

# Polish Criminal Procedure in Respect of Sexual Offences Against Minors

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## Abstract

The objective of this paper is to provide a general overview of Polish criminal procedure in respect of sexual offences against minors. The basic regulation concerning victims and witnesses is outlined, including the basic framework of the commencement of criminal procedure, interrogations therein, as well as the rights of the victim. The discussion of criminal procedure provisions applicable to such offences are all preceded by a short overview of the substantive criminal law on sexual crimes against minors.

*Keywords: sexual offences against minors; obligatory crime report; interrogation of the minor; auxiliary prosecutor; child's rights ombudsperson*

## 1. Introduction

The purpose of this article is to provide a general overview of Polish criminal procedure in respect of sexual offences against minors, defined by Chapter XXV of the Polish Criminal Code. Due to the vastness of the topic, the text outlines only the basic principles of Polish criminal procedure applicable to such offences, such as the fundamental regulation concerning victims and witnesses, without delving into matters such as a witness's right to refuse to testify, release from privilege or secrecy, or the position of the defendant in criminal proceedings. The discussion of the basic framework of the commencement of criminal procedure, interrogations therein, as well as the victim's rights are all preceded by a short overview of the substantive criminal law on sexual offences against minors.

## 2. *Sexual Offences against Minors in Polish Criminal Law*

In Polish law, a person below the age of maturity is referred to as a minor.<sup>1</sup> The age of maturity has been set at 18 years (Article 10(1) of the Civil Code). An exception to the terminological system of Polish law is the Act of 6 January 2000 on the Children's Rights Ombudsperson,<sup>2</sup> wherein the legislature used the term 'child', defined as any human being from conception to coming of age.

The age of maturity must be distinguished from the age of consent, i.e., the age defined in domestic law at which a person may give operative consent to sexual activity with another. In other words, any sexual activity with a person below that age is prohibited.<sup>3</sup> In its article 200(1), the Polish Criminal Code prohibits sexual activity with a minor below the age of 15. Accordingly, the age of consent in Polish law is 15. It must be emphasised that irrespective of the age of consent any person below 18 years is a child and should be treated as such.<sup>4</sup>

Sexual activities within the meaning of the Polish Criminal Code are divided into two categories – sexual intercourse involving penetration of the genitalia or their surrogates (anal or oral intercourse) and so-called other sexual activities, i.e., all other activities that are sexual in nature but that do not involve penetration of the victim's body. Both court decisions and scholarly works appear to indicate that the recognition of an activity

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1 A woman may come of age earlier than this age. Pursuant to Article 10(2) of the Civil Code, a minor comes of age by entering into matrimony, whereas Article 10(1) of Family and Guardianship Code provides that the guardianship court may permit a woman sixteen years of age to marry if it occurs from the circumstances that entering into matrimony will be in the new family's interest.

2 Uniform text: Polish Journal of Laws from 2014 item 243.

3 EU legislation defines the age of consent in Article 2(b) of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography (OJ L 335, 17.12.2011, pp. 1–14) as the: 'age below which, in accordance with national law, it is prohibited to engage in sexual activities with a child'.

4 International documents also clearly define as a child any person who has not reached 18 years of age (the permissible exception are situations in which such a person has become an adult pursuant to domestic law prior to reaching 18 years of age), including without limitation Article 1 of the Convention on the Rights of the Child (United Nations, Treaty Series, vol. 1577, p. 3), Article 9 of the Council of Europe Convention on Cybercrime (ETS No. 185), Article 3 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) Article 2(a) of Directive 2011/93/EU

as ‘other sexual activity’ necessarily requires bodily contact between the perpetrator and the victim (e.g., masturbation of the victim by the perpetrator or vice versa) or the victim’s sexual engagement resulting from the perpetrator’s conduct (e.g., the victim masturbating),<sup>5</sup> although one can also encounter the view that it would be unjustified to exclude from the category of other sexual activities masturbation by the perpetrator in the presence of the victim (especially if the presence of another is indispensable to the perpetrator for sexual gratification).<sup>6</sup>

Sexual activities with a minor below the age of consent are prohibited (Article 200(1) CC). This, however, does not mean that sexual activities with a minor above the age of 15 are always lawful. The necessary condition for the conclusion that such an activity is not prohibited is the child’s unfettered consent and a lack of any circumstances whatsoever suggesting that the consent was not voluntary. Such circumstances, as specified in the Criminal Code, are violence, threat or deceit, as well as abuse of a relationship of dependence or taking advantage of a critical situation and abuse of trust. The use of violence, an unlawful threat or deceit in order to procure sexual intercourse (Article 197(1) CC) or submission to or the performance of another sexual activity (Article 197(2)) fulfils the elements of the offence of rape, for which the perpetrator is criminally liable irrespective of the victim’s age,<sup>7</sup> although an age below 15 will result in aggravated liability.

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- 5 Cf. Marcin Berent / Marian Filar in Marian Filar (ed), *Kodeks karny. Komentarz*, Wolters Kluwer 2016, 1214; Marek Bielski in Włodzimierz Wróbel / Andrzej Zoll (eds), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–211 k.k.*, Wolters Kluwer 2017, 767; Marek Bielski, Wykładnia znamion “obcowanie płciowe” i “inna czynność seksualna” w doktrynie i orzecznictwie sądowym, *Czasopismo Prawa Karnego i Nauk Penalnych* 1 (2008) 227–228; Mateusz Rodzyńkiewicz in Andrzej Zoll (ed), *Kodeks karny. Część szczególna. Komentarz do art. 117–277 k.k.*, t.2, Zakamycze 2006, 601; cf. also Supreme Court’s resolution of 19 May 1999, I KZP 17/99, (1999) OSNKW 7/8.
  - 6 Jarosław Warylewski, Glosa do uchwały SN z dnia 19 maja 1999 r., I KZP 17/99, *OSP* 12 (1999) 224; Jarosław Warylewski, Z zagadnień karnoprawnej ochrony małoletnich przed wykorzystywaniem seksualnym, *Przegląd Sądowy* 2 (2000) 116–117; Marek Bielski in Wróbel / Zoll (n 5), 678; Jarosław Wyrembak, W sprawie znamion przestępstw przeciwko wolności seksualnej i obyczajności, *Prokurator* 2–3 (2008) 46; cf. also the judgement of the Court of Appeals in Katowice of 6 November 2012, I ACa 688/12, LEX no. 1239888. More extensively on this subject cf. M. Skórzewska-Amberg, Prawnokarna ochrona dziecka przed wykorzystaniem seksualnym w cyberprzestrzeni, *Poltext* 2019, 160–169.
  - 7 Aggravated liability will be the case with a minor victim below the age of 15 – Article 197(3)(2) CC.

The liability of a perpetrator who induces a minor to participate in sexual activities by abusing a relationship of dependence, a critical situation or trust is regulated in Article 199 CC. Significantly, as opposed to Article 200(1) CC, the protection extended to a minor by sections 2 and 3 of Article 199 is not limited by the minor's age.

The abuse of a relationship of dependence, which is one of the elements of the offence defined by Article 199(2), means the abuse of an objectively existing relationship between the perpetrator and the victim. The essence of such a relationship is the factual dependence between them, enabling the perpetrator to influence the victim's living situation.<sup>8</sup> Factual dependency means that the relationship of dependence need not be formalised but: 'may arise from the specific configuration of factual circumstances attesting to the perpetrator's realistic influence on the victim's living situation',<sup>9</sup> and thus either from the operation of the law (parents and children) or facts (a teacher and a student).<sup>10</sup> A critical situation, which also belongs to the elements of the offence defined in Article 199(2) CC, means an objectively existing situation that threatens the victim with significant personal or economic harm. Such a situation can be the result, for example, of a fortuitous event, illness or economic distress. Doubts arise as to whether such a relationship of dependence or critical situation may be brought about by the perpetrator's own conduct. Two diverging positions have formed in academia on this topic. The former is that both the relationship of dependence and the critical situation must exist objectively and without the perpetrator's contribution,<sup>11</sup> and the latter is that the perpetrator's contribution to the formation of a relationship of dependence or to the occurrence of a critical situation is irrelevant to the perpetrator's liability.<sup>12</sup>

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8 Cf. Supreme Court order of 18 December 2008, V K.K. 304/08 (2008) OSNwSK 1, item 2691; SC judgement of 6 May 2014, V K.K. 358/13 (2014) KZS 9, item 9.

9 Cf. Bielski (n 5), 723–724.

10 Marek Mozgawa in Marek Mozgawa (ed) *Kodeks karny. Komentarz*, Wolters Kluwer 2017, 616; Violetta Konarska-Wrzosek in Violetta Konarska-Wrzosek, *Kodeks karny. Komentarz*, Wolters Kluwer 2016, 909.

11 Thus i.a. Berent (n 5), 1238; Joanna Piórkowska-Flieger in Tadeusz Bojarski (ed), *Kodeks karny. Komentarz*, Wolters Kluwer 2016, 574; cf. Hubert Myśliwiec, *Granice penalizacji seksualnego nadużycia stosunku zależności, wykorzystania krytycznego położenia oraz nadużycia zaufania małoletniego*, *Czasopismo Prawa Karnego i Nauk Penalnych* 3 (2012) 97; Jarosław Warylewski in Ryszard Stefański (ed), *Kodeks karny. Komentarz*, C.H. Beck 2018, 1310.

12 Thus, cf. Bielski (n 5), 725.

The act criminalised by Article 199(2) CC consists in the minor's consent. It must be emphasised that this consent *de facto* is in no way voluntary and would not have been given in any other circumstances.<sup>13</sup> In the case of the act criminalised by Article 199(3), one of the elements of which is the perpetration of sexual activities vis-à-vis a minor or inducing the minor to participate in such activities by abuse of trust, the minor's consent to participate in sexual activities is voluntary but obtained, among other ways, by the abuse of such a minor's trust.

Abuse of trust is the taking advantage of the belief that the perpetrator's actions are taken in the interest of the minor who consents to the sexual activities on the basis of trusting the perpetrator. But if it were not for that trust, the victim might not have given such consent.<sup>14</sup> The purpose of Article 199(3) is to protect the minor primarily from the actions of persons who, by reasons of their profession, function, or social or family position enjoy a special position of authority and trust from the child (e.g., teachers, coaches, clerics).

The trace of protection of the child from sexual abuse can also be found in Article 198 CC, which criminalises the act of inducing the victim to participate in sexual activities by taking advantage of the victim's helplessness or inability arising from a mental handicap or mental illness, to discern the meaning of the act or guide their own conduct. As regards children, protection is extended primarily to minors above the age of consent, who are no longer protected by Article 200(1) CC. Helplessness is the condition in which the victim is no longer capable of making or carrying out a fully informed decision.<sup>15</sup> This can be the product of causes situated either in the physical sphere (e.g., physical disability, paralysis, shock, exhaustion, neurological illness, etc.) or the mental sphere, as long as the victim's incapacity is caused by transient mental distress and not the result of a mental illness or mental retardation (e.g., intoxication with alcohol, anaesthetics, endocrine disruption, etc.).<sup>16</sup> The taking advantage of the victim's

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13 Similarly Myśliwiec, *Granice* (cf. n 11), 102; Magdalena Budyn-Kulik / Marek Kulik in Michał Królikowski / Robert Zawłocki (eds), *Kodeks karny. Część szczególna, Tom I, Komentarz, Art. 117–221*, C.H. Beck 2017, 706.

14 Cf. Bielski in Wróbel / Zoll (n 5), 727; Konarska-Wrzosek (n 10), 910.

15 Cf. Andrzej Marek, *Kodeks karny. Komentarz*, Wolters Kluwer (LEX) 2010, 453.

16 Cf. Mozgawa (n 10), 614; Bielski (n 5), 711–712; Marek (n 15), 453; Budyn-Kulik (n 14), 97; Jarosław Warylewski in Jarosław Warylewski (ed), *System prawa karnego. Przepięstwa przeciwko dobrom indywidualnym*, t. 10, C.H. Beck 2016, 759–761; Hubert Myśliwiec, *Seksualne wykorzystanie bezradności lub niepoczytalności innej*

helplessness is the inducement, by the perpetrator, of sexual activity with the victim, provided that this would not be possible if the victim had not been in a condition that prevents opposition to the perpetrator.

Another extraordinarily dangerous and increasingly widespread phenomenon is the sexual abuse of a child with the use of the child's image, colloquially known as child pornography.

In Polish criminal law neither pornography nor child pornography have a formal definition. The Criminal Code does not use the term 'pornography'; instead, it mentions: 'pornographic content with the participation of a minor'. That, however, does not mean the complete absence of any legal definitions narrowing down the concept of child pornography.<sup>17</sup> The broadest of those is contained in Article 2(c) of the EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography,<sup>18</sup> where child pornography is defined as any material depicting a child, a person appearing to be a child or realistic images of a child participating in actual or simulated sexual conduct or depiction of the sexual organs of a child or person appearing to be a child for mainly

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osoby (art. 198 k.k.), *Czasopismo Prawa Karnego i Nauk Penalnych* 2 (2013) 97; differently Mateusz Rodzynkiewicz in Andrzej Zoll (ed), *Kodeks karny. Część szczególna*. Tom II. Komentarz do art. 117–277 k.k., Zakamycze 2006, 632–633.

17 Cf. Article 3(1) (c) of the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (UNGA resolution A/RES/54/263 of 25 May 2000); Article 9(2) of the Council of Europe Convention on Cybercrime (ETS No. 185)—pornographic material depicting a minor engaged in sexually explicit conduct (a) or a person who appears to be a minor or the realistic image of a minor (b and c, provided that the decision as to the recognition of such material as child pornography has been left up to the member states); Article 2 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse – depiction of a child engaged in actual or simulated sexual activity or depiction of sexual organs primarily for sexual purposes (CETS No. 201) – any material visually depicting a child engaged in actual or simulated explicitly sexual activity or any depiction of a child's sexual organs mainly for sexual purposes (it was left to the member states' discretion whether to criminalise materials composed solely of simulated depictions or realistic images of a non-existing child or materials with the participation of children having reached the age of consent if such images were created by them and are possessed with their consent and solely for their private use – Article 20(3)).

18 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, pp. 1–14)

sexual purposes, including without limitation of the realistic<sup>19</sup> depictions of a child's sexual organs.

As used in the Directive, the expression 'any material' may include textual or audio-visual materials. *Słownik języka polskiego* (Polish dictionary) defines 'pornography' as: 'periodicals, photographs, paintings, drawings and other articles with indecent contents, calculated to elicit erotic stimulation in the audience',<sup>20</sup> and thus the Polish Criminal Code's use of the term 'pornographic content with the participation of a minor' refers to any type of material, hence text, images, videos and other audio-visual materials – according to the linguistic definition.

Article 202(3) criminalises the following activities if perpetrated with a view to dissemination:<sup>21</sup> producing, fixing, storing or possessing pornographic content involving a minor or disseminating or presenting such content. Fixing, storing, possessing or gaining access to pornographic content which involves a minor is criminalised by sections 4 and 4a of Article 202.

An incredibly important matter from the perspective of protecting minors from sexual abuse is to take into account the broad accessibility of IT and telecommunication technologies in many cases which enable or facilitate committing sexual offences against minors. The most typical offences committed in cyberspace include those linked to child pornography. The transmission or generation of pornographic material featuring a minor is only one example of such activities. Telecommunication and IT networks enable someone to gain access to child pornography without gaining possession of it; hence, the great importance of the language of Article 202(4a) CC, which criminalises the gaining of access to pornographic material featuring a minor. Online presentation of pornographic content featuring minors, including the real-time representation of sexual abuse of a minor, is becoming more widespread. Participation in the presentation of pornographic material featuring a minor, including live material without

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19 This term implies so-called simulated (generated) pornography, i.e., materials created without involving any specific child, instead derived as a resultant of multiple 'innocent' photographs, generated in a wholly artificial way, etc.

20 Mieczysław Szymczak (ed), *Słownik języka polskiego*, tom II, PWN 1988, 823; Witold Doroszewski (ed), *Słownik języka polskiego*: 'literary works, periodicals, images or drawings with indecent contents, calculated to elicit erotic stimulation,' (19 August 2015).

21 In line with the literature of criminal law, disseminating pornographic content to an unlimited audience, including without limitation through the use of mass media, telecommunications and IT networks, etc.

limitation, is criminalised by Article 202(4b) CC – provided that the purpose is one of sexual gratification.

Article 200(3) CC criminalises, among other acts, the presentation of pornographic content to a minor below the age of consent, and Article 200(4) CC the presentation to a minor of the performance of a sexual activity – for the purpose of the sexual gratification of the perpetrator or another.

The Polish Criminal Code also criminalises so-called grooming, an indispensable element of which is for the perpetrator to get into contact with a minor below the age of consent through an IT system or telecommunications network. In this provision, Polish legislature criminalises two kinds of perpetrator conduct. Firstly, establishing contact with a minor below 15 years of age for the purpose of involving such a minor in sexual activities,<sup>22</sup> or of producing or fixing pornographic materials, if the direct consequence of such an establishment of contact is the perpetrator's attempt, through misleading the minor, taking advantage of the minor's error or incapacity to adequately understand the situation, to induce a meeting with such a minor (Article 200a(1) CC). Secondly, it criminalises the conduct of a perpetrator who proposes to a minor below the age of 15 sexual intercourse, submission to or performance of another sexual activity or participation in the production or fixation of pornographic materials, where the direct consequence of such a proposition is the attempt to implement it.

### 3. Reporting a Crime and Initiation of Proceedings

Sexual offences, as defined in Chapter XXV of the Criminal Code, are prosecuted *ex officio*, on the public path, which means that the police and the prosecution service, having received the information about the suspicion that a crime has been committed, are required to institute proceedings in the matter. This path does not require the victim<sup>23</sup> to take any action, and

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22 More narrowly, for the purpose of committing the offence of rape on a minor below the age of consent, gang-rape or incestuous rape, or the inducement of participation in sexual activities.

23 A victim is a person whose interests have been directly harmed by a criminal offence (Article 49(1) of the Code of Criminal Procedure).

information about the suspicion that a crime has been committed may be provided by any person whatsoever, irrespective of the victim's intentions.<sup>24</sup>

Anyone who has obtained reliable information about a criminal offence having been committed has a right to report it.<sup>25</sup> This is provided that such information need not be objectively true; what is important is that the reporting party be convinced of its truth.<sup>26</sup>

In Polish criminal law, anyone who has become aware of a publicly prosecuted criminal offence having been committed has the obligation to report such an offence (Article 304(1) CCP). For individuals, in the majority of cases this is a social, not a legal obligation. A legal obligation visited by a penalty for non-compliance is applicable solely to cases set out in Article 240 CC and refers to the gravest offences. In respect of sexual offences this applies to the rape of a minor below the age of 15, gang rape or incestuous rape or rape committed with particular cruelty (sections 3 and 4 of Article 197 CC); sexual activities with a person who is helpless or, due to a mental illness, unable to discern the meaning of the act or guide their own conduct (Article 198 CC); sexual activities with a minor below 15 years of age, the presentation of pornographic content or articles to or the performance of sexual activities on such a minor (Article 200 CC).

State and local-government institutions always have a legal obligation to report a publicly prosecuted crime (Article 304(2) CCP). This applies not only to: 'offences against the institution's interests but also such other *ex-officio* prosecuted offences as the institution may have become aware of in connection with its statutory or charter activities',<sup>27</sup> and failure to report may result in criminal liability.

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24 Cezary Kulesza, Article 10, in Katarzyna Dudka (ed), *Kodeks postępowania karnego. Komentarz*, wyd. II, Wolters Kluwer 2020.

25 Ryszard A. Stefański / Stanisław Zabłocki, Article 304, in Ryszard A. Stefański / Stanisław Zabłocki (eds), *Kodeks postępowania karnego. Tom. III. Komentarz do art. 297–424*, Wolters Kluwer 2021.

26 Stanisław Cora, *Podstawy społecznego obowiązku zawiadomienia o przestępstwie. Problematyka art. 304 § 1 k.p.k., art. 113 § 1 k.k.s. i art. 4 § 1 i 2 u.p.n.* in Wojciech Cieślak / Sławomir Steinborn (eds), *Profesor Marian Cieślak – osoba, dzieło, kontynuacja*, Wolters Kluwer 2013, 687 and 688.

27 Wincenty Grzeszczyk, 'Obowiązek zawiadomienia o przestępstwie,' (1998) *Prokuratura i Prawo* 10, 124.

A crime report may be made orally to the police or in written form by letter<sup>28</sup> to the prosecution service.<sup>29</sup> If reporting orally, the reporting person is immediately interrogated as a witness.

If a crime report concerning rape (Article 197 CC), taking advantage sexually of incapacity or helplessness (Article 198 CC.) or of a relationship of dependence or of a critical situation (Article 199 CC), is made by the victim, then it may be limited to the identification of key facts and evidence (Article 185c CC).

Immediately following receipt of the crime report the authority competent to conduct the pretrial investigation issues an order instituting or refusing to institute proceedings. Proceedings are precluded by the existence of so-called negative procedural grounds (Article 17(1) CCP), including without limitation the lack of data sufficiently substantiating the suspicion of the offence having been committed, if criminal proceedings are pending or have been finally resolved concerning the same act of the same person, or the statute of limitations has run out on punishment of the offence. In Polish criminal law, the statute of limitations on punishment of the offence means the perpetrator may no longer be prosecuted. For sexual offences against children, the statute of limitations, depending on the gravity of the act, is 10 to 20 years (Article 101(1) CC), provided that the statute of limitations cannot run its course on a criminal offence committed against a minor victim before the victim completes 30 years of age (Article 101(4)(2) CC).

An interlocutory appeal may be brought against the order instituting or refusing to institute proceedings. If the court reverses the disputed order and the procedural authority again issues an order refusing to institute proceedings or discontinuing the proceedings, then the order may be appealed to the prosecutor superior or to the authority conducting the proceedings. If the latter upholds the order, then the victim may bring a so-called subsidiary bill of indictment to the court (Article 55(1) CCP). Such a subsidiary bill of indictment must be drafted and signed by an advo-

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28 Any such letter, affixed with a date and signature, must identify, without limitation, the reporting person and the victim (if they are not the same person), the time and place of the incident, a description of the incident, the identification of any witnesses and information about any evidence possessed.

29 In many cases, the report may be made to different bodies, for example in the case of sexual offences against minors below 15 years of age to the State Commission for Paedophilia (e.g., via call centre) and in the case of any criminal offences against a child to the Child's Rights Ombudsperson.

cate or counsellor-at-law (professional counsel) or by a counsellor with the Treasury Solicitor's Office (Article 55(2)). The public prosecutor may at any time accede to a case instituted in this manner. Furthermore, the public prosecutor may not withdraw the indictment without the victim's consent (Article 55(4) CCP).

If a bill of indictment (either the public prosecutor's or a subsidiary one) is lodged with the court following the pretrial investigation, another stage of criminal proceedings commences, which is the court proceedings.

In principle, a minor may not appear independently in criminal proceedings. In accordance with Article 51(2) CCP, if the victim is a minor, their rights are to be exercised by the statutory guardian (usually the parents) or permanent carer.<sup>30</sup>

Accordingly, where a minor makes a crime report, such a report is inoperative. It must be emphasised, however, that in any such situation the law enforcement agency may, having heard the minor out, if there is a reasonable suspicion that a criminal offence has been committed, institute the proceedings *ex officio*.

The inactivity of parents failing to report a sexual offence committed against their child or obstruction by them of the making of such a report may be recognised as inadequate exercise of parental responsibility and justify the court in issuing the relevant orders, for example: 'instructing the parent to file a motion to prosecute or – in default of the parent's compliance with the obligation – appoint a special guardian-*ad-litem* to do so'.<sup>31</sup>

In no case is it admissible for a child in criminal proceedings to be represented by a parent if the other parent is the suspect or defendant in the same proceedings.<sup>32</sup> In such a case the guardianship court will appoint a *guardian-ad-litem* to represent the child in the proceedings (Article 99 of the Family and Guardianship Code).

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30 Also, where the victim is a vulnerable person, in particular because of age or health, such a victim's rights may be exercised by their primary carer (Article 51(3) CCP).

31 Cf. judgement of the Court of Appeals in Katowice of 6 May 2009, II AKA 396/08, LEX no. 553873.

32 Cf. SC resolution (seven justices) of 30 September 2010, I KZP 10/10, OSNKW 2010/10, item 84; SC judgement of 1 December 2010, III KK 315/09, BPK 2011/2, item 1.2.4; SC order of 11 January 2011, V KK 125/10, OSNwSK 2011/1, item 27; SC order of 18 October 2011, V KK 209/11, OSNwSK 2011/1, item 1879; OSC order of 18 October 2011, V KK 210/11, OSNwSK 2011/1, item 1880; SC order of 30 September 2015, I KZP 8/15, OSNKW 2015/12, item 100.

#### 4. Rights and Obligations of the Victim in Criminal Proceedings

The victim is duty bound to appear at every summons of the authority conducting the proceedings (Article 177 CCP).<sup>33</sup> Fingerprints, hair and saliva samples, odours, etc. may be taken from the victim (Article 192a CCP). The victim may also be subjected to a visual inspection and medical examination where the punishment of a criminal offence depends on the victim's health condition (sections 1 and 3 of Article 192 CCP). If there are doubts as to the victim's mental condition or development, or their ability to perceive or recall perceptions, the court or prosecutor may order the victim to be interrogated with the participation of a physician or psychologist (Article 192(2) CCP).

A victim who is party to the proceedings may appoint counsel – an advocate or counsellor-at-law. In the pretrial investigation, the victim is a party to the proceedings (Article 299(1) CCP). In court proceedings, in principle, the parties are the prosecutor and the defendant, while the victim may only appear as a party if acting as an auxiliary prosecutor (Article 53 CCP).

In *ex-officio* prosecuted cases the public prosecutor is in charge of the prosecution (Article 45(1) CCP) and the victim may act as an auxiliary prosecutor – beside or in lieu of the public prosecutor (Article 53 CCP). Even where the public prosecutor withdraws the indictment, this does not strip away the auxiliary prosecutor's rights; moreover, in such a situation the victim, even if previously not having exercised their right to an auxiliary prosecutor, may accede as one to the proceedings (Article 54 CCP).

When a bill of indictment is brought to the court, the victim loses the status of a party in court proceedings. The victim ceases to be an active party to the trial (with a few exceptions provided for in the Code of Criminal Procedure) – thus, for example, they do not have the right to submit motions for evidence, ask questions to persons questioned or have access to the case files. The auxiliary prosecutor is an institution of the Polish criminal procedure which was introduced in order to enable the aggrieved party to actively participate in the trial and exercise the victim's rights as a party – alongside or instead of the public prosecutor.

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33 Where the victim fails to attend without excuse, they may be fined or even compelled to attend (sections 1 and 2 of Article 285 CCP). The victim is entitled to be reimbursed for the costs of attending (Articles 618a-618e and 618j CCP).

An auxiliary prosecutor may join the proceedings alongside the public prosecutor or make a complaint independently of the public prosecutor; or take action when the public prosecutor does not carry out the function of prosecution (in such a case as a subsidiary prosecutor).<sup>34</sup>

An auxiliary prosecutor, who is party to the proceedings, may appoint counsel. Also, a non-party person may appoint counsel<sup>35</sup> if such a person's interests in the pending proceedings so require (sections 1 and 2 of Article 87 CCP). Such counsel may only be an advocate, counsellor-at-law or counsellor with the Treasury Solicitor's Office (Article 88(1) CCP). The court, however, or the public prosecutor in pretrial investigation, may refuse to admit counsel to a non-party person upon finding such counsel's participation not to be required for the protection of the non-party person's interests (Article 87 CCP). Depending on the outcome of the case, the defendant may be ordered to pay the costs of retaining such counsel (Articles 627–629 CCP). The court may appoint *ex-officio* counsel for the victim if the victim demonstrates that their financial standing does not permit retaining counsel (Article 78(1), sections 1 and 2 of Article 87, and Article 88 CCP).

A social organisation also may participate in court proceedings if there is a need for the protection of a social or individual interest covered by such an organisation's charter objectives. Such participation is conditional upon at least one party's consent. In the absence of such consent, the court will admit the organisation's representative if doing so is in the interests of justice. Once admitted to participation in the proceedings, the representative of a social organisation may attend hearings, speak and make submissions in writing (Articles 90–91 CCP).

The victim may move to recuse a judge or prosecutor in circumstances of such kind as to give rise to a reasonable doubt as to the judge's or prosecutor's impartiality in a given case (Articles 42(1) and 47(1) CCP).

In pretrial investigation, the victim may move for procedural activities to be performed such as the interrogation of a witness, sourcing of a document or admission of an expert opinion (Article 315(1) CCP, Article 325a(2) CCP) and may attend such activities, also with the assistance of

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34 Dariusz Świecki (ed), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany* (Lex/el), Article 53, Wolters Kluwer 2022.

35 The court, and in pretrial investigation the public prosecutor, may refuse to admit such counsel to the proceedings upon finding such counsel's participation not to be required for the protection of such a non-party person's interests (Article 87(3) CCP).

counsel (Articles 315–316 CCP).<sup>36</sup> The victim may also participate in the expert's interrogation and read the expert's opinion (Article 318).

If the victim is acting as a party (auxiliary prosecutor) in the court proceedings, he/she has a right to submit evidentiary motions and pose questions to those being interrogated. The victim also has a right to attend the main hearing (sections 2 and 3 of Article 384 CCP) and the court's sittings prior to the main hearing in respect of conditional discharge (Article 341(1) CCP) or dismissal on the grounds of the defendant's incapacity along with the application of protective measures (Article 354(2) CCP) or conviction and sentencing without a main hearing (Article 343(5) CCP).

The victim has a right to the assistance of a translator or interpreter, including without a limitation a sign-language interpreter (sections 2 and 2 of Article 204).

In criminal proceedings the parties, counsel, statutory guardians and some others, have a right to inspect the files of the case and make copies. The parties and persons directly affected by a ruling have a right to receive a copy of each such ruling (Articles 156 and 157 CCP).

The victim,<sup>37</sup> until the closure of the trial, has a right to petition for redress of compensation for any harm suffered (Article 49a CCP). The victim has a right to sue for damages before the civil court in excess of the amount awarded by the criminal court. If the defendant has been found guilty in the criminal case, the victim, when bringing an action for damages to civil court, may rely on the criminal court's judgement, so that only the amount to be awarded will remain for the civil court to decide.

The victim and the persons closest to him/her may receive medical, psychological, rehabilitation, legal and material assistance from the Crime Victims Support Network (Article 43(8)(1) of Criminal Enforcement Code).

### 5. *Interrogation of the Victim or Witness*

The person being interrogated, in whatever capacity, should first and foremost be provided with the opportunity to speak freely before being asked

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36 Transcripts of activities in criminal proceedings must not contain details of the address of residence and employment, telephone number or e-mail addresses of the victims and witnesses participating in a given activity. Such data are identified in an annex, with access to it restricted to the authority conducting the proceedings (Article 148a (1) CCP).

37 The public prosecutor also has this right.

questions with a view to supplementing or narrowing down the answers given. This is of extraordinary importance also due to the fact that explanations, depositions and witness statements in conditions not guaranteeing free expression are inadmissible as evidence (Article 171(6) CCP). The questions – which, apart from the interrogating authority, also the parties, defence counsel, other counsel and experts may ask – ought to be posed directly (sections 1 and 2 of Article 171). Leading questions, coercion or threat, or hypnosis, chemical or technical agents affecting mental processes or intended to seize control of unconscious reactions of the organism must not be used (sections 4 and 5 of Article 171). The persons interrogated may be confronted with one another in order to explain any inconsistencies, and they may be exhibited a person, image of a person or item for identification (Articles 172–173 CCP).

Anyone summoned as a witness has a duty to attend and testify (Article 177(1) CCP), even if he/she do not know anything about the incident which is the subject matter of the pending proceedings or about circumstances connected therewith or which have any relevance to the proceedings.<sup>38</sup> A witness may be interrogated with the use of technical devices for remote interrogation, enabling direct, simultaneous transmission of video and audio. Proceedings before a court at the witness's place of residence must be attended by a court referendary, clerk or official employed by the court in whose district the witness is present (Article 177(1a) CCP), as well as a consular official if the witness is a Polish citizen abroad (Article 177(1b) CCP).

A witness unable to attend the summons due to illness, physical disability or some other insurmountable obstacle may be attended at the place they are staying (Article 177(2) CCP). The Code of Criminal Procedure also identifies categories of people who shall not be interrogated (Articles 178–179 CCP). Those include without limitation clerics who must not be interrogated about whatever facts they may have learned about in confession.

If the subject interrogated is a minor below 15 years of age, then any activities with his/her participation, in so far as it is possible, should be in the presence of his/her statutory guardian or *de-facto* carer, save where this would be opposed by the interests of the proceedings (Article 171(3) CCP).

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38 Cf. SC judgement of 23 June 1981, III KR 6/81, LEX no. 21910.

The duty to procure the attendance of a minor witness rests on the statutory guardians or carers. In no event may they oppose the interrogation of such a minor, but they have a right to make sure the minor is interrogated in special conditions prescribed for the interrogations of minors.<sup>39</sup>

In cases of sexual offences, a minor victim below the age of 15 will only be interrogated as a witness if his/her testimony may have a significant bearing on the outcome of the case. In principle, the interrogation must be held once only.<sup>40</sup> The interrogation will be conducted by the court in a sitting no later than 14 days following the arrival of the motion.<sup>41</sup> A psychologist's presence is mandatory, and the public prosecutor, defence counsel and victim's counsel may attend. The minor's statutory guardian, permanent carer or such other adult as the minor may specify may attend the interrogation if they do not have a restrictive effect on the interrogated subject's free expression (Article 185a(2) CCP). Any such interrogation must be recorded with a video- and audio-recording device (Article 147(2) CCP), and the record will be played, and the transcript read in the main hearing (Article 185a(3) CCP). A minor who has reached 15 years of age at the time of the interrogation will be interrogated in the same way if there is a reasonable concern that an interrogation conducted in different conditions could have an adverse impact on his/her mental condition<sup>42</sup> (Article 185a(4) CCP), as will a minor witness below 15 years of age at the time of the interrogation if his/her testimony may have a significant bearing on the outcome of the case (Article 185b(1) CCP). The same procedural path applies to victims above the age of consent<sup>43</sup> in cases involving the following offences: rape, taking advantage sexually of incapacity or helplessness, as well as sexual abuse in a relationship of dependence or a critical situation (sections 1a to 3 of Article 185c CCP). In proceedings in such cases, at the victim's motion it must be ensured that the expert appointed is a person

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39 Aleksandra Antoniak-Drożdż, Przesłuchanie dziecka w polskim procesie karnym – uwagi praktyczne, *Prokuratura i Prawo* 6 (2006) 45–49

40 There is an exception when important new circumstances come to light, such that their explanation requires a new interrogation, or the interrogation is requested by a defendant who did not have counsel during the victim's first interrogation (Article 185a(1) CCP). More extensively see: Arkadiusz Łakomy, Przesłuchanie małoletniego w świetle nowelizacji kodeksu postępowania karnego, *Ius Novum* 1 (2016) 3–7.

41 Interrogations following this procedure are held in specially adapted rooms within or outside the courthouse (Article 185d(1)).

42 Article 185c CCP does not apply in such cases.

43 An adult or a minor above the age of 15.

of the same sex as the victim, unless this would hamper the proceedings (Article 185c(4) CCP).

In cases of sexual offences, a minor victim who has reached 15 years at the time of interrogation may testify in the aforementioned way, i.e., with the use of technical devices for remote communication with the simultaneous transmission of audio and video, if there is a reasonable concern that the defendant's immediate presence at the interrogation might have an embarrassing effect on such a minor or an adverse effect on his/her mental condition (Article 185b(2) CCP).

For the time of the interrogation of a minor witness below 15 years of age, the court may exclude the openness of the case to the public in whole or in part (Article 360(1) CCP).

## *6. Appellate Remedies – Challenging the Decision*

In its article 176(1), the Constitution of the Republic of Poland provides for the availability of at least two instances in judicial proceedings. In criminal proceedings appellate remedies include the ordinary appeal against the judgement of the court of first instance (Article 444 CCP) and the interlocutory appeal ('complaint') available in statutorily specified cases against orders and procedural orders<sup>44</sup> (Article 459 CCP). Criminal procedure also provides for extraordinary appeals against a final and binding judicial decision, namely the cassatory appeal (Article 519 CCP), complaint against reversal and remand (Article 539a CCP) and the reopening of the proceedings (Article 540 CCP).

The ordinary appeal is available to the parties and others specified by the legislation. A first-instance court decision may be appealed in whole or in part. The absence of a specific decision-making point may also be appealed. The appellant, save for the public prosecutor, may only appeal decisions or findings that violate their rights or are prejudicial to their interests. The appellant must have so-called *gravamen*, i.e., a legal interest to appeal

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44 Interlocutory appeals are also available against the orders of the public prosecutor or another authority conducting the pretrial investigation (Article 465 CCP).

(Article 425 CCP). The appeal must be filed with the same court that issued the disputed decision (Article 428(1) CCP).<sup>45</sup>

The appellate court either upholds the disputed decision or orders it modified or reversed in whole or in part (Article 437 CCP).

The cassatory appeal is an extraordinary appellate remedy against the final and binding judgement of the appellate court; it is heard by the Supreme Court. In principle, a cassatory appeal involves the examination of the consistency of the final and binding judgement of the appellate court that ends the judicial proceedings with the law. A cassatory appeal may be brought by the parties<sup>46</sup> (ordinary cassatory appeal, Article 520(1) CCP) or by the authorised organs specified in Article 521 CCP (extraordinary cassatory appeal), i.e., the Attorney General ('Prosecutor General'), Civic Rights Ombudsperson ('Human Rights Commissioner') or Child's Rights Ombudsperson – if the judgement violates the child's rights.

A cassatory appeal may be based only on absolute grounds of appeal<sup>47</sup> or some other manifest violation of the law if such a violation may have had a significant bearing on the outcome. A cassatory appeal may not be grounded solely in the allegation of disproportionality of the penalty<sup>48</sup> (Article 523(1) CCP).

A cassatory appeal must be drafted and signed by an advocate or counsellor-at-law or by a counsellor with the Treasury Solicitor's Office (Article 526(2) CCP). It may be brought within 30 days of the date of service of the reasoned decision (Article 524(1) CCP). It must be addressed to the Supreme Court and filed through the appellate court (Article 525(1) CCP). The extraordinary cassatory appeal is filed directly with the Supreme Court (Article 525(2) CCP).

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45 When not originating from the public prosecutor, any appeal against the judgement of a Regional Court must be drafted and signed by an advocate, counsellor-at-law or counsellor with the Treasury Solicitor's Office (Article 445(1) CCP).

46 A party that has not appealed the decision of the court of first instance may not lodge a cassatory appeal against the decision of the appellate court upholding the first-instance judgement or modifying it favourably to such a party (Article 520(2) CCP).

47 Absolute appellate grounds (Article 439(1) CCP) include, without limitation, the improper composition of the court; errors made due to the competence of the court; imposition of a penalty or punitive, compensatory or protective measures unknown to the law; inconsistencies in the holding that prevents enforcement; the lack of the defendant's counsel where mandatory; the absence of the defendant where their attendance is mandatory.

48 This does not apply to the Attorney General's cassatory appeals in cases of felonies, i.e., offences carrying a penalty of at least three years' imprisonment.

Following consideration of the appeal, the appellate court may uphold the disputed judgement, modify it (supplanting a different decision on the merits) or reverse it, in whole or in part. Reversal may lead to dismissal ('discontinuation') of the proceedings or – in the presence of absolute grounds of appeal as set out in Article 439(1) CCP – remand to the court of first instance for reconsideration (Article 437 CCP). In such a situation, the parties have a right to lodge a complaint with the Supreme Court, thus delaying the enforcement of the disputed judgement (Article 539b CCP). The Supreme Court may dismiss the complaint or reverse the disputed judgement in whole or in part and remand the case to the competent appellate court for reconsideration of the appeal (Article 539e(2) CCP).

In special cases, judicial proceedings ended with a final and binding ruling may be reopened at a party's motion or *ex officio* (Article 540 CCP). The reopening of the proceedings against the defendant's interests is possible only in narrowly defined cases, including, without limitation, a criminal offence committed in connection with the proceedings with reasonable grounds to believe this had a bearing on the outcome. The decisive majority of cases in which the reopening of proceedings ended with a final and appealable decision involve situations in which the proceedings are reopened in the defendant's favour. When deciding to reopen the proceedings, the court may reverse the disputed decision and dismiss the proceedings or remand the case to the competent court for reconsideration or acquit the defendant if new facts or evidence indicate the manifest unfairness of the disputed decision (sections 2 and 3 of Article 547 CCP).

## *7. Child's Rights Ombudsperson in Criminal Proceedings*

Special rights in criminal proceedings are afforded to the Child's Rights Ombudsperson, who is a monocratic constitutional organ (Article 72(4) of Polish Constitution) tasked with serving as the guardian of the child's rights set forth in the Constitution of the Republic of Poland, the UN Convention on the Rights of the Child and other provisions of the law, while respecting the responsibility, rights and obligations of parents (Article 1(2) of the Act on the Child's Rights Ombudsperson).<sup>49</sup> The Ombudsperson is independent in their activities from the other organs of the state and

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<sup>49</sup> Uniform text: Polish Journal of Laws from 2020 item 141.

answerable only to the Sejm (lower house of Parliament) on terms set forth by statute (Article 7(1) of the Act on the Child's Rights Ombudsperson).

In criminal proceedings, the Child's Rights Ombudsperson may demand that the competent prosecutor institute a pretrial investigation in cases of criminal offences, including sexual offences (Article 10(1)(4) of the Act on Child's Rights Ombudsperson). Furthermore, the Child's Rights Ombudsperson is authorised to lodge a cassatory appeal (extraordinary cassatory appeal) against any final and binding decision ending court proceedings if the decision violates a child's rights (Article 521(2) CCP). In this, the Child's Rights Ombudsperson is not bound by the thirty-day time limit specified for the ordinary cassatory appeal (Article 523(4) CCP) or by the restriction of appeals unfavourable to the defendant only to acquittals and dismissals. The Child's Rights Ombudsperson lodges his/her cassatory appeal directly with the Supreme Court (Article 525(2) CCP) and is not subject to the mandatory use of professional counsel stipulated for the ordinary cassatory appeal. The Child's Rights Ombudsperson is authorised to demand access to court and prosecutorial files and to the records of other law-enforcement authorities even after the end of the proceedings and the decision having been rendered (Article 521(3) CCP).

## 8. Conclusion

'The administration of justice in criminal cases must be subjected to a specified *modus procedendi*. This is required by the importance and significance of the matters resolved in criminal proceedings and especially the type of cases and civic rights and freedoms that may be restricted by the outcome'.<sup>50</sup>

The essence of modern criminal procedure is breaking from the position grounded solely in the concept of retributive justice and rehabilitation in favour of restorative justice that aims to make good the harm done by the crime and especially to engage the offender in restorative activities. The purpose of such an approach is to: 'build crime response in a perpetra-

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50 Jacek Kosonoga, Article 1, in Ryszard A. Stefański / Stanisław Zabłocki (eds), *Kodeks postępowania karnego*. Tom I. Komentarz do art. 1–166, Wolters Kluwer 2017.

tor–victim–community’ configuration and create an adequate response to the social character of the crime.<sup>51</sup>

Accordingly, the primary goal of criminal procedure is not only to identify and punish the perpetrator of the offence but also to make amends in the social sense of justice. One of the manifestations of broadly understood restorative justice is paying heed to the victim’s legally protected interests both within and outside criminal proceedings.<sup>52</sup>

It is with a wide scope that Polish criminal procedure heeds the victim’s interests, protecting his/her rights at every stage of the proceedings. This is served by the Code of Criminal Procedure’s regulation of matters such as the right of the victim to be informed of his/her rights and given the opportunity for active participation in the activities transacted in the proceedings, for the assistance of counsel, inspection of the record of the proceedings, appropriate procedure for interrogations, or appellate remedies against the decision. In its judgement of 12 February 2019, the Supreme Court emphasised that heeding: ‘the victim’s legally protected interests while respecting their dignity is one of the core directives in criminal procedure’, while depriving the victim: ‘of the possibility of the exercise of the procedural rights available to them must be regarded in terms of a manifest violation of the law’.<sup>53</sup>

Of particular importance here is the procedural treatment of a minor victim, especially a victim of sexual abuse. Polish criminal procedure affords special treatment to both the minor victim and the minor witness. It must be emphasised that especially in the case of sexual offences the minor witness may also be a victim of sexual abuse, if only through indirect participation in an incident for which they had not been prepared by their physical, mental, emotional and social development. Doubts can arise in the context of the different treatment, to some extent, of the minor victim (or witness) depending on whether they have reached the age of consent – especially considering that that legislature allows for the possibility of providing a minor victim below 15 years of age with the same treatment as if he/she had not reached that age.

An important objective pursued by criminal procedure is for it to be shaped in such a way as to achieve – by correct application of the measures

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51 Wojciech Zalewski, *Sprawiedliwość naprawcza. Początek ewolucji polskiego prawa karnego?*, Arche 2006, 184.

52 Kulesza (n 24), Article 2.

53 Cf. SC judgement of 12 February 2019, II KK 291/18, LEX no. 2625016.

prescribed by criminal law and discovery of circumstances conducive to crime – the objectives of criminal procedure, not only with regard to fighting crime but also preventing it and reinforcing respect for the law and the principles of social co-existence (Article 2(1)(2) CCP). Hence, public openness, not only about the penalty imposed but also about all of the circumstances of the offence committed, is as important as punishing the offender and obtaining redress for the harm done. Public openness and transparency are, therefore, enormously important aspects of criminal procedure. Here, though, one must remember that this public openness must be limited wherever the victim's interests are concerned, especially the need to protect the victim from repeated victimisation.

Accordingly, modern criminal procedure has undergone a certain subjectivation of the victim, allowing him/her to participate in the criminal proceedings, which previously focused solely on the crime and the offender.<sup>54</sup> In a way, the philosophy of restorative justice assumes the making of an attempt to have the offender and the victim act together for the purpose of reparation of the harm done and the cancellation of the social effects of the crime, for example by mediation. It must be noted that in the case of sexual offences, extreme caution must be observed with regard to any cooperation between the victim and the offender, for this type of offence is characterised by the infliction of very special harm primarily on the victim's mental sphere, especially where the victim is a minor. However, guaranteeing the realistic participation of the victim or his/her counsel throughout the criminal proceedings provides a tangible guarantee of amends being made to the sense of justice and therewith a factor enabling at least partial reparation of the harm done by the criminal offence. Here, it is a matter of utmost importance to develop and implement such solutions as will, on the one hand, enable the victim to participate in the proceedings (such as notifying the victim of the commencement of the proceedings, enabling him/her to appeal the refusal to institute proceedings or dismissal of proceedings, informing he/she about the outcome of the case or the completion or interruption of the perpetrator's sentence), and on the other hand protect the victim from anything that might expose he/she to any danger, including, without limitation, the deepening of the trauma he/she faces as a victim of crime. This, among other things, is the purpose of the availability of a special procedure for interrogation under the care of an

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54 Magdalena Chalimoniuk-Zięba / Grzegorz Oklejak, *Sprawiedliwość naprawcza i jej zastosowanie w praktyce*, *Kwartalnik ADR* 1 (2013) 5.

expert psychologist and with the attendance of trusted people (e.g., one of the people closest to the victim), in a safe environment and without contact to the perpetrator.

In the case of criminal proceedings concerning the sexual abuse of a minor in particular, especially if linked to the parallel proceedings of different authorities (e.g., disciplinary boards) or of a different nature (e.g., canon law proceedings), it would be an important solution for the victim's welfare to guarantee the avoidance of repeated interrogation of the victim (or minor witness), especially considering that in every situation the perpetrator, even if he/she is subject to special responsibility (e.g., a physician subject to disciplinary liability or a cleric subject to liability under canon law, etc.), is first of all subject to criminal liability before the state in whose jurisdiction he/she is residing – and to this rule there can be no exception.

The sexual abuse of children, more so, any abuse of a child, 'is one of society's most insidious crimes. It robs children of their dignity and places them at a disadvantage compared to non-abused children.'<sup>55</sup> The sexual abuse of a child especially may lead to consequences: 'so often so deleterious that the phenomenon has been aptly described as "soul murder"'.<sup>56</sup>

### *Biography*

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