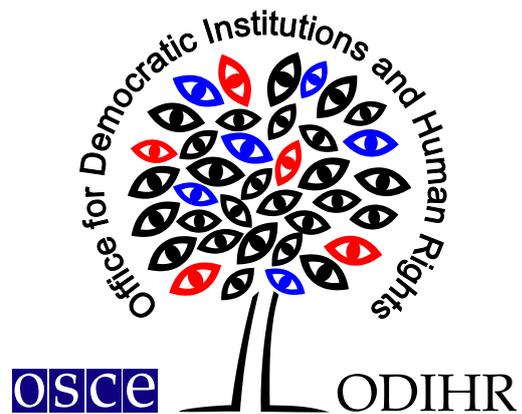


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PRELIMINARY OPINION

ON THE DRAFT ACT AMENDING THE ACT ON THE

COMMISSIONER FOR HUMAN RIGHTS

OF POLAND

**based on an unofficial English translation of the Draft Act commissioned by the OSCE
Office for Democratic Institutions and Human Rights**

OSCE Office for Democratic Institutions and Human Rights
Ulica Miodowa 10 PL-00-251 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

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I. INTRODUCTION

1. *On 21 January 2016, the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) received a request from the Commissioner for Human Rights of Poland (hereinafter “the Commissioner”) to review the Draft Act Amending the Act on the Commissioner for Human Rights¹ of Poland (hereinafter “Draft Act”), which was presented by a group of deputies on 3 December 2015 (document No. 77).*
2. *In view of the urgency of the matter, as a first parliamentary reading is scheduled to take place on 28 January 2016, OSCE/ODIHR agreed to prepare a Preliminary Opinion on the compliance of the Draft Act with international human rights standards and OSCE commitments. This will be followed by a more comprehensive formal Opinion at a later stage.*
3. *This Preliminary Opinion was prepared in response to the above-mentioned request.*

II. SCOPE OF REVIEW

4. The scope of this Preliminary Opinion covers only the Draft Act submitted for review, which will also be reviewed within the framework of other provisions of the Act on the Commissioner for Human Rights, as appropriate and relevant. Thus limited, the Opinion does not, however, constitute a full and comprehensive review of the entire legal and institutional framework regulating the protection and promotion of human rights and fundamental freedoms in Poland.
5. The Preliminary Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on areas that require amendments or improvements rather than on the positive aspects of the Draft Act. The ensuing recommendations are based on international and regional standards and practices governing National Human Rights Institutions (hereinafter “NHRIs”), as well as relevant OSCE commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.
6. This Preliminary Opinion is based on an unofficial English translation of the Draft Act commissioned by the OSCE/ODIHR, which is attached to this document as an Annex. Errors from translation may result.
7. In view of the above, the OSCE/ODIHR would like to make mention that the Preliminary Opinion is without prejudice to the findings and recommendations contained in its final Opinion on the Draft Act, as well as any written or oral recommendations and comments related to the legal and institutional framework on the protection and promotion of human rights in Poland, that the OSCE/ODIHR may make in the future.

¹ For the purpose of this Preliminary Opinion, the term “Commissioner for Human Rights” will be used to designate the “Rzecznik Praw Obywatelskich”, which is the term used on the English version of this Institution’s website <https://www.rpo.gov.pl/en>, while recognizing that various other English terms have been or are being used to designate such an entity as well, such as “Human Rights Defender” or “Ombudsperson”.

III. EXECUTIVE SUMMARY

8. At the outset, it is welcome that the Draft Act seeks to specify the procedure for lifting the Commissioner's immunity, given that this question has so far not been outlined in the Act on the Commissioner for Human Rights in detail. In this respect, international standards recommend that clear, transparent and impartial procedures for lifting immunities be provided in NHRI legislation.
9. At the same time, the Polish legal framework should provide sufficient safeguards to protect the Commissioner and his or her staff from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacities ("functional immunity"). Moreover, the Draft Act fails to indicate with sufficient clarity the modalities and criteria to be taken into account by the Sejm (or its competent authority) to ensure the fairness, transparency and impartiality of the procedure for lifting the Commissioner's immunity in the context of criminal proceedings.
10. In order to ensure full compliance of the Draft Act with international standards and good practices, the OSCE/ODIHR makes the following key recommendations:
 - A. to remove the current wording of Article 7a of the Draft Act and instead clearly state that the Commissioner as well as his or her deputies and staff shall be protected from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacities [pars 29-30, 34-35, 38-39 and 42] - although different rules and procedures for lifting staff functional immunities could be considered [par 42] - while also specifying that:
 - 1) such functional immunity shall also cover baggage, correspondence and means of communication of the Commissioner, deputies and the staff; [par 41]
 - 2) the Commissioner's Office property, documents and premises are inviolable; [par 41]
 - 3) functional immunity should continue to be accorded even after the end of the Commissioner's mandate or after the staff cease their employment with the Commissioner's office; [par 43] and
 - 4) in all other cases, the Commissioner (and his or her staff) may be civilly, administratively or criminally liable before a court of law, subject to a special procedure that would need to be followed in the case of criminal proceedings, i.e., getting approval from the Sejm; [par 31]
 - B. re-consider, in Articles 7c par 1 and 7e par 2, having the request to the Sejm to allow criminal charges to be brought for publicly prosecuted offences made through the Minister of Justice and instead designate a different body as competent to submit such request, that is independent from the executive; [pars 47-49]
 - C. specify in Article 7e par 2 that where an alleged act was not committed in *flagrante delicto* and where arrest or detention are not necessary to ensure the proper course of proceedings, the Commissioner may not be arrested or detained, and should be

immediately released as soon as the persons carrying out the arrest or responsible for the detention become aware of the identity of the Commissioner; [par 52]

- D. explicitly mention in Article 7d par 3 which entity is the competent authority to examine requests for permission to bring criminal charges against the Commissioner, while ensuring that its composition is fixed *ab initio*; [par 55]
- E. introduce a list of clear and precise criteria to be taken into consideration when determining whether immunity should be lifted or not in a given case; [pars 57-58]
- F. specify that the Sejm/competent authority should not analyse the merits of the criminal case when taking their decision on lifting immunity, and that they should duly respect the principle of the presumption of innocence, and remove the requirement for the criminal case file to be made available to the Sejm/competent authority provided in Article 7d par 5; [pars 59-60]
- G. consider introducing in Article 7d par 8 a higher majority of deputies for the vote of the Sejm on lifting immunity; [par 61] and
- H. specify what are the legal consequences in cases where immunity is lifted, or not lifted. [par 62]

Additional Recommendations, highlighted in bold, are also included in the text of the opinion.

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards on NHRIs

11. National Human Rights Institutions (hereinafter “NHRIs”) are independent bodies with a constitutional and/or legislative mandate to protect and promote human rights. They are considered to constitute a “key component of effective national human rights protection systems and indispensable actors for the sustainable promotion and protection of human rights at the country level”,² linking the responsibilities of the State stemming from international human rights obligations to the rights of individuals in the country. Although part of the state apparatus, NHRIs’ independence from the executive, legislative and judicial branches ensures that they are able to fulfil their mandate to protect individuals from human rights violations, particularly when such violations are committed by public authorities or bodies.
12. The main instrument relevant to NHRIs at the international level are the United Nations Principles relating to the status of national institutions for the promotion and protection of human rights (hereinafter “the Paris Principles”).³ While they do not prescribe any particular model for NHRIs, they outline minimum standards in this respect, including a broad human rights mandate, autonomy from government, guarantees of functional and institutional independence, pluralism, adequate resources and adequate powers of investigation.

² See par 15 of the 2007 Annual Report of the UN High Commissioner for Human Rights, A/62/36, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/461/09/PDF/N0746109.pdf?OpenElement>.

³ Defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris (7-9 October 1991), and adopted by UN General Assembly Resolution 48/134 of 20 December 1993, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

13. The ensuing recommendations are also based on the General Observations issued by the Sub-Committee on Accreditation (hereinafter “the SCA”) and adopted by the International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights (hereinafter “the ICC”),⁴ which serve as interpretive tools of the Paris Principles.⁵ According to the SCA, which is also in charge of reviewing and accrediting national human rights institutions in compliance with the Paris Principles, the Commissioner for Human Rights of Poland (hereinafter “the Commissioner”) is accredited with A status, which means that it is considered to be fully compliant with the Paris Principles.⁶
14. While the Paris Principles do not specifically address the issue of immunity of NHRIs, the guarantee of functional immunity is dealt with explicitly in ICC General Observation 2.3. This General Observation strongly recommends that “provisions be included in national law to protect legal liability of members of the National Human Rights Institution’s decision-making body for the actions and decisions that are undertaken in good faith in their official capacity”.⁷ It further highlights the importance of functional immunity in order to “reinforce the independence of a National Institution, [and] promote the security of tenure of its decision-making body, and its ability to engage in critical analysis and commentary on human rights issues”.⁸ General Observation 2.3 also provides, however, that such immunity may be lifted in “certain exceptional circumstances” and “in accordance with fair and transparent procedures” (see also Section 4.2 *infra*); in that respect, it recommends that the decision to lift the immunity of an NHRI “should not be exercised by an individual, but rather by an appropriately constituted body such as the superior court or by a *special majority of parliament*” [emphasis added].⁹ The UN High Commissioner for Human Rights has also reiterated the importance of ensuring that members and staff of national human rights institutions enjoy immunity while discharging their functions in good faith.¹⁰
15. More generally, the UN Human Rights Council has also stated in one of its resolutions that “national human rights institutions and their respective members and staff should not face any form of reprisal or intimidation, including political pressure, physical intimidation, harassment or unjustifiable budgetary limitations, as a result of activities

⁴ The International Coordinating Committee for National Human Rights Institutions (ICC) was established in 1993 and is the international association of national human rights institutions (NHRIs) from all parts of the globe. The ICC promotes and strengthens NHRIs to be in accordance with the Paris Principles, and provides leadership in the promotion and protection of human rights. Through its Sub Committee on Accreditation (SCA), it also reviews and accredits national human rights institutions in compliance with Paris Principles. The ICC may also assist those NHRIs under threat and encourage NHRI statutory legislations’ reforms and the provision of technical assistance, such as education and training opportunities, to strengthen the status and capacities of NHRIs. See <http://nhri.ohchr.org/EN/Pages/default.aspx>.

⁵ Latest revised General Observations of the Sub-Committee on Accreditation, as adopted by the International Coordinating Committee Bureau (hereinafter “ICC General Observations”) at its meeting in Geneva on 6-7 May 2013, available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20GENERAL%20OBSERVATIONS%20ENGLISH.pdf>.

⁶ See <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2823%20May%202014%29.pdf> and page 22 of the Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 19-23 November 2012, available at [http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20Report%20November%202012%20\(English\).pdf](http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20Report%20November%202012%20(English).pdf).

⁷ *Op. cit.* footnote 5, page 36, par 1 of General Observation 2.3 (ICC General Observations).

⁸ *ibid.* page 36, par 2 of General Observation 2.3 (ICC General Observations).

⁹ *ibid.* page 36, par 3 of General Observation 2.3 (ICC General Observations).

¹⁰ See par 106 of the Report of the UN Secretary-General on National institutions for the promotion and protection of human rights, A/HRC/27/39, 30 June 2014, available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A_HRC_27_39_ENG.doc.

- undertaken in accordance with their respective mandates, including when taking up individual cases or when reporting on serious or systematic violations in their countries”¹¹.
16. In addition, pursuant to Article 1 par 4 of the Act on the Commissioner for Human Rights of Poland as amended in 2007,¹² the Commissioner performs the function of a national preventive mechanism (hereinafter “NPM”) under the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹³ (hereinafter “the OPCAT”). As such, the legislation pertaining to the Commissioner should comply with the relevant provisions of the OPCAT, particularly its Article 35 which states that “[m]embers [...] of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions”.
 17. At the Council of Europe level, the key role of NHRIs and key principles regulating their establishment and functioning, including compliance with the Paris Principles, are highlighted in various documents.¹⁴ In particular, Parliamentary Assembly Recommendation 1615 (2003) underlines a number of characteristics considered essential for any Ombuds institution, including the “personal immunity from any disciplinary, administrative or criminal proceedings or penalties relating to the discharge of official responsibilities, other than dismissal by parliament for incapacity or serious ethical misconduct”¹⁵.
 18. Immunities may, in some specific cases, potentially conflict with rights protected by the International Covenant on Civil and Political Rights¹⁶ (hereinafter “ICCPR”) and by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”),¹⁷ particularly their Articles 14 and 6 respectively, which encompass the right of access to courts in the determination of criminal charges and rights and obligations in a suit at law.¹⁸ As stated by the UN Human Rights Committee, any restrictions regarding access rights must be based on law and justified on objective

¹¹ See par 9 of the UN Human Rights Council Resolution 27/18 on National institutions for the promotion and protection of human rights, A/HRC/27/L.25, 25 September 2014, available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Pages/ResDecStat.aspx>.

¹² Available at http://www.legislationline.org/download/action/download/id/6164/file/Poland_Act%20on%20the%20Commissioner%20for%20Human%20Rights_1987_en.pdf.

¹³ UN Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), adopted by the UN General Assembly by Resolution A/RES/57/199 of 18 December 2002. The Republic of Poland ratified the OPCAT on 14 September 2005.

¹⁴ See e.g., CoE Committee of Ministers’ Recommendation Rec(97)14E on the Establishment of Independent National Institutions for the Promotion and Protection of Human Rights, 30 September 1997, available at <https://wcd.coe.int/ViewDoc.jsp?id=589191>; Parliamentary Assembly of the Council of Europe (PACE) Recommendation 1615 (2003) on the Institution of Ombudsman (hereinafter “PACE Recommendation 1615 (2003)”), 8 September 2003, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17133&lang=en>; PACE Recommendation 1959 (2013) on the Strengthening the Institution of Ombudsman in Europe, adopted on 4 October 2013, available at <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20232&lang=en>.

¹⁵ See *ibid.* par 7.5 (PACE Recommendation 1615 (2003)).

¹⁶ UN International Covenant on Civil and Political Rights (hereinafter “ICCPR”), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966. The Republic of Poland ratified the ICCPR on 18 March 1977.

¹⁷ The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”), signed on 4 November 1950, entered into force on 3 September 1953. Poland ratified the ECHR on 19 January 1993.

¹⁸ See page 30 of the OSCE/ODIHR Legal Digest of International Fair Trial Rights (2012), available at <http://www.osce.org/odihr/94214>, where it is stated that it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 14 of the ICCPR and Article 6(1) of the ECHR if, for example, a State could remove from the jurisdiction of the courts a whole range of civil claims without restraint, or confer immunities on large groups or categories of persons.

and reasonable grounds.¹⁹ Similarly, the European Court for Human Rights (hereinafter “ECtHR”) regularly reviews whether any restriction in that respect does not impair the very essence of the right. The Court also looks at whether such restrictions pursue a legitimate aim and whether they are proportionate to such aim.²⁰ Hence, immunity from prosecution must always be justified and shall not extend beyond what is proportionate and necessary in a democratic society.²¹ The ensuing analysis will also take into account these principles when assessing the compliance of the Draft Act with international human rights standards and OSCE commitments.

19. Finally, in the 1990 Copenhagen Document, OSCE participating States have committed to “facilitate the establishment and strengthening of independent national institutions in the area of human rights and the rule of law”.²² The OSCE/ODIHR has been specifically tasked to “continue and increase efforts to promote and assist in building democratic institutions at the request of States, inter alia by helping to strengthen [...] Ombud[s] institutions”,²³ which should be impartial and independent.²⁴

2. General Comments

20. Articles 208 to 212 of the Constitution of the Republic of Poland provide for the establishment of a Commissioner for Human Rights, whose mandate is to be specified in a law. The Act on the Commissioner for Human Rights adopted on 15 July 1987 (as amended), provides for a broad mandate, and includes competences as an equality body and as the national preventive mechanism of the OPCAT, as well as the handling of individual complaints alleging human rights violations.
21. The Draft Act mainly addresses the immunity of the Commissioner (Articles 7a and 7b) and the procedure for lifting such immunity in the context of criminal proceedings and arrest and detention (Articles 7c - 7f), which would also be applicable in proceedings seeking to hold the Commissioner liable for petty offences (Article 7g). It is understood

¹⁹ See par 9 of the UN Human Rights Committee General Comment 32 (2007), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fGC%2f32&Lang=en.

²⁰ See e.g., regarding parliamentary immunities, the case of *A v. United Kingdom*, ECtHR judgment of 17 December 2012 (Application no. 35373/97), available at

²¹ See e.g., by way of comparison regarding parliamentary immunities, par 34 of the European Commission for Democracy through Law of the Council of Europe (Venice Commission) Report on the Scope and Lifting of Parliamentary Immunities, CDL-AD(2014)011, 14 May 2014, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e).

²² See par 27 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990, available at <http://www.osce.org/odihr/elections/14304?download=true>.

²³ See par 10 of the Bucharest Plan of Action for Combating Terrorism (2001), Annex to OSCE Ministerial Council Decision on Combating Terrorism, MC(9).DEC/1, 4 December 2001, available at <http://www.osce.org/atu/42524?download=true>.

²⁴ See e.g., par 42 (second indent) of the OSCE Action Plan for the Promotion of Gender Equality (2004), Annex to OSCE Ministerial Council Decision No. 14/04, MC.DEC/14/04, 7 December 2004, available at <http://www.osce.org/mc/23295>.

that similar draft amendments are being introduced to relevant legislation pertaining to the Commissioner for Children, the President of the Supreme Chamber for Audit, the Inspector General for Personal Data Protection, the President of the Institute of National Remembrance, Deputies and Senators - the main purpose of these amendments being to harmonize the different procedures for lifting immunity from criminal and other liability.

22. While the purpose of this Preliminary Opinion is amendments to the Act on the Commissioner for Human Rights only, it is worth noting that the Council of Europe's Group of States against Corruption (GRECO) recommended to Poland to reduce those categories of holders of public office benefiting from immunities and the scope of these immunities and to simplify the procedure for lifting the immunity of State officials.²⁵ In that respect, the Draft Act is to a certain extent welcome as it aims at clarifying such a procedure.
23. However, while the desire to seek to harmonize such procedures is understandable, these attempts could well raise some concerns from a legal point of view, since they do not appear to take into consideration the very different institutional statuses, mandates, roles and functions of such bodies or persons, as well as the different legal frameworks, including international standards, that apply to them.
24. First, the institutional roles of the Parliament and of the Commissioner are fundamentally different. While the former has as one of its key roles the oversight of the executive, the latter's mandate is much broader, as the Commissioner is tasked to oversee the overall human rights situation in the country, and to protect and promote the human rights of individuals. Second, the Parliament is a collective body and lifting the immunity of one of its members would in itself not impede the functioning of the institution as a whole. In contrast, as a single head institution, the Commissioner is heavily dependent on his/her reputation, integrity and leadership, and his/her position could be jeopardized if he/she were not adequately protected against external pressure. Ensuring an NHRIs' independence from the executive and the legislature as a matter of priority, is thus paramount to enable them to fulfil their mandates. For this reason, some additional safeguards should be in place to render the removal of the Commissioner's immunity even more difficult than the lifting of parliamentarians' immunity.
25. Moreover, while there are no international or European rules explicitly regulating parliamentary immunity at the national level,²⁶ there are such standards pertaining to the immunity of NHRIs (see Section 1 *supra*). At the same time, in the case of state audit institutions (hereinafter "SAI"), the International Organization of Supreme Audit Institutions has developed some non-binding rules such as the Mexico Declaration on SAI Independence which states, in its Principle 2, that national legislation should guarantee the immunity of the SAI Head from any prosecution for any act that results from the normal discharge of his/her duties.²⁷ As for the Inspector General for Personal Data Protection, the standards developed at the Council of Europe and European Union level require a 'complete independence' of the supervisory authorities responsible for

²⁵ See Recommendation xvii (pars 20-24) of the Addendum to the Compliance Report on Poland of GRECO's First Evaluation Round, 13 October 2006, available at [https://www.coe.int/t/dgh/monitoring/greco/evaluations/round1/GrecoRC1\(2004\)5_Add_Poland_EN.pdf](https://www.coe.int/t/dgh/monitoring/greco/evaluations/round1/GrecoRC1(2004)5_Add_Poland_EN.pdf).

²⁶ *Op. cit.* footnote 21, par 2 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

²⁷ See http://www.issai.org/media/12922/issai_10_e.pdf. See also page 17 of the OECD Good Practices in Supporting Supreme Audit Institutions (2012), available at <http://www.oecd.org/dac/effectiveness/Final%20SAI%20Good%20Practice%20Note.pdf>.

- ensuring data protection.²⁸ Hence, the international rules applicable to these bodies or persons, if they so exist, vary greatly, but do in some instances state the necessity of preserving the independence of independent oversight bodies.
26. As noted by GRECO,²⁹ it is acknowledged that the immunities granted by the Polish Constitution to some persons representing the highest political and judicial functions of the State³⁰ aim at guaranteeing “the proper functioning of the organs” for which those persons exercise their functions. The Commissioner’s immunity is indeed essential to the effective fulfilment of his or her mandate, without fear of harassment or undue charges from the executive, the courts or political opponents, and protects the independence of the institution itself (not the individual) (see also comments on functional immunity in Section 2 *infra*).
27. In this context, it is important to inquire whether the lifting the Commissioner’s immunity in the context of criminal proceedings may potentially trigger his/her removal from office. Article 7 par 1 of the Act on the Commissioner for Human Rights enumerates the three grounds that may be invoked to seek removal, i.e., when the Commissioner “1) renounced performing the duties; 2) became permanently incapable to perform obligations as a result of illness, disability or lower strength – observed with a medical certificate; 3) made an untrue lustration statement, observed with a final and binding court decision”. However, Article 7 par 2 also provides the possibility of removal where the Commissioner “defected from the oath made”. Read together with Article 4 of the Act where the oath is mentioned, this may provide a ground for removal in cases where his or her acts are not considered to be in accordance with “the Law and the principles of community life and social justice”.
28. While not directly affected by the Draft Act, OSCE/ODIHR feels that it is important to examine whether the ground mentioned in Article 7 par 2 is compliant with international standards. Indeed, the ICC General Observation 2.1 states that “[t]he grounds for dismissal must be clearly defined and appropriately confined to only those actions which impact adversely on the capacity of the member to fulfil their mandate”. The main purpose of an oath is in general to commit to the highest standards of ethics, professional conduct and personal behaviour, which are, given their very nature, often

²⁸ Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, CETS No. 181, which entered into force in Poland on 1 November 2005, available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680080626>. Its Article 1 par 3 states that “[t]he supervisory authorities shall exercise their functions in complete independence”. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281 , 23/11/1995 P. 0031 – 0050, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>. Its Article 28 par 1 specifies that the Supervisory Authorities shall act with complete independence in exercising the functions entrusted to them. See also Section 5.2 (pages 114-118) of the EU Fundamental Rights Agency (FRA) Handbook on European Data Protection Law (2014), available at http://fra.europa.eu/sites/default/files/fra-2014-handbook-data-protection-law-2nd-ed_en.pdf.

²⁹ See par 67 of the Compliance Report on Poland of GRECO First Evaluation Round, 2 July 2004, available at [https://www.coe.int/t/dgh/monitoring/greco/evaluations/round1/GrecoRC1\(2004\)5_Poland_EN.pdf](https://www.coe.int/t/dgh/monitoring/greco/evaluations/round1/GrecoRC1(2004)5_Poland_EN.pdf).

³⁰ i.e., Deputies (Article 105 of the Constitution), Judges (Article 181 of the Constitution), Judges of the Constitutional Tribunal (Article 196 of the Constitution), Members of the Tribunal of State (Article 200), the President of the Supreme Chamber of Control (Article 206) and Commissioner for Human Rights (Article 211). In addition, the President of the Republic, the Prime Minister and members of the Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Chamber of Control, members of the National Council of Radio Broadcasting and Television, persons to whom the Prime Minister has granted powers of management over a ministry, and the Commander-in-Chief of the Armed Forces are accountable before the Tribunal of State for “violations of the Constitution or of a statute committed by them within their office or within its scope” (Article 198). The President is also held accountable before the Tribunal of State for the commission of any other offence (Article 145) and the members of the Council of Ministers for “the commission of an offence connected with the duties of his office” (Article 156).

drafted in general and vague terms. Hence, a number of actions could potentially be interpreted to fall under Article 7 par 2, which may in practice not be grave enough to justify a removal from office. It is thus doubtful whether the violation of an oath fulfils the requirements of legal certainty and foreseeability, which would apply in cases leading to such removal. Moreover, the mere lifting of immunity should not be used as a ground for removal for breach of oath as long as a final judgment has not been rendered (which is, for example, necessary prior to removal from office for making untrue lustration statements). The removal from office without such a court decision could otherwise conflict with the principle of presumption of innocence, as protected by Article 14 par 2 of the ICCPR and Article 6 par 2 of the ECHR.

29. Finally, Article 7a of the Draft Act merely re-states *ad litteram* Article 211 of the Constitution,³¹ and would thus appear to be redundant, all the more given that Article 8 par 2 of the Constitution expressly states that “the provisions of the Constitution shall apply directly, unless the Constitution provides otherwise”. **It would thus be preferable to remove this provision, and to instead clearly specify in the Draft Act, as recommended at the international level,³² the principle of functional immunity (or ‘non-liability’), which aims to protect NHRIs from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacity** (see also Section 3.1 *infra* regarding the scope of such immunity). This principle constitutes a cornerstone of the independence of the institution, which is guaranteed by Article 210 of the Constitution of Poland.³³ As also mentioned in the justification to ICC General Observation 2.3, this is an “essential hallmark of institutional independence”, while promoting the security of tenure of NHRI decision-making bodies and their ability to engage in critical analysis and commentary on human rights issues.³⁴
30. Specifying such a functional immunity in the Draft Act would also **provide a clear legal basis for courts, in legal proceedings, to consider a claim inadmissible where the functional immunity of the Commissioner and his/her staff applies. It is recommended to clarify in the Draft Act that a court should considered a criminal claim inadmissible when covered by the functional immunity** (see also par 62 *infra*).
31. In any cases falling outside of this scope, meaning in cases that do not involve actions taken by the Commissioner in the exercise of his official functions, the Commissioner (and his or her staff) could be civilly, administratively or criminally liable before a court of law as any other individual, except for the special procedure that would need to be

³¹ Article 211 of the Constitution of the Republic of Poland states: “The Commissioner for Human Rights shall not be held criminally responsible nor deprived of liberty without prior consent granted by the Sejm. The Commissioner for Citizens’ Rights shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The Marshal of the Sejm shall be notified forthwith of any such detention and may order an immediate release of the person detained.”

³² *Op. cit.* footnote 5, page 36, General Observation 2.3 (ICC General Observations). See also Belgrade Principles on the Relationship Between National Human Rights Institutions and Parliaments developed on the occasion of an international seminar co-organized by the Office of the United Nations High Commissioner for Human Rights, the International Coordinating Committee of National Institutions for the promotion and protection of human rights, the National Assembly and the Protector of Citizens of the Republic of Serbia, with the support of the United Nations Country Team in the Republic of Serbia (Belgrade, 22-23 February 2012), available at <http://nhri.ohchr.org/EN/Themes/Portuguese/DocumentsPage/Belgrade%20Principles%20Final.pdf>, particularly par 12 which states: “Parliaments should secure the independence of a NHRI by incorporating in the founding law a provision on immunity for actions taken in an official capacity”.

³³ Article 210 of the Constitution of the Republic of Poland states: “The Commissioner for Human Rights shall be independent in his activities, independent of other State organs and shall be accountable only to the Sejm in accordance with principles specified by statute”.

³⁴ *Op. cit.* footnote 5, page 36, justification to General Observation 2.3 (ICC General Observations).

followed (i.e., getting approval from the Sejm in accordance with Article 211 of the Constitution) in the case of criminal proceedings. This constitutes an additional procedural safeguard (sometimes referred to as ‘procedural immunity’) to protect the independence of NHRIs, as it prevents potentially abusive prosecution, or similar procedures based on frivolous, vexatious or manifestly ill-founded complaints, as well as criminal charges that would be covered by the functional immunity, to proceed further (see also Section 4.2 *infra*). This also means that immunity should be lifted for offences conducted outside the scope of the Commissioner’s authority.³⁵

32. Such an inclusion would also be in line with Article 35 of the OPCAT on immunities of NPM members, which is interpreted as covering immunity of OPCAT bodies from personal arrest and detention, as well as from legal actions in respect of words spoken or written, or acts performed, in the course of their NPM duties.³⁶

3. Scope of Immunity

33. As regards the functional immunity of the Commissioner (and of his or her staff) in general, it is necessary to first consider the substantive aspects relating to the material, personal and temporal scope of the functional immunity (see Sub-Sections 3.1, 3.2 and 3.3 *infra*), which should provide the legal grounds to pronounce the inadmissibility of a complaint against the Commissioner. Second, it is necessary to review the procedural safeguards which exist to protect such a functional immunity (i.e., the procedure for seeking consent of the Sejm, see Section 4 *infra*) to ensure that they are necessary and proportionate (see par 18 *supra*). These issues are addressed separately in the following sub-sections.

3.1. Material Scope of the Functional Immunity

34. As far as the material scope of such functional immunity is concerned, ICC General Observation 2.3 recommends that “provisions be included in national law to protect legal liability of members of the National Human Rights Institution’s decision-making body for the actions and decisions that are undertaken in good faith in their official capacity”. As mentioned in par 29 *supra*, this constitutes an essential guarantee of NHRI’s independence.³⁷ NHRIs need to be able to engage in the proper exercise of their functions without fear of reprisals through criminal proceedings or civil action by individuals or state authorities.³⁸
35. Acts performed in an official capacity are those related to the mandate and functions of the NHRI, that are sanctioned or authorised by the NHRI and/or which the NHRI

³⁵ See page 250 of the UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions (December 2010), available at <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>.

³⁶ See e.g., page 125 of the Association for the Prevention of Torture (APT) and Inter-American Institute for Human Rights (IHR) Joint Implementation Manual on the Optional Protocol to the UN Convention against Torture (revised edition, 2010), available at http://www.apr.ch/content/files_res/opcat-manual-english-revised2010.pdf. See also page 43 of the Association for the Prevention of Torture (APT)’s Guide on Establishment and Designation of National Preventive Mechanisms (2006), available at http://www.apr.ch/content/files_res/NPM_Guide.pdf.

³⁷ *Op. cit.* footnote 5, par 1 of the Justification to General Observation 2.3 (ICC General Observations).

³⁸ See e.g., regarding the immunity of judges, the case of *Ernst v. Belgium*, ECtHR Judgment of 15 October 2003 (Application No. 33400/96, only in French), par 85, available at [privilège de juridiction’\) pursues the legitimate aim of ensuring that judges are protected against undue lawsuits and enable them to exercise their judicial function peacefully and independently.](http://hudoc.echr.coe.int/eng#{)

(including its staff) has been empowered to perform.³⁹ Functional immunity should cover words spoken or written, recommendations, decisions and other acts undertaken in good faith while performing these functions.⁴⁰ Indeed, the NHRI (including its staff) should be saved from civil, administrative or criminal claims when making a recommendation, adopting decisions, or voicing an opinion or views on a human rights matter, even if it is then proved to be false and/or damaging; immunity should not extend however to acts undertaken in bad faith or involving an abuse of power, for example, if an opinion is voiced that someone knew to be wrong or clearly unsupported.⁴¹ The ICC has often recognized the risk that “[e]xternal parties may seek to influence the independent operation of a NHRI by initiating, or by threatening to initiate, legal proceedings against a member”,⁴² which hence justifies the existence of a functional immunity to protect NHRIs and their staff. Functional immunity is specifically meant to avoid situations where NHRIs are sued for slander, libel or similar causes of action as a result of fulfilling their mandate as required by law.⁴³

36. In that respect, it is worth reiterating the concerns raised by OSCE/ODIHR in its recent Opinion on the Draft Amendments to Certain Provisions of the Criminal Code of Poland⁴⁴ concerning the current version of Article 196 of the Criminal Code relating to offences to the religious feelings of others, and its potential restriction on the right to freedom of expression. Given the danger that this criminal provision could be used to prevent or punish criticism directed at ideas, beliefs or ideologies, religions or religious institutions, or religious leaders, OSCE/ODIHR recommended to remove such an offence from the Criminal Code to comply with international human rights standards.⁴⁵

³⁹ *Op. cit.* footnote 35, page 250 (UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions (2010)).

⁴⁰ *Op. cit.* footnote 5, General Observation 2.3 (ICC General Observations). See also Venice Commission Opinion on Amendments to the Law on the Human Rights Defender of Armenia, CDL-AD(2006)038, adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), paragraphs 74 and 76, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2006\)038-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)038-e); and *op. cit.* footnote 14, par 7.5 (PACE Recommendation 1615 (2003)).

⁴¹ *Op. cit.* footnote 35, page 250 (UNDP-OHCHR Toolkit for on National Human Rights Institutions (2010)). See also par 27 of the Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Amendments to the Law on the Human Rights Defender of the Republic of Armenia, CDL-AD(2015)035, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)035-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)035-e), which states that “the only possible exclusion from the general immunity rule should be where the Defender makes deliberately false and very grave public accusations”.

⁴² See e.g., ICC Sub-Committee on Accreditation Report (March 2015), pages 10 and 20, available at <http://nhri.ohchr.org/EN/AboutUs/ICC/Accreditation/Documents/SCA%20MARCH%202015%20FINAL%20REPORT%20-%20ENGLISH.pdf>.

⁴³ *Op. cit.* footnote 35, page 250 (UNDP-OHCHR Toolkit for on National Human Rights Institutions (2010)).

⁴⁴ See par 51 of the OSCE/ODIHR Opinion on the Draft Amendments to Certain Provisions of the Criminal Code of Poland, 3 December 2015, available at <http://www.legislationline.org/countries/country/10>.

⁴⁵ *ibid.* par 51. See UN Human Rights Committee, *General Comment No. 34 on Article 19: Freedoms of opinion and expression*, 12 September 2011, par 48, available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>, where the Committee has expressly recognized that “[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in Article 20 par 2 of the Covenant” i.e., when constituting incitement to discrimination, hostility or violence. See also par 19 of the 2012 Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco, on 5 October 2012, available at http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf, where it is stated that “the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or a belief that is free from criticism or ridicule”. Additionally, see UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *2010 Joint Declaration on Ten Key Threats to Freedom of Expression*, 3 February 2010, Section 2 on Criminal Defamation, available at

37. Other provisions of the Criminal Code, particularly those relating to defamation and insults, including of public officials, which are punishable by up to three years of imprisonment,⁴⁶ are also not in line with the international consensus that such criminal offences should be abolished in view of their chilling effect on free expression.⁴⁷ Moreover, the existence in the Polish Criminal Code of criminal offences pertaining to defamation and insult of certain public officials could lead to a situation where investigations initiated by the Commissioner against such officials could be compromised by the threat of criminal proceedings for defamation and insult.
38. Overall, there needs to be a balance between immunity as a means to protect the Commissioner against pressure and abuse from state powers or individuals (e.g., abusive prosecution, false, frivolous, vexatious or manifestly ill-founded complaints, harassment) and the general concept that nobody, including the Commissioner, should be above the law, given the principle of equality before the law, which is also an element of the rule of law.⁴⁸ In principle, the Commissioner and his or her deputies and staff should only benefit from functional immunity in the exercise of lawful functions; if they commit a criminal offense in the exercise of their functions, for instance in cases of corruption, they should not be immune from criminal liability.⁴⁹
39. In legislation, **the scope of functional immunity should generally be drafted in a broad manner to protect the NHRIs and their staff from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacity.**⁵⁰ It is recommended to introduce such a wording in the **Draft Act**. This would also be in line with the required scope of the functional immunity for NPM bodies (see par 32 *supra*).⁵¹ At the same time, the functional immunity ('non-liability') should not extend to opinions or conduct that do not have a direct link to the Commissioner's mandate or functions.⁵²
40. In all other cases, individuals and public entities should be able to bring a claim, or initiate criminal proceedings – which, according to Article 211 of the Constitution, should be subject to special procedural safeguards to protect the Commissioner's

<http://www.osce.org/fom/154846?download=true>; and Principle 12.3 of the Camden Principles on Freedom of Expression and Equality (2009), prepared by the international non-governmental organization Article 19 on the basis of discussions involving a group of high-level UN and other officials, and civil society and academic experts in international human rights law on freedom of expression and equality issues, available at <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>.

⁴⁶ See e.g., Articles 133 (Public Insult of the Nation or Republic of Poland), 135 (Public Insult of the President) and 226 (Insult of Public Officials and Constitutional Authority of the Republic of Poland) of the Criminal Code of Poland.

⁴⁷ See *op. cit.* footnote 45, par 37 (UN Human Rights Committee General Comment No. 34 (2011)); and par 2 (2010 Joint Declaration on Ten Key Threats to Freedom of Expression). See also Recommendation 1814 (2007) and Resolution 1577 (2007) of the Parliamentary Assembly "Towards decriminalisation of defamation", available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>.

⁴⁸ See, in the case of parliamentary immunities, *op. cit.* footnote 21, par 38 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

⁴⁹ *Op. cit.* footnote 5, General Observation 2.3 (ICC General Observations), which states: "It is acknowledged that no office holder should be beyond the reach of the law and thus, in certain exceptional circumstances it may be necessary to lift immunity".

⁵⁰ ICC General Observation 2.3 refers to the protection from legal liability for "actions and decisions that are undertaken in good faith in their official capacity". See also *op. cit.* footnote 40, pars 74 and 76 (2006 Venice Commission Opinion on Amendments to the Law on the Human Rights Defender of Armenia); and *op. cit.* footnote 14, par 7.5 (PACE Recommendation 1615 (2003)).

⁵¹ See *op. cit.* footnote 36, page 125 (APT-IIHR Joint Implementation Manual on OPCAT (2010)); and page 43 (APT's Guide on Establishment and Designation of National Preventive Mechanisms (2006)).

⁵² See as a matter of comparison, when dealing with the non-liability of parliamentarians, *op. cit.* footnote 21, par 182 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)). See also the case of *Cordova v. Italy*, ECtHR judgment of 30 January 2003 (Application nos. 40877/98 and 45649/99), par 63, where the ECtHR held that the behaviour of the parliamentarian in question was "not connected with the exercise of parliamentary functions in the strict sense" and that it was therefore a violation of Article 6 of the ECHR to deny access to court.

institutional independence. Such a procedure should in principle allow the lifting of the immunity for certain acts that, even if undertaken during the performance of duties, inherently fall outside the scope of the functional immunity – for instance cases involving the acceptance of bribes and other forms of corruption, influence peddling or similar criminal offenses⁵³ (see also pars 57-58 *infra* regarding the criteria for lifting immunity).

41. Finally, **functional immunity should also cover baggage, correspondence and means of communication of the Commissioner, Deputies and the staff.**⁵⁴ In this context, it is important that the Act on the Commissioner for Human Rights also include guarantees as to the **inviolability of the Commissioner’s Office property, documents and premises.**⁵⁵ **It is recommended to supplement the Draft Act accordingly.**

3.2. Personal and Temporal Scope of the Functional Immunity

42. In principle, both the NHRI and its staff should benefit from functional immunity.⁵⁶ The ICC specifically recommended to Poland to supplement the Act on the Commissioner for Human Rights to include **“provisions to protect the officers and staff members of the [Commissioner] from legal liability for actions undertaken in their official capacity”.**⁵⁷ **It is therefore proposed to reflect this in the Draft Act, although different rules and procedures for lifting staff functional immunities could be considered (e.g. waiving of functional immunity by the Commissioner for his or her staff).**⁵⁸
43. Additionally, such functional immunity **should continue to be accorded even after the end of the Commissioner’s mandate or after the staff cease their employment with the Commissioner’s office.**⁵⁹

⁵³ See e.g., *op. cit.* footnote 42, page 20, Section 1 on “Functional Immunity” in relation to Serbia’s Protector of Citizens (ICC Sub-Committee on Accreditation Report (March 2015)), expressly referring to corruption.

⁵⁴ See e.g., par 23 of the Joint OSCE/ODIHR-Venice Commission Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro, adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011), available at <http://www.legislationline.org/documents/id/16665>.

⁵⁵ See e.g., par 52 of the OSCE-ODIHR-Venice Commission Joint Opinion on the Law no. 2008-37 of 16 June 2008 on the Higher Committee for Human Rights and Fundamental Freedoms of the republic of Tunisia, CDL-AD(2013)019, 17 June 2013, available at <http://www.legislationline.org/documents/id/17976>.

⁵⁶ See e.g., *op. cit.* footnote 54, par 23 (2011 OSCE/ODIHR-Venice Commission Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro); and *op. cit.* footnote 40, pars 74-76 (2006 Venice Commission Opinion on Amendments to the Law on the Human Rights Defender of Armenia). See also par 69 of the Venice Commission Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, CDL-AD(2015)034-e, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)034-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)034-e); and par 18 of the Joint Opinion on the Draft Law on the Ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe, CDL-AD(2004)041, adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004), available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2004\)041-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2004)041-e).

⁵⁷ *Op. cit.* footnote 6, page 22 (Report and Recommendations of the Session of the SCA (November 2012)).

⁵⁸ See e.g., *op. cit.* footnote 40, par 74 (2006 Venice Commission Opinion on Amendments to the Law on the Human Rights Defender of Armenia); and *op. cit.* footnote 41, par 26 (2015 Joint Opinion on the Draft Amendments to the Law on the Human Rights Defender of the Republic of Armenia).

⁵⁹ See *op. cit.* footnote 56, par 69 (2015 Venice Commission Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina); *op. cit.* footnote 54, par 23 (2011 OSCE/ODIHR-Venice Commission Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro); *op. cit.* footnote 40, pars 74-76 (2006 Venice Commission Opinion on Amendments to the Law on the Human Rights Defender of Armenia); and *op. cit.* footnote 56, par 18 (2004 Joint Venice Commission-CHR-DGHR Opinion on the Draft Law on the Ombudsman of Serbia).

4. Procedure for Lifting the Immunity

44. As far as the lifting of immunity is concerned, the ICC General Observation 2.3 recommends that “national law provides for well-defined circumstances in which the functional immunity of the decision-making body may be lifted in accordance with fair and transparent procedures”. While the ICC has not elaborated further the criteria and guidelines for the lifting of immunity, these would be a useful addition to the Draft Act in order to avoid misuse, and it is welcome that the Draft Act seeks to fill this gap. In this context, it is paramount that relevant provisions of the Draft Act contain safeguards to avoid selective and arbitrary decisions on the lifting of immunity, and to ensure adequate transparency of procedure.⁶⁰
45. In the Draft Act, Articles 7a-d delineate a special procedure for prior approval from the Sejm before criminal proceedings are initiated, to protect the Commissioner from potentially false accusations or vexatious claims. Such a procedure is particularly important in a country like Poland where criminal proceedings can be started at the instigation of a private individual, and should involve a proper mechanism to prevent or stop such investigations or proceedings when there is no proper evidence to suggest criminal liability on the part of the Commissioner (and his or her staff).⁶¹

4.1. The Request to Lift Immunity

46. Pursuant to Article 7c of the Draft Act, the request for approval to bring criminal charges for publicly prosecuted offences against the Commissioner shall be submitted through the Minister of Justice (Article 7c par 1). In cases involving offences subject to private prosecution, such requests would be made by private prosecutors after having brought the case to court (Article 7c par 2) subject to certain requirements listed in paragraph 3 in the latter case (signature of an attorney-at-law or legal counsel, except in cases involving legal professionals). Both requests should be submitted to the Marshal of the Sejm (Article 7d).
47. In principle, and as stated above, the Commissioner needs to be able to effectively fulfil his or her institutional mandate in an independent manner, without fear of harassment or undue charges particularly from the executive. The procedure proposed in the Draft Act, whereby all requests for approval to bring criminal charges for publicly prosecuted offences should go through the Minister of Justice, would appear to place the Commissioner under some sort of scrutiny by the executive. Granting the Ministry of Justice this function could well constitute a serious encroachment upon the independence of the Commissioner.
48. In other countries, the practice as to which body is authorized to initiate the procedure for lifting of immunity of an Ombudsperson or of members of a human rights body

⁶⁰ See e.g., in the context of parliamentary immunity, the justification for developing criteria and guidelines for lifting such immunity in *op. cit.* footnote 21, par 171 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

⁶¹ See e.g., regarding the immunity of judges, par 54 of Opinion No. 3 of the Consultative Council of European Judges to the attention of the CoE Committee of Ministers on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality (2002), available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2002\)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2002)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3).

varies; however, such a body is most often independent from the executive,⁶² to ensure the independence of the NHRI.

49. The Draft Act does not specify the exact role that the Minister of Justice plays in that respect – it is not clear whether he/she merely transmits the request made by another body, or whether he/she has some discretion in the matter. **It is recommended that the drafters re-consider the current procedure under Article 7c par 1 whereby such request is made through the Minister of Justice, and instead designate a different body as competent to submit such request, that is independent from the executive. The same argumentation applies to the procedure for allowing the arrest and detention of the Commissioner** (Article 7e par 2).
50. Cases subject to private prosecution may lead to numerous requests being potentially submitted to the Marshal of the Sejm. The ‘procedural immunity’ should aim at providing the necessary safeguards to avoid potential false, frivolous, vexatious or manifestly ill-founded complaints (see pars 56-59 *infra*).

4.2. The Need for Clear, Transparent and Impartial Procedures

51. Regarding procedures for the approval of the arrest and detention of the Commissioner, it must be reiterated that Article 211 of the Constitution provides for very limited circumstances in which this would be possible. Namely, these involve situations where the alleged offence has been committed *in flagrante delicto* and cases where the detention is “necessary for ensuring the proper course of proceedings”. According to most criminal procedure rules, this is usually the case where there are reasonable grounds to believe that an accused or defendant may abscond or otherwise impede the proper conduct of criminal investigations.⁶³
52. However, while Article 7a of the Draft Act repeats the provisions of Article 211 of the Constitution, Article 7e par 2 on the procedure to be followed to request the arrest or detention of the Commissioner does not mention these limited circumstances. **It is recommended to specify also in this provision that where the alleged act was not committed *in flagrante delicto* and where arrest or detention are not necessary to ensure the proper course of proceedings, the Commissioner may not be arrested or detained. In cases where this does happen, the Draft Act shall clearly stipulate that he/she shall be immediately released as soon as the persons carrying out the arrest or responsible for the detention become aware of the identity of the Commissioner.**
53. As regards the procedure for the lifting of immunity, ICC General Observation 2.3 specifically recommends that “national law provides for well-defined circumstances in which the functional immunity of the decision-making body may be lifted in accordance

⁶² The procedure is, for instance, initiated by a motion made by certain number of members of parliament (e.g., one third in Slovenia, see Article 21 of the Human Rights Ombudsman Act of 1993, available at <http://www.legislationline.org/topics/country/3/topic/82>); a Parliamentary Committee if the majority of its members so agrees (see e.g., Article 12 of the Law on the Protector of Citizens of Serbia (2005), available at <http://www.legislationline.org/topics/country/5/topic/82>); or the Chief Public Prosecutor (as an entity which in principle should enjoy a certain level of independence from the executive, see Venice Commission's Report on European Standards as regards the Independence of the Judicial System: Part II The Prosecution Service, CDL-AD(2010)040, Venice, 17-18 December 2010), available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)040.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2010)040.aspx)).

⁶³ See e.g., Articles 170 (Arrest without a Warrant) and 177 (Grounds for Detention) of the Model Code of Criminal Procedure (2008) developed by the United States Institute of Peace in cooperation with the Irish Centre for Human Rights (ICHR), the Office of the UN High Commissioner for Human Rights (UNOHCHR), and the UN Office on Drugs and Crime (UNODC) (hereinafter “Model Code of Criminal Procedure (2008)”), available at <http://www.usip.org/model-codes-post-conflict-justice/-publication-the-model-codes/english-version-volume-2>.

with fair and transparent procedures”. While it is welcome that the Draft Act seeks to specify such a procedure, the respective steps and modalities would benefit from amendments to ensure the fairness, transparency and impartiality of the process.

54. In particular, the procedure for the lifting of immunity should be clearly regulated and should comply with general principles of procedural law, including the rights of both parties to be heard.⁶⁴ Furthermore, they should be comprehensive, clear and predictable, and should be transparent and known to the public.⁶⁵ At the same time, such procedures should not be made to resemble judicial proceedings, and under no circumstances should they assess the question of guilt, which is for the courts alone to decide; as such, the procedures should always respect the principle of the presumption of innocence, as protected by the ECHR.⁶⁶
55. Article 7d par 3 of the Draft Act states that the request is referred to the competent authority pursuant to the by-laws of the Sejm. It is unclear whether this involves an *ad hoc* or a permanent body of the Sejm. Unless such a body is already clearly designated in the by-laws, **it would be advisable to explicitly mention in the Draft Act which is this competent authority. It is also important that this authority’s composition be fixed *ab initio* in the Draft Act or in the by-laws of the Sejm to ensure greater transparency of the procedure.**⁶⁷
56. Article 7d pars 3 and 6 of the Draft Act provides that the Commissioner shall be notified of the content of the request and allows the Commissioner to provide explanations and submit his or her own requests, all of which aims to ensure respect for the rights of the Commissioner. At the same time, the Draft Act does not set out any criteria that should be considered by the Sejm (or by the competent authority as per Article 7d par 3) when deciding whether to consent to the initiation of criminal proceedings against the Commissioner. Such clear and objective criteria are key to ensure the transparency and impartiality of the procedure, and to prevent arbitrary or political decisions, all the more so given the majority required for the vote of the Sejm (see comment on this issue in par 61 *infra*).
57. In that respect, **a number of criteria could be taken into consideration when determining whether immunity should be lifted or not in a given case.**⁶⁸ It is recommended to supplement the Draft Act in that respect. The Draft Act could for instance specify that the following criteria should be taken into consideration in favour of maintaining immunity and refusing to approve the initiation of criminal proceedings, e.g., (i) when the allegations involve words spoken or written, or any acts falling within the scope of the functional immunity (see Section 3.1. *supra*); (ii) when they are clearly and obviously unfounded; (iii) when they are clearly brought for partisan-political motives (*fumus persecutionis*) in order to harass or intimidate the Commissioner or to interfere with his or her mandate; or (iv) when legal

⁶⁴ On the general principles of procedural law, see e.g., *op. cit.* footnote 21, par 191 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)) which lists a number of general principles of procedural law.

⁶⁵ See e.g., *ibid.* par 191 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

⁶⁶ See e.g., *ibid.* par 191 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

⁶⁷ See e.g., although in the context of the appointment of the ombudsperson, par 2 (fifth sub-paragraph) of the Venice Commission Memorandum on the Organic Law on the Institution of the Ombudsman of the Federation of Bosnia and Herzegovina, CDL-INF(2001)007, approved by the Venice Commission at its 46th Plenary Meeting (Venice, 9-10 March 2001), available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2011\)079-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2011)079-e).

⁶⁸ See e.g., as a matter of comparison, although in the context of lifting of parliamentary immunities, *op. cit.* footnote 21, pars 188-189 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

proceedings would seriously endanger the institutional functions of the Commissioner.⁶⁹

58. On the other hand, the following could be cited as considerations in favour of lifting immunity, e.g., (i) when the respective request is based on sincere, serious and fair grounds; (ii) when the person concerned is caught in *flagrante delicto*; (iii) when the alleged offence is of a particularly serious nature (the ICC often citing corruption practices as an example);⁷⁰ (iv) when the request concerns a criminal conduct which is not strictly related to the performance of Commissioner's functions but concerns acts committed in relation to other personal activities; (v) when proceedings should be allowed in order not to obstruct justice or in order to safeguard the authority and legitimacy of the Commissioner as an institution; (vi) when the Commissioner requests that immunity be lifted.⁷¹ Immunity should be lifted in any case for offences conducted outside the scope of authority,⁷² for instance accepting bribes, corruption, influence peddling or other similar criminal offenses,⁷³ unless the Sejm or competent body mentioned in Article 7e of the Draft Act finds that the complaint is manifestly false or ill-founded.
59. Parliamentary procedures for lifting immunity may also give rise to other, more general problems. Particularly, they may conflict with the principle of presumption of innocence, as protected by the ICCPR and the ECHR⁷⁴ if the Sejm/competent authority proceeds with an analysis of the merits of the case. In addition, this would also potentially be in breach of fundamental principles of separation of powers, under which it is for the courts alone (and not for the legislature) to assess individual cases of criminal responsibility.⁷⁵ Consequently, given that this only constitutes a preliminary assessment of the case, **it is recommended to specify that the Sejm/competent authority should not analyse the merits of the case and that they should duly respect the principle of the presumption of innocence.**
60. Furthermore, it is also questionable whether making the case files available to the authority competent to examine them under the by-laws of the Sejm (Article 7d par 5) would therefore be necessary, all the more given that this may also violate the principles of confidentiality of criminal proceedings and the separation of powers. **The drafters should therefore re-consider the inclusion of such provision in the Draft Act.**
61. Finally, regarding the lifting of NHRI immunity, the ICC General Observation 2.3 recommends that "a special majority of parliament" be required. Article 7d par 8 requires an absolute majority of the statutory number of deputies of the Sejm for the adoption of a resolution lifting the Commissioner's immunity. While this is a higher threshold than a simple majority of those deputies present at the parliamentary session, it is doubtful whether such a majority would prevent a potential politicisation of the decision regarding the lifting of immunity. **A higher majority could be considered by**

⁶⁹ *ibid.* pars 188-189 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

⁷⁰ See e.g., page 27 of the ICC Sub-Committee on Accreditation Report (November 2013), page 27, available at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20NOVEMBER%202013%20FINAL%20REPOR%20ENGLISH.pdf>; and *op. cit.* footnote 42, page 20 (ICC Sub-Committee on Accreditation Report (March 2015)).

⁷¹ *Op. cit.* footnote 21, par 189 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

⁷² *Op. cit.* footnote 35, page 250 (UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions (2010)).

⁷³ See e.g., *op. cit.* footnote 42, page 20 (ICC Sub-Committee on Accreditation Report (March 2015)), expressly referring to corruption.

⁷⁴ Article 14 par 2 of the ICCPR and Article 6 par 2 of the ECHR. See e.g., in the context of lifting parliamentary immunities, *op. cit.* footnote 21, par 191 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

⁷⁵ *ibid.* par 149 (Venice Commission Report on the Scope and Lifting of Parliamentary Immunities (2014)).

the drafters in order to de-politicize the procedure and guarantee that a Commissioner could never be removed from office simply because his or her legal acts, undertaken in good faith, are disapproved of or questioned by the governmental majority in Parliament.

4.3. The Outcome of the Procedure

62. It is noted that the Draft Act does not specify the possible outcomes of the procedure on the lifting of immunity, and the legal consequences in cases where immunity is not lifted. First, **in cases where the words spoken or written, recommendations, decisions and other acts are covered by the functional immunity (see Section 3.1. *supra*), then no further actions should be possible even after the end of the Commissioner’s mandate or after the staff cease their employment with the Commissioner’s office. This should be a ground for inadmissibility of the claim before a court of law. In all other cases, the criminal prosecution of the Commissioner for the respective offence shall be impossible during his/her mandate.**⁷⁶ It is recommended to supplement the Draft Act accordingly.
63. Moreover, if the procedure for lifting immunities for the Commissioner is indeed similar to other such procedures such as the lifting of judges’ or prosecutor’s immunities, it is assumed that the police and prosecuting authorities would still “collect evidence [...] even before the immunity is lifted, carry out activity (*in rem* proceedings) and that the issue of lifting the immunity arises only after the defendant is formally charged (*in personam* proceedings)”.⁷⁷ If this is the case, these proceedings should not impede the activities of the Commissioner and of his or her staff nor constitute harassment.

5. Final Comments

64. The following comments are in addition to the above-mentioned key recommendations. In light of recent recommendations made to Poland by international and regional human rights monitoring bodies,⁷⁸ OSCE/ODIHR would like to reiterate that it is essential for the independence of the Office of the Commissioner that sufficient funding is provided to allow this Office to have the human, financial, material and technical capacity to guarantee the proper implementation of the Act on the Commissioner for Human

⁷⁶ See e.g., Section 7(1) of the Czech Republic Act on the Public Defender of Rights No. 349/1999 (as amended in 2009).

⁷⁷ See par 66 (second indent) of the Compliance Report on Poland of GRECO First Evaluation Round, 2 July 2004, available at [https://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoRC1\(2004\)5_Poland_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoRC1(2004)5_Poland_EN.pdf).

⁷⁸ See Concluding Observations of the UN Committee on the Elimination of Discrimination against Women on the Republic of Poland (14 November 2014), pars 14-15, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/POL/CO/7-8&Lang=En, where the Committee recommends to Poland to “[p]rovide the Office of the Human Rights Defender with sufficient financial and human resources so as to enable it to fully implement its mandate to protect women’s rights and promote gender equality, in compliance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles) (General Assembly resolution 48/134, annex)”; Concluding Observations of the UN Committee on the Elimination of Racial Discrimination on the Republic of Poland (19 March 2014), par 9, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/POL/CO/20-21&Lang=En; Concluding Observations of the UN Committee against Torture on the Republic of Poland (23 December 2013), par 16, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/POL/CO/5-6&Lang=En. See also *op. cit.* footnote 6, page 24 (Report and Recommendations of the Session of the SCA (November 2012)).

Rights, and to ensure the fulfilment of its mandate as the OPCAT national preventive mechanism and equality body.

65. Finally, it is worth recalling that OSCE commitments require legislation to be adopted “as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (Moscow Document of 1991, par 18.1).⁷⁹ Particularly legislation that may have an impact on human rights and fundamental freedoms, as is the case here, should undergo extensive consultation processes, including with the general public, to ensure that the Commissioner and the people are fully informed and able to submit their views prior to the adoption of the Draft Act. Public discussion and an open and inclusive debate will increase all stakeholders’ understanding of the various factors involved and enhance confidence and trust in the adopted legislation, and in the institutions in general.

[END OF TEXT]

⁷⁹ Available at <http://www.osce.org/fr/odihr/elections/14310>.

ACT

of 2015

**amending the Act on the Commissioner for Human Rights and certain
other Acts⁸⁰**

Article 1. In the Act of 15 July 1987 on the Commissioner for Human Rights (consolidated text: Journal of Laws [Dz. U.] of 2014 item 1648 as amended), the following Articles 7a–7g shall be inserted after Article 7:

“Article 7a. The Commissioner shall not be held criminally liable or deprived of liberty without the prior consent of the Sejm. The Commissioner shall not be detained or arrested, except in flagrante delicto and in cases where his or her detention is necessary for ensuring the proper course of proceedings. The Marshal of the Sejm shall be immediately notified of the detention and may order an immediate release of the detainee.

Article 7b. In the case of acts covered by immunity, the period of limitation in criminal proceedings does not run until the immunity expires.

Article 7c.

1. A request for approval to initiate proceedings to hold the Commissioner criminally liable in cases of publicly prosecuted offences shall be submitted through the Minister of Justice.

2. A request for approval to initiate proceedings to hold the Commissioner criminally liable in cases of private prosecution offences shall be submitted by the private prosecutor after the case has been brought to court.

3. The request referred to in para. 2 above shall be drawn up and signed by an attorney-at-law or legal counsel with the exception of requests submitted in their own cases by judges, public prosecutors, attorneys-at-law, legal counsels, notaries public and professors and associate professors [Polish: “doktor habilitowany”] of law.

⁸⁰ This Act amends the following Acts: the Act of 15 July 1987 on the Ombudsman, the Act of 23 December 1994 on the Supreme Chamber of Audit, the Act of 9 May 1996 on the Discharge of Duties by Deputies and Senators, the Act of 29 August 1997 on Personal Data Protection, the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes Against the Polish Nation, and the Act of 6 January 2000 on the Ombudsman for Children.

4. *The requests referred to in paras. 1 and 2 above should:*

1) indicate the requesting party and the representative, if any;

2) provide the first name, surname and date and place of birth of the Commissioner;

3) identify the legal grounds for the request;

4) provide a precise description of the act which the request concerns, indicating the time, place, manner and circumstances of its commission and its effects, and especially the nature of the resulting damage or injury;

5) present justification.

Article 7d.

1. A request for approval to initiate proceedings to hold the Commissioner criminally liable shall be submitted to the Marshal of the Sejm.

2. If the request referred to in para. 1 above does not meet the formal requirements referred to in Article 7c, para. 4, the Marshal of the Sejm shall demand that the requesting party amend or complete the request within 14 days, indicating the necessary corrections or completions. If the request is not corrected or completed within the prescribed time limit and scope, the Marshal of the Sejm shall decide that the request will not be considered.

3. If the request referred to in para. 1 above meets the formal requirements referred to in Article 7c, para. 4, the Marshal of the Sejm shall refer it to the competent authority to be examined pursuant to the Bylaws of the Sejm and shall at the same time notify the Commissioner of the content of the request.

4. The authority competent to examine the request referred to in para. 1 above shall notify the Commissioner of the time limit within which the request will be examined.

5. At the request of the authority competent to examine the request referred to in para. 1 above, the court or the appropriate authority before which the proceedings against the Commissioner are pending shall make the case files available.

6. The Commissioner shall submit explanations and his or her own requests concerning the case in writing or orally to the authority competent to examine the request referred to in para. 1 above.

7. After examining the case, the authority competent to examine the request referred to in para. 1 above shall adopt a report together with a proposal to accept or reject the request.

8. The Sejm shall approve the initiation of proceedings to hold the Commissioner criminally liable by a resolution adopted by an absolute majority of the statutory number of Deputies. If the required majority of votes is not achieved, this shall be tantamount to adopting a

resolution that does not approve the initiation of proceedings to hold the Commissioner criminally liable.

Article 7e

1. The prohibition of detention referred to in Article 7a shall include all forms of deprivation or restriction of the Commissioner's personal liberty by enforcement authorities.

2. A request for consent for the Commissioner to be detained or arrested shall be submitted through the Minister of Justice.

3. The request referred to in para. 2 above should:

1) indicate the requesting party;

2) provide the first name, surname and the date and place of birth of the Commissioner;

3) provide a precise description of the act and its legal qualification;

4) cite the legal grounds for the measure in question to be applied;

5) present the justification, indicating in particular the necessity of the measure in question.

4. The provisions of Article 7d, paras. 1–7 shall apply mutatis mutandis to the proceedings concerning the request for consent to the detention or arrest of the Commissioner.

5. The Sejm shall consent to the Commissioner being detained or arrested by a resolution adopted by an absolute majority of the statutory number of Deputies. If the required majority of votes is not achieved, this shall be tantamount to adopting a resolution that does not consent to the Commissioner being detained or arrested.

6. The requirement to obtain the consent of the Sejm shall not apply to the implementation of a custodial sentence imposed by a final court judgment.

Article 7f.

1. The Marshal of the Sejm shall immediately send the resolution referred to in Article 7d, para. 8 and in Article 7e, para. 5 to the requesting party.

2. The resolutions referred to in para. 1 above shall be published in the Polish Monitor [Monitor Polski], the Official Journal of the Republic of Poland.

Article 7g. *The provisions of the Act concerning the criminal responsibility of the Commissioner shall apply mutatis mutandis to responsibility for petty offences".*