



**REPUBLIC OF SERBIA  
PROTECTOR OF CITIZENS**

21-89/11  
Belgrade



Заштитник грађана  
Zaštitnik građana

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In order to ensure an adequate institutional mechanism for protection of children and women against all forms of violence, on the basis of information that the Protector of Citizens obtained in his work, adopted strategic documents at the national level, ratified and signed international documents and notifications received from the civil society organisations, the Protector of Citizens has established the need to submit to the Ministry of Justice, in accordance with Article 18, paragraph 2 of the Law on the Protector of Citizens (*Official Gazette of RS, Nos 79/05 and 54/07*), the following

**INITIATIVE  
FOR AMENDING THE CRIMINAL CODE**

**I**

In paragraph 2 of Article 57, after number "180", the following numbers are added "181, 182, 183, 184, 185, 185a, 185b".

*Explanation*

The purpose of the proposed amendment is to exclude the possibility of mitigating the punishment for perpetrators of all crimes against sexual freedom. The existing provision unjustifiably privileges perpetrators of certain crimes against sexual freedom compared to perpetrators of other crimes in the same group, and with this provision, the legislator has unjustifiably made a significant difference in penalising different criminal acts against sexual freedom, which are punishable by the same or similar penalty.

In particular, the present provision privileges also the perpetrators of qualified forms of certain types of criminal offences, such as crimes of sexual intercourse through abuse of position or prohibited sexual act committed against a minor or child, or pimping and procuring a minor for sexual intercourse.

The Convention on the Rights of the Child<sup>1</sup> obligates the States Parties to undertake "legislative...measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual". The protective measures include "...other forms of prevention, identification, reporting, referral, investigation, treatment and follow-up of instances of ... child maltreatment".

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<sup>1</sup> Law on the Ratification of UN Convention on the Rights of the Child (*Official Journal of SFRY- International Treaties No. 15/90, Official Journal of FRY- International Treaties Nos 4/96, 2/97*)

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse<sup>2</sup>, stating that sexual exploitation and sexual abuse are harmful to the child's health, mental and social development, and noting that sexual exploitation and sexual abuse have reached an alarming level, obligates the member State to ensure that crimes against sexual freedom are punishable by **effective** sanctions that have a dissuading function (Article 27).

Both Conventions constitute an integral part of the legal system of the Republic of Serbia and oblige the state to harmonise its national regulations accordingly; both Conventions define a child as any person under the age of 18.

## II

After Article 76, a new Article 76a is added, which reads:

### **"Protective supervision upon serving a full prison term Article 76a**

(1) If a perpetrator is punished by imprisonment for five or more years for a criminal offence committed intentionally or by imprisonment for two or more years for a criminal offence committed intentionally and by using violence or for other criminal offence referred to in Chapters XIII, XIV, XVIII or XIX of this Code and if the punishment is fully served, the protective supervision over this perpetrator shall start immediately after release from prison in accordance with Article 71 of this Code, as well as the special obligations referred to in Article 73 if they are ordered along with the protective supervision.

(2) The supervision period shall last one year. Before the expiry of the supervision period and upon the proposal of the service for execution of criminal sanctions, the Court may extend it for another year if the absence of such supervision would imply the risk of repeated perpetration of any of the criminal offences referred to in paragraph 1 of this Article.

(3) The court can exclude the measure of protective supervision if there is a reason to believe that this person will not commit a new criminal offence even without this measure."

### *Explanation*

The proposed security measure refers primarily to the perpetrators of serious crimes, repeated perpetrators and perpetrators of crimes against life and body, freedoms and rights of individuals and citizens, sexual freedom and marriage and family. The practice, unfortunately, shows that the perpetrators of criminal offences with elements of violence, particularly the perpetrators of crimes against sexual freedom, often repeatedly commit the same or more severe offences.

The introduction of protective supervision harmonises the Criminal Code with the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which authorises the states to adopt different measures against the perpetrators of crimes against sexual freedom committed against children, "such as... supervision of convicted persons " (Article 27 of the Convention).

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<sup>2</sup> Law on the Ratification of Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Official Gazette of RS - International Treaties No. 1/10)

### III

In paragraph 1, Article 89a, after the words “communication with the injured party”, the following words are added “when there is a risk that the perpetrator could repeatedly commit a criminal offence against the injured party”.

In Article 89a, a new paragraph 2 is added, which reads:

“In all cases of criminal offence against sexual freedom, the court shall order a measure prohibiting the perpetrator to approach and communicate with the injured party”.

Paragraphs 2, 3 and 4 become paragraphs 3, 4 and 5.

In new paragraph 3, after number “1”, number “2” is added.

After new paragraph 5, paragraphs 6 and 7 are added, which read:

“(6) The court shall notify the Institute for Execution of Criminal Sanctions and the competent police administration about the ordered measure prohibiting the perpetrator to approach and communicate with the injured party. The control of this measure may be performed also through electronic supervision.

(7) In case that a suspended sentence has been pronounced, the court shall revoke it if the perpetrator should violate the prohibition of approaching and communicating with the injured party.”

#### *Explanation*

The purpose of the proposed amendments is to define more clearly the reasons for ordering this security measure, but also to introduce the mandatory ordering of this measure in criminal offences against sexual freedom, in particular when they were committed against minors or helpless persons. The mandatory ordering of this measure in cases of criminal offences against sexual freedom would eliminate, directly and momentarily, further risks to life, health, physical and mental integrity of the victim, prevent the repeated perpetration of criminal offence and secondary victimisation of the victim who, after reporting the offence most often becomes the object of violence, intimidation and pressures aimed at giving up criminal prosecution. The true rehabilitation of the victim begins only upon the elimination of direct contacts between the victim and the perpetrator.

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse insists particularly on the provision of assistance to the victim, and obligates the states to “provide for their safety, as well as that of their families...from intimidation, retaliation and repeat victimisation”(Article 31) .

### IV

In paragraph 1, Article 79, after item 11), items 12), 13) and 14) are added, which read:

“12) eviction from family household

13) internet access prohibition

14) mandatory psychosocial treatment”.

#### *Explanation*

The proposed amendments represent the introduction of three new security measures proposed by the Protector of Citizens (Amendment V): eviction from family household, internet access prohibition and mandatory psychosocial treatment.

The Amendment V contains more detailed explanation of the reasons for introducing these measures.

## V

After Article 89b, new Articles 89v, 89g and 89d are added, which read:

### **“Eviction from family household**

#### **Article 89v**

- (1) The court may order the measure of eviction from family household to the perpetrator of criminal offences against life and body referred to in Articles 193 and 194, when there is a risk that the perpetrator could repeat the criminal offence against the injured party or if it can be justifiably deemed that the perpetrator’s staying in the joint household could be dangerous for the injured party.
- (2) The court shall order the measure referred to in paragraph 1 of this Article to all perpetrators of criminal offence against sexual freedom and perpetrators of the criminal offence referred to in Article 197 of the Criminal Code.
- (3) The measure referred to in paragraph 1 of this Article may last maximum three years.
- (4) The period of detention and any other deprivation of liberty related to the criminal offence shall not be calculated in the duration of the measure referred to in paragraph 1 of this Article.
- (5) The measure referred to in paragraph 1 of this Article may be suspended before the expiry of its determined duration, if the reasons for which it was ordered cease to exist.
- (6) The court shall notify the Institute for Execution of Criminal Sanctions and the competent police administration about the ordered measure of eviction from family household. The control of this measure may be performed also through electronic supervision.
- (7) In case that a suspended sentence has been pronounced, the court shall revoke it if the perpetrator should violate the measure of eviction from family household.

### **Internet access prohibition**

#### **Article 89g**

- (1) The court may order a security measure of internet access prohibition to the perpetrator who has committed a criminal offence through the internet if there is a risk of repeated perpetration of criminal offence by internet abuse.
- (2) The measure referred to in paragraph 1 of this Article may last maximum three years.
- (3) The period of detention and any other deprivation of liberty related to the criminal offence shall not be calculated in the duration of the measure referred to in paragraph 1 of this Article.
- (4) The court shall notify the Institute for Execution of Criminal Sanctions and the competent police administration about the ordered measure of eviction from family household. The control of this measure may be performed also through electronic supervision by a regulatory body for electronic communications.
- (5) In case that a suspended sentence has been pronounced, the court shall revoke it if the perpetrator should violate the measure of internet access prohibition.

### **Mandatory psychosocial treatment**

#### **Article 89d**

- (1) The court shall order a security measure of mandatory psychosocial treatment to the perpetrator who has committed an offence with the elements of domestic violence if there is a risk of repeating that or similar offence.
- (2) When the measure is ordered along with a fine, suspended sentence or community service, it shall be executed at liberty and may not last longer than three years.“

#### *Explanation*

The aim of proposed introduction of the security measure of eviction from family household is to harmonise the provisions of the Criminal Code with the provisions of the Family Law, which among the measures for protection from violence prescribes also the eviction from family apartment or house. Given that this measure may be imposed in a civil procedure instituted for protection from violence, it is expedient to give such a possibility to the court that conducts a criminal procedure. This would result in reaching the full effect of the protection of victims of crime, who would not be forced to request this kind of protection in a civil procedure once the perpetrator's guilt has been established. The imposition of this measure is particularly important in criminal offences against sexual freedom, domestic violence or abuse and neglect of a minor child, when they are committed against a child/minor, because it allows the victim to have an appropriate period of time for rehabilitation and reintegration.

The proposed security measure of internet access prohibition is an additional instrument in combatting an increasingly spread phenomena of child pornography and child prostitution by using the World Wide Web.

The security measure of eviction from family household and internet access prohibition, as new security measures, were proposed also in the procedure of amending criminal legislation in the countries of the region.

Just punishing the perpetrators of criminal offences in cases of domestic violence, without mandatory psychosocial treatment, cannot give any adequate results in the prevention of potential perpetration of the same or similar offences. In order to prevent further violence, it is necessary to provide the treatment that the perpetrator would undergo, first individually and later on along with other family members, and which would contribute to eliminate the roots of violence.

Some legislations in the region have introduced such or similar measure through special laws; for example, in Croatia, the measure of mandatory psychosocial treatment is prescribed by the Law on Protection from Domestic Violence, and regulated in detail by the Rulebook on the method and place of implementation of psychosocial treatment.

In the cases of dysfunctional family relationships, including the cases of domestic violence, psychosocial treatments are social and health care services and they are based on the principle of voluntary participation. There is a certain degree of obligation only in the case where family is referred to therapeutic counselling, within the implementation of measures of legal protection of children in family, through the institute of corrective supervision over the exercise of parental rights; however, in such case, the guardianship authority, which orders this measure, does not have the option of forcing the parent/s to participate in therapeutic counselling in a relevant institution. The introduction of this security measure would have a preventive effect on perpetrators, and an educational effect both on perpetrators and other family members. The National Strategy for Prevention and Elimination of Violence against Women in the Family and in Intimate Partner Relationship sets the prevention of repeated violence as one of the specific goals, particularly pointing out that "if there is no systemic action against violence against women in the family and in intimate partner relationship, a high number of cases of violence is repeated. In order to combat violence systemically, the prevention of violence should continuously be worked on, not only when it occurs".

## VI

In Article 104, a new paragraph 2 is added and reads:

"(2) Time limitations for criminal prosecution of criminal offences against sexual freedom committed against a minor shall commence as of the day when the victim comes of age".

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The present paragraphs 2, 3, 4, 5 and 6 become paragraphs 3, 4, 5, 6 and 7.

### *Explanation*

The aim of the proposed amendment is to harmonise legal standards of the Criminal Code with the international instruments ratified by the Republic of Serbia. The Convention on the Rights of the Child obliges the States Parties to "take all appropriate national...measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity..." (Article 34 of the Convention). The Council of Europe Convention on the Protection of Children from Sexual Exploitation and Sexual Abuse has a particular and immediate importance for the regulation of this matter; it obliges the signatory states to adjust their legislation to ensure, *inter alia*, that the statute of limitation for initiating proceedings shall continue for a period of time sufficient to allow the efficient starting of proceedings after the victim has reached the age of majority (Article 33 of the Convention).

The existing limitation periods proved to be insufficient for the prosecution of perpetrators of criminal offences against sexual freedom when committed against a child. In addition, in most cases the perpetrators of these crimes against a child are the persons close to the child or those on whom the child depends, or those who are in a position of power over a child. Therefore, it is a fair and proper solution to allow the child to choose whether to file charges when no longer dependant on the perpetrator. Children are unable to make such a choice until the age of majority (and often later), because in most cases they lack adequate protection, assistance and support; the victims who are 18 and older have more options and own capacities to protect their interests.

## VII

Paragraph 28 Article 112 is amended to read:

"A family member shall refer to spouses, ex-spouses, children, parents and other blood relatives, in-laws, persons in adoptive relationship, persons in foster relationship, persons who live or lived in the same family household, former common-law partners, persons who were or still are in emotional or sexual relationship and persons who have or expect a child together, although they have never lived in the same family household."

### *Explanation*

The aim of the proposed amendment is to harmonise the provisions of the Criminal Code with the Family Law as regards the definition of "family member". In penalising domestic violence, the Family Law widened the circle of persons who are considered to be family members exactly to those persons who most often appear to be perpetrators of domestic violence and their victims. It is justifiable and expedient to adjust the Criminal Code definition of family members to already existing legal definition and judicial practice, especially since the term "family member" in the Criminal Code appears exactly in the provisions that regulate criminal offences against life and body, sexual freedom, marriage and family (most of which are with the elements of violence).

Domestic violence is not characterised by the fact that the victim and the perpetrator of violence live together, but rather that they have family ties and specific personal relationship. International and national research and practice show that violence continues and it is even intensified when the victim files a petition for divorce, or divorces, or leaves the joint household. The study of domestic criminal law practice established by processing criminal offences of domestic violence has shown

that the most common form of domestic violence is partner violence, and that the perpetrators of this violence are spouses or former spouses, and that in 22% of cases the place of perpetration is not a joint home (household), but the victim's/perpetrator's apartment or public space. Also, 28.3% of victims were divorced women, and 27.4% were married women.

The experience of countries in the region shows that the requirement for a joint household was deleted because it was depriving numerous victims of domestic violence of legal protection. Thus, for example, in 2006 Croatia deleted (explaining it with the needs of practice) the provisions that defined family members as persons living in the same household (Article 14 of the Law on the Amendments to the Criminal Code of Croatia). The Criminal Code of the Republic of Macedonia, specifying the persons who are considered family members, includes even the persons who have a "close personal relationship" (Article 122, item 19 of the Criminal Code of the Republic of Macedonia), which allows broader interpretation, like the one provided for in the Family Law of the Republic of Serbia and whose application we support in the field of criminal justice.

We believe that the circle of persons who enjoy protection from domestic violence should be uniform in the entire legal protection system, because the inconsistency between the Criminal Code and the Family Law leads to discrimination against all those persons who, according to the Family Law, are entitled to protection from domestic violence, but which are not classified as passive subjects of criminal offence of domestic violence according to the Criminal Code.

## VIII

In paragraph 32 of Article 112, after the words "public information", the words "social protection" are added.

### *Explanation*

The work of public interest, in addition to health care and education activities, is considered to be social protection work. The employees of social protection system are exposed to higher security risks at their workplace and outside of it, since they have a legal obligation to act in cases of conflicting family relationships (including domestic violence, child abuse and neglect, sexual abuse and exploitation). In these procedures, some social care institutions have an obligation and authority to apply repressive measures against their beneficiaries or their family members, and to initiate legal procedures. In particular, social care centres, as guardianship authorities, are obliged to give their professional opinions and proposals in family related legal procedures concerning children. Because of that, they are either subject or may be subject to the actions that prevent them from performing the activities within their competence, but also the actions that directly threaten their lives, health and physical and mental integrity.

## IX

After Article 121, a new Article 121a is added, which reads:

### **"Female genital mutilation Article 121a**

- (1) Whoever excises or permanently alters the whole or any part of external genitals of a female person shall be punished by imprisonment from six months to five years.
- (2) Whoever abets or aids a female person to perform by herself the acts described in paragraph 1 of this Article shall be punished by imprisonment of three years.

- (3) Whoever commits an offence referred to in paragraphs 1 and 2 of this Articles out of hatred towards a minor or a family member shall be punished by imprisonment from one to eight years.
- (4) No offence is committed as referred to in paragraphs 1-3 of this Article if the excise or permanent alteration of the whole or any part of external genitals is performed for medical purposes.“

#### *Explanation*

The criminalisation of this act is the obligation of the Republic of Serbia in the implementation of the Convention on the Rights of the Child, which obligates the States Parties to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children“<sup>3</sup>.

The aim of the proposed amendment is to penalise the criminal offence of genital mutilation of girls and women, which is not performed for medical and/or health reasons or other reasons that could be considered legitimate (aesthetical). It is a traditional practice of "introducing" the girl in the world of adult women, making girls and young women "more fertile" (by removing the "male" parts from their bodies) and more desirable for marriage, removing "unclean" parts from the girl's body and similar reasons. The state of Serbia is obliged to criminalise this act, notwithstanding the fact that there is no sufficient data on the existence and possible outspread of this phenomenon. This is particularly important bearing in mind the contemporary trends of population migration, which makes the import of traditional practice of this type possible.

The consequences of genital mutilation of girls and women are psychologically very difficult, especially with regard to the general state of health of girls and women: the state of shock due to loss of blood, blood poisoning, tetanus, polio, hepatitis or HIV infection, problems with emptying the bladder, damaging and infection of the urinary tract and kidneys, inflammation of the ovaries and uterus, sterility, etc.

#### X

In Article 122, after paragraph 2, a new paragraph 3 is added, which reads:

“If the offence referred to in paragraphs 1 and 2 of this Article is committed against a minor or helpless person by a teacher, tutor, health worker, social care worker or other person to whom a minor or helpless person has been entrusted for temporary custody, treatment, care, education and nurture, the perpetrator shall be punished by imprisonment from 1 to 5 years“.

The present paragraphs 3 and 4 become paragraphs 4 and 5.

#### *Explanation*

The aim of the proposed amendment is to extend criminal liability to the persons who work with children and helpless persons and who inflict on them light bodily injuries, in cases where the acts of these persons cannot be qualified as other criminal offences. The existing provisions do not allow the criminal protection of minors and helpless persons when the light bodily injury is inflicted by a teacher, health worker, tutor, employee of social care institution or other person to whom a minor or helpless person has been entrusted for temporary custody, treatment, care, education and nurture (trainers, home caregivers providing temporary care for a family member, therapists, etc.).

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<sup>3</sup> Article 24, paragraph 3 of the Convention on the Rights of the Child.

Frequent violence against children in all environments, including schools, social care institutions, correctional and health institutions, has been recognised as alarming, and hence the Government of the Republic of Serbia has adopted the General Protocol on Protection of Children from Abuse and Neglect<sup>4</sup>, while five Ministries have adopted special protocols for protecting children from abuse and neglect, which are binding for all employees in their systems.<sup>5</sup> One of the overall objectives of the General Protocol is to "improve well-being of children by preventing child abuse and neglect." The introduction of criminal liability of professionals who work with children for inflicting injuries to children is a measure of general prevention and thereby represents the improvement of status of the child and performance of activities aimed at fulfillment of strategic objectives of the National Strategy for Prevention and Protection of Children from Violence<sup>6</sup>: developing a secure environment where the right of every child to be protected from all forms of violence will be fulfilled and a national system of prevention and protection of children from all forms of abuse, neglect and exploitation will be established.

## XI

After Article 138, new Articles 138a and 138b are added, which read:

### **"Stalking Article 138a**

(1) Whoever persistently and for a longer period of time follows or stalks other person or attempts to establish unsolicited contact with that person, directly or through a third person or otherwise, thus causing the change in this person's routine and arousing apprehension or fear in this person for his or her own safety or safety of any other person close to her or him, shall be punished by imprisonment of up to three years.

(2) If the offence referred to in paragraph 1 of this Article is committed against a family member or a person with whom the perpetrator was in an emotional or sexual relationship, the perpetrator shall be punished by imprisonment from one to five years.

(2) If the offence referred to in paragraph 1 and 2 of this Article is committed against a minor or helpless person, the perpetrator shall be punished by imprisonment from one to eight years.

### **Sexual harassment Article 138b**

(1) Whoever sexually harasses other person

1. who he/she supervises or who depends on him/her,
2. by promising other person a benefit for fulfilling his/her sexual request or threatens with revenge if other person refuses to fulfil such request, or
3. who is particularly vulnerable for his/her age, disease, disability, addiction, pregnancy, serious physical or mental disorder,

shall be punished by imprisonment of up to three years.

(2) Sexual harassment is an unwanted verbal, non-verbal or physical act of sexual nature, gender-based, committed with intention to offend or consequence of offending personal dignity, and

<sup>4</sup> The Government of the Republic of Serbia adopted the General Protocol in August 2005.

<sup>5</sup> Special protocol for the protection of children in social care institutions from abuse and neglect, Ministry of Labour and Social Policy, 2006; Special protocol on procedures applied by police officers in protection of minors from abuse and neglect, MoI, 2006; Special protocol for the protection of children from violence, abuse and neglect in educational institutions, Ministry of Education and Science, 2007; Special protocol of social protection system for the protection of children from abuse and neglect, Ministry of Health, 2009; Special protocol on procedures of judicial authorities in the protection of minors from abuse and neglect, Ministry of Justice, 2009

<sup>6</sup> Official Gazette of RS, No. 122/2008

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which was repeated at least once and aroused fear or strong apprehension in that person or created an intimidating, hostile, degrading or offensive environment.”

#### *Explanation*

The aim of introducing the new Article 138a is to prescribe criminal penalty for the conduct that has been rarely incriminated and processed in legal practice so far. On more than one occasion the public was informed about the fact that before committing serious criminal offences against life and body and sexual freedom against the persons with whom they were in close family or emotional relationship, the perpetrators had persistently attempted to approach these persons or to impose unwanted contact, often by using force or more or less obvious threats to that person or person close to him or her.

The situation is particularly alarming when the victims of such conduct are minors, who due to their age and developmental capacities suffer serious consequences to health and psycho-physical development. Minors are particularly sensitive to threats referred to persons close to them and in such situations they tend not to report an unwanted contact to competent authorities wanting to “protect” the persons close to them, and (justifiably) believing that there is no legal and systemic way of their protection. They are additionally discouraged by the information that the victims obtain when they do address competent authorities: they cannot get any protection until the stalker’s actions have the elements of a legally qualified criminal offence.

The aim of introducing the new Article 138b is to prescribe criminal penalty for sexual harassment. More precisely, the amendments to the Criminal Code of the Republic of Serbia from 2003 (*Official Gazette of RS*, No. 39/2003) introduced a criminal offence of sexual harassment. However, this offence was excluded from the Criminal Code of the Republic of Serbia (*Official Gazette of RS*, No. 85/2005). Sexual harassment is partly regulated by the Law on Gender Equality (*Official Gazette of RS*, No. 104/2009), the Law on Labour and the Law on Prevention of Mobbing at Work (*Official Gazette of RS*, No. 36/2010). The latter two penalise sexual harassment at work and related to work. According to the provisions of these laws, the employer is liable for the protection of sexually harassed persons. However, the protection from the perpetrator of sexual harassment is not envisaged.

In its Concluding Comments given after consideration of the Initial Report of the Republic of Serbia, the Committee on the Elimination of Discrimination Against Women<sup>7</sup> expressed its concern “... that sexual harassment is no longer a criminal offence under the (2005) amended Criminal Code...” (point 21 of Concluding Comments).

*The Convention on preventing and combating violence against women and domestic violence*<sup>8</sup> – although it is not a part of the legal system of the Republic of Serbia – represents a direction of modern international legislation and may serve as a standard for providing victims with protection. It obligates the Parties to “take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction” (Article 40 of the Convention).

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<sup>7</sup> 38<sup>th</sup> session of the Committee on the Elimination of Discrimination Against Women held from 14 May to 1 June 2007

<sup>8</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No.: 210, open for accession on 11 May 2011

Paragraph 2 of proposed Article defines the notion of sexual harassment in accordance with the provisions of the Law on Gender Equality and the Law on Labour.

## XII

In paragraph 3 of Article 178, paragraph 2 of Article 179, paragraph 2 of Article 180 and paragraph 3 of Article 182, after the words “grievous bodily harm”, the words “or serious impairment of health” are added.

### *Explanation*

The aim of the proposed amendment is to recognise, as in other criminal offences, the equal legal importance of health impairment and bodily harm. In a series of criminal offences, in particular those against sexual freedom, the victim suffers serious physical and mental health consequences even when there is no bodily harm. The amendments equalise the position of the victims of criminal offence against sexual freedom who have suffered serious impairment of health and the victims whose health has been seriously impaired as a consequence of other criminal offence committed against them.

## XIII

Paragraph 1, Article 178 is amended to read: “Whoever has sexual intercourse or an equal act, regardless of the form and nature of that act, with a person who has not given his/her consent or whoever forces a person to sexual intercourse or an equal act by the use of force or threat to directly attack upon the life or body of such or other person close to that person, shall be punished by imprisonment from three to twelve years”.

Paragraph 3, Article 178 is amended to read: If the offence specified in paragraphs 1 and 2 of this Article results in grievous bodily harm or serious impairment of health of the person against whom the offence is committed, or if the offence is committed by more than one person or against a family member, or in a particularly cruel or particularly humiliating manner, or if two or more sexual intercourses or equal acts were committed against this person, or the act results in pregnancy, the perpetrator shall be punished by imprisonment from five to fifteen years.”

Paragraph 4, Article 178 is amended to read: “If the offence specified in paragraphs 1 and 2 of this Article results in death of the person against whom it has been committed or if the offence has been committed out of hatred or other low motives, or against a child or helpless person, the perpetrator shall be punished by imprisonment of minimum ten years.”

### *Explanation*

The aim of the proposed amendments is to harmonise the provisions of the Criminal Code with the international instruments and standards. It is also one of the goals of the National Strategy for Prevention and Elimination of Violence against Women in the Family and in Intimate Partner Relationship.<sup>9</sup>

The proposed amendment to the first paragraph of Article 178 stresses the absence of consent to sexual intercourse, and eliminates a decisive role of manner, method and means of forced sexual intercourse or an equal act in legal qualification of this criminal offence.

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<sup>9</sup> Official Gazette of RS, No. 27/11

The aim of proposing the amendment to the third paragraph by adding the words “against a family member, or” is to consider a kinship between the perpetrator and the victim or any other emotional or other tie between them to be a qualifying circumstance. Rape itself leaves permanent and serious consequences on the victim; however, they are much graver if this offence has been committed by a member of the victim’s family or a person close to the victim.

The aim of proposing the amendment to the third paragraph by adding the words “or if two or more sexual intercourses or equal acts were committed against this person” is to qualify more serious form of this offence as multiple rape – a particularly serious form of this criminal offence.

The aim of the proposed amendments to paragraph 4 is:

- to equalise the position of all minor victims, regardless of their age. By thus amending the Criminal Code, it becomes harmonised with the norms of the Convention on the Rights of the Child, which recognises the status of a child to persons under the age of 18. Different treatment of children (persons under 18) in criminal protection contravenes the principle of non-discrimination which was established by the Convention as a guiding principle. Even though developmental capacities of children vary in different periods of childhood, the consequences of criminal offences against children are equally grave and serious for children of all ages, although their forms of appearance may differ significantly, depending on the victim’s age. This fact has been recognised by the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which gives the status of the child to “any person under the age of 18” (Article 3 of the Convention);
- to attribute to this criminal offence an additional qualifying determinant if it is committed against a helpless person, whose vulnerability is equal to the position of a minor;
- to qualify as particularly serious offence the rape committed for low motives, similarly to qualification of some other criminal offences.

#### XIV

In paragraph 1 of Article 179, paragraph 1 of Article 180, paragraphs 1 and 2 of Article 181, paragraphs 1 and 2 of Article 183, paragraph 1 of Article 185a and paragraphs 1 and 2 of Article 193, after the words “an equal act”, the words “regardless of form and nature of that act” are added.

#### *Explanation*

The aim of the proposed amendments is to extend the notion of sexual intercourse to the penetration with a body part other than a male sexual organ or penetration with an object. In cases of penetration with a body part other than a male sexual organ or with an object, the judicial and prosecution practice treated such an act as prohibited sexual act and not a sexual intercourse or an equal act, regardless of the fact that such an act had all elements of sexual intercourse and its consequences, except for a body part or object used.

The existing impreciseness in the definition of criminal offence of rape and sexual intercourse resulted in the situation that forceful penetration committed over a minor by using an object or a body part could not be qualified as criminal offence of rape or some of criminal offences of sexual intercourse. The children victims of such acts were not provided with adequate criminal protection, while the perpetrator was subject to criminal provisions reserved for prohibited sexual act with much milder punishment and legal rule that the prosecution for criminal offence of prohibited sexual act in certain cases is instituted by private actions.

The proposed amendments would harmonise the legal framework with a series of international treaties, in particular with the Convention on the Rights of the Child and the Council of Europe Convention on the Protection of Children from Sexual Exploitation and Sexual Abuse, which obligates the states to undertake necessary legislative or other measures to adequately criminalise each form of sexual activities with the child who does not have legal age for sexual activities. The Council of Europe Convention on preventing and combating violence against women and domestic violence – although it is not a part of the legal system of the Republic of Serbia – shows a direction of modern international legislation in the area of protection from sexual offences. Therefore, this Convention may serve as a standard for defining and determining the level of criminal protection for the victims of criminal offences against sexual freedom. According to the provisions of this Convention, it is unlawful to “...engage in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object” (Article 36 of the Convention).

The Criminal Codes of Belgium<sup>10</sup>, France<sup>11</sup> and Romania<sup>12</sup> contain similar provisions.

## XV

In paragraph 1 of Article 179, the words “mental illness, mental retardation or other mental disorder” are replaced with the word “disability”.

In paragraph 2 of Article 179, after the words “serious bodily harm”, the following words are added “or serious impairment of health”. After the words “humiliating manner or”, the words “against a minor or” are deleted.

In paragraph 3 of Article 179, the word “child” is replaced with the words “minor person” (or alternatively “minor”).

### *Explanation*

The proposed amendments to paragraph 1 would harmonise the terminology with the Convention on the Rights of Persons with Disabilities<sup>13</sup> and the Law on the Prohibition of Discrimination<sup>14</sup>, in order to protect and ensure the enjoyment of all human rights and fundamental freedoms by persons with disabilities and promote respect for their dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.

The notion of disability refers to a person’s condition, while respecting his/her personality and dignity, and at the same time avoiding medical qualifications.

The aim of the proposed amendments to paragraph 3 is to equalise the position of all minor victims, as mentioned in the explanation of amendment XII.

<sup>10</sup> Article 375 of the Criminal Code of Belgium reads: “Any act of sexual penetration, of whatever nature and by whatever means, committed on a person who does not consent to it shall constitute the crime of rape.” (source: ECtHR Judgment in case *MC v. Bulgaria* of 3 December 2003, point 90, (Application no. 39272/98).

<sup>11</sup> Article 222-23 of the Criminal Code of France reads: “Any act of sexual penetration, whatever its nature, committed against another person by violence, constraint, threat or surprise, is rape.” (source: <http://legislationline.org/documents/section/criminal-codes>)

<sup>12</sup> Article 217 of the Criminal Code of Romania reads: “Sexual intercourse, of any kind, with a person of the opposite sex or of the same sex, by coercion of this person or taking advantage of the person’s inability for defence or to express will, shall be punished by strict imprisonment from 3 to 10 years and the prohibition of certain rights.” (source: <http://legislationline.org/documents/section/criminal-codes>)

<sup>13</sup> By the Law of Ratification of the Convention on the Rights of Persons with Disabilities (Official Gazette of RS – International Treaties No. 42/2009)

<sup>14</sup> Official Gazette of RS, No. 22/09

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## XVI

In the title of the criminal offence defined in Article 180, the word “with” is replaced with the word “imposed on”.

Paragraph 1 of Article 180 is amended to read: “Whoever induces a child to sexual intercourse or an equal act, regardless of the form or nature of that act, shall be punished by imprisonment from three to twelve years.”

In paragraph 2 of Article 180, after the words “by several persons”, the following words are added: “or in a particularly cruel or particularly humiliating manner”.

In paragraph 3 of Article 180, after the words “death of the child”, the following words are added “or the offence has been committed by a parent, step-father, step-mother, adoptive parent, guardian, foster parent or other family member or the offence has been committed by abuse of position or authority in relation to the child or relationship of trust with the child”.

### *Explanation*

The aim of the proposed amendments to the title and paragraph 1 is to determine clearly that the child under the age of consent cannot be an equal partner in sexual intercourse, and in cases where children are under the age of 14, there is no and there cannot be voluntary participation in sexual intercourse or freely expressed consent to sexual intercourse.

The aim of the proposed amendments to paragraph 2 is to consider cruelty and humiliation of a child victim in committing a criminal offence to be an aggravating circumstance in court procedures, which, taking into consideration the vulnerability of the injured party- constitutes more serious form of this offence.

By the proposed amendments to paragraph 2, the perpetrator is particularly punished for the fact that he/she has committed an offence by using a specific relationship between him/her and the child, which includes the relationship of trust, authority and/or power. Unfortunately, this is the most frequent case in committing criminal offences against sexual freedom of underage persons, particularly children. The amendments would also mean the fulfillment of the obligation, which the Republic of Serbia undertook by ratifying the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, to take into consideration as aggravating circumstance the fact that the criminal offence was committed by “a member of the family, a person cohabiting with the child or a person having abused his or her authority” (Article 28 of the Convention).

## XVII

In paragraph 2 of Article 181, after the word “guardian”, the words “foster parent” are added. After the word “step-mother”, the words “or a family member” are added, and after the words “or authority”, the words “or trust relationship” are added. The words “a minor entrusted to him/her” are replaced with the words “a person entrusted to him/her”.

In paragraphs 3 and 5 of Article 181, the word “child” in several places and in different corresponding cases is replaced with the words “underage person” in a corresponding grammatical case.

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*Explanation*

The proposed amendments to paragraph 2 extend the circle of persons who may have the relationship of authority and/or trust with the victim of this criminal offence to foster parents and other family members, in line with the proposed change of the term "family member". The amendments are in accordance with the provisions of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which instructs the states to include in their legislations an aggravating circumstance if the criminal offence was committed by "a member of the family, a person cohabiting with the child or a person having abused his or her authority" (Article 28 of the Convention).

The amendments to this paragraph take into consideration the manner of committing this offence and the abuse of trust relationship, because the practice has shown that the victims of this criminal offence, particularly children and minors, are susceptible to manipulations and become victims exactly for the existence of trust relationship between the victim and the abuser.

The purpose of deleting the word "minor" in paragraph 2 and replacing the word "child" with the word "underage person" in a corresponding grammatical case in paragraph 3 is to equalise the position of minor victims of this criminal offence, regardless of their age, as explained in the amendment XII.

**XVIII**

In paragraph 1 of Article 182, the words "by a fine or" are deleted.

*Explanation*

The pronounced punishment of a fine for committed criminal offence of prohibited sexual act is a result of mild penal policy of the Republic of Serbia towards the perpetrators of this serious criminal offence. It is particularly alarming that according to the existing provisions a fine can be pronounced as the main criminal sanction even for those perpetrators who have committed this criminal offence against children (persons under the age of 18). The tightening of penal policy, beginning with the elimination of fine as the main criminal sanction for this criminal offence and abolition of the rule of instituting the prosecution for this criminal offence by private actions in some cases, would represent the harmonisation of the national legislation with the provisions of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

**XIX**

Article 184 is amended to read:

**"Inducing prostitution  
Article 184**

(1) Whoever incites, recruits or abets another person to provide sexual services or organises or enables another person to be provided with sexual services, or advertises prostitution by means of media or otherwise, shall be punished by imprisonment from six months to five years.

(2) Whoever uses sexual services of another person and gives remuneration or any other *consideration* or reward for such service, shall be punished by a fine or imprisonment up to one year.

(3) Whoever forces or induces another person, by the use of force, threat, deception, fraud, abuse of position, vulnerability or relationship of dependence, to provide sexual services, or whoever uses sexual services of such person, being aware of the specified circumstances, shall be punished by imprisonment from three to ten years.

(4) Whoever commits the offence referred to in paragraphs 1 and 2 of this Article against an underage person or against a person with *disability*, or whoever offers, obtains or procures an underage person or a person with *disability* for prostitution or uses sexual services of an underage person or a person with *disability* with consideration or reward, shall be punished by imprisonment from three to twelve years.

(5) Whoever commits the offence referred to in paragraph 3 of this Article against an underage person shall be punished by imprisonment of minimum five years."

### *Explanation*

Persons in prostitution are the victims of gender-based violence, and prostitution is a form of severe exploitation of women and children that represents a serious social problem, damaging not only the person engaged in prostitution, but also society as a whole. According to recent international studies, the average age at which girls enter prostitution is fourteen.

Punishing people who induce prostitution is not a novelty. The current Article 184 of the Criminal Code penalises the "mediation" in prostitution, which includes inciting and inducing prostitution, as well as promoting and advertising of prostitution. Punishing the users of sexual services, or those people who buy sexual services, is known in European legislation and is a standard according to which most European countries amend their legislation.

The proposed amendments are in accordance with Articles 4, 18 and 19 of the Council of Europe Convention on Action against Trafficking in Human Beings.<sup>15</sup> Article 4 of the Convention defines that "exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation...", whereas "consent of a victim of trafficking in human beings to the intended exploitation ... shall be irrelevant in any case...". The Convention obligates that "each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct contained in Article 4 of this Convention, when committed intentionally", but also that each Party shall consider adopting such "legislative and other measures as may be necessary to establish as criminal offences under its internal law, the use of services which are the object of exploitation as referred to in Article 4 paragraph a of this Convention, with the knowledge that the person is a victim of trafficking in human beings".

The introduction of "users" of sexual services as perpetrators of prohibited act represents the harmonisation of national legislation with the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography<sup>16</sup>, which established that child prostitution includes "... obtaining, procuring ... a child..." for the purpose of "using a child in sexual activities for remuneration or any other form of consideration" (Articles 2 and 3 of the Optional Protocol).

## XX

<sup>15</sup> Official Gazette of RS – International Treaties No. 19/2009

<sup>16</sup> Official Journal of FRY – International Treaties No. 7/2002

In paragraph 1 of Article 185a, the word “minor” is replaced with the words “underage person”.

In paragraph 2 of Article 185a, the words “six months to five years” are replaced with the words “one to eight years”.

In paragraph 2 of Article 185a, after the words “force or threat or”, the words “if the offence was committed by a parent, step-father, step-mother, adoptive parent, guardian, foster parent or other family member” are added, and the words “against a child” are deleted. The word “eight” is replaced with the word “ten”.

#### *Explanation*

The aim of the proposed amendments is to equalise the position of children (persons under the age of 18) who are the victims of this criminal offence and the position of minors (persons over 14, but under 18 years of age), who were the only parties protected from this criminal act.

By the amendments to paragraph 2, the relationship and connection between the perpetrator and the victim are given the status of aggravating circumstance in this criminal offence, which is in accordance with the state’s obligation arising from the ratification of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which suggests to consider an aggravating circumstance if the criminal offence was committed by “a member of the family, a person cohabiting with the child or a person having abused his or her authority” (Article 28 of the Convention).

#### **XXI**

Article 186 is deleted.

#### *Explanation*

Bearing in mind the obligations of the Republic of Serbia undertaken by the ratification of international treaties and obligations arising from the adopted national strategy for the protection against domestic violence and intimate partner violence and the protection of children from violence, abuse and neglect, the reasons for instituting the prosecution of any of the crimes against sexual freedom by private actions are not justifiable.

It is particularly justified to exclude the possibility of instigating criminal prosecution by a private action when these criminal offences were committed against children. Taking into consideration that in all proceedings children are represented by legal representatives (usually parents), and that criminal offences against sexual freedom in most cases occur in families, it is clear that the present provision offers the choice to child’s parents/legal representatives/guardians to decide whether or not to initiate criminal proceedings by an appropriate legal action; a child (person under the age of 18) - although the subject of legal protection - has no influence on this decision.

Deleting this Article would also mean the harmonisation of the Criminal Code with the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which obligates the states to ensure that “investigations or prosecution of offences established in accordance with this Convention shall not be dependent upon the report or accusation made by a victim...” (Article 32 of the Convention).

#### **XXII**

Paragraph 4 of Article 190 shall be amended to read:

“The perpetrator shall not be punished for the offence referred to in paragraph 1 of this Article if between him/her and the minor there is no substantial difference in their mental and physical maturity”.

#### *Explanation*

The existing provision provides that the prosecution of the offence of common-law marriage with a minor shall not be undertaken or shall be suspended if a marriage is concluded between the offender and the minor. This provision is contrary to the constitutional principle and the principle prescribed by the Family Law on the equality of marriage and common-law marriage. In addition, this offence is not established in order to protect the institute of marriage, but to prevent cohabitation (regardless of whether in marriage or in common-law relationship) with underage persons and (sexual) exploitation of minors by adults. The subject of protection is a child/minor, and the purpose of general prevention is, *inter alia*, the preservation of mental and physical health of the minor and his/her proper development.

Taking into consideration the purpose of regulating this offence, it is justified to delete the existing paragraph 4. Instead, it would be expedient to prescribe the possibility of not punishing an adult offender for this act, if the difference in mental and physical maturity between him and the minor is small. Similarly, the perpetrator of the offence of sexual intercourse with (imposed on) the child is acquitted of criminal responsibility if there is no significant difference in mental and physical maturity between them.

### **XXIII**

In paragraph 3 of Article 191, after number “1”, the word “and” and number “2” are added, and after the words “underage person”, the words “or his/her serenity and mental state” are added.

#### *Explanation*

The aim of the proposed amendments is to provide criminal protection to the child whose serenity and mental state, which are the basic elements of child’s proper development, are threatened by committing this criminal offence. Thus, the criminal legislation recognises the most frequent consequence of this criminal act, which may occur (and usually does) even when the child’s health, nurture and education are not endangered. The choice of term “serenity and mental state” is made in accordance with the provision that defines the criminal offence of domestic violence, exactly because by abducting a child and preventing his/her contacts with the parents that the child lives with, the child is emotionally violated and his/her proper growth and development is endangered.

In current practice, the Protector of Citizens has had several cases where due to non-compliance with court decisions on custody of the child and failure to execute or inefficient execution of such decision, the child’s state of mind, serenity, mental, and even physical integrity were in danger: in one case, the child has for years maintained personal relations with his mother (who was entrusted with independent exercise of parental rights) by seeing her secretly in the school toilet, fearing that the father's threats of physical violence and disruption of any communication with the child would come true. In addition, the father blackmailed the child by saying that he would not be allowed to cross over his father’s doorstep any more if he decided to live with his mother, into whose custody the child was entrusted by the court. The abuse of the position of authority and the conflict of

loyalties exposed the child to continuous attacks on his peace, tranquillity, mental state and proper mental and physical development.

#### XXIV

In Article 193, a new paragraph 3 is added which reads:

“Child abuse includes all forms of physical or emotional ill-treatment, sexual abuse, neglect or negligent treatment, commercial or other exploitation, and child's exposure to violent environment or traumatic incidents, resulting in actual or potential harm to the child's health, threat to the child's development or dignity in the context of responsibility, trust or power.”

#### *Explanation*

By introducing the definition of abuse and neglect, the Criminal Code is harmonised with the National Strategy for Prevention and Protection of Children from Violence and the objectives set by the National Strategy and General Protocol for the Protection of Children against Abuse and Neglect. The proposed definition of abuse is adjusted to the definition of abuse and neglect from the General Protocol for the Protection of Children against Abuse and Neglect, which is in accordance with the definition of abuse set by the World Health Organisation<sup>17</sup>.

In addition, this amendment extends the criminal protection of children (persons under the age of 18) to the cases of exposure to violent environment or traumatic incidents, such as family violence or perpetration of criminal offence against a family member or person close to the child.

PROTECTOR OF CITIZENS

Saša Janković

Send to:

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<sup>17</sup> Definition adopted by the World Health Organisation at the Consultations on Preventing Child Abuse in Geneva in 1999.