



LA CHILD 
Enhancing legal aid for children in conflict with the law

LEGAL AID FOR CHILDREN IN CONFLICT WITH THE LAW

**National Report on Germany
May - July 2020**



The project is funded by the Justice program of
the European Union (2014 -2020)



This research report has been written in the context of the project "Legal aid for children in criminal proceedings: developing and sharing best practices (LA CHILD)", financed by the Justice program of the European Commission. The content of this report does not necessarily reflect the position of the European Commission and thus does not imply in any way its endorsement of the views expressed in this report. If inaccuracies or mistakes are to be found in this document, they can only be attributed to the authors of this report.

© 2020-2021, «LA CHILD » project

DLA Piper UK LLP is a limited liability partnership registered in England and Wales (number OC307847), which means the liability of the individual partner is limited. It is part of DLA Piper, a global law firm, operating through various separate and distinct legal entities.

A list of members is open for inspection at its registered office and principal place of business, 160 Aldersgate Street, London, EC1A 4HT and at the address at the top of this letter. Partner denotes member of a limited liability partnership.

A list of offices and regulatory information can be found at www.dlapiper.com

The Frankfurt branch is registered at the Frankfurt a.M. Local Court (PR 2663).

Frankfurt switchboard:
+49 69 271 33 0

DLA Piper UK LLP

Neue Mainzer Str. 6-10
60311 Frankfurt am Main
T +496927133027
F +49 69 271 33 100
W www.dlapiper.com

INTRODUCTION TO THE PROJECT AND THE QUESTIONNAIRE	3
KEY DEFINITIONS	4
PART 1: AUTHORS AND GENERAL INFORMATION.....	5
PART 2: NATIONAL LEGAL AID SYSTEM	7
Regulation of legal aid	7
Management and administration of legal aid	10
Funding of legal aid.....	11
PART 3. RIGHTS OF BENEFICIARIES OF LEGAL AID	15
Access to legal aid.....	15
Access to information about legal aid	20
Protection of child interests.....	22
PART 4. LEGAL AID PROVIDERS (LAWYERS)	25
General requirements for legal aid providers	25
Education and qualification of legal aid providers (requirements for becoming legal aid providers)	27
Continuous training	28
Specialisation of legal aid providers	29
PART 5. QUALITY AND ASSESSMENT OF LEGAL AID.....	32
Legal aid quality standards (guidelines).....	32
Complaints	32
Assessment of legal aid quality	33
PART 6. STATISTICS.....	34
PART 7: CASE LAW	35

INTRODUCTION TO THE PROJECT AND THE QUESTIONNAIRE

This national research questionnaire was prepared when implementing the EU co-funded project *Legal aid for children in criminal proceedings: developing and sharing best practices (LA CHILD)*. The Project is implemented by the consortium consisting of *Law Institute of Lithuania (LIL)*, *Defence for Children International (DCI) - Belgium* and *Center of Integrated Legal Services and Practices (CILSP, Albania)*. It started in February 2020 and will end in December 2021.

The Project' s overall objective is to contribute to enhancing protection of procedural rights of children in conflict with the law and to foster coherent implementation of Directive 2016/800 in the EU Member States as regards legal aid to children. For this purpose, the Project will develop common standards, showcase best practices and innovative approaches that can be replicated across the EU as well as organize capacity building activities.

The Project' s activities started with the evaluation of regulation and practices in European States when providing legal aid for children in conflict with the law. This questionnaire is the basis of this research. After having collected the responses, these responses will be analysed by the project researchers and a summarising report will be drafted. The prepared report will identify the main challenges encountered as well as the best approaches to achieving effective and efficient legal aid for children.

Later on, the Project team will draft Guidelines on providing legal aid to children in conflict with the law as well as a 'child friendly' version. In addition, in the end of 2020, an international conference is planned in Vilnius, where experts from different states will share their knowledge and insights. In 2021, tailored practical trainings to lawyers, judges, legal aid board members and social workers will take place in Lithuania, Belgium and Albania. The final stage of this Project will be a roundtable discussion in Brussels where key Project outcomes and best practices will be presented and discussed.

KEY DEFINITIONS

Legal aid means the provision of legal advice, assistance and representation at the expense of the State on the conditions and in accordance with the procedures established under the national law for persons detained, arrested or imprisoned; for persons suspected or accused of, charged with or convicted of a criminal offence; and for victims and witnesses in the criminal justice process. Legal aid includes legal education, access to legal information and other services provided through alternative dispute resolution mechanisms and restorative justice processes.¹

Child is a human being under the age of 18.

A child in conflict with the law is a person who has reached the age of criminal responsibility but not the age of majority (under 18 years old), who is suspected or accused of having committed an offence under his national criminal law.² The age that needs to be taken into consideration to determine whether a child is in conflict with the law is the age at the time of committing the offence, not later than that.

Legal aid provider means any person who is providing legal aid pursuant to national law.

Legal aid authority means the authority established under the national law for the purpose of managing, coordinating and monitoring the provision of legal aid.³

¹ Model Law on Legal Aid in Criminal Justice Systems. United Nations. Vienna, 2017.: www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf

² <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

³ *Ibid.*

PART 1: AUTHORS AND GENERAL INFORMATION

1.1. Please list all the names of experts and lawyers who worked on this report.

Dr. Emanuel Ballo; Dr. Christian Schoop, Dr. Marius Haak, Anna Lena Nowicki, Katina Dorer, Moritz Beumker.

1.2. Please name the country which this report applies to.

This report applies to Germany.

1.3. Please provide a full list of acronyms used in your report, if any.

cf.	confer = compare
etc.	et cetera
ff.	following pages
i.e.	id est = that is
BerHG	Beratungshilfegesetz (Advisory Assistance Act)
BORA	Berufsordnung für Rechtsanwälte (Professional Code of Conduct for Lawyers)
BRAO	Bundesrechtsanwaltsordnung (Federal Lawyers Act)
FAO	Fachanwaltsordnung (Specialist Lawyers Act)
GVG	Gerichtsverfassungsgesetz (Courts Constitution Act)
JGG	Jugendgerichtsgesetz (Youth Courts Act)
RDG	Rechtsdienstleistungsgesetz (Legal Service Act)
StGB	Strafgesetzbuch (German Criminal Code)
StPO	Strafprozessordnung (German Code of Criminal Procedure)

1.4. Please explain the methodology used to complete this report and sources that were used (such as internet research, legal database research, case law research) and any limitations that were experienced when undertaking this research (such as lack of enough data, resources, directives, etc.)

The sources used to complete this report were

- internet research:

https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Justizstatistik/Beratungshilfe/Beratungshilfe_node.html

<https://weisser-ring.de/weisser-ring/der-verein>

<https://frankfurt.de/leistungen/Familie-Kinder-und-Jugend-8958408/Sonstiges-9838460/Jugendgerichtshilfe>

<https://www.rak-ffm.de/anwaltssuche/>

<https://www.rak-ffm.de/buerger/berufsaufsicht/>

[https://www.jura.uni-](https://www.jura.uni-frankfurt.de/75941968/QUAL_AID_Evaluation_of_Legal_Aid_Quality.pdf)

[frankfurt.de/75941968/QUAL_AID_Evaluation_of_Legal_Aid_Quality.pdf](https://www.jura.uni-frankfurt.de/75941968/QUAL_AID_Evaluation_of_Legal_Aid_Quality.pdf)

<http://b-s-r-b.de/studentische-rechtsberatung/studentische-rechtsberatungsstellen-in-deutschland/>

https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Staerkung_Verfahrensrechte_Jugendstrafverfahren.pdf;jsessionid=2D027EE9BFBD69A1C594C4AFAD829B76.1_cid324?_blob=publicationFile&v=2

<https://kinderschutzbund-duesseldorf.de/unsere-angebote/fuer-erwachsene/rechtsberatung/>

https://www.burhoff.de/veroeff/aufsatz/RVGreport_2015_406.htm

- legal database research:

<http://www.beck-online.de>

- case law research:

<http://www.beck-online.de>

<http://www.juris.de>

1.5. Please keep a list of the most useful materials that you find during your research that are applicable to your country. We are mainly looking for research studies, analyses, reports, tools, etc. relevant to the rights of access to legal aid for children in conflict with the law at the local/national level.

- Matthias Kilian "Legal Aid in Germany"
- MyLawyermyRights national Report 2017

PART 2: NATIONAL LEGAL AID SYSTEM

Regulation of legal aid

2.1. Please shortly describe the legal framework regulating the legal aid system in your country. (this description should not be longer than half of a page).

Germany's Legal Aid System is, from a comparative perspective, unique for a number of reasons: It is a pure *judicare* model that lacks any centralized structure which oversees its operation. Services are provided almost exclusively by lawyers in private practice, with the government limiting its role to being a funder. Legal aid in Germany lacks a true, means-based criminal legal aid scheme. Instead, Germany operates a system of court-ordered representation in certain criminal proceedings.

In criminal proceedings, the StPO regulates legal defence. The defendant has the right to appoint a defence counsel at any stage of the proceedings (section 137 para. 1 StPO). In certain cases, representation by defence counsel is mandatory (mandatory defence – "notwendige Verteidigung" section 140 StPO). In these cases, if the accused has not chosen defence counsel himself, the court will appoint defence counsel on his behalf ("Pflichtverteidiger" section 141 StPO). The costs of court-appointed defence counsel are provisionally borne by the state treasury (for details see below under 2.8 and 2.9).

The German Constitutional Court ("Bundesverfassungsgericht") has repeatedly held that the state is under a constitutional obligation, derived from Article 3 para. 1, 20 para. 1 and 3 of the German Constitution, to guarantee that a lack of means does not impede access to justice for indigent citizens. In 2009, however, the Constitutional Court held that these constitutional guarantees must also extend to legal aid for out-of-court advice and representation. In addition, the Youth and Social Welfare Office ("Jugend- und Sozialamt"), specifically the youth court assistance service, provides support for juveniles before and during the proceedings, such as mental support and information on the proceedings (for more details please see below under 2.7).

2.2. Which laws or/and policy documents regulate legal aid? Please describe briefly the objectives and content of regulation of each legal act or policy document.

In Germany, several laws regulate legal aid:

- German Code of Criminal Procedure,
- German Youth Courts Act

- Advisory Assistance Act
- Legal Service Act

German Code of Criminal Procedure (StPO)

The StPO applies to all criminal proceedings in the Federal Republic of Germany.⁴ It is partially superseded by more specific laws, for example in juvenile criminal law. The StPO lays down rules on the defence of the accused and his or her right to apply for legal aid. In particular, sections 137 ff. contain the rights to legal counsel and court-appointed defence counsel in cases of mandatory defence. [...] The right to apply for legal aid is guaranteed by section 404.

German Youth Courts Act (JGG)

The JGG governs the majority of formal juvenile criminal law in the Federal Republic of Germany. It applies to all criminal proceedings against juveniles ages 14 to 18 and can be applied by the court up to the age of 21, depending on the mental maturity of the juvenile.⁵ Under 14 years of age, the juvenile is not liable to prosecution.⁶ The JGG is *lex specialis* to substantive and formal criminal law; where no special rules of the JGG apply, the StGB and the StPO apply according to section 2 JGG. Regarding legal aid in criminal proceedings, the JGG regulates cases of mandatory defence itself, other than the StGB, in sections 68 f. JGG. The appointment procedure works the same way as explained in the StPO.

Advisory Assistance Act (BerHG)

For destitute people, legal advice and, if necessary, legal representation is offered by lawyers within the framework of the BerHG for the exercise of rights outside of court proceedings. Pursuant to section 2 para. 2 BerHG in criminal proceedings, only advice is granted under this act.

Legal Service Act (RDG)

The RDG applies to out-of-court proceedings and regulates the "independent provision of extrajudicial legal services." Legal services are defined as "any activity in specific affairs of others as soon as a legal examination of the individual case is required."⁷ Within this

⁴ Lackner/Kühl/*Heger*, comment on the StGB, before sections 3–7 Recital 2.

⁵ Section 1 JGG.

⁶ BeckOK/*Putzke*, comment on the JGG, section 1 Recital 2.

⁷ BeckOK/*Römermann*, comment on the RDG, section 1 Recital 35.

framework, advice is also provided by student legal advisors (so-called "law clinics," please also see below under 4.2). However, since the advice is not provided by fully qualified lawyers, they cannot represent the defendant in court.

2.3. Do those general laws or/and policy documents on legal aid refer to specifics of legal aid to children? Please describe briefly and present the relevant extracts from those documents.

As explained above, the general procedural principles are partially modified for juvenile proceedings in the JGG, cf. section 2 para. 2 JGG.

Section 2 - Goal of criminal law relating to young people; application of general criminal law

(1) The application of criminal law relating to young people is above all to counter renewed criminal offences on the part of a juvenile or young adult: In order to achieve this goal, the legal consequences, and with respect for the parental right of upbringing also the procedure, shall be orientated primarily in line with the educational concept.

(2) The provisions of general law shall apply only insofar as not otherwise provided for in this Act.

Sections 68, 68a JGG contain provisions on the appointment of court-appointed defence counsel in cases of mandatory defence.

Section 68 – Compulsory defence counsel

The presiding judge shall appoint defence counsel for the accused if

1. defence counsel would have to be appointed for an adult,
 2. the parent or guardian and the legal representative have had their rights withdrawn in accordance with this Act,
 3. the parent or guardian and the legal representative have been excluded from the hearing in accordance with section 51, subsection 2, and the impairment in the defence of their rights can no longer be sufficiently compensated for by subsequent information (section 51, subsection 4, second sentence),
 4. consideration may be given to placing the accused in an institution for the purpose of preparing an expert report on his personal development (section 73),
- or
5. remand detention or provisional committal is to be enforced against him in accordance with section 126a of the Code of Criminal Procedure if he has not yet reached eighteen years of age; defence counsel shall be appointed without delay.

Furthermore, under section 74 of the JGG, the defendant may be exempted from being ordered to pay fees.

The imposition of costs and expenses on the defendant may be dispensed with in proceedings against a juvenile.

2.4. Are there any laws or policy documents specifically addressing legal aid for children adopted in your country? If yes, please describe objectives and content of regulation of these laws or policy documents and provide their texts (if the texts are long, no translation for the texts is requested).

There are no child-specific laws or policy documents regarding legal aid apart from the provisions of the JGG.

2.4 bis. Does your country have a law that specifically regulates or limits access to legal aid for terrorist suspects or perpetrators? Does such a regulation also apply to minors and what does it provide for?

There are no special restrictions.

Management and administration of legal aid

2.5. How the legal aid system is organised nationally, regionally or locally? Who is in charge of the management and oversight? Please describe status and functions of the legal aid authority (legal aid board or similar body) institution.

In Germany, the administration of justice in principle falls within the competence of the 16 federal states and not the federal government. The administration of legal aid is entrusted to the state court systems. Therefore, no centralized legal aid system exists.

Most federal states follow a pure *judicare* model, meaning that there is no central legal aid service in the form of a special governmental office, NGO, or foundation.⁸ Legal aid is instead provided by private lawyers. However, the mandatory defence and advisory assistance is administered through state courts and financed by the federal states. Each court has a counter, which is available for general information and applications. The independence of the legal aid system is guaranteed through the independence of the

⁸ Matthias Kilian "Legal Aid in Germany" page 8.

individual judge who deals with the legal aid application – judges in Germany are appointed for life, not elected, independent, and not bound by any supervision.

An exception to the *judicare* model exists in the two smallest federal states, Hamburg and Bremen. It was argued that the needs of the population in these city-states could also be served by establishing Legal Advice Centres at central locations in which lawyers give legal advice. In all other federal states, this delivery model was seen as impractical because of the costs of establishing a network of advice centres.⁹

2.6. Is there an institution who is working particularly with legal aid for children? Is there a department (division) within the main legal aid institution that is specialised in legal aid for children? If yes please describe in more detail.

In proceedings under the JGG, the Jugend- und Sozialamt is usually also involved by providing "youth court assistance service" ("Jugendgerichtshilfe," section 38 JGG). According to section 52 of the Eighth Book of the Social Code VIII ("SGB VIII"), "participation in proceedings before the juvenile courts" is a so-called "other" task of the Youth Welfare Office, not a separate service.¹⁰

According to section 52 para. 3 SGB VIII, the entrusted Youth Welfare official shall support the young person throughout the entire proceedings. Pursuant to section 38 JGG, the representatives of the youth court assistance service bring, among other things, educational, and thus also socio-pedagogical, aspects into the criminal proceedings before the youth courts by making a statement (in writing and/or orally) about the accused. They also examine, under section 52 para. 2 SGB VIII, whether youth welfare services should be initiated and whether there are alternatives to formal criminal proceedings (diversion).¹¹

Funding of legal aid

2.7. How is the legal aid system financed?

If the courts are organised on the federal state level, the federal states finance the legal aid system. Generally, the grant of legal aid has the effect that the state treasury will bear

⁹ Matthias Kilian "Legal Aid in Germany" page 8.

¹⁰ Meier/Rössner/Trüg/Wulf, comment on the JGG, section 38 recital 3.

¹¹ MyLawyermyRights national Report 2017 p. 30.

the legal costs and the attorney fees. If the proceedings are held before a federal court, the federal treasury finances the proceedings. Therefore, the "legal aid system" is financed by taxes.¹²

If the suspect is convicted, he has to "repay" all costs within the scope of section 464a StPO, i.e. expenses of the treasury, incurred in the proceeding pursuant to section 465 para. 1 StPO. A conviction within the meaning of this section also includes the imposition of educational and disciplinary measures according to sections 9 ff. and 13 ff. JGG.

Section 465 of the StPO

Convicted person's obligation to pay costs

(1) The defendant shall bear the costs of the proceedings insofar as they were caused by the proceedings for an offence of which he has been convicted or for which a measure of reform and prevention has been ordered against him. For the purposes of this provision, a conviction shall also be deemed to have been pronounced if the defendant has been given a warning with sentence reserved or the court has dispensed with imposing a penalty.

(2) If specific expenses have been caused by investigations conducted to clarify certain incriminating or exonerating circumstances and if the outcome of such investigations was in the defendant's favour, the court shall charge the expenses, in part or in full, to the Treasury if it would be inequitable to charge them to the defendant. This shall in particular apply if the defendant is not convicted for individual severable parts of an offence or is not convicted of one or more of a number of violations of the law. Sentences 1 and 2 shall apply accordingly to the defendant's necessary expenses. The court may order that an increase in court fees in cases where a psychosocial assistant has been appointed be waived, in part or in full, if it would be inequitable to charge such fees to the defendant.

(3) If a convicted person dies before the judgment enters into force, his estate shall not be liable for the costs.

2.8. How are legal aid providers (including lawyers) paid? What are legal aid providers' (lawyers') fees for legal aid?

In criminal proceedings:

¹² Federal Office of Justice, instructions for the application for legal aid, online retrievable at https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/HKUE/Verfahrenkostenhilfe_Ausfuhrungshinweise_en.pdf?__blob=publicationFile&v=2.

Defence counsel is appointed by the court and therefore in principle asserts his or her claim for remuneration against the State Treasury.

If the defendant is (partially) convicted, the treasury can demand him or her to (partially) reimburse the fees paid to the court-appointed defence counsel.

The court-appointed defence counsel can claim the full fees of a defence counsel of choice directly from the defendant pursuant to section 52 para. 1 and 2 Lawyers' Fees Act (Rechtsanwaltsvergütungsgesetz, "RVG"), if the defendant is economically capable of paying such fees or has a claim for reimbursement against the state.

In general, however, the court-appointed defence counsel's fees are calculated at 80% of the average fee for the respective fee element, i.e. they are often lower than the fees incurred by a defence counsel of choice.¹³

In cases whose handling is particularly extensive or difficult, a flat rate fee may be set which is higher than the usual fee for a court-appointed defence counsel (section 51 para. 1 RVG).

In cases of Advisory Assistance under the BerHG:

The lawyer is remunerated by the Land Treasury according to the general fee scheme of the RVG unless special agreements apply. Pursuant to no. 2500 ff. of the remuneration regulation ("VV") of the RVG, the lawyer will receive a flat fee of EUR 35,00 - EUR 85,00.

For the suspect costs in the amount of 15 EUR arise.¹⁴

Section 44 RVG

For an activity within the context of advisory assistance, lawyers shall receive remuneration from the Land treasury pursuant to this Act unless special

¹³ Burhoff, RVGreport 2015, 406:
https://www.burhoff.de/veroeff/aufsatz/RVGreport_2015_406.htm.

¹⁴https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Justizstatistik/Beratungshilfe/Beratungshilfe_node.html.

agreements have been made for the activity in advisory centres pursuant to section 3 (1) of the Advisory Assistance Act. [...].

2.9. Are there any differences between fees provided for legal aid for children compared with legal aid for adults? If yes please describe in more detail.

No, there is no difference. The fee calculation is the same.

2.10. Are there different fees for a representation of a child in criminal (juvenile justice) proceedings as compared to representation in civil or administrative cases?

In principle, court costs and lawyers' fees are incurred in all proceedings. In civil proceedings, these are mainly determined by the amount in dispute. In criminal proceedings, the costs depend on the type and content of the decision. Different fee structures for juveniles are not apparent in any proceedings. In any case, however, in criminal proceedings, there is the possibility that the juvenile does not have to bear the costs, pursuant to section 74 JGG. This includes the fees for court-appointed defence counsel, but not defence counsel of choice.¹⁵

¹⁵ MüKo/*Kaspar*, comment on the StPO, section 74 JGG recital 2.

PART 3. RIGHTS OF BENEFICIARIES OF LEGAL AID

Access to legal aid

3.1. What are the general criteria for accessing legal aid? Who is entitled to legal aid?

Section 141 StPO stipulates that defence counsel is to be appointed by the court if

- a case requires a mandatory defence in the sense of section 140 StPO,
- the accusation has been opened, and
- the accused requests the appointment.

Cases of mandatory defence are listed conclusively in section 140 StPO. If it only subsequently appears that defence counsel is needed, he shall be appointed immediately (section 141 para. 2 StPO).

Section 140

Mandatory defence

(1) The participation of defence counsel shall be mandatory if

1. the main hearing at first instance is held at the higher regional court or at the regional court;
2. the accused is charged with a serious criminal offence;
3. the proceedings may result in an order prohibiting the exercise of a profession;
4. remand detention under section 112 or 112a or provisional placement under section 126a or section 275a (6) is enforced against an accused;
5. the accused has been in an institution for at least three months based on judicial order or with the approval of the judge and will not be released from such institution at least two weeks prior to commencement of the main hearing;
6. placement of the accused pursuant to section 81 is being considered for the purpose of preparing an opinion on his mental condition;
7. proceedings for preventive detention are conducted;
8. the previous defence counsel is excluded from participating in the proceedings by a decision;
9. a lawyer has been assigned to the aggrieved person pursuant to section 397a and section 406h (3) and (4).

(2) In all other cases, the presiding judge shall appoint defence counsel upon application or ex officio if the assistance of defence counsel appears necessary due to the severity of the offence, due to the difficult factual or legal situation, or if it is

evident that the accused cannot defend himself. Applications filed by accused persons with a speech or hearing impairment shall be granted.

(3) The appointment of defence counsel pursuant to subsection (1) no. 5 may be revoked if the accused is released from the institution at least two weeks prior to commencement of the main hearing. The appointment of defence counsel pursuant to subsection (1) no. 4 shall remain effective for the further proceedings under the conditions of subsection (1) no. 5, unless another defence counsel is appointed.

According to section 68a JGG, in the case of mandatory defence, the juvenile is to be assigned defence counsel before any interrogation or confrontation. Exceptions to this rule exist if the assignment would be disproportionate taking into account the welfare of the juvenile and the circumstances of the individual case.

Furthermore, in special cases listed in section 68b JGG, questioning, and confrontation can take place without the prior appointment of a defence counsel.¹⁶

Cases of mandatory defence are regulated in section 68 JGG.

Section 68 JGG:

A case of compulsory¹⁷ defence shall be deemed to exist if

1. there would be a case of necessary defence in the proceedings against an adult
2. the legal guardians and legal representatives are deprived of their rights under this Act,
3. the legal guardians and legal representatives have been excluded from the hearing in accordance with section 51 para. 2 and the impairment in the exercise of their rights cannot be sufficiently compensated for by subsequent information (section 51 para. 4 sentence 2) or the presence of another suitable adult person,
4. in order to prepare an expert opinion on the state of development of the accused (section 73), the accused may be placed in an institution, or
5. the imposition of a juvenile sentence, the suspension of the imposition of a juvenile sentence or the ordering of placement in a psychiatric hospital or in a detention centre

¹⁶ BGBl. 2019 Part 1 no. 47; section 70a JGG.

¹⁷ In the official translation of the JGG, the wording is "compulsory" whereas the English version of the StPO uses "mandatory". As the meaning is the same we will use "mandatory defence" in the following.

Version based on the Act on the Strengthening of Procedural Rights of Juveniles enacted 12. December 2019.

If there is no such case of a mandatory defence, pursuant to section 69 JGG, an adviser can be appointed to the juvenile by the chairman at any stage of the proceedings (see below under 4.1).

3.2. In which circumstances are children in conflict with the law entitled to legal aid?

Please see above under 3.1.

3.2bis. Are foreign children entitled to legal aid in your country when they are in conflict with the law (is access to legal aid conditioned by nationality or residency status for children)?

In Germany, access to legal aid is not conditioned by nationality or residency status.

3.3. Is legal aid to children in conflict with the law always free or partial payment can be requested?

As mentioned above under 2.3, the juvenile has to bear the costs only in the case of a conviction, but this may be dispensed under section 74 JGG. Desist from the imposition of costs and expenses is regularly applied if the young person has no income of their own.

3.4. Can children victims of crime access free legal aid in your country?

Criminal offences are usually prosecuted through public action so that the victim is not a party to the criminal proceedings. In the cases of section 395 StPO, however, the victim may join the action as a private accessory prosecutor.¹⁸ However, this only applies with regard to the offences listed there.¹⁹ Otherwise, a connection to the lawsuit according to para. 3 is only admissible with regard to the offences listed there and for the protection of the victim's necessary interests.

¹⁸ BeckOK/*Weiner*, comment on the StPO, section 395 recital 1.

¹⁹ E.g. sexual abuse/sexual assault or rape (sections 174-182 StGB), murder (sections 211, 212 StGB), abandonment or bodily harm (sections 221, 223 ff. StGB) or human trafficking/forced prostitution/forced labour/exploitation/kidnapping (sections 232 ff. StGB).

If the juvenile can be a private accessory prosecutor according to these principles, he or she is entitled under section 397a StPO either to court-appointed defence counsel or, if the conditions of para. 1 are not met, legal aid according to civil law principles (para. 2).

In cases of certain severe crimes, children victims are entitled to free psychosocial support during the proceedings according to section 406g para. 3 StPO.

For compensation claims under civil law, the general legal aid schemes described under 2.1 and 2.2 apply.

Outside of court proceedings, the NGO "Weißer Ring" ("white ring") offers support for victims of crime. In particular, human assistance and personal care, support during appointments with the police, the public prosecutor's office, and the court, and granting of legal protection as well as financial support for emergencies caused by the crime.²⁰

3.5. Is the representation of a lawyer mandatory for any alleged child offender? In which case and at what point in the proceedings?

The general rules as described above apply to cases of mandatory defence.

3.5bis. Is there a mandatory lawyer participation for children who are suspected or accused of terrorism?

Cases of mandatory defence are regulated in section 68 JGG in connection with section 140 StPO (see above, 2.1 and 3.1). As "terrorism" or rather "forming terrorist organisations" is a criminal offence pursuant to section 129a StGB and is qualified as a serious criminal offence in accordance with section 140 para. 1 no. 2 StPO, the juvenile will be assigned defence counsel.

3.6. Is there a mandatory lawyer participation for children victims of crime provided in your country? In which cases?

The victims of a crime are not usually part of the proceedings; thus, no lawyer participation is required. If the juvenile is participating in the proceedings as a private accessory

²⁰ <https://weisser-ring.de/weisser-ring/der-verein>.

prosecutor, cases of mandatory defence are described in section 397a StPO, see above under 3.4.

3.7. If a child benefits from legal aid, can he/she choose his/her lawyer? What is the legal role of the parents in this regard?

A child can choose his/her own lawyer. This reflects the principle of a right to a fair trial. Independently of age, the right to choose a lawyer is explicitly foreseen in Article 6 para. 3 subpara. c) of the European Convention for Protection of Human Rights and Fundamental Freedoms and in section 137 para. 1 sent. 1 StPO.

Section 137 para. 2 StPO, and section 67 para. 2 JGG state that the parents, as the legal representative of the juvenile, are able to choose a lawyer on their own.²¹ This lawyer can be mentioned in the request for assignment (section 141 para. 1 StPO, see also under 3.1.) and shall be assigned in the mandatory defence regime. Despite being appointed by the parents, the defence counsel's mandate is solely to protect the interests of the accused. In this regard, the parents are considered a third-party, i.e. they cannot access information covered by attorney-client privilege. If the lawyer chosen by the parents does not enjoy the trust of the juvenile, a second defence counsel shall be assigned to the juvenile in cases of mandatory defence.²²

3.8. If the child benefits from legal aid, can he/she change lawyer during the same proceedings? In which circumstances? What is the procedure? Please explain the answers in more detail.

Section 143a para. 2 StPO stipulates that the court-appointed defence counsel of the accused is to be replaced if one of the cases described in nos. 1 to 3 applies. Furthermore, a change of court-appointed defence counsel can be made by mutual agreement, if the previous defence counsel agrees that there will be no delay in the proceedings or additional costs for the state treasury.²³

²¹ MyLawyermyRights national Report 2017 p. 32, 36.

²² MüKo/Thomas/Kämpfer, comment on the StPO, section 137 recital 39.

²³ BeckOK/Krawczyk, comment on the StPO, section 143a recital 34.

Section 143a paragraph 2:

(2) The appointment of the public defender of rights shall be cancelled and a new public defender of rights shall be appointed if

1. the accused, to whom a defender other than the one designated by him within the period determined in accordance with section 142 paragraph 5 sentence 1 has been assigned or to whom only a short period has been set for the selection of the defender, applies within three weeks of the publication of the judicial decision on the appointment to appoint another defender designated by him, and no good reason precludes this

2. the public defender appointed on the occasion of a presentation before the next judge pursuant to section 115a applies for the revocation of his appointment for good cause, in particular for unreasonable distance from the future whereabouts of the accused; the application shall be filed without undue delay after the proceedings have ended pursuant to section 115a; or

3. the relationship of trust between the defence counsel and the accused is finally destroyed or for any other reason no adequate defence of the accused is guaranteed.

In the cases of numbers 2 and 3 section 142 paragraph 5 and 6 shall apply accordingly.

3.9. Does a child have the right to access free interpreter if he/she needs one when meeting with provided lawyer?

In accordance with Article 6 para. 3 subpara. (e) of the European Convention for Protection of Human Rights and Fundamental Freedoms, the involvement of a free interpreter is only foreseen for process-related conversations, such as interviews with defence counsels or if the defendant does not understand the language used in court. This right is also provided by section 187 para. 1 GVG.²⁴

Access to information about legal aid

3.10. Does the State play a role in giving information to a child regarding legal aid system? Are there any initiatives (media or educational campaigns, etc.) to inform children about the legal aid system?

²⁴ MüKo/Oğlakcioğlu, comment on the StPO, section 187 GVG recital 12.

In Germany, no public campaign to inform children about their right to access a lawyer exists.

3.11. Are there any organisations or associations that give information and facilitate a child's right to legal aid?

In Germany, the youth courts assistance service ("Jugendgerichtshilfe", for further details see below under 3.17 and 4.4), provided by the Youth Welfare Office working in conjunction with the youth assistance associations, plays an important role in criminal proceedings against children. Their tasks include informing children about the course of the criminal proceedings. They inform children about their right to choose a lawyer even if they have no claim of mandatory defence. In such cases, they recommend free legal advice for youth.²⁵

Additionally, the Federal Association for the Protection of Children ("Der Kinderschutzbund") is committed to children and juveniles in Germany. Members of the federal association are various local and regional associations which are located throughout Germany. They offer free legal advice from experienced lawyers. However, their lawyers are not allowed to accompany the children to authorities or court.²⁶

Furthermore, law clinics organised by students also give information and offer free legal advice (for further information see above 2.2 and below 4.2).

3.12. If a child is deprived of liberty in the context of a criminal proceedings (e.g. held on remand at a prison, held at the police station or a hospital etc.) how does he/she receive information on his/her right to legal aid?

Even before the juvenile is deprived of liberty, when the juvenile is informed that he is a suspect in a criminal investigation, he has to be informed of his rights. In cases of pre-trial detention or other temporary deprivation of liberty, section 70a JGG regulates the corresponding rights to information. These are to be provided by the police, the public prosecutor's office, or the court, depending on the state of proceedings.

²⁵ MyLawyermyRights national Report 2017 p. 30, BeckOK/*Gertler/Schwarz*, comment on the JGG, section 38 recital 11.

²⁶ <https://kinderschutzbund-duesseldorf.de/unsere-angebote/fuer-erwachsene/rechtsberatung/>.

3.13. Is there an obligation to provide the information in child-friendly language?

Generally, pursuant to section 114b para. 1 StPO, an arrested accused shall be instructed on his rights in a language he understands. In addition, section 70b JGG provides a special rule for juvenile offenders. Prescribed instructions shall correspond to the level of development and the level of education of the youth.

3.14. If a child cannot speak the official language of the country, is there an obligation to provide the information in the child's mother tongue or in a language spoken/understood by the child?

There is no specific obligation to provide the information in the child's mother language. The arrested accused shall be instructed as to his rights in a language he understands. Section 70a of the JGG is intended to ensure that procedural rights are clearly communicated.²⁷ It is therefore possible that he may have to be instructed in his mother tongue even before arrest.

3.15. If the information needs to be translated or an interpreter needs to be provided, who covers the costs for the interpretation/translation?

The right to a fair trial may demand that an interpreter or a translator be called in for the entire criminal proceedings free of charge. The interpreter costs for the accused are legal costs and are borne by the Treasury.²⁸ In the event of a conviction, the obligation to bear the costs is determined according to section 74 JGG (see above under 2.11).

Protection of child interests

3.16. Is there a legal mechanism or a rule to address a conflict of interests between the child and his parents (e.g. when a child is a suspect and a parent is a victim)? Is there a legal mechanism or a rule to address a conflict of interests between the child and his lawyer? If yes, please describe in more detail.

Generally, the law gives broad procedural rights to the parent (which often remain unused in practice). Some voices propose that in cases of conflict, the interests of the child must to prevail. The prevailing view, however, is that the rights of the child and the rights of the

²⁷ MüKo/*Kaspar*, comment on the StPO, section 70a JGG recital 1.

²⁸ Satzger/Schluckebier/Widmaier, comment on the StPO, section 187 GVG recital 11.

parents have to be balanced, taking into account the age and autonomy of the child. In addition, the child's defence counsel has to consider whether the involvement of the parents in the proceedings serves the best interest of the accused in line with his mandate.²⁹

Pursuant to section 51 para. 2 no. 1-5 JGG, the presiding judge may exclude the accused's parent or guardian from the hearing.

Section 51 paragraph 2:

(2) The presiding judge may also exclude the accused' s parent or guardian and legal representative from the hearing where

1. there is a risk of considerable educational disadvantages because of a fear that by discussing the personal circumstances of the accused in their presence, necessary future cooperation between the persons named and youth courts assistance service in implementing youth court sanctions which are to be anticipated is made considerably more difficult,

2. they are suspected of being involved in the accused' s misconduct, or to the degree that they have been convicted in respect of participation,

3. there is fear of a danger to the life, limb or liberty of the accused, of a witness or of another person or of another considerable impairment to the well-being of the accused,

4. it is to be feared that their presence will impair the ascertainment of the truth, or

5. circumstances from the personal life of a party concerned by the proceedings, witness or person aggrieved by an unlawful act are discussed the discussion of which in their presence would breach interests in need of protection unless the interest of the parent or guardian and legal representatives in their being discussed in their presence outweighs such interests.

In cases falling under the first sentence, numbers 3 to 5, the presiding judge may also exclude the parent or guardian and legal representatives of the aggrieved person from the hearing, in cases falling under number 3, also if other considerable impairment of the well-being of the aggrieved party is to be feared. Parents and guardians and legal representatives shall be excluded if the preconditions of the first sentence, number 5, are met and the exclusion of the person whose life is affected is applied for. The first sentence, number 5, shall not

²⁹ MüKo/*Kaspar*, comment on the StPO, section 67 JGG recital 3.

apply insofar as the persons whose lives are affected are opposed to exclusion from the main hearing.

Under section 67 para. 4 JGG, the procedural rights of the parents may be removed by the court if the parents are suspected of participating in the accused's misconduct or insofar as they have been convicted of participation. In such case, the court appoints a guardian to assist the child in the proceedings. If the parents or guardians have chosen and engaged a lawyer on behalf of the child, it can appear that the child didn't trust him or her enough.³⁰ If the defence counsel of choice doesn't resign from the mandate, the court can appoint a defence counsel if the requirements of section 68 JGG are met. In particular see 3.8.

Furthermore, according to section 143a para. 2 no. 3 StPO, new defence counsel must be appointed if the relationship of trust between the accused (child) and the lawyer is permanently destroyed. The accused must provide substantiated evidence of this. In addition, the appointment of defence counsel is revoked if there are any other reasons why an adequate defence can no longer be guaranteed.

3.17. Is the child protection institution involved in criminal proceedings when a child is suspect or accused? In case, please describe in more detail.

The youth court assistance ("Jugendgerichtshilfe", see above 2.7) is involved during every stage of criminal proceedings, according to section 38 JGG.³¹ Representatives of the youth court assistance service shall highlight the supervisory, social and care-related aspects in proceedings before the youth courts.

3.18. Are experts such as psychologists, social workers, medical staff or others involved in criminal proceedings when a child is suspected or accused? In which cases? Are they paid by the State or by the child or his/her parents?

Please see above under 2.7 and 3.3.

³⁰ MyLawyermyRights national Report 2017 p. 36f.

³¹ BeckOK/*Gertler/Schwarz*, comment on the JGG, section 38 recital 11.

PART 4. LEGAL AID PROVIDERS (LAWYERS)

General requirements for legal aid providers

4.1. What professionals are entitled to provide legal aid to children in conflict with the law in your country? Please describe the status and functions (duties) of legal aid providers.

Mandatory defence ("notwendige Verteidigung", section 68 JGG) can be provided by any fully qualified lawyer (see below under 4.5). There is no special category of "youth defender" ("Jugendverteidiger"). However, the constitutional and international right to a fair trial demands that the lawyers are knowledgeable in juvenile justice in order to effectively fulfil their duty. There is a discussion whether the judge should take into account the educative capabilities of the candidates when appointing defence counsel. The predominant understanding is, however, that no such educational dimension is necessary,³² especially because there are no sufficiently specific criteria for the determination of educational suitability³³ and the educational and care-related aspects are covered by other actors and institutions such as the parents and the youth court assistance service (see above 2.7).

In practice, the lawyer is usually chosen from a list of court-appointed defence counsels ("Pflichtverteidiger-Liste") provided by the Bar Association.³⁴ Pursuant to section 142 para. 6 StPO, either a specialised lawyer in the field of criminal law or a lawyer who has notified the Bar Association of his interest in taking over mandatory defences and who is suitable shall be selected. However, no formal court-appointed defence counsel scheme exists in Germany.

Furthermore, pursuant to section 69 JGG, an adviser ("Beistand") can be appointed for the accused child if the child has not yet reached the age of 18 and if the circumstances do not warrant the appointment of defence counsel. Formally, anyone – including a lawyer but also a family member, teacher, social worker, or friend – may be appointed as an adviser. Most importantly, it should be ensured that the adviser enjoys the trust of the

³² BeckOK/*Noak*, comment on the JGG, section 68 recital 13.

³³ *Eisenberg/Kölbels*, comment on the JGG, section 68a recital 23 ff.

³⁴ MüKo/*Kaspar*, comment on the StPO, section 68 JGG recital 6.

child.³⁵ During the actual trial or the main hearing, the adviser is entitled to the rights of a defence counsel, however, their position is one of support, comfort, and care rather than legal defence.

4.2. What are the requirements to be a legal aid provider in your country?

In order to be able to provide legal aid, registration with the Bar Association ("Rechtsanwaltskammer") is necessary. The First and Second State Examination must be completed. An officially certified copy of the Second State Examination as well as proof of professional liability insurance (section 51 Federal Lawyers Act, "BRAO") must then be sent to the local Bar Association along with the application for admission.

In addition, according to section 138 para. 1 StPO, professors of law at German institutions of higher education, as defined in the Framework Act for Higher Education ("Hochschulrahmengesetz"), who are qualified to hold judicial office may be engaged as defence counsel and may provide legal aid.

Furthermore, there are a variety of student legal aid offices. Most of them are active in cooperation with various universities or law firms throughout Germany and some of the so-called "Law Clinics" operate in specialised areas such as the right of asylum or residence.³⁶

4.3. In the legal aid system, is there any type of registration requirement for lawyers who want to represent children in criminal proceedings (with bar association or another body)?

In Germany, no type of special registration for the representation of children in criminal proceedings is required.

4.4. In your country, are there any legal entities (any associations/organisations) who provide legal assistance to children in criminal proceedings? If yes, can you please provide some information on such legal entity's activities.

³⁵ BeckOK/*Noak*, comment on the JGG, section 69 recital 4; *Eisenberg/Kölbel*, comment on the JGG, section 69 recital 6.

³⁶ <http://b-s-r-b.de/studentische-rechtsberatung/studentische-rechtsberatungsstellen-in-deutschland/>.

The youth courts assistance service ("Jugendgerichtshilfe", see above, 2.7 and 3.17), pursuant to section 38 JGG, is one of the statutory tasks of the Youth and Social Welfare Office and is provided by educational specialists. Children and juveniles get advice before, during, and after criminal proceedings. The advice does not depend on the nationality of the children.³⁷ This type of assistance does not, however, assume a lawyer's function. The primary task of the youth court assistance is to bring the child's personal situation into the juvenile court proceedings and to work out proposals for possible sanctions which should have educational and preventive effect on the accused.³⁸ Pursuant to section 38 para. 6 JGG, the youth court assistance service should be consulted during the entire criminal proceedings and as early as possible.

As mentioned above (3.4) the organisation called "Weißer Ring" offers support for victims of crime.

Education and qualification of legal aid providers (requirements for becoming legal aid providers)

4.5. What are education requirements for legal aid providers?

The main case in practice is registration with the Bar Association ("Rechtsanwaltskammer"). The requirement for this is that you are a fully qualified lawyer. In Germany, legal education consists of the First and Second State Examination. The First State Examination marks the end of university education. Afterwards, the candidate must go through a mandatory clerkship ("Referendariat") with several stages in courts, public authorities, law firms etc. in order to attain the necessary practical skills. At the end, the candidate must pass the Second State Examination, a set of written and oral exams covering civil law, public law, and criminal law.

In order to provide legal aid according to section 138 para. 1 StPO, one has to be qualified to hold judicial office and must be qualified as a professor of law at a German institution of higher education as defined in section 44 of the Framework Act for Higher Education ("Hochschulrahmengesetz"). To be qualified as such professor of law, one must have a

³⁷ BeckOK/*Gertler/Schwarz*, comment on the JGG, section 38 recital 4.

³⁸ <https://frankfurt.de/leistungen/Familie-Kinder-und-Jugend-8958408/Sonstiges-9838460/Jugendgerichtshilfe>.

degree with the completion of the first state examination as well as a special qualification for academic work, which can regularly be proven by a postdoctoral qualification/habilitation.

4.6. Are there any specific requirements for legal aid providers who provide legal aid for children? Are they required to undergo specific trainings (e.g. on juvenile justice, children's rights, psychology, communication with children, etc.)?

Lawyers can specialize in criminal law. Pursuant to section 142 para. 6 StPO, when selecting a court-appointed defence counsel, it should be ensured that the lawyer either specialised in criminal law or has notified the Bar Association of his specific interest in being appointed as defence counsel. This also applies for legal aid providers who represent children in criminal proceedings. If lawyers wish to remain specialist lawyers (e.g. for criminal law), they must publish scientific papers in this area every calendar year or take part in specialist trainings and interdisciplinary lectures (section 15 of the Specialist Lawyers Act, "FAO").

Pursuant to section 37 JGG, judges in the youth courts as well as public prosecutors handling matters with regard to juveniles should have appropriate education, training, and experience in the education and upbringing of juveniles.

However, the support of relevant further trainings for legal aid providers, which is required by Article 20 para. 3 of the Directive (EU) 2016/800, is primarily a matter for the lawyer's self-organisation. The Federal Ministry of Justice as well as the judicial administration of the federal states shall sensitize the associations and committees of advocacy to this issue.³⁹

Continuous training

4.7. Is there a continuous training on juvenile justice offered/mandated throughout a legal aid provider's (lawyer's) career?

No, no continuous training on juvenile justice is mandated in Germany.

³⁹https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Staerkung_Verfahrensrechte_Jugendstrafverfahren.pdf;jsessionid=2D027EE9BFBD69A1C594C4AFAD829B76.1_cid324?__blob=publicationFile&v=2 (p. 46).

When answering those questions, please cover the following:

- Is the training mandatory?
- Is the training accessible, affordable and/or free?
- Does the training meet a common set of requirements all over the country?
- Who offers the training? (e.g. university, bar association, legal aid administrator, NGOs or other associations, etc.)?
- What is the form of the training? (e.g. day sessions, evening classes, online, self-training, etc.)
- What is the content of the training?
- What is the length of the training offered?
- Is it theoretical and/or practical?
- Is it exclusively legal? Or is it a multidisciplinary training (psycho-socio aspects, how to communicate with children, does the training include a dimension of child support/assistance, etc.)? Are other professionals involved in the training?
- Do children participate in the lawyers' training (e.g. to share their experiences with the lawyers)? How?
- Are there practical exercises on how to interview or represent children?
- Are specific trainings available for legal aid providers on the rights and needs of some specific categories of children when in conflict with the law (including migrant children, children at risk of trafficking, children accused or suspected of terrorism)?

4.8. Are there any materials (e.g. manuals, self-training tools, reports) that exist at the national level on the role and mission of lawyers who represent children in criminal proceedings?

The private organisation "Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen e.V." offers trainings and training materials for all types of professionals involved in juvenile criminal proceedings. (<https://www.dvjj.de/>)

Specialisation of legal aid providers

4.9. Is specialisation on children cases for legal aid providers established in your country? If yes, is the specialisation mandatory? Please describe in more detail.

In Germany, there is no specialisation in juvenile justice, but a specialisation in criminal law exists. However, no specialisation is mandatory in order for the lawyer to act as court-appointed defence counsel for children.

4.10. Is there a network or a list of specialised legal aid providers (lawyers) available to beneficiaries? Please describe in more detail.

Germany does not provide an official list for lawyers who represent children in criminal proceedings. However, the local Bar Association, for example in Frankfurt,⁴⁰ recognizes the speciality by giving juvenile criminal law ("Jugendstrafrecht") its own topic in its search function for legal representatives. The national official lawyer index does not provide such a search function.

Furthermore, it is possible to become a member of the German Criminal Defence Lawyer Association (Deutsche Strafverteidiger e.V). When filling out the application form, lawyers can select the speciality of juvenile criminal law as well.⁴¹

4.11. If the specialisation exists, what is the role of these lawyers at the different stages of the criminal proceeding? Where is it defined? How does it differ from the role of a lawyer who is not specialised to represent children in criminal proceedings?

There is no specialisation in Germany. However, generally speaking, the role of a lawyer representing a child does not differ from the role of a lawyer who represents an adult.⁴² But the lawyer of a child has the function to also strengthen the child's subjective position in the case, especially to compensate his/her linguistic, intellectual, and social inferiority.⁴³ Furthermore, the lawyer is obliged to balance the inexperience of the child in court rituals and legal knowledge and shall insist on the adherence of all procedural rules that work in favour of the defendant. The lawyer also has to make use of the extended opportunities in JGG for charges to be dropped (sections 45, 47). Lastly, the lawyer should ensure that the specific regulations implemented for the protection of children are respected (section 48 JGG).

⁴⁰ <https://www.rak-ffm.de/anwaltssuche/>.

⁴¹ <https://deutsche-strafverteidiger.de/ueber-uns/mitglied-werden.html>.

⁴² BeckOK/*Noak*, comment on the JGG, section 68 recital 12.

⁴³ BeckOK/*Noak*, comment on the JGG, section 68 recital 12.

Criminal proceedings are divided into three procedural steps, and, as stated above, these steps do not differ from the procedural steps in criminal proceedings for adults. They start with the preliminary investigation, which is led by the public prosecutor's office if an initial suspicion of a criminal offence exists (sections 152, 160 StPO). The defence counsel will, at this point, request access to the files and may suggest a discontinuance if appropriate. When the public prosecutor's office decides to file charges, the criminal proceedings enter into the next phase, the intermediate proceedings. In this stage, the defence counsel will examine the indictment and may possibly request that the opening of the main proceedings be rejected. In some cases, it is even possible to have the proceedings discontinued in this procedural step. The court decides whether the results of the preparatory proceedings appear to be sufficient grounds to suspect that the accused has committed an offence and opens the main proceedings (section 203 StPO). During this stage, the defence counsel will discuss all options with the accused (his right to remain silent, the possibility of an admission, filing motions of evidence etc.).

PART 5. QUALITY AND ASSESSMENT OF LEGAL AID

Legal aid quality standards (guidelines)

5.1. Are legal aid standards (or guidelines) for legal aid (in general) established in your country?

Civil legal aid for court proceedings is regulated by law according to the Civil Procedure Code ("ZPO"). Legal assistance in criminal proceedings is regulated within the German Code of Criminal Procedure ("StPO"), the Juvenile Courts Act ("JGG"), the Advisory Assistance Act ("BerHG"), and regulations regarding the youth court assistance. There are no further legal aid standards or guidelines for legal aid.

5.2. Are there special standards on providing legal aid for children (guidelines on child-friendly legal aid) established in your country? If yes, please describe in more detail and present the text if possible (no translation of the text is required).

Legal aid for children and adolescents is specifically regulated by law in the JGG.

Complaints

5.3. What is the procedure for a child/parent/guardian to present complaints about the lawyer's actions in your country (complaints to the bar, legal aid authority, etc.)?

If the child/parent/guardian wants to present a complaint about the lawyer, the simplest and most frequent way is the appeal procedure in front of the local Bar Association. It is possible to appeal in writing and as promptly as possible to the Board of the Bar Association. The complaint is free of charge. The letter of appeal should be in German and state all the facts and reasons why the lawyer could have breached his or her professional duties. The complaint must also contain the name and office address of the lawyer.

If a violation of professional duties is possible on the basis of the written statement, the lawyer will be given the chance to comment.⁴⁴

⁴⁴ <https://www.rak-ffm.de/buerger/berufsaufsicht/>

In a severe case of a, for example, disturbed confidential relationship, the judge will appoint a new defence counsel.

5.4. Can a child make a complaint about his/her lawyer? How?

Please see above under 5.3.

Assessment of legal aid quality

5.5. How is lawyers work quality assessed in your country?

Lawyers are subject to a wide range of duties. Their professional obligations are set out in the BRAO, the BORA as well as the FAO.

There is no quality control mechanism for (court-appointed) defence counsels/lawyers. As all lawyers must be registered members of the Bar Association, clients can submit complaints directly to the Bar Association. However, the Bar Association does not perform an *ex officio* monitoring.

5.6. Are there any legal aid quality assessment measures (e. g. peer review) established and implemented in your country? Please describe in more detail (e .g. who are responsible for assessment, what are the procedures and criteria of assessment etc.).

At this time, there are no legal aid quality measures established and implemented in Germany. However, recommendations for EU Member States to implement quality assurance measures exist.⁴⁵

5.7. Does such assessment include children cases in criminal proceedings? Are there special rules of procedures for assessment of children cases? Please describe in more details.

There are no specific rules of procedure for assessment of children cases.

⁴⁵ For example: https://www.jura.uni-frankfurt.de/75941968/QUAL_AID_Evaluation_of_Legal_Aid_Quality.pdf.

PART 6. STATISTICS

6.1. Please provide the following statistics of the year 2019 (or data of the last year available)

- The number of persons who benefited from legal aid.
- The number of children who benefited from legal aid and the number of cases.
- The number of legal aid providers (lawyers) in general.
- The number of legal aid providers (lawyers) who provided legal aid to children (if available).
- Number of complaints about legal aid per year (total, including cases not related to children).
- Number of complaints where the beneficiary of legal aid was a child (if available).
- If you have data, please provide statistics representing backgrounds of complaint?

As Germany does not have a legal aid scheme in criminal proceedings, there is no data available on the number of persons or children who benefited from mandatory defence and no data available how many of Germany's lawyers are doing legal aid work.

Regarding the number of complaints about lawyers, there is no data available regarding complaints specifically about legal aid.

PART 7: CASE LAW

7.1. Please present national case law of higher courts for the period 2015-2020 (focusing on appeal and supreme court decisions) dealing with the access to legal aid for children in criminal proceedings (for example cases dealing with difficulties to access legal aid, absence of access to a lawyer etc.). Please discuss 5-10 most important decisions/rulings. If less than 3 cases can be found in this period, please refer to the years 2010-2020.

1. Case reference (court, decision number and date)

Local Court Freiburg, 5th August 2019 - JSch 19 Gs 64/19 jug.

Main issue of the case

Appointment of defence counsel pursuant to sections 68 no. 1 JGG, 140. 141 StPO after the implementation period for Directive (EU) 2016/800 had elapsed.

Summary of the facts

Preliminary proceedings against the accused juvenile are pending on suspicion of joint sexual assault, sexual coercion, and rape. A lawyer has applied to be appointed as defence counsel; however, the public prosecutor's office opposed this process as this was not a case under sections 68 no. 1 JGG, 140 para. 1 no. 4 StPO and no further questioning was intended. The court still appointed the attorney as defence counsel.

Summary of the findings

After expiry of the implementation period, the directive's provisions will indirectly apply. Section 141 para. 3 StPO (in the version of August 2019) is relevant, which stipulates that a defence counsel can be appointed in the preliminary proceedings. In answering the question whether this optional provision has become a mandatory provision after the expiry of the implementation period the complainant's submission is based on the provisions of the Federal Government's draft bill, which - in part also in transposition of Directive 2016/1919 - provides in sections 109 para. 1 sent. 1 and 68a JGG that a defence counsel is to be appointed for the adolescent defendant in cases where a defence is necessary, at the latest before a hearing is conducted.

Here, according to the law as it stood, a case of mandatory defence existed because preliminary proceedings had been conducted against the accused on suspicion of sexual coercion and rape under sections 12 para. 1 and 177 para. 4 and 6 StGB, sections 68 para. 1 and 140. para. 1. no. 2 JGG.

Furthermore, the point in time at which an attribution should have been made in the present case has long since elapsed here. Admittedly, in principle, an adjudication is no longer necessary if a first hearing of the accused is no longer to be expected. However, this could not apply if an interrogation of the accused had already been carried out without a defence counsel having been appointed.

Conclusion

The Local Court appointed the lawyer as defence counsel.

2. Case reference (court, decision number and date)

Local Court Potsdam, 30th July 2019 - 71 Ds 459 Js 16556/19 (61/19)

Main issue of the case

Rejection of the defendant's request to be assigned defence counsel.

Summary of the facts

The juvenile is accused of disturbance of the public peace by the threat of criminal offences.

Defence counsel was not appointed by the court.

Summary of the findings

There is no case of mandatory defence within the meaning of section 140 para. 2 StPO in connection with section 68 no. 1 JGG. Defence counsel is appointed if, due to the gravity of the offence or the difficulty of the factual and legal situation, the involvement of defence counsel is necessary or if it is evident that the defendant is not able to defend himself. These conditions are not met in this case as there is no evidence that the defendant is not able to defend himself. Even the juvenile's attorney states that he is a very good student, is extremely thoughtful and objective, and is not involved in any psychological treatment.

Furthermore, the accusation is manageable, even if several witnesses have to be heard. The measure to be expected on the basis of the accusation in all probability also does not justify the appointment of a defence counsel. As the defendant is still a juvenile, a condition or instruction may be expected in the event of a conviction.

Conclusion

The Local Court did not appoint a defence counsel pursuant to section 68 JGG.

3. Case reference (court, decision number and date)

District Court Saarbrücken, 11th February 2020 - 3 Qs 11/20 (previous judgment: Local Court Saarbrücken, 17th January 2020 - 26 Ls 19 Js 366/19 (4/20))

Main issue of the case

The conditions for the mandatory defence pursuant to section 68 para. 1 JGG, in conjunction with section 140 para. 1 no. 1 StPO are in any case present if a charge has been filed with the Youth Criminal Court ("Jugendschöffengericht"). The only decisive factor is whether the main hearing at first instance will take place before one of the courts mentioned in section 140 para. 1 no. 1 StPO.

Summary of the facts

The defendant who is now 17 years old (at the time of the crime she was 16 years old) is charged with a joint bodily injury, whereby the injured party suffered a "burst lip" . So-called harmful inclinations in the sense of section 17 JGG are not evident by the defendant. The existence of special "Gravity of guilt" in the sense of section 17 JGG is also not evident from the records. The defendant has so far been tried only once, albeit for a relevant offence and was given an instruction and hours of work. Before that she had attracted attention with the theft of low-value items, whereby the public prosecutor's office refrained from prosecution pursuant to section 45 para. 1 JGG.

In the previous judgment (at the Local Court Saarbrücken), no defence counsel had been appointed by the court pursuant to section 68 JGG as the provisions (almost) exclusively serve the person who is threatened with a corresponding legal consequence, but not co-defendants.

Summary of the findings

According to the provision of section 140 para. 1, no. 1 StPO as amended by the German Act on the Revision of the Right of Mandatory Defence, which came into force on December 13, 2019 and transposed the so-called Legal Aid Directive (Directive (EU) 2016/1919) into German law, a case of mandatory defence exists, among other things, if it is to be expected that the main hearing at first instance will take place before the Youth Criminal Court ("Jugendschöffengericht"). Further conditions are not required. In the opinion of the District Court, this assessment, which is based on the actual circumstances of the proceedings, also applies in the case of section 68 no. 1 JGG. According to this provision, a case of mandatory defence in juvenile criminal proceedings would be

existence if a case of the mandatory defence were existence in proceedings against an adult.

Conclusion

The District Court has affirmed the existence of the conditions for the mandatory defence pursuant to section 68 JGG.

4. Case reference (court, decision number and date)

Federal Court, 16th May 2012 - 2 StR 36/12 (previous judgment: District Court Darmstadt)

Main issue of the case

If a report by the Youth Court Assistance contains findings that have not been the subject of the main hearing and if the assessment of the Youth Court Assistance communicated therein is in clear contradiction to the conviction of the court, the court is required to hear the Youth Court Assistance in the main hearing. If this is not done, the sentence cannot stand.

Summary of the facts

The accused was 20 years and 9 months old at the time of the crime. In preparation for the main trial, the District Court obtained statements from the Youth Court Assistance. In their last report it is stated, among other things, that the accused had been stabilized significantly in the last few months. He has a regular job, has a steady residence, work together with the debt counselling service to work off his debts, and has a good relationship with his family. In addition, he is a volunteer in working as "street workers" to help addicted juveniles. He sees the injustice of his deeds and visibly regrets them. When evaluating the offences, it should certainly be taken into account that in the meantime a very positive development could be observed and that from the point of view of the Youth Court Assistance, there was now a good social prognosis.

A representative of the Youth Court Assistance did not appear at the date of the main hearing. According to the protocol of the hearing, the reports of the Youth Court Assistance were not made a subject of the main hearing.

The District Court imposed juvenile criminal law because of the seriousness of the guilt. It was assumed that the defendant still lacked insight into the injustice committed and that the change in external conditions was not suitable to document an internal change in the

defendant. In contrast, as it can be seen from the last report of the Youth Court Assistance, which was known to the Chamber, they took a different view by communicating further facts, such as the voluntary work of the complainant, and assumed that the complainant's position had clearly stabilised.

Summary of the findings

The report of the Youth Court Assistance has not been considered.

However, the main purpose of involving the Youth Court Assistance is to contribute to obtaining as complete a picture as possible of the accused's personality, his development, and his environment, and to draw attention to circumstances that might not have been discussed at all without the involvement of the Youth Court Assistance.

Conclusion

Because it cannot be ruled out that, in the event of the participation of the Youth Court Assistance, the Court of First Instance would have been convinced that aspects had come to light which could have had a positive effect on the assessment of the sentence in favour of the defendant. Therefore, the sentence was to be revoked.

LA CHILD

Enhancing legal aid for children in conflict with the law



The project is funded by the Justice Programme of the European Union (2014-2020)

Coordination of the project



Project partners



QENDRA E SHËRBIMEVE
DHE PRAKTIKAVE LIGJORE TË INTEGRUARA
CENTRE OF INTEGRATED LEGAL SERVICES AND PRACTICES

