the attitude which increases the proportion and areas of using mediation.

It is included in the new Civil Code that enters into force foreseeably in January 2014 that the court may oblige the parents to use mediation in justified cases in the interest of the proper exercise of parental supervision and the insurance of their cooperation required for this, including the contact-keeping between the separately living parent and the child.

The Commissioner asked the minister in charge of social affairs to take measures in order to introduce mediation training for the guardianship office administrators dealing with contact-keeping and in order to generally inform the public of mediation and other dispute resolution methods and to introduce the knowledge of mediation and other alternative dispute resolutions into the curriculum for the experts dealing with child protection and at least the law students and to work out the regulation serving territorial equal opportunities for the access to services.

## **5.2. Child-friendly Justice – Children's Rights in Proceedings**

### *1. Concerns and comments in connection with lowering age limit for punishability in the question of the need of separate courts for minors*

In compliance with UN CRC, a child means every human being below the age of 18. In compliance with the Hungarian Civil Code in force, persons who have not yet reached the age of eighteen shall be deemed minors, unless they are married. Persons of legal age are those who have already reached the age of eighteen, except where their legal competency is restricted or precluded by law. The CC attaches particular importance to the age of 14 in the field of legal competency: it provides that a minor shall be of limited competency if he or she

has reached the age of fourteen years and is not legally incompetent and minors under the age of fourteen years are legally incompetent.

In the field of criminal law, in compliance with the Penal Code, persons under the age of fourteen years at the time the criminal offence was committed shall be exempt from criminal responsibility. The upper limit of childhood is set out in the Penal Code this way and it provides that juvenile offender shall be any person between the age of twelve and eighteen years at the time of committing a criminal offence. Age is of particular significance from the perspective of criminal responsibility. In case of childhood, the criminal law in force essentially presumes that a person who has not reached the age of 14 does not have accountability required by criminal law. It can be established as a fact that a person under the age of 14 may also understand that his or her action is harmful to society and he or she may be able to act in compliance with his or her understanding and he or she may act intentionally as well as negligently. In spite of this, it was originally deemed so by the legislator that at the time of reaching this age, children's physical and intellectual development has reached a stage which enables them to be made responsible for their actions that they have committed. Consequently, the absence of imputability is an incontestable presumption in accordance with the regulation in force.

This is the reason why the provision of the new Hungarian Penal Code means a challenge, pursuant to which persons under the age of fourteen years at the time the criminal offense was committed shall be exempt from criminal responsibility, with the exception of homicide [Subsections (1)-(2) of Section 160], voluntary manslaughter (Section 161), battery [Subsection (8) of Section 164], robbery [Subsections (1)-(4) of Section 365] and plundering [Subsections (2)-(3) of Section 366], if over the age of twelve years at the time the criminal offense was committed, and if having the capacity to understand the nature and consequences of his acts.

In the light of what has been detailed above, it is difficult to argue in favour of lowering the minimal age of punishability if the upper limit of childhood is set out as 18 years in international documents. If somebody is considered a "child" on the basis of international experience is not merely a question of terminology. The cited regulation is in conflict with the international human rights expectations and the Hungarian constitutional requirements as it will be unfolded as follows.

Both the previous Hungarian Constitution and the new Basic Law that has been in force as of 1 January 2012 include this right, though, without the indication of particular obligations: "Every child shall have the right to the protection and care necessary for his or her proper physical, intellectual and moral development."

The particularities of children's rights lie in the subject, that is, in being a child. "A child is a human being who is entitled to all constitutional fundamental right like everybody else, however in order for him or her to be able to live with the complexity of the rights, all conditions for becoming an adult adapted to his or her age have to be ensured adapted to his or her age." (995/B/1990. Constitutional Court decision)

On 15 May 2012, the Commissioner for Fundamental Rights explained his serious concerns in a press release in connection with that the draft Penal Code included the provision of lowering the age of punishability which may also lead to the sanction of depriving liberty in case the child's culpability has been established.

Concerning the establishment of the lower age limit of punishability, the practice of the European states is not unified. At the same time, from the UN CRC and the related commentaries, that view and evident direction follows that the objective of a child centered

justice is education, assistance and re-adaptation to society, taking into consideration the child's most important interest. Accordingly, deprivation of liberty may only be applied as an ultimate tool for the shortest possible period. According to the Commissioner for Fundamental Rights with the function of the children's rights special ombudsman, the problem of those children coming up against the law needs to be handled primarily not with criminal legal sanctions but together with the professions dealing with children (child protection, education, health care) focusing on prevention and children's rights.

The solution proposed by the new draft Penal Code, lowering age limit for punishability as a more efficient tool for successful crime prevention and protection of the society, is not supported by the scientific majority since there are criminal-anthropological and psychological arguments against that and it may not comply with the main idea of the criminal law of the minors and the idea of successful education, either.

The establishment of the lower minimum age of criminal responsibility may well be justified, only after social dispute and professional negotiation, however, this amendment of the Penal Code may not be justified by the statistical number and nature of the offences committed by minors, either.

The abovementioned provision of the UN CRC is interpreted evidently so by the summary report regarding juvenile justice, issued by the UNICEF Innocenti that it is the obligation of the state parties to the UN CRC to maintain a system of institutions for minors, separated from that for adults.

Pursuant to the CoE Guidelines on Child-friendly Justice, adopted in 2010<sup>3</sup>, as much as possible, a system of special courts, proceedings and institutions needs to be set up for children running counter to the law. The general principles related to the international standards also highlight child-friendly environment basically needs to be ensured for the time of the court hearing and the delay.

According to the study by the National Institute of Criminology (NIC) prepared upon the ombudsman's request, it would be favourable to set up special courts juveniles only in that case if the underlying legal system would also undergo serious changes. Under the present procedures, special courts for juveniles would not mean a radical change since the strict legal system and the present legal practice would bind courts as well. As a consequence of which, according to their view, the involvement of a child protection expert in the court proceeding would not mean a real novelty in law enforcement. Pursuant to the new Criminal Proceedings Act in force, it is, though, obligatory to engage a teacher in the court proceedings in cases in which juveniles are involved, their role is far from being determining. Court imposes sanctions for a case by applying the criminal legal rules in force and it hardly ever considers the so-called lay participant's opinion.

According to the ombudsman's view aggregating various professional opinions, termination of the special courts for juveniles would induce improprieties related to the children's right to care and protection and the right to a due process.

Beyond the infringement of the provisions of the Basic Law, our international obligations have not been fulfilled, either, as the Parliament failed to pass the legal rules to enforce the requirements in the UN CRC.

The Commissioner has also drawn the attention to that in addition to the question of subsequently setting up child-friendly police interrogation rooms, the absence of the court

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<sup>3</sup>[http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20\\_4\\_.pdf](http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20_4_.pdf)

infrastructure corresponding to the child's and juvenile's level of maturity also causes impropriety related to children's right to care and protection and the right to a due process.

## 2. *Improprieties related to the question of confinement for misdemeanour*

The abovementioned study by the NIC has already drawn the attention to that this is the area where launching a comprehensive research would be sorely needed, partly for inquiring into the enforcement of children's rights, partly for estimating the costs of the operation of the legal institution. As a consequence of the absence of preparing a preliminary impact assessment, the necessity for the inquiry into cost efficiency is indicated by some cases which we have become aware of randomly.

In the new Misdemeanour Act adopted in December 2012 and effective as of April 2012, the legislator maintained the possibility of imposing confinement against a juvenile, a person under 18, and transforming monetary fine into confinement. The Act still includes that a juvenile is a person who has reached the age of 14 years at the time of committing the misdemeanour, but has not reached the age of 18 years yet and the Act also provides that the longest duration for confinement for a misdemeanour is at most 30 days in contrast with the maximal 60 days, in the case of cumulative sentences it may be 45 days.

For juveniles, that is persons older than 14 but younger than 18 years old, placed under a proceeding, short-term deprivation of liberty, confinement or misdemeanour detention disproportionately restricts children's right to personal freedom and their rights to protection and care. That does not serve the child's most important interest.

On one hand, it may not be justified if instead of the short-term deprivation of liberty there is no other tool at disposal for the legislator that would mean milder restriction of rights (sanction, measure).

On the other hand, as the concrete measure in the report illustrates, for children under 18, "juvenile" as used by the Misdemeanour Act, the direct and indirect disadvantage and grievance caused by deprivation of liberty are not proportional to the achievable results, either. Pursuant to the interpretations of the governing international basic requirements in relation to the requirement of proportionality, in case of minor infringements, deprivation of liberty is expressly disadvantageous; it has a serious negative impact. The primary objective of criminal responsibility for juveniles is education and prevention, which cannot be ensured by short-term deprivation of liberty. In the course of the applications of sanctions affecting children, the constitutionally required "different treatment" does not guarantee that maximum duration of the proceeding is shorter for juveniles (instead of 60 days 30 or 45 days).

Several days of confinement do not even have any improving, dissuasive power but on the contrary, they have a harmful impact. The application of confinement may go together with psychic burden, which may cause bigger harm for a person under 18 than the restriction of personal freedom itself.

The possibility of confinement or detention for misdemeanour due to the commission of misdemeanours is fully contrary to some basic principles set out in the UN CRC.

One of the basic principles derived from the UN CRC is that a sanction involving deprivation of liberty may only be a last resort, so it may only be applied as a last resort, consequently it may only be used if no other tool is available. Another important basic

principle is the principle of gradualism: it is not possible to impose the most severe sanction immediately for misdemeanour. The third one, binding for the Hungarian legislator, is the principle of education: for juveniles, no matter what kind of sanction is applied against them, in the whole proceeding, the objective of education has to be enforced. Concerning the abovementioned Articles of the Convention, from the perspective of the assessment of the question, the provisions regarding the comprehensive commentary No. 10 of the UN Committee on Children's Rights and several resolutions of the UN General Assembly may be highlighted

### *3. Personal and objective conditions for the interrogation of children, with special regard to the child-friendly interrogation rooms*

According to the information provided by the minister of interior, there is no such training for the police staff which would prepare them specifically for the differentiated treatment of children. However, the curriculum of their education includes the rules of childhood and the differentiated measures due to cultural background different from the majority's cultural background. Regarding the selection of police staff, no such criterion system is in force which would expressly set out what type of qualifications or professional practice one must have, who may come into contact with children in a proceeding. According to plan, the National Police Headquarters filed in a tender for training experts.

In compliance with general practice, in the investigative phase of criminal proceeding the same person acts as inspector and investigator as well, this way it is generally ensured that in case several interviews are required, the same person should interview the child, the juvenile. If possible, this person is emphatic enough and has a qualification as an educator. It has to be noted that the investigative authority endeavours to set the conditions for that if possible the child should be interviewed only once.

The Budapest Police Headquarters and the County Police Headquarters have to ensure at least one child interview room in their territories by 2014. If in the course of criminal proceeding it is presumable that the interrogation of the child in the hearing would influence his or her development harmfully, the investigative authority requests the prosecutor to order the hearing of the child by the investigative judge.

The Commissioner for Fundamental Rights has pointed out that it does not serve the main interest of the child and occasionally it may result in the prolongation of the proceeding if the interview room available is far from the place of residence of the child. In addition, the investigative judges sometimes cannot fulfil these legal provisions, either, as due to their heavy workload and deadlines in other cases, they cannot travel to another town for interrogating the child.

The ombudsman does not find it sufficient to have only one child-friendly interview room in one county. On the long run, further rooms would be needed in the interest of the child, in order to ensure the conditions for the interrogating persons for schedulable and successful working activity and in order to prevent the prolongation of the proceeding.

Furthermore, it was discussed that if a photo is taken or an audio-record is prepared about the interrogation, further safeguard rules would be needed, which ensure the enforcement of the child's right to human dignity, protection and care and a due process.

### 5.3. Enforcement of our international obligations in relation to the child-friendly justice.

Under the inquiry, the ombudsman addressed and requested the Minister of Administration and Justice to provide information with the help of the Inter-ministerial Working Group for Child-friendly Justice and the competent Ministries. In addition, the Commissioner addressed a number of civil society organisations and correctional facilities and the penitentiary institutions for juveniles. The addressed organs received the same questions which had been compiled in compliance with the provisions of the CoE Guidelines on Child-friendly Justice.

1. The UN directives and the recommendations by the Council of Europe clearly indicate that a complex, inter-professional, wholistic view is required for the treatment of problematic behaviour of children and juveniles and the commission of criminal offences by them. Criminal justice is only one of them, but not the most important element of the complex system in which the problem has to be handled. Juvenile crime cannot be fought by the justice system itself for juveniles. Cooperation of the health care, education, social and welfare service and justice systems is inevitable. According to the Commissioner, in the course of the enforcement of the proceedings and the decisions of the authorities, it is quintessential to work out a multidisciplinary common assessment framework for the lawyers dealing with children, psychologists, policemen, social workers, etc. for ensuring working out the implementation of the measures and circumstances that best suit the age, mental and physical condition of the child. Its absence gives rise to the direct jeopardy of the child's right to protection and care. Consequently, the ombudsman requested the Minister of Public Administration and Justice to take measures on working out the suitable multidisciplinary common assessment framework.
2. As indicated by civil society organisations, in the asylum and alien control proceedings, in the course of age assessment the multidisciplinary approach is not applied in all cases. Age assessment of those asking for asylum occurs in practice if the authority deems that the age said by the one asking for asylum is doubtful. In practice, age assessment means X ray examination, collarbone or hand bone examination. However, there are no examinations carried out by psychologists and social workers, in contrast with the governing international professional standpoint. On this basis, the Commissioner has concluded that in the course of age assessment of minors being unaccompanied, avoiding examinations carried out by psychologists and social workers, corresponding to the international practice and considering psychic maturity and ethnical and cultural aspects as well, infringes the enforcement of the highest interest of the child and the provisions of the Basic Law on the adoption of the generally recognized rules of international law and the enforcement of the child's right to protection and care necessary for his or her proper physical, intellectual and moral development. The ombudsman asked the Minister of Interior to consider establishing an Expert Working Group in order to provide a legal regulation

corresponding to the international provisions and practice and the protocol of the national regulation context and application of age assessment including the psychic maturity of the child and ethnic and cultural aspect as well. In compliance with the CoE Guidelines, all experts dealing with children must receive an interdisciplinary training on the rights and necessities of children of different ages and the proceeding adjusted to children. In the course of the inquiry, the Commissioner has concluded that the absence of the regular, interdisciplinary (communication, legal, psychological, child protection, sociological) trainings of experts dealing with children (policemen, prosecutors, judges, defence lawyers, etc.) or its partly implementation is a restriction to the full enforcement of children's rights. He asked the Minister of Public Administration and Justice to discuss how a regular interdisciplinary training integrated in the present training programs could be ensured concerning the affected professions and to take the suitable measures in order to work out and implement the training program.

3. The Guidelines set out that the justice organs and other authorities have to provide the appropriate information corresponding to the child's age and maturity at the beginning and in the course of the proceeding as well. As indicated by civil society organisations and some correctional facilities, the information provided had not considered the age of the children and juveniles. The information is formal and the experts have not been convinced if children really understand the information provided to them. According to their experience, the experts do not know the cognitive abilities and psychic characteristics of the children groups and they have not been prepared for how they should communicate with children. According to what they said, this is completely missing from the curriculum of the institutions preparing the experts. According to the Commissioner, for ensuring the information corresponding to the child's age and maturity, it is quintessential to train the affected experts in the framework of a comprehensive obligatory training. The ombudsman asked the Minister of Public Administration and Justice to ensure working out information in a child-friendly language that corresponds to the different proceedings with the engagement of civil society organisations.
4. The protection of the child's private life and personal data in the various proceedings is an important principle of the Guidelines. This means that especially in the media no information or personal data shall be published or made public from which directly or indirectly the personal identity of the child can be established, including photos, detailed descriptions about the child or his or her family, audio and video recordings. In compliance with the rules in force, the right of the press to information is always affected together with the right to the protection of personal data and the moral rights. In spite of this, on the website of the Media Council of the National Media and

Infocommunications Authority, several cases from 2012 concern the declarations of minor victims or perpetrators in the media which infringed human dignity. The Media Council analysed these infringements in all cases in detail and applied appropriate sanctions. Considering that the inquiry of the commercial media providers does not belong to the competence of the Commissioner, therefore regarding these it was possible only to make proposals. As a consequence of the infringements concerning the publication of children's private life and personal data by some media providers, the ombudsman proposed the National Media and Infocommunications Authority to consider organizing training for the media providers in which they can learn the provisions on broadcasting children and juveniles in the media and the relevant decisions of the Media Council. This training took place in the spring of 2013.

5. In the field of victimization, several organisations mentioned the shortcomings of the children's psychiatric and psychological care and the absence of the treatment of the injured in ill-treatment cases. They pointed out the shortcomings of the operation of the child protection signalling system and that there is currently no methodical guidance or training system which would provide the justice experts with suitable information as to how a child may be interviewed or has to be interviewed well and successfully keeping in mind the highest interest and necessities and causing as little harm as possible. In addition, the uniform professional protocols and trainings for the experts who come into contact with children in the proceedings (psychologists, interpreters, etc.) are also missing. Therefore, the ombudsman asked the Minister of Administration and Justice to reveal the causes of secondary victimization and to work out in view of those the tools for prevention and to regularly review their implementation in practice.
6. In compliance with the Guidelines, the states shall make efforts to avoid going to court, for children rehabilitation and the restorative approach should be brought to the fore, which is not ensured by the misdemeanour proceeding in force. In the interest of the children's rights, their appropriate education and development, the institutions ensuring restoration as well, should be applied in particular for especially the massively occurring minor infringements. Extension of mediation to the misdemeanours would not only efficiently contribute to re-adaptation to society for juveniles but would also achieve coherence with respect to restorative justice between misdemeanour proceedings and criminal proceedings and would accelerate the proceedings and decrease the burden of the judges and contribute to the defendant's fast reimbursement for his or her damage. According to the report, the absence of the elements of restorative justice in the course of the misdemeanour proceedings, infringes the child's highest interest principle and causes the imminent danger of the infringement of his or her right to protection and care. Therefore, the

Commissioner proposed the Minister of Administration and Justice to consider amending the Misdemeanour Act so that mediation is ensured in the course of the misdemeanour proceeding as well.

7. Beyond Article 12 of the UN CRC, the child's right to express his or her views as well as his or her right to be heard are set out as an important principle in the CoE Guidelines. The use of a language corresponding to the age and mental development of the child, the so-called child-friendly language, the assurance of a child-friendly environment, the application of child-friendly interrogation techniques, interview on as few occasions as possible and the most thorough possible training of the interviewing experts are all set out in the Guidelines. Experts claim that at the same time not the infringement of the right of expression means the biggest problem but the appearance of this right as an obligation, in some cases in the form of repeated testimonies. Experts do not have sufficient knowledge and appropriate training for interrogating the children perpetrators/victims, they are not clear with children's necessities. With regard to the interview of the child, there is no suitable methodological guidance or training system which would prepare justice experts for how a child can be interviewed without causing secondary victimization. The absence of the training and the professional protocol is significant in particular for the justice experts. According to the ombudsman, it is quintessential to train the affected experts in the framework of a comprehensive obligatory training including a practical approach as well for the use of the child-friendly language, the application of child-friendly interrogation techniques and for the assurance of interview on as few occasion as possible. Therefore, the Commissioner asked the Minister of Public Administration and Justice to discuss how a training on child-friendly interview, corresponding to the highest interest of the child and keeping in mind the highest interest of the child, could be inserted in the existing training plans. The Commissioner asked the Minister to take the necessary measures in order to work out and implement that.
8. The Guidelines emphasize the importance of avoiding unreasonable delay in the course of all proceedings affecting children. All of the procedural rules in force set out concretely the extraordinary procedure or such principles from which the application of the principle of urgency follows in the course of the proceeding affecting children. However, regarding the enforcement of legal regulation, experts disapprove of the prolonging proceedings. Most of the answers received from the penitentiary institutions for juveniles and correctional facilities also mention that in case of the juveniles monitored by them extraordinary procedure is not effected. Some proceedings are delayed even for years. The prolonging judgment period and the pre-trial detainment make the efficient implementation of measures with an educational

objective harder. The Commissioner asked the Minister of Public Administration and Justice to analyse the causes of the prolongation of the proceedings affecting children in the framework of the Child-friendly Justice Working Group operating under his coordination and to make proposals actually permitting the extraordinary procedure for the competent organs and to work out and implement the regular monitoring of the enforcement of the extraordinary procedure.

9. The ombudsman inquired into the enforcement of children's rights also in judicial enforcement proceedings. As indicated by civil society organizations, the insufficient preparedness of the experts participating in the enforcement causes problems. The bailiffs and the policemen contributing in the enforcement do not have information and knowledge about the situation of the children and their necessities. This is the reason why such improprieties arise, like for example the use of shackles and physical violence with regard to children. The Commissioner has concluded that it is quintessential to train the experts participating in the enforcement with regard to the child's psychological, sociological and cognitive characteristics. The absence of this preparation or its implementation only in part is an obstacle to the full enforcement of children's rights. The ombudsman asked the Minister of Public Administration and Justice to take the necessary measures in order to work out and implement the training program.
10. In compliance with the Guidelines, in particular, health care service, social and therapeutic programs shall be ensured to the victims of the criminal offences and the children and the nurses, psychologists and social workers shall be immediately informed in an appropriate manner. The civil society organisations appealed to indicated that the victim assistance services are unprepared for supporting the minor victims and the staff do not have the necessary special knowledge about the minors. The ombudsman asked the Minister of Public Administration and Justice to take the necessary measures in order to work out and implement the training program with the involvement of the Child-friendly Justice Working Group.
11. The legislation on child-friendly justice and the legal practice on it need to be regularly reviewed and evaluated. In the monitoring of the implementation of the Guidelines, civil society organisations dealing with the support and protection of children's rights also have to take a role. The Commissioner has concluded that the absence of the monitoring system on the implementation of child-friendly justice infringes the highest interest of the child and the right to protection and care and the right to a due process. Therefore, he asked the Minister of Public Administration and Justice to set up a system that regularly monitors the implementation of the child-friendly justice and to establish its rules of operation and to ensure the conditions of operation, in the

framework of the Child-friendly Justice Working Group, with the involvement of civil society organisations.

#### **5.4. Victim protection procedures of administrative organs with regard to children**

The Commissioner launched an inquiry *ex officio* in relation to the crime prevention and victim protection activity of certain administrative organs participating in the system of victim protection, which concerned the victim protection duties of all social and guardianship offices in the country, county police headquarters and justice services, in addition to the competent Ministry. Furthermore, the Commissioner asked the Budapest Chief Prosecutor, several civil society organisations, altogether about 70 organs to provide information.

The Ombudsman found that the effectiveness of the work of guardianship offices is significantly different in the different counties of the country. According to the inspection report, this phenomenon is caused by the different performance characteristics, the lack of staff, inadequate training, contradictory legislation, grant opportunities, and the narrowing of the national training programs.

The staff members of county police headquarters victim support services, engaged in child and youth care, mainly work without proper qualification and adequate financial background.

The report noted that there are only few, yet unused child friendly hearing/inquiry rooms, and legislative barriers impede the use of audio and video recordings as evidence.

Also a serious problem is that the victim support service offices functioning mostly in the county towns have only a small staff of specialists.

The Commissioner for Fundamental Rights pointed out that the lack of independent experts, the absence of legal provisions supporting child victims and the guides of good practices, loss follow-up of the afterlife of child victims equally results in the anomaly.

In relation to his practice conducted in the field of the victim protection of the police, the Commissioner revealed that the staff of police headquarters do not comply with on time or fail to comply with their obligation to provide information on the victim support services, as a consequence of which the victims do not have access to the victim support services or they cannot use them in time. This is due to several reasons. On one hand, staff of a number of police headquarters perform their duties of victim protection within an attached employment or it often occurs that the substitution of the police colleague commissioned with issuing the certificates is not solved. It has occurred in practice that the justice service has not prepared the information for the police in time. At the same time, there has also been an example for that the minutes contained the handover of information, which according to the ones who have turned to the services for help, in fact, did not take place.

The Commissioner agreed with that professional view, according to which victim protection serves the prevention of becoming a victim, while victim support is the service provided to the people who became the victims of the crime and mitigation. In the course of the inquiry, it has become clear that these two concepts are not uniformly used and interpreted in practice by the authorities participating in the proceeding. On the basis of the abovementioned interpretation, the crime prevention activity of the police is an activity of victim protection, whereas following the commission of the criminal offence their measures serving the enforcement of victims' rights belong to the scope of victim support. According to

the ombudsman, the indicative obligation of the police set out in the Child Protection Act cannot be considered expressly and exclusively as measures of victim support.

Several instructions of the National Police Headquarters provide for the method of the performance of the duty. Consequently, they provide for the duties and measures extending to all police staff, the performance of which ensures as wide enforcement as possible of the victims' rights. In addition, they also provide that crime prevention of the police is a police activity coordinated by the central and regional crime prevention units of the police and performed in cooperation with the state organs and municipality organs, social organisations, corporations and citizens and their communities, which serves the decrease of the number of criminal offences, the improvement of the subjective sense of safety and the prevention of becoming a victim and the prevention of becoming a victim repeatedly.

Concerning the efficient crime prevention (and victim protection) activity, the lack of financial resources causes great difficulty. They try to cover the costs of certain preventive measures (leaflets, impression) through tenders and from support of municipalities. These solutions are, however, temporary and this way long-term planning is not possible.

According to the Commissioner, it would be justified and lifelike to increase the number of interview rooms for children, to be established in the competency area of the police headquarters, since the child-friendly proceeding is still not ensured in the headquarters where there are no interview rooms for children. In addition, pursuant to the Criminal Proceedings Act, persons under fourteen years of age may only be heard as a witness if the evidence expected to be provided by his testimony cannot be substituted by any other means. For the enforcement of this provision, the ombudsman considers such amendment of the Criminal Proceedings Act necessary, pursuant to which the interview of the child in the child-friendly room or recorded on video could be used as evidence in the course of the criminal proceeding. Since, owing to the current regulation, the child-friendly interview room does not fulfil its original purpose. The Budapest Chief Prosecutor also indicated that he would consider justified the amendment of the Criminal Proceedings Act on the basis of a similar consideration in order to ensure that also the investigative judge implement the interrogation of persons under 14 only in an interview room for children.

As a further child-friendly measure and in order to help the children victims efficiently, it would be required to organise special trainings on the subject of child and youth protection for the staff of the investigative authorities. This has been reinforced by both the heads of justice services and the Budapest Chief Prosecutor.

The Commissioner agreed with the Police Commissioner and the Minister of Interior on the question of the employment of a remote witness. They agreed that in the course of the proceeding, efforts have to be made in order to ensure that as few as possible people are present at the interview of children and that these persons shall provide protection and safety. As the heads of these organs explained, the minutes on the hearing in the interview rooms for children contains only the following information: the people being present and the starting time for video- and audio recording. In addition, the minutes include the time when the hearing was interrupted, the reasons for the interruption and the duration of the interruption. There are also video and audio records on this information. According to the ombudsman, on the basis of what has been explained above, the presence of a remote witness does not provide additional guarantee on the certificate of the occurrence of the activity of the authority, however, it is not proportional to the highest interests of children.

According to the ombudsman, the highest interests of children are infringed by the provision of the Criminal Proceeding Act, pursuant to which when a person under 18 is interrogated, the presence of the legal representative and carer of the witness is set out only as a possibility. According to the Commissioner, in the interest of the full enforcement of the protection of children's interests and in order to mitigate the psychic burden, the presence of the legal representative or carer shall be ensured in case a child is heard.

In connection with the proceedings of the county police headquarters, the Commissioner has concluded that the police headquarters do not comply with their obligation to provide information, concerning the victim support services. Staff of the police performs their duties in an attached employment, often without qualification for child and youth protection and in addition, the efficient crime prevention activity also encounters financial difficulties. The low number of interview rooms for children, their access, being unused and the legal obstacles of the use of video- and audio recording as evidence, employment of a remote witness in case a child is heard and the hearing of children under 18 without their legal representative or carer cause impropriety related to the children's right to protection and care, the requirement of promoting equal opportunities and the requirement of legal certainty emanating from the rule of law.

The Ombudsman found that the effectiveness of the work of guardianship offices is significantly different in the different counties of the country. According to the inspection report this phenomenon is caused by the different performance characteristics, the lack of staff, inadequate training, on the other hand contradictory legislation, grant opportunities, and the narrowing of the national training programs.

The staff members of county police headquarters victim support services, engaged in child and youth care, mainly work without proper qualification and the absence of adequate financial background.

The report noted that there are only few, yet unused child friendly hearing/inquiry rooms, and legislative barriers impede the use of audio and video recordings as evidence.

Also a serious problem, that the victim support service offices functioning mostly in the county towns, with small staff of specialists.

The commissioner for fundamental rights pointed out that the lack of independent experts, the absence of legal provisions supporting child victims and the guides of good practices, loss follow-up of the afterlife of child victims equally results the anomaly.

Related to the work of judicial offices, the Ombudsman revealed that their victim protection activities were hindered by differences in the practice of document offices. During the procedure several victim protection services noted that due to limited transportation possibilities, victims face difficulties in reaching these offices – established mainly in county towns – in office hours. Therefore, they are not able to take advantage of the possibility of turning to these offices and enforce due application of their rights. One solution could be running "mobile" offices in settlements far from these county towns operating in certain office hours. In accordance with a ministerial decree in force from August 2013 judicial services may transfer victim support offices – beside county towns – to other settlements, as well. The Commissioner considers that the dispositive provision should not be considered as a real solution to the problem due to lack of professional staff and adequate financial background.

Services do not have updated records on the number of child victims turning to them. The Ombudsman concluded that in order to set up a proper victim protection system,

considering the individual interests of children, it is essential to establish an adequate record keeping for working out development methodologies and possible measures in order to a better enforcement of child victims' rights.

Each victim support service operates only with one or two professionals, sometimes taking several duties. Increased workload might lead to tensions in the staff and professionals are likely to commit errors or get exhausted and depressive. As a result, the victims may face difficulties in access to adequate services.

Given that children are more vulnerable than adults, child victim support services should be more concentrated on the special needs and individual interests of children. The commissioner underlined that the absence of legal provisions supporting child victims, the lack of independent experts and manuals of good practices, the absence of adequate financial background, the lack of follow-up of the afterlife of child victims equally results the anomalies.

Given that the current system is based on crisis-type services - with emphasis on aid within a short time after the crime was committed - and that these services presently are struggling with lack of human resources, follow-up of the afterlife of child victims is not possible. The Commissioner for Fundamental Rights concluded that there was no cooperation between different service suppliers and public authorities aimed to and obliged to protect children presumably due to the lack of adequate knowledge of methodological recommendations and technical protocols. He also noted that the system does not provide special, tailor-made services for children and decisions should be made about children in a way that respects their rights and interests. Strategic inclusion of psychologists and volunteers into the child victim support system would also be an asset.

Based on the above mentioned, in his report the Commissioner for Fundamental Rights found that the effectiveness of the work of victim support offices is significantly different in the different counties of the country. According to the inspection report, this phenomenon is caused by the different performance characteristics, the lack of staff, inadequate training, on the other hand contradictory legislation, grant opportunities, and the narrowing of national training programs. The staff members of county police headquarters victim support services, engaged in child and youth care, mainly work without proper qualification. Lack of independent experts and manuals of good practices, the absence of adequate legal and financial background and the lack of follow-up of the afterlife of child victims constitute an infringement of the child's right to protection and care and result anomalies concerning the principle of legal certainty.

For this reason, the Ombudsman asked the Minister of Interior to initiate the amendment of relevant legal regulations on order to increase the number of child friendly gearing rooms, to ensure their availability, to make possible the use of audio and video recordings as evidence and to ensure that in case when a the police interrogate a juvenile witness, the officials do not miss the notification of the child's parents or legal representatives.

The Commissioner requested the Minister for Human Resources to draw up methodological guidelines for guardianship offices on best practices concerning crime prevention and to launch adequate training programs for professionals dealing with child victim protection and support.

The Ombudsman requested the Minister for Public Administration and Justice to amend relevant legal regulations and to ensure adequate conditions to set up an efficient call center service for victims, to involve volunteers in order to ensure access to protection and support for all victims of crime with special emphasis on child victims.

### **5.5. Juvenile offenders and the Ombudsman's inquiries concerning crime prevention**

The Commissioner has launched a comprehensive investigation to explore problems concerning child and juvenile delinquency prevention and how these problems are managed. The inquiries focused on children and juveniles committing minor offences or crimes and on the effectiveness of child protection activities. The investigations aimed to explore practices followed by guardianship offices, child welfare institutions, police offices, probation officers and prosecutors in four counties and to monitor their activities carried out in the field of prevention. *According to research data, there is a slight decrease in the number of crimes committed by children.* Despite this decrease, negative trends were observed as for the crimes committed and the offenders. Increase in the rate of violent crimes is the most alarming. Number of crimes committed by juvenile offenders practically hasn't changed over the last ten years. The distribution of crimes committed and the structure of delinquency show negative changes. Rates of crimes against property are falling but the number of violent crimes is growing as well as the number of girls committing crimes. Case-law however, can hardly follow these tendencies.

In terms of overall crime rate, the proportion of child offenders is not significant, being between 2-3% over the past ten years. Investigating authorities should notify child protection services under the provisions of the Law on Criminal Procedure if a child or young offender is charged with having committed a crime. The police should notify child welfare services and the guardianship office in order to take the child into protection. *Actions and notifications however are mostly formal and effective communication is not typical. Documents are requested: meaningful relationship between child protection and criminal procedures however is established with the probation supervision.*

In accordance with current practice, "nothing happens" to child offenders. On the one hand it means that criminal proceedings started against them are usually are ended (or not even started ) and, secondly, relationship between institutions, authorities participating in criminal procedures, their communication and the performance of their signaling duties are carried out on an ad hoc basis.

*As the Chief of National Police informed, the number of offenders in 2011 was 7 percent less compared to the same period of last year. The number of child offenders decreased in 2011, while their share of the number of all offenders increased by 0.12 percentage points in case of child offenders and by 0,62 percentage points in case of juvenile offenders. Changes in the proportion of offenders aged between 14 and 18 were similar.*

The Chief of National Police reported that even after the police had notified the competent institutions, they rarely get any feedback on measures taken afterward. He underlined that cooperation could function effectively if it was run by a member of the guardianship office or the signaling system. His experience shows that in places where the signaling systems has been running for years by the same persons, these are operating effectively, accurately, giving all support possible to children.

According to 2010 Annual Report on crime prevention, child welfare services registered 2017 cases when children under 18 committed minor offences and 809 cases when they committed crimes. This shows a change in trends comparing to previous years: the number of minor offences increased and the number of crimes decreased.

Among minor offences begging, trespassing and theft were the most common. Robbery was the most common crime committed by children or juveniles.

According to a report prepared on the work of the authorities in the field child protection in the Northern region of Hungary, child offenders are not always aware of the seriousness of the crime they have committed, they follow their instincts many times. Their acts are primarily due to an unsettled family life, parents with drinking problems and the high rate of unemployment is. *It is typical that some troubled children violate the law repeatedly, but in spite of signaling to the guardianship authorities, quick and effective action is not taken and therefore after a few years they come before the authorities as young criminals.*

At the level of counties, crime prevention strategy is characterized by the dominance of police initiatives that positively affect good cooperation with the institutions concerned. The police considers as an important task to promote healthy lifestyles and to fight crime reproduction. They carry out important prevention activities in schools at all levels: training teachers and sometimes parents for crime prevention. Topics like juvenile delinquency and drug prevention are high priority issues.

For the purposes of crime prevention, police stations continuously held homeroom classes and attended educational meetings. They keep informing the public through the local media about current criminal problems or issues and during public security raids nightclubs frequented by juveniles get more attention. In the academic year 2010-2011, the "school police officer program" continued in county schools.

Child welfare services organize so called case conferences in a growing number but this method is still not applied with frequency. *Child welfare services consider case conferences as a useful tool for solving the problem. In many cases, however, it is not applied because competent members of the signaling system do not attend these discussions therefore it is difficult to achieve satisfactory results.*

Institutions do not dispose of financial resources for prevention programs, the same employees are trying to create the conditions for such programs. There are only a few crime

prevention programs but cooperation with the police is very effective, more and more events are being organized by child welfare services with their participation.

As for cooperation with other authorities, county child welfare services *reported that the police generally signal the crime committed by a juvenile only after the closing of the criminal procedure. This often means that a family counselor learns about the crime only months or even a year after it was committed.* This might have a negative impact on the effectiveness of his work, increase administrative costs and by that time the youngster could have "forgotten" what had happened. Family counseling would be needed during the investigation phase, as well. *Another problem is that family counselors should report to other child protection services if they find that other type of assistance is needed, as well.*

As part of general prevention, every community organizes recreational programs and activities. Some child welfare services organize day-champs, sport programs and other type of activities for children with the aim of crime prevention, or they settle up teen clubs with lectures given by police officers or other type of crime prevention programs.

More well trained and available specialists would be needed in order to prevent exposure to juvenile delinquency. Psychologists, development teachers, family therapists, mediators, psychological counseling, education consultants should all be involved. These services and facilities are not available to the extent needed, therefore it is essential to develop and extend these services.

In the framework of the evaluation of the signaling system, the Minister for Justice underlined that police staff often experienced that guardianship authorities or child welfare services do not dare to go out to families or to make a decision . The police always give assistance to family visits as provided under the law. More often, however, guardianship officers or social workers consider that they don't get enough assistance in their work. In the minister's view, child protection system should be completely revised in order to properly ensure protection for the children which cannot be funded on the police, since main police tasks and duties, as established in the Basic Law, are not considered within the framework of child protection.

Adequate operation of the signaling system - the same way as the police with the application of internal regulations – should be promoted with working out a detailed methodological manual *Efficient operation should be assisted by different protocols on cooperation detailing methods and cases when case conferences would be needed and what organizations should be involved, what type of action is needed and how to implement these actions.* It should be noted however, that currently over official working hours – the only available authority is the police meaning that there are no other organizations or players in the field of child protection at the moment with adequate tools for immediate intervention or decision making.

The minister stressed that in several occasions crimes committed against children could have been prevented if members of the signaling system had fulfilled their signaling duties on time. He reaffirms, that the most efficient was to manage problems arising in the field of child and

youth protection is case conference. Currently, there is no detailed, precise regulation on signaling obligation of members of the child signaling system therefore it would be necessary to work out precise legal rules and manuals on possible ways of cooperation as well as to ensure adequate financial and human resources.

According to the Commissioner for Fundamental Rights, it should be decided which problem is more important: prosecution or prevention. It is clear that in case of a serious infringement of the law, liability is essential. It is also an important circumstance to consider if the offender is 13 or 16 years old. In the vast majority of cases, before a criminal act is committed problems to be solved arise, future juvenile offenders behave like “screaming for help” however their acts remain without any reaction.

Much more attention should be paid to that family counselors or even church clerks and NGO-s explore at the earliest stage possible groups of children at-risk and they participate effectively with offering guidance, positive examples and lifestyle advice for an adequate life conduct.

He stated that child protection and minor offences proceedings should be regulated more precisely and amended, if needed. The authorities, other bodies obliged to initiate a procedure, law enforcement institutions are uncertain regarding the application of legal regulations and counties interpret legislation in different ways.

Efficient operation of the signaling system is inhibited because of slow and uncoordinated signals and that child welfare services get signals from *the police generally only after a crime was committed by a juvenile or only after the closing of the criminal procedure. This often means that a family counselor learns about the crime only months or even a year after it was committed.* Sometimes members of the signaling system comply with their obligations only in extreme cases, or they fail to do so because of fear of revenge by the parties concerned.

The Commissioner is convinced that the effective operation of the signaling system and assisting the effective work of members of this system is the state’s duty. In light of this, the Commissioner requested the minister responsible for social affairs to ensure better institutionalized protection for child protection signaling system members. He also asked the Minister to take measures in order to ensure that child welfare services making a signal receive adequate information on actions taken in each case.

Failure of assistance to children committing crimes or lack of necessary steps taken may also cause irregularities in connection with the child's right to protection and care.

In accordance with legal provisions in force, prior to making a recommendation on taking a child into protection it not required to hold a case conference. In the commissioner’s view, however case conferences cannot be ignored before making such recommendation since case conferences open possibilities for professionals, children and their parents to work together in order to prevent children from being at risk. He concluded, therefore, that the current uncertain practice is the result of lack of adequate regulations while the absence of guidelines on holding case conferences is against the principle of rule of law, legal certainty and the right of the child to protection and care.

County guardianship authorities and child welfare centers, members of the child protection signaling system work make every effort to pay special attention to fulfill their obligations of signaling and cooperation. They characterized as efficient cooperation between child welfare services, the police, probation officers and other members of the signaling system and they emphasized its importance. Good examples of cooperation are joint conferences, case conferences, joint meetings held in the framework of the signaling system, exchange of views and several types of cooperation agreements.

Besides positive experiences, there were several deficiencies, as well: slow, uncoordinated signals, failure to take fast and effective child protection measures and the fact that the police notify the child welfare service only after completion of the investigation. Sometimes members of the signaling system comply with their obligations only in extreme cases, or they fail to do so because of fear of revenge by the parties concerned. Effective cooperation is inhibited many times due to lack of personal contact between members of the system. In some counties, one third of child welfare services do not have any contact with other competent authorities.

All data providers stressed the importance of prevention programs and they underlined the important role of recreation programs in crime prevention. Due to the lack of financial resources however, child welfare services are unable to run teen clubs or organize other types of recreation events.

The report prepared on the results of the investigation explored deficiencies concerning the application of the principle of rule of law, legal certainty and the right of the child to protection therefore the Commissioner for Fundamental Rights turned to the Minister for Human Resources in order to correct these deficiencies.

## **5.6. Trainings of child-protection professionals related to children's rights and child-friendly justice**

In order to carry out a comprehensive investigation, the Commissioner contacted the National Chief Police Headquarters, the Ministry of Public Administration and Justice, commanders of juvenile correctional institutions and the heads of city and county government offices.

The Commissioner concluded that the authorities, offices and institutions getting into contact with children interpret in different ways, in accordance with their competences, some basic concepts. From the child's perspective, child friendly justice is the total of all rights, procedural methods, protocols professional standards and cooperation by which a process is not traumatic to the child involved and respects the child's interests and needs. Child friendly justice means a complex model, because thousands of children could be involved in justice system, as victims, offenders, witnesses. *In order to protect them at the widest range, administrative, criminal and civil justice has to be child friendly at all level and phases, ensuring best interest and the rights of the child.*

Only some of the employees working in juvenile penitentiary institutions participated in trainings on children and persons with different cultural background but there is no

institutionalized training. 80% of the staff working in correctional institutes gained knowledge on children's rights during their education. Non-graduate training employees receive information on children's rights only within the framework of internal trainings.

The *Head of the National Police* have not reported any training aimed to prepare police officers on special treatment of children. However, it is positive tendency that basic training and other trainings address childhood and different cultural backgrounds.

*Probation officers* receive education in the course of their prior studies and other professional trainings that will enable them to conduct child-friendly procedures. The *county government departments' staff* had acquired their knowledge concerning children's rights primarily in the course of their basic studies.

Persons working in child protection have to be qualified in children's rights and understanding of different cultural backgrounds.

Special qualification of guardianship officers concerning children's rights is quite poor. Participation for professionals working in the field of child protection on training courses concerning children's rights – with a few exceptions – is on a voluntary basis. There are no free training programs for guardianship officers or manuals on good practices in this field or methodological recommendations.

The Commissioner argues that training, education and professional development is of utmost importance in the qualification and selection process of officials dealing with children.

*The inquiry found that the lack of adequate training of professionals participating in procedures with children involved or dealing with children on children's rights, equal opportunity, rights of nationalities and understanding different cultural backgrounds child-friendly procedures might be a serious obstacle to the application of children's rights.*

#### **5.7. The Commissioner's inquiry into the situation of social reintegration of prisoners who have served their sentences – with special attention to juveniles**

In the framework of his project focusing on prisoners' rights and social reintegration, the Ombudsman examined difficulties facing prisoners released after having served their sentences. The three main areas explored were (1) probation system, (2) after-care (3) and employment problems and deficiencies of cooperation between competent authorities. He paid special attention to juveniles in each of these areas since in 2012 he focused on child-friendly justice as part of his long term project on children's rights. Considering this, the state cannot rely solely on the voluntary activity of civil organizations.

Assisting the social reintegration of prisoners who have served their sentence requires an active attitude and expenditures both from the state and the society. This requires an active assistance and resources both from the state and the society for facilitating social reintegration of prisoners who have served their sentence in order to ensure public order and public security. It is up to the state to choose the assets for it, however its activity should not be restricted in any way to the limitations of criminal policy, the outcast of criminals from society. The state cannot rely solely on the activities of non-governmental organizations. This

task is very complex indeed, and given its constitutional obligation the state cannot keep in the background.

Assisting the social reintegration of prisoners who have served their sentence requires an active attitude and expenditures both from the state and the society.

The future of a prisoner is largely influenced by the conditions after his/her release. Assisting the social reintegration of prisoners who have served their sentence requires an active attitude and expenditures both from the state and the society. Prisoners need assistance to combat harms resulting from confinement, financial-mental drawbacks resulting from imprisonment and social prejudice. It should be noted, that a significant proportion of these prisoners are poorly socialized: low educational levels, long-term unemployment, uncertain or difficult housing situation, alcoholism, lack of a firm family background, types of friends contribute to potential relapse, moreover, these factors interact often simultaneously. Having served a sentence of imprisonment, even those have to face serious problems who had not have such disadvantages previously.

Requirements on reintegration are established in international and regional human rights documents, as well. Art. 40. of UN CRC provides that States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. In order to help the implementation of this provision, the UN Committee on the Rights of the Child adopted in 2007 General Comment No10 (GC 10) in which recalls States parties to develop and implement a comprehensive juvenile justice policy with special attention to the prevention of juvenile delinquency and the introduction of alternative measures. At first place, prevention programs should be encouraged aiming social reintegration of children. This requires the involvement of the family, small communities, peer groups, schools, vocational training institutions and other type of institutions acting in the world of work.

Prevention programs should focus – primarily – on

- support for particularly vulnerable families (including information about the rights and responsibilities of children and parents under the law)
- involvement of schools in teaching basic values and basic rights
- extending special care and attention to young persons at risk and
- development of community based assistance programs.

The Attorney General emphasized that in case of the release on probation of juvenile detainees or their temporary release from penitentiary correctional institutions, the competent judge – considering the age characteristics of the young detainee – provides that the young person should:

- continue his studies in accordance with his capabilities and attend school,

- respect the house rules of the educational institution
- not keep contact with his previous criminal fellows,
- not visit places of entertainment without parental guidance and
- participate on conflict management trainings.

It has been suggested that a so called *preliminary probation system* would be introduced considering that child offenders become many times juvenile criminals. Well experienced probation officers might effectively participate in order to prevent this. In the juvenile criminal justice system the main problem is that crisis situations of juvenile offenders should be managed within the child protection system but this system is unable to remedy this problem. For this reason, it is within the criminal procedure where these deficiencies are intended to be corrected acting in place of the child protection system.

The *National Institute of Criminology* pointed out to the fact that there are two different groups of juvenile criminals: the quasi “one-time offenders” and those who had been previously committing crimes as children. In the first group there are those “classic” juvenile offenders who committed a “swindle”.

In their respect, the probation system is functioning well. Those child offenders with no perspectives in their lives who commit crimes repeatedly sooner or later will have to face classic criminal justice which –given its nature – is unable to replace child protection tasks. Young criminals, many times growing up in families in social and mental crisis or living in children’s home, would need protection from multiple aspects but the system struggling with economic problems cannot ensure this protection.

Preventive (criminal) probation for children would be needed if decision makers are stuck for the erroneous idea of that criminal justice should replace social policy.

*Based on data provided by the Office of Public Administration and Justice*, at present there are 364 probation officers in the country working on several groups of cases (in 2012 there were 100 thousand cases reported). 168 out of these proceed in cases of juvenile offenders. Given the lack of human resources, controls and assistance is ensured on a monthly basis, however in case of young offenders in crisis this can be on a daily basis, as well.

Probation officers mentioned as main problems the lack of human resources and that judges rarely provide disciplinary rules for the young criminals.

Some positive examples are the organization of Family Group Conferences (FGC). FGC is an alternative, restorative approach based conference model aiming to work out solutions for conflicts of young persons and young adults and to assist decision making in crisis situation which is acceptable for all parties involved. FGC is a conference with a neutral moderator (facilitator) which gives the possibility to all parties involved meaning the client, the family and other persons who help them to explore problems, to work out alternative solutions and activate hidden resources.

*The minister responsible for social affairs* emphasized the importance of education and training of young offenders in order to ensure their integration into the world of work once they went on release. For this reason, assisting young convicts' education and vocational training is a priority within the professional program of all correctional institutions.

Work schemes offered for young offenders in correctional institutions as a therapy promote regular and every-day activity, improve their persistence and self-esteem, make them carrier oriented, teach them to respect the elder and superiors and assist them to integrate into the world of work after their release.

For the prevention of recidivism and assistance of social reintegration, young persons in correctional institutions get assistance after they were released from these institutions to be able to return to their families or to begin an independent life. The after care service receives information on the young person's discipline, school results, working activities, health and mental conditions and his capabilities, qualifications and skills and interviews the young person concerning his plans after he is going on release. It contacts the young offender's family, child welfare services and the competent probation officer in order to explore all available possibilities to his living, working and further education. After-care service officers help young offenders – with the assistance of child welfare services and probation officers – to reintegrate into their families or, if it's not possible, to begin a new, independent life. He helps to find accommodation for those who are unable to return to their families. He contacts county employment centers to find employment for these young offenders or help their retraining. If the juvenile offender wants to continue his studies the officer contacts educational or other type of institutions providing vocational training in order to help school attendance.

Correctional institutions may run after care sections for those young offenders who were released but could not return to their families, find accommodation or employment. Young persons released may also stay at these after care sections if they wish to finish their studies in the correctional institution. The institution keeps a record of released persons and – based on the report prepared by probation officers – monitors the life conduct and life conditions of these persons.

The report has concluded that the system promoting social reintegration of criminals should be more effective in order to ensure the rule of law. Special, tailor made rules on conduct should be applied more often in judicial procedures against juvenile offenders. Another problem is that the number of cases is increasing while the number of probation officers remains low.

The report concluded that much more attention should be paid to the social reintegration of persons released after having served their sentence. Another problem is that group case management is not widely applied due to the lack of human and financial resources and there are only two community job program centers with a decreasing state support. Probation services can offer a very poor financial support for released young persons: HUF 7000/year/person. Legal definition of the violation of probation rules and universal application of this definition in other legal regulations would be needed. It was suggested to introduce a pre-care system for minors in criminally vulnerable situation or for child offenders. Social reintegration programs might fail because of deficiencies of cooperation

between competent authorities and professionals or lack of adequate training and qualification. Employment programs, instruments and infrastructure should be available at all time which requires participation and cooperation with the private sector, as well. Closer cooperation and better communication is needed between participants of social reintegration programs (probation offices, competent ministries, judges, attorneys, institutions providing accommodation, civil organizations, churches etc.) Giving the possibility of continuing prison education should have priority.

In view of this, the Ombudsman requested the Minister for Justice, the Minister for Interior, the Minister for National Economy and the Minister for Human Resources to consider – if possible jointly – the suggestions and recommendations made in the report and to take all necessary legislative, and other type of measures in order to promote social reintegration. He also requested the minister for justice to take measure in order to increase the number of probation officers, to review their activities and other measures which the minister considers necessary for making the probation system more effective.

### ***5.8. Overview of the situation in juvenile penitentiary institutions – follow-up inquiries in 2012***

Parallel to the children’s rights project, in 2012 the ombudsman launched a special project focusing on the enforcement of prisoners’ fundamental rights. In the framework of this project, the ombudsman’s colleagues conducted several on-the-spot inquiries into juvenile penitentiary institutions.

#### **5.8.1. On-site investigation in Tököl Prison**

In 2007, the Ombudsman conducted an investigation in the interest of the protection of the right to life and human dignity after a minor detainee committed suicide in the Penitentiary of Juvenile Delinquents of Tököl. Later, the Commissioner extended the scope of his investigation to the exploration of prison conditions in Tököl. The follow-up inquiry conducted in 2012 aimed to review actions taken based on the recommendations of the report prepared pursuant to the first inquiry in 2008 and to control the situation and health condition of juvenile prisoners.

##### *About the institution*

By comparing the prison’s housing, the ombudsman found that the situation was worst in Tököl because the number of inmates has slightly increased. The institution’s housing capacity was 807 persons and it was filled to 78% in January 2008, but was already 112% in July.

The Commissioner has pointed out that the inmates only commit grave and violent acts against each other in law enforcement institutions for juveniles having a large number of inmates. Aggression of youngsters against each other is not part of punishment therefore it should be prevented by all means by the state. Asserting the rights of juvenile prisoners corresponding to their special position is thus ensured if they are placed in institutions of small holding capacity and in cells for one or two persons.

The Commissioner also stressed that detainment cannot be advance punishment, but at present the principle of “separate treatment” of such people is absolutely not realised. The

placement of such detainees on three-tier beds and the crowdedness of cells mean an inhuman, humiliating treatment and actual punishment. Therefore he has made a recommendation to the minister of justice and law enforcement suggesting that he should take measures for the reduction of crowdedness in the 'detainment houses', if necessary even by the modification of the legal rule.

Young inmates had daily bath in hot water. In 2011 the heating system was renovated which ended problems of hot water supply. Young inmates under 18 shall not buy tobacco products in the prison shop however their relatives may send these products in the package. The inmates complained against the lack of daily bath in hot water and food supply only at Tököl.

#### *Health condition of young inmates*

Instead of the two psychologists in the Penitentiary Institution of Young Delinquents in Tököl of four years ago, there are now three psychologists treating the mental hygiene problems arising from the more and more prevalent occurrences of aggression and drug consumption there. On the other hand, the number of detainees has also increased, and the psychologists also have to look after patients in the Central Hospital of the Penal Institutions in the vicinity of the Penitentiary Institution and after the employees of the prison. The lack of psychologists directly endangers the right to mental health of minor detainees – states the Ombudsman. There are frequent problems of hygiene; minor detainees often have to be reminded of the necessity of washing

Smoking and non-smoking prisoners are kept in separate cells. On this subject the Ombudsman has pointed out that in the penitentiary institutions for young delinquents it is not allowed to have cells for smokers. A considerable part of the detainees are younger than 18, and it is prohibited by law to sell or provide tobacco products for them. Máté Szabó has added that in a confined space like the cells the harmful effects of smoking tend to multiply. The Commissioner suggested that the Act on the protection of non-smokers be modified so that smoking in the cells in the penitentiary institutions for young delinquents be prohibited, since the present situation violates the right of children to protection and health.

Range of regimes were applied to young offenders held at Tököl. The precise combination of activities which would be offered to a given group of inmates depended upon both their security classification (low or medium) and on the regime to which they were allocated after assessment in the establishment's reception unit. Both low and medium security inmates could be placed in regimes described as open, semi-open or semi-closed. In addition to these broad classifications, a number of "special groups" were in operation - inmates who had lodged an appeal; vulnerable inmates; those suspected of bullying and inmates considered to be especially dangerous. The differences between the regimes applied to the above-mentioned groups of inmates lay in the additional privileges which they might receive (e.g. longer periods of free association, extended home leave, etc.) and in the approach of staff (e.g. more or less intensive supervision and different therapeutic techniques).

Usually the daily one-hour stay in the open air means regular occupation, and they can use the library. Therefore the Commissioner stated that detaining juveniles in county or national prisons instead of correctional institutes or in prisons for juveniles causes abuses in relation to

the right of the child to protection and care by family, the state and the society which is necessary to his/her proper physical, intellectual and moral development. For this reason he requested the minister of justice and law enforcement to ensure the assertion of the constitutional rights of juveniles due to their special situation even in the case of minors in detention by the modification of the respective legal norms.

### *Education, free time activities*

There were 200 juvenile inmates studying in Tököl Prison until the age of 18, but from 1 September 2012 – compulsory school attendance age was lowered to 16. The institution supports several professional trainings like pottery. There are certain intentions to restart professional trainings for truck drivers and for stone cladders. Primary education is compulsory and secondary education is also arranged upon demand, in addition different kinds of trade are taught and courses are held. In Tököl Prison usually the daily one-hour stay in the open air means regular occupation, and they can use the library.

There are several juvenile inmates preparing for secondary school graduation exams with the assistance of NGOs. Teacher-parents meetings are held twice a year.

It was indicated everywhere that there were many more problems with juveniles (and with girls in particular) than with adults, their disciplinary situation was much worse, it was difficult to handle them, their school education was low. Changes can only be achieved with the continuous occupation of their leisure and energy, with regular education and employment and with the organisation of various programmes, but all this is a function of financial resources. Being out in fresh air and doing sports are ensured in every institution. In Tököl Prison there are several possibilities for sporting activities and sport events are organized on a regular basis on weekends, as well. The institution has started so called mediation programs for conflict management and to prevent aggression.

### *Release*

Between June and August 2010, university student majoring in social pedagogy conducted preparatory courses for groups of inmates to be released. Psychologists also try to prepare these young men for their release. The instructors also give preparatory courses and the teachers in the school teach the young inmates the basics of being free again, e.g., how to transact their affairs, how to solve the problems that may arise.

### **Recommendations**

According to the new *European Prison Rules*, adopted in 2006 by the Committee of Ministers of the Council of Europe, upon the admission of a prisoner to the prison, the medical services shall seek to detect and treat physical or mental illnesses or defects from which prisoners may suffer. The medical practitioner or a qualified nurse reporting to such a medical practitioner shall pay particular attention to treating illnesses, dealing with withdrawal symptoms resulting from use of drugs, identifying any psychological or other stress brought on by the fact of deprivation of liberty.

There were two psychologists working in the institution in 2008, at the time of the on-site inspection, today there are three of them taking care of the inmates. Although their number has increased by one, the number of juvenile inmates has also risen. Moreover, the job description of the institution's psychologists also includes the treatment of the hospitalized patients and the staff members of the penal institution itself.

The Ombudsman and the warden agree that the occasional problems of mental hygiene, arising as a result of the aggressiveness manifesting itself more and more frequently among young inmates and the ever-growing drug abuse, may be effectively treated only through hiring one more psychologist. It has to be noted that, according to a decree issued by the Director General of the Hungarian Prison Service in 2010, it would be preferable that one psychologist should take care of no more than 150-200 inmates, or no more than 50-70 juvenile or HIV-positive prisoners.

*In view of all of the above, the Ombudsman has established that the number of psychologists in the institution is insufficient, which infringes on the inmates', especially the juvenile prisoners' right to mental health.*

The material condition for proper health care are given in the institution, the size and the equipment of the physician's and the dentist's office are adequate, the premises of the Psychological Ward are suitable for more intimate consultations and psychological examinations and the infirmary and the bathrooms also meet the expectations. Therefore, the inmates' rights to human dignity and health are duly observed.

*The absence of barrier-free cells and bathrooms infringes the right to human dignity of the inmates living with disability, as well as the principle of equal opportunity.* It is a good thing, however, that the institution provides the opportunity of daily baths to all juvenile prisoners.

It can also be considered a step forward that the food problems detected during earlier investigations have been solved and the inmates are satisfied with the quality of their food. According to the documents presented, in January 2012 the competent public health institute carried out an inspection of the kitchen and the canteen and it found the premises clean and adequately equipped. The staff members' health certificates were also found in order.

According to the Commissioner, smoking cells may not be designated in the penitentiary institutions for juvenile offenders as they have a special status in the penitentiary system specified by the law. In an institution for juvenile offenders the significant part of the inmates consists of people younger than 18 whose health is under special protection under the law. In this context the Commissioner has pointed out that designating smoking cells for juvenile prisoners or placing them in such cells, allowing them to smoke in itself contradicts the requirements of the rule of law and the legal certainty deriving therefrom, leading to improprieties in connection with the protection of children and their right to health.

## **5.8.2 On-site Investigation at the Regional Juvenile Penitentiary of Baranya County (Pécs)**

### *About the institution*

The capacity of the Pécs-based institution's juvenile penitentiary is 50 persons. Pre-trial juvenile detainees and convicted juvenile prisoners of both sexes do their time in this penitentiary. It also serves as a designated institution for the confinement of non-criminal offenders. Up till now, there was only one minor non-criminal offender confined here.

The juvenile ward has never worked at its full capacity yet. On the day of the investigation, there were 38 juvenile offenders kept in the institution. One, two or three inmates can be placed in the smoking or non-smoking cells, respectively. Each cell has a shower separated with a wall and a ventilated toilet. Young inmates may take a bath every day. Each cell has a wall-mounted indoor dryer manufactured by the inmates themselves in

the institution's workshop. The cells are also equipped with a safety wash-basin, a polished metallic mirror, a fixed bed, a table, a TV set and a refrigerator. For safety considerations, cells have floor heating.

Possession of prohibited objects (e.g., mobile phone) is not typical among young inmates. Cells are clearly arranged. The instructors' and the warden's mailbox is well visible with an information board in Hungarian, Romanian and Croatian.

The disciplinary unit is on the ground floor with no inmate in it at the time of the investigation. The so called "frenzy room" is state-of-the-art, it has not been used yet. The visiting room for lawyers and the secure visiting rooms are adequately equipped. The room for visiting relatives is equipped with a baby dresser, some toys and a barrier-free lavatory.

The cells for prison-level inmates, a library and a community room are on another floor; the correctional part of the institution has a two-bed infirmary and an isolation ward which is seldom used.

Three instructors work in the institution, one on each floor, which is deemed satisfactory by the warden.

#### *Health conditions, issues of health provision*

Dental and musculoskeletal problems are common among inmates. Their health condition is typically poor. Chronic diseases are diagnosed and treated upon admission. Drug and alcohol abuse and the regular consumption of various sedatives are a serious problem among the young inmates, most of them are smokers (at the time of the investigation only 5 of the 38 inmates were non-smokers). It can be established upon admission if an inmate is company-dependent, under coeval influence, living without purpose. There is a local drug ambulance operating and civil organizations also pay attention to the drug addicts. These young men usually live under difficult circumstances with their families (provided they have one), they are drifters.

Individual education plans are drawn up on the basis of a psychological examination and conversations with the instructors and the warden. Personal development trainings are assisted by civil organizations.

The sole psychologist of the institution deals with the adult population once a week, on other days he helps the minors within the frameworks of individual and group meetings. The psychologist's help is usually requested by the instructor, the warden, an outside psychologist, the institution's physician, the prosecutor or the inmate himself. Due to the extreme workload, the institution's staff members are under the care of the police psychologist.

Making decisions on the treatment or hospitalization of inmates having attempted suicide or self-mutilation is the physician's responsibility. In either case, the inmate has to declare his intent. The number of attempted suicides is insignificant, self-harming actions may be rather considered as a cry for help. As of the year 2000, there is a prison chaplain in charge of the inmates' spiritual and mental health.

#### *Good practices*

The instructor and the psychologist would like to introduce the system of *parental group meetings*. There has been only one such meeting up till now, attended by seven people representing 6 families, held right after visiting time and well received by the participants. During the meeting, parents and guardians were given the opportunity to voice their feelings and share their problems concerning the incarceration of their loved ones. Special attention

was paid to the problems of life after release: accommodation, money, work and education. The instructor and the psychologist outlined the options and the families could decide how to assist the reintegration of these young men into society, into life.

Reintegration into society and civil life is also supported by another program: *group conference on decision-making in the family*. Meetings are chaired by the psychologist. Inmates about to be released and those who will help them afterwards may attend these meetings. The program's leitmotif is that former inmates can be helped the most by those to whom they return after their release. The program is effective if the young inmates is motivated and those around them are ready and willing to help.

The three instructors in charge of the juvenile offenders do their best to ensure the proper development of inmates through organizing regular and periodical programs on various topics.

Within the frameworks of a program financed by the EU, the institution is also organizing trainings and vocational programs that are very popular with the inmates. The trainings and the maintainer program have already ended, the paver program is still under way. Teachers from an outside language school give free English lessons.

Inmates are prepared for their examinations by undergraduate student from various universities and colleges. They conduct their studies as private students. People in custody pending trial may also request to continue their elementary studies. If someone is released in the course of the school year, he may join in the classes of the competent school.

There also is a classroom equipped with personal computers at the inmates' disposal. The institution participated in working out a distance learning program together with the universities of Bremen, Bergen and Vienna and a Dutch institution. They prepared teaching material for the 5<sup>th</sup> through 8<sup>th</sup> grades in math, history and Hungarian language and literature.

Juvenile detainees have their own library but they may request books from the adult inmates' 8,000 volumes library, too. The county library has also deposited more than 600 volumes to the prison library, mainly works of fiction. Inmates may also order books under supervision (e.g., language course books or the Highway Code textbook).

Inmates may engage in various sports activities in the courtyard and the covered multi-function gym which is equipped with state-of-the-art sports gear. Young inmates love to play ball and they are eager to participate in sports tournaments within the institution and between institutions. In the community room they may play table football, table tennis, as well as chess or cards. The inmates operate a prison theater which performs mainly situational plays.

Those participating in the creative group meeting are given interesting, constructive tasks. Everyone can realize their own and discuss each other's ideas. The "Values vs. Violence" program is aimed at correcting the inmates' views on the outside world, discovering their hidden virtues, forming human relationships.

Inmates may participate in the weekly crafts and arts activities where they can get acquainted with the so called *Mural Painting*, a form of street art, where they paint on large mural surfaces. These community-building methods are useful in educating, developing and sensitizing disadvantaged youth. Also on a weekly basis, they can discuss moral issues with the representatives of various religions.

## *Release*

During the 4-6 months before their release, inmates meet the students of the University of Pécs on a weekly basis. The students teach them how to plan their lives, help them to find their ways in the labyrinth of the administrative bureaucracy.

The competent Regional Labor Office organizes monthly meetings, both on individual basis and in groups, for the inmates prior to their release. Labor counseling improves the former convicts' chances on the labor market.

### **Recommendations**

Students regularly visiting the penitentiary institution may positively influence the inmates' views on life and ways of thinking. According to the Ombudsman, their presence counterbalances, mitigates the adverse effects of prison life on their personality (vulnerability, degradation, dehumanization, isolation, stigmatizing). The participation of undergraduate student in the inmates' preparation for their release is a good practice. Parental group meetings are also suitable for preparing the soon to be released juvenile convicts.

Convicts in a penitentiary institution rarely face situations where they have to make decisions or express their opinions. Group meeting in the institution also covering moral education provide a good opportunity to give the inmates advice as to the planning their after-release life, developing their system of values and view on life.

There is only one psychiatrist taking care of the psyches and mental hygiene of the inmates, also dealing with the adult inmates and the staff members of the institution. The Ombudsman has stressed that psychological problems, illnesses manifest themselves more often in closed communities. One may not ignore the fact that behavioral anomalies, underdeveloped problem solving and conflict managing capabilities are more frequent among juvenile convict.

In the course of his investigation the Commissioner has established that one psychologist is not enough to take care of both the adult and juvenile population of the institution, which, in his view, endangers the inmates' right to mental health.

### **5.8.3 On-site Investigation especially in the Mother-Baby Unit of the Institution in Kecskemét**

#### *On the institution*

The Hungarian Prison Service has authorized the increase of the institution's capacity by 150 per cent, from 30 to 45 persons. At the time of the inspection, there were 36 inmates in the institution, among them 14 young women under 18. Inmates do their time in 3 units, two for men and one for women, in single or double cells. 15 single cells have been converted into doubles with bunk beds. The cells have their own lavatories separated by a wall. The cells' condition is varying – those to be renovated were empty at the time of the inspection. The cells have underfloor heating and an emergency calling system. One of the shower rooms in the men's quarters is in need of renovation. In the quarters of the juvenile male inmates there is a therapeutic room where the convicts may pet small animals.

Up to 2003 the women's quarters had been functioning as a mother-child quarters; it was renovated in 2002 – it is in a much better condition than the other two. The bathroom is in good condition and there is a washing machine at the inmates' disposal. However, there is

no dryer so the inmates have to dry their clothes in the cells. In order to prevent sexual abuse, boys and girls bathe separately.

There is no disciplinary room in the institution and juvenile convicts are transferred to the adult penitentiary for disciplinary punishment. There are three instructors, one for every 10-12 inmates, which the deputy warden deems sufficient. Many of the inmates smoke – although they cannot buy cigarettes in the institution's shop, their relatives may send them tobacco products in packages. There is no package inspection in the building.

In the course of the last two years, 2 inmates could attend every year the performances of the city theatre while on group leave.

The institution's kitchen needs to be renovated, meals are provided by an outside caterer. Upon the physician's recommendation, dietary meals are also available. There is a kitchenette in all quarters. The interviewed inmates all seemed to be satisfied with both the quality and the quantity of food.

There are some young people in the institution who have been convicted for violent crimes. They usually find it hard to tolerate constraint due to their age. Nevertheless, they usually refrain from violent behavior. At the time of the investigation there was one inmate who had been transferred from another institution because of his conduct. The institution's leadership was paying extra attention to the transferee and kept him isolated from the others due to his aggressive tendencies.

There has been no suicide committed in the institution, yet the occasional wrist cuttings are mainly aimed at drawing attention. The instructors and the psychologist pay extra attention to these cases. Several civil and church organizations organize programs for the inmates on the topic of aggression management.

#### *On the mother-baby unit*

The unit established upon an earlier recommendation of the Ombudsman, can keep 20 infants (one of the bigger cells is suitable for twins). On average, there are 5-6 mothers and their babies staying here (the occupancy rate is around 20-25 percent). At the time of the investigation 5 young mothers stayed in the ward with their infant babies. There are an instructor, a ward supervisor, a full time district nurse, 5 sick-nurses and an infant-nurse working in the ward. Pediatrician's attendance and psychologist's assistance are also provided on a regular basis.

Fathers may visit their children any time, even on a daily basis. Mothers may have visitors once a month; however, when the father is visiting, the mother may be present, too. Fathers typically do not visit either their kids or the mothers (currently only one infant out of five has regular visitors).

Mothers may engage in various activities in their free time: sewing, embroidering and other, child-related activities. There is also a small library of hundreds of volumes on the ward's territory. Inmates may move around freely, go out to the open air any time.

As a reward of good behavior, mothers may take their children for a stroll in the city in a baby carriage provided by the institution. Infants are bathed under proper circumstances and hygienic conditions. Three infants may be bathed simultaneously under the supervision of the infant-nurse.

5-7 percent of the mother incarcerated in the institution used drugs before/during their pregnancy. It has an effect on the infants' health, too. Most of the young mothers are smokers. Detainees infected with the Hepatitis C virus are brought here regularly. Unfortunately, it is not possible to do mandatory HIV/AIDS testing which would be very

important not only for the mothers, but also for the infants and the institutions personnel in close contact with the inmates.

The cells are properly equipped and cozy, they have cribs, baby dressers, washbasin cabinets, separated toilets, rugs and walls are decorated with cartoon figures.

### *Education, free time*

The institutions tasks include the detention of misdemeanor offenders in the eastern region, too. In their case, education is problematic because they usually spend only a short period in the institution.

The level of educational work has greatly improved recently. Of the school-age inmates, three boys and a girl attend classes, there are 4 private students over 18, and 4 school-age and 2 non school-age inmates participate in the so called "Springboard" program. The Springboard Project, carried out under the professional guidance of the Public-Benefit Nonprofit Company for the Equal Opportunities of Persons with Disabilities, provides personalized education for youngsters who have already completed the 6<sup>th</sup> grade but have not completed the 9<sup>th</sup> grade yet and are not older than 22 years. With the diploma they are awarded upon completion of the program, they can seek admission to vocational secondary schools. The program is financed by the local self-government from normative state funds.

Next year the institution is planning to launch a vocational training program with the assistance of the Technical Secondary and Vocational School of Kecskemét, offering the qualification of house-painter. 12 inmates may attend the program, so the institution is going to advertise it in other juvenile penitentiary institutions, too.

Among the young inmates there are some who are resurgent illiterate; on the other hand, two of them have been admitted to a collage in Kecskemét. One of them has already started studying; the other has requested the formal postponement of study for one year.

Currently the institution's education program has 6 students who can use a library of around 1,000 volumes and a personal computer with no internet access.

Inmates may engage in various sports activities on a regular basis. The institution has its own sports ground and each ward has its own walking yard. The gym that is open to both the male and female inmates may be used by two people at the same time.

## **Recommendations**

*Up till now, the juvenile inmates of the penitentiary institutions could not request to be tested for Hepatitis C. The Ombudsman deems it important to make testing for this contagious disease available for juvenile inmates, too, since the occurrence of this disease may not be excluded among the underage population of such institutions. Considering that testing in the penitentiary institutions of Tököl and Szirmabesenyő is not only ensured but encouraged, the lack of this possibility in Kecskemét is contrary to the requirement of equal opportunity and directly infringes on the juvenile inmates' right to health.*

The Commissioner has found the number of instructors sufficient considering the number of inmates. However, there is only one psychologist responsible for taking care of the inmates and the staff members, handling their mental-hygienic problems. The Commissioner has concluded that one psychologist is not enough to handle both the behavioral problems and aggressiveness of the underage inmates and the regular monitoring of the personnel.

*With regard to the above, the Ombudsman has established that the insufficient number of psychologists in the institution directly endangers the inmates' and the personnel's right to mental health.*

The cells' size, equipment, separated toilet and bathroom of the women's ward all meet the expectations, ensure the implementation of the inmates' right to human dignity and a healthy environment; single and double cells are instrumental in conflict prevention between those incarcerated. The earlier investigation pointed out that the bathrooms in the men's ward needed urgent renovation. According to the Deputy Warden, the necessary material have all been purchased, renovation will start this year and, hopefully, will have been completed by the end of the year.

#### *International outlook: in prison with an infant<sup>4</sup>*

The UN CRC contains several provisions related to the detention of the underage. For instance, the ban on any form of discrimination of the child (Article 2); the consideration of the best interest of the child (Article 3); the child's right to maintain personal relations and direct contact with both parents on a regular basis (Article 9); the child's right to express his/her views freely in all matters affecting the child (Article 12); the child's right to his/her privacy (Article 16); the child's right to protection from any kind of violence (Article 9).

Concerning the protection of the child's paramount interest, the UN CRC stipulates that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

It is extremely important that the proceeding authority paid attention to respecting the protection of these rights, especially when the person subjected to the proceedings as suspect, accused or convicted, is pregnant. [Although we do not have exact data, the number of infants concerned is estimated to be around tens of thousands. According to the 2009 penal statistics of the Council of Europe (SPACE I), there are many women detained in penitentiary institutions all over Europe. In Hungary, the total number of detainees was 16,459 – the number of women: 1,065 (6.5%). The European average stood at 4.9%. In CoE Annual Penal Statistics – Space I – 2009, p. 53] In order to protect the child's rights, one should take into consideration any and all possibilities that would serve the paramount interest of the child simultaneously with meeting the expectations of criminal justice. The judicial practices of several countries incorporate the alternatives to imprisonment and detention, the instruments of restorative/reparative justice, such as postponed, suspended or interrupted imprisonment; and child-friendly visitation in the penitentiary institutions (both from the aspects of the institutional environment and the frameworks of visitation).

In certain cases, small infants in need of daily care live together with their detained mothers in the penitentiary institutions. However, the rules governing their age and stay in the penitentiary differ from country to country. Not only penitentiary cultures are different but also their dominant views on motherhood, the role of families and the child's education.

It is important to stress that many mothers are the primary and sole caretakers of their infants. It raises the question whether the infant may stay with his/her mother in the penitentiary institution and, if yes, for how long. There is no easy answer to this question, since the penitentiary, obviously, cannot provide an optimal environment for the mother and

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<sup>4</sup> Source: Children of imprisoned parents. In: *The Danish Institute for Human Rights, European Network for Children of Imprisoned Parents*. Ed by: Scharff-Smith, Peter – Gampell, Lucy. University of Ulster, 2011; and the documents of Eurochips. [www.eurochips.org](http://www.eurochips.org)

her child; on the other hand, their forced separation is full of risks and long-term adverse effects.

According to the opinion of the Committee Against Torture, in such cases *the interest of the child should be given priority*. It also means that the same circumstances and the same care should be provided before and after birth giving as in civil life. If infants and small children live together with their mothers in detention, proper medical care should be guaranteed with the help of social workers and child protection specialists. A child-centered environment should be created that lacks the outside attributes of incarceration and detainment.

The regulation of the period of stay may differ from country to country – regulation is based, first of all, on the length of the breastfeeding period. In Sweden, for instance, the presence of infants in penitentiary institutions is neither desirable nor characteristic. If needed, infants may stay up to one year – the average is three months. In Germany there are six closed regime penitentiaries where infants may live together with their mothers till the age of three, and two open regime penitentiaries where they may stay till the age of six. The open ward of Frankfurt-Preungesheim is located outside the penitentiary itself, thus complying with the provision according to which the mother-child ward should be separated from the other parts of the prison. Each mother has her own living quarters with kitchen, living and bathroom. In the Netherlands children may stay with their mother till the age of four in the semi-open regime Ter Peel penitentiary. The mother-child ward is situated in a separate building on the penitentiary's territory, simultaneously housing four mothers and four children. In five closed regime institutions children may stay with their mother until they become 9 months old. In Iceland, only those infants may stay at the penitentiary who are breast-fed or have special needs. In Portugal and in Switzerland the age limit is three, and two in Finland. In Denmark, male and female inmates may live together with their children until age three, but in practice only a few children stay with their incarcerated parent. In England and Wales there are three closed regime institutions where 34 infants can be placed and one open regime institution with the capacity of 20 infants. Infants may stay in both the open and closed regime institutions until they become 18 months old.

The psychological mainstream in Western Europe justifies the necessity of mother and child's staying together with the attachment theory. However, according to other theories, separating the child from his/her mother does not necessarily harm the child. Therefore, they suggest alternative methods of care (father, grandparent, foster parent).

Part of the international research shows that the joint detention of mother and child is not desirable from the point of view of the child's emotional and psycho-social development. Penitentiary institutions do not guarantee a proper environment to infants and small children, which often results in long-term retardation. They stress, however, that the forced separation of the child from his/her mother causes permanent emotional damage and difficulties in their social adaptation. Most European countries provide the possibility of joint detention; however, hundreds of infants are separated from their mothers.

According to the Hungarian regulations in effect, an infant may be placed with his/her incarcerated mother until he/she becomes 6 months old; upon the request of the mother the warden may extend this period up till the age of one of the child.

The Ombudsman deems worth considering the introduction of the above mentioned good practice, i.e., the longer term joint placement of mother and child, taking into account that, although 20 mothers and children can be simultaneously placed in the mother-child ward of the Kecskemét institution, there have never been more than 5-6 infants at the same

time there. Therefore, the institution can meet the infrastructural requirements of a longer term (up till the age of one) joint placement.

According to the Ombudsman, it is in the interest of both mother and child that they could stay together as long as possible. From the point of view of forming attachment and the development of the infant's personality, it is very important that the mother, provided she is capable, could take care of her child until he/she becomes one year old. Currently it is possible only with the warden's permission – it means that not all children born in the Central Hospital of the Hungarian Prison Service may stay with their mothers after 6 months.

*The current regulation runs counter to the requirement of equal treatment and directly jeopardizes the right to protection of children of detained mothers.*

The Ombudsman inquired into the implementation of the rights of the child also in connection with participation of mothers in pre-trial detention in the court proceedings. According to the Criminal Proceedings Act, if a mother is held in pre-trial detention, an extraordinary procedure shall be conducted, i.e., after indictment the trial should be set to the earliest possible date and a verdict should be reached as soon as possible. According to the management of the mother-child ward, it usually takes a full day or even more to transfer the detained mothers to the venue of their trial. The absence of the mother is very hard on the infants, it is difficult to arrange their feeding and to take care of them.

The child-friendly character of the Hungarian justice system could be strengthened if the proceeding judge, when setting the trial date, kept in mind that a mother who brings her child up in a penitentiary institution should be presented at the earliest possible date and the trial should be as short as possible. It derives from the principle of the rule of law and from the right to fair trial, also taking into account the special situation of the detained mother.

The Act on the Commissioner for Fundamental Rights does not allow the Ombudsman to make recommendations to the courts or to the National Judiciary Office. Nevertheless, the Commissioner deemed important to point out that the current practice may lead to the infringement of the mother's right to fair trial and the right of the child to care and protection in the process of ensuring the presence of the mother bringing her child up in a penitentiary institution.

The conclusions of the report intended to stress the importance of conducting an extraordinary procedure and setting the trial date carefully in the case of detained mothers; the Ombudsman proposed to the Minister of Interior to consider the amendment of the relevant provisions of Justice Minister's Decree 5/1998 (of 6 March) on providing healthcare to inmates in order to let the detained mother be together with her child until the child is one year old and to repeal the provision entitling the warden of a penitentiary institution to decide if a mother in detention could keep her child after the first six months.

The Minister of Interior accepted the proposal and the provision in question was modified.

#### **5.8.4 On-site Investigation of Juvenile Penitentiary in Szirmabesenyő**

##### *About the institution*

The building of the juvenile penitentiary was designed to be a workers' hostel. The institution's capacity is 115 persons, on the day of the inspection there were 104 inmates there, including 29 in pre-trial detention, 25 penitentiary and 31 prison level convicts. Inmates are placed in 6-bed cells but usually there are only four inmates in a cell. Beside the juvenile

detainees, there are also adult convicts in the institution: at the time of the inspection there were 5 penitentiary and 14 prison level convict there. The adult inmates live in a separate ward – 4 cells have been renovated for this purpose.

The presence of adult convicts has a positive effect on the juvenile population: the number of cases of violence, brawling have become fewer, the wrecking of cells and shower rooms has become less characteristic. Furthermore, the adults' cells are tidier, cleaner, serving as an example for the young inmates.

The decrease in the number of violent acts is also the result of the amendment of a legal regulation stipulating that an inmate may leave his/her cell only with the supervisor's permission. Prior to that, inmates were free to visit each other's cells, occasionally doing damage to the other's cell, which resulted in conflict.

There are two disciplinary cells in the institution – both were empty at the time of the inspection. In the basement there is a praying room, a room for group therapy, a weight room and a gym where the school's classes of physical education and the football championship are held.

The preparatory unit and the cells of the penitentiary-level inmates can be found on the second floor. The community room is on the third floor, as well as the ping-pong table; the personal development classes are also held there. The adult inmates live on this floor, too, in cells separated with bars. The cells of pre-trial detainees can be found on the fourth floor, the bathroom has been renovated and a washing machine has also be installed there. The library having 3,000 volumes is on the fifth floor together with the classrooms. The municipal library has also lent some volumes to the library – last year the value of these books amounted to 300 thousand Forints.

There aren't barrier-free cells and bathroom either in this facility or the county institution. There is, however, a ramp for the handicapped at the entrance of the institution.

The institution has its own package inspection room: there still are some attempts to smuggle in mobile phone, although their number is reducing. The building itself needs renovation – the walls and the second floor's bathroom show signs of leaks.

### *Education, free time*

The authorized number of instructors is 5, plus there is a director whose work is assisted by a junior social worker. The number of inmates per instructor is too high; therefore, the instructors do not have enough time for each inmate, they are unable to prepare the inmates for their release and reintegration.

Juvenile inmates love to be busy – work was a topic of interest during last year's inmates' forum. This year they can participate in a gardening program in the course of which they can learn the process of growing plants.

Earlier the inmates could participate in the *so called "pets in the cell"* program but the warden of the county institution canceled the program due to some technical reasons. He is planning to re-launch the program in modified frameworks: inmates will take care of prospective guide dogs for 10 months. The program is mainly aimed at young people whose emotional development has been arrested at a certain stage. The program may help in inducing their sense of responsibility.

Group leaves are organized within the frameworks of an EU program. Last time 5 juvenile inmates visited a church – the discussion was focused on family life, the issues of life and death. Under the law, the institute may offer various incentives to the inmates. Young

inmates highly value watching TV and oral laudation. On 20 August last year they organized a traditional bread baking – participation was offered as a form of reward.

On the institution's premises one can find a sports ground, a park and a small garden where inmates can grow fruits and vegetables.

Hot meals are brought from the county institution and warmed locally. Juvenile inmates have their meals together; those in pre-trial detention eat in their cells. Inmates get three meals a day; usually they get hot meals for dinner, too (except Saturdays and Sundays). The head cook is a professional, member of the staff – he is assisted by 5 inmates.

The institution also provides dietetic menus, special food for those suffering from diabetes and permanent medical supervision. Once a month inmates may buy food for themselves.

#### *Health conditions, provision of healthcare*

Many juvenile inmates are underdeveloped, malnourished, coming from bad family background. Many of them are smoker and the regular abuse of narcotic and medical drugs is common, too. Pediculosis and scabbiness are also characteristic. Some inmates have serious dental problems. Inmates are susceptible to respiratory, asthmatic diseases, their immune systems are usually weaker, most of them have problems with their personal hygiene. Daily baths are ensured in the institution.

The number of committed and attempted suicides is insignificant, self-harming actions may be rather considered as a cry for help. They usually cut themselves or try to hang themselves with cords. In order to prevent them from attempting suicide, they must attend group meetings.

The head of the county institution's health department is a psychiatrist by specialization. There is only one psychologist working in the institution who takes care of both the inmates and the personnel. Upon reception he has conversations with every detainee and makes them fill various tests. The psychologist tries to single out the victim-type inmates and to arrange their placement within the institution accordingly. Inmates can sign up for an appointment with the psychologist through their instructor; the psychologist regularly reviews the population in order to detect the psychic problems of the introverted inmates, too. In the pre-release period he regularly talks to the inmates about their plans for the future, about being stigmatized.

Dental care is continuous, the dentist of the county institution attends once a week. The consulting room is well equipped, it even has a dental X-ray.

Personality disorder cannot be diagnosed until after the age of 18; therefore, the psychologist cannot assist the young inmates during the group sessions.

Currently there are 5 detainees in the Drug Prevention Unit; juvenile drug addicts are treated by the Váltó-sáv (~ Point Switch) Foundation. The institution has been maintaining good relations with the Drug Ambulance Foundation for years. The sickbay has three beds and a shower. The institution is planning to establish a psycho-social ward.

#### *Education, free time*

70 detainees, both juvenile and adult, participate in an educational program organized with the support of the European Union. 34 of them participate in the convergence program. These adults studied in auxiliary schools before. 24 detainees have completed elementary school, they study in the secondary school program now. Those who have completed the first

six grades of elementary school may attend vocational training (paver). 5 inmates completed the forklift driver program in 2012.

The institution in Szirmabesenyő offers various programs and pastimes to the detainees which are partly aimed at developing their sense of responsibility, partly contributing to their acquiring basic knowledge on keeping their environment in order, and assisting their reintegration into society. From the educational aspect, it is a good practice that there are adult detainees in the institution, too: through their behavior they may positively influence juvenile inmates.

The institute can provide all material conditions necessary to the education program. However, the number of instructors is insufficient. The high number of inmates per instructor does not let imprisonment fulfill its mission, i.e., educate inmates, under the instructors' supervision, in a way so that, upon their release, they would become useful members of society.

*The insufficient number of instructors endangers the juvenile detainees' right to protection and care and, indirectly, affects the way they are treated.*

There is only one psychologist taking care of the inmates' psychic and mental-hygienic problems. Although the number of violent acts within the institution has decreased recently, one may not ignore the fact that underage inmates tend to have more behavioral problems, their problem and conflict management capacities are under-developed, some of them have serious emotional defect due to their inadequate family background. The number of psychologists in the institution is not enough to take regular care of both the inmates and the entire personnel.

### **Recommendation**

*On the basis of all of the above, the Ombudsman has concluded that the insufficient number of psychologists in the institution directly jeopardizes the inmates' and the personnel's right to mental health.*

## 6. Other cases related to child-friendly justice

### 6.1. About the rights of the child during police actions

It directly endangers and infringes the rights of the child if the police take action against the parent in the presence of the minor. According to the Commissioner for Fundamental Rights, acting policemen should take into consideration the psychic development of the child and the requirement of child-friendly justice.

According to a complaint lodged with the Ombudsman, armed policemen wearing ski masks apprehended, subdued and handcuffed a parent in the street, before the very eyes of his child. The complainants deemed the apprehension in itself unnecessary and disproportionate.

The Ombudsman's investigation has established that subduing and handcuffing were lawful and proportionate, in the course of their action the policemen did not infringe upon the complainant's fundamental rights to human dignity and personal freedom. The acting policemen talked to the complainants in a proper tone and manner and duly informed them of what was going to happen.

However, when planning their action, the police should have taken into consideration the possibility that their action could be witnessed by a child and, therefore, have adverse effect on the psychic development of the minor. The police failed to consider this aspect and, as a result, the rights of the child were infringed, the police's action did not meet the requirement of child-friendly justice – stated the Ombudsman in his report.

The Commissioner for Fundamental Rights suggested to the head of the National Bureau of Investigations that, in the future, the police should be considering not only the physical security of the environment and the subject(s) of their action. If the police's action may affect, even indirectly, a minor, the possible effects thereof on the psychic development of the minor should also be taken into consideration. Furthermore, he requested the Bureau's head to instruct the police not to use extreme measures if the underage child of the suspect is present during apprehension, except when there is clear and present threat to someone's life.

### 6.2. *The situation of the so called "missing children"*

Hundreds of children disappear from their homes or escape from child protection institutions every year in Hungary. Most of them go back home on their own free will, but others are found by the police, several of them become victims of crime, and there are even some whose fates remains unknown forever. That is why the Ombudsman has requested data and information from several ministries, country government offices, the Budapest Methodology Centre for Child Protection and relevant NGO's.

The Ombudsman requested answers from the above mentioned institutions to the following questions:

- Is there any data collecting or surveying system on missing persons under the age of 18 in operation in Hungary, on the basis of which one could efficiently analyze and effectively handle this problem;
- What could be done to facilitate prevention or the solution of the problem;
- When a child is missing, run away or seems to be run away, do the authorities concerned do everything in their powers to investigate the concrete crisis situation and do they properly investigate the possible reason(s) behind the child's being missing;
- What kind of cooperation, if any, exists between families, the State and the civil initiatives in connection with missing children;
- Are the relevant legal regulations adequate, are they strict enough to hold those person legally responsible who "hide" those missing children, thus extracting them from the educational system, or use them for criminal purposes;
- Wouldn't it be expedient to annul that provision according to which parents who are absent from work because they are looking for their missing child(ren) are not entitled to paid leave;
- Do children have proper and enough information on how dangerous running away from their homes or escaping from child protection institutions may be;
- To what extent are children aware of the dangers of the state of being run away, on the stroll, separated from their families, being lonely, insecure, exposed, and of the absence of parental (institutional) care?

On 15 February 2007 the Commission adopted a Decision requiring EU countries to make the 116 000 number available for child hotlines. The 116 000 hotline has been designed to report missing children and provide social support services for children and families when a child goes missing. The hotline is operational in 22 EU countries. In Hungary the hotline has been operated since 2008 by the Kék Vonal Gyermekkrízis Alapítvány (Blue Line Foundation for Children in Crisis).

The Ombudsman's inquiry has established that there is no uniformly used definition or an unified practice of collecting data on missing children. From the information provided, however, the Ombudsman has concluded that it is mainly children over 14 – typically girls – and cared for within the child protection system that are found missing. Many of them live in specialized child protection institutions, from where they mainly escape to stay with their parents, relatives or acquaintances. Girls over 14 typically run away to their boyfriends. The same child may repeatedly leave the institution without permission, while others are continuously on the run, and there are even some who do not spend one day in the children's home. Occasionally the institution or the police initiate that the child should return finally to his or her family, which often endangers the young person's development. According to the Commissioner this practice is contrary to the principle of the best interest of the child, and at the same time it violates the child's right to protection and care.

The Commissioner has also found that there are no codified obligations of the State or civil society organisations for which they could be held accountable and with the help of which one could reduce the number of missing children. Professionals in the field often work independently of each other and without any coordination. It also constitutes an impropriety that the activities of authorities investigating the causes of children missing and of child protection providers are not sufficiently regulated or consistent.

Another problem articulated by our data providers is the decreasing number of day-care possibilities at school and of summer day-camps. The Ombudsman holds that during the school-year young people tending to loaf about in their free time could be best occupied in the afternoons in the framework of after-school care, while prevention could be fostered by opportunities for spending the summer holidays in a meaningful way. If, especially in the summer, we fail to provide day-care at schools, which proved a very good practice in the past, we make it impossible for families with children to find or keep their jobs, since disadvantaged families cannot afford privately organised, profit-oriented camps for the whole of the summer holidays.

The Act on Public Education does not contain any provisions on organising school day-care for the period between September 2012 and September 2013. The relevant provisions of the Child Protection Act, effective as of 1 January 2012, do not mention summer day-camps either, nor do they refer to kindergartens or school day-care falling under the scope of the Public Education Act. This lack of regulation is contrary to the requirement of legal certainty, and it endangers the realisation of children's right to care and protection, concluded the Commissioner.

It was concluded that there is little data on missing children. Data on young persons under 18 who were „thrown off” their families or left their home because they were neglected or persecuted is not available. In fact, these children become the most vulnerable and fall victim of prostitution or other kind of sexual exploitation.

In order to prevent this phenomenon, prevention programs were launched by the police in several counties in educational institutions and child protection institutions. Data providers emphasized that prevention of loaf could be fostered by opportunities for spending time in a meaningful way (like clubs, day-camps, play or other type of day-care possibilities). According to the Act on Child Protection, *being at risk*: is a situation resulted from the child's or another person's behavior, omission or other circumstance which blocks or inhibits the child's physical, psychological, emotional or moral development. The police should report any situation in which a child is at risk and should cooperate with the service in order to end this situation. Under the provisions of the order on management of domestic violence and the protection of children, in the course of an administrative procedure conducted in the case of a missing child – if the child disappeared from his family – the child protection service should be contacted and informed on the fact and circumstances of the disappearing. Experience showed that not all police offices were aware of this provision. As child protection services commented, the police do not always fulfill its obligation to report these cases.

Data providers emphasized that runaway prevention is the duty of child protection services and the state, at first place.

The Commissioner have not received any answer on whether the competent authorities and bodies do everything they can in order to have all information on the crisis situation, or if they conduct proper investigations to explore the causes and motives of the disappearance. Another problem is that professionals in the field often work independently from each other and without any coordination. There are no alternative, supporting services where children or families could be sent to have assistance.

The enquiry found that not all police precincts are aware of their obligation to inform child protection services in case a child goes missing from a family. Cooperation between police and child protection only happens in case a child goes missing from a care home. Unfortunately lot of children escape child protection homes repeatedly, and when this happens, police often stops looking for them, or if they know their place of residence (which

is often with relatives) they let them remain there, while the child is still registered as missing. Child protection services lack counseling and therapy solutions that would be needed for families and children – and often lack appropriate tools to uncover the reasons for the child going missing.

The activities of authorities investigating the causes of children missing and of child protection providers are not sufficiently regulated or consistent. There are no codified obligations of the State or civil society organizations for which they could be held accountable and with the help of which one could reduce the number of missing children. Concerning legal responsibility of parents endangering a minor because they do not send him to school, the dilemma of basic law of the day is where the borderlines of state intervention run and what legal means can be applied in the interest of solution. For instance, compliance with compulsory school attendance can be forced against the parent and legal representative; otherwise the missed primary education may later on push the child into grave and insurmountable disadvantage.

In the commissioner's view, in order to coordinate and approach different opinions an open dialogue would be necessary involving competent authorities, professional and civil organizations.

According to the national chief of police, the main responsible to find runaway children who disappeared from child protection institutions is the police and not the institutions. In spite of this, several institutions informed that if possible, they return runaway children to the institutions. It was reported from some counties that the police do not always search for these runaway kids with an adequate intensity. It happened many times that the police did not go after notorious runaways on grounds of that these children will disappear from the institutions short after they were taken back.

Another problem is that in case of children under 14 the phenomena that these children run away from their families is considered to be an age-specific characteristic. There is no uniform practice concerning the reporting or signaling of missing children, their voluntary return or whether they were taken back by the institution itself. The national chief of police considered as a significant problem that children must be registered as missing even if their whereabouts are known and they keep in touch with the child protection institution.

The minister responsible for education agreed with the ombudsman's recommendations and contacted the National Chief Police Headquarters and set up a working group with the competent institutions in order to establish a uniform definition- and data collecting system. In 2011, the institution has prepared a study on the causes and circumstances of why children leave child protection institutions without permission. After the evaluation of data gained from the results of this study a methodological recommendation will be prepared. The starting point of counseling activities might be this recommendation. In the past two years the ministry financed the operation of hotlines with 50,8 million HUF and supported every initiative which aimed to promote hotlines.

*The ombudsman asked the national chief of police* to request all county and municipal police headquarters to fulfill their signaling obligation as provided by the child protection act.

Finally, the commissioner proposed to the minister for interior to initiate dialogue with all institutions, NGO-s concerned and experts in the field to review legal regulations and definitions on the operation of child protection signaling system.

In September 2012, the Ministry of Interior, the Ministry of Public Administration and Justice, the ministry responsible for social affairs, the Attorney General and the Commissioner for Fundamental Rights held a joint meeting on the topic. All participants agreed that the

definition of missing children should be clarified at first place. The police still find “transport” of runaway children a mayor problem. The competent ministry held that the solution for the problem would be the introduction of the institution of child protection guardians visiting children who left a child protection institution without permission but their whereabouts is known. Legal protection is ensured under the provisions of Chapter XX of the Penal Code on offenses against children and against family law in accordance with obligations arising from international treaties.

### ***6.3. Inquiries into the enforcement of fundamental rights of unaccompanied foreign minors seeking asylum and persons in immigration detention***

#### **Unaccompanied minors**

An unaccompanied minor is an alien below the age of eighteen, who arrive on the territory of Hungary unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of Hungary.<sup>5</sup>

In accordance with Art. 19 (2) of Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers (hereinafter: reception directive)<sup>6</sup>, Member States are obliged to place unaccompanied minors who make an application for asylum with adult relatives, with foster family, in accommodation centers with special provisions for minors or in other accommodation suitable for minors.

As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

Under the provisions of Art. 22. 1) of UN CRC, States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

The Commissioner for Fundamental Rights conducted two comprehensive investigations on how national institutions receiving unaccompanied minors who applied for asylum implement these principles and provisions of the reception guideline and the Convention on the Rights of the Child.<sup>7</sup> The investigations focused on the placement of unaccompanied minors, on their legal representation, on their access to public education and vocational training and on the methods of age determination of these minors.

#### **Reception Center in Bicske**

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<sup>5</sup> See Section 2.f) of Act LXXXI of 2007 on Asylum

<sup>6</sup> COUNCIL DIRECTIVE 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

<sup>7</sup> See reports No. A/B 7120/2009. and No. A/B 733/2012.

The "reception centre suitable for placing and boarding unaccompanied minors separately" in the territory of the Republic of Hungary, as laid down in Section 33(4) of Government Decree No. 301/2007 (XI.9.) on the implementation of the Asylum Act, has been operating in the area of the Reception Centre of Bicske city in buildings located in an area protected by a wire fence since 1 January 2008. All resources and equipment required for the operation of the Unaccompanied Minors' Home, the accommodation of the young people and their meals three times per day, as well as any equipment for meals and cleaning, are provided by the Reception Centre; however the social workers performing their education and providing personal care to them have been the employees of the Hungarian Interchurch Aid (hereinafter "Interchurch Aid"). All costs related to the social workers' operation have been covered by the European Refugee Fund on the basis of an application jointly submitted by the Interchurch Aid and the Reception Centre.

On 11 November 2009, at the time of the on-site inspection the total number of residents the Unaccompanied Minors' Home was 62. Almost each and every one of the unaccompanied minors were young people who had suffered serious trauma and events giving cause for their escape; they had lost their close relatives and met with innumerable trials during their journey; a few of them suffered from post-traumatic symptoms (PTS). In order to ease the accumulated tension, the social workers organized group programs involving forms of therapy. As indicated by the social workers organizing the group programs, individual care was also provided by the Interchurch Aid psychologist and the Cordelia Foundation psychiatrist, if required, to the young people in an extremely serious condition.

The irregularities relating to constitutional rights revealed in the course of the examination are basically due to the strongly centralized Hungarian asylum and the decentralized system of child protection, as well as the tension arising from the operation of the institutional system of public education, and, to a less extent, to the incomplete provisions of the Child Protection Act and Act LXXX of 2007 on Asylum.

While the provisions of the Asylum Act and the Implementing Decree thereof basically comply with the relevant rules of both the European Union and the UN CRC, the unaccompanied minors of refugee, subsidiary protection or temporary protection status cannot access the care of foster parents or the children's home system accessible to Hungarian children because the institutions of public education or child protection maintained by the local or county governments are not prepared for their admittance. Unaccompanied minors excluded from the system of county institutions for the protection of children are compelled to live in the area of the Reception Centre, in the Unaccompanied Minors' Home, almost throughout the entire period of their integration to Hungary, which is not the ideal way of understanding the Hungarian way of life and of adapting to it. However the Unaccompanied Minors' Home as an institution for children is not recognized by the Child Protection Act so, in addition to the lack of guarantee rules regarding the establishment and maintenance thereof, there is no guarantee that the head of the institution currently financed on a project basis will be able to perform the guardian's duties permanently.

The commissioner proposed the minister responsible for social affairs and the minister of justice provide for amending Act XXXI of 1997 on the protection of children and the guardianship administration in order to integrate the unaccompanied minors' home as an institution providing special care into the Hungarian system of institutions for the protection of children.

Pursuant to Article 22(1) of UN CRC an unaccompanied minor is entitled to treatment equal to that provided to any child of the nationality of the host country or lawfully residing in

that country.” In the preliminary procedure, the Guardian Office of Bicske did not appoint a guardian to represent the unaccompanied minor submitting an asylum application but, upon the initiative of the Office as competent authority, appointed a guardian. This practice was strongly criticized by the Ombudsman because the guardian ad litem is not qualified to substitute for parental protection; he or she is entitled to provide only legal representation in the administrative proceedings for which his/her appointment is valid. It is disregarded in the current practice that an unaccompanied minor is in need of special protection, but not because he/she is recognised by the Office as a refugee, a beneficiary of subsidiary protection or as an admitted person. The asylum or alien status of a minor separated from his adult relatives is of secondary importance; he/she must be treated primarily as a child. Since an unaccompanied minor applying for asylum is also a child lacking the care and protection of his/her parents or official custodian, i.e. suffering serious social and mental disadvantage, he/she is entitled to the same level of protection as others who have already received refugee or alien status.

The representation of an unaccompanied minor in an aliens’ procedure or in an asylum procedure is a duty requiring qualification in law while such a qualification is not necessary for performing the duty of a guardian. However it would be reasonable to appoint a guardian because the unaccompanied minor can also get into a situation for any reason beyond the asylum procedure, for example, in the event of an urgent medical intervention where one has to make a legal statement for or on behalf of someone. It is by no means satisfactory that, during the 5 or 6 months from submitting the asylum application until the specification of the place of residence of the unaccompanied minor taken into long-term care, three different persons are competent to perform the legal representation of the child.

According to the data from the inspection, workers from the Unaccompanied Minors’ Home can place the child in a primary or secondary educational institution after two or three months. The integrated education of unaccompanied minors could not be implemented until now because most of them have significantly less knowledge than children of the same age participating in the Hungarian public education since the age of six. Primary education for unaccompanied minors is provided by the Zsuzsa Kossuth Children’s Home Primary School operating in the town and maintained by the Municipality of Budapest, which has the required specialists including a psychologist, a development teacher, a mental hygienic specialist and a psychiatrist, and not by the local primary school maintained by the local government, which lacks any special educational program required for the development of unaccompanied minors. At the time of the on-site inspection 30 inmates of the Unaccompanied Minors’ Home were pupils of that institution.

In terms of the enforcement of the special rights for unaccompanied minors, the determination of age is of crucial importance. It is attributable to the lack of guarantee provisions in the Asylum Act prescribing the involvement of a specific expert that the procedure for determining the age of the unaccompanied minor asylum seeker disregards the examination of the affected person’s mental condition as well as the specific “ethnic and cultural factors” affecting him or her therefore the National Office of Immigration and Nationality may prescribe the examination of the age of an unaccompanied minor submitted application for asylum by an order. When determining the age of an asylum seeker, the Asylum Act does not prescribe the involvement of a specific expert (organization, body or person), and so a medical adviser and a paediatrician were ordered for the examination by the Office as „other persons with competence” in accordance with Section 58(3) of Act CXL of 2004 on the general rules of administrative proceedings and services (hereinafter referred to

as the "Administrative Proceedings Act"). Neither the Asylum Act nor the Implementation Decree thereof prescribes the method of forming the expert's opinion. According to the expert's opinion, signed by both experts in the case and checked during the inspection, determination of the age of the persons concerned had been performed using a method „based upon general impressions, inspection of the teeth and physical examination of the secondary sexual characteristics (inspection)". As reported by the persons heard during the inspection, an X-ray examination of wrist-joints occurred only in exceptional cases i.e. only three times during the two years that had expired prior to the effective date of the Asylum Act. For this reason the Commissioner proposed the minister of justice to order the amendment of Section 44 of Act XXX of 2007 with content ensuring that determination of the unaccompanied minors' age should, in addition to their physiological characteristics, also include the consideration of the child's mental condition as well as the ethnic and cultural factors affecting him/her.

The General Director of the Office of Immigration and Nationality considered however that the current practice of the determination of the age of unaccompanied minors is in line with the European Union's requirements. The Commissioner did not accept this answer. He recalled that pursuant to point 31 (i) of the Committee on the Rights of the Child General Comment No. 6 (2005) on the Treatment of unaccompanied and separated children outside their country of origin,<sup>8</sup> – Prioritized identification of a child as separated or unaccompanied immediately upon arrival at ports of entry or as soon as their presence in the country becomes known to the authorities. Such identification measures include age assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such. The Commissioner took note of the fact that the General Director of the Office did not agree with his position.

### **Károlyi István Children's Centre, Fót**

According to Section 93(2) of Government Decree 290/2010 (XII. 21.) on the amendment of migration-related Government Decrees in connection with Act XXXV of 2010, unaccompanied minors seeking recognition as a refugee must be placed in a child protection institution as of 1 May 2011. As a result of a decision by the Ministry of National Resources, the Children's Center in Fót, a small town 20 km from Budapest, was selected as the "child protection institution" referred to above. According to Section 93(2) of Government Decree 290/2010 (XII. 21.) on amending the relevant rules of the Implementation Decree (effective from 1 May 2011), if the asylum seeker is an unaccompanied minor, in accordance with the child protection legislation, he or she will be placed in a child protection institution, provided that the refugee authority has determined the minor status of the affected child.

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<sup>8</sup> The Committee on the Rights of the Child General Comment No. 6 (2005) TREATMENT OF UNACCOMPANIED AND SEPARATED CHILDREN OUTSIDE THEIR COUNTRY OF ORIGIN  
<http://www2.ohchr.org/english/bodies/crc/comments.htm>

The Commissioner of Fundamental Rights examined the enforcement of the rights of unaccompanied and separated children (UASC) in the course of an on-site inspection carried out without prior notice on 29 February 2012.

The staff members of the Children's Center said that some of the new UASC had scabies or lice or suffered from a contagious disease (namely tuberculosis) which was only discovered by the screening examination ordered by the medical officer. It would have been advisable to keep newly arrived UASC away from the community until they are no longer contagious or at least until the screening examinations' results arrive. The Children's Center, however, has no quarantine room. This prevents the enforcement of the inhabitants' and the staff members' right to the highest possible physical and mental health guaranteed by Article XX (1) of the Basic Law.

Since an unaccompanied or separated child is a party in the asylum procedure who cannot act independently and, in the absence of parental protection, he or she has neither a legal nor authorized representative, pursuant to Section 35(6) of the Asylum Act, the Office takes measures without delay to have a person appointed who is authorized to represent the child and contracts the Guardianship Agency of the 5th District of Budapest (hereinafter: Guardianship Agency). The Guardianship Agency appoints a temporary guardian to represent the UASC in accordance with Section 225(1) of Act IV of 1959 on the Civil Code. The temporary guardian has similar powers to a guardian. This means that, until the asylum procedure is completed, the temporary guardian represents the unaccompanied or separated child in any official procedure and before any official forum in addition to the asylum procedure. The temporary guardian of the UASC living in the Children's Center is a full-time staff member (a lawyer by profession). Relating to the appointment of a temporary guardian as a legal representative of the unaccompanied minors, the investigation revealed no circumstance indicating any irregularity in connection with any constitutional right.

If any doubt emerges concerning the minor status of an asylum seeker who claims to be a child, a medical expert examination may be initiated for the determination of his/her age in accordance with Section 44(1) of the Asylum Act. The Commissioner has expressed his concerns over this topic on several occasions.

The staff have not received any special preparatory training before the arrival of the young foreigners at the Children's Center. The institution started to arrange further training for them after the staff members had already started their new job. The staff members are child and youth protection supervisors, child protection assistants, social educators, Romologists, teachers of Romology and education, psychologists and teachers by profession. They obtained their jobs through job applications. Three of them were transferred to the Children's Center from the Bicske Accommodation Center; the rest of them had already been working for the Center before then. One employee even worked at the Center as a university student as part of a practical course and then became an educator by applying for the position. Those staff members of the Children's Center who work with children of foreign nationality typically speak English or German. However, they usually speak to unaccompanied children or young people receiving post-care support in Hungarian.

The young people transferred from Bicske to the Children's Center could speak Hungarian at a certain level, which meant that there was no serious communication problem. The most frequently spoken foreign language by newly arrived children and young people is English. Those peers who have lived in Fót for a longer time and speak Hungarian better can help with communication whenever necessary. Educators make an effort to overcome

communication problems. For instance, they try to learn (at a basic level) Pastu, Dari and other languages spoken by these young people.

Relating to the accommodation and board for UASC seeking asylum or recognized as refugees or beneficiaries of subsidiary protection, the investigation revealed no circumstance indicating any irregularity in connection with any fundamental right.

Under Article 28 of the UN CRC every child has right to the compulsory and free primary education. Under paragraphs (1) and (2) of Article 10 of the Reception Directive, the Member States provide for the participation in the educational system to all child asylum seekers under the same conditions as valid for the nationals of the host Member State. Access to the educational system may be delayed for a maximum of three months upon submitting the application. According to the data from the inspection, the Children's Center staff usually succeed in placing the child in a primary or secondary educational institution after one month, i.e. practically by the time the preliminary examination phase of the asylum procedure finishes. This is the minimum time required by the UASC to complete their medical screenings, and more or less regain their strength, after their exhausting journey, to be able to walk the road from the Children's Center to the school and back alone.

Most of the young persons living in the Children's Centre studied in Budapest. With regard to the large number of foreign national children attending the Than Károly High School, Specialized School and Vocational School (hereinafter: School) in Budapest of those living in the Children's Center, the officials involved in the investigation carried out an on-site inspection at the School. The School had 57 students who had been granted asylum (including young foreigners living in the Children's Center). More than four-fifths of the students were from Afghanistan; the rest were of Somalian or Iraqi nationality and two were Azerbaijanis. The students living in Fót enroll in this school at the request of the Children's Center. Education is provided to children who have been granted asylum under the Minister of Education Directive published in the Education Gazette (Volume XLVIII Issue 24) on the kindergarten and school education of foreign national children and students on the basis of an intercultural educational system. New students first join an intensive language learning class and they study Hungarian as a foreign language 20 hours a week. Depending on the result of a Hungarian language skills exam at the end of the year and their knowledge in other subjects, they are assigned to a language course for further language training or join specialized, vocational or even grammar school courses in which they are taught in classes with Hungarian students and in Hungarian. If the students' language skills remain below the necessary level, the School keeps them in a language training class.

The School teaches the students enjoying asylum and attending a gap (catch-up) course in classes with a maximum of 15 students, in Hungarian and with Hungarian citizen peers who did not manage to complete the eighth grade by the age of 16. Students enjoying asylum and attending a gap course study Hungarian as a foreign language for 10 hours per week (instead of Hungarian Literature and Grammar classes, vocational training and vocational guidance classes, and the form master's class).

Both the teachers at the school and the staff members at the Children's Center reported that almost all children and young adults receiving post-care support show some kind of posttraumatic symptom; such symptoms are particularly striking on newly arrived UASC. Symptoms range from unexplained and significant weight loss through chronic headaches to unexpected and uncontrollable rages. The educators noted that they all suffer from some form of sleep disturbance. Although the Children's Center employs psychologists and development specialists, their work capacity is occupied by the inhabitants of the special

children's home, which means that neither UASC nor young adults receiving post-care support have access to the necessary psychological help. This constitutes an irregularity concerning their right to the highest possible physical and mental health guaranteed by Article XX (1) of the Fundamental Law.

The most significant finding of my follow-up investigation is that my recommendations made in the report AJB 7120/2009 concerning both legislation and legal practice have mostly been implemented.

### **Immigration detention of families with small children**

As of December 2010, a third-country national minor, accompanied by an adult family member may be detained under immigration laws for not more than thirty days "where the best interests of the child shall be a primary consideration".

As of 1 April 2011, the police executes the detention ordered in immigration proceedings of vulnerable third-country nationals such as families with small children, married couples, single women and other third-country nationals who are particularly vulnerable (old people, disabled people etc.) in Reception Centre Békéscsaba. Thus, apart from the transit area of international airports, the Reception Centre Békéscsaba has become the only place in Hungary where the police detain minors who are under the age of fourteen, in other words, minors who have no legal capacity under Hungarian law.

#### *Reception Centre Békéscsaba*

Between 1 April 2011 and 30 April 2012, altogether 409 minors were detained in the institution for a maximum period of 30 days. On 3 May 2012, the Commissioner for Fundamental Rights carried out, without prior notice, an on-site inspection of Reception Centre Békéscsaba, paying special attention to the enforcement of the rights of minors in detention.

Since the law contains no provision as to what priorities the immigration authority must consider before applying detention as a "measure of last resort", detention is applied routinely both in the case of families with small children who are arrested and expelled during illegal border crossing and of those who are arrested and expelled because of violating the rules of lawful residence in Hungary.

Pursuant to the case-law of the European Court of Human Rights (ECHR) concerning Article 5 of the European Convention on Human Rights, there must be a connection between the purpose of detention and the place and the mode of its implementation, and the duration of detention may not exceed the time that is absolutely necessary for achieving its purpose.<sup>9</sup>

Based on Article 37, Clause d) of the UN CRC the states parties ensure that every child deprived of his/her liberty, irrespective of his/her age, has the right to challenge the legality of the deprivation of his/her liberty before a court or other competent, independent and impartial authority, and to a prompt an urgent decision on any such action.

A main feature of the immigration status of minors is that while pursuant to Section 56(2) of the Third-Country Nationals Act they may not be detained individually, according to Section 56(3) of the Third-Country Nationals Act, they may be detained together with an adult relative who accompanies them. Since in such cases the actual subject of the detention ordered by the immigration authority is not the minor but the adult relative accompanying

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<sup>9</sup> See for example *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, paragraph 102; *Muskhadzhiviyeva and others v. Belgium*, paragraph 73; *Popov v. France*, paragraph 118.

him/her, there are neither legal grounds nor legal guarantees for the detention of the child, which gives rise to the abuse of the right to freedom and the right to seek legal.

Pursuant to Article 2, Clause 2 of the UN CRC, States Parties shall take all appropriate measures to ensure that each child within their jurisdiction is protected against all forms of discrimination or punishment on the basis of the status or activities of the child's parents, legal guardians, or family members.

The legal obligation of the immigration authority to consider the best interests of the child as a prime factor, based on Article 3, Clause 1 of the UN CRC, is the same in the cases of unaccompanied minors who stay in the country illegally and in the cases of minors who stay in the country illegally accompanied by their families. The authority must take into consideration the child's best interests also when ordering the detention for immigration purposes of a minor who is accompanied by his/her family. The legal practice based on Section 56(3) of the Third-Country Nationals Act, according to which a child from a third country may be detained simply because he/she is accompanied by an adult relative who violated immigration law, even in cases where the detention of unaccompanied minors in a similar legal situation is excluded, gives rise to irregularities in relation to the ban on discrimination on the grounds of other circumstances.

The staff of the immigration authorities mentioned the enforcement of the fundamental right to the protection of private and family life as one reason for detaining the minor accompanying the adult and the requirement of protecting public safety as the other reason.

It is indeed one of the indispensable elements of the protection of family life (also protected by the Basic Law) that the authorities should not separate children from their adult relatives. However, the joint detention of relatives does not mean that their family life is automatically respected just because they are detained at the same place. Despite the fact that the maximum thirty-day detention of families with small children is seemingly not a long period, the circumstance that they have to spend it in a totalitarian institution where the door-handles were removed from the majority of the bedrooms in which they are supposed to live their private lives and they have no opportunity to separate themselves from the others even during mealtimes, means a serious intervention in their actual family life, thereby resulting in a fundamental right impropriety.

The administrators interviewed during the investigation could not remember any case where the thirty day period following the refusal to readmit a foreigner without documents suitable for identification on the basis of a readmission agreement was sufficient to obtain the documents that are necessary for the implementation of expulsion and to arrange deportation. It is true that during the maximum thirty-day detention the family with small children that violated immigration law cannot leave the Reception Centre Békéscsaba and consequently they have no opportunity to evade the implementation of expulsion. On the other hand, from the 31<sup>st</sup> day after the ordering of detention, there is no barrier to the minor's leaving the open place of residence designated for him/her by the immigration authority, either alone or together with his/her adult relative. For this reason, when the answer of the neighbouring country's authority refusing to readmit the minor on the basis of a readmission agreement is received in Hungary, the lawful reason for the minor's detention determined in Article 5 of the European Convention on Human Rights ceases to exist, therefore it is not necessary to continue the detention which, if continued, gives rise to a fundamental right impropriety.

According to the foreigners interviewed during the on-site inspection, the guards who guard families with small children treat the detainees kindly and humanely. The management of the Reception Centre Békéscsaba observes the statutory requirements concerning the circumstances of detention and the provisions for foreigners. The lawfulness of the implementation of detention is monthly checked by the competent prosecutor of the Békés County Prosecutor's Office on the premises.

Although the police make significant efforts to provide detention conditions that entail the least possible burden for detainees, the composition and quantity of the medicaments taken by those staying at the Reception Centre Békéscsaba and in particular the extraordinary events that led to self-harm and also the sexual contact between detained minors prove that the uncertain future, the fact of the detention, the daily schedule regulated by the house rules and the absence of real intimacy cause psychic ordeals that are incompatible with children's lives. In this situation, the thirty days of detention may seem endless to the minor who is unable to understand the causes and period of detention, which means that it does not serve the child's best interests at all.

## 7. International overview

### 7.1 Maria HERCZOG: Report on the 2012 Activities of the Committee on the Rights of the Child

The UN Committee on the Rights of the Child held 3 sessions in 2012: in January, June and September.

The signing ceremony of the new, third *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* (OPIC) was held in Geneva on 28 February 2012. The Optional Protocol was signed by 20 states. It was an event of major significance since it enabled children to lodge complaints with the Committee on the Rights of the Child individually – upon investigation the members would make recommendations to the governments concerned. All other human right conventions had already recognized individual complaints; however, due to the special status of the child, it had not been possible. The Committee on the Rights of the Child started to draft its methodological guidelines and rules of procedure, taking into consideration, first of all, CEDAW's experiences and practices in the field of investigating complaints related to the discrimination of women.

Till December 2012, 35 states, including 13 EU members, signed the new Optional Protocol with two other countries, Gabon and Thailand, ratifying it. According to UN regulation, at least 10 countries have to ratify it so that the Protocol could take effects and the Committee could start accepting complaints.

The Committee held its Day of General Discussion on the subject of "The rights of all children in the context of international migration" on 28 September 2012. The overall objective of the 2012 DGD was to promote, at the international and national levels, the rights of all children in the context of international migration. This context may include the following situations:

- children who move abroad together with their parents, relatives as immigrants or refugees;
- unaccompanied children;
- refugee children;
- asylum seekers or the so called "left behind" children whose parents have jobs abroad and who are left behind with relatives, friends, or simply left at home without supervision.

The 2012 Day of General Discussion focused its attention on the following specific objectives:

1. Help identify specific child rights issues in the normative, policy and program areas in relation to all children in international migration situations, regardless of their status (regular or irregular).
2. Identify principles and examples of good policies and practices in relation to children in international migration situations.
3. Address international standards protecting the rights of the child in the context of international migration and identify how these international standards take or should take into account the guiding principles in the Convention on the Rights of the Child (non-discrimination, best interests of the child, respect for the views of the child and the right to life, survival and development).

4. Provide further substantive information for facilitating the Committee's dialogue with and recommendations to States parties on issues relating to the rights of children in international migration situations.
5. Raise awareness and promote exchange of information and collaboration among actors/stakeholders dealing with the rights of children in the context of international migration.

More than 250 people attended the DGD: representatives of member state governments, international organizations, UN special agencies, members of the Committee on the Rights of the Child, the UN CRC NGO Group, several NGOs, experts and a group of young people concerned. The summary and the recommendations of the Committee on the Rights of the Child were made public during its January 2013 meeting.

The Committee on the Rights of the Child issued several notices in 2012; it expressed its grave concern vis-à-vis the situation in Syria, with special attention to the children participating in the armed conflict, imprisoned for various reasons, gravely injured or killed. The Committee on the Rights of the Child reminded the Syrian government of its duty to protect the civilians, especially the children living under its jurisdiction, and to do everything within its competence to prevent and eliminate violence against children.

The Committee also expressed its concern for the children who were injured or died during the Gaza conflict and called on the fighting parties to solve their conflict.

In December the Chairperson of the UN Committee on the Rights of the Child, Jean Zermatten expressed his deep dismay concerning the execution of a Yemeni girl, saying it was a clear violation of a binding UN treaty. The Committee appealed to the Government of Yemen to immediately stop such practices since Yemen had ratified the Convention on the Rights of the Child banning capital punishment and proclaiming the inherent right of every child to life.

The Committee on the Rights of the Child prepared several General Comments during 2012 which would be adopted during the following meetings, including commentaries on State obligations regarding the impact of the business sector on children's rights, the right of the child to the enjoyment of the highest attainable standard of health and the right of child to rest, leisure, play, recreational activities, cultural life and the arts. The Committee is currently preparing a most controversial and, consequently, highly anticipated Comment on the best interests of the child and, in cooperation with CEDAW, on such harmful traditional practices as genital mutilation, witch-hunts etc.

On 18 December 2012 the Committee elected 9 new members to replace those whose mandate had expired. The current members of the Committee on the Rights of the Child are as follows:

Name	Nationality	Term expires
<a href="#">Ms. Agnes Akosua AIDOO</a>	Ghana	28 February 2015
<a href="#">Ms. Amal ALDOSERI</a>	Bahrain	28 February 2017
<a href="#">Ms. Aseil AL-SHEHAIL</a> (Vice-Chairperson)	Saudi Arabia	28 February 2015
<a href="#">Mr. Jorge CARDONA LLORENS</a>	Spain	28 February 2015
<a href="#">Ms. Sara DE JESÚS OVIEDO FIERRO</a> (Vice-Chairperson)	Ecuador	28 February 2017

<a href="#">Mr. Bernard GASTAUD</a>	Monaco	28 February 2015
<a href="#">Mr. Peter GURÁN</a>	Slovakia	28 February 2017
<a href="#">Ms. Maria HERCZOG</a> (Rapporteur)	Hungary	28 February 2015
<a href="#">Ms. Olga A. KHAZOVA</a>	Russian Federation	28 February 2017
<a href="#">Mr. Hatem KOTRANE</a>	Tunisia	28 February 2015
<a href="#">Mr. Gehad MADI</a>	Egypt	28 February 2015
<a href="#">Mr. Benyam Dawit MEZMUR</a> (Vice-Chairperson)	Ethiopia	28 February 2017
<a href="#">Ms. Yasmeen MUHAMAD SHARIFF</a>	Malaysia	28 February 2017
<a href="#">Mr. Wanderlino NOGUEIRA NETO</a>	Brazil	28 February 2017
<a href="#">Ms. Maria Rita PARSI</a>	Italy	28 February 2017
<a href="#">Ms. Kirsten SANDBERG</a> (Chairperson)	Norway	28 February 2015
<a href="#">Ms. Hiranthi WIJEMANNE</a> (Vice-Chairperson)	Sri Lanka	28 February 2015
<a href="#">Ms. Renate WINTER</a>	Austria	28 February 2017

Source: <http://www2.ohchr.org/english/bodies/crc/members.htm>

## 7.2. MARGARET TUITE:<sup>10</sup> The role of the EU in child-friendly justice in Europe

In February 2011 the European Commission adopted the [EU Agenda for the rights of the child<sup>11</sup>](#), setting out a programme of concrete action up until end 2014. One of the key areas of focus is child-friendly justice.

### Strands of activity

Our work falls under three main headings: those of data collection, legislative and non-legislative measures. Our non-legislative measures include efforts to foster training, including by way of funding or a focus on the interactions between child protection systems and the justice system in our [November 2012 European Forum<sup>12</sup>](#) on the rights of the child. There are several pieces of EU legislation of relevance today, notably the [Brussels IIa Regulation<sup>13</sup>](#) and the [Maintenance Regulation<sup>14</sup>](#) as well as the forthcoming legislation on

<sup>10</sup> Ms Tuite is European Commission coordinator for the rights of the child – her presentation was delivered on 22 november 2012 on the occasion of the international conference on children’s rights organized in cooperation with the Council of Europe at the Office of the Commissioner for Fundamental Rights.

<sup>11</sup> [http://ec.europa.eu/justice/fundamental-rights/rights-child/eu-agenda/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/rights-child/eu-agenda/index_en.htm)

<sup>12</sup> [http://ec.europa.eu/justice/events/child-forum-2012/index\\_en.htm](http://ec.europa.eu/justice/events/child-forum-2012/index_en.htm)

<sup>13</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:NOT>

<sup>14</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:007:0001:01:EN:HTML>

criminal law procedural rights. Another major strand is the data collection work we are launching to support evidence-based policy making.

### Data collection work

In July 2012, we launched a [study to collect data on missing children in EU27<sup>15</sup>](#) including causes for their disappearance and the follow-up given to their cases.

On 1 September 2012 we launched an [ambitious two-year study to collect data on children's involvement in judicial proceedings in the 27 Member States of the EU and accession country Croatia<sup>16</sup>](#). The study will comprise a narrative overview for each Member State, **using the Council of Europe Guidelines on child-friendly justice<sup>17</sup> as a template**. The Council of Europe Guidelines cover children's involvement in administrative, civil and criminal justice - irrespective of their role - *before, during and after* judicial proceedings. Beyond the quite comprehensive Council of Europe Guidelines, we will also look at aspects of age limits and pay particular attention to **diversion measures** so as to have a clear picture of conditions and if and when diversion measures can lead to a criminal record.

Apart from what is in the Guidelines for **child victims and witnesses**, we will address support measures and mechanisms including advice and support regarding access to complaint, appeal and review mechanisms. While a considerable volume of standards and indicators has already been drawn up by various international bodies and at national level (see study terms of reference for details), they are certainly not all adhered to or populated with data. With this study we want to switch gears and ensure that indicators retained in consultation with stakeholders are **populated with data**. The overarching aim is to provide statistics to support evidence-based policymaking. Given Member State specificities, the statistics must be read in conjunction with the narrative overview. If one Member State has a minimum age of criminal responsibility of eight years old, and another sets that age at 16, then statistics can only be read in full knowledge of those facts.

As well as a **narrative overview for each Member State, and a summary overview for the EU**, we will draw up indicators, taking account of the work already done both internationally and nationally. Then we will collect statistics. Given the vast scope of the study, we will stagger the results. The first database on juvenile justice and criminal justice is due by end April 2013 and the overall results and remaining databases for civil and administrative law are due by end August 2014. The study outputs will be available online and are intended for use by a wide range of stakeholders. The study will provide a unique overview of children's involvement in justice in the EU. In parallel to this study focusing on secondary data collection, the EU Fundamental Rights Agency will collect primary data on child-friendly justice. We know that there will be data gaps and that better data is available for juvenile justice than for civil or administrative justice, but it is also important to correctly identify the data gaps. We hope that this study will lead to consistently better data collection in years to come. Our stakeholders are many and we will ensure proper consultation of Member State authorities. The budget allocated to this study is €1.2m.

### Criminal law – new legislative proposals

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<sup>15</sup> [http://ec.europa.eu/justice/newsroom/contracts/2012\\_90538\\_en.htm](http://ec.europa.eu/justice/newsroom/contracts/2012_90538_en.htm)

<sup>16</sup> [http://ec.europa.eu/justice/newsroom/contracts/2012\\_131975\\_en.htm](http://ec.europa.eu/justice/newsroom/contracts/2012_131975_en.htm)

<sup>17</sup> <http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%204.pdf>

On 25 October 2012, **Directive 2012/29/EU** was adopted to set minimum standards in the area of [victims' rights](#)<sup>18</sup>. Hungary contributed to the preparation of the Victims' rights directive, notably in terms of the Budapest Roadmap<sup>19</sup> adopted during the Hungarian Presidency, which established general principles to be adhered to such as in the areas of training, victim support and interagency cooperation. The Directive includes clear references to the UN Convention on the rights of the child. It provides for the protection of child victims and the primary consideration of the child's best interests; the structures that need to be in place; coordination among them, the role of civil society and training. See in particular Articles 22-24, and the requirement that all child victims *shall be* subject to an individual assessment to identify specific protection needs. **Article 24** includes provisions on the protection of child victims during criminal proceedings aims to avoid secondary victimisation and emphasises that a child is a full bearer of rights, and has a right to a lawyer in her or his own name, wherever a victim would have a right to a lawyer. Article 23 on training is not restricted to judicial practitioners but includes also training for the police and for court staff.

I would like to quickly provide a recap on implementation of the 2009 Roadmap on procedural rights. The first measure on the **right to interpretation and translation (Directive 2010/64/EU)** in criminal proceedings was adopted in October 2010 and implementation is in preparation. The measure guarantees a right to interpretation during criminal proceedings and the right to translation of essential documents. The measure also provides for appropriate assistance for persons with hearing or speech impediments. **Directive 2012/13/EU** provides for the **right to information** and makes specific reference to children. The directive underlines the responsibility of competent authorities in MS when providing information to suspects or accused persons to pay particular attention to persons who cannot understand the content or the meaning of the information, for example because of their youth or their mental or physical condition. A third measure on the **right of access to a lawyer** is in negotiation. For children, the proposal includes a point on notifying the parents/guardians when a child is apprehended. When this notification could comprise a conflict of interests, social services should be contacted. A second potential provision under discussion is the issue of mandatory defence and the question of whether children should be able to waive their right to legal representation. Finally, preparatory work has started for special safeguards for **vulnerable suspects or accused persons**, with a strong focus on children. This proposal is likely to be tabled at the end of 2013.

**In family law disputes**, the Brussels IIa Regulation (**Regulation 2201/2003**) is most commonly applied in crossborder custody cases and the Maintenance regulation (**4/2009**) aims to facilitate the payment of maintenance claims in crossborder situations.

When talking about child-friendly justice, **we should not forget the impact of the justice system on children of imprisoned parents, including at the time of arrest**. There are an estimated **800 000** children of imprisoned parents in Europe and we should also take account of their rights and needs – they are not guilty even if their parents have committed an offence.

## Training

At all levels, increasing emphasis is placed on the importance of training, both judicial training and for other practitioners. In the context of child-friendly justice, training that includes elements of child psychology and communication skills is also needed. By virtue of taking

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<sup>18</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>

<sup>19</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:187:0001:0005:EN:PDF>

time out to train, the opportunity to reflect on one's own practice and to be able to discuss issues with colleagues and other practitioners afforded by training should not be underestimated either.

During the workshop on **the role of child protection systems in child-friendly justice** at the occasion of the **7<sup>th</sup> European Forum on the rights of the child in November 2012**, issues that came up time and again were: the provision of clear and accessible information to children and their parents, including on who does what in the court and who is there to support the child; interdisciplinary training; interagency cooperation; respect of the child's privacy and transparency with regard to the process.

**Article 12 of the UNCRC on the child's right to be heard** is one of the most challenging to implement and as an EU contribution to these efforts, in December 2012 we will launch a one-year study to map legislation, policy and practice on the child's right to be heard in EU27 and Croatia. Children will be involved in the study and we will pay particular attention to particularly vulnerable or marginalised groups, such as unaccompanied children, Roma children and children with disabilities. Outputs will include a child-friendly version of the results and a catalogue of resources and tools that facilitate child participation in the EU.

### **Funding opportunities in 2013**

We run several funding programmes including the well-known **Daphne Programme to prevent violence** against children, young people and women. In 2013, under our **Fundamental rights and citizenship programme**, we will call for projects, involving a number of Member States, for the development and delivery of training modules on **child-friendly justice**, building on the Council of Europe guidelines on child-friendly justice, for a variety of practitioners. There is also a priority on the **fostering of child participation among Roma children** and one on **structural improvements in the provision of information to children on their rights**. Under **DAPHNE**, priorities for children relate to the **rollout of anti-bullying programmes in schools and projects targeting attitudinal and behavioural changes in the context of sexualisation of children**. The annual work programmes should be adopted and published by end 2012<sup>20</sup>.

### **7.3. LILIT DANEGHIAN-BOSSLER: The Council of Europe as the engine of child friendly justice<sup>21</sup>**

Through the children's rights programme of the Council of Europe the word "transversality" has become one of the key objectives of the Council of Europe. This programme has been a quintessence of transversality in the Council of Europe over the past years. Through this programme we have learned that the flexibility and transversal approach are the main principles of a success of a programme. We have also learned that for better promoting the cooperation with other international organisations and member states we need, first of all, internal shared vision and complementary action.

Almost all Council of Europe institutions and bodies are contributing to the success of the programme on children's rights. We have concluded co-operation agreements with key international partners and in particular with UNICEF, the EU, the FRA and the European

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<sup>20</sup> [http://ec.europa.eu/justice/grants/programmes/index\\_en.htm](http://ec.europa.eu/justice/grants/programmes/index_en.htm)

<sup>21</sup> Presentation of LILIT DANEGHIAN BOSSLER, projectmanager of DG Justice of the council of Europe. Delivered on 22 November 2012, in the Office of the Commissioner for Fundamental Rights on the occasion of the international conference held on child friendly justice in Europe and Hungary.

Network of Ombudspersons for children. Civil society is participating in most of our activities, providing us with advice and feedback on the implementation of our standards and projects. And what is more important is that member states continue to fully back the programme. Indeed, this is the most important point since our programmes are for our member states, and the strong will and openness for cooperation of our member states are the first prerequisite for implementing our programmes in member states and by member states.

Before 2006, our Organisation had no agenda for children's rights, only fragmentary initiatives. Our standards and the relevant case law of the Court were hardly visible. The Action Plan adopted at the Warsaw Summit of the Council of Europe (2005) launched the transversal Programme "**Building Europe for and with children**", which has been providing guidelines on how standards for children can be improved.

The 28<sup>th</sup> Conference of European Ministers of Justice, which took place in Lanzarote in October 2007, paved a constructive way forward with the adoption by the Ministers of Justice of Resolution No 2 on child-friendly justice. Further to this Resolution, the Committee of Ministers entrusted the European Committee on Legal Co-operation (CDCJ), the European Committee on Crime Problems (CDPC), the Steering Committee for Human Rights (CDDH), as well as the European Commission for the Efficiency of Justice (CEPEJ), with the task of preparing European Guidelines on child-friendly justice.

Through the flexible and inclusive working methods of the children's rights programme we have successfully mainstreamed children's rights in almost all policy areas of the Council of Europe.

We have completed two three-year strategy cycles in which we have tackled new challenges in different ways. The first cycle brought all actors together, determining the needs and defining working methods. The second cycle focused on completing a set of standards, increasing visibility and building strong partnerships with international organisations and civil society.

New challenge is to make sure that we remain relevant for different cultural and social realities in different member states. This constant "connexion" with the concerns of governments, professionals working with children and civil society is one of the strengths of the Children's Programme so far.

**The current Strategy for the rights of the child (2012-2015)** was adopted on 15 February 2012 by the CoE Ministers' Deputies and aims at the implementation of children's rights standards. It is essential to bridge the gap between standards and implementation by providing expertise, guidance and advice to member states on how to best promote and implement these standards on national levels. Moving from standard setting to implementation has led us to consider possible consequences in terms of working methods and institutional cooperation.

The Council of Europe Inter-Secretariat Task Force on Children's Rights which has been created recently, is an internal body charged with the mission to develop and implement a strategy to improve the transversal nature of CoE activities related to children's rights. This internal co-ordination is important as it also greatly facilitates our relations with partners outside the Council of Europe. Having a visible thematic entry point in the organisation benefits our co-operation with external actors like the EU, UNICEF and the UN.

How we work to coordinate CoE activities on children's rights:

- We generate ideas and partnerships, brainstorm, organise internal COE meetings;
- Provide children's rights input into the work of other sectors in the Organisation;

- Organize conferences, seminars, trainings through the Lisbon Network of the national judicial training institutions and the HELP programme which supports the 47 member states of the Council of Europe in implementing the European Convention on Human Rights (ECHR) at national level.

We also use existing CoE monitoring mechanisms to:

- gather reliable data on implementation of UN and CoE standards on children's rights in the CoE member states;
- design tailor-made advice and co-operation projects, for example in Ukraine, as well as in non-member states of the Council of Europe: Kazakhstan, Morocco, Tunisia, in the context of CoE Neighbourhood Policy, with the emphasis on children's rights

**The Strategy for the rights of the child** is composed of four objectives covering the CoE work on the implementation of children's rights standards:

### **Overall strategic objective 1: promoting child-friendly services and systems**

Children and young people have the legal right to equal access to and adequate treatment in healthcare, social, justice, family, education systems and services as well as sport, culture, youth work and other recreational activities aimed at young people under the age of 18. To ensure a holistic approach to the protection of children's rights, the Council of Europe will foster exchange of good practices as regards local, regional and national procedures and institutions dealing with children's rights.

Here I will present briefly Guidelines of the Committee of Ministers on child friendly justice leaving the detailed presentation on the content and scope of the Guidelines to our colleague Ankie Vandekerckhove:

Child-friendly justice falls under the first strategic objective of the current strategy. It has been on the agenda of the CoE since the creation of the Programme "Building a Europe for and with children". The Guidelines on child-friendly justice were adopted by the Committee of Ministers in 2010 and are designed to guarantee children's **effective access to and adequate treatment in justice**. Member states are encouraged to adapt their legal systems to the specific needs of children, and the Guidelines provide practical advice on how to make national justice systems child-friendly.

Since the adoption of the Guidelines, the focus has been on spreading and promoting them, for instance by ensuring that they are translated in as many languages as possible. Through an important partnership between the CoE and the EU, the EU has decided to translate the Guidelines into all official EU languages. The translation will be completed in the beginning of 2013. We find it extremely important that the Guidelines will be available in national languages, which boosts their implementation by national legal professionals.

Our next steps ahead are to develop training programmes for the member states. In this very moment we are organising a series of expert meetings and events on child-friendly justice in order to develop training curricula and examine how to best ensure the effective implementation of the Guidelines.

Through the CoE Division for Legal Cooperation, we are also reaching out to national judicial training institutions to discuss with them the most efficient ways for implementing the Guidelines on national levels.

The Guidelines on child-friendly justice are today considered as one of the key references on how the justice system can better respect the child as a right holder in administrative, civil and criminal justice.

Internal and external mechanisms of implementation of the Guidelines are:

- ✓ the Lisbon Network and the HELP programme of the Council of Europe publishing the child friendly version of the guidelines (in 2013)
- ✓ Promoting implementation of the Guidelines through other CoE competent bodies (CEPEJ, CDCJ, EJNI)
- ✓ Promoting implementation of the Guidelines through the European Commission (EU Agenda on the rights of the child), FRA
- ✓ Continue to provide support and guidance to our implementation partners: UNICEF, EU, FRA, currently carrying out qualitative and quantitative research projects on child participation in justice proceedings.

### **Overall strategic objective 2: eliminating all forms of violence against children**

Children and young people are legally entitled to be protected from all forms of violence. But despite positive steps in this direction, children continue to suffer violence in all spheres of life – in their home, in school, while practising their activities, in residential institutions and detention, in the community, and in the media.

The Council of Europe continues to act as a regional initiator and co-ordinator of initiatives to eliminate all violence against children in Europe. As the European forum for follow-up to the recommendations of the *UN Secretary General's Study on Violence against Children (2006)*, it continues to support the mandate of the Special Representative of the UN Secretary General on Violence against Children as well as the United Nations Special Rapporteur on the sale of children, child prostitution and child pornography. To this end, the Organisation adopted a two-pronged approach to:

- Support the adoption and implementation of integrated national strategies to protect children from violence, which includes legislative, policy and institutional reforms and a focus on prevention of violence.
- Promote zero tolerance for all forms of violence by raising awareness and taking action.

### **Overall strategic objective 3: guaranteeing the rights of children in vulnerable situations**

Children are legally entitled to equal enjoyment of their rights, yet in practice, some children are particularly exposed to violations of their rights and need special attention and measures to protect them as well as measures to empower them, in particular through access to citizenship and human rights education. The Council of Europe is committed to eliminating discrimination against children in vulnerable situations (children in detention, with disabilities, migrant children and children “on the move”, Roma children, children in the street), through stepped up cooperation with UNICEF, the EU and civil society. Besides these groups of children, the Council of Europe raise issue of protection of rights of other children in vulnerable situations, such as those from national minorities; living in poverty; children raised in social isolation; child victims of discrimination based on race, ethnicity, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status such as sexual orientation or gender identity. While implementing this objective, the

Council of Europe will take into account that children are often exposed to multiple forms of discrimination.

#### **Overall strategic objective 4: promoting child participation**

Children's participation is a cross-cutting approach throughout the whole strategy. The Organisation will continue to mainstream child participation as a working method and an attitude into its own standard-setting, monitoring and co-operation activities.

All children have the legal right to be heard and taken seriously in all matters affecting them, whether in the family or alternative care environments; day-care; schools; local communities; health care, justice and social services; sport, culture, youth work and other recreational activities aimed at young people under the age of 18; and policy-making at domestic, European and international levels. A major obstacle to effective child participation can be attributed to adult attitudes. The Council of Europe and its member states are responsible for reversing this situation and establishing a culture of respect for children's views.

#### **7.4. Veronica YATES:<sup>22</sup> Stop making children criminals!**

CRIN is a network of over 2200 organisations worldwide - we believe in rights - not charity. We advocate for the full implementation of the UN Convention on the rights of the Child and other international human rights standards.

##### *How do we work*

- We monitor violations of children's rights around the world and make this information available to all working in this field.
- We also develop tools to use human rights systems to challenge violations of children's rights and launch campaigns and encourage others to work collectively.
- We are developing legal advocacy workshops to challenge some of the violations that persist in countries, as identified by international and regional human rights bodies. (Show wiki).
- We identify areas of children's rights that are not getting enough attention, are too controversial, or new and emerging. It is in this context that we began our work on juvenile justice.

##### *On juvenile justice*

In monitoring developments around the world, we noticed there was a trend in States lowering the age of criminal responsibility. We feel such debates or campaigns are inadequate, and often confusing. Furthermore the MACR does not mean the same thing in every country. This was not helped by the GC of the CRC on juvenile justice which said the MA should be no lower than 12. Somehow this has become an internationally agreed age, but this is not what the CRC intended. It was simply the average age of those with a known minimum.

We believe there is a need for a new debate about juvenile justice. We want to start this debate that goes beyond pragmatism and compromise. As a result, we published a paper as a modest beginning to such a new debate. What we are advocating for is a separation

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<sup>22</sup> Ms Yates is the director of the Children's Rights International Network. The presentation was delivered on 22 November 2013, on the occasion of the international conference on children's rights held at the Office of the Commissioner for Fundamental Rights.

between the concept of criminalisation and responsibility. This not a new idea. ENOC, Thomas Hammarberg, the Inter-American Commission, all have expressed similar ideas.

But of course in looking at viable solutions, we must look at why this is happening - why are states lowering the ages and locking up more children, at a younger age?

There is a misguided belief that children commit more and more crimes: this is often not helped by media spreading fear about children being responsible for more crimes. And politicians want to please the public: they do not want to be seen to be soft on crime. Yet, research across the world shows children are not committing more crimes today than they did 20 years ago.

Why does it persist? We all want to have someone to blame - and who better than children - it is still one of the few remaining groups of persons against whom discrimination is widely acceptable. They don't vote, they rarely get listened to.

The other oft-quoted excuse is that alternatives are expensive: This is not true either, in fact, across Europe and North America, it is very much the opposite. In the UK, for instance, a country which locks up more children in Europe than anyone else, recent figures released by the Justice Secretary this week says the cost for locking up one child per year amounts to between 100 to 200 thousand pounds - more than the most expensive private school.

Justice Renate Winter (candidate to the UN Committee on the Rights of the Child) from Austria, said this year at the UN that the average cost across Europe for one day in prison for a child was on average 500 Euros. Think about what you can do with that amount of money per child you decide not to lock up.

Prisons don't work - so what do we do then? Aside from excuses, recidivism for children who are locked up across Europe is about 80 per cent. For children who benefit from diversion programmes, this figure is about 14%.

So what then? Do nothing? Surely children know the difference between right and wrong! It is not in our interest to deny their responsibility, but we must recognise that children are in developmental stages that require a special approach. It is in everyone's interest.

The aim of the criminal justice system is to punish, it is about repression and retribution. But the aims of juvenile justice are to reject retribution in favour of positive development, rehabilitation and reintegration. Article 40 of the CRC proposes a special approach: to establish laws, procedures, authorities and institutions specifically applicable to children - not to some of them - but all children up to the age of 18.

There is clear evidence that the roots of serious criminality in children develop and flourish from adult - mostly parental - violence and neglect, often compounded by the failure of the State to fulfill its obligations support parents in raising their children and to provide a rights focused education system.

The more extreme a child's offending, the more certain we can be of its origins in adult maltreatment.

What we are advocating for is the separation between responsibility and criminalisation.

So what do we mean by that? Not criminalising them, does not mean they will not be held responsible - there is a need to identify, assess and respond appropriately to crimes that have been committed by children - and like adults, in doing so, children should not be denied their right to due process, to determine whether the allegations against them are true or false.

### *How would it work?*

I don't want to go into details - more is in the paper (in the paper, we have used the example of the infamous James Bulger case in 1993 in England to explain how it would happen in practice).

But we would conceive the following steps to be taken when a child is alleged to having committed an offence:

1. A hearing to determine what happened - beyond reasonable doubt. The victim and/or the victim's family have the right to know what happened and the State has the duty to protect its citizens.

2. If the child is found responsible, then there is a need for a multi-disciplinary investigation (the more serious the crime, the more in-depth this investigation). Such an investigation must cover the following:

- Environmental and circumstantial factors, such as community responsibility to protect children, etc.
- Other factors that may explain why the offence happened
- Factors in the background of the child who committed the offence, which may help to understand their actions.

Such an investigation should lead to a detailed report attributing weight to the different factors. (during this process, child friendly guidelines, as described, come in to play).

3. Depending the findings of the report and which factors had more weight, a second stage to the investigation would identify both how the crime could have been prevented; and what forms of supervision, education, treatment and support would be necessary for the child who committed the offence, and support are what is most likely to prevent re-offending and ensure the child is fully rehabilitated and reintegrated.

### *A last resort*

Article 37 of the CRC says deprivation of liberty should only be as a last resort. This means the only justification for locking up children is that they pose an assessed serious risk to others and other ways of minimising those risks are considered inadequate.

This second investigation would lead to a second report and plan, including proposals for necessary monitoring and frequent and regular review and evaluation.

I want to end by quoting Thomas Hammarberg, former Human Rights Commissioner of the Council of Europe and a great children's rights advocate:

*"It's in all our interests to stop making children criminals. We should therefore treat them as children while they are still children and save the adult criminal justice system to adults."*

## 7.5. Ankie VANDEKERCKHOVE:<sup>23</sup> About the Coe's Child-friendly justice Guidelines

In this short presentation I will take you for a stroll through the guidelines on child friendly justice as they were approved by the Committee of Ministers of the Council of Europe on November 17<sup>th</sup> 2010.<sup>24</sup> The guidelines were sent to the Ministries of justice in all member states but it remains to be seen if and how they have been implemented in practice up until now.

Reading through the guidelines it is also worthwhile to read the explanatory memorandum as well.

Within the Council of Europe an interest in child friendly justice was raised by several factors and on several occasions:

- The Convention of the Rights of the Child and the European Convention on Human Rights and Fundamental Freedoms, as well as several other conventions pertaining to children, all need to be applied in court settings for children as well;
- Council of Europe high level conferences in Stockholm, 'Building a Europe for and with children: towards a strategy for 2009-2011' (Sept, 8-10 2008) and Toledo, 'The protection of children in European justice systems' (March, 12-13 2009);
- The Council of Europe resolution nr. 2 on child friendly justice from the Lanzarote convention in October 2007;
- The Council of Europe programme 'Building a Europe for and with children' and the strategies on children's rights designed for 2009-2011 and 2012-2015.

But even so, it is getting clearer and clearer that there is quite a gap between law on paper and law in practice when it comes to the rights of children and young people. Even though they get in touch with the judicial system, in the broadest sense, their rights are not always fully guaranteed. They encounter many legal, social, cultural and economical obstacles to their access to court, their lack of legal capacity probably being the most important one. When we think about children and justice, we tend to immediately think about them in criminal law settings, either as perpetrators or as victims. But children and young people have to do with the justice system in many other ways as well: their parents separate, they get in conflict with the school, they try to get asylum status (either unaccompanied or not), they get adopted...But judicial systems do not always treat children in an appropriate way. Children and young people themselves report on intimidating settings and proceedings, lack of understandable information, lack of legal aid, long lasting proceedings etc and they seem to have a general mistrust for the system as such.

Still, when it comes down to having one's rights protected, courts are the mandated instances to do so. With the guidelines we wanted to make the message clear that courts do not have to be child Unfriendly. On the contrary, if the justice system can work more in a child friendly way, it can be the most powerful way to defend, protect, uphold and guarantee children's rights in their daily lives.

With the guidelines, no new rights were invented. Fundamental rights for people under 18 have already been defined and put into binding law, both national and international.

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<sup>23</sup> Ms Vandekerckhove is the former Flemish children's rights commissioner. Independent expert of CoE and EU.

<sup>24</sup> For the text of the Guidelines and the memorandum, see Council of Europe: *Guidelines of the Committee of Ministers on child-friendly justice*, Monograph 5 of Building a Europe for and with children, Strasbourg, 2011. ([www.coe.int/children](http://www.coe.int/children))

Some fundamental rights are mentioned in the guidelines because they are so important, but basically the guidelines want to serve as a practical manual to work with children and young people in court settings.

Bearing in mind the need to enhance access to justice for children and young people and improve the way they are treated, practical support and awareness-raising on the importance of child friendly justice was what the Council of Europe aimed for with these guidelines. A multidisciplinary working group was established with members from several intergovernmental committees of the Council of Europe and independent specialists, both academics and people from the field practice<sup>25</sup>. During several meetings the working group drafted the guidelines and discussed on more than one particularity. The Committee of Ministers then approved the guidelines on Nov. 17<sup>th</sup> 2010, right before the Convention of the Rights of the Child birthday!

In the preamble reference is made to several important international conventions and recommendations, as well as to the relevance of ECHR case law, in which some specific cases can serve as proof of the lamentable situation of some children in court settings (most of these are included in the explanatory memorandum).

The preamble also touches on the role of parents and on the necessity of training, preparatory as well as on the job.

#### SCOPE AND PURPOSE, DEFINITIONS

The guidelines describe how to deal with the place, the role, the rights and needs of children and young people and should be applied in all kinds of judicial and pre-judicial proceedings, in civil, criminal and administrative law. It deals with children in all possible capacities; party, victim, witness, perpetrator...

Children are all people under 18, as defined in art. 1 of the Convention of the Rights of the Child. All children and young people fall under this concept, not only the nice children but also those that challenge us or present problems in society. There is no such thing as 'the' child; children live in different contexts, have different personalities and characters and have different backgrounds and family situations.

As parents, all people are considered who exercise parental responsibilities; it can also mean foster parents, adoptive parents, guardians and such.

Child friendly justice is 'justice in which all children's rights are implemented at the highest possible level, considering the child's level of maturity and understanding and the circumstances of the case.'

#### FUNDAMENTAL PRINCIPLES

##### 1. Participation

The right of children to be involved, to give their opinion on issues that affect them is one of the major principles of the Convention of the Rights of the Child (art. 12) This does not mean that a child is always right but it does pose decision making adults for the responsibility to give 'due weight' to the child's point of view, opinion or wishes. In its General Comment nr 12 on the right to be heard<sup>26</sup> the Committee on the Rights of the Child makes it very clear that this 'duty to listen' should not be taken lightly or easily discarded. Adults often assume that a child

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<sup>25</sup> The group included judges, attorneys, prosecutors, academics, psychologists, police officers, social workers and had observers from children's rights NGO's and international organisations.

<sup>26</sup> Gen. Comm. nr 12 on the right of the child to be heard (CRC/C/GC/12, July 1<sup>st</sup> 2009)

is unable to form an opinion on an issue. In a children's rights perspective however we could state that such an ability should be assumed and that the child should have to prove that he/she is able to express his/her views on a certain matter. Too often children are indeed more than capable to say sensible things about their own living conditions.

Under this heading, the issue of access to court also arises: the right to state an opinion becomes rather useless if one cannot get to the judge (or other decision making body) who should hear this opinion.

It is also remarkable how this 'getting to court' is often so much easier for children in conflict with the law than it is for children looking to have their rights protected e.g. in civil cases.

In the guidelines any reference to age was consciously omitted. The capacity to give an opinion depends on so many variables that any age limit is too arbitrary. This capacity should be assessed (in a multidisciplinary way) given the specific circumstances of the case and the specific character and maturity of the child concerned.

## 2. Best interest of the child

This principle refers to art. 3 of the Convention of the Rights of the Child and is one of the most complex articles of the convention. This is not just a moral principle; it is actually a right in itself, a legally binding norm. Respecting the best interest of the child goes hand in hand with respecting all the child's rights. Defining this best interest in any given case is not always easy and can differ greatly from one perspective to another. It is therefore important to have this best interest assessed by professionals. The child's view on his/her best interest should also be taken into account.

In the memorandum, some case law is cited in which the interest of the child may even overrule the interest of other parties concerned, e.g. grand parents or adoptive parents. The best interest rule should apply to all children. As often this principle is used in e.g. family conflict issues, so little it seems to get mentioned for children in conflict with the law!

## 3. Dignity

Respecting dignity is a basic human rights requirement, for adults just as it is for children and young people. Their integrity, both moral and physical should be respected at all times and there is no allowance for any degrading treatment or punishment.

## 4. Protection from discrimination

As said before, all children's rights should apply to all children without exception (art. 2 of the Convention of the Rights of the Child). Some difference in treatment is possible but this can only be legitimate on the child's specific requirements and situation, never on the child's age, sex, ethnic background, social status or any other specific vulnerability.

## 5. Rule of law

The rule of law, respect for due process and fair trial is one of the most fundamental principles in our society. For children and young people however, this principle deserves to be mentioned explicitly since it is still too often violated. Principles of legality, proportionality, legal aid, presumption of innocence are not as evident in proceedings involving children as they are for adults. One of the most common examples are the so-called status offences: behaviour (e.g. truancy, anti-social behaviour) that is not defined in criminal law but could still lead to prosecution simply because the assumed offender is under age.

## GENERAL ELEMENTS (BEFORE, DURING AND AFTER PROCEEDINGS)

The guidelines under this heading are important for all types of proceedings, in and out of court. They include rules on the necessity of getting correct and complete information and (legal) advice, on the importance of privacy protection, on safety measures for children and young people, on the much needed training of professionals working with children and young people and on required multidisciplinary work (for good practices, see the memorandum). Reference is also made to the binding rules regarding detention, which is still too frequently used, while it should be a measure of last resort and for the shortest time possible. Reference is made to many conventions, recommendations and comments of the Committee on the rights of the child on this issue.

Children and young people need to know their rights in order to be able to use and protect them and this is important from the very first step. They should be informed on all possible ways to have their rights protected and on what services they can rely on to do so.

The privacy of children and young people needs to be respected. Their names and other details by which they can be identified should not appear in media, methods of punishment involving 'naming and shaming' should be banned, trials should possibly be held in camera, with no access of the general public.

Training in children's rights is not merely a legal training but also involves gaining knowledge and expertise of child development, of loyalty issues and family systems, of communicating with children and young people.

## CHILD FRIENDLY JUSTICE BEFORE PROCEEDINGS

After quite some lively debate in the working group, reference was made to the Minimum Age of Criminal Responsibility (MACR). With different age limits (again, often only in criminal law, not in civil law where children are considered as children until their 18<sup>th</sup> birthday!) throughout Europe this is a widely debated issue. The guidelines repeat what the Committee on the Rights of the Child has stated in its General Comment nr 10<sup>27</sup> by stating that the MACR should not be set too low and should be defined by law.

The guidelines mention possible alternatives to avoid court procedures. Here again, it is important that children and young people are informed on those possible alternatives, such as mediation. The guidelines do not however express a preference for either way: sometimes mediation can be beneficial, while in other cases an recourse to a judge can be the most appropriate way to protect the rights of children. Either way, children need to be informed of the possible consequences of both types of proceedings. The role of legal services or ombudsman for children and young people cannot be underestimated in this respect. The quality criteria and legal safeguards, as stated in these guidelines, do apply equally on both proceedings in and outside court.

A specific mention is made concerning treatment of children and young people by the police. In cases of arrest, interviews and other contacts with the police these guidelines are just as important as they are in court, with a focus on respectful treatment, on the right of parents and the child to be informed, on safety and on legal counsel.

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<sup>27</sup> Gen. Comm No 10 on children's rights in juvenile justice (CRC/C/GC/10, april 25<sup>th</sup> 2007)

## CHILD FRIENDLY JUSTICE DURING PROCEEDINGS

The issue of access to court is a fundamental one: there is no use to talk about child friendly justice if the justice system is inaccessible for children and young people. Even though children do have inalienable rights as human beings, they are often not legally capable to exercise them effectively or to bring legal issues to court. This legal incapacity is usually meant as a measure of protection for children and young people but in some kind of perverse way this incapacity turns against them in cases when recourse to a judge could be beneficial for them while no one does so on their behalf. In most member states of the Council of Europe it is still as if recommendation 1121 (1990) doesn't exist. Paragraph 6 of this recommendation states that "children have rights they may independently exercise themselves, even against opposing adults."! Over 20 years later autonomous access to court for children and young people is still an exception to the rule.

Linked to access to court is the right to legal counsel. Independent lawyers acting on behalf of the child should support them, just as they would support an adult client. The child should have a free choice and the lawyer should not be paid by parents or other involved parties as to guarantee his/her independence. A system of free legal aid for children and young people should be developed within existing systems of free legal aid. The role of the child's lawyer is different from the role of court appointed guardians ad litem. The guidelines also advise to develop a training and recommend to work out a system of specialised youth lawyers, as it already exists in some countries.

As said before the right of the child to be heard is one of the guiding principles of the Convention of the Rights of the Child. Again, the Committee on the Rights of the Child has clearly stated that art. 12 does not leave any leeway for states to implement this right. Still, violations of this basic right are a reality for many people under 18.

Rather than age limits, the use of this right should be weighed against the child's level of maturity and understanding, given the circumstances of the case.

Children and young people need to know what will happen when they give their opinion: that it should be given due weight but that this does not mean that their opinion will always be decisive. They also need to be explained that this is a right, not a duty!

The memorandum elaborates on this guideline in depth, including e.g. a warning against a tokenistic approach and unethical practices.

As the time perception of (young) children differs quite a bit from that of adults, any undue delay should be avoided in proceedings where children are concerned. Priority rules and some flexibility should be expected.

Quite some attention is given to the court settings and different ways of making children feel more at ease: the interview rooms, the presence of an accompanying person, avoiding too many formalities, the used language...This does not mean that court settings should become childish: the setting may still be quite formal, but the behaviour of judges, prosecutors, bailiffs etc could be less formal or intimidating and more child friendly. When court settings usually are quite intimidating, even for adults, adding some Ikea-designed furniture alone will certainly not do the trick! The organisation of specific youth courts is strongly recommended.

While fully respecting the rights of the defence, guidelines are also formulated on some needed flexibility on evidence by children and young people. It should preferably be collected by trained professionals in specific settings to avoid secondary traumatisation or intimidation. Technologies such as video and audio links should be used so that direct

confrontations can be avoided. Children's testimony should not automatically be considered less valuable: it is, in the end, always the judge who will consider the validity of the given testimony or evidence.

#### CHILD FRIENDLY JUSTICE AFTER PROCEEDINGS

Children and young people should get a clear explanation on the content of the judgement and of the possibilities of appeal or damage claims. In (family) conflict situations, where the legal decision often does not solve the whole conflict in all its complexity, there should be additional guidance and support and execution by force (e.g. in custody cases) should be avoided.

In juvenile justice settings, the sanctions should be in line with the Convention of the Rights of the Child and be constructive instead of merely punitive, individualised and aimed at reintegration.

#### OTHER CHILD FRIENDLY ACTIONS

We are fully aware that child friendly measures are not only needed in judicial settings. Respecting rights and needs of children and young people requires a lot more than a more child friendly organised justice system. To name a few elements of more child friendly accompanying policies:

- Research on how children and young people perceive and experience such proceedings, on how they should be interviewed...
- General measures on easily accessible children's rights information (in curricula, in specialised youth centres, help lines...);
- Establishment of children's rights commissioners, ombudsmen with accessible complaint mechanisms. They should use these guidelines in their review of law and policies, as a framework for handling complaints, in training sessions and in informative material for children and young people.
- More cooperation between services working for and with children and young people...

#### MONITORING AND ASSESSMENT

These guidelines have been communicated to all Council of Europe member states but it is not clear whether and how they have already been implemented. It should be monitored if this is the case: has there been any law or practice review and adjustment? Has there been any training of involved professionals whatsoever?<sup>28</sup>

It is also recommended that in screening the child friendliness, children and young people themselves should be involved, as well as children's rights commissioners and expert NGO's on the field.

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<sup>28</sup> I myself, e.g., have been invited by the Flemish youth lawyer association for a short introduction to the guidelines, which is a nice start but can hardly be considered as a real training.

## WHAT DO YOUNG PEOPLE SAY?

Besides a hearing with leading international NGO's, children and young people themselves were also involved in the drafting process. It is important to point out that the children and young people who took part in the research, all had experience in dealing with police or courts. A questionnaire was developed by prof. Ursula Kilkelly (University of Cork, Ireland) and distributed among 3721 youngsters with the help of several NGO's and children's rights commissioners. This was the first attempt of the Council of Europe to actually involve the real stakeholders. Assuring authentic participation is never easy but a genuine effort was made and several of the young people's remarks led to changes in the draft guidelines. A lot of their input showed similarity with children's comments and input in other existing research.

Issues on which their input was highly valued were a.o.:

- The implementation, or the lack thereof, of their right to be heard in proceedings that involve them;
- The need for explanation and feedback on what is happening;
- The need for different kinds of supportive services for children and young people;
- The important role that parents play. More than on professional services for them, children and young people seem to rely on their parents more than we imagined.
- The need to be allowed to rely on persons they can trust (not only parents);
- Their wish to interact with the decision making person directly, not to have their views being 'translated' by yet another intervening professional;
- Their right to access independent trustworthy and effective complaint mechanisms or children's rights champions;
- The importance of confidentiality.

In conclusion I would like to add that getting to work with these guidelines in fact does not require huge budgets or major changes. It will however require, for some at least, a huge change of mindset in dealing with children and young people and learning to see what children and young people are really all about and what their competencies are.

## 8. The ombudsman's international work in the field of children's rights

### 8.1. European Network of Ombudsperson for Children (ENOC)

*ENOC Position Statement on  
„The rights of children/young people in conflict with the law’  
Adopted at the 16th ENOC General Assembly, 12 October 2012, Nicosia*

*“Children should not be treated as criminals”*

We, European Independent Children's Rights Institutions (ICRIs), members of ENOC, express our deep concern regarding the position of children in conflict with the law in our countries and notable deficiencies in States' policies to react to their needs and interests.

Children in conflict with the law are children first and do not lose their human rights, including rights to special treatment and protection, to education and to health services. We strongly stress the need for substantial review and where necessary improvement of existing laws, policies and practices across Europe, in line with the Convention on the Rights of the Child and other relevant international instruments and standards.

We make this call based on the results of the Survey conducted among ENOC members in 2012 and the conclusions and recommendations of the independent expert as well as the proposals of the European Network of Young Advisors, as expressed at their meeting in Warsaw in August 2012.

Having regard to the Convention on the Rights of the Child, different UN standards and guidelines (“The Riyadh Guidelines”, “The Beijing Rules”, “The Tokyo Rules”, “The Bangkok Rules”, etc), the CRC General Comment No.10 - “Children's Rights in Juvenile Justice”, the Guidelines of the Committee of Ministers of the Council of Europe on Child - Friendly Justice, the ENOC Statement on Juvenile Justice (2003) and other relevant instruments and standards,

We consider that the following measures and recommendations should be endorsed, implemented and supported by European states:

1. The principles of the best interests of the child must be paramount. Non discrimination, irrespective of any difference, and the right of children to be heard, express their views and opinions should be mainstreamed in the laws, policies and practices dealing with children in conflict with the law.

2. Early preventive measures and interventions through education, social protection, health services, child friendly justice systems and work in local communities are key factors in prevention of behaviour that brings children into conflict with the law and reoffending. Prerequisites for success are planning, comprehensive, fast and efficient measures targeting risk factors (including facilities such as care and accommodation for children at risk) and awareness-raising.

3. Schools should have clear policies and child-sensitive systems in place for handling behaviour of students. They should establish good cooperation with parents and with local social services, and focus on students' character development, building their interests and talents, training and promoting their involvement in conflict resolution, respecting their

diversity and individuality and offering additional support to children with special educational needs.

4. The minimum age of criminal responsibility (MACR) should be clearly defined by domestic laws and raised progressively as high as possible, up to the age of 18. The position and the rights of children in conflict with the law below the MACR should be clearly defined and their broader protection secured. Treatment in the justice system of children in conflict with the law above the MACR should always take into account alongside their age, their level of maturity in accordance with the principle of the evolving capacities of children and their vulnerability.

5. Children in conflict with the law should always be entitled to separate legal representation and/or legal aid by trained lawyers on children's rights.

6. Measures alternative to custody and robust application of Restorative Justice, should be adopted in the law, developed and efficiently implemented in practice. Alternative and restorative measures, chosen and adapted to the particular child and the circumstances of the case, considering their opinion and needs, should be used to the highest possible extent, leaving repressive measures always as "the last resort". If the child is deprived of liberty and placed into specialised institutions, the effects of the placement on the child should be subject to regular inspection and supervision. All services should be monitored by independent authorities, with participation of the children involved.

7. All professionals working with children in conflict with the law should be appropriately, comprehensively and continuously trained not only about the legal aspects of children's rights and child friendly justice, but also about characteristics and specificities of children, childhood, child's development and evolving capacities. This obligation should apply to both professionals in prosecution and justice systems (police officers, prosecutors, judges, lawyers, probation officers) and professionals in penitentiary institutions, correctional facilities, social, health and education services and institutions and media.

8. Data regarding children in conflict with the law, as well as procedures and measures taken against them should be systematically and comprehensively collected, elaborated, harmonized and disaggregated and should be available and securely shared between respective authorities and ICRI's.

9. Any criminal records of children in conflict with the law should be strictly confidential and retained only for a limited period of time after completion of their sentence, while there should be provisions in law and in practice, so that records of other measures imposed to children (such as educational or other reformatory measures) are expunged once the young person reaches the age of 18. The right of the children to private life and data protection rules should clearly apply and implemented in all such situations.

10. Rehabilitation and reintegration services especially at local level, based on inclusion and support to the child in conflict with the law, should be established, developed and strengthened, staffed by multidisciplinary teams of professionals. Resettlement after custody should be assured.

11. Efficient, independent, impartial, available and child-friendly internal and external complaint mechanisms should be established and developed. Children in conflict with the law should be fully informed about their right to file a complaint and supported to make complaints within appropriate structures when necessary.

ENOC urges European states to review their laws, policies and practices on prevention and intervention regarding children in conflict with the law and to harmonize them with international treaties and adopted standards.

ENOC urges European states to review the role and position of their Independent Children's Rights Institutions, with a view to harmonising their respective legal frameworks with the Paris Principles and other relevant international standards, and strengthen these Institutions' capacities for the effective fulfilment of their role in the protection and promotion of the rights of the child.

*Summary of the major implications of the Convention on the Rights of the Child for juvenile justice systems*

Children in the Convention are defined as everyone under 18 (*article 1*);

All the rights in the Convention must be respected and ensured for all children without discrimination on any ground (*article 2*);

The best interests of children must be a primary consideration in all actions concerning them (*article 3*);

Children's views must be heard and taken seriously on all matters that affect them, according to age and maturity (*article 12*).

There must be no torture, inhuman or degrading punishment or treatment, capital punishment

nor life imprisonment without possibility of release;

Arrest, detention and imprisonment must only be used as a measure of last resort and for the shortest appropriate time;

Any child deprived of liberty:

- must be treated with humanity and respect, taking account of the needs of people of his or

her age;

- must be separated from adults unless not in the child's best interests;
- has the right to maintain contact with family through contact and visits;
- has the right to privacy;
- has the right to prompt access to legal and other assistance;
- has the right to challenge deprivation of liberty through court, etc and to prompt decision.

(*article 37*)

Any child who may have offended has the right:

- To be treated in a manner consistent with the promotion of the child's sense of dignity and

worth, taking into account the child's age and the desirability of promoting the child's reintegration

and assuming a constructive role in society;

- To detailed due process guarantees;
- To have their privacy fully respected at all stages of the proceedings;

States are required to:

- Promote the development of laws, procedures, authorities and institutions specifically applicable to children who may have offended;

- Promote as appropriate measures not involving judicial proceedings;
- Establish a minimum age below which children shall be presumed not to have the capacity

to infringe the penal law;

- Make available a variety of dispositions to ensure that children are dealt with in a manner

appropriate to their well-being and proportionate both to their circumstances and the offence.

(article 40)

Additional standards are provided by the 1985 United Nations Standard Minimum Rules for the

Administration of Juvenile Justice (*the Beijing Rules*); the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the 1990 United Nations Guidelines for the

Prevention of Juvenile Delinquency (*the Riyadh Guidelines*)

## 8.2. Renate WINTER:<sup>29</sup> Child friendly justice, a promise and a challenge

Bringing a child into contact with the criminal justice system is an extremely difficult issue. Decisions have to be made that will affect that child's future. The first issue to be decided is whether it is even necessary or wise to bring a child before a justice system. In my opinion it is necessary to look first at ways to prevent children coming before a justice system before thinking about solutions on how to deal with them when they are already involved in it.

In most countries around the world, juvenile prisons, detention centers, closed institutions – whatever they are called - are overcrowded. Children who should not be detained in the first place, as their crimes are petty in nature, are kept far too long in such places (very often under the pretext that no other penal reaction is available). The fact that there are so many of them detained is an obstacle to the provision of sensitive and efficient assistance in terms of education, health care and vocational training, and, according to the terms of the law, these children are detained in order to receive such assistance and education. Overcrowding has therefore to be avoided in order to allow for treatment and (re)integration.

In many of the member states to the UN there is theoretically the wish to use diversion and alternatives in order to remedy to this problem, but in practice, despite the fact that there has often been a lot of information and training for the professionals in the juvenile justice field, not very much has been implemented and still many children are held in police custody, pretrial detention or detention as a punishment.

There are several reasons for that as I have been able to see in numerous countries. If these reasons are not taken into consideration together, I don't think, that we will advance very rapidly, if at all.

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<sup>29</sup> Judge, vice-president of the Sierra Leone Special Court in 2008-2010, elected member of the UN Committee on the Rights of the Child from 2013. His presentation was delivered on the ENOC conference held on 12 October 2012 in Nicosia.

- 1) Training and information is not provided to politicians who are not ready to lose voters in being “soft” on crime. For them, children are not really of interest as they are not voters and thus politicians must be made understood that it is in their own interest to have as less closed institutions as possible and to use alternatives instead. This is possible only via financial arguments that show that deprivation of liberty is the most costly and the most inefficient way of dealing with children in conflict with the law.
- 2) Information campaigns are needed as well for the information of the public about facts e.g. that the level of criminality of children and adolescents is NOT raising, that alternatives are NOT “a soft reaction” but a pedagogic one and by far more effective most of the time on top of it; that it is better to get restitution than having children stigmatized who will then never have the possibility to get out of the vicious circle and become citizens able to maintain themselves. This way it would become by far more difficult for politicians to use populist rhetoric, creating ideas of fear and revenge.
- 3) The argument that institutions exist already and buildings have to be maintained and thus children have to be sent there because one has to pay for the costs of the buildings already and cannot afford extra costs for alternatives has to be answered. Buildings harboring institutions can be used as well when they are open ones and could provide space for the execution of many alternatives (often the arguments brought forward, complain about the lack of space anyway)
- 4) The same goes for the argument that in closing institutions, especially closed ones, a lot of people would lose their jobs. As the execution of diversion and alternatives needs personnel, the door is open for the personnel of closed institutions to get training on how to deal with children in a child friendly way and to assist them in fulfilling their obligations, as ordered by the relevant authorities.
- 5) In countries where religion plays a big role, where repenting and punishment is deemed indispensable, policies have to demonstrate that excuses in whatsoever way (the condition sine qua for alternatives) mean repenting and that a positive act correctly done by the child is equivalent and has even more religious value than punishment. In this context, it is important not to forget about girl children who are very often in a by far more endangered position as boys.
- 6) In very paternalistic societies, where children have no say whatsoever and thus cannot contribute to several restorative mechanisms, other alternatives, such as carefully drafted orders in the best interest of the child, well explained to professionals concerning the extra value for the society, could be still another way for implementing alternatives into the juvenile justice system.
- 7) Very often the lack of professionals, be it specialized judiciary, be it social workers or trained police is another argument for not implementing alternatives that exist already in the law. As member states in this regard most often argue that money for training and/or employing such professionals is not available, assistance should be given through international programs in a way to set incentives for the state in question to hire trained personnel if proper training for a longer period is provided pro bono. Even the argument that the legal system would not allow for specialization of judicial personnel is in the end a matter of finances. Thus, again, it must be made clear that specialized personnel act in a by far better, quicker and more effective way than not specialized ones which will save costs already in a near future.

It is not documents, treaties, recommendations, etc that are missing in order to show that alternatives, as measures in the best interest of children, should be implemented.

Art.40 of the CRC states that State Parties should seek to promote, whenever appropriate and desirable, measures for dealing with children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

In the preamble to the Compendium of the UN Standards and Norms in Crime Prevention and Criminal Justice, the basic principles on the use of restorative justice programs in criminal matters, as already mentioned in Economic and Social Council Resolution 2002/12 , annex, are dealt with in great length. General Comment No 10 (2007) of the Committee of the Rights of the Child again mentions that a comprehensive policy in juvenile justice has to provide methods differing from punishment and including alternatives to it, and general Comment nr 12 (2009) stresses the conditions for the participation of a child in legal proceedings. The recommendation CM/Rec (2008) 11 of the Committee of the Ministers to Member States on the European Rules for Juvenile Offenders subject to Sanctions and Measures again deals with the same issue. The Guidelines of the European Union for a child friendly justice are another instrument to focus on the value of alternatives and diversion mechanisms. This is just to mention a few international documents.

Let us go back now to the legal possibilities to insert diversion and alternatives as the most promising method of dealing with children in conflict with the law into a juvenile justice system. What problems do we encounter?

- 1) In several systems only a few possibilities are given to the authorities concerned and those possibilities are clearly defined. In this case it is rather problematic for the judge, the prosecutor or any other authority concerned, to opt for an adequate reaction, if this reaction doesn't fall under the strict definition of the law. As children have quite a range of problems and a lot of "great ideas" for misbehaving, pedagogical answers of the system should be tailored to the child's needs. This is possible only, if the tools available in the law are broadly defined to give the concerned authorities enough room for finding appropriate solutions to individual problems.
- 2) The legal framework provides for conditions for the use of diversion and alternatives only, in order to give the professionals the possibility to react to the individual cases as mentioned above. Often the judiciary, especially the not specialized one, is insecure and doesn't dare to act at all, unless directives for using diversion or alternatives are given to them, be it by administrative authorities (which endangers the independence of the judiciary) or by the High Court /Supreme Court, which takes a lot of time. In such case, training of professionals by their own authorities is of primordial importance.
- 3) In different systems different professionals can have the legal power to divert a case or to recommend alternatives. These professionals usually depend on different ministries and more often than not have different orders/recommendations to consider. Thus there should be a close cooperation and a good mutual system of information established as well as a common training on child issues for all partners in the field, including NGO's if they are engaged in the execution of the chosen tool.
- 4) The network necessary for implementing diversion and alternatives is not only a practical necessity, but must be regulated by law or ordinance as well, in order to legitimize the actors, whoever those actors might be. There is usually a wide range of

actors available in each country, if the legal bases are set clearly (and of course, if the financial part is regulated)

Let us take a simple example:

A group of 15 year old boys have vandalized benches in a public place. If made to repair those benches, would they not quickly learn to understand how much work goes into making the benches and about their value? Would that not be more effective than awarding formal punishment, thus stigmatizing and labeling a child as a good for nothing criminal? (Not to speak about the fact that the child could learn a wood craft through repairing the benches!) I think most of the people would agree to that, if properly executed. To do that, what would we need?

- 1) somebody who knows about the availability of such measure
- 2) somebody evaluating the children and their circumstances
- 3) somebody who can decide, if the children will profit from the measure
- 4) somebody who will find out about the opportunities to get wood, to find a place where children can learn how to repair, to finally repair without being abused and without abusing, in short, who knows about the necessary network
- 5) somebody, (probably person nr 1,2 or 4) who will report about the finalization or non-finalization of the work to the deciding authority (probably person nr 1 or 3)

Not a really difficult enterprise, is it?

Children living in difficult circumstances are those who would most likely eventually drift into more and more serious criminal behaviour. For those children assistance in the form, for example, of education, vocational training, social services, and integration into a valid social system, is necessary. What is not necessary, and what can impact negatively on the developing child, is bringing them into contact with any kind of justice system. Such children then might become those in conflict with the law, and they can develop from children who have committed very minor offences to children, committing very grave ones as they have had contact with the justice system, often in its worst form – a closed institution, the well-known academy of crime.

I am not going to discuss the systems of welfare, retribution or restoration and their answers to deviant behavior, but rather to address the problems, Cyprus might have.

First of all: Is there a coherent juvenile justice code, dealing with the above mentioned alternatives and diversion and referral mechanisms in order to secure that deprivation of liberty is a matter of last resort only? A bill concerning prevention of deviant behavior, protection of children, be it under-aged child perpetrators, child victims or child witnesses? Such codes would assist the development of a child appropriate juvenile justice by far better than dispositions to be found in different legal documents, decrees etc, because judges, prosecutors and juvenile justice administration would find the relevant dispositions quickly and completely. The establishment of such codes will already bring the necessity to treat children differently than adults into the focus of the legislative and thus to parliament.

In case such code exists, does it have a special procedural part, taking into consideration the principle of best interest in all action taken for or against a child? Are there special procedures adapted to the vulnerability of children? All dispositions established in the above mentioned international documents will have to find their place in these codes in order to guarantee all substantial rights of children in conflict with the law.

Second: Is there a special court for juveniles with special jurisdiction and specially trained personnel so that no judge, overburdened with adult cases, would have the need to declare not to have time enough to deal correctly and in a child appropriate way with the children before him/her, or not to have the possibility due to time constraints to find out about the best solution for the problems of a given child?

Is there a chapter dealing with the conditions of deprivation of liberty of children, be it in police custody, in pre-trial detention, in detention as punishment, in closed medical facilities to safeguard and protect children from mistreatment and abuse of power?

Third: Is there a network of open and semi-open institutions, foster parents, host families, referral mechanisms established? Are there social workers, probation officers, mediators available? The best law, the best judge, the best prosecutor will not be able to function in a child friendly and effective way, if there is no network to execute his/her orders. If there is no assistance or correct and timely information provided, the best possible decision in the best interest of the child, safeguarding as well the interests of the population cannot be found.

And finally: Is there training to get well informed stakeholders in juvenile justice? In special legislations for children one can find often the right and the duty of stakeholders such as judges to participate regularly in training seminars as an on-the-job-training or in national and international seminars to upgrade knowledge concerning modern developments in the field of juvenile justice and skills in dealing with children in a child friendly way.

If such a development in the best interest of the children has taken place, the Guidelines of the European Union concerning child friendly justice certainly could be implemented.

In this regard, allow me to speak just a little bit of restorative justice, the most recent development among the different systems of justice, based on the very old thought of reconciliation, namely to bring victim and offender together for their sake as well as for the sake of the community where they will have to live together one way or the other, a system that is based on responsibility rather than on guilt. There are many traditions, many ways to solve a conflict, especially when a child is involved as perpetrator. There are techniques of victim-offender mediation, there is service for the community, there is group counseling, family counseling a lot more of alternatives, depending on the case at hand.

What sorts of cases would be suitable to consider using alternatives? I would purport that it is not the types of cases that are important when making this consideration, as theoretically all kinds of offences could be considered in which an offender violated a person or a relation or property, but the type of persons involved.

It is the person of the offender that matters most for enabling a decision on whether to use an alternative in a given case. The offender has to wholeheartedly accept responsibility for the offence committed. If the offender claims innocence, a trial must take place to ascertain innocence or guilt, and the presumption of innocence has to be respected. Furthermore, if it is established that a child has committed an offence against another person but is not ready to admit to having done wrong, or if a child is not capable of taking responsibility for the offence, an alternative procedure cannot take place.

In cases where the victim and offender can reach an agreement, but the community is not inclined to accept the outcome, it will be a difficult task for a facilitator, who should be a person who is qualified and well trained, to convince members of the community of the common advantage. Fortunately, such cases occur rarely in the juvenile justice sphere as communities are consistently willing to accept the reparative efforts of a child.

Thus, the most important questions in order to design a valid concept of alternatives are the following:

Is the offender ready to apologize and to put the wrong right? Is the victim ready to accept an apology and accept the efforts of the offender to repair damage caused? Is the community ready to accept and rehabilitate the offender? Is the community ready to accept the reintegration of the victim? (I say this because in many cultures, victims, for example victims of rape, are also considered guilty and are stigmatized.) Almost none of these questions will be even addressed in a classical trial.

Maria is one of many children who have repeatedly stolen sweets from a shop. After an evaluation of the case by a social worker which was requested by the judge, Maria makes a commitment to attend a session run by a policeman and a woman who also has children and who works in a supermarket. There the consequences of shoplifting are discussed with a group of children and it becomes clear to them that they didn't harm an anonymous association, but an employee, responsible for correct money management. Maria then promises to assist in cleaning the shop on four consecutive weekends. The shopkeeper agrees to this, as does the judge. Maria keeps her promise. The social worker who stays in contact with Maria and her family, as well as with the shopkeeper, submits a report to the judge which is signed by the social worker, Maria and the shopkeeper. The judge has given Maria a warning and the case is closed. Maria has learned the lesson and will not re-offend.

Would Maria have learned this lesson better in a court trial or while in detention? Would Maria have found it easier to accept and understand why she was being punished, and be convinced that she should not re-offend when she would find it difficult to face classmates at school or to find future employment as she was stigmatized as a thief?

Would Maria's classmates have been happier to see her return from court or prison? Would the shopkeeper have been happier knowing that Maria was incarcerated, knowing that he wouldn't get any recompense from a jobless person, knowing that he has to support Maria now in prison with tax payers money, knowing that there will be now war between Marias family and him?

Would the community have been happier to remain with unsolved problems between people supposed to live there together, to know that Maria most probably will not find a way to support herself, but has to be supported?

I hope my questions can assist in drafting a law for children that includes a sound basis for the use of diversion and restoration practices as the better alternative to keep children on the right track.