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## **КӨМЕЛЕТКЕ ТОЛМАҒАНДАРҒА ҚАТЫСТЫ ТӘРБИЕЛІК ЫҚПАЛ ЕТУДІҢ МӘЖБҮРЛЕУ ШАРАЛАРЫН ҚОЛДАНУ МӘСЕЛЕСІНЕ**

**Аннотация.** Мақала көмелетке толмағандарға қылмыстық жауаптылықтан және жазадан босатылған кезде қолданылатын тәрбиелік мәжбүрлеу шараларын заңнамалық реттеу мәселелеріне арналған. Сот практикасының деректері бойынша аталған шараларды іс жүзінде қолдану проблемалары белгіленді.

Тәрбиелік ықпал етудің мәжбүрлеу шаралары - бұл қылмыстық әрекетті жасаған көмелетке толмағанға қатысты арнайы педагогикалық, құқықтық және қоғамдық мәжбүрлеудің, оның мінез-құлқын түзету мақсатында қылмыстық жауаптылық ретінде іске асырылатын, мемлекеттік тәрбиелік ықпал етудің қылмыстық-құқықтық шараларының жиынтығы.

Мақаланың өзектілігі: тәрбиелік ықпал етудің мәжбүрлеу шараларын тиімді қолдану қажеттілігінде жатыр. Жүргізілген қылмыстық-құқықтық талдау шеңберінде тәрбиелік ықпал етудің мәжбүрлеу шараларының түрлері, олардың мазмұны және іске асырылуы зерделенді.

Автор жүргізілген талдау негізінде тәрбиелік ықпал етудің мәжбүрлеу шараларын тағайындауды жетілдіру мәселелері бойынша қолданыстағы заңнамаға өзгерістер ұсынады.

**Түйінді сөздер:** көмелетке толмаған адам, тиімділік, тәрбиелік ықпал етудің мәжбүрлеу шаралары, қылмыстық жауапкершілік, алдын алу, бос уақытын шектеу, ерекше талаптарды белгілеу, балалар қылмысының алдын алу.

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## **К ВОПРОСУ ПРИМЕНЕНИЯ ПРИНУДИТЕЛЬНЫХ МЕР ВОСПИТАТЕЛЬНОГО ВОЗДЕЙСТВИЯ В ОТНОШЕНИИ НЕСОВЕРШЕННОЛЕТНИХ**

**Аннотация.** Статья посвящена проблемам законодательного регулирования принудительных мер воспитательного воздействия, применяемых к несовершеннолетним при освобождении их от уголовной ответственности и наказаний. Обозначены проблемы практического применения указанных мер по данным судебной практики.

Принудительные меры воспитательного воздействия представляют собой комплекс уголовно-правовых мер принудительного государственного воспитательного воздействия, который реализуется как уголовная ответственность, с сочетанием специального педагогического, правового и общественного принуждения на несовершеннолетнего, совершившего уголовное правонарушение, с целью исправления и коррекции его поведения.

Актуальность статьи заключается в необходимости эффективной реализации применения принудительных мер воспитательного воздействия. В рамках проведенного уголовно-правового анализа изучены виды принудительных мер воспитательного воздействия, их содержание и реализация.

Автором на основе проведенного анализа предлагаются изменения в действующее законодательство по вопросам совершенствования назначения принудительных мер воспитательного воздействия.

**Ключевые слова:** несовершеннолетний, эффективность, принудительные меры воспитательного воздействия, уголовная ответственность, предупреждение, ограничение досуга, установление особых требований, профилактика детской преступности.

## **ON THE ISSUE OF APPLICATION OF THE COERCIVE EDUCATIONAL MEASURES AGAINST MINORS**

**Abstract.** The article initiated the problems of legislative regulation of coercive measures for educational impact on minors when releasing them from criminal liability and punishment. Based on identified judicial practice, the aforementioned issues of the practical application of these measures have been discussed.

Coercive measures for educational impact are the complex of criminal and legal measures of state forced educational impact, criminal liability implemented, with a combination of special pedagogical, legal and social forcing on a minor who has committed a criminal offense in order to correct his/her behavior.

The relevance of the article lies in the need for coercive educational measures.

Within the framework of the criminal law analysis, the types of compulsory educational measures, their content and implementation have been studied.

Based on the analysis, the author proposes changes to the current legislation on improving the appointment of compulsory measures of educational influence.

**Key words:** minor, juvenile, efficiency, coercive measures for educational impact, criminal liability, prevention, limitation of entertainment, establishment of special requirements, and prevention of child crime.

Application of the coercive measures for educational impact in the Republic of Kazakhstan (hereinafter-RK) is a type of state forced measures applied to minors who have committed criminal offenses that do not represent a great public danger, which implemented as criminal liability with a combination of special pedagogical, legal and social forcing in order to correct their behavior.

Coercive educational measures nature is not punishment. However, the nature of those educational measures is a contributing juvenile to correction and re-education. The nature of forced educational measures for the juvenile is a combination of special educational and socio-psychological impact.

Those measures for educational impact are enshrined in the Criminal Code of the RK (hereinafter-CC RK). Article 84 of CC RK provides for the following measures:

- Warning;
- Transfer under supervision of parents or persons who are replacing them, or the specialized state body;
- The imposition of the duty to make amends;

- Limitation of entertainment and establishment of special requirements for the behavior of a minor;

- Placement in the educational organization with a special regime of maintenance;

- Obligation to apologize to the victim;

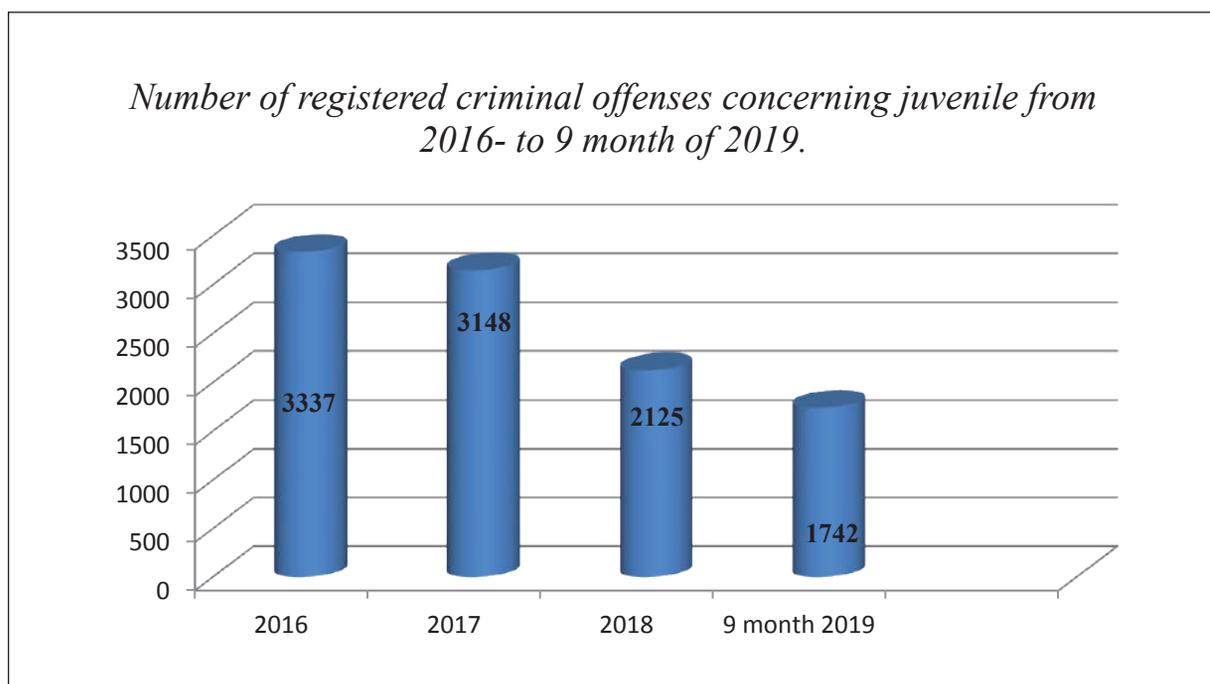
- The establishment of probation control;

- A juvenile can get several coercive measures at the same time;

- According to the Concept of the RK legal policy for the period from 2010 to 2020, the criminal policy directed to a phased reduction sphere of criminal repression by expanding the conditions of exemption from criminal punishment, primarily concerning persons who do not represent a great public danger – juvenile [1].

The analysis of underage crime demonstrates a decrease in the number of registered offenses.

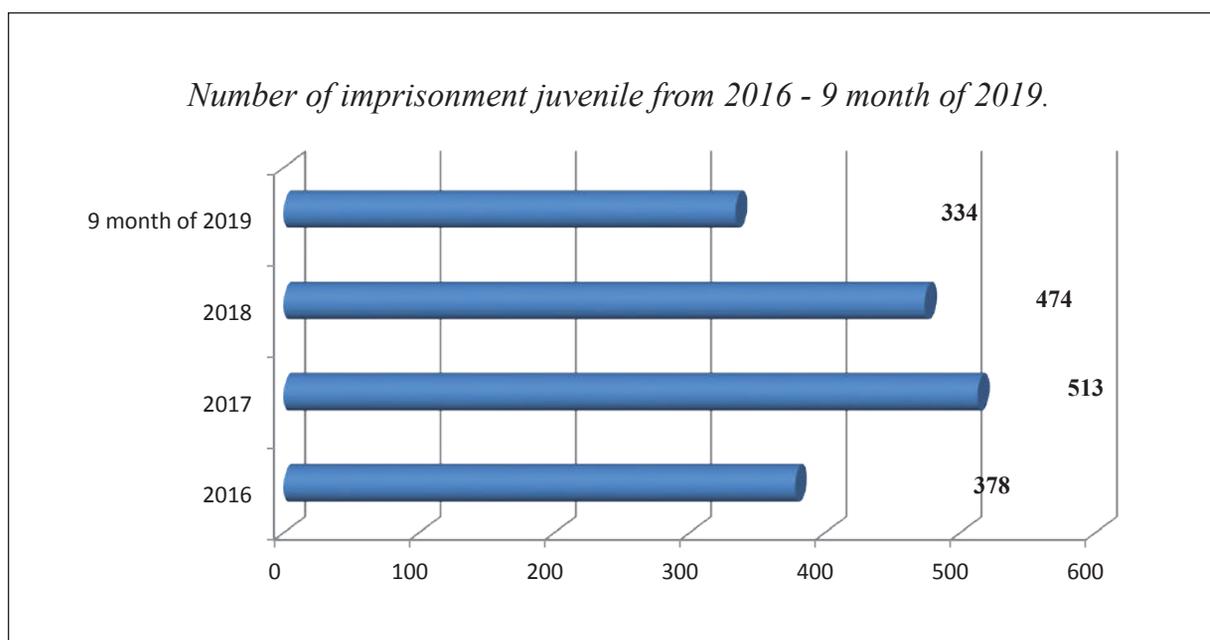
Therefore, in 2016 3337 criminal offenses were committed; in 2017 the number of criminal offences decreased to 3148; in 2018 2125 criminal offenses were committed, for 9 months of 2019 - 1742 criminal offenses.



*Diagram 1*

The analysis of the data of Committee on legal statistics and special records of the Prosecutor General's Office of the Republic of Kazakhstan (hereinafter – PGORK) has illustrated that 378 minors have been

punished in 2016, 513 juveniles have been punished in 2017, 474 minors - in 2018 as well as 334 juveniles have been punished during the 9 months of 2019 by the courts of RK.

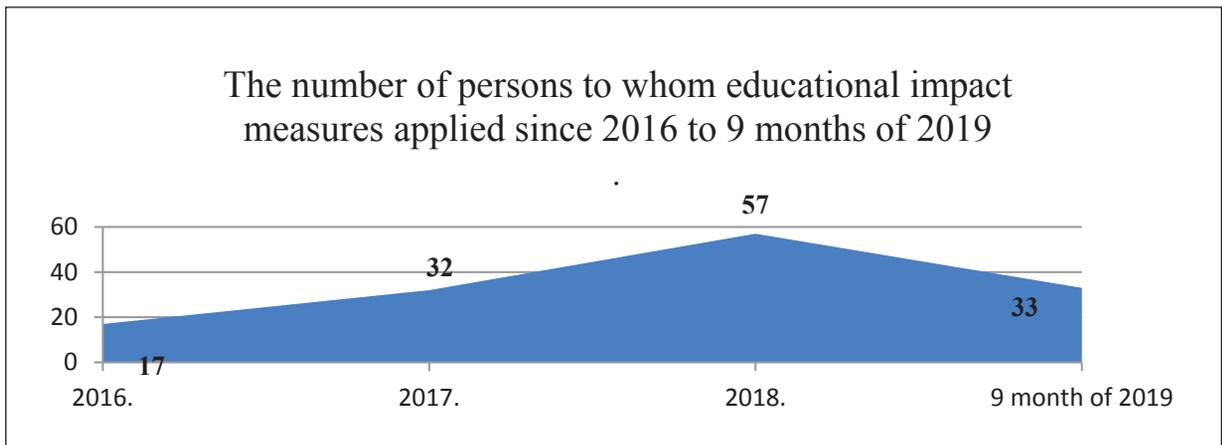


*Diagram 2*

At the same time, the practice of educational impact measures shows that they are applied in isolated cases.

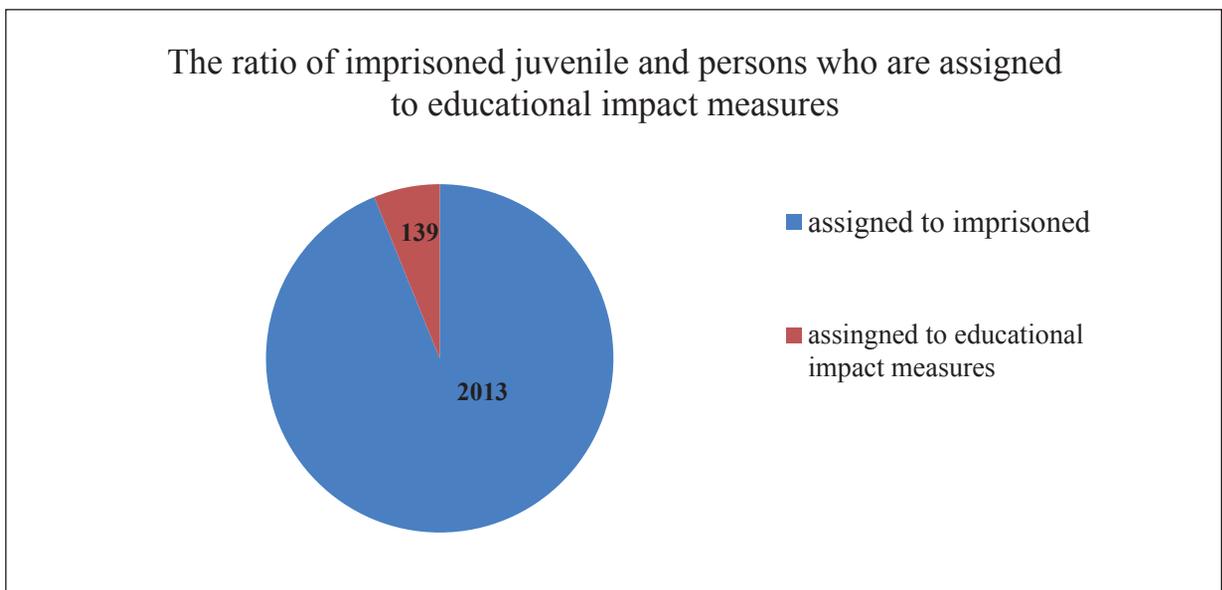
in 2017 concerning 32 persons, in 2018 concerning 57 persons and for 9 months of 2019 concerning 33 persons.

Thus, in 2016 educational impact measures are applied concerning 17 persons,



*Diagram 3*

During the analyzed period, from 2016 to 2019, there was a significant decrease in the number of educational impact measures in comparison with the assignment of punishment.



*Diagram 4*

In the total number of provided educational impact measures, the most applicable types are warning - 93, return to the supervision of parents or legal representatives - 32, limitation of entertainment and the establishment of special requirements for the behavior of juveniles - 23. Other type used only in isolated cases. Thus, the establishment of probation control is appointed only for 4 persons, placement in the educational organization applied for 2 persons [2].

Judicial practice analysis has demonstrated that juvenile assigned for several educational impact measures, such as warning, transfer under the supervision of parents or persons replacing them, or a

specialized state body, limitation entertainment and establishment of special requirements for the behavior of juveniles.

Hence, educational impact measures applied in practice formalized and do not have an effective impact on the prevention of juvenile crime, while the effectiveness of their application depends on the re-education and correction of juvenile's behavior.

At the same time, there are some gaps in the current legislation on the use of educational impact measures.

The study of the regulatory framework has showed the absence of norms reflecting the implementation of educational impact measures.



The content and terms of the application of coercive measures for educational impact noted only in the CC RK.

The current Criminal-procedure code of RK (hereinafter – CPC RK), provides a procedure for relieving juveniles from criminal liability and punishment by educational impact measures.

In the Executive Penal Code of RK (hereinafter - the EPC of the RK), there is a lack of regulatory performance rules of the educational impact measures, it provides execution order of other measures of criminal-legal impact only.

The national law on «Probation» does not distinguish and specify the implementation procedure of coercive impact measures in the form of probation control related to juveniles.

The Law of the RK «About Prevention of Juvenile Delinquency and Child Neglect and Homelessness» dated from 09.07.2004, does not contain regulating provisions use of educational impact measure related to a juvenile, released from criminal liability and penalties.

Thus, all these resulted into a misinterpretation of the application norms, that led to inefficient use of educational impact measures.

In this regard, we propose to provide an independent section in the CPC of the RK, providing for the implementation procedure of forced measures for educational impact on juveniles.

Additionally, from the Supreme Court of the Republic of Kazakhstan the Normative Resolution No.6 «On Judicial Practice in Criminal Offenses Cases of Juveniles and about involving them in the commission of criminal offenses and other anti-social actions» dated on 11.04.2002, it follows that the law does not provide the replacement of forced measures for educational impact by criminal punishment against juveniles who evaded these measures or when he/she commits a repeated offense [3].

Meanwhile, the current CC of the RK established that in case of juvenile intentional failure of forced measures for educational impact two or more times during the year this measures removed by the court and the materials sent to prosecute a juvenile if it is not an expired period of bringing to criminal liability [4].

In this regard, there are conflicts on issues on replacement measures in case of failure or evasion. Thus, for the unmistakable understanding of the content provisions, it is necessary to compare etymological meanings of the terms «Evasion of performance» and «Intentional failure» established in these norms, in which it is possible to replace the measures with criminal liability or punishment.

The concept «Intentional failure» implies deliberate non-implementation of something alleged, entrusted, etc., and «evasion of performance» implies reluctance, tendency to try to avoid any actions, the performance of duty and direct duties from implementation, in this case from the performance of measures. In case of intentional failure, the juvenile has a certain intention to not performance this or that measure of educational impact, and evasion of performance occurs due circumstances. For example, a juvenile does not have his material income will evade the forced measure of educational impact in the form of imposing the obligation to make amends for the harm caused, and in the presence of income, possible deliberate refusal to compensate for the damage caused by criminal actions.

You can agree that intentional failure can be replaced, but it is not provided for evasion, there have been cases of malicious evasion from the performance of measures, which is not legally regulated.

Thus, paragraph 11 of article 85 of the CC of the RK after the words «in case of intentional failure» is proposed to add the following words «and malicious evasion», and outline the following wording:

«Juvenile in the case of intentional failure and malicious evasion of forced measures for educational impact two or more times during the year these measures removed by the court and the materials sent to prosecute a juvenile if it is not an expired period of bringing to criminal liability».

It is also recommended to amend the paragraph 10-1 article 85 of the CC of the RK as follows: «Replacement of educational impact measures for criminal penalty under all circumstances, including when juvenile evading from them or when he committed a new criminal offense during the period of application of forced measures for educational impact is impossible».

The Supreme Court of the Republic of Kazakhstan the Normative Resolution No.6 «on judicial practice in criminal offenses cases of juveniles and about involving them in the commission of criminal offenses and other anti-social actions» dated on 11.04.2002, in accordance with the CC of the RK on the replacement of educational impact measures, necessary to add to paragraph 16 the following content: «Juvenile in the case of intentional failure and malicious evasion of forced measures for educational impact two or more times during the year these measures removed by the court and the materials sent to prosecute a juvenile if it is not an expired period of bringing to criminal liability».

To clarify the distinction between «evasion», «malicious evasion» and «intentional failure», defining that intentional failure the juvenile has a certain intention to do not perform this or that measure of educational impact. When evading execution, measures arise due to circumstances. Malicious evasion is understood as evading compulsory measures two or more times.

Taking into account the current trend of applying compulsory educational measures and their effectiveness, it is necessary to take into account the experience of the most progressive countries in the world.

#### **The USA**

The main legal acts in the field of criminal juvenile justice in the USA are

Juvenile Delinquency and Youth Offenses Control Act dated 1961, Offenses Control Act dated 1961, Juvenile Justice act dated 1974, Omnibus crime control and safe streets Act [5].

#### **Poland**

There is a corresponding normative act regulating curator activities -The law dated 1986 «About Family and Criminal Curators».

Curators practice control over juveniles, in particular those who have committed criminal offenses. This control covers the entire juvenile sphere of life- from visiting school, family, work, etc. They keep reports on juvenile identity; juvenile coordination with various institutions: medical, law enforcement, educational, etc.

#### **Germany**

The German Criminal Law has a separate branch relating to juvenile, called–

Jugendgerichtsgesetz [6]. The Law «About the juvenile court», adopted in 1953 (it complements the previously existing Law of 1923 «on the administration of juvenile justice»).

Educational tools expressed in the following measures:

- establishment of guidelines regulating juveniles life;
- establishment of prescriptions, which expressed in the establishment of educational supervision, placement in medical-educational facility, correctional education;
- warning;
- assignment of the duty to restore the caused harm;
- the apology;
- performing socially useful works;
- payment of funds for generally useful activities.

#### **France**

In France, the application of forced measures for educational impact regulated by a special law about juvenile -Ordinance on juvenile offenses on February 2, 1945 [7].

The following aspects deserve consideration: preference of educational measures before punishment measures; deep knowledge of personal psychology of juvenile offender; specialized of judges who should deal exclusively with juvenile cases.

#### **The United Kingdom of Great Britain and Northern Ireland**

In the UK, juvenile justice issues are devoted to the Laws on children and juvenile, laws on criminal justice.

Educational impact measures consist in the assignment of certain duties to the juvenile offenders.

Duties can expressed in the following:

- live in a specific place for a specific period of time;
- report to supervisor at the specified time;
- engage in activities determined by the court;
- must be at home from 6 PM to 6 am, while leaving at the specified time can only be accompanied by close relatives, guardians, observers;
- pass therapy (prescribed to persons with a mental disorder), outpatient under the supervision of a doctor, or in a special shelter or hospital for the mental disorder;



- guardianship;
- imposing on parents or guardians the obligation to ensure the good behavior of juvenile;
- pay a fine, reimbursement damages or legal costs;
- warning by police, etc. [8].

Thus, having studied foreign countries experience in the application of educational impact measures we consider appropriate, to the Law of RK «About prevention of juvenile delinquency and child neglect and homelessness» dated July 9, 2004, to amend the regulatory coordination of application forced measures for educational impact in special commission for juvenile and protection of their rights.

After analyzing the application of forced measures for educational impact to juvenile in the RK, after examined the statistical data in this area, the materials of criminal cases on the practice of application of such measures, the positive foreign experience of the effective implementation of such measures, including prevention of juvenile crime, we consider it necessary to include in the CEC of the RK separate section, providing for «implement procedure of forced measures of educational impact», which will provide the main directions for the implementation of these measures.

Besides, for optimization educational impact measures, we consider expedient paragraph 4-1 article 84 CC of the RK «Limitation of entertainment and establishment of special requirements for the behavior of juvenile» to exclude this measure as provided by paragraph 7-1 article 84 CC of the RK «The establishment of probation control».

Paragraph 11 article 85 of the CC after the words «in case of intentional failure» to

add the following words «and malicious evasion» and set out in the following edition:

«In case of Intentional failure and malicious evasion juvenile from the coercive measures of educational impact two or more times during the year these measures removed by the court and the materials sent to prosecute a juvenile if it is not an expired period of bringing to criminal liability».

It adds to article 85 of the CC paragraph 10-1 the following contents: «Replacement of educational impact measures for criminal penalty under all circumstances, including when juvenile evading from them or when he committed a new criminal offense during the period of application of forced measures for educational impact is impossible».

The Supreme Court of the Republic of Kazakhstan the Normative Resolution No.6 «on judicial practice in criminal offenses cases of juveniles and about involving them in the commission of criminal offenses and other anti-social actions» dated 11.04.2002, in accordance with the CC of the RK on the replacement of educational impact measures, paragraph 16 necessary to add the paragraph of the following contents: «In case of intentional failure and malicious evasion juvenile from forced measures of educational impact two or more times during the year this measures removed by the court and the materials sent to prosecute a juvenile if it is not an expired period of bringing to criminal liability».

Based on the experience of foreign countries analyzed by the authors, it is recommended to amend the regulatory coordination of application-forced measures for educational impact in special commission for juvenile and protection of their rights in the Law of RK on «Prevention of Juvenile Delinquency and Child Neglect and Homelessness» dated July 9, 2004.

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