

**Mandate of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health**

Ref.: OL SRB 3/2023  
(Please use this reference in your reply)

26 December 2023

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, pursuant to Human Rights Council resolution 51/21.

In this connection, I would like to bring to the attention of your Excellency's Government information we have received concerning **amendments to the Law on the Protection of Persons with Mental Health Disabilities (Official Gazette RS" no. 45/13)**, proposed by your Excellency's Government that if adopted, may impinge on the enjoyment of the right of everyone to the highest attainable standard of physical and mental health, among other human rights of the impacted persons.

I would like to share several observations and comments about this legislation to ensure the compliance of these norms with the Republic of Serbia's obligations under international human rights law, in particular those contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD). I have strong reservations that the proposed amendments, if adopted, would have a negative impact on the rights of the affected persons, particularly the rights of children and persons with mental disabilities.

Please note that nothing in this letter should be interpreted in a way to suggest that I am in agreement with the approach of the existing Law on the Protection of Persons with Mental Health Disabilities as it stands, rather that this letter specifically focuses on the proposed amendments to that law, as opposed to concerns with the broader law itself. The UN Committee on the Rights of Persons with Disabilities has already expressed concern regarding Law on the Protection of Persons with Mental Disabilities ("the Law"), stating that this underlying law *permits the deprivation of liberty on the basis of impairment and provides for involuntary hospitalization and forced institutionalization of children and adults with intellectual and/or psychosocial disabilities*. The Committee urged your Excellency's Government to repeal this underlying law and "*prohibit impairment-based detention of children and adults with disabilities, including involuntary hospitalization and forced institutionalization...*"<sup>1</sup>

### *Background*

Amendments have been proposed to the current Law on the Protection of Persons with Mental Health Disabilities ("the Law"), that will be considered for adoption at a future date.

On 3 May 2023, a thirteen-year-old boy attacked the Vladislav Ribnikar elementary school in Belgrade with firearms, killing nine children, eight girls and one

<sup>1</sup> UN CRPD, Concluding Observations Serbia, 23 May 2016 at para.s 25-26.

boy, and one adult male. Another six children and one teacher were injured.

In the aftermath of this tragedy, on 20 July 2023, the Ministry of Health proposed amendments (“the Proposed Amendments”) to the Law. Between 20 July-9 August 2023 there was a period of consultations on the Proposed Amendments.

On 6 October 2023 the Ministry of Health sent the Proposed Amendments to the Law to the Protector of the Citizens of Serbia, the national Ombudsperson. On 17 October the Ombudsman made his opinion available on his public webpage. We are not yet aware of a Government response to his opinion.

I understand these draft amendments will go before the parliament for the discussion and adoption process at a yet to be determined date in the future.

### *General observations*

The Proposed Amendments as drafted would have a negative impact on the human rights of the affected persons, particularly the rights of children and persons with mental disabilities. If approved, the Proposed Amendments would allow the indefinite detention of children below 14 years old, the minimum age of criminal responsibility, in psychiatric facilities.

The Proposed Amendments to the Law would mainly impact children who have committed acts punishable by the Criminal Code with imprisonment for no less than 10 years, but who are not criminally liable as they are under 14 years of age, as well as persons with mental health difficulties and disorders.

The Proposed Amendments include a proposal that children who are not yet of an age to be criminally responsible when they commit a crime that would otherwise carry a sentence of at least ten years of imprisonment, would now, according to amendments to Article 1, new paragraphs (4) and (5) would, if due to a manifested mental disorder, and are deemed to pose a serious danger to others, be detained in a specialized organisational part of a psychiatric institution, of closed type, and with security.

### *International human rights law*

While the primary focus of this letter is from the perspective of the right of everyone to the highest attainable standard of physical and mental health, the Proposed Amendments raise a breadth of human rights concerns including the detention of children, detention of persons with mental disabilities, punishment when not criminally responsible, punishment without a fair trial, and related legal rights, indefinite detention and/or not clearly defined duration for detention, restrictions on visitation and social contact, particularly for children, lack of institutional safeguards, and appropriate specificity of treatment and institutions, framework for decision making regarding children and persons with mental disabilities, and adequacy of consultation processes, and the right to education *inter alia*. They do not meet the required standards of international human rights law including those set out in the Universal Declaration of Human Rights (UDHR), the Convention of the Rights of the Child (CRC), Convention on the Rights of Persons with Disabilities (CRPD), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment (CAT), the International Covenant and Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

As expressed by the former Special Rapporteur on the right to the highest attainable standard of physical and mental health in his final report to the General Assembly, “*the right to health can be fulfilled only when all other rights are respected and protected, and that advancing other rights promotes the right to health*”.<sup>2</sup> The Proposed Amendments as they stand are inconsistent with the State’s international human rights obligations.

The Proposed Amendments adopt a medicalized approach to persons, including children with mental disabilities, as opposed to a human rights-based approach. They do not contemplate necessary rehabilitation and inclusion of persons with disabilities in their community, contrary to the norms set out in international law, including the CRPD. The Proposed Amendments appear not only to detain a child in this situation indefinitely, but to also limit their inclusion in the community, in their family life, and restrict their access to education and participation in everyday life, *inter alia*.

This exceptional legal regime contemplated by the Proposed Amendments is based on the perceived mental health condition of the child. There are also concerns that the Proposed Amendments may contribute to the discrimination of children with mental disabilities, including stigmatization faced by these children. The Proposed Amendments do not seem to contemplate other reasons for what would otherwise be criminal behaviour, such as previous trauma, abuse, or exploitation suffered. They do not contemplate prevention or any type of early intervention for children at risk of such behaviour, nor any kind of assessment and rehabilitation to ensure the child understands the consequences of their behaviour. Similarly, they do not envision a measure that would contribute to the effective identification of children and youth at risk, nor referral to adequate and timely intervention.

In the former Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health’s report on the critical role of the social and underlying determinants of health in advancing the realization of the right to mental health, he specifically recommended States to *take steps towards the full elimination of institutional care for children, with a special focus on eliminating the institutionalization of young children, with or without disabilities.*”<sup>3</sup>

#### *Specific observations*

#### *Detention of children*

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<sup>2</sup> A/75/163 at para. 17.

<sup>3</sup> A/HRC/41/34 at para. 96.

Relevant to the Proposed Amendments are the applicable standards related to the deprivation of liberty of children under international human rights law, including the Convention on the Rights of the Child (CRC), to which the Republic of Serbia became party on 12 March 2001, and other relevant standards such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines).

In the report of the former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the former Special Rapporteur 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.<sup>4</sup>

As guaranteed by the International Covenant on Civil and Political Rights, to which the Republic of Serbia became a party on 12 March 2001, all people have the right not to be arbitrarily deprived of their liberty.<sup>5</sup> This is of particular concern for children, who upon arrest, should only be detained as a last measure and for the shortest amount of time possible, with regular reviews that are aimed to non-institutionalization as guaranteed by Article 37 of the CRC and explained in the Committee on the Rights of the Child's General Comment No. 10 (2007). In its concluding observations to the Republic of Serbia in 2017, the CRC urged your Excellency's Government to bring its laws in line with this principle, and that in cases where detention was unavoidable, to *ensure that detention conditions are compliant with international standards, including with regard to access to education and health services*.<sup>6</sup> The Proposed Amendments do not provide for education, treatment, or rehabilitation of children institutionalized under Article 12(4).

#### Article 12 new paragraph (4)

*"Psychiatric evaluation, i.e. course diagnostics, disease monitoring diagnostics and treatment, the duration of which cannot be predicted in advance, of children who are not criminally responsible at the time criminal offences were committed and which are recognised by law as criminal offences for which a sentence of at least ten years of imprisonment is prescribed, which, due to manifested mental disorder, pose a serious danger to others, is carried out in a special organisational part of a psychiatric institution, of closed type and with special security."*

#### Article 12, new paras (4) and (5)

The new subparagraph 12 (4) proposes detention of children, who are too young to be held criminally responsible, yet committed offences that hold a sentence of at least ten years imprisonment, when they are deemed to pose a serious danger to others, due to a manifest mental disorder, in *a special organisational part of a psychiatric institution, of a closed type and with special security*.

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<sup>4</sup> A/HRC/38/36, para. 53.

<sup>5</sup> ICCPR, Article 9.

<sup>6</sup> Concluding observations on the combined second and third periodic reports of Serbia, CRC/C/SRB/CO/2-3, 7 March 2017 at para. 65.

The Proposed Amendments violate Article 37 of the CRC, as no child shall be arbitrarily deprived of their liberty and any arrest, detention, or imprisonment shall be *used only as a measure of last resort and for the shortest appropriate period of time.*<sup>7</sup> The Human Rights Committee has also stated that a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. In addition to the other requirements applicable to each category of deprivation of liberty, the best interests of the child must be a primary consideration in every decision to initiate or continue the deprivation. It has found that the placement of a child in institutional care amounts to a deprivation of liberty within the meaning of Article 9 and that a decision to deprive a child of liberty must be subject to periodic review of its continuing necessity and appropriateness. The child has a right to be heard, directly or through legal or other appropriate assistance, in relation to any decision regarding a deprivation of liberty, and the procedures employed should be child-appropriate. The right to release from unlawful detention may result in return to the child's family or placement in an alternative form of care that accords with the child's best interests, rather than simple release into the child's own custody.

New Article 12 (4) refers to the establishment and running of the *special organizational part of a psychiatric institution, of a closed type and with special security.* As drafted, there is a lack of focus on the rights of the child, including their access to quality medical attention, *inter alia.* This type of indefinite detention without proper access to rehabilitation, adequate medical care including psychiatric and psychosocial treatment, is incompatible with the enjoyment of the right to everyone to the highest attainable standard of physical and mental health, and as previously found by the European Court of Human Rights, is not compatible with human dignity.

The Proposed Amendments run contrary to another relevant standard are found in Article 37 of the CRC, which also holds that any deprivation of liberty should be done in a manner that takes into account their needs relative to their age. They do not state that, if a child below the age of criminal responsibility commits an act punishable by the Criminal Code, it is necessary to carry out an assessment of the child's evolving capacities, which is crucial for assessing the extent to which the child understands the significance and consequences of the committed act and is necessary for determining appropriate measures and for planning an adequate treatment.

Under article 3(3) of the CRC, State Parties have an obligation to ensure that institutions responsible for the care or protection of children, such as those outlined in the Proposed Amendments, particularly Article 12 (4), shall not only take the best interests of the child into account, but also *conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.* The UN Committee on the Rights of the Child has recommended to the Republic of Serbia that it strengthen efforts to ensure the best interests of the child are taken into account in all legislative, administrative and judicial proceedings and decisions and in all policies, programmes and projects that are relevant to and have an impact on children.<sup>8</sup>

Any legislation regarding the detention of children should be done in accordance with internally accepted standards such as the UN Rules on the Protection of Minors Deprived of Freedom, and regionally applicable standards such as those of

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<sup>7</sup> Convention on the Rights of the Child, Article 37(b).

<sup>8</sup> UN CRC, Concluding Observations Republic of Serbia, 7 March 2017 at para. 25.

the Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT). It is imperative that the institutions, thresholds used, and protocols that will be applicable to children who fall under these Proposed Amendments be clearly delineated by law and meet international human rights standards.

*Detention of children not criminally responsible*

In its General Comment No. 24 (2019) on children's rights in the child justice system, the UN Committee on the Rights of the Child states that under article 40 (3) of the Convention, States parties are required to establish a minimum age of criminal responsibility. While the article does not specify the age, the Committee recalls that over 50 States parties have raised the minimum age following ratification of the Convention, and the most common minimum age of criminal responsibility internationally is 14 years old, as it is in the Republic of Serbia.

In its General Comment No. 24 (2019) on children's rights in the child justice system, the UN Committee on the Rights of the Child the Committee raises its concern about practices that permit the use of a lower minimum age of criminal responsibility in cases where, for example, the child is accused of committing a serious offence.<sup>9</sup> Such practices are usually created to respond to public pressure and are not based on a rational understanding of children's development. The Committee strongly recommends that States parties abolish such approaches and set one standardized age below which children cannot be held responsible in criminal law, without exception.

Whether the Proposed Amendments explicitly bring these children under the juvenile justice system, in practice that is the case as they are being institutionalized for criminal behaviour while not criminally responsible while not being provided all the legal rights and safeguards of the child justice system, while these children are even younger and in a more vulnerable situation than those of an age to be found criminally responsible.

The Proposed Amendments effectively punish the child with indefinite detention, without access to all legal rights guaranteed by international human rights law, including those specifically guaranteed to children under Article 40 of the Convention on the Rights of the Child. They effectively render a child who is under the minimum age of criminal liability, while not sentenced under the formal child justice system, penalized under another legal regime, the existing Law on the Protection of Persons with Mental Disabilities.

The new subparagraph 12(4), and the legal framework more broadly seem to detain children who are too young to be held criminally responsible, but deemed to have committed a serious crime, to one of the most severe punishments available to those found guilty of these crimes, without even having had a fair trial, nor considerations for mitigating circumstances as would be the case in sentencing after a trial.

While these children are too young to be criminally responsible, the Proposed Amendments have a punitive element, and lack necessary rehabilitative or supportive

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<sup>9</sup> CRC, General Comment no. 24 (2019) on children's rights in the child justice system, at para. 25.

elements. In its concluding observations of 2021, the Committee Against Torture expressed concern at the lack of rehabilitative and educational programmes for children deprived of their liberty in correctional institutions in the Republic of Serbia, as well as reports of ill-treatment, and recommended your Excellency's Government to strengthen same.<sup>10</sup>

Punitive policies to address situations where children are not criminally liable undertake criminal behaviour contravene the spirit of the international framework for children's rights, including the principle of non-discrimination under the International Covenant on Economic, Social, and Cultural Rights, and other legal instruments.

Furthermore, in its General Comment No. 24 (2019) on children's rights in the child justice system, the UN Committee on the Rights of the Child explains that children with developmental delays or neurodevelopmental disorders or disabilities should not be in the child justice system at all, even if they have reached the minimum age of criminal responsibility.<sup>11</sup> If not automatically excluded, such children should be individually assessed.

*Specific concerns related to the issue of detention of Children with mental disabilities*

The Proposed Amendments touch on various areas of the human rights of children with mental disabilities, particularly with regards to freedom and security of the person, freedom from torture or cruel, inhuman or degrading treatment or punishment, and the right to independent living and inclusion in the community, as guaranteed under international law, including the Convention on the Rights of Persons with Disabilities.<sup>12</sup> In its review of the Republic of Serbia in 2016, the Committee on the Rights of Persons with Disabilities expressed concerns regarding the Law itself in relation to these rights, and urged your Excellency's Government to strengthen efforts to deinstitutionalize children, particularly those with intellectual and/or psychosocial disabilities.<sup>13</sup> The Proposed Amendments run contrary to these concluding observations.

In the former Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health's report on the critical role of the social and underlying determinants of health in advancing the realization of the right to mental health, he found that institutionalization and other forms of coercion are unacceptably widespread in mental health-care systems, and that especially in cases of persons who are diagnosed with mental health conditions, often do more harm than good.<sup>14</sup>

Persons with disabilities, including children with disabilities, including mental disorders, have the right to not be deprived of their liberty arbitrarily and to live in the community.<sup>15</sup> Article 14 of the CRPD explicitly states that persons with disabilities should not be deprived of their liberty arbitrarily, and that *existence of a disability shall in no case justify a deprivation of liberty*. A "manifested mental disorder" as

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<sup>10</sup> UN Committee Against Torture, Concluding observations on the third periodic report of Serbia, CAT/C/SRB/CO/3, 20 December 2021, paras. 23-24.

<sup>11</sup> General Comment no. 24 at para. 28.

<sup>12</sup> CRPD, Articles 14, 15, 19.

<sup>13</sup> UN Committee on the Rights of Persons with Disabilities, Republic of Serbia, 23 May 2016 at para. 14.

<sup>14</sup> A/HRC/41/34 at para. 96.

<sup>15</sup> CRPD Articles 14, 19.

delineated in subparagraph 12(4) of the Proposed Amendments is not an acceptable reason in and of itself for detention of an individual, even more so for a child.

In its General comment No. 35 on Article 9 (Liberty and security of person) of the International Covenant on Civil and Political Rights, to which Serbia became a party on 12 March 2001, the Human Rights Committee emphasized the harm inherent in any deprivation of liberty and also the particular harms that may result in situations of involuntary hospitalization and stated that<sup>16</sup> States parties should revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention. The existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others. It must be applied only as a measure of last resort and for the shortest appropriate period of time and must be accompanied by adequate procedural and substantive safeguards established by law.

The Proposed Amendments if adopted, would seem to then be using the Law on the Protection of Persons with Mental Disabilities, for punitive purposes. The Proposed Amendments also seem to infer a mental disorder due to the behaviour of the child in question, and then institutionalize that child for same. In its guidelines on Article 14 of the CPRD on liberty and security of the person, the Committee advises that involuntary institutionalization on the grounds of impairment or associated circumstances such as presumed “dangerousness” or other factors is often caused or increased by a lack of disability specific support services.

In its 2016 country review of the Republic of Serbia, the Committee on the Rights of Persons with Disabilities expressed deep concern at the number of children living in institutions, particularly those with intellectual disabilities.<sup>17</sup> The Proposed Amendments directly impact children with mental disabilities, and this intersectionality places them in an even more vulnerable situation. In its General Comment No. 9 (2006) on the rights of children with disabilities, the UN Committee on the Rights of the Child stated deprivation of liberty should only be applied if necessary, with a view to providing the child with adequate treatment for addressing his or her problems which have resulted in the commission of a crime and the child should be placed in an institution that has the specially trained staff and other facilities to provide this specific treatment. In making such decisions the competent authority should make sure that the human rights and legal safeguards are fully respected.<sup>18</sup> In its 2022 country review, the Committee of the International Covenant on Economic, Social, and Cultural Rights made similar findings. There is no preventative nor rehabilitative framework to the proposed scheme.

The Republic of Serbia also received similar recommendations from states in its Universal Periodic Review report of 2022, including the need to harmonize laws and policies in mental health with international standards, and investing in mental health services in the community, with the aim of eliminating stigma and discrimination, and the deinstitutionalization of persons with psychosocial disabilities, inter alia. Your Excellency’s Government also received specific recommendations

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<sup>16</sup> ICCPR, General comment No. 35 on Article 9 (Liberty and security of person).

<sup>17</sup> UN Committee on the Rights of Persons with Disabilities, Republic of Serbia, 23 May 2016 at para. 13.

<sup>18</sup> General Comment No. 9 (2006) on the rights of children with disabilities.

regarding the need to reduce the number of institutionalized children and ensuring sufficient support for children with disabilities, including mental disabilities to live in their communities. The Proposed Amendments run contrary to these recommendations.

In its 2021 review of the Republic of Serbia, the UN Committee Against Torture expressed regret at the lack of progress in addressing concerns regarding involuntary confinement of persons with mental and psychosocial disabilities in psychiatric institutions, and particularly poor living conditions and inadequate access to healthcare, education, and rehabilitation for children with disabilities in residential care who they stated are exposed to cruel, inhuman, and degrading treatment without redress.<sup>19</sup>

Serbia became a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 12 March 2001. Article 12 of the ICESCR guarantees the right to everyone to the enjoyment of the highest attainable standard of health. In General Comment No. 5 of the Committee on Economic, Social and Cultural Rights on Persons with disabilities, the Committee notes that States should ensure that persons with disabilities, particularly infants and children, are provided with the same level of medical care within the same system as other members of society. Similarly, such persons should be provided with rehabilitation services which would enable them “to reach and sustain their optimum level of independence and functioning”. In its 2017 concluding observations to the Republic of Serbia, the UN Human Rights Committee noted concern regarding the forced placement of large numbers of persons with mental, intellectual, and psychosocial disabilities in medical institutions, isolation and forced treatment, and recommended your Excellency’s Government to both implement a policy of deinstitutionalization and to ensure that any decision to “isolate, place or treat persons with mental, intellectual and psychosocial disabilities is made after a thorough medical assessment, that any restrictions are legal, necessary and proportionate to the individual circumstances...”<sup>20</sup>

The Convention on the Rights of Persons with Disabilities, which Serbia ratified on 31 July 2009, guarantees the rights to independent living and being included in the community. The UN Committee on the Rights of Persons with Disabilities has emphasized that children should not be separated from their parents, the decision is subject to judicial review, in accordance with applicable law and procedures, and that this separation is necessary for the best interests of the child, and that such children must be afforded special protection by the State. In its General Comment no. 5(2017) on the Rights of Persons with Disabilities on living independently and being included in the community, it also said that States shall ensure alternative care for such children, in accordance with their laws.<sup>21</sup> In its General Comment No. 5, the Committee emphasized that support services must be designed to support living in the community, and prevent isolation and segregation from others. In its 2016 country review of the Republic of Serbia, the Committee on the Rights of Persons with Disabilities urged your Excellency’s Government to prohibit, inter alia, the isolation of children with disabilities, which it considers to be cruel, inhuman, or degrading treatment.<sup>22</sup>

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<sup>19</sup> Committee Against Torture, Concluding observations on the third periodic report of Serbia , CAT/C/SRB/CO/3, 20 December 2021 at para. 25.

<sup>20</sup> Human Rights Committee, Concluding Observations, Republic of Serbia, 10 April 2017.

<sup>21</sup> CRPD, General Comment No. 5 (2017) on living independently and being included in the community.

<sup>22</sup> UN Committee on the Rights of Persons with Disabilities, Republic of Serbia, 23 May 2016 at para. 28.

The Proposed Amendments seem to infer that any criminal behaviour undertaken by a child under 14 years of age is due to a “manifested mental disorder” and at the same time infer that as a result of this they are a danger to the public. This characterization as drafted can lead to stigma and discrimination against persons with mental disabilities, and runs contrary to the right to non-discrimination under the International Covenant on Economic, Social, and Cultural Rights, *inter alia*.

The new subparagraph (2) in Article 38 seem to limit the rights of children with mental disabilities in detention even further than those of adults with mental disabilities. Relatedly, there is no explicit reference to educational training for children, only for vocational training which new paragraph 38(2) limits for children institutionalized under Article 12.

#### Article 38 new paragraph 2

*"Exceptionally from paragraph 1 of this Article, the children placed in an institution referred to in Article 12, paragraph 4 of this Law do not have the rights referred to in paragraph 1, points 4) and 5) of this Article."*

In its General Comment its General comment No. 1 (2014) Article 12 on equal recognition before the law, the UN Committee on the Rights of Persons with Disabilities explains that States parties must abolish policies and legislative provisions that allow or perpetrate forced treatment, as it is an ongoing violation found in mental health laws across the globe, despite empirical evidence indicating its lack of effectiveness and the views of people using mental health systems who have experienced deep pain and trauma as a result of forced treatment. Further, in its General Comment No. 6 (2018) on equality and non-discrimination, the Committee notes that persons with disabilities can be disproportionately affected by violence, abuse and other cruel and degrading punishment, which can take the form of restraint or segregation as well as violent assault. It states that the Committee is particularly concerned about certain acts committed against persons with disabilities, *including children on the grounds of impairment, which by definition are discriminatory: separation of children with disabilities from their families and forced placement in institutions; deprivation of liberty; torture or cruel, inhuman or degrading treatment or punishment; violence; and the forced treatment of persons with disabilities inside and outside of mental health facilities. It reiterates that States parties must take all appropriate measures, to provide protection from and prevent all forms of exploitation, violence and abuse against persons with disabilities.*<sup>23</sup>

#### *Indefinite or unclear duration of detention*

#### New Article 35a

*"Exceptionally from Article 30 and Articles 33-35 of this Law, the decision to place a child in a psychiatric institution without the child's consent referred to in Article 12, paragraph 4 of this Law is made without restrictions regarding the duration of the placement, with the court being obliged to review the fulfillment of conditions for further placement and treatment every six months."*

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<sup>23</sup> General comment No. 6 (2018) on equality and nondiscrimination at para. 56.

New Article 35a allows for institutionalization of a child, without a defined time period. On its face, this could lead to the indefinite detention of children. From the information received it seems the lack of an initially defined time period is an exception to the Law, which normally provides for involuntary confinements of one month, three months, or six months. There is no provided justification for this exception for children, which places them in a worse position than for other persons institutionalized under this framework.

Further it does not appear to contemplate the foundational principles of best interests of the child and the right to express their own views in all matters affecting them, as laid down in the Convention of the Rights of the Child.<sup>24</sup> As expressed by the UN Committee on the Rights of the Child in its General Comment 14 on the right of the child to have his or her best interests taken as primary consideration, the best interests of the child are of particular importance in legislative changes that will directly affect children.

There is little in the way of safeguards provided for in the Proposed Amendments, while the impact on the life of a child in this situation is severe, equating to the deprivation of their liberty. Further, there is no provision to ensure adequate legal representation for children throughout this process, nor does it allow for a hearing in which the child could express their views, though this is a procedural right guaranteed under Article 30 of the Constitution of the Republic of Serbia in relation to detention and criminal proceedings. The scheme provided for under the Proposed Amendments is a detention process, the children in question would be deprived of their liberty. The UN Committee on the Rights of the Child has previously expressed concern that children in alternative care and children with disabilities in the Republic of Serbia are often not consulted in matters that concern them,<sup>25</sup> and that alternatives to detention were not being implemented.<sup>26</sup> With regards to the child justice system, it recommended that your Excellency's Government:

*(c) Ensure that alternative measures to detention, such as diversion, probation, mediation, counselling or community service, are fully implemented wherever possible, and ensure that detention is used as a last resort and for the shortest possible period of time and that it is reviewed on a regular basis with a view to withdrawing it;*

*(d) In cases where detention is unavoidable, ensure that detention conditions are compliant with international standards, including with regard to access to education and health services.<sup>27</sup>*

Further, regarding the six month delineated intervals, the duration of these intervals should be set in close collaboration with experts in child psychiatry and psychology. In its General Comment No. 24 (2019), the Committee on the Rights of the Child explained that where children are deprived of their liberty, in accordance with the principle that it should be for the shortest time possible, States parties should provide regular opportunities for early release, including into the care of parents of other appropriate adults.<sup>28</sup> Any institutionalization under this regime should be

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<sup>24</sup> CRC Articles 3, 12.

<sup>25</sup> CRC, Concluding Observations, Republic of Serbia, 7 March 2017 at para. 28.

<sup>26</sup> CRC, Concluding Observations, Republic of Serbia, 7 March 2017 at para. 64.

<sup>27</sup> CRC Concluding Observations 7 March 2017 at para. 65.

<sup>28</sup> General Comment No. 24 at para. 88.

undertaken by a qualified and independent child psychiatrist.

There is no information provided regarding the composition of the panel that would evaluate and make decisions on the extended detention of the child. Of particular importance is that there is participation of the child's legal representation, the family, children's health experts, and the views of the child themselves should be taken into account. However, forced institutionalization of children in this situation is contrary to applicable human rights standards in any case.

#### *Restrictions to visitation*

The Proposed Amendments include severe limitations to the child's contact with their community, particularly through restrictions to visitation.

#### Article 38a<sup>29</sup>

*“Visits and contacts of a child placed in a psychiatric institution referred to in Article 12, paragraph 4 of this Law with others, including members of the immediate family, may be temporarily prohibited in case of a reasonable suspicion that the child intends to obtain weapons or psychoactive substances, to collude about escape, to plan the commission of a criminal offence, as well as when it is necessary to protect the health and safety of the child or others or in case other particularly justified reasons so demand.”*

Proposed Article 38a restricts the right to visits and contact, including a temporary ban on visits by members of the immediate family, as well as with other persons. Further, there is no time limit prescribed for such a ban. This again would put children, who have not been found guilty by a court of law nor sentenced, in an even stricter regime than adults who had been convicted of a serious crime, and would place them at an even greater risk to their mental health. This is in contravention of the basic principle and right to survival and development of the child under the Convention on the Rights of the Child. These proposed restrictions on visitation also run contrary to the standards of the Convention on the Rights of Persons with Disabilities, which includes children with disabilities, who for example have the right not to have their private lives interfered with, and the rights to live in the community.<sup>30</sup>

The UN Committee on the Rights of the Child has stated that every child deprived of liberty has the right to maintain contact with his or her family through

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New paragraph Article 38a in full:

Visits and contacts of a child placed in a psychiatric institution referred to in Article 12, paragraph 4 of this Law with others, including members of the immediate family, may be temporarily prohibited in case of a reasonable suspicion that the child intends to obtain weapons or psychoactive substances, to collude about escape, to plan the commission of a criminal offence, as well as when it is necessary to protect the health and safety of the child or others or in case other particularly justified reasons so demand.

The decision on the temporary prohibition of visits and contacts referred to in paragraph 1 of this Article is adopted by the court in whose territory the seat of the psychiatric institution where the child is placed is located, within three days from the date of receipt of the notification from the psychiatric institution about the need for the temporary prohibition of visits and contacts referred to in paragraph 1 of this Article. The notification must contain a justification of the reasons and a proposal regarding the period of review of the decision regarding the prohibition, i.e. the duration of the prohibition on visits and contacts.

The provisions referred to in Articles 28 and 37 of this Law shall be applied to the court procedure referred to in paragraph 2. of this Article."

<sup>30</sup> CRPD, Articles 19, 22.

correspondence and visits. Exceptional circumstances that may limit this contact should be clearly described in law and not be left to the discretion of the authorities.<sup>31</sup> Any such restrictions should be done according to limits set out by law, and for the shortest time possible. All such limits must be prescribed by law, and time-defined.

This new paragraph runs contrary to the guiding principles of children's rights, and against the spirit of the rights guaranteed in Article 37(b) of the CRC which provides that children deprived of their liberty "*shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.*" As mentioned above, even children found guilty of a crime should only be detained as a measure of last resort and for the shortest appropriate period of time.<sup>32</sup> The Proposed Amendments do not even provide for a maximum duration of the institutionalization.

According to the Committee on the Rights of the Child, any disciplinary measure is to be consistent with upholding the inherent dignity of the child and the fundamental objectives of institutional care. Disciplinary measures in violation of Article 37 of the Convention 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 representative, family contact, food, water, clothing, bedding, education, exercise or meaningful daily contact with others.<sup>33</sup>

Solitary confinement should not be used for a child. 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.

The wording of this new subparagraph is also vague in its use of the child "**intends** to obtain weapons or psychoactive substances..." providing overly broad discretion to authorities, further limiting the rights of children in a way that will have a severe impact on them, and attempts to address an issue that could be done in another manner such as ensuring visitors do not bring in contraband items. There is a similar concern regarding the following; "*or in case other particularly justified reasons so demand*". Language on any such limitations should be clearly defined, the use of "intends" does not clearly provide a threshold or how the institution would determine the child has this intent.

#### *Process of consultations on the proposed Amendments*

Access to health information is a critical element of the right to health. According to the information received, a Public Discussion Program on the Draft Law Amendments regarding the protection of persons with mental disorders was established by proposal of the Ministry of Health ("the Ministry"). The Ministry conducted a public consultation from 20 July-9 August 2023 with representatives of

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<sup>31</sup> CRC General Comment No. 24 at para. 94.

<sup>32</sup> CRC, Article 37. See Also CRC General Comment No. 10 (2007).

<sup>33</sup> CRC General Comment No. 24.

the state, healthcare institutions, civil society, and other interested stakeholders. The text of the Proposed Amendments was published on the Ministry's website and the public was able to submit comments and recommendations via email or post.

From the information received, the documents related to the Proposed Amendments were uploaded on the Ministry's website on 20 July, but the announcement of public consultations was only made on their website on 27 July and the public debate was on 28 July. Interested civil society members were not otherwise timely informed of the public debate and therefore did not participate in the debate and many only learned of the debate after it took place.

On 28 July 2023 a roundtable was held. During the roundtable, Representatives of the Ministry presented the Proposed Amendments, after which there was a discussion about proposals, and comments and suggestions were made. Participants were asked to submit comments in writing within the prescribed deadline. Comments were then submitted by a range of civil society organizations, psychiatry and mental health organizations, children's organizations, and international organizations, *inter alia*. The Ministry then considered these comments and a report by the Ministry of Health on its webpage on 28 August.

It is crucial that consultations of such laws are open, broad, and transparent. They should allow for full participation by the public, including civil society, particularly that they have adequate information regarding the proposals, and time to review and respond in a comprehensive manner. Subsequent reports should be made public and adequately contemplate comments received during the consultations.

#### *National legal framework*

While this letter focuses on international human rights law, it bears noting that the Proposed Amendments also seem to contravene the applicable national legal framework, including the Constitution of the Republic of Serbia that expressly integrates its international legal obligations into national law. These international obligations include international human rights law, including the treaties that your Excellency's Government has ratified including the above-referenced treaties. The Proposed Amendments also seem to be in contravention with the rights of children as provided under Serbia's national legal framework, including its Constitution which provides in Article 64 that "*a child shall enjoy human rights suitable to their age and mental maturity*" and that "*a child shall be protected from psychological, physical, economic and any other form of exploitation or abuse.*" More generally, the Proposed Amendments seem to run contrary to the guarantees of special protection afforded to children under national law, including under Article 66 the Constitution.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned issues.
2. Considering your Excellency's Government obligations under the above-reference standards of international human rights law, and in light of the aforementioned inconsistencies of the Proposed

Amendments with such obligations, please provide information on the steps it may take to remediate such inconsistencies to bring the Proposed Amendments in line with international human rights standards;

3. Please provide any information on the remaining stages of the legislative process with regard to the proposed amendments, including your Government's plans for further consultation with civil society and concerned groups.

I respectfully encourage your Excellency's Government to review the abovementioned legislation to bring into line with international human rights norms and standards. As a part of this process we urge your Excellency's Government to conduct further full and broad, inclusive, and meaningful consultations on the Proposed Amendments involving civil society and experts on children's rights and mental health. National laws and decrees should respect, protect and fulfill human rights. I am at your disposal for any technical expertise you may require in this endeavour, including future technical assistance on both these Proposed Amendments, as well as the broader law, with concerns to the right of everyone to the highest attainable standard of physical and mental health.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Yours Sincerely,

Tlaleng Mofokeng  
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health