

THE CHILD INSTITUTIONAL ABUSE: CURRENT KNOWLEDGE AND PRACTICES

Romanian Report, Legal Framework¹

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1. Description of the legislation, policies, procedures and services regarding the removal of children from their family

1. LEGISLATION, POLICIES

At present, in Romania child protection is regulated by Law no 272 of 2004 on the protection and promotion of the rights of the child, republished in 2014 and 2015; the law is based on the United Nations Convention on the Rights of the Child (UNCRC), ratified by Romania by Law no 18 of 1990. Besides the United Nations Convention on the Rights of the Child, the Romanian legal system regarding child protection is completed also by the Lanzarote Convention (The Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse), ratified by Romania by Law no 252 of 2010. These are the most important legal references, completed by provisions included in the Civil Code, adopted by Law no 287 of 2009, republished in other internal legal acts as well we will refer to throughout this document. The Criminal Law does not specifically regulate the rights of the child, only crimes in general, therefore we will not specifically refer to such regulations. The Code of Organization and Civil Procedure establishes the general rules of conducting civil procedures, and not specifically those related to the rights of the child. We suggest to refer strictly to the specific laws regulating the rights of the child; the Civil Code addresses such rights expressly, that is why these articles are included in this document.

A description of the legal framework of Romanian child protection and all the relevant laws are presented on the site of the Romanian National Authority of Child Protection and Adoption, , www.copii.ro²

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2. Description of the legislation, policies, procedures and mandates regarding the reporting of CAN cases in different professional fields. The role of the victims in the judicial procedures

One of the fundamental rights of the child, regarding which a special protection measure was set-up, approved by Law no 272 of 2004, is the right of the child to be protected against abuse, neglect, exploitation, human trafficking, abduction, violence, online pornography, and against all types of violence, irrelevant of the environment it would occur, respectively in institutions of protection as well as in educational, health institutions, organizations for the research of crimes, internet, media, sports environment, community etc. All offences to the rights of the child regarding which a special protection measure was introduced by the competent authorities can be reported by the affected child as well as by any physical or legal person, who is aware of the infringement, and the staff of the protection institution has an obligation clearly imposed in this sense.

Regarding **the right of the affected child to report an offence**, first of all, **the child has the right to address the D.G.A.S.P.C.** (General Directorate of Social Assistance and Child Protection) within the county or district where the child has their domicile in order to initiate the necessary measures; Article 34 of Law no 272 of 2004 acknowledges the right of the child to petition. In this sense, the child has the right to submit themselves a complaint regarding the infringement of their fundamental rights, that is personally, and not through a legal representative, without the necessity to be assisted by a legal representative, and without any referring to the condition of discernment. The child has the right to request from the competent authority to be protected against any form of violence, including sexual violence, injury or physical or mental abuse, maltreatment or exploitation, abandon or neglect, the Article 89, paragraph 2 of Law 272 of 2004 expressly regulating this right.

The child has the right to report any abuse against him or her, including reports on situations face in the center he is cared-for. In the Minimal compulsory standards of residential child protection (Order 21, 26 February 2004, chapter 5, „Reports and protection against abuse" it is mentioned that the Center should organize a system of collecting, registering and responding to referrals and reports on violence and , as well as possible support services.

² A description of the child protection system can be seen at: <http://www.copii.ro/activity/child-protection-system/overview/?lang=en> Vizualizat în data de 02.10.2017, ora 13:00

In case of known child maltreatment, the prosecution authorities shall be notified by any physical or legal person, including the employees of the protection institution, through denunciation. Denunciation is an optional way of reporting; however, in certain situations, it is compulsory. The D.G.A.S.P.C. employee or the employee of an educational institution, who is a public servant, whenever they acknowledge the commitment of an act included in the Criminal Law related to the service within which they carry out their tasks, they are obliged to report the case to the prosecution authorities, otherwise they shall be liable for the commitment of the crime specified as the omission of reporting, an act regulated and sanctioned under Article 267 of the Criminal Law adopted by Law no 286 of 2009. The omission of reporting refers only to public servants, who have the duty to monitor and report any events within the centre. The teachers working in public schools are considered public servants, therefore, whenever a child suffers abuse, they are responsible for such events taking place within the school, and are legally liable for not reporting such cases.

Likewise, **any physical or legal person**, no matter if they are in a close relationship with the child or not, whenever they acknowledge the commitment of an act as specified by the Criminal Law, which threatens the life of a child or which had as a consequence the death of a child, **is obliged to immediately notify the authorities**, otherwise they shall be liable for committing the offence of not-denouncing, an act regulated and sanctioned under Article 267 of the Criminal Law.

In addition, Article 102 of Law no 272 of 2004 specifies that the employers of the institution or organization which is in charge of taking care of the child are obliged to report immediately to the prosecution authorities and to dispose over the moving away of the respective employee from the proximity of the child being under their care, if the abuse, neglect, exploitation or any other form of violence against the child was committed by the employee, who, according to a legal report on their work or other type of report, was in the charge of ensuring the protection, upbringing, care or education of the child; the non-fulfilment of this obligation represents an infringement, and shall be sanctioned. In addition, among the Norms specified by Order no 21 of 2004, it is expressly specified at Section XXI, Subchapter 6, that the home care child protection service is obliged to inform in writing the directly interested parties regarding any special incidents occurred in relation with the protection of the child, including any serious harm, injury or accident, within 24 hours from the occurrence of such incident.

The prosecution authority can report on its own initiative if it acknowledges the commitment of a crime through any other procedure as well than by filing a complaint or a denunciation. The procedure and the rights of the child who is the victim of such incident are the same in such reporting situations as well.

Regarding infringements related to the obligation to assist a child in institutional care who is in danger, the Article 204 of the Criminal Law incriminates the commitment of the infringement specified as the *Obstruction of rescue*, without implying a derogatory punishment system if the crime was committed against a juvenile, against a child in institutional care, or by an employee of the care institution.

Limitations of criminal liability

Regarding the **limitations of criminal liability**, departing from community regulations, in cases of **offences against sexual freedom and integrity** committed against an underage person, the liability limitation term runs as of the date the victim becomes of age. If the underage person dies before becoming of age, the statute of limitations term runs as of the date of death, according to Article 154, paragraph 4 of the Criminal Law, and if the underage person dies before the term for introducing the preliminary complaint as stipulated by law expires, the prosecution action can be initiated ex officio.

According to the regulations by Article 154 of the Criminal Law, the statute of limitations term for criminal liability is: a) 15 years, when the penalty provided by the law for the offense committed is life imprisonment or a term of imprisonment exceeding 20 years; b) 10 years, when the penalty provided by the law for the offense committed is a term of imprisonment exceeding 10 years, but no more than 20 years; c) 8 years, when the penalty provided by the law for the offense committed is a term of imprisonment exceeding 5 years, but no more than 10 years; d) 5 years, when the penalty provided by the law for the offense committed is a term of imprisonment exceeding one year, but no more than 5 years; e) 3 years, when the penalty provided by the law for the offense committed is a term of imprisonment not exceeding one year or a fine.

In order to illustrate the above mentioned regulations, the offence of *Battery or any other acts of violence* as specified in the Criminal Law shall be punishable by no less than 3 months and no more than 2 years of imprisonment or by a fine, and if such act causes traumatic injuries or affects the health of the child, the

seriousness of which is assessed based on medical-care days of maximum 90 days, it shall be punishable by no less than 6 months and no more than 5 years of imprisonment or by a fine, the term of limitations in both situations being thus 5 years. The offence of *Ill treatments applied to underage persons* as specified by the Criminal Law shall be punishable by no less than 3 and no more than 7 years of imprisonment and a ban on the exercise of certain rights, the limitations term thus being 8 years. The offence of *Trafficking in underage persons* shall be punishable by no less than 3 and no more than 10 years of imprisonment and a ban on the exercise of certain rights, the limitations term thus being 8 years again. Such act shall be punishable by no less than 5 and no more than 12 years of imprisonment and a ban on the exercise of certain rights, when: a) the act was committed by means of coercion, abduction, deception, or abuse of authority; by taking advantage of the inability of a person to defend themselves or to express their will or of their blatant state of vulnerability; by offering, giving and receiving payments or other benefits in exchange for the consent of an individual having authority over such person; b) the act was committed by a public servant while in the exercise of their professional duties; c) such act represents a threat to the life of the underage person; d) the act was committed by a family member of the underage person; e) the act was committed by a person who had been assigned for the care, protection, education, guard or treatment of the underage person, or by a person who abused their position of acknowledged trust or authority over the underage person. In such case, the limitations term is 10 years. The crime *Rape* shall be punishable by no less than 5 and no more than 12 years and a ban to exercise certain rights, when the victim is an underage person, or the victim is entrusted to the perpetrator for care, protection, education, guard or treatment, or the victim is a direct-line relative, a brother or sister to the perpetrator, the limitations term being 10 years.

Regarding **the measures imposed subsequently**, in public or private institutions, and in home care public or private services, which ensure the protection, upbringing, care or education of children, the Article 103 of Law no 272 of 2004 expressly forbids the employment of a person against whom a final and irreversible court decree has been issued for intentionally committing a crime. Also, Article 90 of Law no 214 of 2004 stipulates that the legal representative of the child, the public authorities and private bodies shall take all necessary steps in order to facilitate the physical and psychological re-adaptation and the social re-integration of a child who had been the victim of any form of neglect, exploitation or abuse, torture, punishment or cruel, inhuman or degrading treatment, and they shall provide for all necessary conditions so that re-adaptation and re-integration would improve the health, self-esteem and dignity of the child. In addition, among the Norms

specified by Order no 21 of 2004, it is expressly specified at Section XVII, Subchapter 5, that in the case of the abuse, neglect or exploitation of a child, the home care service ensures the child's access to the services established by the public service specialized in child protection.

3. Types of compensations foreseen for children victims of child abuse and for adults who suffered abuse when they were children. Opportunities ensured by restorative justice.

The child in institutional care, as well as the young person who became of age and thus left institutional care **have the right to request material and moral compensation** for the harm caused by an offence. Compensations can be requested by means of a civil claim based on civil liability under tort law, either within the framework of a valid criminal file, either, in lack of such opened criminal file, or when such file was closed and the civil claim did not reach to a solution, within the framework of a separate civil proceeding, by making reference to general provisions. If the child lacks legal capacity, the claim shall be submitted on their behalf by their legal representative, while a child with limited legal capacity can file the claim with the consent of the legal representative. According to Article 92, paragraph 1 of the Civil Procedure Code, the prosecutor can initiate any civil claim whenever it is necessary in order to protect the rights and legitimate interests of underage persons.

Rights to legal action related to property law, unlike legal actions for the protection of a non-property right, are subjected to **limitation**. The general rule is that the term of limitations for providing compensation is 3 years from the date when the injured party acknowledged or should have acknowledged the harm as well as the person responsible for that harm, according to Article 2528 paragraph 1 of the Civil Code. Taking into account that the underage person will initiate the legal action either through their legal representative, either with their consent, we think that the right to legal action is not self-evident for the underage person without full legal capacity, as long as the legal representative did not acknowledge or should not have acknowledged the harm and the person responsible for it. In case of the malevolence displayed by the legal representative, we think that the right to legal action can ensue when the victim turns 18 years old, moreover, the child can even request the re-imposing of the limitation term, if the child submitted the request within 30 days from the day when the child acknowledged or should have acknowledged the ceasing of the reasons which were at the basis of surpassing the limitations term, according to Article 2522 of the Civil Code.

As an exception, Article 2518, paragraph 2 of the Civil Code stipulates that the reparation of a moral or material damage caused to a person through torture or barbarous acts, or caused through violence or sexual assault against an underage person or to a person unable to defend themselves or to express their will is 10 years. It is to note that according to the provisions under Article 1394 of the Civil Code, in all cases when compensation ensues from an act which is subjected by Criminal Law to a longer limitations term than by the Civil Code, the limitations term of criminal liability is applicable also to the right to claim in civil liability. As a consequence, in order to repair a harm ensuing from the offence against sexual freedom and integrity committed against a child in institutional care, the liability limitation term runs as of the date the victim becomes of age.

Likewise, according the regulations in Article 2532, paragraph 2 of the Civil Code, the liability limitation term does not run again, or in the case when it started to run, it shall be suspended in cases of persons lacking legal capacity or having limited legal capacity and also regarding those they represent, as long as the guardianship is valid, and the accounting have not been finished and approved yet, and in the case of the child lacking legal capacity or with limited legal capacity, as long as the child does not have legal representative or guardian, with the exception of cases when there is a converse legal disposition in force.

Concerning **the modality to repair harm**, the respective general regulations are applicable, since there is not at place a special system regarding the situation of the child in institutional care and the person who left institutional care. According to these regulations, harm is to be repaired integrally, and compensation can be due also for a future harm, when its occurrence is certain. The repairing should cover the loss suffered by the victim, the costs occurred while attempting to avoid or limit harm. If the unlawful act also determined the losing of the chance to gain an advantage or to avoid a damage, the repair shall be proportionate with the probability to obtain that advantage or, should the case be, to avoiding that damage, taking into account the circumstances and the concrete situation. If the harm is continuous, the compensation shall be granted through regular services. In case of offences against bodily integrity or health, compensation may be granted also for the restriction of the possibilities of family and social life. Besides these, the repair shall cover all expenses related to health care, and, should the case be, the expenses ensuing from the increase of the needs of the harmed person, and any other material damages. In the case of an offence against the bodily integrity or health of a child, the repair should imply, as the case may be, the equivalent of the wage the juvenile was losing or was hindered to earn, by losing or restricting their ability to work. Likewise, among the Norms specified by Order no

21 of 2004, it is expressly specified at Section XX, Subchapter 6, that in the case when the child left home care due to an abuse, the public service specialized in child protection shall establish the appropriate protection measures and services.

In the same context, Law no 211 of May 21st 2004 regarding certain measures for ensuring the protection of victims of crimes stipulates that psychological counselling shall be provided upon request for victims of an attempt to murder and to first degree murder, for victims of **intentional offences which caused bodily harm to the victim, of rape, sexual assault, sexual intercourse with juveniles and sexual corruption of juveniles**, of offences consisting in **mistreatment applied to juveniles**, and for victims of offences consisting in trafficking and exploitation of vulnerable persons and the attempt to such acts. Counselling is provided by certain *services specialized in the protection and social reintegration of victims and by organizations (it is not clear what kind of organizations)* during a period of maximum 3 months, and in case of victims younger than 18 years old, for a period of maximum 6 months.

In addition, Law no 211 of 2004 stipulates also that for the same category of victims, under certain conditions, **the state offers financial compensations** from the state budget through the budget of the Ministry of Justice. The financial compensation can be granted to the victim only if the victim reported to the prosecution authorities within 60 days from the date of the commitment of the crime. The law, however, foresees a derogation as well, namely those victims, who didn't become of age yet, are not obliged to report to the prosecution authorities regarding the crime. In the case of an underage person who is not aware of their rights, the situation is the following: If a preliminary complaint is needed (as in case of a rape), the child has to file the preliminary complaint within 3 months after acknowledging such act, and subsequently, the limitation term of 1 year and 3 years runs as of the date the victim becomes of age, for submitting a request for compensation, depending on the conditions stipulated under Article 24 of the law.

Yet, again, no derogation is at place regarding the preliminary complaint of 90 days (probably it is presumed that the legal representative pursues their duties). The only derogation is the following: if the perpetrator is the legal representative of the child, the term of 3 months runs as of the date when a new legal representative is assigned, and the law stipulates that the criminal complaint can be initiated ex officio as well. There are certain derogations regarding limitation terms as well, but their impact is minor, whenever it is not related to a preliminary complaint.

Thus, derogation is at place only regarding the permissibility of the request for financial compensation, while in order to initiate a criminal file, a preliminary complaint is still needed to be submitted within 3 months starting from the date when the victim acknowledged the commitment of the offence, the legal nature of the two terms being different.

***4. Critical issues concerning the legal support to survivors of child abuse in residential settings.
Potential gaps and opportunities.***

In our recommendations, the following aspects need further regulation:

- In case of categories of crimes against a child in institutional care and of all requests of the child related to material and moral compensation, the liability limitation term should run as of the date the victim left the protection system, if this right was not enforced before, and certain ceilings should be established regarding compensations;
- The legal actions targeting the granting of material and moral compensations initiated by the adult who left the protection system should be exempted from the payment of court fees.
- Regarding the settling of legal complaint with the above mentioned subjects, special procedural rules should be at place, like: the liability limitation term for filing a preliminary complaint in order to initiate legal actions should run as of the date when the victim leaves the protection system, if the preliminary complaint wasn't submitted previously; a larger and more permissive taking of evidence than as stipulated by general provisions; the term of settlement should be very short; more experts should be involved in the procedure (psychologists, sociologists etc.);
- In the settlement of legal procedures with the above mentioned objects, in Law no 51 of 1995 regarding the organization and practicing of the attorney's profession (re-issued), the right of the attorney to grant counselling, assistance and representation *pro bono* to the child or adult victim should be regulated expressly.
- We recommend the setting up of more premises specifically destined to the hearing of juveniles by the court on the territory of Romania, as at present the number of such premises is very low.

Recommended documents

<http://www.copii.ro/activity/child-protection-system/overview/?lang=en>.

Legislation references

1. UN Convention on the Rights of the Child, ratified by Romania by Law no 18 of 1990;

2. The Lanzarote Convention (The Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse), ratified by Romania by Law no 252 of 2010;
3. Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by Romania by Law no 30 of 1994, with subsequent modifications;
4. Law no 272 of 2004 on the protection and promotion of the rights of the child – republished;
5. Civil Code, adopted by Law no 287 of 2009 – republished;
6. Civil Procedure Code, adopted by Law no 134 of 2010 – republished;
7. Criminal Code, adopted by Law no 286 of 2009;
8. Criminal Procedure Code, adopted by Law no 135 of 2010;
9. Minimal compulsory norms regarding the services for the protection of the child in home care, approved by Order no 21 of February 26th 2004;
10. Minimal Compulsory Norms of July 27th 2004 regarding the emergency centre for the abused, neglected and exploited child, approved by Order no 89 of July 27th 2004;
11. Minimal Compulsory Norms regarding the child’s call centre, approved by Order no 177 of December 16th 2003;
12. Law no 211 of May 27th 2004 on certain measures for ensuring the protection of the victims of offences;
13. Government Emergency Ordinance no 80 of 2013 regarding court fees.