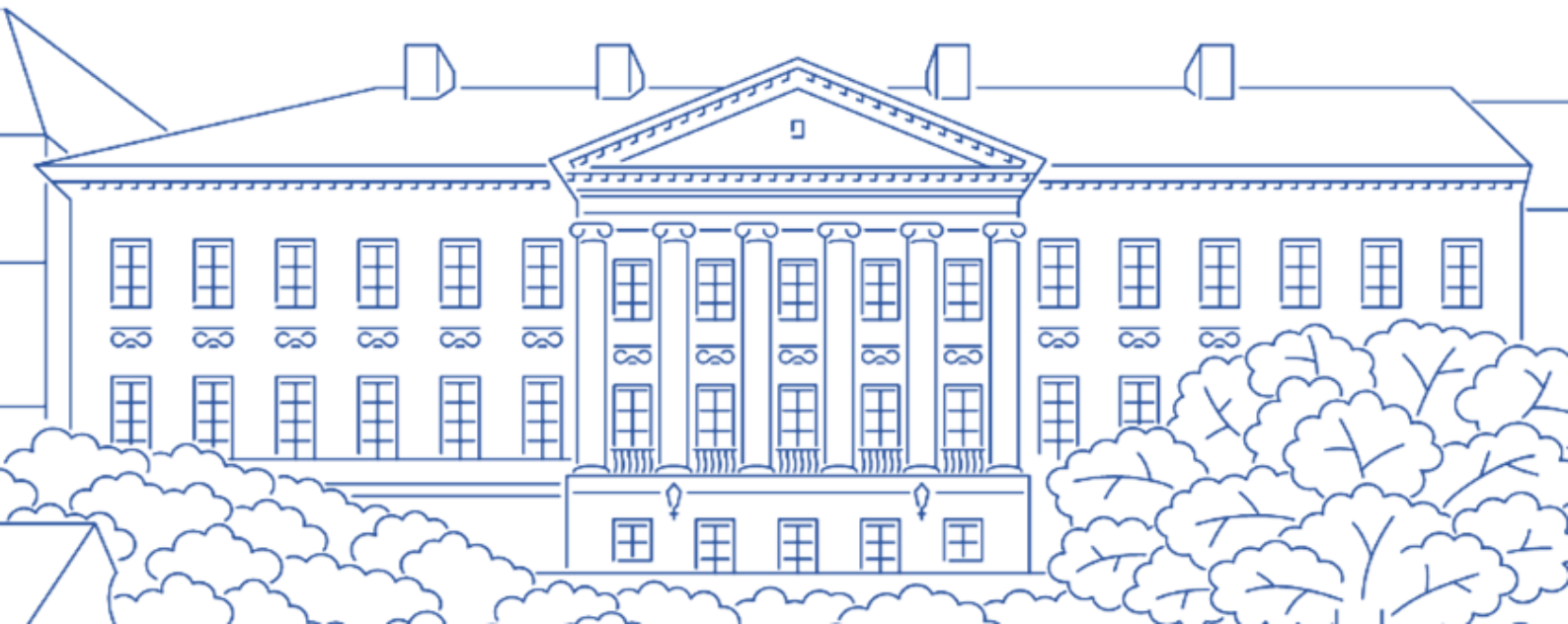
Õiguskantsler

# 2016-2017 OVERVIEW OF THE CHANCELLOR OF JUSTICE ACTIVITIES

Tallinn 2017



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Dear Reader

The main task of the Chancellor of Justice is to ensure constitutional review within the Estonian legal order: to make certain that legislation in Estonia is in conformity with the Constitution. On that basis, I assessed almost all the questions sent to the Chancellor's Office from 1 September 2016 to the end of August 2017 first and foremost on the scale of constitutionality. I also often received complaints from individuals where the underlying issue was allegedly unfair treatment and the blame laid on either the state, a city or rural municipality, a court or a bailiff, a social worker or a tax official.

The reporting year also saw a number of complicated constitutional review issues, starting from administrative reform to faster-than-planned increase in tax rates that had previously been set for years to come. Among many important proceedings that brought about a change, perhaps the most gratifying was the breakthrough in the field of 21st century work. At the Chancellor's request, the Supreme Court declared unconstitutional the norms under which a person, who at the time of losing their salaried employment was a member of the board of their temporarily inactive small business, was deprived of unemployment insurance benefit. They had paid monthly insurance premiums but upon losing their employment-related income were deprived of the benefit. The only reason was that they were listed as an entrepreneur, even though not earning any income.

In addition to saving a number of people from an unconstitutional situation, the judgment was significant more generally in terms of regulating 21st century employment relationships. It is likely to become increasingly common that people now have to do different jobs and in different forms. However, in line with the Constitution, a social safety net must still be guaranteed. This is a range of issues to which I will try to contribute as much as possible during my term in office.

Another important issue with regard to which I hope to see overall progress by the end of my mandate is dignity at the end of life. The Chancellor's inspection visits to care homes, the description of conditions there, and recommendations aimed at ensuring dignified treatment will hopefully lead eventually to the situation where the dignity of the elderly and other persons in need will also become a central issue in future election debates. The social welfare system needs additional funds, first and foremost to hire additional staff in care homes and to improve room design and functionality, but even now work in those institutions can be arranged so as to enable residents to maintain their dignity. The issue boils down to work habits, organisation of work, and attitude. Needless to say, the criticism does not apply to all. The work of carers is physically and mentally demanding,

and people who do this work with dedication deserve praise. Unfortunately, callousness can also occur. It is positive that discrimination against the elderly and the opportunity for them to be happy and dignified has become an important issue of debate in society. Perhaps the Chancellor's proceedings and initiatives have played a role in this. The special issue of the law journal Juridica, published on the initiative of the Chancellor's Office, deals exactly with these topics, the most sensitive among them being the right to give end-of-life instructions.

With regard to local government reform, an issue of direct concern for people is whether life will improve. Thus, besides assessing the constitutionality of forced mergers of local authorities, performance of statutory duties imposed on local authorities must also be assessed, e.g. whether local authorities offer all the social services ranging from disabled transport to childcare, and whether people are actually informed about the assistance available to them. Unfortunately, several cities and rural municipalities have already said that they are unable to comply with the law and provide sufficient assistance to their people. The dispute continues over the nature of local issues. In this dispute, the Chancellor defends the constitutional model, i.e. a local issue is one which can best be resolved on the level of a rural municipality or city, based on decisions by the local community and in a customised manner: provision of public services and amenities, public space, an allowance for children starting school, being an intermediary for social benefits to those in need. State-level issues must be resolved uniformly everywhere, with or without involvement of local authorities, depending on choice; in any case, funding for them must come from the state budget. Under the Constitution, neither rural municipalities nor cities are a local extension of the central government.

The Chancellor's constitutional role requires constant analysis of the development of the legal order. The only positive development here is that public debate over the intelligibility of language used in laws and documents has become more frequent. German legal philosopher Rudolf von Jhering aptly said that the legislator should think like a philosopher but speak like a peasant. It is possible for legal texts to be intelligible and in beautiful Estonian. Those who know what they want to say are also able to write it down clearly.

Direct and indirect costs resulting from unnecessary rewriting of laws are still a point of concern. Attempts have intensified to change the formula on which the balance of constitutional institutions rests, without showing why this would be necessary, and apparently without understanding the risks. Of course, the Constitution and the organisation of government may change, but this should be based on a comprehensive impartial analysis, so as to fix what is wrong.

The working principle of the Chancellor's Office is to resolve problems of constitutionality as swiftly and as well as possible, without causing additional tensions and confusion in society and without seeking public glory and praise, which for some critics seems to be particularly important. We wish to take responsibility for a better life for the Estonian people and development of society. How well we managed this during the last reporting period is for you to decide.

I wish you a pleasant reading!

Ülle Madise
Chancellor of Justice

# I. CHILDREN AND YOUNG PEOPLE

Estonia ratified the UN Convention on the Rights of the Child on 26 September 1991. Under Article 4 of the Convention, States Parties must undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention.

In Estonia, the function of the independent ombudsman for children is performed by the Chancellor of Justice. The task of the Ombudsman for Children is to ensure that all the authorities, institutions and persons that pass decisions concerning children respect the rights of children and proceed from the best interests of the child.

## 1.1. Children and sport

Parents have started paying increasing attention to issues of safety of children in sport, and are able to set increasingly higher expectations on sports clubs, trainers and competition organisers in this regard. During the reporting period, several petitioners asked the Chancellor for clarification concerning transfer fees involving children's sports clubs and safety in children's sports competitions.

### *1.1.1. Transfer fees for changing sports clubs*

Based on petitions from parents, the Chancellor initiated a discussion on whether it was justified to ask for a transfer fee when a child changes from one sports club to another. Involved in the discussion were several sports federations, the Ministry of Culture, the Ministry of Education and Research, the Estonian Youth Work Centre, the Estonian Olympic Committee, and Tallinn Sports and Youth Department.

The Chancellor found that applying transfer fees should proceed from the best interests of the child. To this end, the Chancellor made the following recommendations to sports federations and clubs:

- to ascertain the best interests of the child concerning decisions and activities affecting children and young people, and keep these interests in mind as a primary consideration in decision-making;
- to ensure that children and young people also have opportunities to train and compete while a transfer dispute between clubs is pending;
- not to use the rights of the child as a contractual guarantee or means of pressure in resolving contractual disputes;

- when entering into a contract between the sports club and a parent, explain to parents the rights and duties arising from such a contract, including the principles concerning transfer fees;
- to advise parents in the process of developing practical pursuit of sports corresponding to the needs and abilities of children and young persons;
- to develop best practices for protecting the interests of the child in sports federations and to update them as necessary.

Parents must also proceed from the best interests of the child and set aside their own ambitions when guiding a child in practising sports and choosing training courses for a child. The same principle applies when entering into a contract on behalf of a child and a young person (including a professional contract). A parent must explain the rights and duties arising from the contract in a manner understood by the child.

Meetings organised on the initiative of the Chancellor's Office also considered whether to set a minimum age limit in line with general good practice, below which no transfer fees would be imposed on children. However, in the opinion of sports federations, no minimum age limit can be set since each sport is unique. In order to become a professional athlete, children should take up sports such as rhythmic gymnastics and competitive ballroom dancing as early as the age of four. Thus, a ten-year-old child has already been practicing these sports for six or seven years.

The Chancellor invited the federations to critically assess the age limits set in their regulations, so that the system of transfer fees would also take into account the time children have contributed to training. Children must retain the right to change their sports, club and trainer without excessively formal hurdles.

### *1.1.2. Safety in sports competitions*

Several letters asked the Chancellor about the safety of sports competitions for juveniles and the liability of organisers.

In her reply, the Chancellor explained that safety at children's sports competitions can be guaranteed, first and foremost, by complying with the requirements for organising sports events, ensuring access to appropriate first aid, and the skills of trainers and instructors. Authorisation from the local authority is needed to organise a public sports event, and issuing the authorisation is regulated by local authority regulations. If necessary, a local authority may request information on how provision of first aid and reporting accidents is organised at the competition. If a competition is not public, no authorisation for a public event needs to be applied for, but this does not mean that the competition organiser has no

responsibility at all. When organising competitions, sports federations proceed from their regulations/rulebooks for competitions, and if a federation is also a member of their respective international federation, the international rules for competitions applicable for the particular sport apply to organising the competition.

Safety of children in sport can be improved through availability of relevant information, awareness of parents and trainers and competence of sports federations. An important role is played by parents, who could ask for information about the professional competence of their child's trainer, as well as about safety and first aid during competitions. In addition, safety in sport should be ensured by applying good practice. For example, an initiative of the Ministry of Education and Research led to preparation of good practice in protecting the interests of minors in sports and on transfers, based on which guidelines on better protection of children and young people in sports have been drawn up for organisers of sports activities and parents.

### *1.1.3. Competence of trainers*

In a petition to the Chancellor, one parent expressed concern about the professional skills and competence of children's trainers. In her reply, the Chancellor explained to the petitioner that the credibility and competence of all persons dealing with children is important but under the Constitution not all specialists dealing with children need have the same level of education and preparation. The law requires that trainers should have a trainer's qualification, but statutes do not prescribe the level of professional qualification for trainers and the skills required to obtain their qualification. This is decided by the professional council when setting professional standards for trainers.

If experts in a sport or the public do not find the current requirements to be sufficient, a proposal could be made to the professional council, either directly or through representative organisations, that the requirements should be revised. The Chancellor also stressed the need to keep parents better informed, so that they would show an interest in the professional skills of their child's trainer.

### *1.1.4. Financial support to sports activities*

Tallinn Sports Association 'Kalev' asked the Chancellor for an explanation concerning financial support for sports activities. The Association does not consider it right that children attending sports clubs in Tallinn, as well as their parents, are treated unequally depending on whether they are residents of Tallinn or another local authority. If the local authority for the place where a child resides

does not financially support the child's sports activity or pays support to a lesser extent than Tallinn, sports clubs are forced to ask families from those local authorities to pay a higher tuition fee than families who are residents of Tallinn.

The Chancellor replied to the Sports Association that the decision of a local authority to pay support only for its own residents and within its budgetary means is in line with the Constitution. The Chancellor added that the duties of a local authority do not extend beyond its borders. A local authority must not use its money to pay support for children and young people from other local authorities.

As a rule, payment of other types of support and provision of services from a local authority budget follows the same principle, for example as concerns social welfare benefits and services. Since by law local authorities pay sports support from their own budget, the amount of support need not be the same in every city and rural municipality but depends on the resources and preferences of each local authority.

## 1.2. Children and health

### *1.2.1. Healthcare professionals in kindergartens*

The Chancellor was asked whether a kindergarten must hire a healthcare professional. The Chancellor explained to the parent that even though the Pre-school Childcare Institutions Act establishes the position and sets out the tasks of a healthcare professional in a kindergarten, under the ministerial regulations issued on the basis of the Act the existence of a healthcare professional in a kindergarten is not mandatory.

The Ministry of Social Affairs explained that a healthcare professional in a kindergarten is not necessary because the development and health of children is monitored by a general practitioner. Kindergarten staff deal with promoting health in general, provide first aid if necessary, and notify the parent if a child falls ill.

In a memorandum, the Chancellor drew the attention of the Minister of Health and Labour and the Minister of Education and Research and the Riigikogu committees to the need to bring the Pre-school Childcare Institutions Act and the regulations issued on that basis into line with each other. The healthcare system should also be compatible with the Act. It should be unequivocally clear to parents as to who is responsible for monitoring a child's health in a kindergarten.

### *1.2.2. Health protection requirements for daily school schedules and organisation of study*

Issues concerning the study load of pupils and arranging tests at school still continue to be topical. Similarly to previous years, during this reporting year the Chancellor was repeatedly asked about implementation of the Minister of Social Affairs Regulation No 36 of 27 March 2001 "Health protection requirements for daily school schedules and organisation of study". In order to obtain an overview of the situation, the Chancellor asked schools to describe how tests are planned and what problems implementation of the regulation entails for schools.

It was found that schools were not against the requirements for arranging tests as defined in the regulation. Under the regulation, a test is defined as a written paper to check study results at the end of a quarter of a school year or upon completion of a course. In actuality, such comprehensive tests are rarely arranged.

Unfortunately, this does not allow the conclusion that the rules for protecting pupils are flawless and the practices of schools impeccable. The definition of a test in the regulation does not cover the majority of forms used for testing knowledge at schools. If a large number of smaller tests and other work requiring independent preparation fall on the same day, the load might be excessive for some pupils.

As the Ministry of Social Affairs also plans to review the regulation in the course of preparing the consolidated text of the Public Health Act, the Chancellor sent a memorandum to the Minister of Health and Labour with a summary of opinions expressed by schools with regard to test planning within the proceedings carried out by the Chancellor.

The Minister of Health and Labour convened a working group to discuss how to update the health protection requirements laid down in the regulation. Representatives of the Chancellor also participated in the working group. As a result of input by the working group, a proposal for amendments to the regulation will be presented to the Minister.

### *1.2.3. Assessment of childcare service provider activities*

The Chancellor reviewed the legality of activities by the Health Board based on a petition by a childcare service provider. The Chancellor found that the Health Board violated the requirements of the Administrative Procedure Act as it failed to provide explanations to the childcare service provider within supervisory

proceedings, failed to forward information received from the petitioner to the county government, and delayed the conduct of proceedings without justification.

For over four months the Health Board had been unable to assess whether the petitioner's childcare centre complied with health protection requirements, whereas the procedure required was a standard procedure carried out by the Health Board. The Health Board also violated the principle of equal treatment since it measured the floor temperature at the petitioner's childcare centre differently than at the premises of all other providers of the same service.

The Chancellor recommended that the Health Board should carry out the pending proceedings in respect of the petitioner without further delay and in a manner that treats the petitioner equally with all other childcare service providers.

## 1.3. Education

The Chancellor regularly receives petitions from parents of children with special educational needs and facing different problems at school. The issue is implementation of the principle of inclusive education. Sometimes a school does not have enough qualified specialists, sometimes a child with special needs experiences a reluctant attitude from the school while the school puts pressure on parents to put the child in another school or on home schooling.

### *1.3.1. Assigning a school of residence for children with special educational needs*

During the reporting year, the Chancellor assessed the constitutionality of § 3(2) of Kuressaare Town Government Regulation No 2 of 9 February 2016 "The conditions and procedure for assigning a school based on residence". Under this provision, the school of residence for the town's pupils with special educational needs is Saaremaa Ühisgümnaasium, to which pupils are referred on the recommendation of the counselling committee.

As the Chancellor understood the town's motives for laying down this procedure, she first addressed the Riigikogu cultural affairs committee and the Minister of Education and Research with a request to consider whether it would be necessary to amend the Basic Schools and Upper Secondary Schools Act, so that deviation from the rules on assigning a school of residence would be possible in the case of justified need. The Riigikogu cultural affairs committee did not support the proposal to amend the procedure.

In the Chancellor's opinion, the Act does not allow a school of residence to be assigned in the manner laid down in § 3(2) of the regulation adopted by

Kuressaare town. Since the provision of the regulation contravenes § 10(1) of the Basic Schools and Upper Secondary Schools Act and thus also the principle of legality under § 3(1) and § 145(1) of the Constitution, the Chancellor made a proposal to Kuressaare to eliminate the unconstitutional situation and either amend or repeal § 3(2) of the regulation.

Since Kuressaare did not comply with the Chancellor's proposal, the Chancellor filed an application with the Supreme Court. The Supreme Court did not grant the Chancellor's application, finding that under § 49(3) (first sentence) of the Basic and Upper Secondary Schools Act a decision should be made on a case-by-case basis in respect of each pupil with special educational needs on whether it is possible to organise a pupil's study in their school of residence. That decision can be made after a school of residence has been assigned to the pupil and the counselling committee has made a recommendation concerning organisation of the pupil's studies. However, in the court's opinion this does not allow the conclusion that a local authority may not lay down in a legislative act which of the measures recommended by the counselling committee would be implemented in which schools within its administrative boundaries.

### *1.3.2. Home schooling of pupils with special needs*

During the reporting year, the Chancellor was contacted by several parents who were dissatisfied that, when problems at school arose, they were pressured to put their child on home schooling.

In the case of one school, the Chancellor also found a specific violation with regard to referral of the pupil to home schooling. In her recommendation, the Chancellor drew the attention of the school to the fact that home schooling is an educational model operating completely on the initiative and at the discretion of a parent, where the parent bears the main responsibility for organising tuition (including financing tuition taking place outside the school) as well as for the learning outcome. A school may not pressure a parent or other legal representative of a pupil to apply for home schooling.

Home schooling must not be used to drive a pupil with behavioural problems away from school. Different support measures and sanctions can be applied with regard to pupils with behavioural problems, as set out in § 58 of the Basic Schools and Upper Secondary Schools Act. For example, a support person may be assigned to a pupil or an individual curriculum applied. If the school believes that statutory support measures and sanctions are not enough to resolve a pupil's problems, recourse may be had to the county counselling committee, a child protection

official, or the child protection unit of the Social Insurance Board, who advise local authorities in resolving more complicated cases.

Home schooling should always proceed from the best interests of each child. Under § 21(1) of the Child Protection Act, the best interests of the child must be ascertained and relied on as the primary consideration in all decision-making concerning the child.

### *1.3.3. Religious activities in educational institutions*

The Chancellor's opinion was asked with regard to events organised in a kindergarten and allegedly proselytising one specific religion, during which religious books were distributed to children.

The Chancellor repeated her earlier opinion that educational institutions should be neutral with regard to issues of church and religion. Besides, under § 2(2) of the Republic of Estonia Education Act, the fundamental principles of education are based on recognition of universal and national values, freedom of the individual, religion and conscience.

This does not mean that an educational institution should not introduce religions and their history to children. However, it is important to avoid proselytising a specific religion – it is essential to distribute knowledge and not reinforce beliefs. Educational institutions are not barred from organising religious events and carrying out religious rites, but authorisation to do so must be obtained from the owner or head of the educational institution as well as consent from parents.

Under Article 14 para. 1 of the Convention on the Rights of the Child, the right of the child to freedom of thought, conscience and religion must be respected. At the same time, the state must respect the rights and duties of parents to provide direction to the child in the exercise of his or her rights (including to freedom of religion) in a manner consistent with the evolving capacities of the child. This does not mean that a child should automatically share the religious views of the parents until reaching the age of majority; however, in view of the age and level of development of kindergarten children the decision is mostly made by a child's parents.

### *1.3.4. Restriction on use of smart devices in boarding school facilities*

If previously the Chancellor has expressed an opinion on the requirement to deposit smart phones at school and in a children's camp, during this reporting period the Chancellor was asked to check whether the rights of children at a

boarding school facility had been violated by asking them to deposit their mobile phones and computers at night. The school explained that only those pupils who have used their smart devices at a time not designated for this or whose parents have asked that their smart devices be deposited are required to deposit them with the attendant overnight.

Under the Basic Schools and Upper Secondary Schools Act, a boarding school facility must guarantee for all children and young people the learning, living and education conditions corresponding to their needs and interests. As the school and staff of a boarding school facility are responsible for the security and protection of health of the children there, the organisation of life and other rules are laid down in the internal rules of the facility. The staff must monitor that all children can have sufficient rest during the 'lights out' period as set out in the internal rules. If some pupils use smart devices during rest time, the requirement to deposit smart devices overnight can be considered justified.

The Chancellor concluded that if smart devices are deposited during 'lights out' in a boarding school with the aim of providing sufficient time for children to rest, and if parents are notified of this, if in exceptional cases children are also allowed to call their parents during 'lights out', and if smart devices are deposited securely, this does not amount to a violation of pupils' rights.

### *1.3.5. Payment of operating support between local authorities*

During the reporting year, the Supreme Court Constitutional Review Chamber discussed the constitutionality of payment of school operating support between local authorities as laid down in § 83(1) of the Basic Schools and Upper Secondary Schools Act.

In an opinion sent to the Supreme Court, the Chancellor found that the obligation under § 83(1) of the Basic Schools and Upper Secondary Schools Act for a rural municipality or a city to participate in covering the operating expenses of a municipal school in another local authority if a pupil residing in that particular rural municipality or city attends a school operated by another local authority is a state-level duty imposed on local authorities.

Under § 154(2) of the Constitution, funds to cover expenditure related to state-level duties imposed by law on local authorities should be provided from the national budget. The state has failed to cover this expenditure from the national budget, so that the absence of a legal arrangement concerning allocation of funds to local authorities for performing the duty set out in § 83(1) of the same Act should be declared unconstitutional.

The Supreme Court decisions are available on the Court website.

### *1.3.6. Language of instruction in a kindergarten*

A concerned parent enquired from the Chancellor whether a kindergarten where Estonian is used as the language of instruction may prohibit their child from speaking in their mother tongue during free-time activities.

The Chancellor explained that, just as legislation does not entitle a school where the language of instruction is Estonian to prohibit pupils from speaking in their mother tongue (other than Estonian) outside educational activities, nor may a kindergarten do so either. Regardless of where the borderline runs between educational and free-time activities, kindergarten staff must respect a child's cultural background and their ethnic belonging at all times. A child in a kindergarten should never get the feeling that their identity and mother tongue are belittled or suppressed.

Under § 49 of the Constitution, everyone has the right to preserve their ethnic identity and mother tongue. Article 8 of the UN Convention on the Rights of the Child also obliges States Parties to respect the right of the child to preserve his or her identity, including nationality and family relations.

At the same time, the Chancellor concluded that playfully and positively motivating children to speak more in Estonian in a group where the language of instruction is Estonian cannot be considered a violation of these principles if a child's mother tongue and identity are respected. Thus, the main focus in a kindergarten group where the language of instruction is Estonian should be on how to guide and motivate children with a different mother tongue to speak in Estonian, while at the same time respecting the child's cultural identity and their mother tongue.

## 1.4. Reception of migrant unaccompanied minors

In connection with the migration crisis facing Europe in recent years, the Chancellor analysed how Estonia has organised reception of unaccompanied minors. The problem was not acute in 2017 because, as far as known, no minor refugees without parents or without a responsible accompanying adult arrived in Estonia. However, the responsible authorities need guidelines on how to lawfully resolve these situations.

Significant progress has occurred with regard to several issues in recent years and readiness to deal with these children has considerably improved. The Chancellor

sent her conclusions and recommendations to the responsible ministries, boards, local authorities, and the Estonian SOS Children's Village Association.

Most problems have occurred with regard to representation of unaccompanied minors. So far, the duties of guardian have been performed by local authorities, and thus the guardian changes depending on which local authority the child is currently staying in. Representatives of local authorities have been present at initial interviews and interrogations, but their further contacts with young people have been scarce. Sometimes young people did not even know who their legal representative was.

The Chancellor pointed out that a local authority should perform the duties of guardian independently and effectively. This covers, for example, communication with minors, representing them in procedural steps, observing the principle of the best interests of the child, and applying for legal aid. It would be reasonable for the Ministry of the Interior and the Ministry of Social Affairs to inform local authorities performing the duties of guardian of unaccompanied minors about the legal status of unaccompanied minors and about the distinctions regarding their guardianship in comparison to local children.

Persons arriving in the country illegally often lack documents, so that it may be necessary to arrange an expert age assessment for them. In the event of a suspicion that a person might be a minor, the presumption should be that they are a minor.

The Chancellor considered that a minor's consent to age assessment should be sought and that consent be recorded. The aim of assessment and the steps taken to this end should be explained to a minor in accessible language. The legal representative should be present when consent is asked for and expert assessment carried out. Detention of a minor should be avoided during expert assessment.

In proceedings relating to the legal status of a minor's presence in the country, the Police and Border Guard Board should observe the general principles of administrative procedure. The aim is to ascertain all the important circumstances and to involve participants in the proceedings. Interviews with unaccompanied minors revealed that the majority were not aware of their situation or their legal options.

The Chancellor pointed out that the Police and Border Guard Board should always inform unaccompanied minors and their guardians about a minor's status and legal options. To establish the legal status of an unaccompanied minor arriving in

the country illegally, all the material facts relating to their arrival in the country should be ascertained. An order to leave the country should not be issued without thoroughly considering the child's interests.

Clarification is needed as to distribution of the duties of representation and welfare of unaccompanied minors between the Social Insurance Board and local authorities. In line with the Social Welfare Act and the Child Protection Act, the Social Insurance Board must ascertain the need for assistance by unaccompanied minors and, on that basis, arrange their welfare and exchange of information.

Children at the age of compulsory school attendance should be given an immediate opportunity to be enrolled in education. Teaching Estonian to them should also start immediately, so as to facilitate their integration and education.

### 1.5. Children and the police

In recent years, the Chancellor has received a large number of petitions from parents and young people asking about their rights and duties in communicating with the police. For this reason, the Chancellor decided to analyse the norms regulating this interaction, and to draw up guidelines for children and young people and parents.

As a result of the analysis, the Chancellor concluded that more clarification is needed in rules concerning notification of parents and their involvement in cases where proceedings have been initiated in respect of their child. Currently, it is not unequivocally clear what the role of parents in different proceedings is and at what stage they are involved in the proceedings. This depends on the decision of the specific person conducting the proceedings, and the approach in similar cases is not always the same.

Secondly, the procedure for detention of minors needs to be revised. In view of the risks to the mental health of minors entailed in detention, detaining them should be an exception and last as briefly as possible. Minors should not be detained for more than 24 hours without court authorisation.

Thirdly, more attention than before should be paid to minors whose parents are subject to pending proceedings. Those conducting the proceedings should be aware of the consequences of their actions for the child, and should always ensure the safety of the child. The interests of the child should also be taken into account in proceedings concerning parents and procedural steps should be carried out in a manner least damaging to the relationship between the child and the parent and

least traumatising to the child. These issues are topical, for example, in the case of detention of a parent or a home search.

The Chancellor submitted her observations to the Ministry of Justice, the Ministry of Social Affairs, the Prosecutor General's Office, and the Police and Border Guard Board, and expressed the readiness of her staff to help resolve these issues.

The guidance materials prepared after analysis are intended to raise the awareness of children, parents and law enforcement officers about the rights of children and parents in initial contact with the police.

According to the guidelines, a child is entitled to information about the proceedings in a manner they can understand; the child should cooperate with the police and speak the truth. The guidelines also explain the rights and duties of the child when checking intoxication and the right to receive assistance from a lawyer and a specialist working with children.

Officials from the Ministry of Justice and the Police and Border Guard Board, representatives from the Estonian Union for Child Welfare, and members of the advisory body to the Ombudsman for Children set up at the Chancellor's Office helped to prepare the guidelines.

### 1.6. Work by minors

During the reporting period, the Employment Contracts Act was amended, so as to expand opportunities for minors to work and make hiring them easier for employers.

Making the procedure for work by minors more flexible is a welcome step. This way, more young people can earn their own pocket money, gain valuable work experience and later be more competitive in the labour market. However, in the context of work by minors it is important to keep in mind that studying and acquiring a basic education is the main 'work' for children at the age of compulsory school attendance. The main duty of secondary school pupils is also study. An important role here is played by parents who, before giving consent to employment of their child, should ensure that the work is within the child's capabilities and safe, and does not interfere with studying.

The Chancellor also analysed the amendments to the working conditions of minors. In her opinion on the Draft Act amending the Employment Contracts Act, the Chancellor criticised the intention to abolish extended annual leave for minors. This amendment would have reduced the rest time of hundreds of minors working

throughout the year. In comparison to adults, minors need more rest, and they should also have sufficient time for self-development and acquiring social skills. The UN Convention on the Rights of the Child underlines the importance of rest for the development of minors.

The Ministry of Social Affairs agreed with the Chancellor and removed the amendment reducing the annual leave of minors from the Draft Act.

### 1.7. Lowering the age of voting, and political campaigning in schools

At the municipal council elections in October 2017, young people at the age of 16 and 17 have been for the first time given the right to vote. To date, only a handful of European countries have applied such an exceptional extension of the right to vote. This change helps better involve minors in the life of society, even though lowering the voting age also entails some risks.

School-age children and young people spend most of their day at school. During that time, they depend to a large extent on school staff, their beliefs and the role-model they offer. Considering that the heads and staff of many educational institutions are members of political parties or election coalitions and run in elections, it is essential to observe that all school staff respect the principle of neutrality at school.

School staff may not impose their own political views on young people. However, this does not mean that there is no place at all for politics at school. School is a place that should offer a balanced picture of different ideologies and political views.

It is welcome that, prior to elections, school pupils are told about issues relating to elections, and that discussions, information days and debates are organised. In doing so, it is important not to give preference to any ideology, political party or candidate, but to introduce different approaches. Active management of events organised at school is required, and these should be open to different parties, election coalitions, and independent candidates. It is equally important that the focus of these discussions should be on substantive issues, platforms and ideological differences. The school bears responsibility for the events it organises, so that it is also possible to restrict political campaigning, distribution of paraphernalia, hiring of new members, and other similar activities, at school.

In order to formulate these principles and provide guidance to heads of educational institutions in organising election activities and ensuring impartiality, the Chancellor helped the Ministry of Education and Research draw up guidelines.

In a situation where legislation is absent or a generally recognised custom has developed, such guidelines help heads of schools more confidently deal with election-related issues. Pupils, school staff and parents can also use the guidelines in cases of doubt whether a school has failed to observe the principle of political neutrality.

The Chancellor initiated a project for young election monitors together with the Estonian National Youth Council, the Estonian School Student Councils' Union, and the Network of Estonian Non-profit Organisations. The aim is to educate young people politically, offer them a participatory experience, and contribute to ensuring neutrality in schools. In the frame of the project, several hundred young people received an overview of organising elections and explanations were given concerning election campaigning.

In pre-election weeks, young election monitors who have received the training check that schools comply with the principle of neutrality and, if necessary, notify violations to local authorities, the Ministry of Education and Research, the National Electoral Committee, and the Chancellor of Justice. Young people can also participate in organising elections as observers and as members of polling division committees. In this regard, recognition should be given to local authorities that are prepared to include minors in polling division committees. This helps to increase the trust of young people in government and, hopefully, will also raise their interest in developments in society.

### 1.8. Parental disputes, right of custody, right of access

Similarly to previous years, during this reporting period parents often asked the Chancellor about the right of custody and access to children, and payment of maintenance support. The Chancellor cannot interfere in disputes under private law, and with regard to such issues the Chancellor's advisers provide explanations to parents.

The large number of parental disputes and the fact that parents are unable to reach agreement with each other on issues concerning children is worrying. Recourse to the court for assigning the right of custody of a child should be the option of last resort when no solution can otherwise be found. The Chancellor believes that conciliation and intermediation should be made more accessible for parents, and they should be made aware of the existence of these services.

### *1.8.1. Enforcement proceedings in connection with children*

To enforce the right of access to a child, the Code of Enforcement Procedure allows a penalty payment of 192–767 euros to be imposed on a parent who obstructs access and a penalty payment of up to 1917 euros if the penalty needs to be imposed repeatedly. However, if it appears that even ten or twenty penalty payment warnings have had no effect and the parent has been unable to gain access to the child, and the total amount of penalty is approximately 30 000 euros, the suspicion arises whether such action is reasonable and serves its purpose.

When imposing a penalty payment, it should be ascertained whether the parent obstructed access between the other parent and the child during the period set in the penalty warning, and the decision should not be based on the mere fact that no access took place between the child and the parent at the time, the place and in the manner set out in the court ruling. Each instance of enforcement of the right of access should take account of the circumstances arising from the child, the parent's intentional obstructive action or inaction, and whether imposing the penalty payment would help to ensure that a visit between the child and the other parent takes place. Therefore, a penalty payment should serve its purpose. Meaningless proceedings are prohibited and unlawful as they disproportionately interfere in the rights of individuals.

The Chancellor found that the amount of the penalty payment that has been rigidly fixed in the law is not in line with the best interests of the child, and proposed that bailiffs be given the discretion to find the most appropriate solution in each specific case. Moreover, the actual solution to a problem might not lie in imposing a penalty payment but in conciliating the parents.

A petitioner complained to the Chancellor that legislation favours the situation where, upon separation, the parent living with the child begins to hold back the other parent and abuse parental rights. This is not how it should be and is also not the idea of any laws.

Both parents have equal rights and duties in respect of their common child, and their actions must proceed from the best interests of the child. The best solution for the child can be found in agreement between the parents and not through judicial or enforcement proceedings. Clearly, a situation where one parent lives with the child and the other is only obliged to pay maintenance support cannot satisfy both parties. However, the attitude "the children are mine, not ours", as described in the petition, is developed only by parents who abuse their rights.

The Chancellor received a case where several separate enforcement proceedings were initiated to enforce a court decision concerning maintenance support, where maintenance was ordered for several children of the same debtor. This also leads to double fees in enforcement proceedings. The practice by bailiffs where one bailiff initiates enforcement proceedings (along with imposition of a new enforcement fee) to claim debts of enforcement costs for another bailiff's proceedings is questionable. A solution of this kind also results in additional costs. Similarly unreasonable seems the situation where in maintenance support enforcement proceedings, payment of enforcement costs is sought from the child receiving maintenance as the claimant.

The Chancellor is concerned about the high number of maintenance support debtors in Estonia. A large number of parents (approximately 8900 debtors) do not pay maintenance for their child (over 11 000 children), and the total amount of maintenance debts is up to 52 million euros. On that basis, the Chancellor considers as understandable the plan by the Ministry of Justice to harshen measures imposed on maintenance support debtors. Even though the measures planned in the Draft Act have an unusually strong impact on maintenance debtors as well as third parties, the move is understandable in view of the current extent of the problem. Maintenance support is intended to contribute to a child's daily life and subsistence, so that it is indeed important that the child should receive prompt maintenance support.

## 1.9. Prevention in the field of rights of children and young people

The Chancellor's tasks also include raising awareness of the rights of children and strengthening the position of children in society as active participants and contributors. As Ombudsman for Children, the Chancellor organises analytical studies and surveys concerning children's rights, and on that basis makes recommendations and proposals for improving the situation of children. The Ombudsman for Children represents the rights of children in the law-making process and organises a variety of training events and seminars on the rights of the child.

In order to encourage and support children's active participation in analysing and interpreting their rights and duties, an advisory body to the Ombudsman for Children has been established at the Chancellor's Office, comprising representatives of children's and youth organisations. During the reporting period, the advisory body to the Ombudsman for Children convened once to discuss the rights and duties of children in interactions with the police. The Chancellor's advisers presented an overview of the rules regulating the field, and young people shared their ideas and experiences. A joint discussion took place on issues that

could be explained in the guidance material being prepared by the Chancellor. The young people also helped to make the text of the guidelines more accessible for children.

During the reporting period, the Chancellor's advisers carried out several training events on the rights of the child and delivered lectures in kindergartens and schools. For child protection and social welfare workers, the advisers explained rights of custody and access, as well as rules and international recommendations regulating separation of children from their family. In order to improve the awareness of the Russian-speaking community about issues relating to the rights of children, the Chancellor's advisers met with local Russian-speaking journalists and representatives of educational institutions and youth organisations.

Also during this reporting period, the children's and youth film festival 'Just Film' held as part of the PÖFF Film Festival included a special programme on the rights of the child, prepared in cooperation between Just Film, the Chancellor of Justice, the Ministry of Justice, the Ministry of Social Affairs, and the Estonian Union for Child Welfare. A special programme on the rights of the child has become a tradition and this year featured for the sixth time.

Screening of selected films was followed by debates with experts and well-known personalities analysing the films together with viewers. The films and debates focused on topics such as ill-treatment, sexual offences, stereotypes, gender roles, exclusion driven by special needs, development of the sexual self-concept, loneliness, poverty, and humiliation.

The Ombudsman for Children can further contribute to making society more child-friendly by recognising good people who have done something remarkable either together with children or for children. The merit awards event "Lastega ja lastele" (With and For Children), which was brought to life by organisations championing the interests of children, was held for the fourth time in 2017. The Office of the President of the Republic also joined the organising team. On the International Day for the Protection of Children, the President of the Republic, the Chancellor of Justice and the Minister of Social Affairs recognised those who have significantly contributed to the well-being of children through their new initiatives or long-term activities.

# II. PREVENTION OF ILL-TREATMENT

The Chancellor must monitor respect for the fundamental rights of individuals held in custodial institutions. This task arises from the Act under which the Chancellor has been assigned the role of the national preventive mechanism set out in Article 3 of the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). To perform this task, advisers from the Inspection Visits Department of the Chancellor's Office carry out either announced or unannounced visits to these institutions.

Places of detention means all institutions where persons are or may be deprived of their liberty, either by virtue of an order by a public authority or at its instigation or with its consent or acquiescence. Various types of custodial institutions exist in Estonia: prisons, police detention facilities (including a detention centre for aliens), psychiatric hospitals providing involuntary treatment, social welfare institutions providing 24-hour special care services, etc.

During the reporting period, the Chancellor carried out 25 inspection visits:

- psychiatric hospitals – 6
- 24-hour special care institutions – 2
- general care homes – 8
- prisons – 2
- police detention facilities – 3
- units of the Defence Forces – 2
- educational institutions for pupils requiring special educational measures due to behavioural problems or for pupils with emotional and conduct disorders – 2

Healthcare experts were involved in inspection visits on 18 occasions.

## 2.1. Psychiatric hospitals

During the reporting year, the Chancellor inspected six hospitals providing in-patient psychiatric care: the Pärnu Hospital psychiatric clinic, Wismari Hospital, the Kuressaare Hospital psychiatric clinic, the North Estonia Medical Centre psychiatric hospital, the Tartu University Hospital psychiatric clinic and the Viljandi Hospital psychiatric clinic.

A couple of hospitals (Tartu University Hospital and Viljandi Hospital) now keep electronic records of events concerning restriction of the rights of individuals. The living conditions in the acute department of the North Estonia Medical Centre have

been significantly improved compared to the last inspection. Smaller hospitals are also making an effort to expand possibilities for therapy, and many places have hired an activity supervisor or an occupational therapist.

At the same time, the hospitals still have problems with drawing up treatment documents and using unjustifiably extensive video surveillance of patients.

The inspections revealed that Kuressaare Hospital, Wismari Hospital and Pärnu Hospital did not always draw up decisions on involuntary treatment in time and in compliance with requirements. The liberty of patients undergoing treatment voluntarily is restricted arbitrarily if they are not allowed to leave the hospital or means of restraint are used on them. If on arrival in hospital a patient consents to treatment and to a stay in hospital, but at some point their condition requires them to be restrained, a decision on involuntary treatment must be drawn up after determining the need for restraint. Only the psychiatrist who directly assessed the patient's condition may make a decision on involuntary treatment without court authorisation.

Twenty-four-hour video monitoring of all patients in wards without exception unjustifiably interferes with the fundamental right of individuals to privacy. For example, extensive video surveillance was used in the acute department of the psychiatric clinic of the North Estonia Medical Centre, the Pärnu Hospital psychiatric clinic, and the Tartu University Hospital psychiatric clinic. Cameras were located in rooms for common activities (corridors, dining rooms and activity rooms), as well as in all the wards. The video stream could be constantly monitored from a nurse's workstation, and in all hospitals the recording could be retained for a certain period. However, patients are not properly notified about the fact and extent of video surveillance; indeed, some patients were unaware that their wards were under constant video monitoring.

Observation rooms (rooms for mechanical restraint) in some hospitals still do not comply with requirements. The observation rooms at Wismari Hospital and Tartu University Hospital psychiatric clinic were not safe and the privacy of restrained persons was not ensured. Access by unrestrained patients to mechanically restrained patients should be avoided, and restraint should not take place in the sight of other patients. A member of the medical staff should always be present beside a mechanically restrained patient.

Records of instances of applying means of restraint should always contain a fairly detailed description of reasons for applying the measure, as well as the circumstances that justify continued restraint. A brief note that a patient was restless or aggressive is not sufficient, because this does not indicate what exactly

it was that presented a danger. In addition, chemical restraint should always be properly recorded.

## 2.2. Institutions providing a 24-hour special care service

During the reporting period, the Chancellor also inspected two special care institutions: Valkla Home (where 100 clients were receiving a 24-hour special care service under court authorisation) and Sõmera Home (where 356 clients were receiving a 24-hour special care service, including 42 clients with profound multiple disability).

The twenty-four-hour special care service financed from the state budget is intended for those in need of daily guidance, counselling, assistance, and supervision due to their mental health condition. Referral to the service of persons diagnosed with a mental disorder, severe or profound disability and incapacity for work in addition to the above needs is based on a rehabilitation plan.

Use of the 24-hour special care service is voluntary, but those who could pose a danger to themselves or others due to their mental health are involuntarily consigned to the service in a closed institution under a court ruling. There the individual is under the constant supervision of the service provider and is not free to leave the grounds of the institution. A twenty-four-hour special care service under a court ruling is provided to minors in three locations and to adults in one location (Valkla Home). Estonia has a total of 47 24-hour special care service institutions, with 2699 residents as at the end of 2016 (including 110 persons referred to a closed institution under a court ruling).

During inspection of special care institutions this year, the Chancellor reviewed whether the freedom of movement of residents was restricted (e.g. by locking them in rooms, securing them to their beds) and how means of restraint were used. The Chancellor also assessed the living conditions in these institutions and checked whether staffing was sufficient, the food was good and the residents were offered enough meaningful free-time activities. Dispensing of medications and access to healthcare services were reviewed. A general practitioner was involved as an expert in both inspection visits. During the visits, rooms were inspected, documents perused, and staff and clients were interviewed.

In Sõmera Home, the Chancellor assessed how assistance is provided to clients in transfer to smaller social welfare institutions under the reorganisation plan for special care institutions. Preparations for the changes were thorough, and the dedication of the staff left a good impression – this had not faltered, despite uncertainty arising from the plan to close down the institution. The Chancellor

asked that residents be involved as much as possible in making reorganisation decisions, that they be kept informed and their opinions heard within the decision-making process.

In reference to Sõmera Home, the Chancellor noted that residents' freedom of movement must not be restricted without a legal basis. Without a court ruling, a client's freedom of movement may be restricted in specific and exceptional conditions, and only for up to three hours by placing them in a secure seclusion room. In doing so, the client may not be left or locked in just any room but in a room that complies with the requirements for a seclusion room.

In both of the care homes inspected, many residents were not involved in dynamic activities contributing to development of skills, which would help residents spend time by engaging in their preferred activities.

The inspections revealed that, in view of the specific nature of their clients, neither special care institution might have a sufficient number of competent activity supervisors constantly present. Their numbers should be sufficient and their work organised in such a way as to enable an individual approach to all clients and, if necessary, keep a constant eye on their movement and activities. Staffing should be sufficient so as to enable swift and safe resolution of tense and dangerous situations. The minimum staffing level laid down in legislation might not always be sufficient to provide quality service and ensure the fundamental rights of clients.

In comparison to the previous inspection visit, Valkla Home had not significantly improved conditions in the seclusion room – the room was not secure, nor did it create a calming environment. To ensure security, Valkla Home still extensively uses metal grids and barbed wire, which the Chancellor had already found inappropriate in 2015.

The Chancellor asked both care homes to ensure that nursing care services are available at least to an extent conforming to the statutory minimum requirement. A lingering suspicion also remained that in both care homes prescription medications – which should be taken only in specific circumstances – are dispensed to residents in the evenings and at night by an activity supervisor not qualified to make such decisions.

## 2.3. Institutions providing the general care service

During the reporting period, the Chancellor inspected the activities of eight general care homes (so-called old people's homes). Residents of general care homes are adults who need support in their daily lives and are unable to cope

independently at home. Young or middle-aged people may also find themselves in this situation as a result of illness or trauma, but the majority of the residents in general care homes are the elderly in need of daily support. According to data from the Ministry of Social Affairs, 11 445 clients received the general care service in 2016.

The inspections in social welfare institutions focused on whether the freedom of movement of individuals had been restricted (e.g. locking them in their rooms, securing them to their beds), whether clients were treated with dignity (e.g. unjustified interference in privacy, unsanitary living conditions), and whether any risks to their life and health existed (e.g. number and presence of staff, nursing and care, meals, issues related to medication, access to healthcare).

As a rule, the Chancellor carries out inspection visits to general care homes without advance notice. A healthcare expert was involved in all the visits, and general practitioners as well as medical professionals qualified in geriatrics also contributed with their specialist expertise. The inspections involved examining the rooms and documentation plus interviews with staff and residents.

Similarly to the previous reporting period, the problems include ensuring decent living conditions, compliance with health protection requirements applicable for social welfare institutions, unlawful restriction of freedom of movement of clients, incorrect handling and administration of medication to clients. Some problems also occurred in relation to lack of privacy during hygiene procedures, maintaining records of the care service (absence of mandatory care plans), and regular assessment of the need for healthcare services. In some care homes, high doorsteps, narrow doorways and absence of a lift made it difficult to move around in a wheelchair or a wheeled walking frame.

Frequently, numbers of care staff in care homes were insufficient, in particular at night, which directly affects the quality of service provided. On several occasions, the Chancellor's advisers formed the impression that even though the staff of the institutions were dedicated to their work and cared about the clients, clearly not enough specialists were available to deal directly with clients. More than the statutory minimum number of staff are required if clients are in need of special care and the building has a specific character. In that case, an institution should be able to deploy more competent and motivated staff to deal with the clients.

In several care homes, the Chancellor's advisers found unlawful restriction of freedom of movement of clients – the practice of locking doors of departments as well as rooms, thus impeding residents from freely moving around. The general care home service is provided on a voluntary basis, i.e. at a person's own request

(i.e. these are not closed institutions where individuals may be kept against their will). It is inadmissible to restrain persons either physically (locking or using means of binding) or by using medication. Freedom of movement was restricted mostly for clients with dementia and serious memory problems whose behaviour could be problematic and unpredictable and who are difficult to handle. In view of this, the Chancellor sent a memorandum to the Ministry of Social Affairs in autumn 2016 and requested that development of a care service aimed at persons suffering from dementia and having reached the retirement age should be initiated. In the reply, the Ministry of Social Affairs agreed with the Chancellor's proposal and considered it necessary to create a suitable legal framework for providing a service for elderly people with dementia and to develop the respective service. The Ministry in its reply also pointed out that the principles of funding social services should be reviewed in the course of the administrative reform to ensure the capacity of local authorities.

In July 2017, the Chancellor wrote about the problems of general care services and the funding of the social sphere in a circular concerning the quality of the general care service. The aim was to draw the attention of all general care service providers to the shortcomings found during the inspections, so as to contribute to improving the quality of the service and prevent possible violations.

The Chancellor's advisers also discussed the issue of the rights of the elderly at the autumn conference "Elderly patients in healthcare institutions" organised by Tartu University Clinic and Ida-Viru County Central Hospital in autumn 2016. The Chancellor's advisers discussed the challenges facing healthcare institutions and medical professionals at the bioethics seminar "Right to freedom versus the right to protection of health – an inevitable and unmanageable moral conflict?" organised in cooperation between the Estonian Bioethics Council and the Ministry of Social Affairs on 16 December 2016. In a special edition of the law journal Juridica, a Chancellor's adviser wrote about the right to privacy of the elderly. Motivated by the problems of restriction of freedom of movement of clients in social welfare institutions, on the initiative of the Chancellor the special edition of Juridica published an analysis of the limits of acting in self-defence and in an emergency in social welfare and healthcare institutions.

## 2.4. Prisons

Estonia has three prisons – Tartu, Viru, and Tallinn Prison – each with approximately 800–1000 convicted and remand prisoners. During the reporting year, the Chancellor inspected Tartu Prison and Tallinn Prison. Tartu Prison is a relatively new facility, while the premises at Tallinn Prison are in a desperate state of repair – its new buildings should be completed in 2018.

The Chancellor intensely reviewed restrictions imposed on prisoner access to the internet. Under § 31[1] of the Imprisonment Act, prisoners are only allowed access to legislation and judicial decisions on the internet. Internet access restrictions apply equally to convicted prisoners as well as to remand prisoners who have not yet been convicted and who may eventually also be acquitted.

Obviously, internet access for prisoners should not be unlimited since this may also contribute to planning new criminal offences. However, current information technology enables imposition of reasonable restrictions and alleviation of risks, while also allowing convicted and remand prisoners considerably more extensive access to the internet.

The experience of several countries demonstrates that internet use expands the opportunities of prisoners to keep abreast of developments in society, to better prepare for life on their release and to participate in internet-based education. Therefore, in an opinion sent to the Supreme Court, the Chancellor concluded that a restriction denying access to websites www.oiguskantsler.ee and www.riigikogu.ee is excessive. The Supreme Court declined to entertain the case of internet use of prisoners in terms of constitutional review.

In the Chancellor's opinion, many problems in the open prison sections of all prisons derive precisely from outdated legal rules regulating internet access.

Persons assigned to an open prison are those convicted of less serious offences. Prisoners whom it is not expedient to keep in a closed prison, those whose behaviour has been law-abiding, and those in respect of whom sufficient reason exists to presume that they would not commit further offences are also assigned to an open prison section. The main purpose of an open prison is to get prisoners used to law-abiding behaviour prior to their release. Scarce opportunity for internet use prevents prisoners from looking for information on jobs, optimal routes for proceeding from one place to another, and public transport. Without learning to use a computer, prisoners will not learn how to write a CV, and it is also difficult to imagine modern education without a computer and the internet.

Almost complete isolation of prisoners from the rest of the world leads to a situation where they are unable to start a law-abiding life upon release from prison, for example finding a job that matches their skills. The Minister of Justice agreed to revise the rules and practice concerning prisoner internet access.

In separate proceedings, the Chancellor emphasised that short-term leave from an open prison is important for maintaining family relationships and positive

social contacts and helps prisoners to start leading a law-abiding life upon release. The Chancellor asked the prison always to take this into account when deciding on grant of short-term prison leave.

During the inspection of Tallinn and Tartu prisons, considerable attention was paid to communication by convicted and remand prisoners with their next of kin. A commendable initiative are the "family days" organised by Tartu Prison, where prisoners can meet their next of kin without having a glass or wire barrier separating them. Short-term contact visits (i.e. without a barrier) help to maintain relationships with family members, especially with children. The Chancellor's recommendation to both prisons was that, as a rule, individual short-term visits with family members should also take place without a separating barrier.

In both prisons, access by convicted and remand prisoners with mobility disability (e.g. those using a wheelchair) to different parts of the prison (including the medical department) was complicated without assistance.

In Tartu Prison, the Chancellor paid particular attention to the section where mothers with children up to three years old were serving their sentence. Women are able to work in the section but have no opportunity to study or participate in social programmes.

A suspicion remained that handcuffs were used to escort pregnant women from the prison to hospital for childbirth and subsequently during return to prison. Prison officers are present at childbirth; male officers also stay with the woman in a postnatal ward, sometimes around the clock. The Chancellor asked the prison to organise supervision of women at birth by using different measures.

## 2.5. Police detention facilities

The Chancellor inspected the cellblock of Viljandi police station in the South Prefecture and the cellblock of Narva police station in the East Prefecture. The Chancellor's advisers also inspected buildings currently under construction for the detention centre of the migration bureau of the information management and procedural department of the Police and Border Guard Board.

The Chancellor asked that during construction of the new building for the detention centre it should be kept in mind that this is neither a prison nor a police detention centre. Keeping persons subject to expulsion and asylum seekers in a building where living conditions and the environment are similar to a prison should be avoided. The centre will have separate rooms for persons in need of

enhanced supervision. Persons with special needs (e.g. with a mobility disability) must have equal accessibility to free-time and public areas and to the outdoors.

In the Chancellor's opinion, to prevent and detect ill-treatment it is extremely important to record as precisely as possible and maintain records of the health condition of persons admitted to a cellblock. In Viljandi cellblock, external injuries or their absence were sometimes recorded and sometimes not.

## 2.6. Units of the Defence Forces

During the reporting period, two inspection visits were carried out to units of the Defence Forces. The Chancellor did not identify any significant shortcomings in the Logistics Battalion. After the inspection visit to the Navy, the Chancellor asked that both active service members and conscripts on watchkeeping duty should not stay in an environment posing a health hazard during repair and maintenance work on ships.

## 2.7. Maarjamaa Education College

The Chancellor inspected Emajõe Centre and Valgejõe Centre of Maarjamaa Education College, which are educational institutions for pupils requiring special educational measures due to behavioural problems or for pupils with emotional and conduct disorders. Maarjamaa Education College also provides a 24-hour special care service to minors under a court ruling.

The inspection revealed that Valgejõe Centre had problems with ensuring the safety of children. Pupils said that they had experienced both mental and physical violence from their peers. Children did not feel sufficient trust towards staff. The staff of the centre mentioned that they would need clearer guidelines on how to deal with violent incidents. The centre did not have enough night attendants, so it could happen that pupils were left on their own for a while at night. Both in Valgejõe and Emajõe Centre, security checks of children took place without a legal basis.

In both centres, placement of pupils in a seclusion room caused concern. Specific requirements must be complied with when placing children under 24-hour special care in a seclusion room. For example, the service provider must notify the police or the ambulance service of each such incident.

The Chancellor asked both centres to let young people have more say in resolving matters of everyday living of direct concern to them and in planning activities. For example, they could themselves make plans concerning options for spending free

time, choice of food, and decorating rooms. Pupils should also be given more information about educational opportunities. Young people could have more opportunities to move and spend time outdoors.

In Valgejõe centre, the windows of children's bedrooms were covered with white plastic, which let light inside but completely blocked the view outside. Some bedrooms could be locked so that the door could not be opened from the inside.

The Chancellor emphasised to Maarjamaa Education College that telephone use by children should be flexible, taking into account the working schedules of their parents and the working hours of different authorities. The presence of staff during phone conversations interferes with pupils' privacy. Restricting communication with next of kin (including by phone) is not allowed as a disciplinary sanction.

## 2.8. Promotional activities

In addition to inspection visits, the Chancellor of Justice performs other work that prevents mistreatment, which is aimed at increasing the awareness of people working and held in detention facilities as well as of the general public of the nature of mistreatment and the need to fight it. For example, officials working under the Chancellor of Justice have carried out training and information events to increase the awareness of people working and held in detention facilities and distributed information materials during inspection visits to help people whose freedom has been restricted gain a better understanding of their fundamental rights and freedoms and to use various complaint mechanisms efficiently. In order to raise general awareness, the Chancellor of Justice and the Chancellor's advisers have published various articles about mistreatment in print media and online publications.

International cooperation with other preventive mechanisms and relevant international organisations is also extremely important to the Chancellor of Justice. The Chancellor of Justice has been active in the European network of National Preventive Mechanisms (NPM) against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and she has close contacts with several other NPMs in other countries.

### *2.8.1. Circular letters*

On 11 July 2017, the Chancellor of Justice sent a circular letter to Estonian social policy makers, municipalities and care homes to increase future funding of care homes in order to improve their living conditions and the quality of the provided

services. In the circular letter, the Chancellor of Justice noted, among other things, that many problems with general care homes have raised from the scarcity of professional staff. For example, residents of a care home were locked up, detained or forcibly given tranquilizers, although the law does not allow it. Humanly, it is difficult to blame a carer who alone is responsible for so many residents dangerous to oneself and others. However, the dignified treatment of people living in care homes is possible and necessary. The situation can also be improved by motivating and educating carers and creating working conditions that prevent apathy.

### *2.8.2. Articles and interviews*

- Eva Lillemaa, "Ressursi nappusega ei saa õigustada inimväärikust alandavat kohtlemist hooldekodudes" (Scarcity of resources cannot justify degrading treatment in nursing homes), Delfi, 20.07.2017.
- Andres Aru, "Kas elu koos emaga vanglas võib olla lapse parimates huvides?" (Is living with their mother in a prison in the best interest of the child?), journal Sotsiaaltöö No. 4/2016.
- The Chancellor of Justice has a special radio broadcast “Law and Justice” in Radio Kuku, which is on-air every Sunday at noon and which re-broadcasts can be heard on Sunday and Wednesday evenings. In the 20 November broadcast, the Chancellor of Justice discussed the application of prohibition of ill-treatment in theory and practice with criminologist Jako Salla and the Head of Inspection Visits Department of the Office of the Chancellor of Justice Indrek-Ivar Määrits. The radio broadcast was dedicated to the 10th anniversary of OPCAT.

### *2.8.3. Trainings and other events*

- The training programme wherein Raivo Sults introduces fundamental rights to conscripts serving in the Defence Forces continued in 2016 and 2017. In 2016, Raivo Sults introduced fundamental rights to conscripts in 5 battalions and delivered 2 lectures at the Estonian National Defence College. In 2017, he delivered 5 lectures in different battalions.
- Ksenia Žurakovskaja-Aru gave lectures on "The child and prison" to the students of the Estonian Academy of Security Sciences on 30 September 2016 and on 10 March 2017, in which she explained, among other things, what is ill-treatment, the OPCAT and the role of the Chancellor of Justice in the prevention of ill-treatment.
- Raivo Sults attended the summer school for the national preventive mechanisms on 14-17 August 2017 in Bristol.

- Indrek-Ivar Määrits attended the consultation meeting “Draft set of rules for administration detention of migrants and independent observatory of NPMs (NPM Obs)“ organised by the Council of Europe on 3 May – 2 June 2017 in Strasbourg.
- Indrek-Ivar Määrits attended the cooperation seminar of preventive mechanisms „Network of SPACE national correspondents and Network of national prison monitoring bodies (especially NPMs)“ on 3-5 April 2017 in Strasbourg.
- Raivo Sults attended the training seminar for ombudsmen of the armed forces on 19-22 March 2017 in Warsaw.
- On 28 November 2016, a colloquium dedicated to the 10th anniversary of OPCAT was organised in the Office of the Chancellor of Justice. In the colloquium, Estonia's renowned legal scholars discussed substance of the prohibition of ill-treatment and how the principle should be interpreted in practice.
- For the sixth time, the children’s and youth film festival ‘Just Film’ held as part of the PÖFF Film Festival included a special programme on the rights of the child, prepared in cooperation between Just Film, the Chancellor of Justice, the Ministry of Justice, the Ministry of Social Affairs and the Estonian Union for Child Welfare. Bearing in mind the anniversary of OPCAT, three films speaking about youth in closed institutions were chosen into the programme – 4 Kings, They Call Us Monsters and Starless Dreams. On 15, 17 and 18 November 2016, screening of the films were followed by debates with invited experts and recognised personalities analysing the films together with viewers.
- Eva Lillemaa made a presentation on respecting for fundamental rights in health care institutions at the conference of the Tartu University Hospital and Ida-Viru Central Hospital "An elderly patient in health care institution" held on 21 October 2016.
- Eva Lillemaa and Maria Sults attended the training course „Training School 2016 – Modern forensic in-patient facility design standards“ on 21-22 September 2016 in Helsinki.

### *2.8.4. Projects*

In autumn 2016, advisers from the Inspection Visits Department visited Danish and Swedish parliamentary ombudsmen within the Nordic-Baltic Mobility Programme for Public Administration and discussed the issues of supervision of migration authorities.

Similarly to the Estonian Chancellor of Justice, Danish and Swedish parliamentary ombudsmen also perform the functions of the national preventive mechanism

under the Optional Protocol to the UN Convention on the Prevention of Torture. For example, they check how dignified treatment is ensured in closed immigration facilities. The Chancellor's advisers also visited the Ellebæk immigration detention centre, Sjælsmark deportation centre, and Auderødi asylum reception centre in Denmark, and Märsta detention centre, refugee accommodation centre, and Storboda prison in Sweden.

# III. EQUAL TREATMENT

Under § 12(1) of the Constitution of the Republic of Estonia, everyone is equal before the law. No one may be discriminated against on the basis of ethnicity, race, colour, sex, language, origin, religion, political or other views, property or social status, or on other grounds.

The Chancellor of Justice Act confers on the Chancellor the competence to verify the conformity of legislation with the Constitution and existing statutes, and to supervise the activities of representatives of public authority. The Chancellor also arranges conciliation proceedings for resolving discrimination disputes between persons under private law, and promotes the principle of equality and equal treatment.

During the reporting period, the Chancellor received 37 petitions concerning issues of equal treatment. Of these, 23 cases concerned the general fundamental right to equality and 14 concerned discrimination.

By breakdown based on grounds of discrimination, the petitions were divided as follows:

- language – 1
- sexual orientation – 2
- age – 2
- ethnicity and ethnic belonging – 1
- sex – 2
- disability – 4
- property or social status – 1
- other grounds – 1

The Chancellor found a violation in seven cases. Of these, in one case, the Chancellor sent a memorandum to the Riigikogu requesting that a statute be brought into conformity with the Constitution, and in three cases proposed to a representative of a public authority that a violation be eliminated or recommended that the principle of good administration be complied with in the future. In three cases, the matter was resolved during the proceedings.

## 3.1. Income tax refund to low-paid employees

The Chancellor was asked to clarify whether an employee with a reduced capacity for work and employed part-time in a public authority is entitled to benefit for low-paid employees.

In general, under the Labour Market Services and Benefits Act a person must be employed at least full-time to be entitled to the refund. An exception is made for those with partial or no capacity for work on whose remuneration social tax is paid by the state. According to the interpretation by the Tax and Customs Board, these are cases when social tax for a person with partial or no capacity for work is paid by the Estonian Unemployment Insurance Fund under the Social Tax Act. However, this means that only those with partial or no capacity for work whose employer is a company, non-profit association, foundation, or those who are self-employed, may apply for the refund. This excludes from among the recipients of the refund persons with partial or no capacity for work who are employed, for example, by a public authority, rural municipal government, any other local authority body, or a legal person in public law (e.g. the Unemployment Insurance Fund).

The Chancellor sent a memorandum asking the Riigikogu to revise the procedure for the income tax refund for low-paid employees so that it would not depend on the type of employer. The Riigikogu agreed with the Chancellor's conclusions and on 24 December 2016 adopted amendments to the Labour Market Services and Benefits Act.

### 3.2. The right of elderly people to a credit card

The Chancellor dealt with a case where a bank had automatically refused to issue a credit card to a 76-year-old pensioner due to their age.

In the Chancellor's opinion, imposing such an age limit in standard terms by a bank amounts to age discrimination. Of course, financial institutions must observe the principles of responsible lending, and advanced age and, for example, retirement may affect the ability of a bank client to service their loans. However, a bank must also keep in mind that age is only one of the factors affecting a person's income and creditworthiness. Many people aged 75 or older meet their credit obligations without any problems. In the Chancellor's opinion, credit institutions must not refuse to issue a loan or a credit card merely on account of a person's age – the decision should also take account of a person's income, property and credit history.

The Chancellor initiated proceedings to conciliate the parties but terminated them because the parties resolved the problem during the proceedings.

## 3.3. Survey of internet usage among the elderly

Statistics Estonia carries out a survey of internet usage among households, for the purpose of which only people up to 74 years of age are polled. The data collected in the survey provide important information about the Estonian economy and use of public sector services, and the data are also used as a basis for drawing up and implementing the Estonian information society development plan.

Elderly people are lagging behind the rest of society in terms of internet skills, while their more widespread use of the internet could help to improve their quality of life. One of the important principles in the Estonian information society development plan is to support equal opportunities – the aim is that all members of society should have the skills and knowledge to use the e-services they need. This would make several services more accessible for the elderly and would help increase their social involvement. Therefore, data are also needed about people over 74 years of age, who make up almost ten per cent of the Estonian population.

The Chancellor found that no compelling reasons exist as to why people at the age of 75 and older should be distinguished from the rest of the population in terms of collecting data on internet usage, so that excluding them from the survey is also not justified. The Chancellor recommended that Statistics Estonia should change their current practice and also ask people over 74 years of age about their internet usage.

## 3.4. Exclusion of a child from camp due to disability

A parent complained to the Chancellor against the activities of a rural municipal government that had excluded their disabled child from among the participants in a youth camp. The parent found the decision to be discriminatory.

The Chancellor agreed with the petitioner that the rural municipal government discriminated against the child by excluding them from the youth camp merely on account of the child's disability, without having considered possibilities to make reasonable adjustments. The Chancellor recommended that the rural municipal government should contact the petitioner, apologise to them and their child, and seek alternatives together with the family to find recreational activities for the child in summer.

The Chancellor also recommended that the rural municipal government should consider making reasonable adjustments for people with disabilities in the future, so as to enable them to participate equally with others in events organised by the rural municipality.

## 3.5. Communication in Russian in a kindergarten group where the language of instruction is Estonian

Another parent enquired from the Chancellor whether kindergarten staff had the right to prohibit children from speaking in Russian with each other during times when no educational activities were taking place. The Chancellor has also previously received petitions with a similar question.

Under the Preschool Child Care Institutions Act, which regulates the activities of kindergartens, learning and teaching in a kindergarten takes place in Estonian unless a municipal council has decided otherwise. According to the national curriculum for preschool child care institutions, in the daily schedule of a kindergarten teaching and learning activities planned by a teacher alternate with everyday activities, play and recreation. Even though not all free-time activities can be considered as educational activities, as a rule they are intertwined. Thus, the national curriculum for preschool child care institutions sets out that play is the main activity of pre-school children and in the course of playing children acquire and perfect new knowledge and skills, reflect feelings and wishes, learn to communicate, and acquire experience and rules of behaviour.

The Chancellor explained to the parent that teachers cannot prohibit children in a kindergarten from speaking in their mother tongue. However, playfully and positively motivating children to speak more in Estonian in a group where the language of instruction is Estonian cannot be considered unlawful if a child's mother tongue and identity is respected. Thus, a kindergarten with a group where the language of instruction is Estonian should pay more attention to how to guide and motivate children with a different mother tongue to speak in Estonian, so that the child's cultural identity and the mother tongue are also respected.

## 3.6. Discrimination due to non-membership of trade union

A petitioner asked the Chancellor to clarify whether it was lawful for an employer to pay additional compensation for length of employment laid down in a collective agreement only to those employees who were members of the trade union that had concluded the collective agreement.

The Chancellor explained to the petitioner that the Trade Unions Act prohibits restricting an employee's rights depending on their membership or non-membership of a trade union. Restriction of rights should be understood as any cases of unequal treatment. However, it should be kept in mind that granting

preferences on the grounds of trade union membership is not deemed to be unequal treatment.

The Equal Treatment Act also gives rise to the principle that granting preferences on the grounds of membership in an association representing the interests of employees is not deemed to be discrimination in labour relations. This applies if granting preferences is objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. A collective agreement extends to employers and employees who are members of the organisations that have concluded the collective agreement, unless otherwise provided in the collective agreement. In Estonia, it tends to be customary to extend a collective agreement to all company employees, not only to members of a trade union.

### 3.7. Other issues relating to equal treatment

Previous annual reports of the Chancellor's activities described the Chancellor's memorandums dealing with legal gaps or failure to implement existing rules.

It should be noted that the necessary implementing legislation for the Registered Partnerships Act has still not been passed. Since the entry into force of the Registered Partnerships Act in 2016, the Chancellor has dealt with several cases concerning implementation of the Act. First and foremost, petitioners enquire about recording legal relationships arising under the Registered Partnerships Act in the Population Register. The Chancellor concluded that absence of implementing legislation is not an obstacle to recording legal relationships arising under the Registered Partnerships Act in the Population Register, or taking any respective data into account in any decision-making. The necessary procedures and arrangements can be found in the Constitution (§§ 12 and 14) and by way of analogy from the Family Law Act and Acts concerning vital statistics.

Previously, the Chancellor has also drawn attention to the fact that the narrowly defined scope of the Equal Treatment Act and the different degree of protection with regard to different grounds of discrimination is unconstitutional. In August 2017, the Ministry of Social Affairs submitted for approval to other authorities a Draft Act amending the Equal Treatment Act, which aims to expand the scope of the Equal Treatment Act to all types of discrimination. The amendments have not yet been adopted.

In 2011, the Chancellor sent to the Minister of Social Affairs a memorandum concerning issues of implementation of the Gender Equality Act. In the memorandum, the Chancellor drew attention to the fact that until then the

Government regulation mentioned in § 11(2) of the Act to lay down the procedure for collecting work-related gender-based statistical data and the list of such data had not been adopted. The Ministry of Social Affairs submitted the draft regulation for approval to other authorities at the beginning of 2015 but to date the regulation has not yet been adopted.

# IV. PEOPLE IN THE DIGITAL WORLD

During the last year, the Chancellor has on several occasions been faced with one and the same question – when is it justified to process data in national databases for purposes other than those for which the data were initially collected?

## 4.1. Reasonable use of data or a surveillance society?

One of the principles for protection of personal as well as other data is compatibility with a legitimate purpose – data may be collected and processed only to achieve specified and lawful objectives. On the other hand, once data have already been collected, additional legal bases may be established for their repeated use. The new General Data Protection Regulation entering into force in spring 2018 also sets out possibilities for re-use of previously collected data – for example, for performing a task carried out in the public interest or in the exercise of official authority. Derogations are allowed for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes.

However, data in national databases need not be sufficient for performing new tasks and, as befitting the digital age, it has been suggested that the state could also use so-called big data for these purposes. For example, in the course of preparing a national population and housing census to be sourced from databases, Statistics Estonia found an approximately 20% discrepancy between the data registered in the Population Register and people's actual residence. To eliminate this inconsistency, Statistics Estonia wishes to explore the possible use of big data in compiling national statistics and has initiated a pilot study involving volunteers. An anchor point determined on the basis of an individual's mobile positioning data is analysed and compared to residence data obtained from the registers and based on personal statements. With the help of the study, the aim is to develop a model for choosing the most likely place of residence.

Both cross-use of national databases as well as analysis of big data may prove useful by speeding up dealings with the authorities, providing better products and services for people and commercial benefits for businesses. At the same time, these advantages should not be obtained by infringing fundamental rights. Transparency of data collection is ensured by the existence of a legal basis, and establishing that basis should also involve considering whether the reasons for additional data processing are sufficiently sound and whether the state is not abusing the trust of people who have previously surrendered their data for a different purpose.

Recently, the Ministry of the Interior proposed amending the Tourism Act so as to oblige providers of accommodation services to collect accommodation data electronically and do away with paper-based guest registration forms. The new mode of collection would allow for swifter data processing and real-time comparison of lists of users of accommodation services with the internal security databases of other countries and the European Union (including the police database). This data comparison should help enhance the capability of law enforcement agencies to respond promptly to threats to Estonian internal security.

The police database contains personal data on a very large number of individuals, including victims of misdemeanours or criminal offences, witnesses, persons who have called the emergency number or those who have been kept in a police detention facility. Any subsequent plan for additional processing of these individuals' data should require prior justification for the resulting interference with fundamental rights. Clear statutory criteria should exist, setting out when the data of individuals for whom a match is found between the register of an accommodation service provider and internal security databases would require additional processing.

## 4.2. Identifying inactive young people

The Ministry of Social Affairs has prepared a Draft Act aiming to support young people's ability to cope, acquire education and prepare for employment. The aim of the Draft Act was to establish a legal basis for conducting searches about young people aged 16–26 in national databases to identify those whom the state considers not to be engaged in any meaningful activity (i.e. not in education, employment, service in the Defence Forces, on child leave, and the like). Subsequently, local authority specialists were to contact young people identified on the basis of screened register data, enquiring as to the reasons why they have become disengaged from active life and informing them about the services offered by the *Rajaleidja* centres, the Estonian Unemployment Insurance Fund, as well as other available services. The data of the young people identified were to be stored in a national database.

The Chancellor was not convinced that the Draft Act in its originally proposed form would fulfil the desired purpose. The Chancellor recommends considering other solutions to involve young people in active life, such as facilitating access to education by providing appropriate courses and curricula and flexible study opportunities, traineeships, and improved career counselling, as well as by enabling flexible and simple employment relationships.

## 4.3. Opinion on Draft Act on background checks

The Ministry of Justice initiated a Draft Act laying down a basis for checking the integrity of persons to be entrusted with the tasks of a public authority or duties closely linked to these tasks. In the Chancellor's opinion, the initial version of the Draft Act contained inappropriate methods for checks, while several provisions included constitutionally questionable solutions. For example, a proposal to allow a person carrying out checks to retrieve data from the health information system without a person's consent amounts to a serious interference with that person's privacy.

The provisions of the Draft Act interfere with the inviolability of family life and the privacy not only of the addressees of the checks but also of persons having family or business relationships with them. Processing the data of related persons also involves the duty for those persons to participate in procedural steps. The situation should be avoided where the entry into force of the Act would lead to many persons deciding not to apply for public service posts merely because they do not wish to subject their close relatives to a background check procedure.

Another matter of concern is that the addressee of a background check under the Draft Act has to submit to an administrative body data already contained in national databases or data already collected during a previous background check.

## 4.4. Digital divide and digital communication channels

A digital divide on the level of people and countries is reflected in access to and skilled use of the internet. In its Digital Dividends report last year, the World Bank notes that introducing ICT and improving access to it is not as such enough to promote the development of countries. Serious attention should also be devoted to people and processes as well as legal space and education, so as to support adoption of ICT and a competitive business environment.

While on average 40 per cent of the world's population has access to the internet, in the European Union 82 per cent of individuals aged between 16 and 74 used the internet in the first quarter of 2016, while for Estonia the same indicator was 87 per cent.

Nowadays, the majority of Estonians take internet access for granted. This fact also offers a legitimate ground to use as many digital communication channels as possible in the provision of public services in Estonia, and in certain cases no alternative now exists to a digital service. Internet-based solutions, such as video calls or VOLIS, expand modes of work and enable people to participate in decision-

making processes more than previously. Via VOLIS, virtual local council sessions can also be held so that a council member need not be present in the meeting room.

Even though internet-based communication between the state and individuals is swifter, cheaper and more environmentally friendly than exchange of letters on paper, it should not be presumed that everyone can and wants to communicate with the state electronically. Habits of use and choices available to a particular target group should definitely be kept in mind while choosing communication channels. When introducing mandatory internet-based communication, the state must offer help and guidance to individuals if necessary.

## 4.5. Survey of internet use among the elderly

When conducting a survey of the use of ICT equipment and internet among households, Statistics Estonia regularly polls only people up to 74 years of age. The results of the survey are used to analyse ICT equipment and the services provided through it. Survey data are also necessary to evaluate the goals set in the Estonian information society development plan and for developing services.

In the Chancellor's opinion, data are also needed on people older than 74 years of age, who make up almost 10 per cent of the Estonian population. Even though the maximum age limit for respondents in the survey arises from European Union law, this does not prohibit polling older people. Nor are restrictions imposed under the Official Statistics Act either. In view of the constant development of e-government services and electronic commerce channels as well as increasing life expectancy, it is not reasonable to set age limits on improving ICT skills. Therefore, the Chancellor recommended to Statistics Estonia that it should also consistently collect data on internet usage by older people.

## 4.6. Obligatory use of electronic reporting by insurance brokers

Insurance brokers must file reports with the Financial Supervision Authority. This can only be done electronically. A digitally signed report must be filed with the Financial Supervision Authority either through the Authority's website or in encrypted format by e-mail.

An insurance broker who contacted the Chancellor asserted that requiring digital signing of reports was not justified since this presumes sound computer skills. The broker also found it problematic that no simpler alternative to electronic submission of reports existed.

However, the Chancellor did not find the provisions imposing the electronic reporting obligation to be unconstitutional. The principle of good administration arising from the Constitution requires that a burden placed on individuals in communicating with the state should be as light as possible. The obligation to file reports electronically serves the same purpose. Other electronic reporting obligations are also imposed on businesses: for example, since the beginning of 2010 they must file annual reports electronically through the e-reporting environment.

If the state imposes an obligation to use an electronic channel, assistance should also be provided if necessary. In the event of problems with the ID card, assistance can be sought from the Help Centre both by telephone and e-mail. If using an ID card in a personal computer is unsuccessful, public computers in public libraries or public internet points can be used, and library staff will have to assist people with accessing websites of state and local authority bodies.

## 4.7. Use of e-invoices in settlements with the public sector

In autumn 2016, the Chancellor was asked to verify the constitutionality of a Draft Act in the Riigikogu requiring businesses to use only machine-readable invoices, i.e. e-invoices, in settlements with the public sector.

An invoice is one of the most frequently-used documents sent between public sector institutions and businesses. In the interests of more environmentally sustainable and efficient management of affairs, it would be reasonable to introduce e-invoices that do not require manual inputting or printing on paper. However, in the opinion of the Chancellor, imposing the new obligation should involve ensuring that the preparatory work for transition to e-invoicing is sufficient so that the new requirement does not become overly burdensome on businesses.

The Riigikogu itself reached the same conclusion during the proceedings on the Draft Act. Since preparations were insufficient, imposing the requirement of e-invoicing was abandoned as a result of parliamentary discussions. Work on the transition to e-invoices continues but for the time being their use is optional.

## 4.8. Accuracy of data in the criminal records database

For some time now several agencies and the public have been displeased by the inaccuracy of data in the criminal records database. These data must be accurate because disclosure of inaccurate data infringes the fundamental rights of both those with a criminal record as well as others concerned. If criminal records data are inaccurate, a sentenced person may be hired for a position to which they

should have no access; or escape with an unjustifiably lenient sentence upon committing another offence. Timely archiving of records data must also be ensured.

The idea behind the criminal records database is to maintain a reliable record of a person's sentencing data. Section 5 of the Criminal Records Database Act affords legal effect to the data entered in the database. These data are used in checking a person's criminal record, including for recurrence of commission of criminal offences or misdemeanours. Data that have been deleted from the database and archived have legal effect only in exceptional cases laid down in the Act.

The Chancellor asked the Minister of Justice to explain what steps have been taken to address data problems in the criminal records database. The Minister agreed that data in the criminal records database should be improved and intends to upgrade information systems to do so. He also plans additional training for officials using the database in order to avoid errors and remind them of the duties imposed under legislation.

### 4.9. Improving the data quality of lists of members of political parties

During the previous reporting period, the Chancellor noted that inaccuracies occurred in the lists of members of political parties disclosed on the internet and concluded that showing inaccurate data about persons may breach their rights.

The Ministry of Justice and the Centre of Registers and Information Systems took commendable steps to improve the situation. At the end of 2016, disclosed data were changed so that a person could no longer be mistakenly linked to a political party to which they have never belonged. The Chancellor asked political parties to verify problematic entries concerning the history of a person becoming a member of or leaving a political party. To simplify the verification process, the Centre of Registers and Information Systems prepared lists of presumably erroneous registry entries.

Unfortunately, it is not possible retroactively to ensure that all errors are corrected. Due to weaknesses in the previous system, political parties could enter on their lists people who were simultaneously members of another political party regardless of the unlawfulness of that situation. Even though the system was improved in 2011, previous errors are visible in the register data disclosed on the internet. Therefore, consideration should be given to whether the history of political party membership of people dating back to the period prior to 2011 is so necessary as to outweigh the risk of providing inaccurate information to the public.

## 4.10. Amending entries in the population register at the initiative of the owner of residential space

Under the Population Register Act, a local authority may change a residential address entered in the population register upon a reasoned request by the owner if:

- the space belonging to the owner is indicated as the person's residence,
- the person has no right to use the space as their residence, and
- the person does not use the space as their residence.

As a result of the amendment, a person's residence is entered in the register only to the level of accuracy stating the local authority.

Thus, changing residential data first requires establishing whether all three of the above preconditions have been complied with. The local authority must also notify the person concerned about the owner's request within ten working days by post at the residential address currently indicated in the population register. At first sight, this leads to a situation where the administrative body must notify the person at their previously registered address which they no longer use as their actual residence.

This is what had happened to one petitioner, even though the owner of the residential space had also given the person's new address to the local authority. In the opinion of the Chancellor, it would have been reasonable to try and contact the petitioner at their new address. This would have better allowed compliance with the investigative principle and checking whether the preconditions for changing residential data had been fulfilled. Under the Family Law Act, a married couple may have the right to use the owner's space as their residence even in the event of temporary separation.

## 4.11. User-friendly and up-to-date e-government

The right to good administration arising from the Constitution and the Administrative Procedure Act places an obligation on agencies to publish on their websites essential information concerning administrative procedures within a particular agency's area of activity. The Supreme Court has emphasised that information must not be misleading or wrong, be contradictory or distort the facts. Due to misleading information, individuals could make harmful wrong decisions in exercising their rights and freedoms. Thus, in order to achieve good administration, it is necessary to ensure that information is accurate and up-to-date.

The right to good administration also means that the activities of an administrative agency must be clear and unambiguous for individuals, and individuals must be notified about examination of their case and of any other circumstances within a reasonable time.

The principles of good administration must also be valid in digital management of affairs. Even though our e-government services are highly ranked in the European Union, room for development and improvement still exists to attain user-friendly services.

Last year, the Chancellor was contacted by several persons who had returned home from abroad and had encountered problems with applying for social security benefits, changing their driver's licence, and finding a place at school. The Chancellor invited returnees to share their stories in order to find out whether these could be an indication of the existence of deeper problems in the process of dealings with the authorities. In the Chancellor's opinion, the biggest problem is that relevant information is hard to find. No separate information section for returnees exists in the State Portal, and also no references have been provided to the services of the Integration Foundation.

Finding the necessary information very much depends on a person's ability to search for it on the internet. If information has not been organised by subject areas, it is complicated for persons with little experience in dealings with the authorities to find answers to their questions. To prevent and resolve problems of returnees, agencies could provide more personal counselling to people with specific issues, because general information on a website or elsewhere may prove to be insufficient to resolve a particular problem a person is faced with.

### 4.12. Everyone's rights under e-government, or the e-government charter

The e-government charter called "Everyone's rights under e-government", describing the principles of good administration, was drawn up by the National Audit Office in 2008 as a corollary of an audit dealing with the same subject matter. The charter was written from the viewpoint of ordinary people and lists the rights of individuals when communicating with administrative agencies in a system of e-government. E-government has been described as a society where people communicate to a large extent by means of information and communication technology and where information is presented, stored and forwarded electronically.

The expansion of digital opportunities for communication during the last decade has brought about the need to revise and amend the charter. Nowadays, with the

increasing number of computer users, users of services also increasingly prefer more electronic channels and expect significantly more convenience than mere sending of an e-mail when communicating with the state.

In 2016, the Auditor General and the Chancellor of Justice agreed on updating the e-government charter. The Ministry of Economic Affairs and Communications also participated in drafting the new text. Both the National Audit Office and the Office of the Chancellor of Justice wish to start using the criteria outlined in the e-government charter in assessing the quality of public services and issuing recommendations to administrative agencies on making administration more citizen-friendly.

## 4.13. User-friendliness of the Register of Buildings

One person contacting the Chancellor complained that they could not apply for a permit for use of a building without filing the building design documentation electronically. Apparently, the building design documentation had been drawn up years ago on paper and had also been filed in that format with the rural municipal government for obtaining a building permit.

Under the current procedure, if an owner wishes to obtain a permit for use of their building, then in line with the Building Code they must communicate with the relevant agency through the Register of Buildings, i.e. electronically. Since the building process may become protracted, in the opinion of the Chancellor the body maintaining the Register of Buildings should proceed from the fact that an owner could also obtain a permit for use of their building when they have already filed some of the documents (e.g. the building design documentation) with the competent authority earlier in paper format.

The Chancellor made a proposal to the Minister responsible for the register also to allow filing of paper documents in certain justified cases. Guidance materials of the Register of Buildings should also be made more user-friendly. The guidance materials should help the owner of a building to apply easily through the register and the application procedure should be comprehensible to everyone.

## 4.14. Students with disabilities and bureaucracy

Students with special needs may apply for a grant of which the amount depends on the type and degree of disability. Grants are awarded by the Archimedes Foundation, with whom documents proving the degree of disability (e.g. an expert assessment) must be filed along with the application. However, these documents

also contain detailed health data which have no relevance in terms of award of the grant.

A petitioner contacting the Chancellor found that in today's information society it would be appropriate to use a solution where the administrative body awarding grants could itself search the social insurance information system and obtain confirmation of the degree and type of disability (functional abnormality) without detailed health data. This would also reduce the administrative burden on students with disabilities and prevent processing of sensitive personal data to a larger extent than unavoidably necessary. A higher educational institution that also needs student data could obtain the information from the Estonian Education Information System.

The Chancellor forwarded the petitioner's questions to the Ministry of Education and Research, which acknowledged the need for a more effective arrangement for processing grants for students with special needs. The Ministry affirmed that they would seek a solution that is more appropriate for an information society.

### 4.15. Misleading information regarding fishing reports

The website of the Environmental Board contained an explanation regarding the deadline for filing data on recreational fishing that has occurred based on a fishing card, which was not in line with the regulation laying down the procedure for filing data on recreational fishing.

The misleading deadline had also been given in an instructional video clip on filing the report. Violating the procedure for filing data may result in a misdemeanour sanction; while the sanction is in force, the person loses the right to apply for a fishing card. The Chancellor asked the Environmental Inspectorate to revise the information published on its website.

### 4.16. Misleading information on legal remedies

The website of the Estonian Data Protection Inspectorate contains recommendations on steps that people should take to protect their rights. If a person is dissatisfied because someone using a false identity discloses their data on Facebook, the following recommendation was given: "If contacting Facebook is unsuccessful, we advise resorting to an action in the county court and, if necessary, seeking to establish the identity of the discloser, and an order prohibiting them from disclosing further data on yourself, including publication of defamatory information."

The Chancellor drew the attention of the Data Protection Inspectorate to the fact that establishing the identity of a person disclosing personal data cannot be sought from the court. The prevalent opinion under current case law is that the procedure for pre-trial taking of evidence is not intended for establishing the identity of the defendant.

### 4.17. Limited legal remedies available to private car parks

In 2016, the Chancellor recommended that the Road Administration should change its current practice and start releasing data from the traffic register to private car parks. Several logical and reasonable preconditions were set for releasing the data: e.g., correct designation of the paid parking area, laying down in the standard terms the presumption of liability of a vehicle owner or authorised user, compiling sufficient records of a violation of a parking agreement.

In the dispute it was relevant that a private car park had no other reasonable avenues to bring civil claims against violators of parking arrangements. Towing away a vehicle is considerably more costly for an individual, it also increases traffic congestion, and has not always helped to resolve the case. More detailed arguments behind the Chancellor's recommendation were described by a Chancellor's adviser in an article published in the law journal Juridica 2016/IX *Põhiõigus tasuta parkida teisele isikule kuuluval eramaal? Eraisiku õigus saada riigilt teise isiku andmeid* [A fundamental right to free parking on private land owned by another person? A private individual's right to receive another person's data from the state].

However, the Road Administration refused to comply with the Chancellor's recommendation. The private car park brought an action with the administrative court against the Road Administration and the dispute continues concerning legal remedies available to a private car park in the event of failure to pay for a parking agreement. It will be interesting to see what effect the recent judgment of 4 May 2017 of the Court of Justice of the EU will have on this dispute; in that case, the CJEU also had to deal with the issue of release of data held by the state to allow another person to bring an action for damages before a civil court.

The Court of Justice considered disclosure of personal data to be justified in the circumstances of the instant case: "/…/ it does not appear to be justified, in circumstances such as those at issue in the main proceedings, to refuse to disclose to an injured party the personal data necessary for bringing an action for damages against the person who caused the harm, or, where appropriate, the persons exercising parental authority, on the ground that the person who caused the damage was a minor."

# V. COVERT PROCESSING OF PERSONAL DATA

The Chancellor of Justice exercises supervision over state agencies that organise interception of phone calls and conversations, surveillance of correspondence, and otherwise covertly collect, process and use personal data. The Chancellor checks whether all covert measures are carried out in compliance with applicable rules. Surveillance is used to investigate crimes and guarantee public order, while surveillance agencies also use covert processing of personal data to collect information necessary for their work.

The Chancellor's competence also includes supervision of supervisors, if necessary, in order to influence and direct them in complying with their duties. An inseparable part of supervision involves making proposals and recommendations to prevent both unintentional risks as well as risks arising from potential abuses leading to unjustified interference with the rights of individuals. Even when the actions of surveillance and security agencies are formally lawful, the Chancellor tries to ensure that the fundamental rights of individuals are reckoned with to the maximum possible extent.

The Chancellor proceeds from the premise that, as a rule, the public are not aware of possible breaches of rights in this field and cannot have recourse to the court in order to protect their rights. By putting herself in the position of individuals whose rights and freedoms may be interfered with in the course of covert data processing, the Chancellor can also scrutinise issues or problems which the court might not always review or would not even be aware of to review.

## 5.1. Protection of fundamental rights and freedoms in covert processing of personal data

During the last reporting year, the Chancellor's advisers verified how the Military Police and the Police and Border Guard Board respect the fundamental rights of individuals when carrying out surveillance. In the Police and Border Guard Board, surveillance files were inspected that reflect surveillance measures conducted outside the scope of criminal proceedings with the aim of collecting information about crimes in preparation with the aim of detecting or combating a criminal offence, as well as surveillance carried out when executing a warrant to locate a wanted person. During this period, the Chancellor also paid more attention to the activities of security agencies, focusing on fundamental rights protection during covert collection of data to combat criminal offences under the Security Authorities Act.

A separate inspection was carried out to evaluate issues concerning implementation of § 113 of the Electronic Communications Act, including activities of competent state agencies and telecommunication companies who process interception logs and content data and who supervise how this is done.

## 5.2. Inspection visits to security agencies

The Chancellor's advisers reviewed how the Estonian Internal Security Service and the Information Board have guaranteed the fundamental rights protection of individuals in respect of whom data are covertly collected by measures laid down in § 25 and § 26 of the Security Authorities Act (e.g. interception, covert surveillance, covert examination of items, phone records, covert entry).

The inspection focused first and foremost on whether carrying out a measure for collecting information was lawful, as well as unavoidable and necessary. The inspection also included checking for compliance with the requirement under § 29 of the Security Authorities Act to notify a person who had been subjected to the measure.

Security agencies have clearly established multi-level intra-agency supervision over activities carried out under the Security Authorities Act. In-house guidelines set out the duties and liability of officials, as well as overall requirements on how to draw up, register and keep the documents needed to carry out measures for collection of information (including obtaining various approvals). All this is extremely important in terms of guaranteeing the fundamental rights of individuals.

Nevertheless, based on the results of the inspection the Chancellor found it necessary to make some proposals to the Internal Security Service and the Information Board for better protection of the fundamental rights of individuals.

The main observations concerned the reasoning provided in authorisations of measures for collecting information, and notifying individuals.

## 5.3. Authorisations of measures for collecting information

The measures laid down in § 25 of the Security Authorities Act, which may only be carried out with court authorisation, restrict a person's right to the confidentiality of messages, as well as the right to privacy, more seriously than several of the covert measures laid down in § 26 of the Act, which may be carried out with authorisation from the head of a security agency or an official authorised by them. Under § 3(2) of the same Act, in the event of a choice between several possible

measures, the measure that least restricts the fundamental rights of individuals should be chosen. Therefore, authorisation of a measure for collecting information should clearly indicate that prior to issuing the authorisation consideration was given to possible alternatives, i.e. measures that would be less restrictive in terms of fundamental rights.

Under currently effective law and established practice, opportunities are extremely limited for cases of information collection by security agencies to come within the ambit of judicial review by superior courts. Therefore, it is even more important that authorising and carrying out a measure is thoroughly considered and that this can also be subsequently verified. This precludes the possibility of arbitrary suspicion.

Since measures for collecting information are similar to surveillance in terms of substance and intensity of interference, the principles for applicable rules in the context of fundamental rights overlap.

## 5.4. Notifying individuals about measures for collecting information

The Chancellor found that if an individual cannot be immediately notified about a measure for collecting information carried out on and affecting them, a security agency's own effective and efficient procedures (a control system) should ensure that a ground for non-notification exists in actuality and once the ground ceases to exist the individual would, if possible, still be notified about the measure restricting their fundamental rights.

## 5.5. Inspection visit to the Police and Border Guard Board

The aim was to review surveillance files processed by different structural units (prefectures, the Central Criminal Police, internal audit bureau) of the Police and Border Guard Board, which had been opened in order to:

- collect information about a crime in preparation, with the aim of detecting and combating it;
- execute a warrant to locate a wanted person;
- collect information in confiscation proceedings.

With regard to the files reviewed, most attention was given to whether authorisations for surveillance files had been justified (including the principle of *ultima ratio*), whether surveillance measures had been carried out in compliance with the law, and whether the duty of notification had been complied with. In all cases reviewed, surveillance had been carried out in line with authorisation by the court or the prosecutor's office and the time limit indicated in it.

No significant shortcomings were found in the surveillance files reviewed concerning notification of surveillance measures.

### 5.6. Inspection visit to the Military Police

In autumn 2016, the Chancellor's advisers reviewed the working arrangements and practice of the Military Police as to conducting surveillance.

### 5.7. Implementation of § 113 of the Electronic Communications Act

During an inspection visit from November 2016 to April 2017, the Chancellor's advisers assessed the lawfulness of measures carried out under § 113 of the Electronic Communications Act regarding the activities of competent state agencies as well as communications undertakings that process interception logs and content data. In order to do so, the relevant legislation and reports from the prosecutor's office on verifying the lawfulness of surveillance were reviewed. In addition, interviews were carried out in the Prosecutor General's Office, the Technical Surveillance Authority, the Internal Security Service, the Police and Border Guard Board, and three larger communication companies.

In the Chancellor's opinion, more clarity is needed as to using the fixed internet network for interception purposes – this would help to ensure the verifiability of communications transmissions at a level equivalent to voice and mobile telephony.

# VI. LOCAL AUTHORITY

Chapter 14 of the Constitution guarantees the autonomy of local government, i.e. the right of local authorities to resolve and manage local matters independently. Naturally, rural municipalities and cities must keep within the limits of the Constitution and laws in their activities. The duty to respect fundamental rights and liberties of individuals, to save the taxpayer's money, and handle all matters fairly also extends to local authorities.

## 6.1. Administrative reform

During the reporting year, heated debates were sparked off by the Administrative Reform Act and its implementation. In connection with court cases motivated by the disputes, the Chancellor also had to express an opinion on several important issues.

The Chancellor emphasises that under the Constitution local authorities may not be merged arbitrarily but a merger must serve a constitutional aim. A Government Regulation by which a local authority is merged with another local authority is a future-oriented prediction-based decision. In the course of judicial review, moderation is called for while re-evaluating the underlying justifications for a prediction-based decision. Only a fundamental error may lead to unconstitutionality of the decision.

The Chancellor's 2016 overview already briefly outlined the issues concerning an application filed with the Supreme Court by 26 municipal councils seeking to review the constitutionality of the Administrative Reform Act. By a judgment of 20 December 2016, the Supreme Court granted the applications of three councils by declaring unconstitutional and repealing a provision of the Administrative Reform Act insofar as it prescribed that the costs of Government-initiated alteration of administrative-territorial organisation would be compensated by no more than up to 100 000 euros. In the remaining part, the application of the municipal councils was dismissed and thus the Act remained in force.

Even though the provisions of the Administrative Reform Act concerning elections of local councils were not declared unconstitutional, the temporal proximity of forced mergers and elections did cause problems. In an opinion sent to the Riigikogu, the Chancellor noted the following: "Forced mergers may lead to a situation where two simultaneously valid but contradictory election procedures exist prior to municipal council elections. The council of a local authority that is to be merged may proceed from the premise that the election procedures and regulations approved by itself in respect of its former territory are lawful because

it has contested (or is about to contest) the forced merger in the Supreme Court. On the other hand, under § 12(9) of the Administrative Reform Act the county governor has issued the same decisions and legal acts, but in respect of the already merged local authority."

Seventeen rural municipal councils (Emmaste, Illuka, Kambja, Koeru, Lasva, Lüganuse, Mikitamäe, Padise, Pala, Pühalepa, Rakke, Sõmerpalu, Tõstamaa, Vasalemma, Vastseliina, Võru and Ülenurme) lodged an application with the Supreme Court to verify whether forced merger regulations issued by the Government were constitutional. When issuing the regulations the Government had to weigh ten criteria set out under § 7(5) of the Territory of Estonia Administrative Division Act (e.g. the effect on the living conditions of residents, the quality of public services, and the administrative capacity of the respective local authority), as well as financial capability and other circumstances set out under the Act.

By mid-August, the Chancellor formed an opinion on the constitutionality of three forced-merger regulations issued by the Government (regulations Nos. 96, 102 and 106 of 22 June 2017). Even though the Chancellor found shortcomings in the manner of adoption and reasoning of the regulations by the Government, in the Chancellor's opinion the shortcomings were not so serious as to lead to the unconstitutionality of these legal acts (see the opinions concerning Rakke, Koeru and Lüganuse rural municipalities).

The Chancellor also had to express an opinion on several issues in connection with alteration of the administrative-territorial status of villages.

- Consideration of an initiative made by village residents must take place in line with the applicable legislation and the principle of good administration (§ 14 Constitution). Even though village residents have no right to determine the administrative-territorial status of their village, they are entitled to timely and proper consideration of the initiative to that end by the municipal council and the Government (recommendation concerning the issue of administrative-territorial status of Soontaga village; proceedings in respect of an initiative by residents of Tammiste village; proceedings in respect of a proposal lodged with Ambla Rural Municipal Government).

  ● The results of a local popular initiative and of an opinion poll are not legally binding on a municipal council. The council is not required to consent to an initiative proposed under § 32(1) of the Local Government Organisation Act, seeking the transfer of a village or villages from one local authority to

another. The result of a local opinion poll is not legally binding on members of the municipal council; they bear political responsibility for their decision.

The Chancellor reached the opinion that local authority officials may collect signatures for or against a forced merger of their rural municipality or city only outside the performance of their official duties. Public service presumes political neutrality of officials (§ 51(2) Civil Service Act; Code of Ethics of Officials). Collection of signatures concerning the future legal status of a local authority fails to comply with this principle. However, the Constitution and statutes do not prohibit persons working as local authority officials from collecting signatures outside their working time for or against a merger with (an)other local authority or authorities.

### 6.2. The right of members of a political party to run on a list of candidates of an election coalition

The Chancellor found that the Municipal Council Election Act, the Political Parties Act, and the Non-Profit Associations Act do not prevent members of a political party from being affiliated with an election coalition or running as a candidate on its list. This is also affirmed by a comparison with the Riigikogu Election Act and the European Parliament Election Act under which members of a political party may not run on a list of another political party in those elections.

However, no such restriction is imposed under the Municipal Council Election Act, so that in council elections members of a political party may even run on another party's list, let alone on the list of an election coalition. Local matters – which are debated during municipal council elections – are not generally resolved from the narrow viewpoint of party ideology. Running members of a political party on a list of an election coalition in municipal council elections is widespread practice. Indeed, restricting or banning this right might itself be contrary to the Constitution.

### 6.3. Prohibition on political outdoor advertising

When the Supreme Court started hearing the political outdoor advertising case, the Chancellor in her opinion concluded that the provisions of the Municipal Council Election Act, the Riigikogu Election Act, and the European Parliament Election Act that prohibit political outdoor advertising by a candidate during the active campaign stage on movable property used personally by the candidate were unconstitutional.

The Chancellor concluded that the applicable prohibition has not attained its original aims – to promote more substantive campaigning and ensure a better level playing field for candidates – but rather restricts the opportunities of

candidates with a tighter budget to express their opinions. Informative outdoor advertising may often be the only available means of campaigning for a candidate or an election coalition because, unlike political parties, it would not be reasonable or financially possible for them to invest in television, radio and internet advertising. In particular, this holds true for local elections. The Supreme Court did not form an opinion on the constitutionality of the prohibition of political outdoor advertising since the prohibitive rule did not need to be applied in the instant case.

### 6.4. Reconciling the positions of a member of the Riigikogu and a municipal council

In a dispute over whether a member of the Riigikogu may simultaneously also be a member of a municipal council (the so-called double-seat rule), the Chancellor reached the opinion that a statute enabling such a double mandate is compatible with the Constitution. The Supreme Court reached the same conclusion. Under the Constitution, the position of a municipal council member is not a public office. Reconciling the two positions is also not prevented by considerations of time management in connection with exercising the mandate of a member of the Riigikogu and of a municipal council.

Municipal council members have a free mandate giving rise to a member's freedom of decision. A member of the Riigikogu who is also a municipal council member may freely proceed from local interests when sitting in the council. The autonomy of local authorities might, instead, be negatively affected by banning reconciliation of the two positions, since this would disregard the will of voters.

The electoral success of independent election coalitions and candidates may be hindered by members of the Riigikogu running as candidates but not by their becoming members of a municipal council. In the event of a ban on reconciling the two seats, an alternate member from the same electoral list would instead take up the municipal council member's seat. The seat in the municipal council won by the member of the Riigikogu would not transfer to any other political association. It would be unjustified to assume that an alternate member with a lower number of votes would be more impartial in resolving local matters than a member of the Riigikogu who is a local resident and who won a mandate from voters.

If a clear distinction is sought between local community leaders and leaders of the state, appropriate restrictions on running in elections should be considered. A situation that favours candidates running as "decoy ducks" and thus misleading voters is not a suitable solution for strengthening local democracy and local government.

## 6.5. Functioning of the municipal council and audit committee

New IT solutions (e.g. Skype and VOLIS) allow novel approaches to legal regulation of traditional forms of the work of local government bodies. Nowadays, a member of a municipal council need not be physically present to attend a council session. However, legal requirements should be complied with, including ensuring equal access to innovative methods of participation for all council members.

Restrictions on posts and positions held by members of municipal councils are necessary to avoid conflict of interest and the risk of corruption. A municipal council must ensure independent, sufficient and transparent supervision over the government, its agencies and bodies, as well as municipal companies and foundations. If council members simultaneously maintain links to agencies and companies subject to supervision, this may give rise to justified misgivings as to the sufficiency and objectiveness of supervision. A suspicion may also arise that positions which by nature are non-political are filled by taking into account people's party-political affiliation.

To alleviate suspicions of this kind and the risk of corruption, it is necessary to consider revising the restrictions on holding posts and positions imposed under the Local Government Organisation Act. In many cases, rules on transparency and withdrawal from decision-making would be sufficient.

Conflicts of interest can be avoided, first and foremost, by procedural restrictions laying down a requirement to withdraw oneself from decision-making in relevant cases. Under the Anti-corruption Act, procedural restrictions should also prevent a conflict of interests when an official is a member of a management body of a private legal entity (company, non-profit association, foundation). As a rule, an official is barred from taking a step or decision that concerns themselves or a person connected to them.

An audit committee scrutinises the financial records of local authorities. This should be done lawfully, effectively and transparently, while not impeding performance of the main functions of the audited entity. An audit committee is entitled to obtain information and all documents needed for its work. In the Chancellor's opinion, the statutes of a local authority should prevent a situation where a rural municipality or city mayor would be entitled to veto an audit committee's work plan.

## 6.6. Redundancy compensation to local authority officials in a merger agreement

The Chancellor dealt with compensation to local authority officials in the event of redundancy under a merger agreement, and in a memorandum drew attention to the fact that a merger agreement must comply with the Civil Service Act.

Under the Civil Service Act (§ 61(6)), an official must not be paid any additional remuneration or allowance by an authority where payment is not laid down by law. Under § 61(5) of the Act, an irregular part of an official's remuneration is called variable salary, which may be paid as a performance payment, as an additional payment for performance of additional duties or as a bonus for exceptional service-related achievements. Under the same provision, a variable salary of up to 20 percent of the basic salary of the official may be paid in addition to the basic salary of the official. Compensation amounting to six months' salary under a merger agreement does not fit within the frame laid down by the Act (this is also not altered by § 101(6) of the Act).

Section 61(6) of the Civil Service Act does not extend to employees of an authority, but laying down their social guarantees should take into account that service-related conditions of employees should not be significantly better than those of officials. Under § 63 of the Act, the conditions and procedure for payment of additional remuneration and benefits should be laid down in an authority's salary guide.

The Chancellor proposed to the Ministry of Finance that consideration be given to drawing up a specific norm that would allow payment of higher-than-ordinary redundancy compensation if necessary.

## 6.7. Social services

During the reporting year, the Chancellor paid close attention to social services provided by local authorities. Under the Social Welfare Act, local authorities must establish the procedure for provision of social welfare assistance, which must contain at least the description of social services and benefits, their financing, and the conditions and procedure for applying for social services and benefits. The Act requires local authorities to provide at least 11 social services.

In autumn 2016, the Chancellor sent a memorandum to local authority leaders, emphasising, among other things, three main tasks facing local authorities:

- ensuring the existence of necessary social services,
- ascertaining what assistance meets the needs of individuals, and

- participating in covering the costs of social services, if necessary.

Local authorities may decide whether to provide services themselves or outsource them from a service provider (cooperation with a neighbouring rural municipality or city may be arranged for providing a service), what kind of service is arranged for a specific person in line with the principles of social protection and social welfare, and whether and to what extent service recipients themselves should pay for a social service in line with the principles of charging for services.

In the memorandum, the Chancellor also dealt with the procedure for providing social welfare assistance, the choice of a suitable social service, charging services, formal requirements for drawing up administrative decisions, and financing of social services. Since the state has imposed on local authorities the duty to provide social services to the appropriate extent to persons in need, it should also allocate sufficient funding to carry out this task. However, a local authority should not wait passively until money is allocated, but should raise the alert about lack of funds already early on. If the state fails to guarantee the necessary funding, a local authority may have recourse to the court.

## 6.8. Establishing and changing location addresses

Under the Spatial Data Act, establishing and changing location addresses is the duty of local authorities. In a recommendation to Kaiu Rural Municipality Government, the Chancellor emphasised that receipt of a single pensioner allowance depends on the pensioner's address being accurate and current. Therefore, in line with the principle of good administration (§ 14 Constitution), upon receiving a change-of-address request a local authority must change the address as quickly as possible, without raising unnecessary bureaucratic hurdles for an individual.

A single pensioner allowance is a state benefit granted to single pensioners on the basis of population register data. Thus, one of the main conditions for granting the allowance, i.e. a pensioner's precise address in the population register, depends on the local authority. A rural municipality or city government should initiate a change of address immediately upon receiving notification from an individual, whereas no written application needs to be asked from the individual. Local authorities may not presume that individuals themselves are aware of how to request the right solution, such as initiating the right administrative proceedings.

Once the new address has been determined, the person's residential address data in the population register must be changed and the resident must be notified

about the change of address. The local authority should perform this step on its own initiative, and the individual should not be required file a notice of residence.

### 6.9. Law enforcement in local authorities

The Chancellor issued a critical opinion regarding amendments planned in the Law Enforcement Act and other Acts. These would have expanded the powers of local authorities in checking the right to travel on public transport. Careful consideration should be given to whether fare-dodging is such a serious violation as to justify use of immediate coercion, i.e. force, in respect of fare-dodgers**.**

### 6.10. Noise caused by public events

The Chancellor received several complaints concerning noise caused by public events. In her reply, the Chancellor noted that a rural municipality or city government may not allow businesses to organise public events which cause noise that significantly disturbs other people, i.e. noise exceeding the reasonable threshold for duty to tolerate a nuisance. By authorising a public event, a local authority regulates economic activities arising from the freedom of enterprise. However, in doing so, the inviolability of the home and property of residents is restricted and normal family life is disturbed. These nuisances may sometimes outweigh freedom of enterprise. Law restricts the freedom of businesses in various ways, including by prohibiting causing noise that significantly disturbs others.

### 6.11. Advertising tax

The Supreme Court asked for the Chancellor's opinion on whether the Constitution requires laying down the maximum or minimum rate of advertising tax as a local tax in an Act. The Chancellor found that the right of a municipal council to develop public space in line with the preferences of a local community outweighs the consequent minor interference with the freedom of enterprise. Thus § 10(4) of the Local Taxes Act is constitutional. The Supreme Court reached the same conclusion.

# VII. TAXES AND ENTREPRENEURSHIP

Levying and abolishing taxes and changing tax rates is the constitutional right and duty of the Riigikogu in order to raise revenue to cover public expenditure. However, new taxes and tax increases mean expenses for taxpayers that hamper their daily life and business activities. The damage is more severe if taxes rise "overnight", without leaving businesses the opportunity to reorganise their activities. At the same time, the Constitution also protects everyone's right to engage in entrepreneurial activity.

Amending legislation, in particular with regard to tax matters, entails first and foremost risk for businesses. The faster taxes can be changed the greater the risk, partly because the actual impact of amendments has not been analysed and the result might not be what was expected. Eventually at stake could be the credibility and reputation of the country's whole business environment, which is of immense value for a country with an open economy.

## 7.1. Faster-than-planned rise of excise rates on low-alcohol beverages

On 15 June 2015, the Riigikogu adopted an Act laying down a prospective increase on rates of alcohol excise duty up to the year 2020 (the so-called tax ladder). On 19 December 2016, the Riigikogu approved an Act amending the Income Tax Act, the Social Tax Act and other Acts, which stipulates significantly higher excise rate increases than had previously been planned.

Amending tax legislation in this way caused intense controversy. Arguments were put forward both in favour of and against the prospective faster-than-expected alcohol excise increase.

For example, it was asserted that changing the applicable tax ladder has become established practice in the last decade, so that no legitimate expectation could have arisen with regard to maintaining the anticipated tax rate increase.

A question was also raised whether establishing the so-called tax ladder for years in advance is permissible at all in line with the principle of democracy, since this restricts the right of future ruling coalitions and parliaments to make new choices based on their ideological preferences.

Close attention was also given to § $85^{12}$ of the Alcohol, Tobacco, Fuel and Electricity Excise Duty Act, which obliges the Government first to analyse the impact of tax rates and only then – if analysis substantively indicates the need – to initiate procedures in the Riigikogu for increasing the tax.

To bring legal clarity on these as well as other issues, the Chancellor initiated constitutional review proceedings. Since the Riigikogu did not observe the Chancellor's proposal, the Chancellor filed an application with the Supreme Court. In a judgment delivered on 30 June 2017, the Supreme Court held that the Riigikogu's decision to raise excise duty rates faster than previously planned was not unconstitutional**.**

Thus, the situation seems to be clear, but it is another matter whether one has to fully agree with it. The Supreme Court found, for example, that norms entering into force in the future – even if linked to specific dates – do not create a strong legitimate future expectation. However, the Court conceded that individuals might also start planning their activities with a view to arrangements entering into force in the future, and the expectations of these people are not insignificant. The state must not lay down new rules arbitrarily: first and foremost it is important that a reasonable time is left to adjust to changes.

The Supreme Court also assessed the sufficiency of *vacatio legis* (the length of the period between adopting a rule, its publication and entry into force), and considering that only excise duty rates were raised, while other elements of the tax law relationship remained unchanged, the Court found the period between adoption of the Act on 19 December 2016, its promulgation on 24 December 2016 and entry into force of the disputed excise duty increases (on 1 July 2017) to be sufficient.

## 7.2. Abandoning reduction of the social tax rate

By amendments adopted on 19 December 2016, the Riigikogu decided to abandon the lowering of the rate of social tax. The social tax rate was planned to be lowered by 0.5 percentage points on 1 January 2017 and by another 0.5 percentage points on 1 January 2018.

The Chancellor noted in her opinion that even though the amendments may have been damaging to the business environment, the legitimate expectation of businesses was not violated. The state's fiscal interest, the sustainability of the budget of the Health Insurance Fund, and the right of the new ruling coalition to revise previous policy constitute a strong public interest that outweighs the interference resulting from the decision not to lower the social tax rate.

Section 4[1] of the Taxation Act stipulates that a period of at least six months should generally stand between adoption of a burdensome tax amendment and its entry into force. However, the period may also be shorter if sound reasons exist for it.

At the same time, justification should always be given when rushing decisions unfavourable to taxpayers, and the weight of the aims and reasons of a change should be considered in comparison to damage caused to taxpayers.

### 7.3. Raising the rate of excise duty on natural gas

By the Act adopted on 19 December 2016, the Riigikogu also raised the rate of excise duty on natural gas. The Chancellor assessed the constitutionality of the decision and found that businesses could not have had a legitimate expectation that rates of excise duty on natural gas would not change. As the increase in the excise rate is significant (up to 2020 the excise rate would rise by 25 per cent a year in comparison to the rate applicable the year before), it cannot be ruled out that people and businesses would replace natural gas by another energy source.

Increasing the excise duty would thus bring about negative consequences for natural gas undertakings, as well as for persons who replace the type of fuel they use; however, *in abstracto* it was not possible to establish that the specific excise duty increase would render exercise of the freedom of enterprise or of the fundamental right to property impossible or extremely difficult.

### 7.4. Constitutionality of the rate of tax interest

Several petitioners contacted the Chancellor to contest the rate of tax interest. (The common rate of tax interest is 0.06% a day and 21.9 per cent a year.) At the same time, Tallinn Administrative Court also entertained doubts about the constitutionality of the rate of tax interest. Within constitutional review proceedings stemming from these cases, the Supreme Court Constitutional Review Chamber delivered a judgment affirming that the rate of interest did not contravene the Constitution. The Chancellor also submitted her opinion to the Supreme Court within these proceedings.

Even though the Supreme Court did not find the uniform rate of tax interest to be clearly unconstitutional, the Court did not rule out that an excessive financial burden might result for some persons or groups of persons because the rate is imposed uniformly on all groups. The Supreme Court noted that the more general the rate of tax interest laid down by the legislator the more effective the legal mechanisms should be that enable excess interest to be prevented in a specific case.

In its reasoning, the Court referred to norms that allow interest calculation to be suspended if the amount of interest exceeds the claim for the tax which is the basis for calculation (§ 119(1) clause 5 Taxation Act), and the right of a tax

authority, in the event of payment of tax arrears by instalments, to reduce the interest rate by up to 50 per cent as of the date of making the decision on payment of tax arrears by instalments (§ 117(2) Taxation Act). One possibility to obtain alleviation of the financial burden arising from tax interest is to apply for forgiveness of tax arrears (§ 114(3) Taxation Act 3).

In the cases reviewed by the Supreme Court, no circumstances were found to indicate an excessive rate of interest. However, it cannot be ruled out that such circumstances might arise in another case. If no effective remedies are available to prevent an excessive rate of interest in those cases, assessment of the constitutionality of regulatory provisions could lead to a different conclusion.

The Ministry of Finance has begun to prepare amendments to make regulation of interest more flexible.

# VIII. INTERNATIONAL RELATIONS

Since 2001, the Estonian Chancellor of Justice is a member of the International Ombudsman Institute (IOI). The Institute was established in 1978 and includes approximately 170 national and regional ombudsmen from 90 countries worldwide. The IOI operates in six regions – Africa, Asia, Australasia and Pacific, Europe, the Caribbean and Latin America, and North America – and is governed through regional Boards. The Institute's European region includes 80 national and regional ombudsmen from the majority of European countries. Chancellor of Justice, Ülle Madise, was elected to the seven-member Board of the IOI European region on 30 September 2015 and was re-elected on 27 July 2016. Her mandate on the Board lasts until 2020.

Chancellor of Justice, Ülle Madise, also represents Estonia in the Council of Europe Commission against Racism and Intolerance (ECRI). Head of the International Relations and Organisational Development, Kertti Pilvik, participates as Estonian representative in the work of the Management Board of the EU Agency of Fundamental Rights (FRA).

Since 2012, the Chancellor of Justice as Ombudsman for Children has been a member of the European Network of Ombudspersons for Children (ENOC). The Chancellor also represents Estonia in the networks of European Ombudsmen, the Ombudsman Institutions for the Armed Forces, and the National Preventive Mechanisms.

## 8.1. Foreign guests

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| 6 September | Delegation of the Monitoring Committee of the Council of Europe Congress of Local and Regional Authorities (CLRAE). |
| 21 September | Delegation of the Minister of Justice of the Federal State of Hesse, Eva Kühne-Hörmann, and the Legal Affairs Committee of the Parliament of Hesse. |
| 22 September | Delegation of Austrian judges, prosecutors and judicial officers. |
| 25–26 October | Dutch Ombudsman Reinier van Zutphen with advisers. |
| 4 November | Council of Europe Commissioner for Human Rights, Nils Muižnieks, and Director of the Office, Isil Gachet. |
| 23 November | French Ambassador to Estonia, Claudia Delmas-Scherer. |
| 7 December | Georgian Ambassador to Estonia, Tea Akhvlediani. |
| 6 February | Director of the EU Agency of Fundamental Rights (FRA), Michael O'Flaherty. |
| 17 February | Delegation of Ukrainian judicial communication specialists. |

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| 3 March | Data Protection Officer of the Federal State of Hesse, Michael Ronellenfitsch, and delegation of the Data Protection Committee of the Parliament of Hesse. |
| 5 April | Deputy Regional Representative of the UN High Commissioner for Refugees (UNHCR), Wilfried Buchhorn, and his legal adviser Andrei Arjupin. |
| 12 May | Representatives of the Swedish Family Law and Parental Support Authority (MFoF). |
| 23 May | Delegation of students from Georgia and Abhasia. |
| 30 May | Delegation of the Legal Affairs, Constitutional, and Equality Committees of the Parliament of the Federal State of Saxony-Anhalt. |
| 8 June 2017 | Delegation of Moldovan civil servants. |

## 8.2. Foreign visits

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| 21–22 September | Eva Lillemaa and Maria Sults attended the training course „Training School 2016 – Modern forensic in-patient facility design standards“ in Helsinki. |
| 25–27 September | Ülle Madise and Kertti Pilvik attended the IOI European Board meeting in Naples. |
| 1–7 October | Vladimir Svet delivered a presentation at the training seminar „The United Nations and the EU-human rights supporting documents“ in Bishkek. |
| 3–5 October | Hent Kalmo, Heili Sepp, Indrek-Ivar Määrits, Kaarel Ots and Kertti Pilvik delivered presentations at the meeting of the Baltic and Nordic ombudsmen in Helsinki. |
| 8–10 October | Olari Koppel as member of the National Electoral Committee participated in the observation mission of Lithuanian parliamentary elections. |
| 31 Oct – 3 Nov | Indrek-Ivar Määrits, Raivo Sults, Ksenia Žurakovskaja-Aru and Eva Lillemaa were on a study visit at the Danish ombudsman's office concerning issues of supervision of immigration authorities. |
| 5–10 November | Olari Koppel as member of the National Electoral Committee participated in the observation mission of the US presidential elections. |
| 29–30 November | Ülle Madise and Kertti Pilvik attended the IOI European Board meeting in Barcelona. |
| 29–30 November | Kristi Paron attended the forum on the rights of the child organised by the European Commission in Brussels. |

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| 1 December | Ülle Madise, Olari Koppel, Indrek-Ivar Määrits and Kertti Pilvik visited the Finnish Parliamentary Ombudsman regarding the issue of the national human rights institution. |
| 5–8 December | Indrek-Ivar Määrits, Raivo Sults, Ksenia Žurakovskaja-Aru and Eva Lillemaa were on a study visit at the Swedish ombudsman's office concerning issues of supervision of immigration authorities. |
| 6–7 February | Andres Aru attended the opening meeting of the project „Non Violent Childhoods: Moving on from corporal punishment in the Baltic Sea Region" in Stockholm. |
| 20 February | Evelin Lopman attended the EU Council of Ministers Aarhus working party meeting in Brussels. |
| 28 Feb – 2 March | Andres Aru, Kristi Paron and Vladimir Svet attended the working meeting of the Estonian, Latvian, Lithuanian and Polish ombudsmen for children in Riga. |
| 19–22 March | Raivo Sults attended the training seminar for ombudsmen of the armed forces in Warsaw. |
| 22–24 March | Ülle Madise attended the 72nd ECRI plenary meeting in Strasbourg. |
| 3–5 April | Indrek-Ivar Määrits attended the cooperation seminar of preventive mechanisms „Network of SPACE national correspondents and Network of national prison monitoring bodies (especially NPMs)" in Strasbourg. |
| 3–5 April | Ülle Madise and Kertti Pilvik attended the IOI European Board meeting and the seminar for members of the European region in Barcelona. |
| 23–24 April | Andres Aru attended the conference „Europe's challenge to ensure a rights perspective for children in migration" in Stockholm. |
| 2–5 May | Heili Sepp attended the training seminar for GRECO evaluators in Strasbourg. |
| 22–24 May | Olari Koppel attended the seminar of ECRI equality bodies in Strasbourg. |
| 30 May – 2 June | Indrek-Ivar Määrits attended the consultation meeting "Draft set of rules for administration detention of migrants and independent observatory of NPMs (NPM Obs)" organised by the Council of Europe in Strasbourg. |
| 6–8 June | Vladimir Svet delivered a presentation at the conference „Ensuring the rights of children in alternative care" in Vilnius. |

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| 14–17 August | Raivo Sults attended the summer school for the national preventive mechanisms in Bristol. |
| 19–20 June | Ülle Madise and Kertti Pilvik attended the conference of the European Network of Ombudsmen in Brussels. |
| 21–23 June | Ülle Madise attended the 73rd ECRI plenary meeting in Strasbourg. |
| 23 August | Ülle Madise moderated the public speech event held by the President of the German Federal Republic, Frank-Walter Steinmeier, „Germany and Estonia – a chequered history, a common future“ in the Estonian Academy of Sciences. |

## 8.3. Projects

In autumn 2016, advisers from the Inspection Visits Department visited Danish and Swedish parliamentary ombudsmen within the Nordic-Baltic Mobility Programme for Public Administration and discussed the issues of supervision of migration authorities.

Similarly to the Estonian Chancellor of Justice, Danish and Swedish parliamentary ombudsmen also perform the functions of the national preventive mechanism under the Optional Protocol to the UN Convention on the Prevention of Torture. For example, they check how dignified treatment is ensured in closed immigration facilities. The Chancellor's advisers also visited the Ellebæk immigration detention centre, Sjælsmark deportation centre, and Auderødi asylum reception centre in Denmark, and Märsta detention centre, refugee accommodation centre, and Storboda prison in Sweden.