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## The systemic position of the State Commission for the Explanation of Actions Against Sexual Liberty and Decency of Minors Under 15 Years of Age

**Abstract:** At present, a socially significant problem resounding in the space of public discussion is the lack of a proper response of state organs and various social institutions in the past, on the phenomenon of sexual exploitation of children less than 15 years old. In many cases it led to the expiration for these crimes and the inability to punish the perpetrators and thus a sense of profound injustice among the victims of these acts. A similar situation concerned the failure to notify law enforcement authorities of such crimes despite having reliable information. The legal answer is the establishment of a new administrative body: the State Commission for the Explanation of Actions Against Sexual Liberty and Decency of Minors Under 15 Years of Age. The subject of the analysis is to indicate the political position of the Commission through the prism of other institutions operating in the Polish legal system, such as the Ombudsman (RPO) or the Children's Ombudsman (RPD). The subject of the analysis is in the indication of the competence of the Commission and the status of members allows to identify possible threats that occur in the process of operation and implementation of assigned tasks. There is no similar analysis in the literature so far, because the emphasis on scientific discussion has been placed on the criminal-law guarantees of a person who can be entered in the Register of Sexual Offenders. The comparative method is being considered. They analyze systemic solutions in relation to the operation and method of organization, other bodies, broadly understood state administration, and focus on mechanisms that guarantee the effective work of the Commission.

**Key words:** State Commission for the Explanation of Actions Against Sexual Liberty and Decency of Minors Under 15 Years of Age, pedophilia, Register of Sexual Offenders, administration authority.

## Introduction

I would like to precede the presented deliberations with one important reservation, the presented content, criticism of the adopted solutions or the current judicial or prosecutorial practice cannot be interpreted in any dimension as the acceptance of the author of the text for the phenomenon socially called pedophilia<sup>1</sup> in any form or dimension, as well as cannot be treated as a defense or justification of persons who committed such actions.

The subject of the analysis is the systemic empowerment of the State Commission for the Explanation of Actions Against Sexual Liberty and Decency of Minors Under 15 Years of Age (hereinafter referred to as the Commission), established via the Act of August 30, 2019<sup>2</sup> according to the legal status taking into account the changes introduced by the so-called anti-crisis shield 4.

Already at the stage of the first parliamentary works, carried out at the end of the previous parliamentary term, the Helsinki Foundation for Human Rights and the Supreme Court made remarks concerning the project, and the Sejm's Office of Analyses additionally submitted an opinion. The Act was passed by the Sejm by a majority of 401 votes in favor, so the simple arithmetic of the Sejm indicates that the prepared solutions were accepted by all parliamentary forces, including the main leaders of opposition parties. For a period of 10 months, the full line-up of the Commission was not established, and thus the Commission was not constituted. The procedures launched by the Sejm for appointing candidates for the line-up of the Commission have resulted in a lively public debate on the scope of its activities, its competences, which has cited the critical remarks made during the initial stage of parliamentary work.

The fact that the work of the Sejm coincided with the presidential campaign has shifted the level of discussion from the substantive aspect to the political dimension, which makes it necessary to start a scientific analysis of the problem, which, for obvious reasons, has not been undertaken so far. The most relevant issues in this respect include: the ratio legis of the establishment of the Commission, its systemic authority, the status of the members of the Commission, the scope of the tasks entrusted and the forms of implementation.

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<sup>1</sup> The text focuses on the administrative and legal functioning of the Commission. The use of the notion of pedophilia, which is not legally defined, shall be used within the meaning adopted by the legislator for the purposes of the Act establishing the Commission.

<sup>2</sup> Any reference to articles without specifying any other legal act shall refer to the Act indicated in the footnote. The use of the term Act without further specification in the article means the Act of August 30, 2019.

## ***Ratio legis* of the establishment of the Commission**

The solutions existing before the Commission was established, protecting the legal interest of a person who had fallen victim of a crime of pedophilia, on the basis of civil and criminal law, were based primarily on extending the limitation period. Article 4421§ 2 of the Civil Code (Journal of Laws of 2007, No. 80, item 538), in force since August 10, 2007, provides for a 20-year limitation period for claims, counted from the date on which the crime was committed. Taking into account the amendment of the Civil Code of 2018 (Journal of Laws 2018.1104, Article 1), consisting, inter alia, in shortening the period of limitation from 10 to 6 years, it should be emphasized that the period of limitation of claims resulting from committing a crime or an offence has been extended to the end of the calendar year marking 20 years from the date of committing the offence. In practice, this means that a victim who was at least 12 years old at the time the offence was committed will be entitled to make a civil claim until the end of the calendar year in which they reach the age of 32. The legal possibility of interrupting the limitation period, which makes the 20-year period count from the beginning, cannot be overlooked. On the grounds of criminal law, initially the regulations introduced no possibility of the crime becoming statute-barred before the victim reaches the age of 23, and from 2014 – before the victim reaches the age of 30. Axiologically, these solutions, with the specificity of the crime of pedophilia, were supposed to help the victim to reveal the perpetrator and in some sense endure the associated mental discomfort already as an adult. Additionally, from July 13, 2017, the liability for failure to notify law enforcement authorities of any credible message concerning a committed or attempted crime of pedophilia was introduced into the catalogue of criminal offenses. The assumptions of the above mentioned regulations provided for a judicial way to satisfy claims and punish the perpetrator with a simultaneous penalization of behavior aimed at concealing information about the crime of pedophilia being committed. The legal instruments for combating pedophilia and protecting the interests of minors are complemented by information and education mechanisms provided for in the act of May 13, 2016 on counteracting threats of sexual crime. As reality has shown, this system has failed to work, as explicitly acknowledged by the authors of the bill, who in their justification stated: “In the current state of law, there is a lack of means for victims who only as adults, at the age of 30, have the conditions and courage to talk about the wrongs suffered in their childhood. In such cases, it is impossible to prosecute the perpetrators, due to the expiry of the limitation period for prosecution. However, the rules of social coexistence require that these persons be given special care and have their dignity restored.<sup>3</sup> It should be noted

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<sup>3</sup> <http://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=3663>, p. 1.

that the State's recognition of the ineffectiveness of the legal tools used so far with the need to interfere in the legal effects occurring during their validity has already taken place in the case of the adoption of the Act on Special Rules for Removal of Legal Effects of Reprivatization Decisions concerning Warsaw's<sup>4</sup> real estate issued in violation of the law and the appointment of a Verification Commission with the power to overrule and amend final administrative<sup>5</sup> decisions. In both cases described above, due to the social effects revealed, we can speak of the indolence of the legal system. Such a correlation significantly reduces some of the critical arguments, referring to the duplication of the work of the prosecutor by the Commission or its quasi-judicial position. It seems that a system of law, as a value in itself, can be protected when its application leads to the realization of the socially justified values for which it was established. Otherwise, it will collide with the common allegation of "lawlessness in the majesty of the law". In this context, the argument that similar collegial bodies exist in other countries, not only European, cannot be ignored.

## The Commission's systemic authority

The legislator has appointed the State Commission for the Explanation of Actions Against Sexual Liberty and Decency of Minors Under 15 Years of Age, which, within the scope of its activities, is an authority independent of other state authorities. Analyzing the legal regulations concerning entities with similar tasks or powers, i.e. the Ombudsman and the Children's Ombudsman, we can point out that the Constitution (Article 210) states that the Ombudsman "is autonomous, independent in their activities from other state bodies and is accountable only to the Sejm under the rules set out in the act", while the Children's Ombudsman "is independent in their activities from other state bodies and is accountable only to the Sejm under the rules set out in the Act" (Article 7 sec. 1). Due to the leading role of the Sejm in the process of appointing both ombudsmen, a solution concerning the responsibility before the Sejm was adopted. In the case of the Commission, due to the multitude of entities involved in the process of

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<sup>4</sup> It is worth recalling that in the public discussion the terms "wild reprivatization" or the reprivatization mafia were used.

<sup>5</sup> By the way, it is worth to quote an excerpt from the justification of the draft from the Council of Ministers, which indicated the scope of legal pathologies: "In the process of reprivatization on the basis of the decree, offences such as forgery of documents, procedural violations during administrative proceedings, violations related to the abuse of subjective rights in civil law transactions, as well as violations detrimental to the public interest, consisting in depriving persons residing in properties subject to reprivatization proceedings of their rights took place. As a result of these violations, ownership was transferred or perpetual usufruct was established in relation to municipal real estate in relation to persons who have never been the owners of such real estate. The administrative decisions issued were also the basis for awarding damages claims in significant amounts.

appointing its members, the construction of the designation of a single body to which the Commission is accountable has been abandoned, giving authority to the entity appointing a member of the Commission to dismiss the member in the event of cessation of meeting any of the conditions necessary to be a part of the Commission or the determination of non-fulfilment of the obligations imposed by the Act or acting to the detriment of persons harmed by sexual abuse or crimes of pedophilia. The notion of independence of the Commission, as a collegial body, implies a lack of power on the part of other public authorities to issue binding instructions in the field of substantiality and intra-organizational operation. The independence of the Commission is guaranteed by provisions conferring immunity on its members. This means that it is not possible to be held liable for activities falling within the scope of the function exercised. Although the legislator does not use this term, it can be argued from the overall legal framework that the members of the Commission are independent in the exercise of their powers. This means taking decisions without external pressure, according to one's own will, life experience, in accordance with the applicable laws.

The works of the Commission are managed by the chairman, elected by the Sejm by a simple majority of votes from among the Commission members. This means the possibility to elect a chairman from the whole line-up of the Commission, and not only from among the members appointed by the Sejm. Any dismissal from office shall require a declaration that the person fails to comply with the obligations imposed on the chairman. The removal from this function does not automatically mean the termination of the membership of the Commission, unless there are grounds for termination of the membership or the person has been removed for reasons specified in the act.

The tasks of the chairman are to direct the work of the Commission, to represent it externally, including the right to make declarations of intent on behalf of the Commission. The Chairman shall be entitled to propose a maximum of two deputies from among the Commission. The act does not provide for the direct powers of the deputies, their assignment can be envisaged once the Commission has adopted its rules of procedure. It should also be understood that the Chairman may request the removal of a deputy from office and the appointment of another person in that place. The Act provides for the possibility to authorize a member of the Commission to perform certain activities of the Commission's chairman. Authorization may be granted to any Member of the Commission and shall not relate, for example, to the exercise of the functions of deputy chairman. It should be noted that the adoption of the Commission's rules of procedure is its exclusive competence and no body has been given the power of approval or, for example, providing an opinion<sup>6</sup>. In addition, the Chairman of the Commission .....

<sup>6</sup> It is worth pointing out that the Statute of the Supreme Chamber of Control is established by way of an ordinance by the Marshal of the Sejm at the request of the President of the Supreme

may invite a representative of the Ombudsman in an advisory capacity to participate in the work of the Commission. However, it seems that this invitation to participate in the work of the Commission cannot relate to activities carried out for example in the framework of a hearing.

The institutional strengthening of the Commission is the decision to establish the Office of the State Commission for the Explanation of Actions Against Sexual Liberty and Decency of Minors Under 15 Years of Age. The legislator could entrust the handling of the Commission's administrative affairs to e.g. the Registrar's Office of the Sejm or the Registrar's Office of the Prime Minister, but equipping it with a separate office means there is no need to overcome external administrative barriers. Expenditure relating to the functioning of the Commission and the Commission's Office are borne by the state budget. In accordance with the assumptions of the "regulatory impact assessment", the planned state budget in the year of commencement of the Commission's activities was planned at PLN 8 million, while in subsequent years the Commission's activities were planned at PLN 12 million. The costs of operation will be covered by the state budget and have been estimated in relation to similar institutions, such as the Children's Ombudsman. According to the assumptions, the Commission will be serviced by the Office with 44 employees, including the director of the Commission's Office, its deputy and 32 substantive employees (according to the plan, two for each voivodeship). With regard to employee rights and obligations, the provisions of the Act on Employees of State Offices apply.

The Commission establishes the statute of the Commission Office, which defines its tasks and organization, and the internal organization and detailed scope of tasks of the Commission Office shall be laid down by the chairman of the Commission in its organizational rules. The Chairman of the Commission may authorize a member of the staff of the Commission's Office to deal with certain matters on their behalf, in particular to issue certificates and to certify copies of documents as true copies for the purposes of the proceedings (article 17 section 2). The arrangements for the organization of the Commission's Office also do not provide for the power of other administrative bodies to interfere in the shape of internal documents. The Commission has been empowered to process all information necessary for the performance of its statutory tasks, including personal data<sup>7</sup>. The Commission shall refuse to disclose the personal data of the person from whom it has obtained the information and of the person concerned, as well as the documentation collected during the investigation, if it considers this necessary

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Chamber of Control after consultation with the relevant Sejm commission (Article 25 Section 2 of the Supreme Chamber of Control Act).

<sup>7</sup> Indicated in art. 9 sec. 1 and art. 10 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ of the EU L 119 of 04.05.2016, p. 1, as amended).

to protect the honor, rights and dignity of the person concerned. In addition, the documentation gathered in the course of the investigation, including the decision on entry in the Register, does not constitute public information and is not subject to access to public information.

## Status of the Members of the Commission

The current regulation provides for the interaction of the legislative and executive branches in the process of appointment of Commission members. An independent right to appoint a member was assigned to the President of the Republic of Poland, the President of the Council of Ministers, the Sejm (right to appoint 3 members), the Senate and the Children's Ombudsman. It is not a solution that is alien to the Polish legal system – one can indicate here members of the National Broadcasting Council or members of the Monetary Policy Council appointed separately by the Sejm, the Senate and the President. However, the above mentioned solutions are anchored in the Polish Constitution.

However, at the level of creating a collegial body exclusively by the so-called ordinary legislator, this solution is a certain novelty. In particular, in the process of appointing the members of the Commission, such a right was assigned to the Children's Ombudsman, i.e. a body protecting the law. The hitherto practice of constructing the rules for appointing members of the collegial body has, as a rule, given this power to one entity, e.g. the President of the Council of Ministers appointing members of the collegium of Regional Accounting Chambers<sup>8</sup>.

There is no detailed explanation of the adopted project in the project justification. However, the adopted axiology of regulation aims at ensuring a broad representation of people with their background in various social, political or scientific environments. The possibility for a member of the Commission to be appointed by a specific body guarantees, in a way, their institutional interest and involvement in the tasks entrusted to the Commission.

Such an understanding of the legislator's intentions is supported by the way in which the Sejm and Senate propose and appoint members of the Commission and the formal requirements for candidates for members of the Commission. With regard to the nomination of candidates, in addition to the powers assigned to the Speaker of the Sejm and a group of 35 MPs (the Marshal of the Senate and 7 senators, respectively), the powers of administrative bodies<sup>9</sup>, institutions and

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<sup>8</sup> Some similarities can be found in the selection of the members of the Polish Financial Supervision Authority, where, in addition to persons being members by default in connection with their public function, there are representatives of entities connected with the financial market in terms of their system and tasks.

<sup>9</sup> E.g. The General Prosecutor or the National Judicial Council.

professional self-governments<sup>10</sup> and entities from the so-called third sector were introduced, which for a period of two years dealt with the protection of the rights of persons covered by the substantive activities of the Commission. As regards the appointment of the members of the Commission by the Sejm and the Senate, as a rule, it was indicated that the Candidate should obtain a qualified majority of 3/5 votes. It is only the lack of political consensus that gives both chambers of parliament the power to vote on a candidate by a simple majority, which in practice may be considered a weaker public mandate to fulfil the duties of a member of the Commission. Additionally, as regards the appointment of the members of the Commission by the Sejm, the possibility of voting en bloc on all the candidates together was excluded, ordering the election of each member separately. As far as formal issues are concerned, the adopted solutions are to a large extent based on the requirements for candidates for the civil service corps (the requirement of being a Polish citizen, exercising full public rights or having full legal capacity). The requirement of not having a final conviction for a crime or fiscal offence is to be discussed in more detail, compared with another requirement, that of having good repute. The Civil Service Act (article 4) requires, inter alia, that the candidate must be of good repute and not have been convicted by a judgment which has the force of res judicata for an intentional crime or an intentional fiscal offense. The analysis of these provisions shows that it is theoretically possible to employ a person who has been validly convicted of an unintentional offense, and the mere fact of conviction in this respect does not lead to a loss of good repute. Assuming, of course, that the notion of good repute itself is a blurred concept, we can indicate that it is primarily about the legal irrelevance of a given person's behavior in the environment and community in which he or she lives in the social, economic, political or scientific dimension in which he or she operates. Looking for justification for the possibility of coexistence of a conviction for an unintentional crime and preservation of good repute, one can point out a very broad catalogue of criminal liability resulting not only from the provisions of the Penal Code, but also from a number of specific acts and a doctrinal assumption of criminal law related to forms of unintentional guilt. In the case of the Commission, it has been indicated that committing any offence eliminates the possibility of being a member of the Commission. There may be a view that this regulation needs to be changed as too stringent in the area of public administration. However, it can be assumed that the success of the Commission's work will be particularly determined by the choice of people. Therefore, there is a justification for making higher demands. The good reputation of the members of the Commission, compared with the absence of any criminal record, may be a kind of antidote to possible attempts of non-constructive criticism of its indi-

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<sup>10</sup> Among others, the Supreme Bar Council, the Supreme Chamber of Physicians and Dentists, the National Council of Legal Advisors and others.



vidual members and influence on them when the work of the Commission becomes more advanced. In comparison, a candidate for the Children's Ombudsman must be impeccable in character and distinguished by high authority due to their moral qualities and social sensitivity. Additional requirements formulated by the legislator are to confirm the candidate's substantive preparation for the function, significantly promoting the academic formation of the candidates, possibly their education. If the legislator prefers persons holding the title of doctor habilitatus or professor, or persons who are academic teachers, this clearly exposes the expectation that a given person will bring an academic ethos to the work of the Commission, the basic paradigm of which is the search for truth and the service of truth. The admission to the Commission of persons who have been awarded a relevant medal or distinction also promotes above all the formation and personality traits of the candidates who have been awarded the distinction for their outstanding attitude. The additional possibility to become a member of the Commission due to higher legal, medical, psychological or pedagogical education is expected to open up the possibility of appointing specialists, practitioners in the fields preferred by the subject of the Commission's activities<sup>11</sup>.

The legislator also provides for a number of reasons which make it impossible to be a member of the Commission, primarily on the grounds of depoliticization of its activities. For these reasons, a member of the Commission may not be a Member of the Parliament, a Senator, a Member of the European Parliament or a person holding other leading State positions<sup>12</sup>, as well as a member of the constituent and executive bodies of local and regional authorities, including their secretaries and treasurers. Neither may a member of the Commission be a social associate or employed in an office of a Member of the Parliament, a senatorial office or an office of a Member of the European Parliament, or a member of an organ of a political party which represents a political party externally and having the power to enter into commitments, or employed by a political party on the basis of an employment contract, or work under a civil law contract. The Act also introduces a restriction, specific to public services, for persons who worked or served in, or cooperated with the state security authorities<sup>13</sup> between 22 July 1944 and 31 July 1990.

The term of office of the Commission is 7 years from the date of its first meeting and is one of the longest terms provided for by Polish law. Only judges

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<sup>11</sup> The article was submitted for publication before the full selection of the Commission's line-up. In order to ensure that the Commission's work is carried out properly, it appears that, overall, appointing bodies should be proportionate to the envisaged selection criteria.

<sup>12</sup> Within the meaning of the Act of July 31, 1981 on the Remuneration of persons holding senior state positions. (Journal of Laws of 2019, item 152, as amended).

<sup>13</sup> The catalogue of entities includes art. 2 of the Act of October 18, 2006 on the Disclosure of information about the documents of state security bodies from 1944-1990 and the content of these documents (Journal of Laws of 2019, item 430 as amended).

of the Constitutional Tribunal have a longer term of office (9 years). Although the law does not mention the possibility of re-election, it must be assumed that reappointment for another term is not acceptable. These issues may possibly be considered in relation to a person who has replaced another person during the term of office. The Act provides that in the event of termination of the Commission's membership, a new member is appointed only for the period that remains until the expiry of the current Commission's term of office. It is therefore the legislator's assumption that the expiry of the Commission's term of office makes it necessary for it to be fully elected in a new line-up. This interpretation is confirmed by the adopted structure of the extension of the mandate (despite the formal end of term) for work in the new Commission, for a period of 60 days only. This solution is intended to prevent the Commission from being unable to act in the event that the eligible body has not appointed new members.

Members of the Commission are treated as persons who have entered into an employment relationship by appointment, social security and health insurance contributions are paid by the office serving the Commission, and the rules of remuneration are laid down by the provisions of the Act of July 31, 1981 on the Remuneration of persons holding senior state positions. As regards the economic situation of the members of the Commission, the amendment to the Act introduced by means of shield 4.0 limits the possibility of taking up additional employment or performing other gainful activities, or conducting business activity, only to a situation in which such activity would be contrary to the duties of a member of the Commission or would undermine trust in the Commission. This solution made it possible to apply for membership in the Commission for, among others, legal advisers or advocates who, in the previous version of the Act, would have been faced with the necessity of immediate cessation of professional practice. In addition, previous legislation did not provide for the institution to agree to certain paid activities (as is the case for civil servants, for example).

Before proceeding to perform their duties, members of the Commission take an oath before the Sejm. Any doubt as to when the employment should be counted from, due to the staggered appointment procedure, must be resolved towards the date of the first meeting of the Commission convened by the Marshal of the Sejm, which formally begins its term of office.

When analyzing the mandate to act of the members of the Commission, the assessment of the reasons for the expiry of the membership of the Commission cannot be omitted. It is particularly important to analyze the possibility of dismissing a person against their will. Obvious reasons for losing the status of a member of the Commission include death or written resignation, as well as conviction by a final judgment in criminal or criminal/fiscal proceedings. The legislator also provided for the possibility to dismiss a member by the appointing authority.

A member of the Commission shall be dismissed if: they no longer fulfill the conditions required for the performance of their duties or have become perma-

nently unfit for duty by reason of illness. Finally, the dismissal is lodged in the event of failure to comply with the obligations imposed by the law or acting to the detriment of persons harmed by sexual abuse or pedophilia crimes. As regards members of the Commission appointed by the Chambers of the Parliament, in order for their dismissal to be effective, an obligation to obtain a qualified majority of 3/5 votes with at least half of the statutory number of Members of Parliament or Senators respectively being present has been introduced. On the one hand, these provisions deserve to be approved, since the assessment of cessation of duties as a member of the Commission or action to the detriment of victims may be a very discretionary concept and, in this context, the political will of those in power who have to seek a consensus with the opposition is significantly restricted<sup>14</sup>. On the other hand, since the act of dismissal (and not the automatic expiry of the mandate) was provided for in a situation where the statutory prerequisites for appointment were not met, it could lead to a disastrous situation, from the point of view of social evaluation of the Commission's work, that a person who does not meet the requirements (e.g. loses the status of an academic teacher, not meeting other substantive criteria necessary for appointment) will continue to hold office as a result of political dispute. The expiry of a membership of the Commission shall be determined by the entities entitled to appoint a member, except that the Chambers of Parliament are represented here by the Marshals.

In conclusion, the status of the members of the Commission in terms of their mandate, the duration of their term, the fact of granting immunity and the need to obtain political consensus for their removal from office may lead to the conviction that the persons appointed are sufficiently secure not to succumb to pressure and to carry out their tasks responsibly in an area burdened by high emotion, high public expectations and, consequently, social and media pressure. This makes it all the more important for those entitled to appoint them to have a high degree of social and professional authority as well as to represent the experience and attitude of life which makes it credible that the Commission is a place of public service and not a place of pursuit of particular interests.

## Tasks of the Commission and method of implementation

The tasks and competences entrusted to the Commission can of course be broken down according to their statutory criteria, i.e. tasks relating to clarifying cases of acts against sexual freedom and morality against a minor under 15 years of age, named for the purposes of the Commission's activity "sexual abuse", tasks relating to ensuring an immediate response from state authorities, organizations .....

<sup>14</sup> To a certain extent, this reduces the concerns raised by the Helsinki Foundation for Human Rights.

and entities in the fight against sexual abuse, in terms of the possibility of bringing the perpetrators of such abuse to justice, and finally the last part of the tasks relating to preventive and educational activities. For the purpose of this article, it is worth to make a division according to the time criteria, according to which further deliberations will be made. The first group is concerned with the resolution of cases on which statute of limitations has expired and with conferring on the Commission powers not so much to remedy non-material damage by sentencing the perpetrator but to prevent the perpetrator from remaining anonymous. In practice, in pedophilia cases, it is possible to see the expectation of injured parties to reveal the identity of the perpetrator in the context of a specific warning to others against the perpetrator's actions. The lack of this element, i.e. allowing the perpetrator's identity to remain hidden, results in the conviction of the lack of justice and intensifies the syndrome of negative feelings in the mental sphere of the victim. The basic allegations made to the public opinion often use the phrase that pedophilia cases have been concealed and covered up, allowing the perpetrator to avoid responsibility. In this context, the legislator was in a manner of speaking obliged to find legal instruments to restore a basic sense of justice to victims. The second group of cases are what could be called current cases, where the Commission's role is in fact to focus on monitoring the correctness of the work of other entities, which are required by the current legal order to take appropriate and timely action. The Commission is to perform the role of the institutional guardian of victims, where, as previously indicated, the subjective element of trust in the members of the Commission is to provide guarantees to those who decide to report sexual abuse that a state authority, which is on their side in a manner of speaking, could even be said to represent their interests, is involved in their case. However, it does not about performing the role of a legal representative (although the Commission has also received such powers), but convincing the victim that they are not alone.

Finally, the last educational-preventive sphere, i.e. the sphere which is aimed at the future in a manner of speaking. This sphere is of great importance in order to identify socially unacceptable behaviors and situations, as well as to make society more sensitive to the issue of harming minors.

Moving on to the first group, i.e. activities related to the issuance of decisions on entry in the "Register of persons with regard to whom the State Commission for the Explanation of Actions Against Sexual Liberty and Decency of Minors Under 15 Years of Age" which is a component (part of) the Sexual Offenders Registry.

The basis for the Commission's work in this area is to issue a final decision refusing to initiate or discontinue the proceedings due to the statute of limitations on the punishability of pedophilia. In such a situation, the prosecutor or court refers the case to the Commission, which in fact means the handing over of the collected case files. Only those cases in which the person identified as the perpe-

trator is still alive shall be referred. The referral of the case automatically triggers an investigation which is notified to the injured party, the person indicated in the report as the perpetrator and the person filing the report (if any). The Commission is required to carry out an investigation

which includes at least: analysis of the prosecutor's and/or court records, a hearing of the injured party and of the person indicated as the perpetrator. Their appearance is voluntary. Each party, in their own interest (including possible adverse procedural effects), may decide to participate in the Commission hearings. Regardless of the decision to take an active part, the injured party and the person indicated as the perpetrator have the right to appoint an attorney, however, it should be understood that the power of attorney is de facto of a procedural nature, thus a limited circle of people who can accept the power of attorney should be assumed. The right to non-appearance does not apply to witnesses and experts, as the Commission is entitled to call upon and hear them. The Commission is not bound by the procedural material submitted to it and may rely on other documents submitted to it in the given case.

The entire procedure is conducted on the premises of the Commission's office, except where a state of health or other obstacles which cannot be removed justify hearing the person in their place of residence. The course of the hearing includes a spontaneous statement by the person heard, followed by answers to questions from the Commission. The person heard has the right to refuse to answer a question if answering it would make them or their loved one liable for a criminal or tax offense, result in order to be entered in the Register; if they are suspected of having committed an offense in close connection with the act under investigation or have been convicted of that offense, and finally, if they are asked about the circumstances covered by the obligation of statutory confidentiality. The right to refuse to answer questions should be notified before the hearing begins. It should be stressed that the provisions of the Act do not provide for contradictory conduct of the case, but focus on the collection of the entirety of material. Therefore, on the one hand, not a single representative of the person indicated as the perpetrator can be present during the hearing of the injured party, and on the other hand, the Commission may request the competent prosecutor (who may further delegate this task to the Police) to take the necessary steps to make arrangements for the investigation and transfer the collected material to the Commission, immediately after the activities are carried out.

The hearings shall be held in private and information obtained in the course of a hearing shall be covered by statutory confidentiality. The hearing protocol shall be taken and signed by the Chairman of the Commission and the person heard. If the person heard refuses to sign the protocol or cannot sign it, the Chairman of the Commission shall indicate the reason for the lack of signature in the protocol. The Commission shall close the investigation procedure in the case of the death of the person identified as the perpetrator, notifying the injured person

and the person filing the report. In all other cases, following an investigation, the Commission either issues an order for entry in the Register or terminates the proceedings without issuing such an order, which may be the case if the material collected does not make it possible to attribute either the act or other circumstances determining the classification of the act as “sexual abuse”. The injured person, the person indicated as the perpetrator and the person filing the report shall be notified of such a decision. The Commission shall vote in this regard by an open, simple majority in the presence of at least five members of the Commission, including the Chairman of the Commission. In the event of a tie, the Chairman of the Commission shall have the casting vote. The resolutions and rulings shall be signed by the members of the Commission participating in the vote.

If a decision on entry in the Register is made, the person indicated as the perpetrator may file an appeal with the civil district court having jurisdiction over the perpetrator’s place of residence within 30 days from the date of being served with the decision. Proceedings in cases of appeal against the order to be entered in the Register shall be governed by the provisions on the protection of personal rights. This means that the mere entry of a person in the Register constitutes an infringement of their personal rights, and it will be up to the Commission to remedy the unlawfulness of such entry. Until the appeal is finally ruled on, the entry into the Register is suspended. After the ruling has become final, the Commission (within 14 days if no appeal has been lodged, or immediately if the court ruling has become final) shall transfer the decision on entry into the Register to the Information Office of the National Criminal Register, anonymizing the data of the injured party. A decision on entry in the Register contains: personal data of the injured person – last name, first and second names and maiden name; personal data of the person indicated as the perpetrator in the case files submitted by the prosecutor or the competent court – last name, including alias, first and second names, maiden name, profession or function and place of residence; justification containing a description of the act, including the time, place and circumstances of the act. The data from the Register of persons with regards to whom the State Commission for the Explanation of Actions Against Sexual Liberty and Decency of Minors Under 15 Years of Age has issued a decision on entry into the Register is available without any restrictions and published on the website of the Public Information Bulletin of the Ministry of Justice. The power and operating procedure of the Commission described above is what raises the most controversy. The argument that the Commission is becoming a quasi-judicial body, imposing a penalty similar to a punitive measure, is only formally justified because it omits the basic point that in each of these cases we are talking about the statute of limitations on punishment. Disclosure of the identity of a person who, following legal proceedings, will be deemed to have committed sexual abuse is nothing more than a public apology to the victim, and the very design of the proceedings will shift the burden of proof to the Commission. It should be stressed that the

conduct itself may revolve around the person who has been found guilty in the case file, so that it is not for the Commission to determine actual guilt of the person. If the Commission establishes that a person has been wrongly identified as the perpetrator, it has no power to search for the actual perpetrator on its own.

The second dimension of the Commission's action concerns cases defined as current. The essence of this is that the Commission should take action to ensure that state authorities, organizations and entities<sup>15</sup> respond promptly to the fight against sexual abuse, with a view to ensuring that the perpetrators of such abuse are brought to justice. Here we can distinguish two groups of cases. Firstly, cases which have not yet been reported to the law enforcement and cases which are, in a way, pending proceedings. This action shall be initiated by means of a written (or oral) report or report submitted by electronic means of communication of a suspicion of sexual abuse or suspicion of failure to notify a competent authority of the suspected sexual abuse. Regardless of the form adopted, a formal application must contain the full name, address or correspondence address and the signature of the person making the application and, as regards material matters, an indication of the circumstances of the event, including the time and place as well as identity of the potential perpetrator and the injured person. The report of a suspicion of sexual abuse may also identify entities who were required to report the suspicion of sexual abuse to the law enforcement.

A limitation for false reporting is the introduction of criminal liability for persons who report to the Commission an offense against sexual freedom or morality to the detriment of a minor under 15 years of age or an act referred to in Art. 240 of the Penal Code, knowing that the offense was not committed.

Upon receipt of the notification, the Commission has to assess whether it is "obviously groundless". Obvious groundlessness concerns the perception of the case by the ordinary recipient and not by a professionally prepared committee member. Obvious groundlessness may concern the injured person, the course of events, the perpetrator or also the area of failure to report. The idea is to eliminate the situation in which each report will have to gain legal force by definition. Given that the misclassification of such a case may result in the dismissal of the members of the Commission, the solution adopted by the legislator should be considered appropriate. In the event of acceptance of the report, indicating that no procedural steps have been taken so far, the Commission shall immediately transfer the report to the prosecutor competent for the place of residence of the injured person and this is tantamount to notifying the authority appointed to prosecute crimes within the meaning of Art. 240 of the Penal Code. The fur-

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<sup>15</sup> Organizations and entities within the meaning of the Act, i.e. "non-governmental organizations, entities and institutions conducting educational, counseling, care-taking, cultural and related to physical culture, leisure and medical treatment activities, as well as professional self-governments, churches and religious associations, including ecclesiastical legal persons" – see Art. 1 item 3.

ther action of the Commission focuses on monitoring (not duplicating) the work of the law enforcement and judiciary agencies. The Commission shall have the right to inspect the case files of the pre-trial proceedings and to be informed of the ongoing pre-trial proceedings, including the dates of action taken, unless the good of the pre-trial proceedings precludes this. The Chairman of the Commission shall file such a request. In the event of a suspicion of irregularity or prolonged proceedings, the Commission shall inform the authority supervising the proceedings. In such a situation, the authority supervising the authority conducting the proceedings shall immediately take a position on the report and inform the Commission of the action taken.

At the stage of judicial proceedings, the Commission shall have the right to inspect the court records and obtain information about the proceedings, or to participate in the proceedings as an auxiliary prosecutor with the consent of the injured party or their legal guardian.

Finally, the Commission has the right to request the Prosecutor General to make an emergency appeal or a cassation against a final decision terminating a case in the area of pedophilia offenses and to put the proceedings under special surveillance.

The Commission is also required to communicate to the organization and entity authorities<sup>16</sup> the information on suspected pedophilia offenses or failures to report to competent authorities of suspected pedophilia offenses, with a view to possible appropriate proceedings, including disciplinary proceedings. However, it seems necessary to limit this obligation to the professional, social or economic environment from which the person identified as the perpetrator originates. Such report does not, of course, prejudge the guilt, but only serves as a kind of communication route to entities whose direct legal interest may suffer, either because of a lack of corporate responsibility or because of subsequent property claims made against such an entity. In so doing, the Commission shall monitor the action taken by the competent authorities, organizations and entities on the basis of reports and notifications.

What remains to be analyzed is the preventive and educational activities of the Commission. In this respect, the legislator has put a strong emphasis on the preparation and presentation of activity reports, containing conclusions and recommendations to state authorities, organizations and entities on preventing and combating sexual abuse as well as taking action to bring those guilty of such abuse to justice. The report on the Commission's activity shall include an anonymous description of the cases of sexual abuse identified, as well as cases of failure to report suspected sexual abuse to competent authorities. In addition, it shall include an analysis of the reasons for the occurrence of the identified cases

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<sup>16</sup> These are entities and organizations within the meaning of the Act.



of sexual abuse as well as conclusions and recommendations to state authorities, organizations and entities on how to prevent and combat sexual abuse and take action to bring those guilty of such abuse to justice.

Conclusions and recommendations should be formulated with regards to: the responsibility of state authorities, organizations and entities for sexual abuse and acts of pedophilia in the event of absence of action or inappropriate action by these authorities, organizations and entities; an appropriate response of state authorities, organizations and entities to a report of sexual abuse or acts of pedophilia, or to the knowledge of the possibility of its occurrence; the appropriate treatment and protection of victims of sexual abuse or acts of pedophilia as well as specification of form of support for them; action by state authorities, organizations and entities to prevent situations conducive to risks of sexual abuse or acts of pedophilia; protection of children from online content that exposes them to sexual abuse or pedophilia. The Commission shall draw up an annual public report on the Commission's activities and make it available in the Public Information Bulletin of the Commission's Office. The first report is to be prepared by the Commission and made available within one year of the appointment of all members of the Commission.

The Commission shall also to carry out awareness-raising activities on sexual abuse and pedophilia, ways of responding to them and assessing the symptoms showing that a minor under 15 years of age may become a victim of sexual abuse or pedophilia. In addition, in the framework of its preventive activity in the broad sense, the Commission shall have the right to make requests to the competent authorities to take a legislative initiative or to adopt or amend other normative acts, and shall also have the right to provide opinions on draft normative acts within the Commission's area of competence. The Commission supports social projects promoting appropriate social attitudes in the area of reporting sexual abuse to the law enforcement, including information campaigns on the need to report sexual abuse.

In the field of education and prevention, the Commission cooperates with associations, professional self-governments, churches and religious associations, civic movements, other voluntary associations and foundations, organizations and with foreign and international authorities, and organizations working for the protection of children's rights, in particular those working to protect and prevent violence, including sexual violence. The Commission may carry out educational tasks in cooperation with schools, universities, educational and cultural institutions, associations, foundations and other non-governmental organizations, as well as with the media.

## Summary – main threats to the functioning of the Commission

The decision of the legislator to appoint the Commission as well as to assign certain tasks and powers to it may be evaluated at several levels. First of all, using sport-related terminology, this is a red card for people who have dealt with the subject of sexual abuse in the past. This is a red card for social actors and institutions as well as for state authorities. The procedural statute of limitations on punishment dominates the sense of justice, which does not mean that the antidote to such a situation can always be the creation of a dedicated state authority. In this context, one may wonder whether the Commission is to have the character of an entity that will be permanently inscribed in the image of the Polish administration, or whether the passage of time, the adopted and well-established procedures of other state authorities, as well as extensive educational and preventive activities will allow it to cease operation. The public administration, constitutionally obliged to act on the basis and within the limits of the law, tries to limit the element of subjective influence of the human factor in the context of the effectiveness of the implementation of the entrusted tasks. The multiplicity of procedures, the setting of a framework for decision making or the enumerating of the possibility of acting as part of so-called administrative recognition in essence indicate that more trust is placed in the law than in the people who apply it. Paradoxically, the strength of the Commission will not lie in the procedures, but the members selected to carry out its tasks. The members, who have been given a high degree of autonomy and independence by guaranteeing financial stability after the end of the term of office and immunity during and after the term of office. The members of the Commission have been equipped with all the guarantee instruments, which allows them to focus on the proper performance of extremely important and difficult tasks, without looking at the public popularity of decisions taken or the reaction of politicians. Undoubtedly, the starting stage of the Commission's work will be extremely important, when numerous reports will be received all at one, and which, on the organizational side, the creation of the office and procedures, will be divided between substantive and organizational work. The lack of rapid action expected by the person filing the report may be a reason for premature criticism of the Commission's activity, affecting the level of assessment of its subsequent work and decisions. The Commission's preventive and educational activities will be an area of lively discussion, especially in the scope in which it wants to set socially acceptable behavioral boundaries. An example is the area of children's education and their contacts with e.g. teachers, trainers, caretakers. The point is not to paralyze the activities of a school or sports club due to the fear of criminal sanctions and social ostracism. It seems that the

timing of the publication of the first annual report will be a good moment to start discussions on the purposefulness of the Commission's work.

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