Country Report on Austria for the Study on Member States' Policies for Children with Disabilities

Study for the LIBE Committee
Abstract

Upon request of the LIBE committee, this study looks at the situation of children with disabilities in Austria to identify the gaps in the legal framework and its implementation, the obstacles faced by children with disabilities and best practices. This country study is part of a larger study which analyses all the 28 Member States. In the first phase of the study, a comparative analysis has been drawn based on 18 of the country studies. In the second phase of this study, the situation in the remaining ten countries and Scotland has been analysed. The overall report “Member State Policies on Children with Disabilities” provides some recommendations for EU action to enhance the situation of children with disabilities.
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<th>Description</th>
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<tr>
<td>ABGB</td>
<td>Civil Code (<em>Allgemeines Bürgerliches Gesetzbuch</em>)</td>
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<td>BBG</td>
<td>Federal Disability Act (<em>Behindertengesetz</em>)</td>
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<td>BEinstG</td>
<td>Disability Employment Act (<em>Behinderteneinstellungsgesetz</em>)</td>
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<td>BGBl</td>
<td>Federal Gazette (<em>Bundesgesetzblatt</em>)</td>
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<td>BGStG</td>
<td>Federal Disability Equality Act (<em>Behindertengleichstellungsgesetz</em>)</td>
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<td>BMASK</td>
<td>Federal Ministry of Labour, Social Affairs and Consumer Protection (<em>Bundesministerium für Arbeit, Soziales und Konsumentenschutz</em>)</td>
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<td>B-VG</td>
<td>Federal Constitutional Law (<em>Bundes-Verfassungsgesetz</em>)</td>
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<td>Charter</td>
<td>The Charter of Fundamental Rights of the European Union</td>
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<td>CRC</td>
<td>United Nations Convention on the Rights of the Child</td>
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<td>CRPD</td>
<td>United Nations Convention on the Rights of Persons with Disabilities</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>CoE</td>
<td>Council of Europe</td>
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<td>ECHR</td>
<td>Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<td>EU</td>
<td>The European Union</td>
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<td>JGG</td>
<td>Juvenile Court Act (<em>Jugendgerichtsgesetz</em>)</td>
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<td>StGG</td>
<td>Basic Law on the General Rights of Nationals (<em>Staatsgrundgesetz</em>)</td>
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<tr>
<td>StPO</td>
<td>Criminal Procedure Code (<em>Strafprozessordnung</em>)</td>
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<td>StGB</td>
<td>Criminal Code (<em>Strafgesetzbuch</em>)</td>
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<td>TEU</td>
<td>Treaty on the European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>UN</td>
<td>United Nations</td>
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<td>VOG</td>
<td>Victims of Crime Act (<em>Verbrechensopfergesetz</em>)</td>
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EXECUTIVE SUMMARY

The CRC and the CRPD are not directly applicable in Austria but need to be implemented by legislation. Due to the federal structure of Austria, in some areas the applicable legislation is not uniform but varies from Land to Land. While the Civil Code, the Criminal Code and the main Acts on education are federal laws and hence applicable in all nine Länder, various areas of life are regulated at Land level. For example, the area of construction is a competence of the Länder. Barrier-free construction is therefore regulated very differently from Land to Land. The same also applies to other areas that are not related to labour, such as leisure and personal assistance. Even the constitutions of the Länder do not provide for the same rights.

Disability law forms part of the so-called ‘cross-cutting issue’, i.e. various different laws apply to the various areas of life of a person with disabilities. As said, some of them are federal laws, others are Länder laws. There are very few laws that apply specifically to children with disabilities, except in the area of education.

Similarly, the competences are spread over federal and Länder (or local) authorities. Institutions whose purpose is to deal exclusively with matters related to persons with disabilities are the Federal Disability Advisory Board and the Disability Ombudsperson.

The 4th Constitutional Law on Children’s Rights of 2011 (4. Bundesverfassungsgesetz über die Rechte von Kindern) enshrines the principle of safeguarding the best interests of the child at constitutional level. It is also echoed in the Civil Code which specifies certain requirements.

The 4th Constitutional Law on Children’s Rights of 2011 also calls to ensure the same treatment of children with and without disabilities in all areas of daily life while invoking Article 7(1) of the Federal Constitutional Law (Bundes-Verfassungsgesetz) on non-discrimination of persons with disabilities. Non-discrimination is also regulated by the Federal Disability Equality Act that contains a ban on discrimination of persons with disabilities in many areas of everyday life. It does not, however, provide for a legal basis of a right to eliminate a barrier to persons with disabilities, but merely for a claim for compensation.

As regards the evolving capacities and participation rights of children with disabilities, the legislation applicable to all children also applies to children with disabilities, including children with disabilities as vulnerable suspects. In the Criminal Code there are numerous provisions aiming to protect children and persons with disabilities.

Also, the right to family life is addressed in the 4th Constitutional Law on Children’s Rights. Article 2 provides that every child has a right to regular personal relationships and direct contact with both parents, unless this is contrary to his/her interests.

Right to assistance for families is regulated in the Family Compensation Act and the 4th Constitutional Law on Children’s Rights provides that every child with a disability has a right to protection and care that is adapted to his/her special needs. The Federal Disability Act is relevant in relation to rehabilitation measures.

Education falls under the legislative competence of the Federation (Bund), but the implementation of the legislation is a Länder competence and so is the construction of
special schools. Compulsory schooling lasts nine years, according to the Compulsory Schooling Act, and applies to all children, including children with disabilities. As a rule, children with disabilities can choose whether they attend a special school for children with disabilities (Sonderschule) or a mainstream school. Austria applies a system of ‘integrative education’, rather than inclusive education.

There is no meaningful data on persons with disabilities, including children with disabilities.
INTRODUCTION

In December 2010, the European Union (EU) became a party to the United Nations Convention on the Rights of Persons with Disabilities (CRPD). In doing so, the EU recognised the challenges persons with disabilities face in securing their rights and highlighted the need for supportive EU actions to be firmly on the agenda of the European Union and its Member States.

Children with disabilities are already vulnerable because they are children. Their disability renders them particularly vulnerable. As such, they deserve specific safeguards and protection from the EU and its Member States.

The key legal framework for EU action in this field is the EU decision to ratifying the CRPD, the requirement under Article 10 TFEU for the EU to combat discrimination based on disability, as well as the EU objective of promoting the rights of the child found under Article 3 TEU. This framework provides the EU with a unique position to push forward for further protection of the rights of children with disabilities, and to develop legislative or policy initiatives. The UN Convention on the Rights of the Child (CRC) provides another basis for action in this area.

This national report for Austria is part of a larger study which aims at providing the European Parliament with an overview of the situation of children with disabilities in all the EU Member States, with a view to evaluating the need for European legislation to enhance the rights of children with disabilities in the European Union. The project reviews the existing legal, policy and institutional frameworks in the Member States. Each country report analyses the implementation of international principles and rights stemming from the CRPD and the CRC to uncover any particular issues that necessitate further policy and legislative actions at national and EU level. In a first phase, 18 selected countries have been analysed, the results of which formed the basis for a comparative analysis in the overall report called “Member States Policies for Children with Disabilities” published in 2013. In a second phase, which took place in 2014, the situation of children with disabilities in the remaining 10 countries, as well as Scotland, have been analysed in separate country reports, including this present report.

The key elements deriving from the CRC and CRPD, with regard to children with disabilities include:

- The obligation to act in the best interests of the child;
- The right to non-discrimination;
- The consideration of the evolving capacities of the child;
- The right to be heard/to participate;
- The right to be free from violence;
- The right to family life;
- The right to assistance;
- The right to education, including inclusive education.

1 All the 28 Member States have ratified the CRC, and all 28 Member States have signed the CRPD (Finland, Ireland and the Netherlands have signed but not yet ratified).
Given their ratification\(^2\) of both UN Conventions, the Member States are obliged to take necessary measures to ensure the respect of the rights set forth for each child or person with a disability within their jurisdiction. The Member States should take the appropriate measures to ensure that children are protected against all forms of discrimination or violence, including adopting all appropriate legislative, administrative and other measures for the implementation of those rights. Moreover, the protection of the rights of children with disabilities should be mainstreamed in all policies and programmes in accordance with Article 4(3) of the CRPD on the involvement of persons with disabilities in all decision-making processes.

Due to the scale of this subject and the scarcity of materials available, the scope of this study does not cover in detail the wide range of issues arising from and relating to the situation of children with disabilities. It does not aim to provide an in-depth analysis but rather an overview of the situation of children with disabilities’ rights in Austria. This study presents a snapshot of some of the major issues and obstacles faced by children with disabilities and their families, a legal analysis of the implementation of the main rights and principles recognised in the CRC and CRPD and relevant in the context of the situation of children with disabilities and points to some potential solutions at national and EU level to improve their situation.

Each country report is structured as follows: it first looks at the situation of children with disabilities at the national level. It describes the national legal and institutional framework for the protection of children with disabilities and analyses national implementation of principles and rights developed in the UN Conventions (CRC and CRPD). It then considers specific issues relevant to the situation of children with disabilities, including children as suspects, gender issues and education. Finally, the report covers the mechanisms in place to implement the legal framework, highlighting gaps, problems, best practices, and recommendations found by the literature or via interviews with stakeholders.

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\(^2\) Except for Finland, Ireland and the Netherlands which have signed but not yet ratified the CRPD.
1. OVERVIEW OF THE SITUATION AND CHALLENGES FOR CHILDREN WITH DISABILITIES IN AUSTRIA

KEY FINDINGS

- The national policy focuses on the following areas: health, rehabilitation, social security and education of children with disabilities.
- The following gaps, problems and challenges have been identified: The legislation is not uniform throughout Austria due to its federal structure; There is no right to the elimination of a barrier that can be pursued in court; There is no right to integrative education in kindergartens.

1.1. Introduction to the situation of children with disabilities in Austria

The various areas of life of children with disabilities are regulated in Austria by numerous legal measures. There are only very few laws that are applicable exclusively to children with disabilities, rather they either apply to persons with disabilities or to children in general. It is notable that the right of children with disabilities to protection and care and to non-discrimination in all areas of daily life has had constitutional status since 2011.3

Also the policies implementing the CRPD and the CRC reflect the conventions and, hence, do not extensively address the concerns of children with disabilities. The 'National Action Plan Disability' sets out the strategy of the Austrian government to implement the CRPD4. It contains the chapters Disability Policy, Anti-Discrimination, Accessibility, Education, Employment, Self-determined life, Health and Rehabilitation, and Awareness Raising and Information. All of them are, to some extent, relevant to children with disabilities. Their concerns are, however, only briefly addressed in the chapter on Disability Policy and, more extensively, in the chapter on education. Regarding the latter, the Austrian government aims to implement the principle of inclusion in schools. The national action plan foresees a gradual implementation starting in model regions, vocational training for teachers and awareness raising campaigns in the years 2012-20205. Furthermore, it aims to enhance the accessibility of education to enable children with disabilities to participate in a manner equal to other children6.

The 'National Action Plan for the Rights of Children and Youth' establishes the policy of the government regarding the implementation of the CRC7. It addresses participation rights, family, health, social security, education and employment, leisure, the right to freedom from violence and abuse and children as vulnerable suspects. The rights of children with disabilities are addressed in particular in relation to anti-discrimination, health and education. However, rather than setting targets the action plan states what has been

34th Constitutional Law on Children's Rights of 2011, Article 6.
5 ibid. 65-66.
6 ibid. 67-68.
achieved. For example, it establishes that social integration of children with disabilities is achieved by measures of integration in all forms of mandatory schooling.

1.2. Review of issues and identification of possible regulatory gaps

Due to the federal structure of Austria, in some areas the applicable legislation is not uniform but varies from Land to Land. While the Civil Code, the Criminal Code and the main Acts on education are federal laws and hence applicable in all nine Länder, various areas of life are regulated at Land level. For example, the area of construction is a competence of the Länder. Barrier-free construction is hence regulated very differently from Land to Land, which hinders an implementation of accessibility throughout the country. The same also applies to other areas that are not related to labour, such as leisure and personal assistance. Even the constitutions of the Länder do not provide for the same rights.

Education falls under the legislative competence of the Federation (Bund) but the implementation of the legislation is a Länder competence and so is the construction of special schools. As a result, for example in Styria, regions of inclusive education are developing while Tirol is currently building a new special school.

The division of competences between Federation and Länder creates inequality in the treatment of children with disabilities depending in which Land they live. This, in turn, leads to a migration of families with children with disabilities to those Länder that have a more favourable legislation in place, for example Vienna.

Although Austria has made some progress in integrating children with disabilities in the mandatory school system, there is still no right to integrative education for children with disabilities in kindergartens.

There is no legal basis for the claim to eliminate a barrier to persons with disabilities under the Federal Disability Equality Act, which only foresees a compensation for the occurred damage, (for more details please see below Sections 3.1.2 and 4.2).

It can be considered a positive signal that several principles of the CRC, including the right of children with disabilities to protection and care and to non-discrimination in all areas of daily life, have constitutional status.

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8 ibid. 50.
9 Information based on stakeholder interview.
10 For example, only Upper Austria, Salzburg and Vorarlberg have included regulations on equal treatment in their constitutions (Source: Austrian National Council of Persons with Disabilities (OEAR), Alternative report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria, January 2013, p.21).
11 Information based on stakeholder interview.
12 Information based on stakeholder interview.
14 Austrian National Council of Persons with Disabilities (OEAR), Alternative report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria, January 2013, p.41.
15 4th BV-G, Article 6.
2. OVERVIEW OF THE NATIONAL LEGAL FRAMEWORK

**KEY FINDINGS**

- Austria has signed and ratified both the CRC and CRPD in 1992 and 2008, respectively.
- Some of the principles established in the conventions have been enshrined in Austrian constitutional law, most have been implemented by ‘ordinary’ laws.
- The central constitutional laws are the 4th Constitutional Law on Children’s Rights of 2011 and the Federal Constitutional Law.
- Various different laws apply to the various areas of life of persons with disabilities.
- As Austria is a federal state, some areas, e.g. education and assistance, are also regulated under Länder law.

2.1. General overview of the national legal and institutional framework

Austrian law is primarily codified. The case law of the highest courts, which lays down important guidelines as to the application of the law, is of great importance but is not formally recognised as a source of law\(^{16}\).

The Austrian constitutional law declares that the generally recognised rules of international law, e.g. the Universal Declaration of Human Rights, form part of federal law and it provides for international treaties to be incorporated into the Austrian legal system (general and specific transformation). However, international treaties which amend or supplement the constitution must be approved by the lower house of the parliament (Nationalrat) where they require the same quorums as resolutions regarding federal constitutional laws. The same requirements that apply to the passing of bills also apply to resolutions on international treaties which amend or supplement the law. Political international treaties which amend or supplement the legislation require the prior consent of the National Assembly\(^{17}\). In addition, the Nationalrat, when approving the treaty, can determine to what extent the treaty must be implemented by passing new legislation. As a rule, the Federal President concludes international treaties at the request of the federal government\(^{18}\). As Austria is organised as a federation of provinces (Länder), the nine Länder have their own provincial (constitutional) law in addition to the federal (constitutional) law. Federal constitutional law takes precedence over Länder constitutional law. However, this order of precedence does not apply in principle to the relation between (non-constitutional) federal and provincial legal provisions\(^{19}\).

Austria does not have one constitution including all constitutional provisions but constitutional law is divided over many different acts. The main piece is the Federal Constitutional Law (Bundes-Verfassungsgesetz – B-VG) which mainly regulates how the

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\(^{17}\) BV-G, Article 50(1).

\(^{18}\) Ibid.

\(^{19}\) Ibid.
state is organised. It does not, however, contain a catalogue of civil rights. These are spread over several constitutional laws.

The hierarchy of the sources of law can be presented as follows:

1. Guiding principles of the federal constitution, including: the democratic principle, the principle of the separation of powers, the principle of the rule of law, the republican principle, the federal state principle and the liberal principle.
2. Primary and secondary Community law
3. “Ordinary” federal constitutional law
4. Federal laws/Länder laws. Federal laws are passed by the Nationalrat and the Upper House (Bundesrat); Länder laws by the provincial councils (Landtage). They bind the entire executive.
5. Regulations Orders.

### 2.2. Children with disabilities specific legal and institutional framework

#### 2.2.1. Legal framework

After being approved by the National Assembly (Nationalrat), the Convention on the Rights of the Child (CRC) was ratified and came into force in Austria on 5 September 1992. It is not directly applicable by authorities or courts, but must be implemented by legislation, according to Article 50(2) point 4 of the Federal Constitutional Law (B-VG). Some, but not all, of the principles of the CRC have been enshrined in the 4th Constitutional Law on Children’s Rights of 2011 (4. Bundesverfassungsgesetz über die Rechte von Kindern). The law consists of eight Articles, relating to the following principles or aspects: best interests of the child (Article 1); right to personal contact with the parents (Article 2(1)); right to special protection by the state in case of separation from the parents (Article 2(2)); prohibition of child labour (Article 3); right to be heard and to participate, considering the evolving capacities of the child (Article 4); right to violent-free education, to protection from commercial and sexual exploitation and prohibition of corporal punishments, inflicting of psychological suffering, sexual and other abuse (Article 5(1)); right of victims of violence and exploitation to adequate compensation (Article 5(2)); and the right of children with disabilities to protection, care and non-discrimination (Article 6). Article 7 foresees that Articles 1, 2, 4 and 6 may be restricted if it is necessary to protect other very important rights or values, such as the public order or the protection of the rights and liberties of others. Article 8 provides for the responsibility of the federal government to implement this law. The children’s rights referred to in this Law have hence gained constitutional status and take precedence over ‘ordinary’ laws within the above-mentioned limitations.

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20 ibid.
21 ibid.
22 ibid.
23 BGBl 1993/7.
After its ratification, the **UN Convention on the Rights of Persons with Disabilities (CRPD)** came into force in Austria on 26 October 2008. Also, the CRPD has to be implemented by legislation to become applicable in Austria, pursuant to Article 50(2) point 4 B-VG\(^{25}\). The highest ranking law on non-discrimination is Article 7(1) of the B-VG, which bans the discrimination of persons due to their disability (see below Section 3).

Disability law forms part of the so-called ‘cross-cutting issue’, i.e. various different laws apply to the various areas of life of a person with disabilities. Some of them are federal laws, others are Länder laws. Some laws address persons with disabilities specifically, for example the **Federal Disability Equality Act (Bundesbehindertengleichstellungsgesetz – BGStG)** which mainly protects persons with disabilities as consumers of goods and services. In the area of employment, the **Disability Employment Act (Behinderteneinstellungsgesetz - BEinstG)** and corresponding Länder laws apply. As regards healthcare and assistance, general and disability specific law apply. For example, child allowances are regulated in the **Family Compensation Act (Familienlastenausgleichsgesetz)**, while assistance for persons with disabilities is mainly regulated in the **Disability Acts of the Länder**.

Furthermore, some areas covered by this study are codified in general laws applying to persons with and without disabilities. For example, the relationship of parents and children is regulated in the **Civil Code (Allgemeines Bürgerliches Gesetzbuch - ABGB)**. Rights of children being victims or suspects of criminal offences are established in the Juvenile Court Act (**Jugendgerichtsgesetz**), the Criminal Code (**Strafgesetzbuch**), the Code of Criminal Procedure (**Strafprozessordnung**) and the Victims of Crime Act (**Verbrechensopfergesetz**). Lastly, several general laws apply to the school education of children, for example, the **Compulsory Schooling Act (Schulpflichtgesetz)** and the School Organisation Act (**Schulorganisationsgesetz**). For details on the laws please see Section 3 below.

### 2.2.2. Institutions and authorities

The organisational structure of disability policy in Austria is very complex, partly due to the federal organisation of the country. Only very few subject matters are solely under the competence of the federal government, namely the protection of persons with disabilities under constitutional and other law – Federal Chancellery and Federal Ministry of Justice, respectively, and tax relief – Federal Ministry of Finance\(^{26}\).

Employment matters fall under the competence of the **Federal Ministry of Labour, Social Affairs and Consumer Protection (the BMASK)** and the Public Employment Service, but also under the competence of the relevant Länder ministries\(^{27}\).

As regards long-term care allowances, the BMASK, the Federal Office for Social Affairs and Disability, Länder authorities, as well as social insurance institutions, are in charge. In addition, local authorities are responsible for health services, rehabilitation and work accident pensions. For invalidity pensions, the BMASK, the Federal Ministry of Health and social insurance institutions are in charge. Social compensation is ensured by the Ministry and the Federal Social Office. Guardians of equality are the BMASK, the Federal Social, the

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\(^{25}\) Information based on stakeholder interview.


\(^{27}\) Ibid.
Federal Disability Advisory Board and the Disability Ombudsperson (regarding the latter two see below for further explanation)\(^{28}\).

The **Länder**, some of which are supported by designated Advisory Boards, and local authorities are competent with regard to the following subject matters relevant for persons with disabilities:

- Housing and construction;
- Austrian standards of accessibility (shared competence with the Federal Ministry of Economy, Family and Youth);
- Transport (shared competence with the Federal Ministry of Transport, Innovation and Technology);
- Social services;
- Social assistance for persons with disabilities;
- Education (shared competence with the Federal Ministry of Science and Research and the Federal Ministry of Education, Arts and Culture)\(^{29}\).

The **Federal Disability Advisory Board** advises the Ministry in all matters related to disability policy and monitors the implementation of the CRPD\(^{30}\). It consists of the following members: the secretary, one representative per party represented in the Nationalrat, three representatives (one each) of three federal ministries, two representatives of the **Länder**, one representative of the main association of social insurances, three representatives from each of the employers’ organisations and of the trade unions, eight representatives of persons with disabilities, the Disability Ombudsperson and the chair of the monitoring committee\(^{31}\).

The task of the **Federal Office for Social Affairs and Disability** is to inform persons with disabilities of the possibilities to obtain assistance, including by issuing publications, and to transfer any applications and requests to the competent authorities\(^{32}\).

The 2006 amendment to the Federal Disability Act established the office of the Federal Disability Ombudsperson (**Behindertenanwalt**)\(^{33}\). The task of the Disability Ombudsperson is to advise and support persons who feel they were discriminated against within the meaning of the Federal Disability Equality Act or Disability Employment Act\(^{34}\). He or she is independent and not bound by any instructions\(^{35}\). The Ombudsperson provides advice to persons with disabilities in cases of discrimination; he or she does not, however, decide himself or herself on the cases. He or she can conduct studies on the topic "discrimination of persons with disabilities", has to submit an annual work report to the Minister of Labour and Social Affairs and reports orally to the Federal Disability Advisory

\(^{28}\) ibid.  
\(^{29}\) ibid.  
\(^{30}\) BBG, Section 8(2) points 1 and 4  
\(^{31}\) BBG, Section 9(1).  
\(^{32}\) BBG, Section 15 and 18.  
\(^{34}\) BBG, Section 13c(1).  
\(^{35}\) BBG, Section 13c(1) sentence 3.
Board\textsuperscript{36}. Some of the \textit{Länder} have also introduced Disability Ombudspersons or an equivalent advisory committee in which disability organisations are represented\textsuperscript{37}.

Focal points for the purpose of the CRPD are the BMASK and the nine provincial branches of the Federal Social Office\textsuperscript{38}. The Independent Monitoring Committee monitors the implementation of the CRPD at federal level\textsuperscript{39}.

The independent Child and Youth Advocate Offices in the \textit{Länder} act as ‘children’s ombudspersons’ and provide advice, support and information on compliance with children's rights\textsuperscript{40}.

2.2.3. Definitions

There is not one national definition of ‘disability’ or of ‘child with disability’ that applies to all relevant laws. The various laws concerning persons with disabilities contain different definitions of disability. In the Federal Disability Equality Act (\textit{Bundesbehindertengleichstellungsgesetz} – BGStG), for example, disability is defined as “the effect of a not only temporary physical, mental or intellectual impairment or an impairment of the senses which makes participation in the life of society difficult. Non-temporary means a period which is expected to be more than six months.”\textsuperscript{41} The Upper Austrian law on the equal opportunities of people with impairments defines “persons with impairments” as persons who, “due to the failure of important functions as a result of physical, mental, intellectual or multiple such (not predominantly age-related) impairments, are lastingly and significantly disabled in an important social context such as in connection with their upbringing, their vocational education and training, their personal development and in their gainful employment as well as in their integration into society. They can also be persons who can be expected to suffer from such impairments in the foreseeable future, particularly in the case of small children”\textsuperscript{42}.

Also, different age limits apply across different areas of life\textsuperscript{43}. Persons are ‘minors’ until they reach the age of 18 years when they enter majority\textsuperscript{44}. However, minors are eligible to vote in elections if they are at least 16 years old\textsuperscript{45} and can be held responsible for criminal offences under the Criminal Code from the age of 14 years\textsuperscript{46}. Under the Civil Code, a married child is to be treated in the same way as a person who has reached majority in relation to his or her personal affairs\textsuperscript{47}.

\textsuperscript{36} BBG, Section 13c(2), (3).
\textsuperscript{38} ibid. 50.
\textsuperscript{39} BBG, Section 13.
\textsuperscript{41} BGStG, Section 3.
\textsuperscript{42} Upper Austrian law on the equal opportunities of people with impairments (Provincial Law Gazette, LGBI. No. 41/2008), Section 2(1). Section 2(2) further provides that persons are also considered to have physical impairments “if they have impaired sight or hearing, are deaf and blind, mute and deaf people and people with important disorders in sensory processing who thus have considerable disabilities in terms of communication and orientation, in as far as this does not relate to development disorders with regard to learning skills at school.”
\textsuperscript{43} See the overview in the Second periodic report submitted by Austria to the UN Committee of the Rights of the Child in 1999, Chapter 4, paragraphs 72-117.
\textsuperscript{44} ABGB, Section 21
\textsuperscript{45} Act amending the Austrian Electoral Law (\textit{Wahlrechtsänderungsgesetz}) 2007, Section 21(1).
\textsuperscript{46} StGB, Section 74(1) point 1.
\textsuperscript{47} ABGB, Section 174.
3. LEGAL FRAMEWORK FOR CHILDREN WITH DISABILITIES IN AUSTRIA

KEY FINDINGS

- Discrimination of persons with disabilities is mainly addressed by the Federal Disability Equality Act, the Disability Employment Act and the Federal Disability Act.
- The Federal Disability Equality Act does not contain provisions on reasonable accommodation. However, persons with disabilities may claim compensation for the non-elimination of barriers.
- The Civil Code provides criteria to be applied in the assessment of the child’s best interests which renders the abstract notion more tangible.
- The evolving capacities of children and their right to be heard and participate are addressed in various important laws. The latter is also established in the 4th Constitutional Law on Children’s Rights, as is the right of the child to freedom from violence.
- The 4th Constitutional Law and the Civil Code aim to protect the right to family life and provide the right of the child to regular personal contact with his or her parents.
- The right to assistance is mainly regulated under the Family Compensation Act, which also specifically addresses children with disabilities. It is complemented by Länder laws.
- As a rule, parents of children with disabilities can choose between schooling in mainstream schools and special schools. This does not apply to kindergartens.

3.1. Implementation of the provisions of the CRPD and CRC

3.1.1. Best interests of the child (Art. 3 CRC; Art. 7 CRPD)

The 4th Constitutional Law on Children’s Rights of 2011 (4. Bundesverfassungsgesetz über die Rechte von Kindern) enshrines the principle of safeguarding the best interests of the child at constitutional level. It provides that every child has got a right to the protection and care that is necessary for his/her well-being and for his/her best possible development. In addition, it provides that the child’s best interests must be the primary consideration for all measures taken by all public and private institutions affecting a child48.

The best interests of the child are specifically referred to in the chapter of the Civil Code that regulates the rights between parents and children. It echoes the above-mentioned 4th Constitutional Law on Children’s Rights in providing that the best interests of the child should be “considered as the leading concern” in all matters affecting the child, in particular the care and personal contacts. Further, it establishes criteria in the assessment of the child’s best interests, including adequate supplies, especially with food, medical care and housing, education, promotion of development, protection of psychological and physical

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security, taking into account the views of the child\textsuperscript{49}. Furthermore, the Civil Code obligates the parents to take care of the child, his/her education, to represent him/her in all legal matters and to have personal contact with the child\textsuperscript{50}. With regard to decisions concerning the \textit{custody} of a child, the court must consider the best interests of the child\textsuperscript{51}. For example, if the parents endanger the best interests of the child through their behaviour, the court can take the necessary measures to ensure the best interests of the child, including the (partial) deprivation of the custody from one or both parents\textsuperscript{52}. The adoption of a child may only be permitted by the court if it serves the best interests of the child\textsuperscript{53}.

Austrian legislation provides for several measures to ensure that \textbf{criminal proceedings} involving children are dealt with as quickly as possible to protect the best interests of the child, mainly through the Victim Assistance Service (\textit{Prozessbegleitung}) and the right to be accompanied by a person of trust, a psychologist and a lawyer. Victims’ organisations try to familiarise children with the layout of the court and the roles and identities of the officials involved before proceedings begin, e.g. through the brochure for children called “\textit{Milli goes to court}” (\textit{Milli ist beim Gericht})\textsuperscript{54}.

In order to lower the stress for children in criminal proceedings through more child-friendly settings, the police and judicial authorities are encouraged to protect the best interests of the child during the entire process by adapting to the child’s pace and attention span and by trying to keep disruption and the length of proceedings to a minimum. Some courts provide toys in the waiting rooms. There are special waiting-areas for witnesses\textsuperscript{55}.

\textbf{3.1.2. Non-discrimination (Art. 2 CRC; Arts. 3 and 5 CRPD)}

The \textbf{4th Constitutional Law on Children’s Rights} of 2011 (\textit{4. Bundesverfassungsgesetz über die Rechte von Kindern}) calls to ensure the same treatment of children with and without disabilities in all areas of daily life while invoking \textit{Article 7(1) of the Federal

\hspace{1cm} 49 ABGB, Section 138. It provides: “\textit{In all matters relating to the minor child, in particular the care and personal contacts, the best interests of the child [...] should be considered as a leading concern and to be ensured the best possible. Important criteria in the assessment of the child’s best interests are particularly} \\
1. \hspace{1cm} \textit{adequate supplies, especially with food, medical and sanitary care and housing, as well as a careful education of the child;} \\
2. \hspace{1cm} \textit{welfare, security and the protection of the physical and psychological integrity of the child;} \\
3. \hspace{1cm} \textit{the appreciation and acceptance of the child by the parents;} \\
4. \hspace{1cm} \textit{promoting the talents, abilities, inclinations and development opportunities of the child;} \\
5. \hspace{1cm} \textit{taking into account the views of the child depending on their understanding and the ability to form opinions;} \\
6. \hspace{1cm} \textit{avoiding the harm that the child could suffer through the implementation and enforcement of a measure against their will;} \\
7. \hspace{1cm} \textit{avoiding of the danger to the child to experience assault or violence themselves or to witness it being experienced by important persons;} \\
8. \hspace{1cm} \textit{avoiding of the danger to the child to be unlawfully removed or retained or otherwise to come to harm;} \\
9. \hspace{1cm} \textit{reliable contacts of the child with both parents and significant other persons and secure bonds of the child to these persons;} \\
10. \hspace{1cm} \textit{the avoidance of conflicts of loyalty and guilt of the child;} \\
11. \hspace{1cm} \textit{respect for the rights, claims and interests of the child and} \\
12. \hspace{1cm} \textit{the living conditions of the child, their parents and their other environment.”}

\hspace{1cm} 50 ABGB, Sections 158 and 186 respectively.

\hspace{1cm} 51 ABGB, Sections 162(3), 180, 181, 190(2).

\hspace{1cm} 52 ABGB, Section 181.

\hspace{1cm} 53 ABGB, Section 194(1).

\hspace{1cm} 54 Julia Behrens, Study on children’s involvement in judicial proceedings – Contextual overview for the criminal justice phase – Austria, European Commission, 2014, p.18, available at: \url{http://www.childreninjudicialproceedings.eu/docs/ContextualOverview/Austria.pdf}.

\hspace{1cm} 55 ibid. 11
Constitutional Law (Bundes-Verfassungsgesetz) on non-discrimination of persons with disabilities\textsuperscript{56}. The latter provides: “All citizens are equal before the law. Privileges due to birth, gender, status, class or religion are unacceptable. Nobody shall be discriminated against because of his/her disability. The Republic (federation, Länder and local authorities) is committed to ensuring equal treatment of disabled and non-disabled persons in all areas of everyday life” (emphasis added).

At federal level, the constitutional ban on discrimination of persons with disabilities is supported by three pillars of ‘ordinary’ laws:

1. Federal Disability Equality Act (Bundesbehindertengleichstellungsgesetz - BGStG);
2. Disability Employment Act (Behinderteneinstellungsgesetz - BEinstG);
3. Federal Disability Act (Bundesbehindertengesetz - BBG).

These federal Acts only cover the responsibility of the federal government; however, several Länder have also adopted anti-discrimination laws\textsuperscript{57}.

The Federal Disability Equality Act contains a ban on discrimination of persons with disabilities\textsuperscript{58} in many areas of everyday life, except in employment, which is covered by the Disability Employment Act. It covers the federal administration, as well as access to goods and services that are available to the public\textsuperscript{59}. This essentially corresponds to consumer protection\textsuperscript{60}. Hence it also covers access to healthcare as far as it is regulated under private law, e.g. access to a private health insurance. In addition, it covers the barrier-free access to schools inasmuch as they are regulated under federal legislation\textsuperscript{61}.

Under the BGStG, ‘discrimination’ also includes discrimination of a person because he or she is close to a person with a disability\textsuperscript{62}. Both direct and indirect discrimination are covered where the former includes cases where “a person experiences due to a disability a less favourable treatment, has experienced or would have experienced in a comparable situation”. Indirect discrimination includes cases where a person is discriminated by the application of a provision, a criterion or a procedure that appears neutral but that may put persons with a disability at a particular disadvantage in comparison to other persons, except where the provision, criterion or procedure is justified by a legally valid objective\textsuperscript{63}. When assessing whether a disadvantage due to barriers constitutes discrimination, it must be taken into account whether the cost and/or effort necessary to eliminate the barrier is reasonable, i.e. does not represent a disproportionate burden\textsuperscript{64}. In addition, under the BGStG, harassment of the disabled person is also considered as ‘discrimination’\textsuperscript{65}, as well

\begin{itemize}
\item \textsuperscript{56} 4th Constitutional Law on Children’s Rights, Article 6.
\item \textsuperscript{58} BGStG, Section 4(1).
\item \textsuperscript{59} BGStG, Section 2.
\item \textsuperscript{60} UN-Disability Right Convention – First State Report of Austria -, adopted on 5 October 2010, p. 12, available at: http://www.sozialministerium.at/cms/site/attachments/2/5/8/CH2218/CMS1314697554749/1__staatenbericht_crpd_englische_endfassung.pdf.
\item \textsuperscript{61} Information provided on the website of the NGO BIZEPS, available at: http://www.bizeps.or.at/gleichstellung/rechte/bgstd.php.
\item \textsuperscript{62} BGStG, Section 4(2).
\item \textsuperscript{63} BGStG, Section 5(1), (2).
\item \textsuperscript{64} BGStG, Section 6.
\item \textsuperscript{65} BGStG, Section 5(4).
\end{itemize}
as advising another person to discriminate\textsuperscript{66}. The federal government is obligated to consider the ban on discrimination during all stages of an administrative procedure\textsuperscript{67}. The BGStG does not explicitly require reasonable accommodation. However, an important element of the Federal Disability Equality Act is the possibility to claim an adequate compensation for the material or immaterial damage suffered\textsuperscript{68}. This may increase the pressure on the discriminating legal or natural person to eliminate the barrier and provide reasonable accommodation\textsuperscript{69}. Arguably, reasonable accommodation is hence covered by the ban on indirect discrimination. The compensation must be adequate, effective and persuasive\textsuperscript{70}. The claim can be made before the regular courts if a prior mandatory mediation procedure, which must not be longer than three months, was not successful\textsuperscript{71}. The claimant can file the claim before the court of the district where he/she lives\textsuperscript{72}. To facilitate the access to judicial review, an easing of the burden of proof for the claimant applies\textsuperscript{73}. A period of limitation of three years applies to claims based on discrimination; one year to claims based on harassment\textsuperscript{74}. The commencement of a mediation procedure suspends the period of limitation\textsuperscript{75}.

**Legislation on construction**, and thus the regulations on the elimination of construction-related barriers, is the responsibility of the Ländere. There are numerous laws and regulations related to construction (e.g. building regulations, building technology regulations and laws). For example, in Vienna, all buildings used for public purposes, educational purposes, buildings with meeting rooms, event and sports venues, trading companies selling consumer goods, banks, churches, health and social facilities, doctors’ surgeries and pharmacies, public toilets and buildings which are designed for at least 50 visitors or customers, have to be planned and built in a barrier-free way\textsuperscript{76}.

In the area of employment, the Disability Employment Act (Behinderteneinstellungsgesetz - BEinstG) and corresponding Länder laws apply. The BEinstG contains a ban on discrimination of persons with disabilities\textsuperscript{77}. It includes all stages of an employment, from the application to a dismissal, and covers pay rates, vocational training, career promotion and social payments\textsuperscript{78}. The definition of ‘discrimination’ is similar to the one in the Federal Disability Equality Act. Here a distinction is also made between direct and indirect discrimination, harassment is also included, as well as advising another person to discriminate\textsuperscript{79}. If the employment has not been established because of

\textsuperscript{66} BGStG, Section 5(3), (5).

\textsuperscript{67} BGStG, Section 8(1).

\textsuperscript{68} BGStG, Section 9.

\textsuperscript{69} This is the opinion of the authors of the Disability Report 2008 published by the BMASK, p.94, available at: http://www.sozialministerium.at/cms/site/attachments/9/3/4/CH2092/CMS1407932711107/behindertenbericht_09-03-17.pdf.

\textsuperscript{70} BGStG, Section 9(4).

\textsuperscript{71} BGStG, Section 10(2). The requirement of mediation does not apply to discrimination by law.

\textsuperscript{72} BGStG, Section 10(3).

\textsuperscript{73} BGStG, Section 12.

\textsuperscript{74} BGStG, Section 10(3).

\textsuperscript{75} BGStG, Section 10(4).


\textsuperscript{77} BEinstG, Section 7b.

\textsuperscript{78} BEinstG, Section 7b(1).

\textsuperscript{79} BEinstG, Sections 7c and 7d, respectively.
discrimination, the victim may claim a financial compensation\textsuperscript{80}. If the employment has been terminated because the employee has a disability, the employee may file an application to the court to annul the dismissal\textsuperscript{81}. Compensation may also be claimed for other cases of discrimination, e.g. low pay rate or refusal of vocational training\textsuperscript{82}. The claims can be made before the civil courts after a mediation procedure has been conducted to no avail\textsuperscript{83}.

The \textbf{Federal Disability Act} regulates assistance and benefits aiming to ensure the ‘best possible’ participation in society\textsuperscript{84}. As regards the establishment of the Disability Ombudsperson under this Act, see Section 2.2.2 above.

3.1.3. Evolving capacities of the child (Art. 5 CRC and Art. 3 CRPD)\textsuperscript{85}

The \textbf{4th Constitutional Law on Children’s Rights} of 2011 (\textit{4. Bundesverfassungsgesetz über die Rechte von Kindern}) provides that “every child with a disability has got a right to protection and care that is adapted to his/her special needs”\textsuperscript{86}.

While Austrian legislation considers a link between degree of protection, participation rights and opportunities for autonomous decision-making on the one side, and evolving capacities on the other, this link is made mainly by referring to the age of the child rather than to a case-by-case assessment of the child’s capacity. As mentioned in Section 2.2.3 above, different age limits apply to different areas of life. The most relevant age limits are presented in the table below:

<table>
<thead>
<tr>
<th>Table 1: Age Limits</th>
<th>Age in years</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Civil Code</strong></td>
<td></td>
</tr>
<tr>
<td>No legal capacity</td>
<td>0-6</td>
</tr>
<tr>
<td>Limited legal capacity</td>
<td>7-13 (minor not of age)</td>
</tr>
<tr>
<td>Less limited legal capacity</td>
<td>14-17 (minor of age)</td>
</tr>
<tr>
<td>Limited procedural capacity in family matters</td>
<td>14-17</td>
</tr>
<tr>
<td><strong>Other areas and laws</strong></td>
<td></td>
</tr>
<tr>
<td>Mandatory schooling</td>
<td>1 September following the 6\textsuperscript{th} birthday (for nine years)</td>
</tr>
<tr>
<td>Legal age of sexual consent</td>
<td>14 (with exceptions)</td>
</tr>
<tr>
<td>Criminal responsibility</td>
<td>14+</td>
</tr>
<tr>
<td>Paid work</td>
<td>13/15/18</td>
</tr>
<tr>
<td>Right to vote</td>
<td>16</td>
</tr>
<tr>
<td>Right to marry</td>
<td>18 (with exceptions)</td>
</tr>
<tr>
<td>Majority</td>
<td>18</td>
</tr>
</tbody>
</table>

\textsuperscript{80} BEinstG, Section 7e.
\textsuperscript{81} BEinstG, Section 7f.
\textsuperscript{82} BEinstG, Section 7h.
\textsuperscript{83} BEinstG, Section 7k.
\textsuperscript{84} The objective is referred to in Section 1(1) of the BBG.
\textsuperscript{85} The concept of evolving capacities of the child establishes that as children acquire enhanced competencies and experience, there is a reduced need for direction and a greater capacity for the children to take responsibility for decisions affecting their lives. In light of the CRC, the concept of evolving capacities of the child entails that parents (or persons legally responsible) should have the right and the duty to provide, in a manner consistent with the evolving capacities of the child, appropriate guidance in the exercise by the child of his/her rights. See the overview project report for a more detail description of the concept.
\textsuperscript{86} 4\textsuperscript{th} Constitutional Law on Children’s Rights, Article 1.
The **Civil Code** provides that children enjoy particular protection by the laws\(^{87}\). One area where this protection plays an important role is legal transactions. A child under the age of seven does not have any legal capacity to act\(^{88}\). Children under the age of seven cannot acquire rights and bind themselves, except through their parents. If they are over seven but under 14 years old they can conduct legal acts that relate to trivial matters of daily life - so called ‘pocket-money transactions’. As of the age of 14, children have more extensive rights to conduct legal transactions\(^{89}\).

To the extent that a child lacks the necessary capacity to understand and discern, or the capacity to perform a legal act required by one or more matters as a result of noticeably delayed development, psychological illness or an intellectual disability, the court has to state this *ex officio* or at the request of the person who has been fully, or partially, entrusted with the care of the child. This statement stays in effect if it is not revoked or limited in time by the court, until the child reaches the age of majority\(^{90}\).

However, some provisions, mainly of the **Civil Code**, do require a case-by-case assessment of the child’s capacity. For example, the parents must take the opinion of the child into consideration when deciding about his/her care and education\(^{91}\). The view of the child is more significant **the more he or she understands the reason** and significance of a measure\(^{92}\). Children need to obey the instructions given by their parents, but the parents need to consider age, development and personality of the child when instructing and when ‘enforcing’ the instructions\(^{93}\). The individual capacity of the child also plays an important role in questions of education, i.e. vocational training, habitual residence and medical treatment. Under the Civil Code, a child who has the capability of making a reasonable judgment can file an application with a court if he/she has presented his or her opinion about his/her **vocational training** ‘without success’\(^{94}\). If a child has the capability of making a reasonable judgment, only the child him/herself can agree to **medical treatment**. If the child has reached the age of 14, it is assumed that he/she has the required capability\(^{95}\).

Under the **Juvenile Court Act** (*Jugendgerichtsgesetz*), a child of 14 years or above is only held responsible for a criminal offence, when he or she shows a sufficiently mature moral and mental state of development at the time of the offence so that he or she recognises the unlawfulness of the offence and is able to act in line with that recognition\(^{96}\).

Regarding aspects concerning the right to be heard and the rights to participate, please see Section 3.1.4 below.

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87 ABGB, Section 21.
88 ABGB, Section 865.
89 AGBG, Sections 170-171.
90 ABGB, Section 175.
91 ‘Care’ includes the pursuit of the physical well-being and health, as well as the immediate supervision; ‘education’ includes in particular the development of physical, intellectual, spiritual and moral strengths, the promotion of talents, abilities, preferences and opportunities for development of the child, as well as their education in school and profession, pursuant to Section 160(1) ABGB.
92 ABGB, Section 160(3).
93 ABGB, Section 161.
94 ABGB, Section 172.
95 ABGB, Section 173(1).
96 JGG, Section 4(2).
3.1.4. The right to be heard/to participate (Art. 12 CRC; Arts. 7 and 30 CRPD)

The right of children to be heard and to participate is specifically addressed in the 4th Constitutional Law on Children’s Rights which provides: “Every child has the right to adequate participation and consideration of his/her opinion in all matters affecting the child, in a manner that is appropriate in light of his/her age and development”97.

In addition, the Basic law on general rights of citizens (Staatsgrundgesetz) provides that anyone has the right to “freely express their opinion orally, in writing or in print, or by visual means within the limitations defined by law”98.

Several provisions of the Civil Code thus aim to protect the right of the child to be heard in matters that concern them. For example, if the parents endanger the child’s well-being through their behaviour, a child who has reached the age of 14 may file an application to the court to order the necessary measures99.

Furthermore, in cases of (partial) transfer of the custody to foster parents, the child must be heard by the court if he/she has reached the age of 10 years, and may be heard also before100.

Also, as mentioned above in Section 3.1.3, a child may apply to a court if there is disagreement between parents and child regarding the vocational training of the child101. The right to be heard in case of adoption is also regulated in the Civil Code. In adoption proceedings, a child must be heard if he/she is at least five years old, except if he/she has already been living with the adoptive parents since he/she has reached the age of five years102.

In criminal proceedings, no distinction is made between adults and children regarding the right to be heard. The offender and the victim have the right to be heard103. Witnesses have a limited right to be heard104.

As mentioned in Section 2.3.3 above, since the year 2007 children are eligible to vote in elections if they are at least 16 years old105. Participation is also established in the Länder legislation. For example, the Youth Act (Jugendgesetz) of Voralberg provides that “children and youth are heard in matters of the Land that concern them particularly and can participate in the discussion”106. To this end, the establishment of youth councils is foreseen by the Act. Their members are representatives of youth organisations107.
At school level, participation of pupils is enshrined in the School Education Act. It provides that the pupils may participate in designing the courses and in choosing teaching material\textsuperscript{108}. Pupils also have the right to be organised in a pupils’ council\textsuperscript{109}.

### 3.1.5. Freedom from violence (Art. 19 CRC; Art. 16 CRPD) and its implementation

The following principles are enshrined in Article 5 of the **4th Constitutional Law on Children’s Rights**:

“(1) Every child has the right to violence-free education. Corporal punishment, the infliction of mental suffering, sexual abuse and other ill-treatment are prohibited. Every child has the right to protection from economic and sexual exploitation.

(2) Every child being victim of violence or exploitation has a right to adequate compensation and rehabilitation. Details are determined in the laws.”

As regards the relationship between parents and children, the **Civil Code** prohibits parents to exercise any violence or to inflict physical or psychological harm on their children\textsuperscript{110}.

Under **criminal law** persons, including children, with disabilities principally enjoy the same protection against exploitation, violence and abuse. In addition, the **Criminal Code** contains provisions which refer specifically to children as victims and/or persons with disabilities as victims of criminal offences:

It counts as an **aggravating circumstance** if an offence was committed out of racist, xenophobic or “otherwise particularly reprehensible motives”\textsuperscript{111}. An offence committed out of hate or resentment against a person with a disability could hence be considered as committed out of “otherwise reprehensible motives”. Another aggravating circumstance is given if the offence was committed by taking advantage of the defencelessness or helplessness of another person\textsuperscript{112}. Depending on the circumstances, a child, including a child with a disability, may be considered as being defenceless or helpless due to his/her physical or intellectual condition.

Furthermore, a person is punished with imprisonment of at least six months if he/she **abandons** a person in a helpless situation and thereby endangers his/her life, if the person had been in his/her care\textsuperscript{113}.

Also, the **inflicting of physical or psychological suffering** on a person who is either in the care of the offender and not yet 18 years old or defenceless due to physical ailments, sickness or intellectual disability, is punished with imprisonment of up to three years\textsuperscript{114}. Furthermore, the exhausting of a child who is in the care of the offender is criminalised if the offence was committed out of malice or recklessness\textsuperscript{115}.

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\textsuperscript{108} School Education Act, Section 57a.
\textsuperscript{109} School Education Act, Section 58.
\textsuperscript{110} ABGB, Section 137(2).
\textsuperscript{111} StGB, Section 33(1) point 5.
\textsuperscript{112} StGB, Section 33(1) point 7.
\textsuperscript{113} StGB, Section 82(2).
\textsuperscript{114} StGB, Section 92.
\textsuperscript{115} StGB, Section 93.
The Criminal Code also foresees a punishment for sexual abuse of persons who are defenceless or have an intellectual disability that impedes them from understanding the significance of what is happening or of acting according to such an understanding\textsuperscript{116}. In addition, sexual abuse of children and pornographic pictures of children are criminalised\textsuperscript{117}. Sexual acts with a child are punished with imprisonment of up to three years if the offender takes advantage of his/her authority vis-à-vis the child. This includes the parents, but also, for example, educators, physicians, other members of health services, employees of institutions, if they take advantage of their position\textsuperscript{118}. Lastly, the inflicting of violence on another person for a longer period is punishable and the punishment is more severe if the victim is a person who is defenceless due to a mental disability. Whoever commits crimes against sexual self-determination and integrity in the context of a continued execution of violence, is punished by imprisonment from one to ten years\textsuperscript{119}.

Victims of crime have a right to compensation from the state. This is regulated in the Victims of Crime Act (\textit{Verbrechensopfergesetz}). Victims can apply for compensation if, due to an offence against another person, they have suffered a personal injury, damage to their health or a shock resulting in psychological difficulties of clinical significance\textsuperscript{120}.

Although stakeholders point out that persons with disabilities generally face a greater risk of being victims of psychological and physical violence than persons without disabilities, meaningful empirical studies about violence and abuse of persons with disabilities do not exist\textsuperscript{121}. In its Violence Report of 2001, the (former) Federal Ministry for Social Security and Generations stresses that persons with disabilities are ‘frequently affected by violence within institutions’\textsuperscript{122}. Stakeholders point out that abuse of persons with disabilities is often treated as a ‘social work issue’ rather than as a criminal offence. Accusations are hence often not followed up by police investigations\textsuperscript{123}. Counselling services are usually not accessible, brochures in easy language are missing, and there is no availability of sign language interpreters\textsuperscript{124}. Neither counsellors nor police officers are adequately trained in the interaction with persons with disabilities\textsuperscript{125}.

3.1.6. Right to family life (Art. 9 CRC; Art. 23(3) CRPD)

The right to family life is also addressed in the 4th Constitutional Law on Children’s Rights. Article 2 provides that every child has a right to regular personal relationships and direct contact with both parents, unless this is contrary to his/her interests\textsuperscript{126}. Furthermore, it foresees that children who are temporarily or permanently removed from their family environment are entitled to special protection and assistance of the state\textsuperscript{127}.

The right to family life is also regulated in the chapter of the Civil Code that refers to the

\textsuperscript{116}StGB, Section 205.
\textsuperscript{117}StGB, Sections 206-208a.
\textsuperscript{118}StGB, Section 212.
\textsuperscript{119}StBG, Section 92.
\textsuperscript{120}VOG, Section 1(1).
\textsuperscript{121}2\textsuperscript{nd} Joint Submission of the Austrian National Council of Disabled Persons (OeAR), the European Disability Forum (EDF) and the International Disability Alliance (IDA) on Austria to the 61st session of the UN Committee on the Rights of the Child, p.2.
\textsuperscript{122}Austrian National Council of Persons with Disabilities (OEAR), Alternative report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria, January 2013, p.74.
\textsuperscript{123}ibid. 75.
\textsuperscript{124}ibid. and interview with stakeholder.
\textsuperscript{125}ibid. 76.
\textsuperscript{126}4\textsuperscript{th} Constitutional Law on Children’s Rights, Article 2(1).
\textsuperscript{127}4\textsuperscript{th} Constitutional Law on Children’s Rights, Article 2(2).
rights between parents and children. It provides that every parent of a child should maintain a personal relationship including personal contact with the child. From this principle derives the right of the child to claim regular contact in cases where there is no consent on the contact. Subsequently, the court arranges the contact in a way that meets the best interests of the child.

In the case of separation of the parents, both parents share the custody over the child but they must agree in whose household the child is taken care of primarily.

As mentioned in Section 3.1.1 above, the custody of the parents can be restricted or annulled, only in exceptional cases where the parents endanger the well-being of the child through their behaviour.

3.1.7. Right to assistance (Art. 23 CRC; Arts. 23(5), 26 and 28 CRPD)

As mentioned above, the 4th Constitutional Law on Children’s Rights provides that “every child with a disability has got a right to protection and care that is adapted to his/her special needs.” All ‘ordinary’ laws need to be judged applying this constitutional principle.

Under the Family Compensation Act, families receive a monthly allowance for every child – whether with a disability or not - from the state. It is a staggered allowance depending on the age of the child (0-3; 3-10; 10-19; 19-24 years), and depending on whether there is one child or more. The more children the family has (up to seven), the higher the monthly allowance per child. For example, a family with one child of the age of seven and one child of the age of 11 will receive EUR 266.90 per month for the two of them. If a child has a ‘significant disability’, the allowance increases by EUR 150 per month. In this context, a child is considered as having a ‘significant disability’ if he/she has “a non-temporary physical or intellectual functional impairment or a functional impairment in the sensory perception.” Non-temporary means a period of “probably more than three years.” The degree of disability must be at least 50 per cent, except if the child is likely to be permanently unable to take care of him/herself. To assess the degree of disability, the Act refers to the Disabled Persons Employment Act, and the Regulation of the Federal Minister of Labour, Social Affairs and Consumer Protection, on more detailed provisions on the determination of the degree of disability (assessment ordinance) of 18 August 2010. A significant disability is revised within five years, unless the nature and extent of the disability exclude a chance for change. The degree of disability or the expected permanent inability to take care of him/herself must be established by a certificate from the Federal Office for Social Affairs and Disability on the basis of a medical expert’s opinion. The related costs are

128 ABGB, Section 186.
129 ABGB, Section 187(1).
130 ABGB, Section 179.
131 ABGB, Section 180.
133 Family Compensation Act, Section 8.
134 Family Compensation Act, Section 8(4).
135 Family Compensation Act, Section 8(5) sentence 1.
136 Family Compensation Act, Section 8(5) sentence 2.
137 Family Compensation Act, Section 8(5) sentence 3.
138 Family Compensation Act, Section 8(5) sentence 4.
139 Family Compensation Act, Section 8(6) sentence 1.
reimbursed from the Compensation Fund for Family Allowances\textsuperscript{140}.

In addition, families with a low income can claim a \textbf{supplement} if they have at least three children. The supplement is EUR 20 per month and is paid per child, except for the first and second child\textsuperscript{141}. Currently, the supplement is paid if the common income of the applicant and a spouse or partner who lives in the same household, does not exceed EUR 55,000 gross per year\textsuperscript{142}.

In relation to children who, due to their disability, cannot live with their family and are institutionalised, the above-mentioned Article 2 of the \textbf{4th Constitutional Law on Children’s Rights} should also be referred to here since it provides that children who are removed from their family environment enjoy special protection by the state. Also, the above-mentioned Article 6 should be invoked in this context providing that every child with a disability has a right to the protection and care that is appropriate in light of his/her special needs and that children with disabilities must be treated in a non-discriminatory manner in all areas of daily life.

Rehabilitation measures are regulated in the \textbf{Federal Disability Act}\textsuperscript{143}. It also refers to other forms of assistance, but since this is mainly a \textit{Länder} competence the provisions only form a framework and mainly relate to the provision of information by the federal institutions\textsuperscript{144}. However, it foresees the right to receive a disability card (\textit{Behindertenpass}) where the level of disability is 50 per cent\textsuperscript{145}. The card facilitates for the holder to prove his/her disability vis-à-vis authorities, insurance companies or service providers that offer special conditions for persons with disabilities. The Federal Disability Act further foresees that \textbf{price reductions} for persons with disabilities of level of at least 70\% can be agreed with providers of \textbf{public transport}\textsuperscript{146}.

The \textit{Länder} have their own Disability Acts in which they establish the legal framework for assistance for persons with disabilities, including children. For example, the Land Salzburg has the Salzburg Disability Act (\textit{Salzburger Behindertengesetz}) in place. It aims to provide assistance to those persons who, due to their disability, are not able to obtain an independent life on their own. The assistance includes integration assistance and social services for persons with disabilities\textsuperscript{147}. Measures to be provided or financed may include\textsuperscript{148}:

\begin{itemize}
  \item[a)] Treatment includes, for example, treatment by a physician, medication, and care in hospitals or other institutions;\textsuperscript{149}
  \item[b)] Supply of prostheses, orthopedic appliances and other aids;
  \item[c)] Assistance for education and schooling (see the next Section 3.1.8 );
  \item[d)] Assistance for the occupational integration, including vocational training\textsuperscript{150};
\end{itemize}

\textsuperscript{140} Family Compensation Act, Section 8(6) sentence 2.
\textsuperscript{141} Family Compensation Act, Section 9.
\textsuperscript{142} Family Compensation Act, Section 9a.
\textsuperscript{143} Federal Disability Act, Sections 2-7.
\textsuperscript{144} Federal Disability Act, Sections 15-19.
\textsuperscript{145} Federal Disability Act, Section 40.
\textsuperscript{146} Federal Disability Act, Section 48.
\textsuperscript{147} Salzburg Disability Act, Section 1.
\textsuperscript{148} Salzburg Disability Act, Section 5.
\textsuperscript{149} Salzburg Disability Act, Section 6.
\textsuperscript{150} Salzburg Disability Act, Section 9.
e) Assistance for social inclusion that aims to enable the person with a disability to lead an independent life in society with a focus on his/her psychological or social hardship\textsuperscript{151};

f) Assistance for social care in an institution that aims to “stabilize a status of development that cannot be further improved”\textsuperscript{152}.

Persons who fall within the scope of the Act have a right to assistance but not to a specific measure\textsuperscript{153}.

3.1.8. The right to inclusive education (Art. 28 CRC; Art. 24 CRPD) and its implementation

Compulsory schooling begins on 1 September following the child’s 6\textsuperscript{th} birthday and lasts nine years, according to the Compulsory Schooling Act (Schulpflichtgesetz)\textsuperscript{154}. This applies to all children, including children with disabilities. No tuition fee is to be paid to attend a compulsory public school\textsuperscript{155}. As a rule, children with disabilities can choose whether they attend a special school for children with disabilities (Sonderschule) or a mainstream school\textsuperscript{156}.

The School Organisation Act provides that, taking the principle of social integration into account, all types of school must provide an education to children with special needs that corresponds to the education provided in a special school while aiming to achieve the tuition goals of the respective school\textsuperscript{157}. As a rule, the curriculum of the respective school also applies to children with disabilities, provided that the child is likely to achieve the tuition goals without this being too heavy a burden for the child; otherwise the curriculum of the special school applies\textsuperscript{158}.

The objective of special schools is to promote children with intellectual or physical disabilities in a manner that is adapted to their specific disability and to provide an education that corresponds, as far as possible, to an education provided by elementary and secondary schools, except for the preparation for university by secondary schools (Allgemeinbildende höhere Schulen)\textsuperscript{159}. Special schools, which are managed with due regard to the curriculum of the Hauptschule or Neue Mittelschule, have to enable the students according to their interests, talents, gifts and ability to make the transition to these mainstream schools\textsuperscript{160}. The special school includes nine grades and can be managed as full-day schools\textsuperscript{161}. The Act foresees ten different types of special schools for

\textsuperscript{151} Salzburg Disability Act, Section 10.
\textsuperscript{152} Salzburg Disability Act, Section 10a.
\textsuperscript{153} Salzburg Disability Act, Section 5(2).
\textsuperscript{154} Compulsory Schooling Act, Sections 2 and 3, respectively.
\textsuperscript{155} School Organisation Act (Schulorganisationsgesetz), Section 5.
\textsuperscript{156} Compulsory Schooling Act, Section 8a.
\textsuperscript{157} School Organisation Act, Section 9(3) regarding primary schools (Volksschule); Section 15(3) regarding Hauptschulen (grades 5-8); Section 21a regarding Neue Mittelschulen (grades 5-8); Section 28(4) regarding polytechnical schools (9\textsuperscript{th} grade); Section 34(2) regarding Allgemeinbildende höhere Schulen (grades 5-12); Section 52 regarding housekeeping schools (Haushaltungsschulen).
\textsuperscript{158} School Organisation Act, Section 9(3) regarding primary schools; Section 16(5) regarding Hauptschulen; Section 21b(4) regarding Neue Mittelschulen; Section 29(2) regarding polytechnical schools; Section 39(3) regarding Allgemeinbildende höhere Schulen until 8\textsuperscript{th} grade; Section 55a(1a) regarding housekeeping schools.
\textsuperscript{159} School Organisation Act, Section 22 sentence 1.
\textsuperscript{160} School Organisation Act, Section 22 sentence 2.
\textsuperscript{161} School Organisation Act, Section 24 (1) and (3).
various types of disabilities\textsuperscript{162}. They can be managed as independent schools or as special classes affiliated to a primary school, a \textit{Hauptschule} or a \textit{Neue Mittelschule}\textsuperscript{163}.

All children have a right to receive a monthly contribution from the state to the costs of the journey to school if the distance from their home to the school is at least 2 km long. This restriction does not apply to children with disabilities\textsuperscript{164}. The allowance is EUR 13.10 per month if the child travels to school on more than four days per week and the distance is not further than 10 km; if it is further, the allowance is EUR 19.70 per month\textsuperscript{165}.

As mentioned in Section 3.1.7 above, the \textit{Länder} have \textbf{Disability Acts} in which they establish the legal framework for assistance for persons with disabilities, including children. The above-mentioned \textit{Salzburg Disability Act}, provides that assistance to an adequate school education covers the additional costs of all the measures that are necessary to enable the person with a disability to obtain a school education in a mainstream school or outside of such a school\textsuperscript{166}. The assistance may also include the training at secondary schools, academies, art schools and universities in so far as it corresponds to the abilities of the person and the training is justified by his/her performance. Furthermore, it must be likely that this education leads to a professional integration. The proof for the corresponding performance is assessed according to the rules that apply to students (without disabilities) applying for state allowances but taking the disability into account\textsuperscript{167}. If an appropriate education can only be provided if the student is accommodated in an institution, the assistance also covers the arising costs.

There is no right to integrative education for children with disabilities in kindergartens\textsuperscript{168}.

In spite of the above-mentioned legal requirements, it must be stated that the Austrian educational system does not provide inclusive education neither in the Austrian legislation nor in practice\textsuperscript{169}. Rather, the system follows the so-called ‘integration’ concept. According to stakeholders, this concept is based on the assumption that it is not the environment that needs to adapt to the needs of children with disabilities, but the children need to adapt to the existing framework\textsuperscript{170}. An ‘integrative measure’ may be, for instance, to provide classes for pupils with disabilities in a mainstream school\textsuperscript{171}.

The level of integration also significantly depends on the \textit{Länder} and even within the \textit{Länder} there are regional differences. The whole range of possible variations exists from near

\textsuperscript{162} School Organisation Act, Section 25(2).
\textsuperscript{163} School Organisation Act, Section 25(1).
\textsuperscript{164} Family Compensation Act, Section 30a(1).
\textsuperscript{165} Family Compensation Act, Section 30c(1).
\textsuperscript{166} Salzburg Disability Act, Section 8a (1).
\textsuperscript{167} Salzburg Disability Act, Section 8a (2).
\textsuperscript{169} Statement by the Independent Monitoring Committee about inclusive education of 10 June 2010, \url{http://www.monitoringausschuss.at/cms/monitoringausschuss/attachments/2/8/6/CH0914/CMS1276526308845/ma_sn_bildung_final.pdf}.
\textsuperscript{170} 2\textsuperscript{nd} Joint Submission of the Austrian National Council of Disabled Persons (OeAR), the European Disability Forum (EDF) and the International Disability Alliance (IDA) on Austria to the 61st session of the UN Committee on the Rights of the Child, p.4.
\textsuperscript{171} Ibid.
elimination of the special school system to completely segregating systems\textsuperscript{172}.

The willingness of teachers to include pupils with disabilities and their training also plays an important role. Teachers are not sufficiently trained to deal with inclusive classes, whilst the quality of education at special schools is often criticised by parents of children with severe impairments\textsuperscript{173}. Moreover, teaching in alternative forms of communication, such as sign language and Braille, is neither adequately guaranteed by law, nor realised in practice\textsuperscript{174}.

Another point of criticism concerns the lack of reasonable accommodation and individual support measures\textsuperscript{175}. Accessibility of mandatory schools is under the competence of the \textit{Länder}, hence the level of accessibility varies strongly\textsuperscript{176}.

Furthermore, in most regions full-time schools hardly exist in the integrated area which is why parents are often obliged to enrol their child at a special school, which usually offers a service of full-time care\textsuperscript{177}. The above-mentioned freedom of parents to choose between special schools and mainstream schools hence only exists ‘on paper’. Stakeholders blame the lack of inclusive education for the fact that a distinctly lower number of pupils with disabilities complete their A-levels and university degrees compared to persons without disabilities\textsuperscript{178}.

Lastly, the system of special educational needs (SEN) is also criticised. Schools or parents can apply for a so-called special educational needs certificate if they believe that the child needs support – due to a physical or psychosocial disability – to be able to follow instruction at a primary or middle school or at Polytechnic School\textsuperscript{179}. This system has two disadvantages: first, there are no standards based on which the competent school authority decides whether the child needs such support. Stakeholders therefore perceive the assessments at times as arbitrary\textsuperscript{180}. Furthermore, schools receive more resources the more SEN certificates they have obtained. This leads to a disproportionate amount of requests for SEN and in a ‘labelling’ of children as ‘disabled’ although their difficulties to follow classes stem from other reasons, such as having a native language other than German, having behavioural problems, being socially disadvantaged, or simply being ‘slow learners’\textsuperscript{181}. On average, 6\% of pupils whose native language is not German have been assigned SEN while the percentage among all pupils is 4\%. In some \textit{Länder} (Lower Austria, Upper Austria and Salzburg) the share of this group is 1.5 – 2 times higher than on average of all pupils. Instruction is mainly conducted in these countries, except in Upper

\textsuperscript{172} Austrian National Council of Persons with Disabilities (OEAR), Alternative report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria, January 2013, p.104.
\textsuperscript{173} ibid. 5.
\textsuperscript{174} 2\textsuperscript{nd} Joint Submission of the Austrian National Council of Disabled Persons (OeAR), the European Disability Forum (EDF) and the International Disability Alliance (IDA) on Austria to the 61st session of the UN Committee on the Rights of the Child, p.6.
\textsuperscript{175} 2\textsuperscript{nd} Joint Submission of the Austrian National Council of Disabled Persons (OeAR), the European Disability Forum (EDF) and the International Disability Alliance (IDA) on Austria to the 61st session of the UN Committee on the Rights of the Child, p.6.
\textsuperscript{176} Information based on stakeholder interview.
\textsuperscript{177} ibid. 5.
\textsuperscript{178} Austrian National Council of Persons with Disabilities (OEAR), Alternative report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria, January 2013, p.104.
\textsuperscript{179} School Organisation Act, Section 8.
\textsuperscript{180} Information based on stakeholder interview.
\textsuperscript{181} Information based on stakeholder interview.
Austria, in special schools. It is also notable that although the total number of compulsory students has receded during the past few years, the number of children with SEN has increased, and also the total number of pupils attending special schools has increased.

3.2. Specific issues faced by children with disabilities

3.2.1. Gender vulnerability

**Article 7(1) of the Federal Constitutional Law** *(Bundes-Verfassungsgesetz)* prohibits discrimination of persons on grounds of gender or disability. It provides: “All citizens are equal before the law. Privileges due to birth, gender, status, class or religion are unacceptable. Nobody shall be discriminated against because of his or her disability. The Republic (federation, Länder and local authorities) is committed to ensuring equal treatment of disabled and non-disabled persons in all areas of everyday life” (emphasis added). Paragraph 2 further states: “The federal government, the Länder and local authorities commit themselves to the equal treatment of men and women. Measures to promote the actual equality of women and men, particularly by eliminating actually existing inequalities, are admissible.” (emphasis added)

The particularly difficult situation of girls with disabilities has been taken into account in the **Federal Disability Equality Act** *(BGStG)* by requiring that multiple discrimination must be considered when assessing the amount of compensation for immaterial damage.

Following a study conducted on behalf of the Federal Ministry of Women Affairs and Consumer Protection, women were often sterilised against their will when they were children. Today, the Civil Code prohibits any medical treatment aiming at the sterilisation of a child. This ban particularly protects children with disabilities. The study also pointed out that women with disabilities are often victims of sexual abuse. According to the study, 62% of the women that were interviewed said that they have been sexually abused. Every fourth woman has been raped. Offenders are mainly acquaintances (39.4%) and strangers (23.1%). An important group of offenders are the fellow inmates of institutions where the women or girls live (13.3%).

183 Austrian National Council of Persons with Disabilities (OEAR), Alternative report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria, January 2013, p.106.
185 BGStG, Section 9(4) sentence 2.
187 ABGB, Section 163.
189 Zemp, A. et al, Weil das alles weh tut mit Gewalt – Sexuelle Ausbeutung von Mädchen und Frauen mit Behinderung, 1996, Section III.3. Available at: http://bidok.uihk.ac.at/library/zemp-ausbeutung.html#idp88128272. Following the information provided by the association Ninil the figures have not lost their relevance over the years, see the website of Ninil: http://www.ninil.at/kraftwerk/ninil_grundsaetzliches1.html.
190 ibid.
191 ibid.
Some initiatives trying to identify problems and to develop solutions exist at Länder and local authority level. For example, the City of Vienna established the ‘Vienna Health Forum for Women with Disabilities’, including the most important social and health services of the city. The forum focusses, inter alia, on sexuality and violence against women and girls with disabilities. The Vienna-based association Ninil provides seminars, counselling, and networking for women and girls with disabilities.

3.2.2. Children as vulnerable suspects

According to Austrian criminal law, children - in the terminology of the Juvenile Court Act referred to as ‘juveniles’- can be held responsible for criminal offences under the Criminal Code from the age of 14 years. Under the Act, a child of 14 years or above is only held responsible for a criminal offence, if he or she shows a sufficiently mature moral and mental state of development at the time of the offence so that he or she recognises the unlawfulness of the offence and is able to act in line with that recognition.

Furthermore, a juvenile who has not reached the age of 16 cannot be punished for a misdemeanour without serious guilt, unless special reasons justify the application of criminal law relating to juvenile offenders to prevent the juvenile from criminal acts.

The main purpose of applying juvenile criminal law is to prevent the offender from committing criminal offences. Accordingly, courts can, under certain circumstances, dispense with a punishment and only state the guilt of the offender if it can be assumed that this suffices to prevent the offender from committing further offences. The punishment is significantly reduced in comparison to the punishment of adult offenders.

The Juvenile Court Act also allows for some flexibility regarding the prosecution of an offence, hence the prosecution office may discontinue the prosecution in cases of less serious offences or where the guilt of the offender is not considered serious.

Pre-trial detention can only be imposed, enforced and maintained on juveniles if its purpose cannot be achieved by measures under family law or less invasive measures and if it is proportional with regard to the development of the child.

The legal representative of a child offender can appoint a defence attorney, even against the will of the child. If this is not done, the child must, under certain circumstances, be given a defence attorney, ex officio. Where the child is not represented by a legal counsel, the child can request to be represented by a person of confidence. The child must be informed of this right in the legal caution, in the summons to appear or, at the latest, before the beginning of the interview. A person of confidence may be the legal

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194 StGB, Section 74(1) point 1.
195 JGG, Section 4(2).
196 JGG, Section 4(2) point 2.
197 JGG, Section 5 point 1.
198 JGG, Section 12.
199 JGG, Section 5 points 2-10.
200 JGG, Sections 6, 7.
201 JGG, Section 35
202 StPO, Section 58(4).
203 JGG, Section 39.
204 JGG, Section 37(1).
representative of the child, a guardian, a relative, a teacher, an educator or a representative of the Youth welfare (Jugendwohlfahrtsträger), the juvenile court assistance service (Jugendgerichtshilfe) or the probation service. As the right to be accompanied by a person of trust only applies upon request, in practise, this leads to the situation that many children waive their right to be accompanied, which bears the risk of self-incrimination.

In order to protect the child’s privacy, only the main investigative judicial proceedings are open to the public (with exceptions). However, the public can never be excluded from the giving of the judgment.

3.2.3. Other particular issues faced by children with disabilities in Austria
Regarding the higher percentage of children whose native language is not German and socially disadvantaged children being assessed as in need of special education (SEN), please see Section 3.1.8 above.

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205 JGG, Section 37(2).
206 Julia Behrens, Study on children’s involvement in judicial proceedings – Contextual overview for the criminal justice phase – Austria, p.18.
207Julia Behrens, Study on children’s involvement in judicial proceedings – Contextual overview for the criminal justice phase – Austria, p.18.
4. ASSESSMENT OF THE PRACTICAL IMPLEMENTATION OF THE RIGHTS AND LEGAL PRINCIPLES

**KEY FINDINGS**

- There is an insufficient implementation and enforcement of the discrimination ban, in particular in relation to the accessibility of public buildings and public transport both at federal and Land level.

- For violations of the rights protected under the Federal Disability Equality Act, a claim for compensation may be filed to the courts. There is no right to the elimination of a barrier.

- The implementation of the right to assistance is compromised by a lack of a nationwide and comprehensive system. Personal assistance beyond school does not exist.

- Provision of healthcare varies from Land to Land. Waiting periods for therapies are too long.

- Meaningful data on children with disabilities, disaggregated by gender, age and type of disability, are missing.

- Single regions can be praised for their implementation of inclusive education. One Land included a child with a disability in its monitoring committee.

- The main recommendation is to standardise the various federal and Länder laws for persons with disabilities. The right of the parents to choose between mainstream school and special school should be replaced by the right of the child to inclusive education.

4.1. Enforcement and reporting mechanisms

As referred to in Section 2.2.2 above, the Disability Ombudsperson advises persons who feel they were discriminated against within the meaning of the Federal Disability Equality Act or the Disability Employment Act\(^\text{208}\), he/she does not, however, decide him/herself on the cases or represent the claimants in procedures. The advices given by the Disability Ombudsperson have a non-binding character and he/she does not have competencies to refer the case to another enforcement authority (i.e. the police, courts, prosecution). Cases are decided by courts. Claimants may be represented by lawyers. Some of the Länder have also introduced Disability Ombudspersons or an equivalent advisory committee in which disability organisations are represented\(^\text{209}\).

The independent Child and Youth Advocate Offices in the Länder act as ‘children’s ombudspersons and provide advice, support and information on compliance with children’s

\(^\text{208}\) BBG, Section 13c(1).

rights\textsuperscript{210}. Children can address the offices directly. There is no fixed procedure because the support given depends on the request.

Parents may turn to court if the rights of their children under the Federal Disability Equality Act have been violated and claim compensation for the material or immaterial damage suffered. As referred to in Section 3.1.2 above, the claim can be made before the regular courts if a prior mandatory mediation procedure, which must not be longer than three months, was not successful\textsuperscript{211}. The claimant can file the claim before the court of the district where he/she lives\textsuperscript{212}. To facilitate the access to judicial review, an easing of the burden of proof for the claimant applies\textsuperscript{213}. A period of limitation of three years applies to claims based on discrimination; one year to claims based on harassment\textsuperscript{214}. The commencement of a mediation procedure suspends the period of limitation\textsuperscript{215}. However, not many potential claimants make use of their right to claim compensation for being discriminated against\textsuperscript{216}. Reasons for this are a lack of awareness of their rights, a lack of confidence to opt for a confrontation, a (felt) lack of financial resources for court and lawyers’ fees and the limited potential outcome of the proceedings\textsuperscript{217}. Consequently, not many cases have been decided by courts so far\textsuperscript{218}.

With respect to cases of violence and abuse, the police, the prosecution office and the criminal courts are the authorities responsible for the enforcement of the relevant laws. There are no specific provisions on a child’s ability to report crimes, hence the rules for adults apply to children, too. The Federal Ministry of Economy, Family and Youth maintains the Victim Assistance Services (\textit{Prozessbegleitung}), which provides victims of violence or sexual abuse psychological and judicial support free of charge from the moment in time when they report a crime until the end of the proceedings\textsuperscript{219}. A book called ‘\textit{Milli ist beim Gericht}’ (‘Milli is at court’), produced by the Victim Assistance Services, aims to prepare children who are victims of violence or sexual abuse for their role as witnesses in the proceedings before the criminal court. It informs them about the proceedings and what is expected from them during the proceedings\textsuperscript{220}.

\section*{4.2. Gaps, problems and issues in the implementation}

In relation to children with disabilities, the Austrian government issued a national action plan for the implementation of the CRPD which foresees measures to be implemented between 2012 and 2020\textsuperscript{221}. Measures include the provision of information for families, the
promotion of counselling centres for families who have relatives with disabilities, to include children with disabilities in the child health strategy and the development of children’s rehabilitation. Human or financial resources are, however, not defined in the plan\textsuperscript{222}. The national action plan for the rights of children and juveniles does not define human and financial resources, either, and does not specify a time line for the implementation of the envisaged measures\textsuperscript{223}.

Stakeholders criticise the – in their opinion - insufficient implementation of the discrimination ban in Austria, and stress that, although staged plans for the identification of barriers to accessibility are foreseen for public buildings and for public transport, many public buildings are still not accessible\textsuperscript{224}. The transitional period for the creation of barrier-free access for buildings used by the federation has been extended by four years to the year 2020 and concerns only the barriers identified in the staged plans\textsuperscript{225}. Staged plans that concern accessibility to buildings used by the Land have only been set up in two of the Länder\textsuperscript{226}.

Another severe point of criticism is the lack of a legal claim for the elimination of a barrier under the Federal Disability Equality Act, which only foresees compensation for the occurred damage\textsuperscript{227}. While, according to stakeholders, the mandatory conciliation procedures can result in the elimination of the barrier, law suits only lead to low amounts of damages to be paid\textsuperscript{228}. This assessment has been confirmed during the evaluation of the Act in 2012 on behalf of BMASK\textsuperscript{229}.

Furthermore, stakeholders point out that in practice, even in cases of massive intrusion into the lives of children, for example, in custody cases, the best interests of the child are not always considered and the right of the child to be heard is neglected\textsuperscript{230}. They also see the rights of children being violated by maintaining boarding schools for children with special education needs from the age of six years. Children stay there throughout the working week\textsuperscript{231}.

With respect to forced sterilisation, stakeholders are concerned by a high estimated number of unreported cases that take place in a grey zone in spite of the prohibition\textsuperscript{232}.

Stakeholders see the implementation of the right to assistance, pursuant to Article 23
CRC, compromised by the “absence of a nationwide and comprehensive system of personal assistance in Austria”\textsuperscript{233}. In particular, personal assistance exists only in rudimentary forms and does not extend beyond school, e.g. for leisure activities\textsuperscript{234}.

They also pin-point failures in the provision of basic healthcare. For example, the Early Childhood Intervention is not equally available in all \textit{Länder}. The waiting period to receive a standardised diagnosis is not often less than three months, and two years to receive appropriate therapy. Moreover, the Austrian Ombudsperson has voiced its concern about the insufficient rehabilitation of children in its 2009 Annual Report stating that there are no rehabilitation clinics specialising in the special needs of children and youths\textsuperscript{235}.

### 4.3. Best practices

In the field of education, Upper Austria can be referred to as a positive exception from the rule that personal assistants for pupils are not available to pupils with disabilities, even during the years of compulsory schooling. In the educational system of Upper Austria, the provision of personal assistants is ‘quite common’\textsuperscript{236}. Also Styria may be mentioned in the context of education because it started implementing ‘model regions of inclusive education’\textsuperscript{237}. The region of Reutte in Tirol applies inclusive education in schools\textsuperscript{238}. Kindergartens throughout Tirol are inclusive\textsuperscript{239}.

Tirol, which otherwise cannot serve as a model region for inclusive school education\textsuperscript{240}, included a child with a disability as a full member in its monitoring committee\textsuperscript{241}.

Various websites of the federal government and of the \textit{Länder} inform children with disabilities and their parents of their rights and direct them to the offices that can assist them. Some of the websites have been referred to above in Section 4.2, and additional ones are described briefly below:

1. Website HELP of the Federal Chancellery:
   The website informs about early diagnosis, early intervention and therapies, financial assistance, benefits, benefits in kind, inclusion of children in kindergartens, institutions\textsuperscript{242},

2. Website of the Federal Ministry of Science, Research and Economy:
   Informs of children’s rights\textsuperscript{243},

3. Website ‘bidok’ of the University of Innsbruck:

\textsuperscript{233} 2\textsuperscript{nd} Joint Submission of the Austrian National Council of Disabled Persons (OeAR), the European Disability Forum (EDF) and the International Disability Alliance (IDA) on Austria to the 61st session of the UN Committee on the Rights of the Child, p.54.
\textsuperscript{234} Information based on stakeholder interview.
\textsuperscript{236} 2\textsuperscript{nd} Joint Submission of the Austrian National Council of Disabled Persons (OeAR), the European Disability Forum (EDF) and the International Disability Alliance (IDA) on Austria to the 61st session of the UN Committee on the Rights of the Child, p.5.
\textsuperscript{237} Information based on stakeholder interview.
\textsuperscript{238} Information based on stakeholder interview.
\textsuperscript{239} Information based on stakeholder interview.
\textsuperscript{240} Tirol has been reported as a Land which increases the number of special schools (information from stakeholder interview).
\textsuperscript{241} Information based on stakeholder interview.
\textsuperscript{242} Website available at: https://www.help.gv.at/Portal.Node/hlpd/public/content/122/Seite.1220000.html.
\textsuperscript{243} Website available at: http://www.kinderrechte.gv.at/.
The digital library and learning platform provides information on the inclusion of persons with disabilities\textsuperscript{244}.

4.4. Data and monitoring mechanisms

There are \textit{no comprehensive official data on persons with disabilities}, including children with disabilities\textsuperscript{245}. Stakeholders also criticise that in various general data collection procedures, \textit{different definitions of the term 'disability' are used}. There are figures on the amount of persons with disabilities in Austria that are based on an extrapolation of the EU-SILC survey of 2006, but the estimates only refer to persons between the age of 16 and 64 years who live in households. There are therefore no meaningful data on the children with disabilities\textsuperscript{246}.

Under the Federal Disability Act, the Independent Monitoring Committee \textit{monitors} the implementation of the CRPD at federal level\textsuperscript{247}. The Committee reports on its consultations regularly to the Disability Advisory Board, requests statements of administrative bodies in individual cases, makes recommendations and delivers opinions in relation to the rights of persons with disabilities.

Stakeholders criticise the Committee’s lack of independence since it is incorporated in the administration of BMASK which may limit its agenda to an exclusively social one and hence does not ensure full inclusion of persons with disabilities\textsuperscript{248}. In addition, they submit that the Monitoring Committee does not have the required budget that is to be administered independently\textsuperscript{249}.

4.5. Recommendations

The Alternative report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria of January 2013 contains numerous recommendations to enhance the implementation of the CRPD, including Article 7. They are grouped by Articles of the CRPD and a selection is presented here below by direct quotation:

\textbf{Articles 3 and 4 (General principles and Obligations)}

- \textbf{Standardise} the various federal and regional (\textit{Länder}) laws for persons with disabilities;
- Systematically examine the Austrian laws on the contradictions to the CRPD and ensure the systematic \textbf{legal revision};
- \textbf{Mainstream} disability in all new laws and programmes at federal, regional (\textit{Länder}) and municipal level;
- \textbf{Include} and \textbf{consult} persons with disabilities and their representatives in all measures that affect them.

\textsuperscript{244} bidok, available at: \url{http://bidok.ubk.ac.at/}.
\textsuperscript{245} Statistik Austria, Gesundheitsstatistik 2012, p.58, available at: \url{http://www.statistik.at/web_de/dynamic/statistiken/gesundheit/publdetail?id=4&listid=4&detail=601}.
\textsuperscript{246} Austrian National Council of Persons with Disabilities (OEAR), Alternative report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria, January 2013, p.154.
\textsuperscript{247} BBG, Section 13.
\textsuperscript{248} BBG, Section 13.
\textsuperscript{249} ibid.
Article 5 (Equality and Non-Discrimination)

- **Adopt equality provisions** for persons with disabilities into the regional (Länder) constitutions of Burgenland, Carinthia, Lower Austria, Styria, Vienna and Tyrol;
- Simplify and **harmonise** the non-discrimination legislation;
- **Introduce a legal claim to** omit or **eliminate barriers**;
- **Ensure effective legal protection** for persons with disabilities against discrimination through effective and dissuasive sanctions, as well as through facilitated access to court.

Article 7 (Children with Disabilities)

- Implement **full inclusion** of children with disabilities;
- Launch more programmes for the **early detection and Early Childhood Intervention (ECI)** of children with disabilities;
- Improve the **protection from violence** for children with disabilities;
- Establish a **central contact point** for comprehensive counselling and information services for children with disabilities.

Article 16 (Freedom from Exploitation, Violence and Abuse)

- **Take preventive measures for the protection against violence**: awareness-raising and information for persons with disabilities; initial and continuing training in interacting with persons with disabilities for relatives, care personnel, police, etc.;
- **Dismantle large institutions** and forms of accommodation for persons with disabilities that favour structural violence;
- Adequate **representation** of persons with disabilities within the National Preventive Mechanism according to OP-CAT according to Art 16 para 3;
- Abolish “**net beds**” and ensure that interferences with the freedom of movement are in compliance with human rights.

In addition, stakeholders emphasise the need for **adequate data** on children with disabilities, including girls with disabilities, to develop policies and programmes to tackle discrimination and promote equal opportunities for them in society\textsuperscript{250}.

\textsuperscript{250} 2\textsuperscript{nd} Joint Submission of the Austrian National Council of Disabled Persons (OeAR), the European Disability Forum (EDF) and the International Disability Alliance (IDA) on Austria to the 61st session of the UN Committee on the Rights of the Child, p.8.
5. CONCLUSIONS

The shift from seeing persons with disabilities, including children, as persons in need of care to perceiving them as independent individuals who have a right to participate in societal life on an equal basis like others, is slow in Austria. Also, the principles of reasonable accommodation and inclusion are not understood as cross-cutting issues.

Furthermore, there appears to be a gap between the legal framework on the one hand, and the implementation of the legislation on the other. One example for such a gap concerns the right to integrative education. By law, parents have the right to choose between mainstream school and special school for their child with a disability. However, first, the ‘integrative education’ in a mainstream school may still be carried out in separate classes. Second, as mainstream schools rarely offer day-care, parents often opt for the special school which does offer it. Another example is the right to receive therapy. Although this right is enshrined in the legislation, in practice, children may wait two years to be allocated a place in therapy. As the implementation of the relevant legislation varies significantly among the nine Länder, some families with children with disabilities move to a Land with a more favourable practice, such as Vienna.

The main obstacle of an effective implementation of the CRPD and the CRC throughout Austria seems to be therefore the absence of standardised legislation and implementation applicable both at federal and at Länder level. Even where federal legislation also applies at Länder level, it is implemented in various different ways, like in the case of education referred to above. Healthcare is also affected by this fragmentation and so is accessibility, since construction laws are under the competence of the Länder.

Länder may feel less committed to conventions signed by the federal government while the federal government may not be willing or capable to overcome the situation. Stakeholders report the pushing of responsibilities between the federal level and the Länder. The National Action Plan on Disability 2012-2020 does not include the Länder.

A way forward may be to conclude so-called ‘15a-agreements’ (Bund-Länder agreements) in which the federal level and the Länder can agree on matters relevant for their sphere. These agreements legally bind the federal level and the Länder. In such an agreement the parties could, for example, agree on a certain way of implementation of a federal law which has to be implemented by the Länder.
REFERENCES

1. Legislation
   a. International Law
      • United Nations Convention on the Rights of the Child
      • United Nations Convention on the Rights of Persons with Disabilities
   b. National Law
      • Act amending the Austrian Electoral Law 2007 (Wahlrechtsänderungsgesetz)
      • Basic Law on the General Rights of Nationals (Staatsgrundgesetz)
      • Civil Code (Allgemeines Bürgerliches Gesetzbuch)
      • Compulsory Schooling Act (Schulpflichtgesetz)
      • Criminal Procedure Code (Strafprozessordnung)
      • Criminal Code (Strafgesetzbuch)
      • Family Compensation Act (Familienlastenausgleichsgesetz)
      • Federal Constitutional Law (Bundes-Verfassungsgesetz)
      • Federal Disability Act (Behindertengesetz)
      • Federal Disability Equality Act (Behindertengleichstellungsgesetz)
      • Juvenile Court Act (Jugendgerichtsgesetz)
      • Salzburg Disability Act (Salzburger Behindertengesetz)
      • School Education Act (Schulgesetz)
      • School Organisation Act (Schulorganisationsgesetz)
      • Victims of Crime Act (Verbrechensopfergesetz)
      • Youth Act Vorarlberg (Jugendgesetz Vorarlberg)
      • 4th Constitutional Law on Children’s Rights (4. Bundesverfassungsgesetz über die Rechte von Kindern)

2. Literature

3. Other
   • Austrian National Council of Persons with Disabilities (OEAR), Alternative report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria, January 2013.
   • bidok, available at: http://bidok.uibk.ac.at/
   • BIZEPS (NGO), website available at:
http://www.bizeps.or.at/gleichstellung/rechte/bgstg.php


- BMASK service (Sozialministeriumservice), available at: http://www.sozialministeriumservice.at/site/Neuigkeiten/Hundstorfer:_Schlichtungsverfahren_fuer_Menschen_mit_Behinderungen_hat_sich_bewaehrt


- Ninlil – Gegen sexuelle Gewalt an Frauen mit Lernschwierigkeiten und Mehrfachbehinderungen, website: http://www.ninlil.at/


- Victim Assistance Services (Prozessbegleitung), website available at: http://www.prozessbegleitung.co.at/publi_milli.htm


- 2nd Joint Submission of the Austrian National Council of Disabled Persons (OeAR), the European Disability Forum (EDF) and the International Disability Alliance (IDA) on Austria to the 61st session of the UN Committee on the Rights of the Child
ANNEX 1 – SUMMARY TABLE

| Analysis of the legal implementation of CRPD and CRC rights and principles |
|--------------------------------------------------|--------------------------------------------------|
| National legislation (translated in English) | Comments/assessment on the implementation |

**Best interests of the child**

4th Constitutional Law on Children’s Rights, Article 1
Every child has the right to such protection and care as is necessary for his/her well-being, to the best possible development and self-fulfilment as well as to the protection of his/her interests also in consideration of inter-generational justice. The best interests of the child must be a primary consideration of all measures of public or private institutions affecting children.

Civil Code (ABGB)

Section 21
(1) Minors and persons who are not able to take care of some or all of their personal matters due to reasons other than minority are under special protection of the law.
(2) Minors are person who have not completed their 18th year of life; if they have not completed their 14th year of life they are underage.

Section 865
Children under the age of seven and persons over the age of seven years not able of reasoning, are – except for the cases of § 170 para. 3 – incapable to make a promise or to accept it. Other minors or persons with a legal guardian may accept a promise made only to their advantage; however, as soon as this is linked to a burden or to a promise made by themselves, the validity of the contract depends generally – except for the cases of § 170 para 3 and § 280 para 2 – on the approval of the representative or, at the same time, of the court, based on the provisions laid down in the third and fourth main sections. Until such approval is given, the other party may not withdraw but may request an adequate period for declaration.

Effective implementation
The safeguard of the best interests of the child has constitutional status. The Civil Code provides for specific assessment criteria which helps implementing the principle. The principle is also reflected in the sectoral legislation, including criminal and civil (procedural) law.
### Analysis of the legal implementation of CRPD and CRC rights and principles

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#### Section 170
(1) A minor child cannot dispose or commit himself/herself legally without the explicit or tacit consent of his/her legal representative.

(2) When becoming of age, the child can dispose and commit himself/herself with regard to objects that have been ceded to him/her for his/her free disposal or with regard to income earned by himself/herself insofar as the satisfaction of his/her vital needs is not put at risk.

(3) If a minor child concludes a legal transaction which is usually concluded by minors of his/her age and which concerns a minor matter of daily life, this legal transaction becomes legally effective retroactively upon fulfilment of the child's obligations, even if the conditions of paragraph 2 are not met.

#### Section 171
If not specified otherwise, a child of minor age can commit himself/herself autonomously to services through a contract unless these services are linked to an education or other training contract. The legal representative of the child can annul the legal relationship based on such contract prematurely upon important grounds.

#### Section 138:
In all matters relating to the minor child, in particular the care and personal contacts, the best interests of the child [...] should be considered as a leading concern and to be ensured the best possible. Important criteria in the assessment of the child's best interests are particularly

1. adequate supplies, especially with food, medical and sanitary care and housing, as well as a careful education of the child;
2. welfare, security and the protection of the physical and psychological integrity of the child;
3. the appreciation and acceptance of the child by the parents;
### Analysis of the legal implementation of CRPD and CRC rights and principles

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<tr>
<td>4. promoting the talents, abilities, inclinations and development opportunities of the child;</td>
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<td>5. taking into account the views of the child depending on their understanding and the ability to form opinions;</td>
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<td>6. avoiding the harm that the child could suffer through the implementation and enforcement of a measure against their will;</td>
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<td>7. avoiding of the danger to the child to experience assault or violence themselves or to witness it being experienced by important persons;</td>
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<td>8. avoiding of the danger to the child to be unlawfully removed or retained or otherwise to come to harm;</td>
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<td>9. reliable contacts of the child with both parents and significant other persons and secure bonds of the child to these persons;</td>
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<td>10. the avoidance of conflicts of loyalty and guilt of the child;</td>
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<tr>
<td>11. respect for the rights, claims and interests of the child and</td>
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<td>12. the living conditions of the child, their parents and their other environment.</td>
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Section 158
(1) Who is entrusted with the custody of a minor child, shall take care of and educate him/her, to manage his/her property and to represent him/her in all other matters; Care, education as well as the management of property include legal representation in these areas. [...]  

Section 186
Each parent of a minor child shall maintain a personal relationship with the child including personal contacts (§ 187).  

Section 187
(1) The child and each parent have the right to regular personal contacts, corresponding to the needs of the child. These personal contacts shall be established based on joint agreement of the child and the parents. If such joint agreement cannot be reached, the court shall, upon request of
<table>
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<td>the child or one parent, lay down the arrangement of such contacts and related obligations in the best interests of the child. Such arrangement shall allow for the creation and maintenance of the special close relationship between parents and the child and shall, if possible, include both leisure time and supporting the child in his/her daily life. The age, needs and desires of the child as well as the intensity of the previous relationship shall be particularly taken into account.</td>
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<tr>
<td>Section 162(3) (3) If the primary household to take care of the child has not been determined, the place of residence of the child can only be transferred abroad with the consent of both parents, or approval by a court. When deciding on the approval the court shall take into consideration the well-being of the child as well as the rights of the parents to protection from violence, freedom of movement and freedom to choose an occupation.</td>
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<tr>
<td>Section 180 (1) If this corresponds to the interests of the child, the court shall take a preliminary decision with regards to parental responsibility (phase of preliminary parental responsibility), if</td>
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<tr>
<td>1. an agreement in accordance with § 179 has not been concluded within a reasonable time after the dissolution of marriage or common household or</td>
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<td>2. one parent is requesting the sole custody or his/her participation in taking custody.</td>
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<td>[...]</td>
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<tr>
<td>Section 181 (1) If the parents’ behaviour puts the well-being of the minor child at risk, the court shall, independently of the person bringing the matter before it, take the necessary decisions to protect the best interests of the child. In particular, the court may withdraw the parental authority completely or partly, including the rights to approval or consent as foreseen by the law.</td>
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</table>
### Analysis of the legal implementation of CRPD and CRC rights and principles

| National legislation (translated in English) |
| Comments/assessment on the implementation |

individual cases, the court may also replace an approval or consent required by law if there are no justified reasons for a refusal.

[...]

Section 190(2)
(2) The determination of custody (§ 177 para. 2) and agreements concluded in court in accordance with para. 1, do not need court approval to become legally effective. However, the court shall declare such determination of custody or agreements by the parents invalid and make differing dispositions if the child’s best interests were compromised otherwise.

Section 194(1)
(1) The adoption of a child that is not legally competent shall be approved if it serves the best interests of the child and if a relationship similar to the one between biological parents and their children exists or is to be created.

**Code of Criminal Procedure (StPO)**

Section 58(4)
For a minor and a person with a legal guardian, the legal representative may appoint a defence attorney, even against their will.

Section 160(3)
(3) To an examination of a person who is mentally ill or mentally disabled or has not completed his/her fourteenth year of life, a person of his/her trust shall in any case be called in.

Section 165(3)
(3) The opportunity of participation of a witness during the examination shall, in his/her interest considering in particular his/her low age or his/her mental state and state of health, or in the interest of establishing the truth upon request of the prosecutor or ex officio, be limited to the...
Analysis of the legal implementation of CRPD and CRC rights and principles

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extent that the parties of the process (para. 2) and their representatives can follow the examination by using audio-visual equipment and exercise their right to interrogation without being physically present. Particularly if the witness has not completed his/her fourteenth year of life an expert can be assigned to carry out the interrogation. In any case it shall be taken care of avoiding as possible the encounter between the witness and the accused and other parties of the process.

Section 165(4).
(4) A witness who has not completed his/her fourteenth year of life and whose sexual integrity might have been violated through the criminal offense the accused is charged with, shall be examined in every case according to the modalities described in para. 3; the same applies for the other in § 156 para. 1 point 1 und 2 mentioned witnesses upon their or the prosecutor's request.

Section 156(1) point 2.
(1) Exempt from the obligation to testify are […]

2. persons who may have been injured through the criminal offence the accused is charged with and have not completed their fourteenth year of life at the time of the hearing or whose sexual integrity may have been violated, if these parties had the opportunity to be involved in a prior cross examination (§§ 165, 247).

**Non-discrimination**

- **General**
  - 4th Constitutional Law on Children’s Rights
  - Article 1 (see above)

- Article 6(1)
  - Every child with a disability has a right to protection and care that takes their special needs into

Incomplete implementation

Non-discrimination of children with disabilities is a constitutional principle. It is complemented by several laws covering all areas of life. However,
## Analysis of the legal implementation of CRPD and CRC rights and principles

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<tr>
<td>account. Within the meaning of Article 7(1) of the B-VG the equal treatment of children with and without disabilities in all areas of daily life shall be ensured.</td>
<td>reasonable accommodation is not fully recognised. Therefore the implementation in law of the right is assessed as incomplete.</td>
</tr>
</tbody>
</table>

**B-VG**

Section 7(1)

All citizens are equal before the law. Privileges due to birth, gender, status, class or religion are unacceptable. Nobody shall be discriminated against because of her/his disability. The Republic (federation, Länder and local authorities) is committed to ensuring equal treatment of disabled and non-disabled persons in all areas of everyday life.

**BGStG**

Section 4

(1) Nobody shall be discriminated against directly or indirectly on the grounds of a disability.

Section 8

(1) The prohibition of discrimination referred to in Section 4(1) shall be taken into account during all stages of the administrative procedure.

(2) The federation is obligated to take the appropriate and specifically necessary measures to ensure access to its services and offers. [...] 

Section 9

(1) In violation of the prohibition of discrimination under § 4 para. 1 the victim is in any event entitled to compensation for the pecuniary damage and to compensation for personal detriment suffered.

(2) In case of a harassment pursuant to § 5 para. 4 the victim has in any case a right to compensation against the harasser for the damage suffered. In addition to compensation for any financial loss the victim has a right to a reasonable compensation for the personal detriment...
### Analysis of the legal implementation of CRPD and CRC rights and principles

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<tr>
<td>suffered, but at least to € 1,000.</td>
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<td>(3) If the harassment is done in execution of the laws, the claim is directed also against the competent entity.</td>
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Section 10

(2) Other claims according to this federal Act can be made before the regular courts only if a mediation procedure has been conducted at the Social Ministry Service pursuant to §§ 14 sq. [...]  

- **Gender**
  
  B-VG
  
  Section 7:
  
  (1) All citizens are equal before the law. Privileges due to birth, gender, status, class or religion are unacceptable. Nobody shall be discriminated against because of his/her disability. The Republic (federation, Länder and local authorities) is committed to ensuring equal treatment of disabled and non-disabled persons in all areas of everyday life.
  
  (2) The federal government, the Länder and local authorities commit themselves to the equal treatment of men and women. Measures to promote the actual equality of women and men, particularly by eliminating actually existing inequalities, are admissible.

- **Employment**
  
  BEinStG, Section 7b
  
  (1) Nobody shall be discriminated against directly or indirectly in the context of an employment relationship [...].
  
  [...]  

- **Hidden (indirect discrimination)**
### Analysis of the legal implementation of CRPD and CRC rights and principles

<table>
<thead>
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<th>National legislation (translated in English)</th>
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| **BGStG** Section 5(2)**
It is an indirect discrimination if seemingly neutral provisions, criteria or procedures as well as features of designed life areas may disadvantage persons with disabilities in comparison to other persons in a special way, unless the provisions, criteria or procedures as well as features of designed life are objectively justified by a legitimate objective and the means to achieve this objective are appropriate and necessary. | |
| **Accessibility**
BGStG Section 4
Nobody shall be discriminated against directly or indirectly on the grounds of a disability. | |

### Evolving capacities of the child

| 4th Constitutional Law on Children’s Rights
Article 4
Every child has the right to adequate participation and consideration of his/her opinion in all matters affecting the child, in a manner that is appropriate in light of his/her age and development. | Effective implementation
The principle has constitutional status. It is complemented by provisions in the Civil Code and the Juvenile Court Act. |
| **Civil Code**
Section 160(3)
(3) The parents shall also take into account the child’s will in matters of care and education insofar as this is not opposed to the child’s best interests or their living conditions. The will of the child is the more decisive the more he/she is able to understand the reason for and meaning of a measure and is able to form his/her will based on this understanding. | |
### Analysis of the legal implementation of CRPD and CRC rights and principles

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<tr>
<td>The minor child has to obey the instructions of the parents. When giving instructions and enforcing them the parents shall take the age, the development and the personality of the child into account.</td>
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**Section 172**  
If a child that has the capability of discernment and of making a judgment has expressed his/her opinion regarding his/her education to his/her parents without success, he/she can turn to court. The court shall take the adequate decision with regard to the best interests of the child after careful consideration of the arguments brought forward by parents and child.

**Section 173(1)**  
(1) Consent to medical treatments can only be given by the child himself/herself if it has the capability of discernment and of making a judgement; in case of doubt such capability is assumed for minors of age. In case of lacking capability of discernment and of making a judgement, the consent of the person responsible for legal representation in matters of care and education is required.

**Juvenile Court Act**  
Section 4(2)  
§ 4. (1) Minors who commit a punishable act, shall not be punishable.

(2) A juvenile who commits a punishable act is not punishable if

1. he/she is for some reason not yet mature enough to see the injustice of the offence, or to act on this insight, or

2. he/she commits an offence before the completion of the sixteenth year of life, there is no serious guilt and not for specific reasons the application of juvenile justice is necessary to prevent the juvenile from criminal acts.
### Analysis of the legal implementation of CRPD and CRC rights and principles

#### National legislation (translated in English) | Comments/assessment on the implementation

<table>
<thead>
<tr>
<th><strong>Right of the child to be heard/right to participate</strong></th>
<th>Effective implementation</th>
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<tr>
<td><strong>4th Constitutional Law on Children’s Rights</strong></td>
<td>The principle has constitutional status. It is complemented by provisions in the Civil Code, criminal law, and other ordinary acts.</td>
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<tr>
<td>Article 4</td>
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<tr>
<td>Every child has the right to adequate participation and consideration of his/her opinion in all matters affecting the child, in a manner that is appropriate in light of his/her age and development.</td>
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<tr>
<td><strong>StGG</strong></td>
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<td>Article 13</td>
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<tr>
<td>Anyone has the right to freely express their opinion orally, in writing or in print, or by visual means within the limitations defined by law.</td>
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<tr>
<td><strong>Civil Code (ABGB)</strong></td>
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<tr>
<td>Section 181(1), (2)</td>
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<td>(1) If the parents’ behaviour puts the best interests of the minor child at risk, the court shall, independently of the person bringing the matter before it, take the necessary decisions to protect the best interests of the child. [...]</td>
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<tr>
<td>(2) Such decisions may be requested by [...] by the minor child of age himself/herself but only in matters of care and education. [...]</td>
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<td>Section 187(1)</td>
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<td>(1) The child and each parent have the right to regular personal contacts, corresponding to the needs of the child. These personal contacts shall be established based on joint agreement of the child and the parents. If such joint agreement cannot be reached, the court shall, upon request of the child or one parent, lay down the arrangement of such contacts and related obligations in the</td>
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<td>best interest of the child. [...]</td>
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<tr>
<td>Section 172 - as above in ‘Evolving capacities of the child’</td>
<td></td>
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<tr>
<td>Section 196(1) point 1</td>
<td></td>
</tr>
<tr>
<td>(1) The right to be heard exists for:</td>
<td></td>
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<tr>
<td>1. the not legally competent child from the age of five years, unless s/he has been living with the adopting person since then; [...]</td>
<td></td>
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<tr>
<td><strong>StPO</strong></td>
<td></td>
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<tr>
<td>Section 66(1) point 7</td>
<td></td>
</tr>
<tr>
<td>(1) Victims have – irrespective of their position as civil party – the right to</td>
<td></td>
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<tr>
<td>7. be present during the main sittings, interrogate the accused, witnesses and experts, and to be heard on their claims,</td>
<td></td>
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<tr>
<td>Section 6(2)</td>
<td></td>
</tr>
<tr>
<td>(2) Each party of a process or person subject to coercive measures has the right to be heard in a legally adequate way and to be informed about reason and purpose of the process he/she is involved in, as well as on his/her main rights during the process. The accused has the right to be informed about all causes for suspicion against him/her and to be provided with the full opportunity to eliminate those and to justify himself/herself.</td>
<td></td>
</tr>
</tbody>
</table>

**Act amending the Austrian Electoral Law (Wahlrechtsänderungsgesetz) 2007**

Section 21(1)
Eligible to vote are all men and women who have the Austrian citizenship, who have completed the 16th year of age on the day of the elections and who have not been deprived of the right to vote.
### Analysis of the legal implementation of CRPD and CRC rights and principles

#### National legislation (translated in English) | Comments/assessment on the implementation

#### Right to be free from violence

**4th Constitutional Law on Children’s Rights**

<table>
<thead>
<tr>
<th>Article 5</th>
<th>Effective implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Every child has the right to violence-free education. Corporal punishment, the infliction of mental suffering, sexual abuse and other ill-treatment are prohibited. Every child has the right to protection from economic and sexual exploitation.</td>
<td></td>
</tr>
<tr>
<td>(2) Every child being victim of violence or exploitation has a right to adequate compensation and rehabilitation. Details are determined in the laws.</td>
<td></td>
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</tbody>
</table>

**Civil Code**

<table>
<thead>
<tr>
<th>Section 137(2)</th>
<th></th>
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</thead>
<tbody>
<tr>
<td>(2) Parents shall foster the well-being of their minor children and provide care, security and a thorough education for them. Exerting any violence or inflicting physical or mental suffering is prohibited. If adequate and feasible, parents should assume custody conjointly.</td>
<td></td>
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</tbody>
</table>

**StGB**

<table>
<thead>
<tr>
<th>Section 92</th>
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</thead>
<tbody>
<tr>
<td>(1) Whoever inflicts physical or mental anguish on another person who [...] is defenceless because of [...] an intellectual disability, shall be punished with imprisonment of up to three years.</td>
<td></td>
</tr>
<tr>
<td>Section 107b</td>
<td></td>
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<tr>
<td>(1) Whoever continuously exercises violence on another person over a longer period of time, shall be punished by imprisonment of up to three years.</td>
<td></td>
</tr>
<tr>
<td>(3) A sentence between six months and five years applies to whoever commits the crime against a person who is defenceless due to a mental disability.</td>
<td></td>
</tr>
</tbody>
</table>
## Analysis of the legal implementation of CRPD and CRC rights and principles

<table>
<thead>
<tr>
<th>National legislation (translated in English)</th>
<th>Comments/assessment on the implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td>(4) Whoever commits a crime pursuant to para 3 in a painful manner or who repeatedly commits crimes against the sexual self-determination and integrity in the context of a continued execution of violence pursuant to para 3, shall be punished by imprisonment from one to ten years. In case a crime pursuant para 3 results in an assault with serious permanent consequences (Sec 85) or in case the violence according to para 3 is executed for more than one year, the offender shall be punished by imprisonment from five to fifteen years. In case the violence results in the death of the injured person, the offender shall be punished by imprisonment between ten to twenty years.</td>
<td></td>
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</tbody>
</table>

### Right to family life

#### 4th Constitutional Law on Children’s Rights

<table>
<thead>
<tr>
<th>Article 2(1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Every child has a right to regular personal relationships and direct contact to both parents, unless this is contrary to his/her interests.</td>
</tr>
</tbody>
</table>

**Effective implementation**

The right is safeguarded by the 4th Constitutional Law on Children’s Rights and the Civil Code. The latter, in particular, attaches great importance to the right to family life. The right of the child to maintain a relationship with his/her parents is ensured by the legislation.

#### Civil Code

<table>
<thead>
<tr>
<th>Section 186</th>
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</thead>
<tbody>
<tr>
<td>Each parent of a minor child shall maintain a personal relationship with the child including personal contacts (§ 187).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section 187(1) – see above ‘Right of the child to be heard’</th>
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<table>
<thead>
<tr>
<th>Section 179</th>
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</thead>
<tbody>
<tr>
<td>(1) If the marriage or the common household of the parents is dissolved, the parental authority of both parents is maintained. [...]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section 180 – see above ‘Best interests of the child’</th>
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</thead>
</table>

<table>
<thead>
<tr>
<th>Section 163</th>
</tr>
</thead>
</table>
### Analysis of the legal implementation of CRPD and CRC rights and principles

<table>
<thead>
<tr>
<th>National legislation (translated in English)</th>
<th>Comments/assessment on the implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Neither a minor child nor the parents can consent a medical intervention which leads to a permanent loss of the capacity of reproduction of the minor child.</td>
<td>Effective implementation</td>
</tr>
</tbody>
</table>

**Right to assistance**

**4th Constitutional Law on Children’s Rights**
Article 1
Every child with a disability has got a right to protection and care that is adapted to his/her special needs.

**Family Compensation Act**
Section 8(4)
The family compensation monthly increases for every child who has a significant disability [...].

**Federal Disability Act**
Section 18
The Federal Office for Social Affairs and Disability Matters shall advise on the aid that is available on the Austrian market for persons with disabilities.

**Salzburg Disability Act**
Section 1
(1) The Disability assistance has the duty to support persons who are not able to live an independent life from their own forces according to this Act.
(2) The Disability assistance includes the rehabilitation assistance and the social services for persons with disabilities.

Section 5
(1) In the context of rehabilitation assistance may be provided depending on the requirements of the specific case:
Analysis of the legal implementation of CRPD and CRC rights and principles

<table>
<thead>
<tr>
<th>National legislation (translated in English)</th>
<th>Comments/assessment on the implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Treatment (§ 6);</td>
<td></td>
</tr>
<tr>
<td>b) the provision of prostheses, orthopedic appliances and other aids (§ 7);</td>
<td></td>
</tr>
<tr>
<td>c) assistance for education and schooling (§ 8);</td>
<td></td>
</tr>
<tr>
<td>d) assistance for the vocational integration (§ 9);</td>
<td></td>
</tr>
<tr>
<td>e) support for social inclusion (§ 10);</td>
<td></td>
</tr>
<tr>
<td>f) support for social care (§ 10a);</td>
<td></td>
</tr>
<tr>
<td>g) help with protected work (§ 11).</td>
<td></td>
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</tbody>
</table>

(2) There is no right to a particular measure or type of integration assistance.

**Right to education (including inclusive education)**

**Compulsory Schooling Act**

Section 2
Mandatory schooling begins on 1 September following the completion of the sixth year of age.

Section 3
Mandatory schooling is nine school years long.

Section 8a (1)
(1) School-age children with special educational needs (§ 8 para. 1) are entitled to compulsory education either in special school suitable for their needs or in a special education class or in an elementary school, secondary school, New Middle School, Polytechnic School, lower cycle of a

Effective implementation
Mandatory schooling applies to all children. The School Organisation Act provides that, taking the principle of social integration into account, all types of school must provide an education to children with special needs that corresponds to the education provided in a special school while aiming to achieve the tuition
### Analysis of the legal implementation of CRPD and CRC rights and principles

<table>
<thead>
<tr>
<th>National legislation (translated in English)</th>
<th>Comments/assessment on the implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td>general secondary school or housekeeping school that meets the special educational needs where such schools (classes) are in place and the way to school is reasonable or attending school is possible because of a boarding possibility in an institution attached to the school attached or an otherwise suitable boarding institution.</td>
<td>goals of the respective school. Parents of children with disabilities are free to choose between mainstream schools and special schools.</td>
</tr>
</tbody>
</table>

**School Organisation Act**

Section 9(3)
The objective of the elementary school in the 5th until 8th grade (secondary level) is to provide a basic general education and to enable the pupils according to their interests, talents, gifts and ability to enter professional life and to the transition to middle schools and high schools. In compliance with the principle of social integration, pupils with social educational needs shall be provided with an education that is equivalent to the task of the special school (§22), with the learning requirements of the pupil must be sought in accordance with the teaching goals of the 'Volksschuloberstufe'.

Similar provisions regarding other school forms in Sections 15(3), 21a, 29(2), 39(3).
### ANNEX 2 – STATISTICAL INFORMATION

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of violation(^{251})</th>
<th>Violence</th>
<th>Gender discrimination</th>
<th>Other discrimination</th>
<th>Criminal suspects</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2010</td>
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<td>2012</td>
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<tr>
<td>2013</td>
<td></td>
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</tbody>
</table>

No relevant statistical information has been identified by the expert.

\(^{251}\) Cases reported to any relevant body; depending on the availability of data.
ANNEX 3 – STUDY ON MEMBER STATES' POLICIES FOR CHILDREN WITH DISABILITIES - EXECUTIVE SUMMARY

- There are about 100 million children in the European Union and about 80 million European persons with disabilities. While the number of children and the number of persons with disabilities is well documented, the same cannot be said of children with disabilities. Children with disabilities combine different factors of vulnerability. As children the protection of their rights requires the adoption of special measures that are recognised by the UN Convention on the Rights of the Child (CRC). As individuals with disabilities, they are particularly vulnerable EU citizens who deserve specific safeguards and protection as acknowledged by the UN Convention on the Rights of Persons with Disabilities (CRPD).

- Children with disabilities and their families face on a daily basis specific problems such as the lack of assistance and support for their inclusion in schools, experiences of violence and the lack of proper tools for reporting them, difficulties in accessing buildings or services or troubles in being heard and participating in decisions affecting their lives.

- The Conventions include provisions addressing these concerns and providing protection to the right to enjoy all human rights and freedoms with no discrimination ensuring
  - equality of opportunities and accessibility,
  - the best interests of the child as a consideration in all actions concerning them,
  - the evolving capacities of children with disabilities as a consideration in decisions affecting them,
  - the right to be heard in proceedings and decision-making processes affecting the child and the right to a full and effective participation,
  - the right to family life,
  - the right to effective access to education and inclusive education,
  - the right to health care,
  - the right to assistance, and
  - freedom from violence.

- This study is structured to mirror the requirements of both conventions reflecting the main rights of children with disabilities to be implemented generally in the EU due to the high rate of ratification by EU Member States. Moreover, in December 2010, the European Union became a party to the CRPD. In doing so, the EU recognised the challenges persons with disabilities face in securing the fulfilment of their rights and assumed the responsibility for its implementation alongside Member States. The EU's responsibility towards the implementation of the CRC is of a different scale. Despite the lack of ratification by the EU, the CRC rights and principles guide the EU policies and action since the Treaty recognizes the rights of the child as an EU objective.

- This study assesses the current situation with respect to the rights of children with disabilities in the EU and the need for EU legislation or for other measures. The options to act at EU level are framed within the extent of the competences conferred by the Treaties, which can be exclusive, shared or supporting competences (Article 2 TFEU).

- The current EU legislative and policy framework give recognition to the Conventions' rights and principles applicable to children with disabilities and a certain degree of
implementation. However, the existing EU legislation relevant to this area is mainly sectoral (i.e., employment or immigration). The legislation addresses the situation of persons with disabilities separately from the rights of the child, whereas there is a need to consider children with disabilities as they face multiple discrimination, on the basis of age as well as disability, and to tailor measures to ensure that their rights are respected.

A. Comparative analysis of national legal frameworks

- The comparative analysis of the national legal frameworks on children with disabilities' rights in 18 Member States\textsuperscript{252} is based on a set of criteria developed to enable an assessment of comparable data reported in each national study. The criteria are based on the requirements within each right and principles identified as pertinent to the situation of children with disabilities.\textsuperscript{253} The criteria are derived from the text of both conventions and the CRC General Comments on their interpretation.

- Overall, the 18 Member States have in place comprehensive legal frameworks reflecting the main aspects of the rights and principles identified under the CRPD and CRC. While it may be stated that the rights of children with disabilities are broadly recognised under national legal systems either through general or specific legislation, their practical implementation revealed to be problematic in most Member States.

- Consideration of the principle of best interests of the child is generally recognised under national laws. However, implementation is mostly limited to family and social protection decisions affecting children and the specific needs of children with disabilities are not recognised. The country studies found a lack of understanding of what the principle entails, along with insufficient development of the concept through law or jurisprudence and an overall lack of implementing rules.

- The right to non-discrimination based on disability or age is reflected in national legislations, however, the implementation of the right is generally only partial and the reasonable accommodation measures are generally insufficient to guarantee the right. In practice, accessibility remains a key problem in most Member States. Reference to the multi-discrimination factors faced by children with disabilities or girls with disabilities is rarely acknowledged. There is a lack of monitoring results and of data on cases of rights' violations that could help define more effective measures.

- Most countries partially take account of the evolving capacities of the child mainly on the basis of considerations of age, maturity and development of the child. However, the situation of children with disabilities is not specifically acknowledged. The implementation is limited to a certain type of decisions and Member States tend to primarily take into consideration the child's age, which for children with disabilities may not be relevant and which can effectively exclude them from decision making processes that affect them.

\textsuperscript{252} For the first phase of this study, 18 selected Member States legal frameworks have been analysed: Belgium, Czech Republic, Estonia, Finland, France, Austria, Greece, Hungary, Italy, Ireland, the Netherlands, Malta, Poland, Romania, Slovenia, Spain, Sweden and the United Kingdom. Those countries have been selected by the European Parliament in the Terms of Specifications of this study.

\textsuperscript{253} 8 rights and principles have been identified as most relevant to the situation of children with disabilities: the best interests of the child, the right to non-discrimination, the consideration of evolving capacities, the right to participation/to be heard, the right to be free from violence, the right to family life, the right to assistance and the right to education.
• The **rights to participation and to be heard** in decision making processes affecting children with disabilities are recognised under the legislation of the 18 Member States. However, their implementation is often limited to some sectoral procedures mostly regarding family law and at a certain extent in education. In practice, children with disabilities are not systematically involved and do not get to participate in public and private life at the same level than their able-peers.

• In general **freedom from violence** is recognised by Member States’ legislation. However, abuse against children with disabilities is a key problem acknowledged in all country reports. Violence occurring in institutions is of particular concern. The lack of systematic data and the difficulty for victims to report abuses do not allow an overview of the situation needed for the adoption of appropriate policies and measures.

• The **right to family life** is widely recognised in the laws of the selected Member States. However, insufficient guidance and support to families for the integration of the child with disabilities and for helping them in their day to day lives is a key problem in most of the 18 Member States. Without proper assistance, families with difficulties might give up on their responsibility leading to a situation where alternative options are unlikely and institutionalisation is the only response available.

• Overall the right to various forms of **assistance** (financial, social, health care, etc.) both for children with disabilities and for their families is recognised in legislation or regulatory rules. However, again in most cases assistance is sectoral (mainly social and health) and insufficient (financially and human assistance). The economic crisis is contributing to the removal and reduction of assistance in most Member States. Access to assistance is often perceived not as an instrument enabling protection of rights but rather as a discretionary measure subject to budget constraints.

• All Member States recognise the **right to education** in their Constitutions or legal frameworks; however, the ability to access the school of choice for children with disabilities remains very challenging in practice. Mainstream schools remain largely inaccessible to children with disabilities in many Member States, while in other countries schools have insufficient resources and support for the child with disabilities is scarce. In addition, teachers in mainstream schools lack training and awareness on the needs of children with disabilities and programmes are not systematically adapted to them.

• **Compliance mechanisms** are weak and lack adaptation to the situation of children with disabilities. Lack of information and guidance to families with children with disabilities on their rights, procedures and competent authorities decreases their ability to access these tools.

• On the basis of these findings, the study sets forth conclusions and recommendations for EU action, taking into account the competence of the EU conferred by the Treaties on a range of policy areas, including disability and children's rights.

**B.1 The role of the European Union**

• The EU has no explicit competence on children with disabilities. However the EU framework contains provisions recognising the EU’s role to promote the protection of the rights of the child as an EU objective as well as its competence to combat discrimination based on disability. Furthermore, the Charter of Fundamental Rights of the European Union, with similar legal value as the Treaties, recognises the right to
non-discrimination on ground of disability in Article 21 and the rights of the child under its Article 24. This recognition, while important, cannot extend the competences of the EU as conferred by the Treaties.

- The EU, together with Member States in areas of shared competence or national competence, is bound by the CRPD obligations and is required to take the necessary measures to combat discrimination on the grounds of disability within the framework of Article 19 TFEU or in other matters falling within EU competence. Article 19(1) TFEU provides the legal basis for EU action (see among others the proposal for equal treatment Directive of 2008\textsuperscript{254}) but the unanimity requirement makes achieving agreement under this legal base difficult. Article 19(2) provides the possibility for the EU to adopt basic principles and incentive measures to support Member States’ action to combat discrimination through the ordinary legislative procedure.

- Neither the above mentioned proposal for an equal treatment Directive nor any other EU measures provide for a definition of disability. Prior to the adoption of the CRPD, in a judgment in July 2006, the Court of Justice of the European Union (CJEU) defined disability in the same sense as the CRPD within the context of employment policy as ‘a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life’.\textsuperscript{255} Recently, the CJEU has further developed this concept\textsuperscript{256} stating that disability results from barriers hindering the full and effective participation of the person concerned in professional life on an equal basis with other workers and calling on the employer to take reasonable accommodation measures.

- EU action is also possible when linked to other policy areas of EU competence. Several issues related to the rights of the child with disabilities are linked to EU policies such as social policy, economic, social and territorial cohesion, transport, freedom, security and justice all of which are shared competence. In addition, the EU has the option to take action to support Member States policies in a number of areas affecting children with disabilities such as education, sports, youth or health.

**B. 2 Existing relevant EU secondary legislation**

The best interests of the child as primary consideration in actions relating to children is a fundamental requirement recognised in EU legislation. Article 7 of the Mediation Directive 2008/52\textsuperscript{257} requires the mediator to take into account the best interests of the child when deciding whether the child can give evidence in judicial proceedings. The Family Reunification Directive\textsuperscript{258} requires Member States’ authorities to consider the best interests of children when examining an application for family.


\textsuperscript{255} Judgment C-13/05 of the Court (Grand Chamber) of 11 July 2006, Sonia Chacón Navas v Eurest Colectividades, pt 43.

\textsuperscript{256} Judgment of the Court, Joint cases C-335/11 and C-337/11 of 11 April 2013, HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S (C-337/11), pt 47.

\textsuperscript{257} Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

reunification (Article 5)\textsuperscript{259}. The protection of the best interests of the child is explicitly mentioned in Council Directive 2004/81/EC\textsuperscript{260} on victims of trafficking in human beings.

- **Non-discrimination** at EU level is currently addressed by four EU Directives to combat discrimination on the basis of protected grounds such as sex, racial or ethnic origin, religion or belief, age and sexual orientation, most of them restricted to the area of employment.\textsuperscript{261} They lay down rules for combating discrimination (…) with a view to putting into effect in the Member States the principle of equal treatment.\textsuperscript{262} Disability is recognised as grounds for discrimination under Directive 2000/78/EC and, furthermore, protection of equality between men and women in matters of employment and occupation under Directive 2006/54/EC applies to persons with disabilities. Directive 2000/43/EC on equal treatment between persons irrespective of racial or ethnic origin does not include disability as a protected ground. Directive 2004/113/EC on equal treatment between women and men in access to supply of goods and services refers to discrimination on grounds of sex but not on age or disability.

- The European Commission has acknowledged the differences of protection provided across the various grounds and published a proposal for a Directive in 2008 aiming at completing the legal framework on anti-discrimination law and providing for a more equal level of protection across the grounds\textsuperscript{263}.

- Other measures in policy areas such as the internal market or transport have an impact on children with disabilities’ access to services with no-discrimination. For example, Directive 2001/85/EC on the carriage of passengers, requires accessibility features for persons with reduced mobility and visually impaired persons. Other instruments cover rights of persons with disabilities when travelling by air, accessibility to lifts, in carrying out public procurement or in measures for telecommunication\textsuperscript{264}.

- Within the remit of its competences, the EU’s action to combat discrimination is complemented with activities by the EU Institutions to improve knowledge about discrimination (e.g. by raising awareness), support intermediary actors (e.g. NGOs, social partners and equality bodies) to improve their capacity to combat discrimination and to encourage the exchange of national good practices.

- The consideration of children’s evolving capacities is recognised in the Brussels IIbis Regulation 2201/2003 which requires courts to hear the view of the child according to


\textsuperscript{260} Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who has been the subject of an action to facilitate illegal immigration.

\textsuperscript{261} Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast directive); Directive 2004/113/EC on the principle of equal treatment between women and men in the access to and supply of goods and services; Directive 2000/43/EC on the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

\textsuperscript{262} Article 1 Directive 2000/43/EC.

\textsuperscript{263} Proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)426). It is currently blocked in the Council.

his/her age or degree of maturity. The same formulation is found in EU legislation concerning immigration and asylum in relation to unaccompanied minors.

- **Children's right to participation** is recognised in some Commission strategic documents including the 2005 ‘European policies concerning youth’, the 2006 ‘EU strategy on the rights of the child’, the Youth in Action Programme and the EU Agenda for the Rights of the child of 2011. EU legislation on immigration and asylum recognise the right of the child to be heard during proceedings under the Brussels IIbis Regulation 2201/2003.

- The EU has adopted a number of measures on the **protection of children from violence** relating to child trafficking, to the sexual exploitation of children and to the protection of victims including some Directives that have been adopted to replace some of these instruments. For example, the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, focus on the protection of children which are more vulnerable than adults and establishes more severe Criminalties when the offence is committed against vulnerable persons such as children and persons with disabilities.

- The Directive 2012/29/EU establishing minimum standards on the rights, support and protection of the victims of crime recognises that a victim of crime should be treated without discrimination based on any ground including age and disability. Lastly, Directive 2011/92/EU on combating sexual abuse, the sexual exploitation of children and child pornography267 provides the need for specific protection of children with disabilities.

- **The right to family life** and the maintenance of the child in family context is at the heart of Council Regulation 2201/2003 Brussels IIbis (EC)268. In the field of immigration policies, the right of the child to family life is ensured by the rules on family reunification269 and the provisions of the Directives on asylum270 regarding unaccompanied minors and the respect for the family unit.

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267 Article 1 Directive 2011/92/EU.


The principle of **maximum inclusion in society** of children with disabilities is reflected in strategy documents such as the Disability Strategy 2010-2020\(^{271}\) and the EU 2020 Programme in relation to education and training\(^{272}\). The 2003 Council Resolution on equal opportunities for Pupils and Students with Disabilities\(^{273}\) addressed the problem of access to education by children with disabilities. In 2010, the Resolution of the European Parliament on mobility and inclusion of children with disabilities\(^{274}\) stressed the need to ensure full respect for the rights of the child, including the right to education and the right to participate in community life of children with disabilities. The EU Institutions also support the **European Agency for Development in Special Needs Education**, the independent organisation acting as a platform for collaboration on special educational needs and the promotion of full participation within mainstream education and training\(^{275}\).

### C. Recommendations for EU action

- When evaluating the need for specific recommendations aimed at improving the situation of children with disabilities, it is important to highlight that children with disabilities are first and foremost children with the same needs as any other children and who should be beneficiaries of all rights recognised by the CRC. Their intrinsic difference with their peers needs to be recognised for designing appropriate legislative and policy measures.

**Horizontal issues**

- As a first and general recommendation, all EU Member States which have not already done so should ratify the two conventions referred to in this study and implement their provisions by adopting national legislation and ensuring its practice.

- The European Commission, liaising with the UN Secretariat for the CRPD and the UN Secretariat for the CRC, should ensure Member States understanding and implementation of several definitions of the Conventions that are cornerstones for the implementation of the rights of children with disabilities, namely the definition of “disability”, the “best interests of the child” and the “evolving capacities of the child”. They should lead the development of initiatives to ensure that the specificities of children with disabilities are taken into account.

- To that end, it is recommended that the Commission takes the initiative to provide clarification at EU level of the CRDP definition of “disability” as it is considered to be too broad in practice and its implementation at national level is therefore difficult. The development of guidance documents, exchange of best practices and promotion of existing manuals are recommended.
• The European Commission should take action to promote that children with disabilities are considered in existing mainstreaming initiatives for non-discrimination and equal treatment.

• The EP, the Council and the Commission should promote the development of national information tools to assist families with children with disabilities to understand the legal frameworks applicable to them, including access to assistance measures, competent authorities, procedures and compliance mechanisms. Specific tools addressed to these families could include an EU web portal which could be linked, where possible, to national portals providing full information on rights, requirements, criteria for implementation, competent authorities, and coordination systems. This initiative could bring citizens closer to the EU.

• The EU Institutions should take a leading role in promoting awareness-raising on issues concerning the rights of children with disabilities, their interests and specific needs in order to promote the full implementation of the principle of best interests of children with disabilities. The EP and the Council could also use their budgetary powers to provide for financing of awareness-raising campaigns.

**Best interests of the child**

• While most countries have legislation recognising the principle of best interests of the child, only few Member States contain in their legislation a general requirement for its systematic consideration in all decisions affecting children. Some Member States (such as Sweden and the UK) have introduced child impact assessments of proposed legislation. It is recommended that the European Commission promotes the exchange of these initiatives and develops a guide on methodologies for carrying out these child impact assessments implementing the best interests of the child principle.

**Right to non-discrimination**

• The concept of reasonable accommodation in relation to the specific situation of children with disabilities needs clarification and further development to define the boundaries for the use of disproportionate burden. The EU, through the Commission, could support this through exchange of best practices at national level on the implementation of reasonable accommodation covering different situations. This would help defining the baselines from which the respect of the right requires public authorities’ action and prevents it from being subject to arguments of disproportionate costs.

• The 2008 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, if adopted, has the potential of addressing the situation of children with disabilities. Amendment 37 introduced by the European Parliament refers to multiple discrimination. Within this context, clarification could be introduced in the recitals of the proposed Directive in order to ensure that the situation of children with disabilities is considered as a part of its scope.

• The European Commission's draft for an upcoming European Accessibility Act should explicitly cover children with disabilities' access to goods and services, at least with a reference to multiple discrimination cases.
Evolving capacities of children with disabilities

- The EP should consider ways to raise awareness and promote taking into account the evolving capacities of children, including children with disabilities, with the aim to have the principle applied in all decision making processes affecting them.
- Any new legislation on child-friendly justice should include consideration of the ability of the child with disabilities to be heard in judicial proceedings affecting them. The Commission should ensure that these provisions are included in the anticipated EU law on special safeguards for suspected or accused persons who are vulnerable, including children, or the anticipated EU law for the recognition and enforcement of decisions on parental responsibility.
- Furthermore, it is recommended that the European Commission, the Council and the EP promote the use of the Council of Europe Guidelines on child-friendly justice and support training for the relevant professionals at all levels.

Right of participation of children with disabilities

- The anticipated European Accessibility Act could provide for the development of tools to ensure the participation of children with disabilities in the consultation processes of the legislative and policy initiatives affecting them.
- The EP should explore ways to raise awareness on the requirements needed to ensure the right of participation of children with disabilities through concrete measures such as simulation of plenary meetings in the EP involving children with disabilities, guaranteeing physical access to the EP buildings or designing tools to ensure nonphysical participation.

Right to be heard of children with disabilities

- In order to enable effective implementation of the right to be heard by children with disabilities, changes in the attitudes of judicial, administrative and enforcement officers are needed. To that end, the EP, the Council and the Commission should encourage Member States to develop awareness-raising actions and training addressed at public authorities.
- The Commission in preparing legislation on child-friendly justice, should ensure that adequate steps are taken to identify the ability of the child to express his/her views in judicial proceedings affecting them, enabling a climate of trust between the child and the judicial and enforcement officers and providing reasonable accommodation to ensure the effective right to be heard of children with disabilities.

Freedom from violence

- It is recommended that the EP, the Council and the Commission promote the development of statistical information on the situation of violence affecting children, and in particular children with disabilities. Furthermore, they should promote the development of indicators (such as disability, children, girls, family environment) to be mainstreamed in other policy or general surveys so as to provide systematic data on the situation of children with disabilities.
- The European Commission and the EP should promote FRA to examine the situation of violence against children, particularly in institutions, including children with disabilities.
as they are particularly vulnerable. The necessary funding should be proposed to the budgetary authority.

- The European Commission should consider in particular the need for measures at EU level aimed at reducing the number of cases of violence against children, especially children with disabilities, in Member States (both in a domestic context and in public institutions). The Commission could start preparatory work by organising working groups with Member States experts to consider:
  - proposals for ensuring that Member States set up preventive measures and proper monitoring systems to detect cases of violence and abuse against children,
  - the set up of control mechanisms and regular inspections,
  - peer reviews or the Open Method of Coordination for implementation of proposals,
  - access to information and communication services targeted at improving the system of complaints concerning children's right to freedom from violence.
- The Commission could promote the organisation of specialised EU-wide training and workshops amongst professionals to share knowledge on complaint procedures, reporting measures and accessibility of communication services for children with disabilities, especially for children with severe disabilities or intellectual impairments. The budgetary authority should provide adequate funding for these activities.

**Right to family life of children with disabilities**

- The Commission, the Council and the EP should encourage Member States to set up appropriate support structures for families with children with disabilities in order to reduce the risks of the child losing family life while safeguarding the best interests of children with disabilities.
- Within the Open Method of Coordination, the Commission should develop Guidelines on minimum requirements of residential institutions with regards to children with disabilities. The Guidelines would aim at ensuring that residential care centres have a small number of users and the capacity to host children with autism or with intellectual disabilities.
- The Commission should propose to the budgetary authority the use of EU funds for the protection of children's right to family life, prioritising funds for families while ensuring that the good quality of the institutions is maintained.

**Access to assistance**

- A special single national body (with regional offices) responsible for the management of services, budget and assistance of children and their families should be established in order to ensure consistency, coordination, effectiveness, increase accessibility and better guidance for families on the funding support available.
- The EP should continue to lead actions on children with disabilities to inform Member States on the negative impacts of budget cuts on implementation of their rights, especially in the field of education, social protection and health care.
- Within the European Semester process, the Commission should provide appropriate recommendations to Member States on how to use existing resources effectively instead of just cutting the necessary assistance for children with disabilities who belong to the most vulnerable citizens.
**Access to inclusive education**

- The Commission should develop actions to support Member States in improving education systems for children with disabilities through the Open Method of Coordination or peer review while respecting their general competence for matters related to education. Action at EU level could include:
  - Development of best practice guides and recommendations on the minimum type of resources needed in mainstreaming schools, and on the role of parents and children with disabilities in decision-making processes affecting children with disabilities or the development of education objectives;
  - Promotion of training for teachers on better understanding of children with disabilities' needs and evolving capacities, teaching methodologies and handling of children with specific disabilities in a class together with their able-peers;
  - Promotion of teaching tools that help the inclusion of children with disabilities in schools and outside of schools such as the Council of Europe's COMPASS manual;
  - Promotion of anti-bullying and anti-stigmatisation initiatives, including awareness-raising campaigns promoting inclusion of children with disabilities; and
  - Development of quality objectives for education offered to children with disabilities and the promotion of initiatives to maintain the support for higher education.

**EU Funding**

- The EP, the Council and the Commission should promote among Member States the use of the Structural Funds to foster the development of quality social services provided for children with disabilities, while facilitating the implementation of the Voluntary European Quality Framework for Social Services;
- The EP, the Council and the Commission should promote the development of family and community-based alternatives with the purpose of de-institutionalisation.
- The EP, the Council and the Commission should encourage the use of structural funds for improving accessibility and inclusive education.
### ANNEX 4 - OVERVIEW OF RELATED STUDIES

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