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REPUBLIKA SLOVENIJA
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Building a Europe for and with children

Construire une Europe pour et avec les enfants

European Union – Council of Europe Joint Project on

IMPROVING THE JUVENILE JUSTICE SYSTEM AND STRENGTHENING THE EDUCATION AND TRAINING OF PENITENTIARY STAFF IN SLOVENIA (Component I)

International Research and Gap Analysis (Output 1)

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Executive summary

The document at hand is the international Research and Gap Analysis, developed under Output 1 of the Council of Europe Project on "Improving the juvenile justice system and strengthening the education and training of penitentiary staff in Slovenia".

The aim of this Analysis is to assess the compatibility of the Slovenian juvenile justice system with international standards in light of the findings of the national Research and Gap Analysis and the legal analysis of the draft ZOMSKD[1] (draft "Liability of minors for criminal offences Act"). The Analysis also identifies some further aspects or issues that are not sufficiently addressed in the National Analysis and for which there are solid standards at international level. It then provides high-level recommendations to improve the draft legislation in light of international and regional instruments.

The International Research and Gap Analysis takes into account the structure of the National Analysis and of the draft ZOMSKD and provides a comprehensive overview regarding three axes which are interconnected: a) criminal sanctions; b) proceedings and c) enforcement of criminal sanctions. These axes are analysed on the basis of the existing legislation, the gaps identified in practice, possible responses offered in the draft ZOMSKD, as well as gaps of the draft ZOMSKD in this respect and suggestions for future improvements.

In the first Part, which addresses the criminal sanctions of the juvenile justice system, the International Analysis proceeds initially with some general considerations pertaining to the terminology used in the draft ZOMSKD, the establishment of the minimum age of criminal responsibility and the age groups of juveniles, as well as the purpose of sanctions in the Slovenian juvenile justice system. The recommendations are based on the need to safeguard the presumption of innocence of the child alleged as or accused of having infringed the criminal law, to take into account recent international standards in the field of age determination and to emphasise even more the reintegration purpose of sanctions and measures.

Moreover, this Part includes a thorough analysis of the criminal sanctions that can be imposed on a juvenile offender according to the draft ZOMSKD. The International Analysis stresses the importance of the individual needs assessment of the child and that this assessment should inform systematically all decisions and measures taken by the authorities before, during and after proceedings. Furthermore, the draft ZOMSKD regulates in details the non-residential and residential measures that can be imposed on a juvenile offender. Based on the findings of the National Research and Gap Analysis, the International Analysis proceeds with a set of

[1] Zakon o obravnavanju mladoletnih storilcev kaznivih dejanj (ZOMSKD), EVA: 2018-2030-0046.

recommendations aiming at clarifying the scope of the provisions pertaining to the placement in an educational facility or a training institution as well as at encouraging the Slovenian authorities not to keep in the draft ZOMSKD mandatory minimum duration for the placement in a correctional home or the juvenile detention. The International Analysis further deals with the safety measures that can be ordered by the judge and recommends the clarification of the criteria for the exceptional imposition of such a measure in the draft ZOMSKD instead in KZ-1 where currently this issue is regulated. The value of specialised training that could be offered to judges is highlighted regarding all criminal sanctions. On a general note, the International Analysis emphasises the need to concentrate on building the capacity of the facilities to accommodate every child who is placed therein in accordance with their individual needs rather than on establishing a system of specialised institutions.

The second Part of the International Analysis explores the proceedings that are regulated in the draft ZOMSKD. The diversion processes are indeed given priority by the draft law and the International Analysis makes a set of recommendations: to enhance the protection of the child's rights in the choice and implementation of a diversion measure; to ensure a wider understanding of the requirements for such procedures by professionals and to allow for a broader range of available diversion measures in the draft ZOMSKD.

This Part also deals with the need to monitor the quality of specialised training offered to lawyers who are qualified to work with children in the juvenile justice system and to ensure that all children are -as a rule- assisted, where relevant free of charge, by a lawyer from the earliest stage of their encounter with police officers. The need to more often accord mandatory legal defence in practice for children who are accused of offences which are punishable with less than three years imprisonment is also stressed.

Furthermore, the International Analysis examines the restrictive measures of pre-trail detention and of temporary supervision and placement. For pre-trial detention, it encourages the authorities to maintain its exceptional character and to ensure the effective exercise by the child of the right to information as well as appropriate screening and training of professionals who come into contact with detained children. Regarding temporary supervision and placement, the authorities are encouraged to provide clear guidance on the conditions under which these restrictive measures can be imposed and to prioritise the child's protection over the commencement or continuance of criminal proceedings. The last topic of Part 2 concerns the length of proceedings, and the International Analysis contains targeted recommendations to either amend the draft ZOMSKD or adopt judicial standards for the acceleration of proceedings.

The third Part deals with the enforcement of criminal sanctions. First, the International Analysis identifies the need to ensure, through training, a harmonised practice in terms of swift

commencement of the educational measure. In addition, the authorities are encouraged to amend the Catalogue and prescribe more frequent contacts and more diverse and individualised activities with juvenile offenders. Adequate human, financial and technical resources are important for an effective operation of social services centres.

Regarding disciplinary measures, the International Analysis strongly recommends the prohibition of solitary confinement under any circumstances and also recommends the revision of the draft ZOMSKD so as to better define that any exceptional separation of the child from others should be used only as a measure of last resort for the protection of the child or others. It is also strongly recommended to not include deprivation of education as part of disciplinary measures.

The Analysis identifies also the need for adequate programmes and appropriate arrangements to promote the reintegration of juvenile offenders who have completed their sanctions into the community. The authorities should also ensure that the draft ZOMSKD includes a provision providing that records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same person. The issue of specialised training for all professionals who come into contact with children during the enforcement of an imposed measure or sanction is also very important.

At the end, the Analysis contains a list of all recommendations which aim to enhance the compliance of the draft ZOMSKD with existing international and European standards.

Introduction

The Council of Europe is currently implementing a Project on "Improving the juvenile justice system and strengthening the education and training of penitentiary staff in Slovenia". This Project aims to support the Slovenian authorities in the reform of the juvenile justice system. It started on 1 September 2021 and will be completed on 31 May 2023.

The key outcome of the reform process is expected to be the improvement of the juvenile criminal justice system in Slovenia through new legislation and policies that are in line with European and international standards and good practices.

The project's objective will be achieved through four axes of activities, strongly interconnected and in particular, through:

- a Research and Gap analysis report (Output 1),
- an Analysis report of the juvenile justice case-law (Output 2),
- a Comparative Study of European standards and promising practices (Output 3) and
- Recommendations and roadmap for their implementation (Output 4).

The document at hand is the international Research and Gap Analysis, developed under **Output 1**. The aim of this Analysis is to assess the compatibility of the Slovenian juvenile justice system with international standards in light of the findings of the national Research and Gap Analysis and the legal analysis of the draft ZOMSKD[2] (draft "Liability of minors for criminal offences Act"). The Analysis also identifies some further aspects or issues that are not sufficiently addressed in the National Analysis and for which there are solid standards at international level. It then provides high-level recommendations to improve the draft legislation in light of international and regional instruments. Given the overall context of the Slovenian legal order, it may be not be excluded that issues addressed under the recommendations fall within the scope of other pieces of legislation, such as the ZKP, the KZ-1, the ZIKS-1 and the ZOOMTVI.

The International Research and Gap Analysis takes into account the structure of the National Analysis and of the draft ZOMSKD and is divided into three Parts (criminal sanctions, proceedings, and enforcement of criminal sanctions). Each Part contains an analysis of international and regional standards for the most relevant topics and an assessment of the national context. The Analysis at hand does not focus on aspects of the national context that do not raise compatibility questions from an international perspective. Recommendations are made at the end of each topic. A list of all recommendations is available in the Appendix.

[2] Zakon o obravnavanju mladoletnih storilcev kaznivih dejanj (ZOMSKD), EVA: 2018-2030-0046.

Part I. Criminal sanctions

1. General considerations

1.1 Terminology used in the ZOMSKD

As a general remark it should be noted that when referring to children alleged as or accused of having infringed the criminal law, the draft ZOMSKD sometimes uses the word "offender" or otherwise uses a wording which states that the offence has indeed been committed by the young person in question. Indicatively, Article 47 sets out that "If a juvenile **has participated** [instead of "is accused of having participated"] **in a criminal offence** together with adult offenders, the proceedings against the juvenile shall be separated and conducted pursuant to the provisions of this Act"; Article 48 mentions that "[i]f an **offender** committed [instead of "is a juvenile accused of having committed"] one criminal offence as a juvenile and another as an adult, joint proceedings shall be conducted (…)"; Article 49 concerns "actions of the competent authority if the **offender** is under the age of fourteen" whereas in Article 4 sets that a child of this age cannot be an "offender", etc.

More terminology issues will be analysed under the relevant section.

It is recommended that the wording of the draft ZOMSKD be revised so as to ensure that the presumption of innocence of the child alleged as or accused of having infringed the law is fully respected.

1.2 Minimum age of criminal responsibility and age groups

Under article 40 (3) of the CRC, States parties are required to establish a minimum age of criminal responsibility, but the article does not specify the age. The most common minimum age of criminal responsibility internationally is 14[3]. However, developmental- and neuro-scientific evidence indicate that adolescent brains continue to mature beyond the teenage years and well into early adulthood, affecting certain kinds of decision-making[4]. Therefore, States parties are encouraged to set a higher minimum age, for instance 15 or 16 years of age. Although

[3] See, CRC, General Comment No 24 (2019), para 22.

[4] *Ibid. See also,* Hartley CA, Somerville LH., "The neuroscience of adolescent decision-making*", Curr Opin Behav Sci*., 2015, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4671080/; Staci A. Gruber & Deborah A. Yurgelun-Todd, "Neurobiology and the Law: A Role in Juvenile Justice", *Ohio St J Crim L*, 2006, p. 321-340; Kambam, P. and Thompson, C., "The development of decision-making capacities in children and adolescents: Psychological and neurological perspectives and their implications for juvenile defendants", *Behav. Sci. Law*, 2009, p. 173-190.

the setting of a minimum age of criminal responsibility at a reasonably high level is important, an effective approach also depends on how each State deals with children above and below that age[5].

Moreover, according to international standards, if there is no proof of age and it cannot be established that the child is below or above the minimum age of criminal responsibility, the child is to be given the benefit of the doubt and is not to be held criminally responsible[6].

Article 4 of the ZOMSKD provides that a child who was not yet fourteen years old at the time of an alleged commission of an illegal act cannot be held criminally liable. This provision is in line with international standards. In addition, **Article 5** of the said draft law maintains the age system according to which sanctions will be imposed and continues to establish groups of younger and older juveniles as well as young adults[7]. This categorisation should be commended, because it expands the scope of application of the ZOMSKD to young adults and it is combined with less drastic dispositional options for younger juvenile offenders. At the same time, caution should be exercised to the wording used in Article 5. This provision if entitled "age of the **offender**" and in its first paragraph sets that "**A juvenile is an offender** who was over the age of fourteen but under the age of eighteen at the time of commission of a criminal offence" (emphasis added). However, the word "juvenile" is also used (throughout the ZOMSKD for children who have not been recognised as having infringed the criminal law, but they are alleged as or accused of having infringed criminal law[8]. Thus, for the sake of clarity and to avoid any misunderstandings as to the presumption of innocence, article 5 should be reworded. Similar considerations apply with regard to **Article 6** ("age of the offender").

In addition, the draft ZOMSKD sets forth that "[w]hen the age of an offender cannot be established, in the case of doubt as to whether they are over the age of fourteen, sixteen, eighteen or twenty-one, it shall be assumed that they are not over the age in question" (**Article 6**). This provision reflects the "benefit of the doubt" principle which is well recognised in children's rights international law and should be welcome. The draft does not, however, regulate in detail the procedure of age determination[9]. In this respect, it will be important that supporting regulation prescribe that age assessment procedures should be limited to situations where it is absolutely necessary and that any such procedure be child-centred and use a multidisciplinary approach, grounded in evidence-based knowledge, methods and practice.

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[5] *Ibid*.
[6] *Ibid*., para 24.
[7] The definition of young adults is slightly altered, since their age is relevant only to the time of the commission of the criminal offence and not regarding the time of the trial, as is currently prescribed in the KZ. See, National Research and Gap Analysis, page 54.
[8] See, indicatively, Article 7 (right to be accompanied and informed) which refer to "juvenile[s]" as well as the provisions on institutions of proceedings, pre-trial proceedings, etc.
[9] See, also, Legal Review of the Draft Act of Slovenia on the Liability of Minors in criminal offences (ZOMSKD), page 11.

Useful guidance in this respect can be given by the recent Recommendation CM/Rec(2022)22 of the Committee of Ministers to member States on human rights principles and guidelines on age assessment in the context of migration.

It is recommended to maintain the age groups of children prescribed in Article 5 but reformulate the wording of the said provision so as to ensure that the presumption of innocence of the persons who fall within the scope of the draft ZOMSKD is respected and that any risk of equating the notion of "juvenile" with the commission of an offence is averted.

In addition, the Slovenian authorities should adopt supporting regulation pertaining to the age assessment of young persons, taking into account the principles and guidance included in international standards, such as the recent Recommendation CM/Rec(2022)22 of the Committee of Ministers.

1.3 Purpose of sanctions and other measures

Article 40(1) of the CRC sets out the purpose of a juvenile justice system, which should be the **reintegration** of the child, and helping the child **assume a constructive role in society** (emphasis added). This comprehensive model of justice puts the focus on fostering the well-being of children and addressing the offending behavior in a manner appropriate to children's development. These principles should define all aspects of a juvenile system, including procedures against children alleged as or accused of having infringed the penal law as well as sentencing and enforcement of sentencing.

Article 6 of the ZOMSKD provides that "[t]he purpose of criminal sanctions and other measures in proceedings against juveniles is to provide them, through advice and warnings, protection and help, supervision, vocational training and development of their personal responsibility, with education, re-education and optimal development according to their abilities". This provision of the ZOMSKD intends to broaden the scope of the respective provision of KZ[10] and expands the purpose of sanctions for juveniles to all other measures that can be determined under the ZOMSKD[11].

This amendment is very welcome and subscribes to a non-retributive model of accountability. At the same time, however, it is noted that in practice the purpose of dispositions is not always understood or endorsed by all professionals involved in the juvenile justice system

[10] Article 73 KZ.
[11] See the explanatory memorandum of ZOMSKD and the National Research and Gap Analysis, page 54.

in Slovenia[12]. Against this backdrop, it may be useful to slightly adjust the wording of Article 6 of the ZOMSKD so as to formulate the purpose of sentencing in a way that will enhance the awareness of parties involved. National authorities may thus wish to consider indicating in an explicit manner the purpose of "**reintegration**" (emphasis added) in Article 6 of the ZOMSKD. Indeed, education, re-education and optimal development of children in conflict with the law will support them to successfully reintegrate into society.

In addition, the authorities may wish to reconsider the **title** of Article 6 of the ZOMDSK ("purpose of treatment of children"). As explained, this provision concerns the purpose of sanctions and other measures that can be imposed on children that have been recognised as guilty or in the context of diversion procedure. By contrast, the "purpose of the treatment of children" is a broader concept and may include, for example, procedural aspects and rights of children alleged as or accused as having infringed the criminal law. Thus, in order to avoid any confusion between the purpose of the treatment of children, on the one hand, and the purpose of sanctions and measures, on the other hand, the title of Article 6 could be reformulated so that it directly refers to the "purpose of criminal sanctions and other measures".

It is recommended to keep Article 6 in the draft ZOMSKD, reformulate its title and ensure that its content expressly indicates (alongside the educational) the reintegration purpose of sanctions and other measures.

2. Analysis of sanctions

2.1 Proportionality and consideration in the treatment of juveniles: individualisation

Children who are alleged as, accused of or recognised as having infringed the criminal law should have the right to an individual assessment which will identify their specific needs in terms of protection, education, training and social (re-)integration. The identification of the individual needs of the child should be carried out following, as far as possible, a multi-disciplinary approach, already from the first contact with the child. It should take place at the earliest appropriate stage of the proceedings (at an initial or pre-trial stage) and in due time so that the information deriving from it can be taken into account by the prosecutor, judge or another competent authority[13].

The individual assessment is a tool serving the child to promote all his/her rights as guaranteed under international and national standards and to ensure the child's effective

[12] See for example, the views of some stakeholders who stated that "punishment should not always be excluded" or that "retribution and general prevention might be appropriate goals to follow in the sanctioning of more serious juvenile offences", in the National Research and Gap Analysis, pages 29

[13] In principle before presentation of the indictment for the purposes of the trial.

participation in proceedings. This function of the individual assessment has both substantive and procedural dimensions. The assessment can thus be used for determining if and to what extent a child would need special measures during the criminal proceedings, the extent of their criminal responsibility and the appropriateness of a diversion process or a particular sanction or educative measure[14].

More specifically on the issue of sentencing, the CRC Committee emphasises that the reaction to an offence should always be proportionate not only to the circumstances and the gravity of the offence, but also to the personal circumstances (age, lesser culpability, circumstances and needs, including, if appropriate, the mental health needs of the child), as well as to the various and particularly long-term needs of the society[15].

Article 10 paragraph 1 of the ZOMSKD, entitled "proportionality and consideration in the treatment of juveniles", addresses both the need to take into account the personal circumstances of the young person and the nature and gravity of the offence. The second paragraph of this provision concerns the duty of all professionals who come into contact with children to treat them with respect and take into account their needs and characteristics. In addition, Article 71 provides for the individual assessment of the young person and the requirement that the social service centre submits a report which constitutes an integral part of the individual assessment. This Article reproduces in substance Articles 468(2) and 469 of ZKP and is applicable in the preparatory proceedings. Moreover, under Article 62 of ZOMSKD the prosecutor can request a social service centre to issue an opinion regarding the appropriateness of criminal proceeding.

First it should be stressed that Article 10 of ZOMSKD, which sets forth the obligation of authorities to take into account the individual needs of the child should be commended. At the same time, a modification of the wording of Article 10 could expand its scope and would ensure its effective implementation in practice.

More particularly, Article 10 (1) sets out that "[i]n their decisions and actions, the authorities dealing with a juvenile must take into account, in addition to the gravity and nature of the offence committed, the juvenile's age, mental development and psychological characteristics, and also the purpose of treatment of juvenile as per Article 6 of this Act".

Although the said provision refers to an individual assessment when authorities take "decisions and actions", it does not clearly establish this assessment as a distinct right of the child[16] (and an obligation of professionals). This provision is closely connected to Article 72 which, nonetheless, concerns the preparatory proceedings and does not cover for example the

[14] See, article 7 of Directive (EU) 2016/800 and Recital 35 of its preamble, ECtHR, *Blokhin v. Russia*, 23.3.2016, *T. and V. v. the United Kingdom*, S.C. v. the United Kingdom, 15.6.2004,
[15] CRC, GC No 24, para 76.
[16] See, especially the Legal review of the draft Act of Slovenia on the liability of Minors in criminal offences (ZOMDSK), page 10.

prosecutors' decisions in respect of possible diversion procedures or the application of the principle of expediency[17]. Additionally, there is no further connection between the individual assessment and the decision of the prosecutor on whether to assign a criminal complaint to diversion proceedings, neither is the role of social services centres specified in this respect.

Against this backdrop, it would be useful if Article 10 were to be reformulated so as to clearly provide for a right to an individual needs assessment and to further specify its scope and procedural aspects, including its necessity in the phase before the initiation of proceedings and its relevance to diversion proceedings and the principle of expediency.

It is recommended that the draft ZOMSKD be amended, either through the reformulation of article 10 or the adoption of another provision to ensure that it clearly establishes a right to individual assessment, the outcome of which will inform all decisions of authorities before, during and after proceedings. In addition, other provisions of the draft ZOMSKD which are connected to the individual assessment should be reformulated and aligned accordingly and the role of the social service should be further clarified[18].

An essential aim of treatment of children recognised as having infringed the criminal law shall be their rehabilitation and resocialisation. A variety of dispositions shall be available to the competent authorities to ensure that each child is dealt with in a manner appropriate to his/her particular circumstances and needs, and that no child is unnecessarily institutionalised[19]. States enjoy a level of discretion in choosing those alternatives measures to institutional care which they consider most appropriate in their jurisdiction.

As mentioned before, any decision on educational or other measures must be informed by the outcome of the individual needs assessment.

In addition, it should be noted that any measure that involves the deprivation of liberty, must be imposed only under the strict conditions that govern the decisions on detention. In other words, even if an institution has an educational purpose and character, as long as it amounts to deprivation of liberty all procedural guarantees must be in place.

It is recommended that the specialised training offered to judges focus on the importance to systematically take into account the individual needs assessment of the child when they decide the educational measure or other sanction to be imposed on a child in conflict with the law.

[17] The refence in Article 62 (principle of expediency) to a possibility for requesting an opinion from a social services centre does not seem to clarify the procedure of individual needs assessment.
[18] Regarding the role of the social service center and the purpose, scope and content of the social inquiry report, see also, Legal Review of the Draft Act of Slovenia on the Liability of Minors in criminal offences (ZOMSKD), page 18.
[19] See, Article 40 para 3 CRC, and Rules 17 and 18 of Beijing Rules.

2.2 Educational measures

The draft ZOMSKD provides for educational measures that can be either non-residential or residential. Non-residential educational measures (reprimand, instructions and prohibitions and supervision of a social service centre) are imposed when the juvenile offender's attention needs to be drawn to their behaviour and when their education and proper development in their existing environment need to be ensured through measures lasting a shorter time and involving appropriate professional guidance[20].

Non-residential measures

The measures of reprimand as well as of instructions and prohibitions (Articles 15 and 16) should remain in the draft ZOMSKD.

The measures of supervision by the social services centres may be imposed under two conditions: if the juvenile offender is in need of professional assistance and supervision and if a more continuous support to their education, re-education or proper development is required[21]. The competent social services centres must report at least every three months to the state prosecutor and the court that imposed the educational measure on the progress of enforcement of the educational measure imposed. The juvenile judge may also request more frequent reports. Challenges with regard to this measure are identified at the level of its enforcement[22] and will be addressed in Part III.

Residential measures

As a general principle, the requirement to establish a system of different institutions for children in order that children may be placed according to their educational, developmental and other needs, may seem problematic. The various types of mental health, mental development, behavioural and emotional issues may overlap and cannot necessarily be defined separately in a clear-cut way. The use of deprivation of liberty should be, according to the CRC, strictly limited and used only as a measure of last resort. States should therefore concentrate on measures aiming at reducing reliance on deprivation of liberty as a reaction to the unlawful behaviour of children rather than on establishing a system of specialised institutions in which children could be deprived of liberty "according to their needs". For those children, who are, in compliance with the last resort rule, deprived of their liberty, it is necessary to concentrate on building the capacity of the facilities to accommodate every child who is placed therein in

[20] See National Research and Gap Analysis, page 40.
[21] See Article 17 of the draft ZOMSKD and the National Research and Gap Analysis, page 37.
[22] See National Research and Gap Analysis, pages 56 and 103.

accordance with their individual needs[23]. Building a system of segregated facilities for children according with their "specific needs" seems to contravene the principle of inclusion and the model of inclusive equality.

As a general point, it is recommended that, for those children in conflict with the law who are, in compliance with the last resort rule, deprived of their liberty, efforts be concentrated on building the capacity of the facilities to accommodate every child who is placed therein in accordance with their individual needs rather than on establishing a system of specialised institutions.

Placement in an educational facility

Article 18 ("placement in an educational institution") provides that the court shall order the placement of a juvenile offender in an educational institution **in cases where the juvenile's education, re-education and optimal development according to their abilities requires the constant guidance and supervision of professionals**. The court shall simultaneously name the educational institution in which the juvenile offender is to be placed, having previously obtained the opinion of the social services centre on the choice of institution. Article 8 of the Act on the Intervention for Children and Youth with Emotional and Behavioural disorders in Education (ZOOMTVI), however, sets forth that it is the social services centre that will choose the educational institution[24]. In addition, the National Research and Gap Analysis stresses that ZOOMTVI regulates the educational institutions (referred to as "Expert centres" or "residential institutions"). These institutions provide children with "emotional and behavioural problems" with continuous assistance[25].

Article 99 (enforcement of placement in an educational institution) stipulates that the educational measure of placement in an educational institution shall be enforced in institutions for the education and care of children and adolescents **with emotional and behavioural difficulties and disorders** defined by the minister responsible for education (emphasis added).

It is not clear from the information received in English whether the "educational institutions" referred in Article 18 are addressed only to children that have been considered by the judge as presenting "emotional and behavioural difficulties and disorders" and under which circumstances they are categorised as such. Following clarifications from the Ministry of Justice, it is understood that a child to be placed in an educational institution does not need to have an official diagnosis. The judge decides on the basis of the information received in the child's file. The placement of the child is not decided thus on the basis of a multidisciplinary

[23] See, international Commission of Jurists (ICJ), Individual assessment of children in conflict with the law.
[24] See, National Research and Gap Analysis, pages 43 and 56.
[25] *Ibid*.

assessment nor an assessment carried out by a diagnostic centre. Moreover, the labelling of a child in conflict with the law who is of need of enhanced assistance and support as one with "emotional and behavioural difficulties and disorders" may risk to create stigmatisation of that child.

It is recommended to clarify the relevant authority for the identification of the institution that a child should be placed under article 18 of the draft ZOMSKD. It is also recommended that any decision for the placement of a child in the educational facility is the outcome of an assessment carried out in a multidisciplinary approach, such as an assessment of a diagnostic centre.

Placement in a correctional home

Article 19 (placement in a correctional home) stipulates that the court shall order the placement of a juvenile offender in a correctional home in cases where the juvenile offender's education and re-education and the process of deterring them from committing offences require, in addition to the constant guidance of professionals, stricter supervision.

When deciding whether to impose this measure, the court shall also take into account the circumstance of whether educational measures or penalties have previously been imposed on the young person.

The correctional home in Slovenia is a closed penal institution, whose aims are nevertheless educational[26]. Thus, all guarantees and children's right pertaining to the deprivation of their liberty should be applied in this respect.

According to the CRC Committee "[m]andatory minimum sentences are incompatible with the child justice principle of proportionality and with the requirement that detention is to be a measure of **last resort** and for the **shortest appropriate period of time**. Courts sentencing children should start with a clean slate; even discretionary minimum sentence regimes impede proper application of international standards"[27].

Article 19 of the ZOMSKD prescribes a mandatory minimum of duration of the placement into the correctional home of one year. As it is mentioned in the National Research and Gap Analysis, this period has been considered necessary so as to better contribute to the rehabilitation and reintegration of the child. However, in light of international standards on measures involving deprivation of liberty it is questionable whether a mandatory minimum sentence should be kept in the letter of the draft ZOMSKD. It is preferable that the judge receives training on the conditions under which such a sanction produces better results for

[26] See, National Research and Gap Analysis, page 44.
[27] CRC, General Comment No 24 (2019), para 78.

children. Further, all decisions should take into consideration the outcome of the individual needs assessment to which every child in conflict with the law should be entitled.

It is recommended that Article 19 of the draft ZOMSKD be reformulated so as not to contain a mandatory minimum sentence. It is also recommended that judges receive appropriate training on the circumstances under which the measure of placement in a correctional home has been proven to offer better results in terms of the rehabilitation and reintegration of a juvenile offender.

Placement in a training institution

Several international and regional standards advocate the use of non-institutional over institutional treatment. For example, the CCPR has stressed that adequate community-based or alternative social-care services for persons with mental health issues should be made available, in order to provide less restrictive alternatives to confinement[28].

In case of institutional treatment, States must offer to institutionalised persons programmes of treatment and rehabilitation that serve the purposes that are asserted to justify the detention. Deprivation of liberty must be re-evaluated at appropriate intervals with regard to its continuing necessity[29].

With regard to Slovenia, the CRPD found back in 2018 "[a] number of disability definitions that are not in compliance with the human rights model of disability, in particular definitions that are derogatory or describe the "unfitness" of persons to participate in regular education, independent life and work on the grounds of their impairment" and also recommended the authorities to "[p]rovide reasonable accommodation in the penal system and in places of detention, including in the form of suitable health care[30].

Article 20 of the draft ZOMSKD addresses the placement of children in conflict with the law in a training institution. According to the National Research and Gap Analysis[31] this provision concerns only juvenile offenders who are affected by mental disabilities – physical disabilities are no longer covered[32]. It is also prescribed that the court shall obtain an expert opinion from the Committee for guidance of children with special needs; the Committee shall deliver its opinion within one month of receiving the court's request. According to the National Analysis, this amendment can be seen as positive, since juvenile offenders should be examined by a professional and dedicated authority within a reasonable amount of time so that their

[28] CCPR, General comment No. 35, CCPR/C/GC/35.
[29] *Ibid*.
[30] Concluding observations on the initial report of Slovenia, 2018, CRPD/C/SVN/CO/1.
[31] See, National Research and Gap Analysis, pages 57.
[32] See, however Article 115 ZOMSKD.

treatment can start as early as possible. The amended provision is also clearer regarding the length of placement, since it is no longer ambiguous which educational measure's legal regime is to be applied. These delimitations are therefore considered positive.

It should be noted, however, that Article 115 of the draft ZOMSKD seem to have a different scope and defines training institution as an institution addressed to children with physical and mental development disorders.

It is recommended that article 115 of the draft ZOMSKD be revised so as to clarify that for the purposes of that law the notion of "training institutions" refers only to children with intellectual disabilities.

2.3 Juvenile detention

A plethora of standards reverberate that detention of juvenile offenders shall be a measure of **last resort** and for the **minimum period of time**. This principle requires not only that alternative options should be considered rather than imposing deprivation of liberty, but, if deprivation of liberty is the **only appropriate option**, that an **'appropriate'** time frame is considered.

Recognising the harm caused to children and adolescents by deprivation of liberty, and its negative effects on their prospects for successful development and reintegration, the CRC Committee recommends that States parties set a maximum penalty for children accused of crimes that reflects the principle of the "shortest appropriate period of time"[33].

In addition, the Committee has found that mandatory minimum sentences are incompatible with the child justice principle of proportionality and with the requirement that detention is to be a measure of last resort and for the shortest appropriate period of time. Courts sentencing children should start with a clean slate; even discretionary minimum sentence regimes impede proper application of international standards[34]. It should be noted also that mandatory minimum sentences do not allow any review.

Article 25 of the draft ZOMSKD provides that the duration of juvenile detention **may not be less than six months**. This provision seems to set a horizontal minimum threshold that is applied in all cases of detention.

[33] CRC, General Comment, No. 24 para 77.
[34] *Ibid*., para 78.

In addition, it should be highlighted that the National Research and Gap Analysis pinpoints to important gaps in the execution of juvenile prison sentences because of the absence of sophisticated treatment programmes. Thus, in practice it seems that this measure is confined to the incapacitation of juveniles[35].

Against this background:

It is recommended that Article 25 of the draft ZOMSKD be revised so as to keep only the maximum penalty, while leaving the discretion of the judge to determine the appropriate sentence below the maximum. To this effect, the training of judges under Article 42 of the draft ZOMSKD should focus on the rule of "last resort" and "shortest duration" and also address the practical gaps in the execution of detention, including the challenges that detention presents for children.

2.4 Safety measures

Involuntary treatment and care involve the use of coercive measures for reasons of safety or for therapeutic reasons. The involuntary psychiatric treatment of juveniles inside and outside criminal justice system has been an issue of discussions and often diverging views and approaches at international and European levels.

For example, the Havana Rules stipulate that "[a] juvenile who is suffering from mental illness should be treated in a specialized institution under independent medical management. Steps should be taken, by arrangement with appropriate agencies, to ensure any necessary continuation of mental health care after release"[36]. This approach is not in line with the position of CRPD. The latter has stressed that "[l]egal systems based on the rule of law have criminal and other laws in place to deal with breaches of that obligation. Persons with disabilities are frequently denied equal protection under those laws by being diverted to a separate track of law, including through mental health laws. Those laws and procedures commonly have a lower standard when it comes to human rights protection, particularly the right to due process and fair trial, and are incompatible with article 13, in conjunction with article 14, of the Convention[37]".

The CRPD Committee has criticised safety/security measures imposed on persons found not responsible due to "insanity" and incapacity to be held criminally responsible. The Committee has also recommended eliminating security measures[38], including those which involve forced medical and psychiatric treatment in institutions[39]. It has also expressed concern

[35] See, National Research and Gap Analysis, pages 54.
[36] Havana Rules, Rule 53.
[37] Report of the CRPD, 13th to 16th Sessions, Annex 1, para 6-15. CRPD, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities.
[38] CRPD/C/BEL/CO/1, para. 28.
[39] CRPD/C/ECU/CO/1, para. 29 c).

about security measures that involve indefinite deprivation of liberty and absence of regular guarantees in the criminal justice system[40].

Article 32 of the draft ZOMSKD provides for the possibility of imposing security measures on a juvenile offender and the list of those measures includes the compulsory psychiatric treatment outside an institution or inside a healthcare institution. The criteria under which such a safety measure can be imposed are not clarified in the text of the draft ZOMSKD nor the duration of the measure or its purpose.

Against this background:

Article 32 of the draft ZOMSKD should be revised and secondary regulation be adopted with a view to defining the strict criteria under which the safety measures of compulsory psychiatric treatment may be exceptionally allowed and provide adequate training to the judiciary so as to ensure that such a measure will be imposed in a child rights compliant way and will not amount to discrimination of a young person due to his/her actual or perceived mental health issues.

[40] CRPD/C/DEU/CO/1, para. 31

Part II. Proceedings

1. Diversion processes: Interventions that avoid resorting to judicial proceedings

1.1 General principles

Diversion should be the preferred manner of dealing with children in conflict with the law in the majority of cases. According to the CRC Committee, "States parties should continually extend the range of offences for which diversion is possible, including serious offences where appropriate"[41]. The use of diversion processes however is subject to conditions: such processes and measures must be appropriate, desirable and ensure respect for the child's human rights.

According to international standards, diversion should be preferred when this is in the **best interest of the child** and if a number of criteria is met:

- there is **compelling evidence** that the child committed the alleged offence, that (s)he **freely and voluntarily admits** responsibility, without intimidation or pressure[42]. Diversion should thus not be used automatically by national authorities, where there is no suitable evidence for charges to be brought or prosecution to be achieved.
- any diversion shall require the free and voluntary consent of the child (and her or his parents or guardian, where relevant)[43]. The consent to diversion should be based on adequate and specific **information** on the nature, content and duration of the measure, and on an understanding of the **consequences** of a failure to cooperate or complete the measure. The child must always be aware that he or she may be acquitted if the case goes to court[44]. Care should be taken to minimise the risk of potential coercion and intimidation; children should not feel pressured into consenting to diversion programmes.
- **due process rights** are fully respected. The child is to be given the opportunity to seek **legal or other appropriate assistance** relating to the diversion offered by the competent authorities, including the appropriateness and desirability of the diversion measure proposed[45]. If children are diverted in a system that does not result in convictions, criminal records or deprivation of liberty, "other appropriate assistance" by well-trained officers may be an acceptable form of assistance, although States that can provide legal representation for children during all

[41] CRC, General Comment, No. 24 para 16.
[42] *Ibid*., para 18.
[43] Beijing Rules No 11.3.
[44] CRC, General Comment, No. 24 para 18.
[45] *Ibid*., para 58.

processes should do so[46]. Where other appropriate assistance is permissible, the person providing the assistance is required to have sufficient knowledge of the legal aspects of the child justice process and receive appropriate training.

- the **admission or confession of the child should not be used against the child in any subsequent legal proceedings**. Indeed, in cases where the child does not comply with the diversion process and the case is referred to court, the child's incriminating statements or acceptance of guilt made during the diversion process should not be used against him/her[47].

Article 8 of the draft ZOMSKD gives greater weight to diversion procedures and states that such procedures shall be given priority over criminal prosecution. Moreover, Article 58 (diversion processes) of the draft ZOMSKD reads as follows: "[t]he state prosecutor may assign a criminal complaint to a settlement procedure or defer prosecution in the case of a criminal offence carrying the penalty of a fine or up to five years' imprisonment. When making this decision, (s)he must take into account, in addition to the conditions laid down by the law governing criminal procedure, **whether circumstances exist** from which it is possible to conclude that the implementation of such proceedings would contribute to the **optimal development** of the juvenile according to their abilities" (emphasis added). Articles 59 (settlement) and 60 (deferment of prosecution) enlarge the range of criminal offences for which a diversion process is possible and further clarify the implementation steps.

Thus, Article 58 specifies that the circumstances that should be taken into account by the state prosecutor when considering the option of diversion must be linked to the juveniles' optimal development, but does not indicate any further elements. While this is an important aspect, it should be noted that not all factors that should be assessed by the state prosecutor are necessarily connected to the young person's development. As explained above, according to international standards the first consideration should be related to the evidence. Only when there is compelling evidence that the child committed the offence and the child voluntarily admits responsibility, the state prosecutor should start contemplating diversion options. In other words, before considering the appropriateness of a measure in terms of its contribution to the education of the juvenile, the prosecutor should carefully verify the existence or not of compelling evidence of the person's guilt.

Similar considerations apply with regard to the consent of the child. This consent should be given freely and voluntarily, and its context must include the option of the diversion, as such, and the specific measure proposed by the prosecutor. Such a procedural guarantee does

[46] Article 41 of the CRC: "Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State."
[47] CRC, General Comment, No. 24 para 18.

not seem to appear in the current wording of Article 58 which sets out the general lines of the diversion processes.

Moreover, the right of the child concerned to be adequately informed of the option of diversion and of the measures as well as his/her right to legal or other appropriate assistance should be ensured. Last but not least, attention should be paid to the fact that not all information released or obtained during the diversion process can be used at subsequent court proceedings in case of an unsuccessful diversion measure. This is particularly the case of admission or confessions made by the child.

It is recommended that Slovenian authorities maintain Article 8 of the draft ZOMSKD as it stands and reformulate Articles 58-60 of the draft ZOMSKD regarding diversion processes or provide specialised training to prosecutors so as to ensure that:

- diversion processes are not proposed automatically but only when there is compelling evidence that the child committed the alleged offence and the child freely and voluntarily admits responsibility
- prior to consenting, the child is given the opportunity to seek legal or other appropriate assistance relating to the diversion offered

It is also recommended that draft ZOMSKD is amended, in view of existing secondary legislation, so as to ensure that any statements, admissions, or confessions made by, or incriminating information obtained from a child in the context of the diversion processes shall not be admitted as evidence against the child in any subsequent criminal proceedings.

1.2 Choice of diversion process

International standards do not prescribe which specific diversion process should be preferred and under which specific circumstances. The CRC Committee has stressed that States enjoy a discretionary power when deciding on the exact nature and content of measures of diversion, and when taking the necessary legislative and other measures for their implementation[48].

Nevertheless, States are invited to provide a wide range of community-based programmes and measures, such as community service, supervision and guidance by designated officials, conferencing and other restorative justice[49] options, including reparation to victims[50],

[48] CRC, General Comment, No. 24 para 17.
[49] Restorative justice is any process in which the victim, the child in conflict with the law and any other individual or community member affected by a crime actively participates together in the resolution of matters arising from the offence, often with the help of a fair and impartial third party.
[50] CRC, General Comment, No. 24 para 17;Beijing Rules 11.4.

mediation conciliation and sentencing circles[51]. Priority shall be given to those processes "that may have an educational impact as well as constituting a restorative response"[52]. Programmes that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are especially commended. The merits of individual cases would make diversion appropriate even when more serious offences have been committed (for example first offence, the act having been committed under peer pressure, etc.)[53].

As mentioned, the outcome of the individual needs assessment is particularly relevant during diversion proceedings and should inform the decision of the prosecutor on the appropriateness of the diversion measure to be offered.

It is recommended that the draft ZOMSKD be reformulated so as to strengthen the role and impact of the individual assessment of the child in the context of diversion processes and ensure that any decision of the prosecutor on diversion measures is informed by such an assessment.

1.2.1 Mediation (settlement)

Mediation programmes allow willing victims and the child in conflict with the law to meet face-to-face in a safe, secure environment and talk about the offence with a trained, third-party mediator facilitating and directing the proceedings. The mediator is an independent, neutral actor within the proceedings. (S)he plays an active role in the process, helping both parties understand the other's point of view, and ensuring that neither party dominates the proceedings or make the other feel victimised; the mediator also keeps the dialogue productive and ensures that both parties can meaningfully participate.

Mediation processes should be used only where there is compelling evidence to charge, when the child has accepted responsibility, and with the free and voluntary consent of the victim and the child in conflict with the law. The victim and the child should normally agree on the basic facts of a case as the basis for their participation in a mediation process[54]. They should also be able to withdraw such consent at any time during the process. In addition, the safety of the parties, any disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a mediation process[55].

[51] Basic principles on the use of restorative justice programmes in criminal matters, para. 2
[52] Europe Recommendation (2008)11 on the Rules for Juvenile Offenders subject to sanctions or measures, see also, Vienna Guidelines, art. 15
[53] Beijing Rules, Commentary to Rule 11.4.
[54] Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters.
[55] Basic principles on the use of restorative justice programmes in criminal matters, paras 6-10.

Agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations. The measures to be taken following such an agreement may include: community services, supervision, restitution (for damaged property, medical and funeral expenses, etc.), counselling, treatment for addiction, mandatory education, fines, home monitoring, a simple apology, or other measures aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the child in conflict with the law. In contrast to formal sentences, agreements reached during mediation tend to reflect the wishes of both the victim and the child in conflict with the law regarding the measures that should be imposed.

As explained, the role of mediators in such processes is crucial and they must be afforded sufficient time and resources to undertake adequate levels of preparation, risk assessment and follow-up work with the parties. In addition, they should receive initial training before conducting a mediation, as well as ongoing, in-service training. Their training should provide them with a high level of competence, taking into account conflict resolution skills, the specific requirements of working with juveniles and victims, and basic knowledge of the criminal justice system. Criminal justice professionals who refer cases for restorative justice should also be trained accordingly[56].

In addition, national guidelines defining the use of mediation, conditions for the referral of cases and their follow- up as well as the qualifications, training of mediators and the rules of conduct governing the operation of mediation should exist[57].

The National Research and Gap Analysis indicates a considerable decline in the use of mediation during the past years. It also stresses with concern the lack of variety of outcomes of mediation agreements in practice. The apology to the victim is by far the most frequent outcome of such agreement (on average more than 50% of all agreements)[58].

It is recommended that authorities adopt measures to ensure adequate financial and technical resources for the purposes of mediation processes.

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It is recommended that the content of the training for mediators be updated to enhance their conflict resolution skills and their understanding of specific requirements of working with juveniles and victims, and the dynamics of mediation.

1.2.2 Deferred prosecution

[56] Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters.
[57] Council of Europe Recommendation (99)19 concerning Mediation in Penal Matters, Basic principles on the use of restorative justice programmes in criminal matters, para 12.
[58] See, National Research and Gap Analysis, pages 72.

Diversion processes can also take the form of a deferred prosecution. In this case, the deferred prosecution can be subjected to the condition that the child in conflict with the law performs certain actions to remove the harmful consequences of the criminal offence. This kind of deferment can be **conditional** to the agreement of the injured party or **non-conditional**.

Article 60 in conjunction with Article 58 of the draft ZOMSKD extends the catalogue of criminal offences for deferred prosecution, under special circumstances even to certain offences for which the prescribed sentence is higher than 5 years[59]. It also extends the measures that can be instructed to the child by the prosecutor. These measures include repairing or compensating for any caused damage, paying a contribution to a public fund, a charity institution or the compensation fund for victims of criminal offences, or performing community service. The time frame for completion of such measures is extended to 6 months and if the child fulfils the agreed measure within this period, the criminal complaint is dismissed.

The National Research and Gap Analysis stresses the existence of significant geographical differences in exercising deferment of prosecution. This could be attributed to the lack of an individualised needs assessment of the child at the stage when the prosecutor decides the measure to be adopted.

It is recommended that the training provided to prosecutors include also the topic of deferred prosecution and how to make appropriate use of this form of diversion.

Moreover, Article 60 provides only for a conditional deferment of prosecution, i.e. deferment subject to the victim's consent. In order to provide the prosecutor with as many alternatives as possible, it may be useful to provide also for the possibility of deferment without the consent of the victim, when such measures will better serve the needs of the child and his/her rehabilitation and re-integration[60].

It is recommended that Article 60 of the draft ZOMSKD be revised so as to provide for deferment of prosecution which is not subjected to the victim's consent as well as to provide a broader range of diversion measures, such as a verbal warning or formal written warning.

2. Legal counsel

2.1 The role of lawyers in the juvenile justice system

The lawyers should **advice** the child in matters regarding available protective measures, guarantees and proposed litigation strategy. This includes the proposal of diversion and alternative measures. At the same time, the lawyer should be able to **understand what the child's point of view** is and to convey this through the formal procedure. It is necessary that

[59] See, also the National Gap Analysis, page 76.
[60] See, in this regard also the Legal Review, pages 13-14.

the lawyer brings the child's logic into the debate between adults, without depriving the child of his/her right to speak before the judge, if appropriate. The lawyer should seek the child's informed consent on the best strategy to use. If (s)he disagrees with the child's opinion, (s)he should try to convince the child as (s)he would do with any other adult client[61].

From the stakeholders' views presented in the National Research and Gap Analysis it may be concluded that lawyers are not sufficiently trained on their specific role and the relevant expectations towards them in the juvenile justice system[62].

It is recommended that efforts be pursued to ensure that the training of lawyers who are qualified to work with children addresses adequately the child's needs in the juvenile justice system and the specific expectations towards lawyers in this context.

2.2 Stage at which the access to legal assistance must be guaranteed

Several international and regional standards[63] stress that States should ensure that the child is guaranteed legal assistance from the outset of the proceedings. In order for the right to a fair trial to remain sufficiently practical and effective, access to a lawyer should be provided from the first time a suspect is questioned by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. The right of access to a lawyer arises from the moment there is a "criminal charge" which includes also cases where a person is not deprived of liberty but is summoned for a questioning by the police concerning the suspicion of his or her involvement in a criminal offence[64].

The Procedural Safeguards Directive EU 2016/800 requires Member States to ensure that children are assisted by a lawyer without undue delay once they are made **aware that they are suspects or accused persons**. "In any event, children shall be assisted by a lawyer from **whichever of the following points in time is the earliest**:

(a) **before** they are **questioned by the police** or by another law enforcement or judicial authority; (b) **upon** the carrying out by investigating or other competent authorities of **an investigative** or other evidence-gathering **act**; (c) without undue delay after deprivation of liberty; (d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time **before they appear before that court** (emphasis added)"[65].

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[61] See, for example, the CFJ Guidelines. Thus, the lawyer's role is different from the guardian ad litem. The latter is appointed by the court, not by "a client" as such, and should help the court in defining what is in the best interests of the child.

[62] "when proposing a sanction, the attorney should not just follow the offender's wishes but should also take into account their specific needs". See, National Research and Gap Analysis, page 37.

[63] See, indicatively, CRC, GC, No. 24, ECtHR, *Salduz v. Turkey*, paras 54-55, *Ibrahim and Others v. the United Kingdom*, para 256, EU Directive 2016/800.

[64] ECtHR, *Dubois v. France*, 2022, paras 45-46 and 69-75.

[65] Article 6 para 3 of the EU Directive 2016/800.

National authorities have a duty to inform children alleged as or suspected of having infringed the criminal law about their right to legal assistance[66]. In addition, the domestic court or other relevant judicial body, when considering the voluntariness and reliability of an admission or confession made by a child during questioning, should take several factors into account, including the child's age and maturity, the length of questioning or custody and **the presence of legal or other independent assistance** and of the parent(s), guardian or appropriate adult (emphasis added)[67].

It should be noted that the aims pursued by the right to access to a lawyer at the initial stage include the following: prevention of a miscarriage of justice and notably equality of arms between the investigating or prosecuting authorities and the accused; counterweight to the vulnerability of suspects in police custody; fundamental safeguard against coercion and ill-treatment of suspects by the police; ensuring respect for the right of an accused not to incriminate him/herself and to remain silent. Besides, the immediate access to a lawyer able to provide information about procedural rights is likely to prevent any risk of unfairness arising from the lack of appropriate information on rights[68].

2.3 Legal assistance as a right of the child and as an obligation of authorities

Legal assistance is a right of the child alleged as, accused of or recognised as having infringed the law, but at the same time the provision of such assistance can be a duty of national authorities.

In this context, the CRC Committee recommends that States provide effective **legal representation**, **free of charge**, **for all children** who are facing criminal charges before judicial, administrative or other public authorities (emphasis added). If children are diverted to programmes or are in a system that does not result in convictions, criminal records or deprivation of liberty, "other appropriate assistance" by well-trained officers may be an acceptable form of support. In this case, the person providing the assistance is required to have sufficient knowledge of the legal aspects of the juvenile justice process and have received appropriate training.

Moreover, Article 6 of the Procedural Safeguards Directive EU 2016/800 requires States to ensure the provision of legal assistance to children, as explained above. It also sets out that "where (…) no lawyer is present, the competent authorities shall postpone the questioning (…) in order to allow for the arrival of the lawyer or, where the child has not nominated a

[66] ECtHR, *Panovits v. Cyprus*. Where the suspect is not notified of the right to legal assistance, it will be very difficult to show that the proceedings as a whole were fair (*Beuze v. Belgium* [GC], 2018, para 146).
[67] CRC, General Comment No. 24 para. 60.
[68] ECtHR, *Beuze v. Belgium*.

lawyer, to arrange a lawyer for the child"[69]. Article 18 provides that "Member States **shall ensure** that national law in relation to **legal aid** guarantees the effective exercise of the right to be assisted by a lawyer **pursuant to Article 6**" (emphasis added).

The Directive sets out that provision of legal assistance (and thus relevant legal aid) may be restricted under specific circumstances. Provided that this complies with the right to a fair trial, Member States may derogate from the provision of legal assistance as described where this assistance is **not proportionate in the light of the circumstances of the case, taking into account the seriousness of the alleged criminal offence, the complexity of the case and the measures that could be taken in respect of such an offence**, it being understood that the **child's best interests shall always be a primary consideration**. Such derogation must be understood as applying neither solely on the basis of the seriousness of the alleged offence nor *in abstracto*, but on a case-by-case basis[70]. It applies, in other words, on the basis of an individualised case-by-case proportionality assessment of the provision of legal assessment.

2.4 Legal assistance and the draft ZOMSKD

Article 41 of the draft ZOMSKD regulates the right to legal assistance with a focus on mandatory legal assistance. Its first sentence sets out that juveniles "**are allowed to have** to a defence counsel throughout the proceedings against them". While this is welcome, it is not clear whether this means that children have the right to access a lawyer or whether the authorities shall ensure that children are assisted by a lawyer. This distinction is particularly important in case of children who have not appointed a lawyer or do not have the means to appoint one.

Moreover, Article 41 provides for mandatory defence council, which is to be understood as provision of legal assistance regardless of the wish of the child, i.e. assistance which cannot be waived. More particularly, children **must** have a defence counsel from the start of preparatory proceedings, i.e. after the institution of proceedings by the prosecutor if proceedings are pending against them in connection with a criminal offence carrying a sentence of more than three years' imprisonment. For less severe offences, they must have a defence if **the judge** considers it necessary taking into account a series of factors[71].

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[69] "(…) Member States should arrange for the child to be assisted by a lawyer where the child or the holder of parental responsibility has not arranged such assistance. Member States should provide legal aid where this is necessary to ensure that the child is effectively assisted by a lawyer". Recital para 25.

[70] See, among others, *S.E. Rap* and *D. Zlotnik,* 'The Right to Legal and Other Appropriate Assistance for Child Suspects and Accused', in European Journal of Crime, Criminal Law and Criminal Justice 26 (2018), p. 121.

[71] "taking into account above all the mental development and personal characteristics of the juvenile, the complexity of the case and the gravity of the sanction or other measures that can be applied against the juvenile in the concrete proceedings".

On the basis of the above-mentioned distinction (more or less than three years imprisonment), paragraph 2 of the said article provides that the juvenile must have a defence counsel before the preparatory proceedings and during the course of investigating acts.

If, in the above-mentioned cases, a defence counsel is not engaged by the child themselves or by their parents or guardian, a defence counsel shall be appointed *ex officio* by the authority before which the proceedings are pending, from the list of lawyers in Article 42(3) of this Act. When essential in order to guarantee an effective defence, the competent authority may also appoint a lawyer who is not on this list to act as defence counsel for the child.

In addition, the National Research and Gap Analysis observes that in practice the provision that the court appoints a defence counsel whenever the judge deems that necessary is very rarely used. The need for a more frequent appointment of a lawyer to defend the child is thus identified[72].

Against the above background, the following points should be made:

The reading of Article 41 of the draft ZOMSKD, alone as well as in conjunction with Article 7, does not allow the conclusion that a **defence counsel must be ensured at the very initial stage, "before they are questioned by the police"**[73]. Besides, the earliest stage at which a juvenile can have mandatory legal assistance is "during the course of the investigative act, (…) if such act is carried out, before the state prosecutor submits a proposal to institute preparatory proceedings".

Moreover, since a defence counsel can be provided exceptionally for less severe offences, as described, upon a **judge's decision**, it is not clear how the legal assistance can be provided during the course of the investigative act. Besides, certain evidence-gathering acts can potentially be intrusive and impactful on the child. There is thus a risk that particularly vulnerable children will not be provided with mandatory legal assistance before the preparatory proceedings[74].

Furthermore, as previously explained, international standards invite States either to ensure legal assistance (free of charge) in all cases (regardless of the offence of which the child is accused) or to subject this right to exceptions. The latter is the case of the EU Directive 2016/800 which allows States to deviate from the rule of ensuring legal assistance on the basis of an individualised case-by-case proportionality assessment (and not an *ante hoc* assessment). The above standards do not seem to be sufficiently reflected in the wording of Article 41 (which addresses the issues of mandatory legal defence).

On the basis of the above analysis:

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[72] See, National Gap and Research Analysis Report, pages 90.

[73] Wording taken by Article 6 of the EU Directive 2016/800. Attention should be drawn to the difference between the duty to **ensure that children are assisted** by a lawyer and the duty to **ensure access** of children to legal assistance (e.g. not to obstruct access of children to the lawyer they appointed).

[74] Unless they or their family have the means to pay their own lawyer.

It is recommended that the wording of Article 41 of the draft ZOMSKD be amended so as to clarify that all children must -as a rule- be assisted[75] by a lawyer before they are questioned by the police and during the questioning as well as during preparatory and subsequent proceedings. Where relevant, the legal assistance should be provided free of charge. In this respect the draft ZOMSKD can refer to the relevant provisions on legal aid.

Derogations may be possible on the basis of an individualised assessment and in light of the criteria mentioned above. The fair trial principles should be guaranteed in all cases and the best interest of the child should be a primary consideration in all relevant actions and decisions[76]. In these exceptional cases, the authorities may also wish to consider establishing the right of the child to receive "other appropriate assistance" (such as guidance and support by well-trained officers) so as to ensure his/her effective participation in the proceedings.

It is recommended that mandatory legal defence in cases of offences which are punishable with less than three years imprisonment, already at the very initial stage of proceedings, be accorded in practice more often. To this effect, relevant training of professionals to better identify the needs of the child may be necessary.

3. Restrictive measures

3.1 Pre-trial detention

Numerous international and regional standards have recognised that pre-trial detention can be particularly damaging for children. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has noted that the scale and magnitude of children's suffering in detention and confinement called for a global commitment to the abolition of child prisons and large care institutions, alongside scaled-up investment in community-based services[77].

Pretrial detention should be used only in exceptional cases. The CRC Committee recommends that any deprivation of liberty is to be used only as a measure of last resort and for the shortest appropriate period of time. In addition, the law should clearly state the criteria for the use of pretrial detention, which should be primarily for ensuring appearance at the court proceedings and if the child poses an **immediate danger** to others[78]. If the child is considered a danger (to himself or herself or others) child protection measures should be applied.

[75] Attention should be drawn to the difference between the right of a child to access lawyer and the obligation of authorities to ensure that a child is indeed assisted by a lawyer, free of charge.
[76] This part of the recommendation reflects the standards of the EU Directive 2016/800 and not the CRC General Comment.
[77] A/HRC/38/36, para. 53.
[78] CRC, General Comment No. 24 para. 87.

It should be stressed that pretrial detention should be subject to regular review and its duration limited by law[79]. All actors in the juvenile justice system should prioritise cases of children in pretrial detention, to ensure prompt proceedings and avoid any undue delays.

Moreover, children must be detained separately from adults. The permitted exception to the separation of children from adults stated in article 37 (c) of the Convention on the Rights of the Child – "unless it is considered in the child's best interests not to do so" – should be interpreted narrowly and the convenience of the States parties should not override best interests[80]. States parties should establish separate facilities for children deprived of their liberty that are staffed by appropriately trained personnel and that operate according to child-friendly policies and practices.

Every child deprived of liberty, including at a pre-trial stage, has the right to maintain contact with his or her family through correspondence and visits. To facilitate visits, the child should be placed in a facility as close as possible to his or her family's place of residence. In addition, upon their admission, children should receive an information sheet which is written in a child-friendly manner, in simple and clear language and available in a variety of languages. Special care should be taken to ensure that children fully understand the information.

Moreover, the CPT has always maintained that there is a strong connection between the staff who work in facilities where children are detained and a facility's capacity to operate in a safe and effective manner. In particular, it has noted frequently the importance of ensuring that all staff working in juvenile detention facilities are suited to the task, chosen in line with this suitability and trained both at induction and on an ongoing basis[81]. Such training should address the rights, wellbeing and needs of children detained and should also aim at enhancing professionals' skills on guiding and motivating the juveniles in their charge.

According to the National Research and Gap Analysis, the draft ZOMSKD has considerably reduced the maximum length of pre-trial detention, which is welcome. The draft ZOMSKD states that juveniles must not be placed together with adults unless such placement would be in the juvenile's best interest, especially when separation from other detainees would cause the isolation of a juvenile. A judge may decide to place a juvenile in detention together with adults after having received an opinion from the representative of the respective institution and must justify their decision. The National Analysis refers also to the need to enhance the reasoning of the judge's decision in light of considerations that concern the child. It also refers to the benefits of eventual visits paid by the judge to the child inside the detention facility[82].

Against this background,

[79] CRC, General Comment, No. 24 para 87.
[80] CRC, General Comment, No. 24 para 92.
[81] CoE, Children's rights and the European Committee for the Prevention of Torture.
[82] See, National Research and Gap Analysis, pages 103.

It is recommended that the draft ZOMSKD be amended or otherwise that supporting regulation be adopted so as to ensure that any decision to place a child in a detention facility for adults is made exceptionally and following a comprehensive risk assessment as well as an individual assessment of the needs of the child. The individual needs assessment should also consider the place of residence of the child's family, where appropriate.

It is recommended that all professionals who come into contact with detained children be carefully selected for their personal maturity and ability to cope with the challenges of working with – and safeguarding the welfare of – these children. All such staff should receive professional training, both during induction and on an ongoing basis, and benefit from appropriate external support and supervision in the exercise of their duties.

It is also recommended that appropriate information material on the child's rights and on rules governing everyday life in the detention facility be developed in a child-friendly manner, in simple and clear language and be distributed to every child, upon his/her admission to pre-trial detention.

3.2 Temporary supervision and placement measures

Article 64 of the ZOMSKD provides that "[i]f a juvenile needs immediate assistance and protection or must immediately be removed from the environment in which they live, the court may order that the juvenile be temporarily placed under the supervision of a social services centre or placed with another family or a specific person or temporarily placed in an educational institution". Such an order may be adopted, after a reasoned proposal of a state prosecutor, by a juvenile judge during the **preparatory proceedings**, or by a juvenile judge or juvenile panel at a district court following the filing of a motion for the imposition of a criminal sanction. Paragraph 4 of the same provision sets out that "[t]he maximum allowable duration of the measures referred to in the first paragraph of this Article shall be until the decision by which an educational measure, juvenile detention or stand-alone security measure is imposed on the juvenile becomes final". Thus, Article 64 read as a whole implies that a restrictive measure can be imposed in the preparatory proceedings and will last until the child is found guilty by a final decision. This implies however that the child will definitely be found guilty and that a measure will be imposed on him/her. The wording of Article 64 seems to contravene the presumption of innocence of the child.

It is recommended that Article 64 of the draft ZOMSKD be revised and supporting

regulation be adopted so as to provide clear guidance on the conditions under which restrictive measures can be imposed on children accused of having committed an offence who are considered in need of immediate protection or assistance. In particular, guidance should address: a) the type of assistance (such as psycho-social support, etc.) b) the need to provide assistance to the child at an early stage even before preparatory proceedings c) the duty to prioritise the protection needs of the child over the beginning of any criminal proceedings against him/her d) the duty to give priority to the removal of any person that constitutes threat to the child from the family environment over the removal of the child from his/her family environment. The individual needs and risk assessment of the child should inform any relevant decision.

4. Length of the proceedings

The speedy conduct of formal procedures in juvenile justice cases is a paramount concern. Otherwise, whatever good may be achieved by the procedure and the disposition is at risk. As time passes, the juvenile will find it increasingly difficult, if not impossible, to relate the procedure and disposition to the offence, both intellectually and psychologically. The CRC Committee has stressed that the time between the commission of the offence and the conclusion of proceedings should be as short as possible. The longer this period, the more likely it is that the response loses its desired outcome. In this context, the Committee has recommended that States parties set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to institute charges, and the final decision by the court or other judicial body[83]. These time limits should be much shorter than those set for adults, but should still allow legal safeguards to be fully respected. Similar speedy time limits should apply to diversion measures.

The practice of adjourning court hearings many times and/or for long periods may also lead to excessive length of proceedings. In the case of pre-trial detention, the CRC Committee urges States parties to adopt maximum limits for the number and length of postponements and introduce provisions to ensure that the court or other competent body makes a final decision on the charges not later than six months from the initial date of detention, failing which the child should be released.

According to the National Gap and Research Analysis, the preliminary proceedings and the proceedings before the juvenile panel take, in the vast majority of cases, more than one

[83] CRC, General Comment, No. 24 para 55.

month and less than six months. The duration of both procedures very rarely exceeds one year, and in only a few exceptional cases two years[84].

The draft ZOMSKD foresees in Article 40 (duty to act promptly) that the police, prosecutors, courts and other institutions, experts and translators must act as fast as possible during pre-trial proceedings as well as in criminal proceedings against a juvenile. The difference with the ZKP is that the draft ZOMSKD mentions the stakeholders more specifically, which brings greater clarity to the provision[85]. However, it seems that social workers are not directly mentioned under Article 40 of the draft ZOMSKD.

According to Article 47 of the draft ZOMSKD, if a child is accused of having participated in a criminal offence jointly with adult persons, the proceedings against the child shall be separated and conducted in accordance with the provisions regarding juveniles, unless the joinder is necessary for a comprehensive clarification of the case.

It is recommended that Article 40 of the draft ZOMSKD include also social workers' duty to act promptly.

It is also recommended that judicial time standards be adopted regarding proceedings falling within the scope of the ZOMSKD. The implementation of these limits should be monitored by a competent authority.

It is recommended that Article 81 paragraph 2 of the draft ZOMSKD require that the adjournment or suspension of the oral hearing be both exceptional and duly reasoned. The adjourned or suspended cases should be given priority to ensure their speedy completion.

It is recommended that in case a joinder is necessary for a comprehensive clarification of the case, under Article 47 of the draft ZOMSKD, the case involving a juvenile be given priority and that the length of proceedings be significantly shorter than the comparable time limit in proceedings against only adult offenders.

[84] National research and Gap Analysis, page 87.
[85] See, National research and Gap Analysis, page 88.

Part III. Enforcement of sanctions

1. Enforcement of educational measures

According to the National Research and Gap Analysis, inconsistencies may arise due to different understandings of when the enforcement of institutional measures begins[86]. In addition, the draft ZOMSKD does not regulate in detail the placement of juvenile offenders in the context of residential educational measures. It states, however, that the educational institution is compelled to accept a juvenile offender sent there on the basis of a court decision.

It is recommended that appropriate guidance be given, through training or secondary regulation, to relevant professionals with a view of ensuring a harmonised practice in terms of swift commencement of the educational measure and acceptance of the juvenile offender in the residential educational facility.

In addition, the National Research and Gap Analysis mentions that the execution of supervision by social services continues to face difficulties – contacts of social workers with juvenile offenders are superficial (not frequent and thorough enough) and individual programmes and activities are absent[87].

It is recommended that the Catalogue be amended so that more contacts and more diverse and individualised activities with juvenile offenders would be prescribed. Authorities should also make efforts to ensure that adequate human, financial and technical resources are allocated for social services centres.

2. Disciplinary measures

Any disciplinary measures and procedures should maintain the interest of safety and an ordered community life and should be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care, namely, instilling a sense of justice, self-respect and respect for the basic rights of every person[88].

[86] See, National Research and Gap Analysis, pages 95.
[87] *Ibid*., page 52.
[88] Havana Rules No 66.

According to numerous international standards, the imposition of solitary confinement[89], of any duration, on children constitutes cruel, inhuman or degrading treatment or punishment or even torture, and should be prohibited[90].

Disciplinary measures in violation of article 37 of the Convention on the Rights of the Child must be strictly forbidden, including corporal punishment, placement in a dark cell, solitary confinement or any other punishment that may compromise the **physical or mental health or well-being** of the child concerned, and disciplinary measures should not deprive children of their **basic rights**, such as visits by legal representatives, **family contact**, food, water, clothing, bedding, **education**, exercise or **meaningful daily contact with others** (emphasis added)[91].

Any separation of the child from others should be for the shortest possible time and used only as a measure of last resort **for the protection of the child or others**. Where it is deemed necessary to hold a child separately, this should be done in the presence or under the close supervision of a suitably trained staff member, and the reasons and duration should be recorded[92].

In the context of juvenile detention, Article 124 paragraph 2 of the draft ZOMSKD provides that "[a]s an exceptional measure, the disciplinary penalties of placement in solitary confinement with or without the right to work, for a maximum of three days, and placement in a special room as an urgent measure may be imposed on a convicted juvenile offender for disciplinary offences".

Moreover, in the context of the enforcement of the educational measure of placement in a correctional home, Articles 110-114 provides for the (exceptional) case of the placement of the child in a separation room as a disciplinary measure (placement in a separation room during free time for up to three days or placement in a separation room **without the option of leaving to attend education** or work for up to three days)[93].

Article 111 provides an exhaustive list of disciplinary offences for which a disciplinary procedure may be started. These offences include also the causing damage to property, whether intentionally or due to negligence and the unauthorised possession or use of mobile telephones and other communication devices[94].

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[89] The accepted definition is set out in the Istanbul Statement on the Use and Effects of Solitary Confinement, adopted on 9 December 2007 at p 1. It is as follows: "Solitary confinement is the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day".
[90]Indicatively, see CRC GC No 24, para 95; CRC GC No. 13, para. 21; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, rule 67; CCPR, Concluding Observations on Portugal, U.N. Doc. CCPR/CO/78/PRT; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/28/68.
[91] CRC, General Comment, No. 24 para 95.
[92] *Ibid*.
[93] Emphasis added.
[94] See, National Research and Gap Analysis, pages 103.

Against the above background:

It is strongly recommended that Article 124 paragraph 2 of the draft ZOMSKD be revised so as to prohibit solitary confinement under any circumstances.

It is recommended that Articles 110-114 of the draft ZOMSKD be revised so as to better reflect international legal obligations and standards, and especially to define that any exceptional separation of the child from others should be used only as a measure of last resort for the protection of the child or others. Separating a child from others as a disciplinary measure for offences such as causing damage to property or unauthorised possession of mobiles telephones should be strictly forbidden by the law.

It is also strongly recommended to not include deprivation of education as part of disciplinary measures.

3. Mandatory training

The CRC Committee has emphasized that continuous and systematic training of professionals in the child justice system is crucial to uphold the guarantees and rights of the child. Such professionals should be able to work in interdisciplinary teams, and should be well informed about the physical, psychological, mental and social development of children and adolescents, as well as about the special needs of the most marginalized children[95]. This training is of major importance also in the context of the enforcement of measures and sanctions that have been imposed on juvenile offenders.

The National Research and Gap Analysis stressed that the majority of concerns regarding the enforcement of criminal sanctions does not arise at a legislative level but at a practical level[96].

It is recommended that all professionals who come into contact with children during the enforcement of an imposed measure or sanction receive professional training on children's right and how to better address their needs, both during induction and on an ongoing basis, and benefit from appropriate external support and supervision in the exercise of their duties. Relevant guidance should also promote more thorough, regular and individualised contacts with juvenile offenders, both among social workers and judges.

4. Reintegration and aftercare

[95] CRC, General Comment, No. 24 paras 39 and 112.
[96] See, National Research and Gap Analysis, page 103.

With regard to the aftercare of juvenile offenders, after the completion of an education measure, the National Research and Gap Analysis identifies that the role and duties of social services centres and residential educational facilities are not sufficiently addressed. The Havana Rules stipulate that all children in conflict with the law should benefit from arrangements designed to assist them in returning to society, family life, education or employment after completing a sentence. Competent authorities should provide or ensure services to assist juveniles in re-establishing themselves in society and to lessen prejudice against them. Such services should ensure, to the extent possible, that the juvenile is provided with suitable residence, employment, clothing, and sufficient means to maintain him- or herself upon release in order to facilitate successful reintegration. The representatives of agencies providing such services should be consulted and should have access to juveniles while detained, with a view to accompanying and assisting them in their return to the community[97].

It is recommended that efforts be made to design programmes and make appropriate arrangements to promote the reintegration of juvenile offenders who have completed their sanctions into the community.

5. Criminal records

Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender. Where a person commits a criminal offence after turning 18, neither the police nor the prosecutor concerned nor the competent court may refer to or make any use of recorded criminal offences that were committed by the same person when a child[98].

It is recommended that the draft ZOMSKD include a provision providing that records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same person. Such provision is already included in the KZ but it is nevertheless recommended to include it into the ZOMSKD as well.

[97] Havana Rules Nos 79 and 80.
[98] Beijing Rule 21.2.

Appendix. List of Recommendations

It is recommended that the wording of the draft ZOMSKD be revised so as to ensure that the presumption of innocence of the child alleged as or accused of having infringed the law is fully respected.

It is recommended to maintain the age groups of children prescribed in Article 5 but reformulate the wording of the said provision so as to ensure that the presumption of innocence of the persons who fall within the scope of the draft ZOMSKD is respected and that any risk of equating the notion of "juvenile" with the commission of an offence is averted.

In addition, the Slovenian authorities should adopt supporting regulation pertaining to the age assessment of young persons, taking into account the principles and guidance included in international standards, such as the recent Recommendation CM/Rec(2022)22 of the Committee of Ministers.

It is recommended to keep Article 6 in the draft ZOMSKD, reformulate its title and ensure that its content expressly indicates (alongside the educational) the reintegration purpose of sanctions and other measures.

It is recommended that the draft ZOMSKD be amended, either through the reformulation of article 10 or the adoption of another provision to ensure that it clearly establishes a right to individual assessment, the outcome of which will inform all decisions of authorities before, during and after proceedings. In addition, other provisions of the draft ZOMSKD which are connected to the individual assessment should be reformulated and aligned accordingly and the role of the social service should be further clarified.

It is recommended that the specialised training offered to judges focus on the importance to systematically take into account the individual needs assessment of the child when they decide the educational measure or other sanction to be imposed on a child in conflict with the law.

As a general point, it is recommended that, for those children in conflict with the law who are, in compliance with the last resort rule, deprived of their liberty, efforts be concentrated on building the capacity of the facilities to accommodate every child who is placed therein in accordance with their individual needs rather than on establishing a system of specialised institutions.

It is recommended to clarify the relevant authority for the identification of the institution that a child should be placed under article 18 of the draft ZOMSKD. It is also recommended that any decision for the placement of a child in the educational facility is the

outcome of an assessment carried out in a multidisciplinary approach, such as an assessment of a diagnostic centre.

It is recommended that Article 19 of the draft ZOMSKD be reformulated so as not to contain a mandatory minimum sentence. It is also recommended that judges receive appropriate training on the circumstances under which the measure of placement in a correctional home has been proven to offer better results in terms of the rehabilitation and reintegration of a juvenile offender.

It is recommended that article 115 of the draft ZOMSKD be revised so as to clarify that for the purposes of that law the notion of "training institutions" refers only to children with intellectual disabilities.

It is recommended that Article 25 of the draft ZOMSKD be revised so as to keep only the maximum penalty, while leaving the discretion of the judge to determine the appropriate sentence below the maximum. To this effect, the training of judges under Article 42 of the draft ZOMSKD should focus on the rule of "last resort" and "shortest duration" and also address the practical gaps in the execution of detention, including the challenges that detention presents for children.

Article 32 of the draft ZOMSKD should be revised and secondary regulation be adopted with a view to defining the strict criteria under which the safety measures of compulsory psychiatric treatment may be exceptionally allowed and provide adequate training to the judiciary so as to ensure that such a measure will be imposed in a child rights compliant way and will not amount to discrimination of a young person due to his/her actual or perceived mental health issues.

It is recommended that Slovenian authorities maintain Article 8 of the draft ZOMSKD as it stands and reformulate Articles 58-60 of the draft ZOMSKD regarding diversion processes or provide specialised training to prosecutors so as to ensure that:

- diversion processes are not proposed automatically but only when there is compelling evidence that the child committed the alleged offence and the child freely and voluntarily admits responsibility
- prior to consenting, the child is given the opportunity to seek legal or other appropriate assistance relating to the diversion offered

It is also recommended that draft ZOMSKD is amended, in view of existing secondary legislation, so as to ensure that any statements, admissions, or confessions made by, or incriminating information obtained from a child in the context of the diversion processes shall not be admitted as evidence against the child in any subsequent criminal proceedings.

It is recommended that the draft ZOMSKD be reformulated so as to strengthen the role and impact of the individual assessment of the child in the context of diversion processes and ensure that any decision of the prosecutor on diversion measures is informed by such an assessment.

It is recommended that authorities adopt measures to ensure adequate financial and technical resources for the purposes of mediation processes.

It is recommended that the content of the training for mediators be updated to enhance their conflict resolution skills and their understanding of specific requirements of working with juveniles and victims, and the dynamics of mediation.

It is recommended that the training provided to prosecutors include also the topic of deferred prosecution and how to make appropriate use of this form of diversion.

It is recommended that Article 60 of the draft ZOMSKD be revised so as to provide for deferment of prosecution which is not subjected to the victim's consent as well as to provide a broader range of diversion measures, such as a verbal warning or formal written warning.

It is recommended that efforts be pursued to ensure that the training of lawyers who are qualified to work with children addresses adequately the child's needs in the juvenile justice system and the specific expectations towards lawyers in this context.

It is recommended that the wording of Article 41 of the draft ZOMSKD be amended so as to clarify that all children must -as a rule- be assisted by a lawyer before they are questioned by the police and during the questioning as well as during preparatory and subsequent proceedings. Where relevant, the legal assistance should be provided free of charge. In this respect the draft ZOMSKD can refer to the relevant provisions on legal aid.

Derogations may be possible on the basis of an individualised assessment and in light of the criteria mentioned above. The fair trial principles should be guaranteed in all cases and the best interest of the child should be a primary consideration in all relevant actions and decisions[99]. In these exceptional cases, the authorities may also wish to consider establishing the right of the child to receive "other appropriate assistance" (such as guidance and support by well-trained officers) so as to ensure his/her effective participation in the proceedings.

It is recommended that mandatory legal defence in cases of offences which are punishable with less than three years imprisonment, already at the very initial stage of proceedings, be accorded in practice more often. To this effect, relevant training of professionals to better identify the needs of the child may be necessary.

[99] This part of the recommendation reflects the standards of the EU Directive 2016/800 and not the CRC General Comment.

It is recommended that the draft ZOMSKD be amended or otherwise that supporting regulation be adopted so as to ensure that any decision to place a child in a detention facility for adults is made exceptionally and following a comprehensive risk assessment as well as an individual assessment of the needs of the child. The individual needs assessment should also consider the place of residence of the child's family, where appropriate.

It is recommended that professionals who come into contact with detained children be carefully selected for their personal maturity and ability to cope with the challenges of working with – and safeguarding the welfare of – these children. All such staff should receive professional training, both during induction and on an ongoing basis, and benefit from appropriate external support and supervision in the exercise of their duties.

It is also recommended that appropriate information material on the child's rights and on rules governing everyday life in the detention facility be developed in a child-friendly manner, in simple and clear language and be distributed to every child, upon his/her admission to pre-trial detention.

It is recommended that Article 64 of the draft ZOMSKD be revised and supporting regulation be adopted so as to provide clear guidance on the conditions under which restrictive measures can be imposed on children accused of having committed an offence who are considered in need of immediate protection or assistance. In particular, guidance should address: a) the type of assistance (such as psycho-social support, etc.) b) the need to provide assistance to the child at an early stage even before preparatory proceedings c) the duty to prioritise the protection needs of the child over the beginning of any criminal proceedings against him/her d) the duty to give priority to the removal of any person that constitutes threat to the child from the family environment over the removal of the child from his/her family environment. The individual needs and risk assessment of the child should inform any relevant decision.

It is recommended that Article 40 of the draft ZOMSKD include also social workers' duty to act promptly.

It is also recommended that judicial time standards be adopted regarding proceedings falling within the scope of the ZOMSKD. The implementation of these limits should be monitored by a competent authority.

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It is recommended that in case a joinder is necessary for a comprehensive clarification of the case, under Article 47 of the draft ZOMSDK, the case involving a juvenile be given priority and that the length of proceedings be significantly shorter than the comparable time limit in proceedings against only adult offenders.

It is recommended that appropriate guidance be given, through training or secondary regulation, to relevant professionals with a view of ensuring a harmonised practice in terms of swift commencement of the educational measure and acceptance of the juvenile offender in the residential educational facility.

It is recommended that the Catalogue be amended so that more contacts and more diverse and individualised activities with juvenile offenders would be prescribed. Authorities should also make efforts to ensure that adequate human, financial and technical resources are allocated for social services centres.

It is strongly recommended that Article 124 paragraph 2 of the draft ZOMSKD be revised so as to prohibit solitary confinement under any circumstances.

It is recommended that Articles 110-114 of the draft ZOMSKD be revised so as to better reflect international legal obligations and standards, and especially to define that any exceptional separation of the child from others should be used only as a measure of last resort for the protection of the child or others. Separating a child from others as a disciplinary measure for offences such as causing damage to property or unauthorised possession of mobiles telephones should be strictly forbidden by the law.

It is also strongly recommended to not include deprivation of education as part of disciplinary measures.

It is recommended that all professionals who come into contact with children during the enforcement of an imposed measure or sanction receive professional training on children's right and how to better address their needs, both during induction and on an ongoing basis, and benefit from appropriate external support and supervision in the exercise of their duties. Relevant guidance should also promote more thorough, regular and individualised contacts with juvenile offenders, both among social workers and judges.

It is recommended that efforts be made to design programmes and make appropriate arrangements to promote the reintegration of juvenile offenders who have completed their sanctions into the community.

It is recommended that the draft ZOMSKD include a provision providing that records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the

same person. Such provision is already included in the KZ but it is nevertheless recommended to include it into the ZOMSKD as well.