



RZECZNIK PRAW OBYWATELSKICH

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**Summary**  
**of the Report on the Activity**  
**of the Commissioner for Human Rights**  
**in 2017,**  
**with Comments on the Observance**  
**of Human and Civil Rights and Freedoms**

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**Summary of the Report on the Activity  
of the Commissioner for Human Rights/Ombudsman  
in 2017, with Comments on the Observance  
of Human and Civil Rights and Freedoms**

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# Key civil rights issues in Poland

## Adam Bodnar, PhD, Commissioner for Human Rights

It is the duty of the Commissioner for Human Rights (CHR) to uphold human and civil rights and freedoms as provided for in the Constitution and other legal acts. This goal can only be achieved through good communication between the Commissioner and citizens. The Commissioner has to know what people need, what they expect and how the Commissioner can help them. It is good when this knowledge comes not only from letters and complaints submitted to the Commissioner's office but also from direct meetings and conversations. On the other hand, the citizens should be properly informed about the activities of the Commissioner – what he does on an everyday basis, how he tries to solve the problems, where he sees the most serious threats to the citizens' rights and freedoms.

We analysed thoroughly the annual reports of the CHR from previous years. We decided that something should be changed because they have become too formal. Although they have always imparted factual knowledge about the activities of the Office and the situation in the country concerning respect for civil rights and freedoms, reading them was not made easy by their volume and structure.

We decided to introduce comprehensive changes to the annual report for 2017, prepared under Article 212 of the Constitution of the Republic of Poland. The citizens participating in July demonstrations to protect the independence of the judiciary showed clearly how much the Constitution matters to them and that they attach great importance to its understanding and observance, and to constitutional guarantees. Therefore, we tried to look at all the activities of the CHR on the one hand, and on the situation concerning observance of human and civil rights and freedoms on the other hand, from the perspective of the specific provisions of the Constitution.

Another reason for the new approach is the need to clarify and systematize many notions and to give an interpretation of the events. As a matter of fact, our legal system, as well as many other aspects of the country's social and political reality, has been undergoing rapid changes in recent times. Some institutions of the state are being eroded and becoming unstable. As a result, confusion, uncertainty, misconceptions and misinterpretation of terms clearly defined by the law a long time ago, are becoming more and more evident in public debate. Therefore, we referred to the Constitution as the most important document defining our rights and freedoms in order to restore intellectual discipline and demonstrate that all of the CHR's activities are motivated by the need to protect constitutional order.

Finally, life itself prompted us to change our approach. The large-scale campaign of meetings of the CHR with the public across the country was continued in 2017. Talking to hundreds of people in various places, I noticed that they are often unable to link their own case with a specific legal act, provision or article, but they do like to refer to the

Constitution. They may not have in-depth knowledge of the law, but they do have civic awareness and sensitivity. While asserting their own rights, they justly refer to the rights guaranteed by the Constitution and to the duty of the public authorities to respect those rights.

In our report, not only did we write about important things that took place in 2017, but we took the liberty to give our comments as well. Deputy Commissioners, eminent in their fields, shared their views on their respective areas of interest: Stanisław Trociuk described changes in the constitutional system, Sylwia Spurek, PhD, gave account of the implementation of the principle of equal treatment, and Hanna Machińska, PhD, shared her thoughts on the prevention of torture and on the execution of punishments. Finally, Director General Katarzyna Jakimowicz wrote about some of the activities and the financial situation of the CHR Office.

We did our best to present all the information as simply as possible, in a clear language, taking into account the difficult nature of the discussed legal and statistical issues. We believe that in this way we will be able to raise the citizens' awareness of the significance of the provisions of the Constitution. We intend to continue to improve our work so that every year the CHR annual reports can better communicate our findings and inform the society about what more should be done in Poland to improve the observance of human rights. We will therefore be grateful for any suggestions and critical comments.

I do hope you will find this an enriching read.

# Comments on the constitutional system of Poland

## Stanisław Trociuk, Deputy CHR

The principle of social dialogue and cooperation between the public powers, cited in the preamble to the Constitution, provides that final legislative decisions be preceded by dialogue with all the relevant participants of the public life. However, the way acts of parliament are currently processed indicates that the said principle of social dialogue and cooperation between public powers is not respected. The fact that many draft acts are processed as MPs' draft acts even though they have been drafted in ministries indicates that the purpose of this practice is, in fact, to avoid any public consultations of the draft acts before they are referred to the Sejm, i.e. to circumvent the social dialogue that the Constitution calls for. This mechanism has been used to pass acts of highest importance for the functioning of the state and the society, such as the series of acts concerning the Constitutional Tribunal, acts introducing changes in the functioning of common courts, establishing the National Revenue Administration or amending provisions concerning secret service operations and collecting telecommunications data.

The changes in the functioning of common courts, the National Council of the Judiciary and the Supreme Court increase the sway of political factors on the judiciary, thereby impairing the human rights protection system, since independent courts are prerequisite essential for the rule of law and are a basic guarantee of the reliability of court proceedings. According to the judgements of the European Court of Human Rights, independence of the judiciary does not only refer to the performing of the duties of the judge in individual cases but also to the organization of the judiciary (structural independence). From this point of view, it is extremely important whether the considered body appears independent, as independence is essential for maintaining the trust that courts should enjoy in a democratic society. This trust in the independence of courts has just been seriously undermined in Poland through the organizational changes in the judiciary.

The freedom of assembly has been significantly restricted as a result of the provisions giving priority to regular assemblies. The direct effect of privileging of those assemblies is a ban on organizing other assemblies in the same place and at the same time. The ban ensures absolute protection of the participants of regular assemblies while violating the freedom of assembly of all other people. In practice, the amended public assemblies law has led to additional social tensions and protests.

The threats to the right to privacy posed by several provisions giving the Police and other services broad powers as concerns surveillance and collection of telecommunications, postal and Internet data still have not been addressed. The reservations concern both the scope of the collected data and the lack of effective court control over secret data collection.

The legislator has also undermined the constitutional right of citizens to access to civil service jobs on equal terms. This is evidenced by the termination of employment contracts with employees holding senior civil service positions, as well as with employees of the Office of the Constitutional Tribunal, officers of the Customs Service, employees of the Agricultural Property Agency and of the Agricultural Market Agency. In all those cases, the legislator waived the constitutional duty to provide the employee with guarantees of protection against unjustified actions of the public employer. The employer, unconstrained by any criteria referring to qualifications, is now in a position to decide freely on the future of the employees, as the respective acts no longer provide any objective selection criteria for public servant jobs, failing to ensure equal opportunities and to prevent discrimination.

The problem of the failure to implement the ruling of the Constitutional Tribunal concerning financial benefits for caretakers of adults with disabilities, raised in previous annual reports, still remains unsolved. The fact that the ruling has not been implemented forces the guardians to seek justice through lengthy proceedings before courts.

The legislator has failed to establish a legal framework for dealing with the consequences of post-war expropriations and nationalization. No regulations have been passed to somehow structure the chaotic reprivatization process that is currently taking place through administrative and court proceedings. In 2015, the Constitutional Tribunal ruled that the regulation allowing to declare null and void any administrative decision issued with gross violation of the law, regardless of how long ago that decision was taken, is partly non-compliant with the Constitution. To this day, not even this ruling has been implemented. This situation undermines the sense of security of legal transactions.



# Comments on the application of the principle of equal treatment

## Sylwia Spurek, PhD, Deputy CHR for Equal Treatment

Joanna, a visually impaired patient, made an appointment with an ophthalmologist. The visit was to concern an artificial eyeball. While making her appointment, she let the doctor know that being blind, she would come with a seeing eye dog. In response, the doctor cancelled the appointment. Before that situation, he had refused to provide service to another blind person with a seeing eye dog. The woman was not offered any other date of appointment or any support during the visit. She had to go to another clinic where a worse quality artificial eyeball was made for her (an acrylic instead of a glass one).

In this case, we filed a civil suit against the doctor. In the lawsuit, we emphasized that the doctor had violated the patient's dignity and made her feel humiliated and helpless. Moreover, she had to look for another service provider. We won the case and the court ordered the ophthalmologist who refused to treat the woman because she used a guide dog to pay PLN 10 thousand to a charity.

The Commissioner for Human Rights, as the state body for equal treatment, has the duty to defend the rights of those who are discriminated and excluded on grounds of their gender, race, ethnic origin, nationality, religion, belief, age, sexual orientation or disability – as in case of Joanna. We do this by participating in lawsuits, but, most importantly, we work to convince the relevant bodies to introduce changes in the law or in the ways the law is applied.

For several years, we have been monitoring and responding to human rights violations involving discrimination practices in all areas of life. We fight against the discrimination of the elderly in the health care system and we work to ensure they are offered support in their homes rather than institutional care. We lobby for full enforcement of women's rights concerning perinatal care, including access to anaesthesia during childbirth, and we oppose the stereotypes about violence against women. We point to the need to support women and men in their efforts to reconcile family and professional life. We are concerned about the growing numbers of prejudice- and hate-motivated crimes against people of different races, ethnicities, nationalities and religions and we bring the problem to the attention of the relevant authorities. We argue for the introduction of a gender recognition procedure for transgender people that will not force them to sue their own parents, thereby causing further trauma. We speak out loud against the violation of the privacy rights of gays and lesbians, who are not even allowed to bury their partner. These are just a few examples of the Commissioner's involvement in the fight against discrimination, exclusion and violence.

The most recent, third Congress of People with Disabilities took place in autumn 2017 under the slogan "For independent life". This slogan is relevant both in the context of the rights of people with disabilities and of rights of the elderly. We must keep in mind that every person, regardless of age, race, ethnic origin, nationality, religion, religious denomination,

philosophy of life, age or sexual orientation, has the right to a life free of discrimination, exclusion or violence motivated by prejudice and stereotypes. Our experiences of 2017 and of previous years indicate there is still a lot to be done in this area. As a body appointed to stand up for equality, we will continue to be active in this regard in the coming years.

# Prevention of torture and execution of punishment

**Hanna Machińska, PhD, Deputy CHR**

The annual report of the Commissioner for Human Rights portrays both positive and negative changes taking place in Poland in the field of human rights. We assess this picture in the light of world and European standards adopted by human rights organizations. By assuming international obligations, a state declares to fulfil them through its laws and through the way in which its institutions operate.

International regulations on preventing torture are of particular importance. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment obliges the States Parties to take effective legislative, administrative and judicial measures to prevent acts of torture. The Convention defines the term “torture”, thus creating a common terminology and an objective reference framework that allows to classify specific acts as torture. A ban on torture is imposed expressly by Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which says that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

The fact that a state has assumed an international obligation does not mean that the obligation is automatically fulfilled through legislation and the practices of state institutions. This is why the activities of the Commissioner for Human Rights, aimed at preventing torture and assessing the way punishments are effected, are so important.

Torture and degrading treatment are frequent practices in states where preventive mechanisms tend to fail. Dozens of such cases have been identified in Europe as a result of more than 420 visits of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (CPT). The problem is so widespread, particularly in the context of arrest and temporary detention, that it calls for firm action both at the national and international level. The Committee pays special attention to the need to adopt so-called positive torture prevention measures, including, most notably, access to legal and medical aid and the detainee’s right to notify other persons about the detention.

Prevention is the basis of any culture of statehood without torture. Prevention includes comprehensive educational measures and effective monitoring in places of detention. It also includes activities of the National Preventive Mechanism (NPM), which, according to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is an independent mechanism established to inspect places of detention regularly, to offer recommendations to the relevant authorities and to submit comments and suggestions concerning draft legislation.

The importance of the NPM’s visits lies in evaluating the inspected places of detention, indicating areas requiring improvement both in terms of individual and systemic problems, and in submitting suggestions concerning draft legislation. Another important objective of

the NPM's recommendations is to promote good practices. Knowledge of the standards adopted by international organizations and those arising from rulings of international tribunals is extremely important in the work of the NPM.

The NPM's recommendations aim to support the activities of bodies responsible for the functioning of places of detention, among others by pointing to the need to adapt those places to the needs of people with disabilities and to provide funding for the necessary changes, or to increase the number of medical and psychological staff.

The NPM's work contributes to the improvement of the situation of people in places of detention. Preventing torture and degrading treatment is a long process involving a variety of measures. To build a state without torture and degrading treatment is a great challenge to all state institutions responsible for the proper functioning of places of detention.

The Commissioner for Human Rights pays special attention to execution of punishment. The focus is the observance of the law, and in particular the provisions of the Code of Criminal Procedure, especially in the context of the rights of people with intellectual or mental disabilities and elderly people.

The disclosure by the Commissioner for Human Rights of violations of the rights of people deprived of liberty and of gaps in existing legislation, have led to many appeals to the relevant authorities, including the Minister of Justice, Minister of Health, the Commissioner for Patients' Rights, Head of the Prison Service and the Senate of the Republic of Poland.

By dealing with the problems of people deprived of liberty, the Commissioner contributes to building an environment in which individuals may function in accordance with the established international standards of human rights and with national legislation. By contributing to the improvement of the situation of prisoners, the Commissioner is conducting an important civilizational mission of building a state free from torture and inhuman treatment.

# Human and civil freedoms, rights and obligations

## A. Equality before the law

The newly-adopted solution according to which female judges must retire at the age of 60, while male judges may retire at the age of 65, raises concerns in the light of the principle of equality before the law. This unequal treatment on the grounds of gender is made even worse by the fact that it is the Minister of Justice who has the power to decide whether or not a female judge may continue her career. The law is very laconic about the criteria to be applied by the Minister when making such a decision. According to the new law, the Minister does not need to justify a refusal to grant permission to continue working to a judge who has reached retirement age. The ability of the executive branch to interfere so deeply with the right of judges who have reached retirement age to continue to work may violate the principle of separation of powers and the constitutional principle of separateness and independence of courts of other branches of power. It may also undermine the principle of independence of judges. In the Commissioner's view, the reaching of retirement age and entitlement to retirement pension are not a sufficient reason for terminating a contract of employment by the employer. In this regard, the situation of judges is less favourable than that of other persons employed under the Labour Code because a decision of the Minister of Justice not to permit a judge to continue to work effectively bans the judge from professional activity, which may constitute a violation of the constitutional principle of equality.

Moreover, the Commissioner filed an application with the Constitutional Tribunal to declare Article 86.4 of the Criminal Code non-compliant with the constitutional principle of equality insofar as it treats unequally people to whom cumulative sentences have been applied before and those to whom such sentences have not yet been applied since, as concerns the former group, the said provision allows to increase the minimum limit of the cumulative sentence and to adjudicate a more severe sentence, i.e. 25 years of imprisonment. At present, it is possible to combine both individual sentences and earlier cumulative sentences, with the latter treated as individual sentences for the purpose of calculating the limit of the final cumulative sentence. As a result, the maximum individual sentence (i.e. the minimum final cumulative sentence) may be higher if some sentences have already been combined into a cumulative sentence. In some cases, this may lead to a sentence of 25 years of imprisonment even if none of the individual sentences allows it. The case is pending consideration by the Tribunal.

The Commissioner for Human Rights made several requests to the Minister of National Education to modify the new core curriculum so as to incorporate issues of human rights and equal treatment, and to modify the new Regulation of the Minister of National Education on Obligations of Schools and Educational Establishments so as to oblige schools to implement anti-discriminatory measures. The Commissioner emphasized that this obligation stems from

international laws binding on Poland. If this obligation was reflected in the regulations of the Minister of National Education, effective monitoring of its discharge would be possible. In response, the Minister informed the CHR that the duties of schools with regard to developing students' respect for human rights, equal treatment and tolerance stem not only from the core curriculum but, first and foremost, from the Educational Law. These issues are also addressed in the general education curriculum, particularly within the framework of Citizenship Education, as well as in the educational goals and contents defined for other subjects.

The Commissioner published a report entitled "Prejudice motivated crimes. Analysis and recommendations", concerning prejudice motivated crimes against senior persons, persons with disabilities, non-heterosexual and transgender people. In Polish penal law, the level of protection against prejudice motivated crimes against those groups is lower than the level of protection against crimes motivated by prejudice against people of nationality, ethnicity or religion, or irreligious people. Yet, a survey commissioned by the Commissioner indicates that the psychological and social consequences for victims of prejudice motivated crimes, and in particular for LGBT people and representatives of ethnic minorities, are much more serious than the consequences of crimes that are similar, but are not motivated by prejudice. The differences noted included a higher intensity of PTSD symptoms, less support for the victims and a lower level of recognition by the public of the harm done to the victims of prejudice motivated crimes. It is therefore necessary to increase legal protection of victims of prejudice motivated crimes and to provide them with proper support, as well as to monitor the dark (unreported) number of such crimes and to continuously improve the competence of law enforcement and judiciary staff.

## **B. The principle of non-discrimination**

### **1. Combating discrimination on the grounds of disability, and implementation of the Convention on the Rights of Persons with Disabilities**

The Commissioner published a report entitled "Personal assistants to persons with disabilities: a need arising from the Convention on the Rights of Persons with Disabilities". The report emphasized that in order to enforce the right to an independent life, state-financed personal assistance services to persons with disabilities must be made widely available. Personal assistance services should not be considered a form of social assistance but an element of the equal opportunities policy for people with disabilities. The services should be managed by the assistance users, i.e. the concerned person with disability should be the one who signs the contract with a service provider or employee of his/her choice. People with disabilities should also be in the position to adjust the services provided to their individual needs and to decide who, how, when, where and in what way will provide the services to them.

The Commissioner, together with 54 non-governmental organizations, appealed to the Prime Minister to deinstitutionalize the system of support provision to persons with disabili-

ities and senior persons. Deinstitutionalization is a process of transition from institutional care to support at the community level, with due respect for the subjectivity and inherent dignity of all people, including the right to make decisions regarding their lives. The appeal called for adoption of a comprehensive deinstitutionalization programme, drawing on the experiences of many European countries and using EU funds. In addition, the authors called for a moratorium on the building of large care institutions and on a partial moratorium on the referral to institutions of people who do not yet need round-the-clock support.

The Commissioner continued his efforts to increase the accessibility of the justice system to persons with disabilities, submitting once again legislative proposals (e.g. concerning procedural capacity and capacity to be a witness) and non-legislative proposals (concerning *inter alia* improved access to information and infrastructure). The Commissioner believes that it is extremely important to provide training for people performing various functions in the justice system to disseminate knowledge on disabilities and the standards set by the Convention. In response, the Minister informed the Commissioner on the activities undertaken by the Ministry of Justice in order to improve the access of persons with disabilities to the justice system. Among other things, he pointed out that training courses organized by the National School of Judiciary and Public Prosecution for justice system staff include, *inter alia*, issues related to providing services to people with disabilities. He also pointed to activities aimed at further computerization and removal of architectural barriers, as well as to the promotion of persons with disabilities in court staff recruitment procedures.

The Commissioner took measures, both in individual cases and on a general level, to ensure that the right of students with disabilities to education is exercised, by making municipalities comply with the obligation to provide such students with free transport to schools and educational institutions or to reimburse the transport costs when transport is provided by the parents. Municipalities often evade this obligation by misinterpreting the term “nearest school”, pointing to the lack of statutory reimbursement criteria and offering the parents agreements which do not guarantee full reimbursement. According to the Minister of National Education, the regulations on the transport of children do not prevent children and youth with disabilities from fulfilling their school obligations and from studying. They do not infringe their right to education, including inclusive education, either. As regards the lack of criteria for the reimbursement of the costs of transport of children and their guardians when the transport and care is provided by the parents, the Minister insisted that this issue should be dealt with in regulations other than the education law. However, the Minister agreed with the Commissioner that the term “the nearest school” should be clarified in the context of regulations on the provision by municipalities of free transport to schools and educational institutions. The Minister also informed that the Ministry is working on a concept of changes in the system of teaching children and youth with special learning needs. In this context, the needs of children and youth with disabilities as regards free transport to and care in schools and educational institutions, are being analysed.

## **2. Combating discrimination on the grounds of age**

In his appeal to the Minister of Family, Labour and Social Policy, the Commissioner highlighted the particular issues connected with respecting the rights of the elderly as concerns violence and discrimination on the grounds of age and once again emphasized the need to develop a comprehensive national strategy for the elderly, involving all institutions at the central and local level. The Commissioner also inquired about the nature of the document announced by the Minister, entitled “Social Policy for the elderly until 2030. Safety – Participation – Solidarity”. In the response, it was explained that, as expected by the Commissioner, the document would specify particular objectives and tasks associated with policy for the elderly, and entities responsible for their implementation. The document is to be adopted by the Council of Ministers by the end of this year. The Minister also informed that work is under way in the Ministry on an amendment of the Act on the Elderly.

The Commissioner forwarded to the Minister of Family, Labour and Social Policy the conclusions of the report on a survey on community support for the elderly, highlighting, among other things, the low level of awareness of local decision-makers as concerns indirect discrimination of the elderly in the form of architectural barriers and stereotypes limiting social participation of the elderly. The Minister responded by informing that the Ministry is preparing a document outlining the policy for the elderly in Poland, entitled “Social Policy for the elderly until 2030. Safety – Participation – Solidarity”.

The Commissioner continued his efforts to increase support for the proposed UN Convention on the Rights of Older Persons. In particular, the Commissioner informed the Minister of Family, Labour and Social Policy about the state of the global debate on the protection of the rights of older people and encouraged the Polish government to take part in it. This may be done, among others, by answering the questions of the Chair of the Open-Ended Working Group on Ageing (OEWGA) concerning measures that UN member states are currently implementing with regard to long-term and palliative care, and to the protection of the independence and autonomy of older people.

## **3. Combating discrimination on the grounds of gender**

The Commissioner continued to work towards increased protection of victims of domestic violence. The Commissioner drew attention to doubts connected with the implementation of the provisions of the Act on Prevention of Domestic Violence and of the Regulation of the Minister of Labour and Social Policy on the Standard of Basic Services Provided by Specialist Centres Offering Support for Domestic Violence Victims, on the Qualifications of Staff Employed in those Centres, on the Details of Correctional and Educational Measures with regard to Domestic Violence Perpetrators and on the Qualifications of Staff Responsible for Correctional and Educational measures. The Commissioner was also interested in correctional and educational measures of people serving prison terms for committing violence against women and for domestic violence.

The Commissioner was alarmed by media reports according to which government ministries are working to denounce the Council of Europe Convention on Preventing and Combat-



ing Violence against Women and Domestic Violence. The entry into force of the Convention was a breakthrough in ensuring the protection of the fundamental rights and freedoms of women suffering from gender-based violence. In response to the Commissioner's inquiry, the Minister of Justice stated that no steps were being taken to denounce the Convention.

In 2017, the Commissioner drew attention to several aspects of limited access to the ellaOne medication, and to the fact that some chemists cite the "conscience clause" in order to refuse to sell contraceptives. According to the Commissioner, such practices violate the existing law and may lead to infringement of patient rights to health care. The Commissioner was also alarmed about media reports that in Podkarpackie voivodeship there were no healthcare institutions performing free-of-charge abortions in cases provided for in the Act on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy. Failure to ensure access to abortion procedures in cases provided for in the Act constitutes an infringement of the right of women to protection of their health and life.

In connection with the announced reform of vocational education and career counselling in schools, the Commissioner drew the attention of the Minister of National Education to the need to take measures to reduce the disproportions between the numbers of males and females studying exact sciences and technical disciplines. In response, the Minister ensured that Poland's educational policy guarantees all children and youth equal access to education and that all students attending a particular type of school have the same learning goals and learning contents, as provided for in the core curriculum.

The Commissioner monitored the work of the Labour Law Codification Committee at the Ministry of Family, Labour and Social Policy with regard to the inclusion of the issues of reconciling family life and professional careers in the draft of the new Labour Code. The Minister stated that the issues of reconciling family life and professional career would be analysed by the Team for Drafting the Labour Code at the Labour Law Codification Committee as part of an overview of the existing provisions of the Labour Code concerning entitlements associated with parenthood.

#### **4. Combating discrimination on the grounds of sexual orientation and gender identity**

The Commissioner continued his activities associated with the implementation of the recommendations of the report "Equal treatment in employment regardless of gender identity – analysis and recommendations". In his appeal to the Minister of Family, Labour and Social Policy, the Commissioner, among other things, argued that the right of transgender people to perform a job of their choice is limited by the lack of regulations for changing the registered gender. The documents of transgender people during the transition process include personal details that do not correspond to their look. This makes finding jobs really difficult for them and also intensifies the sense of exclusion. It is urgent to amend the Regulation of the Minister of Family, Labour and Social Policy on Certificates of Employment as concerns issuing and correcting certificates of employment in order to make it possible to change personal details of people who have obtained a court ruling on gender change. The Minister agreed,

*inter alia*, with the suggestion concerning the amendment of the Regulation of the Minister of Family, Labour and Social Policy on Certificates of Employment as concerns issuing and correcting certificates of employment. The Commissioner was assured that the issue would be addressed in the next amendment of the considered regulation.

## C. Rights of national and ethnic minorities

In 2017, about 100 cases were registered in the Office of the CHR that related to hate crimes on the grounds of nationality, ethnicity, race or religion. Some of them concerned so called hate speech, i.e. public incitement to hate or public insulting of individuals or groups of people on the above grounds. Other cases in which the Commissioner intervened were associated with physical violence against representatives of ethnic minorities or people identified with religious minorities.

The Commissioner examined the situation of the Roma community from Małopolskie Voivodeship, which existed in dreadful housing conditions and were often totally excluded from social and economic life. In the Commissioner's view, whether or not the living conditions of that community are improved depends greatly on the state assistance, and in particular on involvement of the local authorities. The dreadful living conditions in Roma settlements persist not because of the lack of assistance funds – such funds have been secured under the 2014–2020 Programme for the Integration of the Roma Community in Poland, but because of the lack of a comprehensive strategy. Hence, the suggestions concerning modifications in the Roma Programme, put forward by the Commissioner in previous years, remain relevant. Among other things, the Commissioner recommended to allocate a part of the Programme's funds to investments, to develop mechanisms that would encourage local governments to take part in the Programme, and to improve control over the spending of money under the Programme. In another development, talks with representatives of local governments gave rise to the idea that legal conditions should be created to allow individuals (e.g. inhabitants of the Roma settlements) to apply for funding.

In 2015, the Commissioner launched an inquiry into a project implemented by the municipal authorities of the town of Limanowa. The aim of the project was to improve the living conditions of several Roma families. The project was co-funded under the 2014-2020 Programme for the Integration of the Roma Community in Poland. The municipality of Limanowa used the funds to buy new houses for Roma people who had lived in a building owned by the municipality. One of the new houses is located in Czchów municipality. The mayor of Czchów, having learned about the plans to relocate the Roma families from Limanowa to his municipality, issued a prohibition to use of the building for residential purposes. The governor of Małopolskie Voivodeship, as a supervisory body, challenged the prohibition and the approving resolution of Czchów Municipality Council before the Voivodeship Administrative Court in Kraków, and the Commissioner joined the proceedings initiated by the Court. The Commissioner, among others, argued that by denying the Roma people the opportunity to move to the building which was bought for them, Czchów authorities committed an act of discrimination on the grounds of ethnicity and infringed the right of the Roma

families to protection of private life. In the opinion of the Commissioner, Czchów municipality breached the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Voivodeship Administrative Court in Kraków shared the Commissioner's concerns and declared the prohibition issued by the mayor of Czchów, and the resolution of Czchów Municipality Council approving the prohibition, null and void.

## **D. Right to diplomatic and consular protection**

For several years, the Commissioner has been monitoring the situation of Polish citizens abroad. In response to complaints received, the Commissioner has taken action concerning such issues as discrimination by German courts in child custody cases, denial of the parents' right to communicate in Polish with their children or taking away minors of Polish citizenship from their parents. In his interventions with the Minister of Justice and the Prime Minister, the Commissioner referred to problems faced by Polish citizens. The Commissioner welcomed the Ministry's idea to develop a list of Polish foster families where Polish children taken from their parents would be placed for the time of the proceedings, and to make the list available in consulates of the Republic of Poland. The Commissioner was informed that the similar measures were needed in the case of Polish children in Norway. The Commissioner offered to join the efforts of the Polish Ombudsman and of the Government of the Republic of Poland to fight for the preservation of the national identity of minor citizens of Poland and for the parental rights of their parents. In the response, the Secretary of State at the Ministry of Justice raised a number of important issues concerning the enforcement of the rights of Polish citizens abroad when their children have been taken away from them. The Commissioner informed the Minister that in his replies to citizens who have found themselves in such difficult circumstances, he would refer to the Minister's announcements, stressing the importance of participation of the relevant diplomatic and consular services of the Republic of Poland in the proceedings, as well as the need for the parents to notify these services.

# Personal freedoms and rights

## A. Right to protection of life

In his letter to the Chair of the Extraordinary Commission of the Sejm, the Commissioner presented his comments on the government's draft Act amending the Criminal Code Act, which includes changes concerning defence of necessity. According to the Commissioner, the proposed extension of the right to the defence of necessity to include situations when domestic peace is threatened, in addition to other values protected by the law (e.g. life, health, personal liberty or sexual freedom), is not justified. The proposed solutions may contribute to the worsening of the situation of the victims of crimes, since upon crossing the limits of the defence of necessity, a person defending themselves will act illegally. From that point onwards, the aggressor will be able to make use of the right to the defence of necessity against the person defending himself/herself. The proposed amendment states that defence of necessity "is not punishable". This amounts to granting the prosecutor the power to decide on those issues. However, the significance of the values in question calls for an open and independent procedure. This is why it should be the courts, and not the prosecution, who should make decisions in such cases.

## B. Prohibition of torture and inhuman and degrading treatment

Visits of representatives of the National Preventive Mechanism to places of detention indicate that the situation as concerns documenting and reporting torture or inhuman and degrading treatment is unsatisfactory. The lack of procedures to be followed by staff members who have learned about instances of torture or other forms of violence against a detainee may result in failure to help the victim or in help coming too late. In addition, injuries are documented superficially or not at all. Furthermore, prison officers who have obtained information about torture or inhuman treatment do not always notify the law enforcement agencies.

In response to the Commissioner's inquiry, the Head of the Prison Service stated that the issues in question are addressed in a systematic way at various levels of education. In addition, he sent a letter to all the district directors and Chiefs of Penitentiary Training Centres, reminding them about the need to include, on a continuous basis, the subject of effective investigation and documentation of torture or inhuman or degrading treatment in penitentiary medical personnel training programmes.

Representatives of the National Preventive Mechanism visiting psychiatric wards and hospitals pointed to the need to install alarm call buttons in all rooms used by patients, to allow quick response by the personnel. This is extremely important in the context of the mental comfort of the patients since their feeling safe or unsafe may impact their condition. It is

also particularly important for persons with disabilities. According to the Commissioner, this problem should be solved in a systemic manner so as to eliminate the existing inequalities in the standard of patient safety. It should be considered whether the Regulation of the Minister of Health on the requirements imposed on hospitals should be amended accordingly. The Commissioner submitted an inquiry to this effect to the Minister of Health, who, however, dismissed the proposed changes as unjustified, explaining that due to the nature of mental illnesses and disorders, the patients of those wards are under continuous observation of the nurses.

The Commissioner turned to the Minister of Health to inquire about patients who, as a security measure, have been confined in mental hospitals for very long periods, and in particular about the effectiveness of the therapies or medical treatment they received. Moreover, the medical staff of mental hospitals where such internment takes place also face problems, including insufficient numbers of nurses and actual, as opposed to official, numbers of doctors. According to the Minister, long stays of some people in mental hospitals are a consequence of the need to continue treatment in hospital conditions, as the patients would be left without sufficient social support if released. As a matter of fact, court rulings concerning release from detention in hospital take into account both the mental condition of the patient and his/her ability to live independently and continue treatment out of hospital in a way that does not threaten his/her life or health.

An analysis of the use of direct coercion against patients of prison hospital units under the Act on Mental Health has revealed a number of irregularities, including incidents of degrading and inhuman treatment of patients. In many cases, the justification for the use of direct coercion and for prolonging its use were doubtful. In the opinion of the Commissioner, there should be seclusion rooms in hospitals with psychiatric wards or wards where patients stay who may potentially require direct coercion. As a matter of fact, seclusion is a measure which is more effective and less troublesome to the patient than forcible administration of medication or restraint. Moreover, for the patients' sake, measures should be taken to equip all rooms used for restraint in all prisons and pre-trial detention centres with monitoring devices to record both the vision and sound. Reliable control is also very important to ensure direct coercion is used within the limits of the law. In response to the inquiry of the Commissioner, the Head of the Prison Service replied that he ordered the district directors under whose territorial jurisdiction prison hospitals operated to conduct training courses on direct coercion, to verify whether information on patient rights, including information on the Commissioner for Patients' Rights and the Commissioner for the Rights of Patients of Psychiatric Hospitals, is available to prisoners, and to provide better access to such information as and when necessary. The Minister of Health, who was requested by the Commissioner to regulate the mandate of Prison Service officers to resort to direct coercion, stated that the relevant provision of the Act on Mental Health would be amended. The announced change indeed took place on 1 January 2018.

## **C. Personal inviolability and liberty**

The Constitutional Tribunal in its ruling of 14 December 2017 (ref. K 17/14) shared the Commissioner's standpoint that several provisions granting Police and other services powers to conduct a search and a body search, without defining the limits thereof, violates personal inviolability and liberty, as well as the right to privacy. The Tribunal agreed with the Commissioner that independent verification of the conduct of the services in such situations is impossible and as such infringes the right to a fair trial.

Acting *ex officio*, the Commissioner initiated a proceeding concerning illegal use of a taser gun by a police officer who was not authorized to have one, resulting in body injury of a French citizen and in subsequent disturbance of his health. This case, which caused a wave of public indignation, is yet another case in which a police officer has used a device to which he was not authorized. According to the Commissioner, the bearing and use of private equipment by police officers while on duty is totally unacceptable. The use of such devices always poses a threat to the life and health of those against whom they are used. Using equipment which has not been certified for use by the police only increases that risk. The Commander-in-Chief of the Police, who had been requested by the Commissioner to take appropriate action, informed that letters strongly disapproving of the behaviours described by the Commissioner were sent to all Police units. Moreover, orders were issued categorically forbidding the bearing and use of privately-owned coercion devices while on duty.

## **D. Right to human treatment**

On many occasions, the Commissioner pointed to the lack of regulations concerning the escorting of patients who, as a security measure, have been placed in mental hospitals and wards, and need to be transported outside those facilities, e.g. for medical consultations. According to the Commissioner, new statutory provisions should specify the entity responsible for escorting the patient, the means of transport to be used, and the procedures to be followed by the guards in emergency situations (aggressive behaviour, escape attempt). The Minister of Health, who had been requested by the Commissioner to take appropriate action, stated that a Regulation on the Psychiatric Committee for Security Measures in Mental Hospitals had been issued. Moreover, the Minister, acting within his competencies, included provisions concerning medical transport of people under a security regime in the Act on Publicly-Funded Healthcare Services. However, those provisions do not cover such issues as the stay of the patient outside the place to which the patient has been confined as a security measure. Therefore, the Commissioner is preparing another intervention concerning the issue.

Preventive visits conducted by the National Preventive Mechanism justify the general conclusion that although prison cells for persons in wheelchairs have been provided in places of detention, architectural barriers have not been eliminated, making those facilities only partly accessible for such detainees who, as a consequence, cannot fully exercise their rights. The Commissioner requested the Head of the Prison Service to take steps to amend the Order of the Head of the Prison Service on the designation of prisons and pre-trial detention centres so as to ensure that cells where wheelchair persons are to be placed are fully adaptable to

their needs so that they can move about unassisted. The Head of the Prison Service assured the CHR that the Prison Service continually implements modernization and repair projects to improve the living conditions of prisoners in Poland and to eliminate architectural barriers for wheelchair prisoners.

Representatives of the National Preventive Mechanism carried out an analysis of a document entitled *Border Guard Procedure for Dealing with Foreigners Requiring Special Treatment* from the point of view of its compliance with national legislation and international standards. They were concerned with the fact that the Border Guard officers were confident that thanks to the measures prescribed in the said document they are able to provide proper care in foreigner detention centres to foreigners requiring special treatment. While not questioning the willingness of the Border Guard to help and provide foreigners who are victims of torture or other forms of violence with medical treatment and psychological counselling, the Commissioner pointed out that, according to express provisions of national legislation, such people, regardless of the reason for their placement in the centre and of the type, place and circumstances of the violence they suffered, must be released from detention as soon as there is reason to believe that they are victims of violence. Moreover, the lack of an effective mechanism of early identification of victims of torture or other forms of violence exposes the Polish state to liability for unlawful deprivation of liberty. The Commissioner requested the Chief Commander of the Border Guard to take immediate steps to implement effective mechanisms of early identification of victims of torture or other forms of violence to eliminate incidents of unlawful detention of foreigners, as well as effective mechanisms of identification of victims of torture amongst those who are already in detention so as to release them as soon as possible. The Chief Commander disagreed with the Commissioner. He argued that the concerned document is not about releasing detainees from the detention centre but about identifying people with special needs and providing them with the necessary specialist medical and psychological treatment as soon as possible, and that this is precisely the kind of assistance such people receive in the centres.

The Commissioner requested the opinion of the Commissioner for Patients' Rights on the preventive use of handcuffs on mentally ill patients under the Act on Direct Coercion and Firearms, and to consider visiting all medical institutions providing round-the-clock psychiatric care to people deprived of liberty. According to the Commissioner, the existing five psychiatric prison hospitals do not meet the conditions necessary to treat and rehabilitate mentally ill people, as they lack proper facilities, specialist therapists and social workers, and are mainly used for psychiatric surveillance as ordered by the courts. In response, the Commissioner was informed that, regardless of its form, direct coercion referred to in the Act on Mental Health should be used in a manner which is least distressing to the patient, with due regard to the patient's wellbeing. However, patients of psychiatric wards may pose serious threats, including threats to the health and life of other patients and personnel. Therefore, direct coercion of such patients by the Prison Service may be justified by security concerns.

In his letter to the Minister of Justice, the Commissioner emphasized that Commission Recommendation of 27 November 2013 on Procedural Safeguards for Vulnerable Persons Suspected or Accused in Criminal Proceedings obliges Poland to take measures to guar-

antee respect for the rights of detainees with mental or intellectual disabilities. The right of people with disabilities to access to justice stems from the Convention on the Rights of Persons with Disabilities, which obliges the States-Parties to the Convention to provide procedural accommodations in order to facilitate the effective participation of persons with disabilities in all legal proceedings, including investigative and other preliminary stages. However, the analysis of 80 court proceedings, conducted by the CHR Office, indicated violations that were serious and disturbing from the perspective of civil rights and freedoms. In response, the Minister argued, *inter alia*, that when there are any doubts concerning the health of a prisoner, the penitentiary judge should be notified since it is the penitentiary judge's duty to ensure that the punishment is executed lawfully. If the judge determines that the detention is illegal, he/she shall notify the relevant authority and, if necessary, shall order the release of such a person. Having received the Minister's reply, the Commissioner requested the Minister of Justice to provide information on the actual functioning of penitentiary supervision.

The Commissioner also requested the Minister of Justice to enforce the judgement of the Constitutional Tribunal, which ruled that the provision of the Act on Procedures Involving People with Mental Disorders Posing Threats to the Life, Health or Sexual Freedom of Other People that concerns the procedure for prolonging detention in the National Centre for the Prevention of Dissocial Behaviour in Gostynin, violates the Constitution. The Commissioner also argued that it is necessary to create a legal basis for transferring mentally ill persons from the Centre to a psychiatric hospital. The Minister replied that a draft amendment of the considered Act had been already prepared by the Ministry of Justice and that the issue of providing psychiatric treatment to people staying in the Centre in Gostynin would be addressed by the working team established by the ministries of justice and health to develop legal and organizational measures allowing people who become mentally ill while serving a prison sentence to be referred to psychiatric treatment. Continuing activities in this area, the Commissioner requested the Senate of the Republic of Poland to undertake a legislative initiative to determine the rights and obligations of people placed in the National Centre for the Prevention of Dissocial Behaviour in Gostynin, as well as the grounds of and reasons for restricting their constitutional rights. The Commissioner's previous requests to the Minister of Justice and Minister of Health concerning this issue were ineffective.

The Commissioner submitted to the Head of the Prison Service the results of a survey concerning prisoners and arrestees aged more than 75 years, described in a paper entitled "Execution of pre-trial detention and prison sentences in the case of the elderly". According to the Commissioner, there is a need to develop a clear approach to the execution of prison sentences served by this group of prisoners. This approach should ensure that the needs of the elderly are addressed as fully as possible, and that the necessary conditions are created for the Prison Service to work with elderly prisoners, taking into account the limitations of their age and health. In the opinion of the Head of the Prison Service, there is no need to introduce a new inmate classification group whereas creating separate sections for older prisoners does not encourage their social integration. All prisoners, regardless of their age, receive appropriate medical care.



In view of a large number of complaints submitted to the CHR Office by prisoners and concerning the fact that prisoners serving sentences for murder, sexual assault or indecent behaviour are being barred from working outside the prison, the Commissioner requested an explanation from the Head of the Prison Service. The Head of the Prison Service replied that taking into account the Prison Service's statutory tasks, including the protection of the society against the perpetrators of the most dangerous crimes, he had ordered to employ such prisoners in prison units and manufacturing halls, under strict supervision of the Prison Guard. Consequently, the directors of prisons and pre-trial detention centres took steps to withdraw such prisoners from places of employment outside the prison and to employ them in prison compounds and in manufacturing halls. These measures were never aimed at and have never resulted in denying the prisoners the right to temporary leave under the terms of the prison leave system.

The Commissioner requested the Head of the Prison Service and the Minister of Justice to take steps to eliminate provisions contained in prison internal rules and regulations which are non-compliant with the law and violate the rights of the prisoners to use clothes appropriate to the season. He also indicated some other areas where the internal rules and regulations required modifications, including those concerning the right of prisoners to use payphones or the right to maintain contact with family members and other close people through visits. The Head of the Prison Service replied that he had ordered the district directors of the Prison Service to check the compliance of the provisions of the internal prison rules and regulations with the law and to publish the prison internal rules and regulations in the Public Information Bulletins of the detention centres.

At present, the Prison Service tests the sobriety of visitors to detention centres even though no legal basis for such a measure exists. The Commissioner can see the rationale for conducting sobriety tests; however, he emphasizes that such tests may only be conducted once appropriate provisions are introduced to the Act on the Prison Service, granting such powers to the Prison Service. The Commissioner requested the Minister of Justice to undertake the a legislative initiative to amend the Act on the Prison Service so that it expressly states that people intending to visit a detention centre must submit to such a test. In response, the Minister stated that he would consider undertaking such an initiative.

The Commissioner agrees with the position of prosecutors that supervision of the meetings of temporarily detained people with their relatives, and control of conversations during the visits by the Prison Service officers, are not always a sufficient guarantee of proper pre-trial proceedings. Nonetheless, if the presence of a police officer during meetings of a temporarily detained person with his/her relatives is indeed necessary to ensure that the objectives of detention, the most restrictive of all preventive measures, are achieved, appropriate regulations providing for such police presence must be introduced. The Minister of Justice replied that the authority in whose custody the detainee is kept has the right to limit or determine the manner in which the detainee's right to contact religious ministers or other people is exercised, if required in order to ensure sound criminal proceedings. The linguistic interpretation of the cited regulation is that the limiting and determination of the way of exercising the right to contact other people refers to an unspecified circle of people, including relatives.

The Commissioner pointed out that the Regulations of the Minister of Justice on the Rules and Regulations for the Execution of Prison Sentences and on the Rules and Regulations for the Execution of Pre-Trial Detention state that sanitary facilities shall be situated in the cells in a way that ensures privacy. Undoubtedly washbasins are such facilities. Yet, in numerous detention centres, washbasins are installed outside the sanitary section, in full view. According to the Commissioner, installing washbasins outside sanitary sections infringes the right to privacy, results in decreasing the surface area of the sanitary sections and in numerous inconveniences associated with the use of washbasins in full view of other inmates. The Commissioner contacted the Head of the Prison Service regarding the problem and then requested the Minister of Justice to take appropriate measures. The reply was that the problem described by the Commissioner virtually does not exist in open and semi-open prisons. In closed prisons, however, technical and architectural limitations sometimes occur, which do not allow to install the washbasin in the sanitary section. The Minister added that the Prison Service has for years been systematically working to improve the sanitary and living conditions of prisoners.

The Supreme Court passed a resolution in connection with an inquiry of the Commissioner concerning the grounds for parole. According to the Supreme Court, the criteria specified in the Criminal Code are the grounds for parole, whereas the general guidelines for determining the length of prison terms are not. The Supreme Court stated that it is difficult to accept, as some courts do, that, in ruling whether or not to grant a parole, a penitentiary court should cite the circumstances that have already been taken into account when determining the length of the prison sentence.

## **E. Right to damages for unlawful deprivation of liberty**

The Commissioner requested the Minister of Justice to undertake a legislative initiative aimed at specifying more precisely the provisions governing compensation for unlawful conviction, arrest or detention. The Commissioner argued that although the ruling on compensation for unlawful detention is made on the basis of the Code of Criminal Procedure, it is, in its essence, a civil procedure ruling, and the date from which the claimant is entitled to interest on the sum of compensation is determined on the basis of the date of enforceability of the claim. In the Commissioner's view, the date of submission of the compensation claim to the court would be appropriate.

## **F. Nullum crimen sine lege**

The Commissioner declared his participation in the Constitutional Tribunal proceedings concerning compliance with the Constitution of a provision of the Construction Law and he submitted his opinion that the provision in question, insofar as it penalizes the use of a building in a way that is noncompliant with the law, without specifying the legislation the breach of which the legislator associates with criminal liability, is against the principle of citizens' trust for the state and its laws, as well as the principle of unambiguity and specificity of the law because it is not possible to establish in an unambiguous and comprehensive way

what laws are referred to in the cited provision. Consequently, the questioned provision is inconsistent with the fundamental principles of the criminal law, and in particular with the principle of specificity and therefore undermines the foundations of the rule of law. The case is pending consideration by the Constitutional Tribunal.

The Commissioner joined the proceedings before the Constitutional Tribunal concerning the possibility of punishing twice one and the same person for one and the same act, by referring to criminal responsibility under the Criminal Code on the one hand and to fines provided for in the Act on Road Transport on the other hand. The Tribunal ruled that the provisions of those acts, insofar as they permit one and the same person to be punished for the same act both under the Criminal Code and by a fine, are inconsistent with the *ne bis in idem* principle and with the principle of proportional response of the state to violations of the law since such double punishment is excessively repressive, which is inconsistent with the principles of a democracy based on the rule of law.

In his intervention with the Minister of Justice, the Commissioner pointed to the need to revise some provisions of the Minor Offences Code, particularly those concerning offences against property, the penalization of which seems unjustified in the present social and economic circumstances. This refers, among others, to begging, the treatment of which as a criminal act raises concerns and should be preceded by an attempt to solve the problem through other legal mechanisms. Moreover, the features of begging as an offence are extremely vague, which makes it impossible to precisely and comprehensively assess a specific deed in the light of the Criminal Code. The penalization of begging is an interference with individual rights and freedoms which is out of proportion to the weight of the act. The effectiveness of such an approach in terms of meeting its objectives, which are to prevent people from avoiding work or to ensure public peace and order, is also doubtful.

## **G. Right of defence**

The Commissioner highlighted the need to undertake a legislative initiative to guarantee that every person detained by the police or other authorised services has the right to contact a lawyer immediately upon detention. The ban on torture stemming from the Constitution and from international human rights law, is an absolute ban and cannot be abolished. Poland is obliged to effectively punish the perpetrators of any incidents of torture, as well as to take preventive measures so as to eliminate the risk of torture in the future. Yet, incidents of officers using torture against detainees and witnesses continue to take place in Poland because the existing preventive mechanisms do not work. This is why the Commissioner stressed the great need to change the existing model of legal aid provided to detainees. Before any procedures are launched, the detainee should be offered a face to face meeting with a lawyer, who will explain to him/her the situation and will inform him/her, in a clear manner, about the rights, obligations and procedural options, as well as the consequences of the statements given by the detainee. The lawyer should also be able to assess the physical and mental condition of the detainee and to provide him/her with mental support. If the lawyer learns about improper treatment of the detainee by the officers, he/she will be in a position to take

appropriate measures. The detainee should also be able to meet the lawyer in private, without the presence of any third persons, as well as to talk to the lawyer on a secure phone. Due to lack of response of the Minister of Justice, the Commissioner raised the issue in letter to the Prime Minister.

In his intervention with the Minister of Justice, the Commissioner requested that the necessary legislative measures be taken to regulate, in compliance with the Constitution, the issue of limiting the circle of people whom a person who has been temporarily detained can, upon consent from the authority in whose custody the detainee is kept, contact by phone. The existing rules and regulations on pre-trial arrest procedures are non-compliant in this respect with the Code of Criminal Procedure. According to the said rules and regulations, the authority in whose custody the detainee is kept issues permission for the temporarily detained person to use a phone in particularly justified cases in order to contact his/her close relative. Yet, the provisions of the Code of Criminal Procedure do not limit the circle of people the temporarily detained person may contact by phone. The Minister informed the Commissioner that his suggestions would be referred for consideration to the Chair of the Team for Drafting Amendments to the Code of Criminal Procedure.

In his letter to the Head of the Prison Service, the Commissioner appealed for respect to the detainees' right of defence in all places of detention. According to the Commissioner, in the light of existing legislation, it is not correct to assume that if a detainee has talked with a family member or an office on a particular day, he/she is no longer entitled to talk with his/her lawyer on phone on the same day, because these are separate rights which are not mutually exclusive. The Head of the Prison Service expressed the view that the procedures followed by the administration of prisons and pre-trial detention centres do not infringe the prisoner's rights. Therefore, the Commissioner turned to the Minister of Justice to take necessary legislative measures to ensure that the detainees' right to talk to their lawyers or representatives is fully respected. The Minister replied that the suggestions of the Commissioner would be referred to the Chair of the Team for Drafting Amendments to the Code of Criminal Procedure.

In 2017, the Commissioner dealt with the issue of transposition of the Directive of the European Parliament and of the Council on the right of access to a lawyer, and with the issue of practical enforcement of the detainees' right to contact a lawyer or legal counsel prior to the first interrogation. In his interventions with the Minister of Justice and the Commander-in-Chief of the Police, the Commissioner pointed out that the provisions of the Directive had not been implemented although the deadline had already passed. The detainees' right to contact their lawyer or legal counsel prior to the first questioning is not always respected. The Commissioner receives reports that law enforcement officers discourage detainees from exercising that right. Moreover, the requirement of confidentiality of meetings with lawyers or legal counsels is not satisfied since law enforcement officers reserve the right to be present during such conversations. Detainees are often denied the right to talk on the phone with their lawyers or legal counsels. Contrary to the requirements of the Directive, it is not possible to file a complaint against a decision denying the right of access to a lawyer, and the law does not specify any sanctions for unjustified denial. Finally, persons arrested on the basis of a European arrest warrant are not being informed about the right to a lawyer in the state

which has issued the warrant. The Commissioner requested the Minister to consider taking appropriate legislative measures.

The Commissioner also investigated the issue of refusal of access to a lawyer or representative during questioning carried out abroad by a consul of the Republic of Poland. In his intervention with the Minister of Foreign Affairs, the Commissioner pointed out that there are no grounds allowing a consul of the Republic of Poland to deny a lawyer the right to be present during questioning or to fail to notify the lawyer of the date of such questioning. Such practices constitute an infringement of the right of defence. The Commissioner requested the Minister to issue appropriate guidelines for consuls. The Minister argued that during such questioning, the consul only reads out the questions attached to the request for questioning sent by the relevant authority and that the procedural regulations do not equip the consul with the attributes of a court, of an authority conducting the proceedings or even of a summoned court or authority. According to the Minister, in view of the existing regulations, it is not possible to admit the presence of the party's lawyer or representative during questioning carried out abroad by a consul of the Republic of Poland.

The Commissioner remains interested in the issue of refusal to grant the suspect access to the case files during the pre-trial proceedings and refusal to grant the suspect access to the evidence which has led to pre-trial detention. It is necessary to introduce court control of decisions to refuse access to case files, taken by public prosecutors and other authorities conducting pre-trial proceedings, to introduce a register of applications for access to case files and a register of refusals, to grant sufficient time to study the case files prior to pre-trial detention hearing, to oblige the prosecutor to inform the suspect and his/her lawyer of the intention to submit, or submission, of an application for prolonged pre-trial detention, and to provide the suspect and his/her lawyer with a copy of the application. Moreover, according to existing regulations, evidence given by witnesses may be forwarded to the court, and not to the suspect and his/her lawyer, which makes it difficult to challenge the legitimacy of prolonged pre-trial detention and makes proper defence impossible. The Commissioner appealed to the Minister of Justice for appropriate legislative changes.

## **H. Right to court**

### **1. Reforms of the system of justice**

In 2017, the Commissioner monitored the legislative process concerning reforms of the judiciary, including amendments of the Act on the National Council of the Judiciary, of the Act on the Supreme Court and of the Act on the System of Common Courts. The Commissioner expressed his doubts as to the compliance of the proposed legislation with the Constitution. Among others, he pointed out that the changes violate the principle of separation of powers and of independence of the judiciary. A judiciary dependent on political factors is not able to effectively defend the individual. Moreover, the changes will undermine the trust in the Polish judiciary as a component of the EU judiciary. On 8 December, the Act on the Supreme Court was passed. In accordance with that Act, some of the current judges of the

Supreme Court will be forced to retire. The President of the Republic of Poland will be free to decide whether or not to prolong the stay in office of these judges if they file a request to stay, and all new judges of the Supreme Court will be appointed by the President of the Republic of Poland upon request of the National Council of the Judiciary, whose members will be selected not by judges themselves, but by politicians. This is what the adopted amendment to the Act on the National Council of the Judiciary states. This means that the independence of Poland's supreme judiciary body will be undermined. Taking into account the broad competencies of the Supreme Court, this may result in rulings on issues of great importance for citizens without any guarantee of the Court's independence from political factors. Despite numerous interventions of the Commissioner, who stressed that the entry into force of the proposed reforms threaten citizens' right to court, the amendments of the Act on the System of Common Courts entered into force on 12 August 2017, and on 20 December 2017, the President of the Republic of Poland signed the Act of the National Council of the Judiciary and the Act on the Supreme Court.

## 2. Free legal aid, role of lawyers and legal counsels, costs

The Constitutional Tribunal examined the application of the Commissioner concerning the act of exceeding by the Minister of Justice of his statutory mandate when regulating fee rates for services of legal counsels and lawyers in civil proceedings. In issuing the regulations on the basis of the cited statutory mandate, the Minister of Justice was to determine the minimum fees for services of lawyers and legal counsels, taking into account the type and intricacy of the case and the required work input. Therefore, in determining the minimum fees, the Minister was obliged to take into account the type and intricacy of the case and the required work input. In the Commissioner's opinion, the regulations failed short of meeting these statutory requirements. Unfortunately, the Constitutional Tribunal did not agree with the Commissioner's standpoint. According to the Tribunal's ruling, the fee of PLN 60 for the services of a legal counsel in labour law cases does not infringe the right to court.

The Commissioner joined the proceedings before the Constitutional Tribunal concerning a constitutional appeal referring to the determination of experts' fees and bulk tariffs and to the way of documenting expenditures related to the issuing of expert opinions in criminal proceedings. The Commissioner drew attention to inequalities between permanent court experts and *ad hoc* experts. The latter are *a priori* deprived of certain options for increasing their remuneration. According to the Commissioner, the right to remuneration for preparing an expert opinion is a property right protected by the Constitution because the expert presents his/her opinion in the criminal proceedings as part of his/her professional activity. In principle, an expert cannot refuse to give his/her opinion if he/she has been appointed by an authority of the justice system and cannot negotiate the fee. Disproportionately low fees for the services of experts who have been appointed by the justice system may lead to their unfair treatment as compared with their fellow experts who have not been appointed and may therefore continue to conduct their professional activity on market-based principles. The case is pending consideration by the Constitutional Tribunal.

The Commissioner requested the Minister of Justice to initiate changes in the Code of Procedure for Minor Offences so as to introduce a provision allowing to charge, in exceptional circumstances, the accused or the auxiliary prosecutor with the cost of the proceedings if the proceeding have been discontinued. Such a change would be consistent with a series of rulings of the Constitutional Tribunal spanning more than 10 years. The Minister replied that the Ministry is working on changes in criminal proceeding law, basing on the results of an assessment of the functioning of the regulations introduced by the latest major amendment, i.e. the Act amending the Code of Criminal Procedure and some Other Acts. That work also includes adjusting the rules of charging the costs of minor offence proceedings to those applicable in criminal proceedings, in line with the rulings of the Constitutional Tribunal.

### **3. Status of the aggrieved party, victims of crime**

The Commissioner remains interested in the issue of appointing guardians of minor victims in criminal proceedings, in which the minors' parents are the accused. The Constitutional Tribunal ruled that it is necessary to take legislative measures to remove existing irregularities in the representation of minors by guardians appointed by guardianship courts. According to the Commissioner, any unregulated issues should be governed by the Family and Guardianship Code. It would be advisable to charge the criminal court (rather than the family court) with the duty to appoint the guardian in criminal cases, thus allowing to shorten the proceedings and making it easier to calculate the guardian's remuneration. The criminal procedure should provide for the exclusion of the parent as a representative of the aggrieved minor in situations when the crime against the minor was committed by the other parent or by a person close to at least one of the minor's parents. The Minister of Justice, with whom the Commissioner intervened in this matter, replied that the Ministry had begun drafting amendments to the Family and Guardianship Code and to the Code of Civil Procedure.

The Commissioner drew attention to the need to strengthen the position of the aggrieved person in cases involving minors. The major concern is that the legislator has not granted the aggrieved person the rights of a party to the proceedings, which limits his/her rights to appeal and deprives the proceedings of the qualities of an adversarial procedure. Moreover, there are no regulations obliging the family court to inform the aggrieved person about his/her rights and obligations. Therefore, the Commissioner requested the Minister of Justice to consider initiating the appropriate legislative changes. The Minister replied that the Commissioner's letter was referred for further consideration to the Chair of the Team for analysing existing regulations concerning cases involving minors, adapting those regulations to existing standards and developing new legal solutions.

### **4. Participation in court hearings**

The Constitutional Tribunal has ruled in a case of a constitutional appeal, supported by the Commissioner, which concerned the denial of the right of the accused to participate in a court hearing concerning the prolongation of the accused's confinement in a closed mental

hospital. The Tribunal ruled that the challenged regulation, insofar as it does not provide for the personal participation of the perpetrator, confined in a closed mental hospital, in the hearing concerning the prolongation of that stay, is against the Constitution. The Commissioner requested the Minister of Justice to take the necessary legislative measures to implement the ruling.

The Code of Criminal Procedure provides for the participation of detainees in hearings of the Court of Appeal concerning granting them leave from prison. However, courts do not respect this right of the convicts. According to the Commissioner, the existing legislation leaves no doubt as to the duty of the court to rule to ensure the participation of the convict in the hearing if the convicts applies for it, regardless of the participation of the convict's lawyer. Therefore, the Commissioner requested the Minister of Justice to make the courts respect these regulations. The Minister referred the issue to the Team for Drafting the Amendments to the Provisions of the Code of Criminal Procedure.

In his intervention with the Minister of Justice, the Commissioner drew attention to situations in which a person subpoenaed by an authority of the justice system claims inability to appear due to illness of a person who is under charge of the subpoenaed person. At present, a court physician may issue a certificate on inability to appear only due to the illness of the subpoenaed person. However, there are some situations when the inability to appear is associated with the illness or accident of another person (in particular a minor) who is under the charge of the subpoenaed person. According to the Commissioner, participant of court proceedings are not adequately protected in such situations. They are forced to choose between attending to an ill person they are responsible for and appearing in court when failure to appear may have serious consequences for them, such as a fine or an unfavourable ruling. The Commissioner appealed for appropriate changes to the provisions of the Act on the Court Physician. So far, the Minister has not responded to the Commissioner's appeal.

In his intervention to the Minister of Justice, the Commissioner pointed out that new requirement that all letters related to the proceeding have to be collected in person has caused many difficulties for the participants of criminal proceedings. It is now against the law to collect such a letter through a postal proxy (only lawyers and legal counsels are entitled to do so). If the recipient does not collect the letter within 2 weeks, it is sent back to the sender deemed delivered. According to the Commissioner, there are convincing reasons for not allowing a registered letter to be collected by a properly authorized postal proxy. For the sake of protection of the rights of participants of court proceedings, if an addressee is unable to collect a letter from an authority, the letter must not be automatically deemed delivered, because this does not allow the addressee to read the letter and protect his/her rights effectively. Hence, it is advisable to broaden the options for collecting registered letters.

According to the Commissioner, the provisions of the Code of Criminal Procedure constitute a sort of legislative trap for the aggrieved person, as his/her position is worse than that of other parties of a trial without hearing. In accordance with existing legislation, the aggrieved person must be informed about the possibility of joining the court proceedings as an auxiliary prosecutor prior to the beginning of the main hearing; however, no regulations make it obligatory to inform the aggrieved person that the trial may take the form of a trial



without hearing, or even to inform the aggrieved person of the ruling in such a trial. For the aggrieved person who does not have a professional lawyer, that may amount to inability to defend his/her legitimate interests. This may be a case of non-compliance with the constitutional principle of procedural justice. Therefore the Commissioner requested the Minister of Justice to take appropriate legislative measures.

Moreover, the Commissioner requested the Minister of Justice to change the regulations concerning the nature of the deadline to apply for justification of a judgement delivered in an accelerated procedure. Usually, it can only be done verbally for the record, from the moment of announcement of the judgement to the closure of the hearing or session. The deadline for applying by the accused for a justification of the judgement delivered in an accelerated procedure is usually not a rigorous deadline, which makes the situation of the convict even worse because only such deadlines may be set anew. A person to whom a judgement is not delivered *ex officio* should have the right to apply for justification within 3 days from the date of the announcement of the judgement. This would allow time to make a more informed decision on whether or not to appeal, without unnecessarily prolonging the accelerated criminal procedure.

## **I. Right to protection of private and family life, honour and good name**

The Commissioner applied to the Constitutional Tribunal to rule unconstitutional the provisions of the National Revenue Administration Act, concerning secret operations conducted by officers of the Duty and Tax Service. The objections presented in the application are that secret operations that these provisions allow go too far in their interference in the rights to privacy and communication and that the legislator has failed to establish the necessary effective mechanisms of independent control. In particular, the Commissioner questioned the provisions according to which: the court which is to authorize such a secret operation receives only those materials that the Head of the NRA chooses to present to the court; a secret operation may be conducted for excessively long periods of up to 18 months; the authorities are not obliged to inform *a posteriori* the person who was the target of the secret operation, thus making it impossible to file a complaint against any irregularities that may have taken place in connection with the operation; legally protected information (e.g. information protected by legal professional privilege) may be used in an arbitrary fashion; the range of deeds which may result in the launching of a secret operation is excessively broad; no real *ex ante* court control of the operations exists. The application is pending consideration by the Constitutional Tribunal.

In 2017, the Commissioner took measures in connection with the transposition into Polish law of EU regulations aimed at reforming the personal data protection system (Regulation EU 2016/679 and Directive 2016/680). In his letters to the Minister of Digital Affairs, the CHR pointed to the need to ensure that the future personal data protection authority is independent, as the uncertainty regarding the future of that authority and its bureau may have consequences that will limit its independence. In response, the Minister of Digital Affairs

assured the CHR that the Chair of the Personal Data Protection Office, who will be the legal successor of the General Personal Data Protection Inspector, will be an independent body.

The Commissioner turned to the Minister of Internal Affairs and Administration with a request to provide information on the progress on the drafting of the act transposing Directive 2016/680. The Minister replied that appropriate legislative solutions would be ready within deadlines prescribed by EU legislation in this regard and that work on the transposition of the said Directive is aimed at developing optimal solutions that will, on the one hand, ensure coherence with the draft Personal Data Protection Act and the associated implementing legislation, prepared by the Ministry of Digital Affairs and, on the other hand, ensure that Polish regulations are adjusted according to the requirements of Directive 2016/680.

As the issue of visual monitoring still has not been properly regulated and there is no comprehensive legislation in this matter, the Commissioner inquired the Minister of Health about visual monitoring in health service facilities. The main focus of the complaints the Commissioner receives is the lack of a unified approach to the issue among entities wishing to install visual monitoring systems in order to improve the security of patients and medical personnel and to ensure order and better protection of people and property. The Minister of Health replied that according to existing regulations personal data processing (including monitoring patients) is permissible if the purpose is health protection, provision of medical services and treatment of patients by medical professionals. The monitoring of patients for other purposes, such as patient and staff security, ensuring order or protecting people and property, is against the law. The issue is still being analysed by the Office of the CHR.

In 2017, the Commissioner took measures in connection with the judgement of the Court of Justice of the European Union of December 2016 (the so-called Tele2 case). In his letters to the Minister of Foreign Affairs and the Minister of Digital Affairs, the Commissioner pointed to the need to take steps to amend the Telecommunications Law and acts which regulate the access of law enforcement and security services to data. The problem lies in the need to establish an appropriate legal framework for accessing data. In the opinion of the Ministry of Digital Affairs, existing regulations within the Ministry's area of competence do not require any amendments in this respect. The Minister of Justice assured the Commissioner that compliance of Polish law with EU law, including the judgements of the CJEU, is being monitored on a continuous basis.

The Act on Prevention of Domestic Violence has extended the list of probation measures provided for in the Criminal Code to include an obligation to participate in a corrective educational programme. This measure may be imposed by the court both in a criminal proceeding and as part of proceedings related to the execution of punishment. The number of cases in which criminal courts impose such an obligation remains low. Measures must be intensified to increase the number of requests to courts to impose an obligation to participate in a corrective education programme on the perpetrators of domestic violence crimes, as well as the number of court rulings that impose such an obligation. The Commissioner requested the Minister of Justice to take appropriate steps in this regard. The Minister replied he fully supports all measures leading to the effective implementation of the Act on Prevention of Domestic Violence. In another letter, the Commissioner pointed to the

need to modify existing legislation so that, as a rule, all perpetrators of domestic violence are made to participate in corrective education programmes. The courts should be obliged to impose the obligation to participate in such programmes on perpetrators on probation. Similar solutions should be adopted with regard to perpetrators whose prison sentences have not been suspended.

The Commissioner joined the proceedings before the Constitutional Tribunal concerning a legal question posed by a court with regard to the admissibility of filing a complaint against the exhumation of a body. The Commissioner appealed to the Tribunal to rule that regulations which make it impossible to file such a complaint are against the Constitution and international agreements binding on Poland. They violate both the right of the deceased's family to privacy and the general right to a fair trial and to appeal. Although certain exceptions to these rights are admissible, such exceptions cannot violate other constitutional norms or undermine the general principle itself. They must also be justifiable in the context of a democracy based on the rule of law. The objective is the protection of the individual against an arbitrary intervention of state authorities. In the Commissioner's view, the exhumation of bodies and human remains on the orders of a prosecutor is an overbearing interference in legally protected personal rights – in this case, the right to honour the dead. This means that the family of the deceased must be entitled to legal measures allowing to determine whether the prosecutor's interference in their personal rights was excessive or not. The case is pending consideration by the Tribunal.

## **J. Right to information autonomy**

The Commissioner requested the Supreme Administrative Court to give a ruling concerning the discrepancies in the rulings of administrative courts with regard to protection of personal data of persons who have abandoned, or wish to abandon, their church or other religious community. Both the Inspector General for the Protection of Personal Data and the Commissioner have for years been receiving complaints concerning the protection of personal data of such people. The contentious issue that causes discrepancies in the case law of administrative courts is on the basis of what evidence should the personal data protection authority determine whether or not the given person belongs to a particular church or religious community. The question is pending consideration by the Supreme Administrative Court.

In his letter to the Minister of Justice, the Commissioner requested that measures be taken to eliminate the differences in the way the physician-patient privilege is treated in criminal proceedings in comparison with other professional privileges (e.g. concerning lawyers, notaries or journalists). In the opinion of the Commissioner, there are no axiological reasons justifying a lesser degree of protection of the professional secrets of physicians in comparison with those of lawyers, notaries or journalists. This disparity in the level of protection is not commendable. The Commissioner's view is that decisions in this matter should be left to the discretion of the court. The lack of sufficient protection of the physician-patient privilege and the resulting excessively easy access of various authorities and institutions to private information concerning health and medical treatment may undermine the trust that is the

foundation of physician-patient relations. Moreover, the disclosure of medical secrets by a physician may expose him/her to professional, civil or even criminal liability.

## **K. Freedom to move within the territory of the Republic of Poland**

In his letter to the Chair of the Senate's Committee for Human Rights, Rule of Law and Petitions, the Commissioner wrote about the discontent of veteran communities caused by changes in the rules for granting parking cards. The new rules have stripped many veterans of the right to a parking card. Despite mobility problems, these people can no longer enjoy the benefits of having a parking card. According to the Constitution, the state has a duty to provide special care to veterans who fought for independence, and particularly to veterans with disabilities. The Senate's Committee heeded the Commissioner's appeal and began work on appropriate legislation.

The Commissioner turned to the Constitutional Tribunal to consider the issue of cars towed from streets and kept on guarded parking lots until the owner pays for the towing and parking and presents proof of payment. The Commissioner stressed that, according to the Constitution, the right to property can only be limited through an act of parliament and only insofar as such an act does not undermine the essence of the right to property. The case is pending consideration by the Tribunal.

The Commissioner joined the proceedings before the Supreme Administrative Court, aimed at determining whether Public Roads Act fees for parking cars on public roads in paid parking zones can be collected only for parking in designated places or also for parking in non-designated places. The Commissioner presented the view that fees may only be collected for parking in designated places. The Supreme Administrative Court agreed with the Commissioner and ruled accordingly.

## **L. Freedom of conscience and religion**

The Commissioner was concerned about the practical implementation of those provisions of the Regulation of the Minister of National Education on the Conditions and Methods of Teaching Religion in Public Schools that concern the conducting of Great Lent spiritual retreats. In his letter to the Minister of National Education, the Commissioner pointed out that this matter should be regulated by an act of parliament. In the Commissioner's opinion, it would be advisable to adopt generally binding regulations on the principles of organizing religious ceremonies of any sort in schools. The Minister disagreed with these suggestions and stated that it would be impossible to standardize practices in this area throughout the country. However, following the Commissioner's letter, the cited regulation was amended. As a result of these amendments, students will be entitled to leave from school not only during the Great Lent, but also at other times, which opens the way, among others, for conducting Advent spiritual retreats. Moreover, students will be able to take leave not just when participating in the retreat is obligatory for the church members, but also when it is a non-obligatory practice

of the church in question. A provision was also added, according to which schools are not relieved from their chaperoning duties during retreats.

The Commissioner appealed to the Chair of the National Health Fund and the Minister of Health to take legislative action in response to pharmacists who invoke the conscience clause and refuse to supply certain medications. In the Commissioner's opinion, such practices are against the existing law and may result in infringement of the patients' right to medical care. The Chair of the National Health Fund and the Minister of Health disagreed with the Commissioner. In their assessment, the pharmacists' right to invoking the conscience clause stems directly from the provisions of the Constitution. In the Commissioner's assessment, this standpoint completely ignores the fact that the Constitution guarantees not only freedom of conscience but also the right to health protection.

## **M. Freedom of speech**

The Commissioner pays special attention to the standards of freedom of speech in Poland. In his activities in 2017 the Commissioner expressed reservations about the fact that Polish law, and article 212 of the Criminal Code in particular, has retained provisions, according to which defamation is a criminal offence. In the Commissioner's opinion, practical application of this regulation may have a negative impact on freedom of speech, particularly by limiting the freedom of journalists to do their job. The Commissioner believes it would be advisable to limit the application of this provision and resort instead to civil liability for violating personal rights. The Commissioner presented his standpoint to the Minister of Justice, the Senate's Committee for Human Rights, Rule of Law and Petitions and to the Office of the President of the Republic of Poland. Unfortunately, the Commissioner has not received any answers to his letters.

In his letter to the Minister of Culture and National Heritage, the Commissioner requested that steps be taken to amend the Radio and Television Act and the Act on National Media according to the instructions of the Constitutional Tribunal of 13 December 2016. The ruling of the Constitutional Tribunal may lead to the conclusion that some of the provisions of the Act on National Media violate the Constitution, especially those that amend the Radio and Television Act. According to the instructions of the Constitutional Tribunal, the legislator is obliged to implement such legal mechanisms as are necessary to ensure that the National Radio and Television Council effectively fulfils its constitutional duties. To date, the Minister has not replied to the Commissioner's request.

## **N. Right to asylum and refugee status**

The Commissioner has been monitoring the development by the Ministry of Internal Affairs and Administration of the new migration policy which is to replace the document entitled "Poland's Migration Policy", repealed by the Council of Ministers in 2016. It is difficult to say, at this stage, what will be the final shape of the new strategy. It will doubtless have to respect the existing guarantees of rights and freedoms to which foreigners arriving and staying in Poland are entitled to. According to the explanations of the Ministry, work on the new

migration policy is one of the priorities for 2018 and will be interdisciplinary in its character.

In 2017, the Commissioner received reports of large numbers of foreigners who unsuccessfully tried to enter the territory of Poland through border crossings in Terespol (Belarusian border) and Medyka (Ukrainian border) with the intention to file an application for international protection (refugee status) in Poland. Following a statement of intent to seek such protection, the Border Guard should allow the foreigner entry to Poland and receive the application for protection. However, according to complaints received by the Commissioner, in many cases Border Guard officers refused to accept such statements from foreigners and prevented them from filing applications for protection. In effect, since the foreigners had no documents allowing them to enter Poland, they were refused entry by administrative decision and turned back to Belarus or Ukraine. In his letter to the Commander in Chief of the Border Guard, the Commissioner requested the Commander in Chief to consider taking steps to ensure uniformity of the practices of the units under his command by, e.g. issuing appropriate guidelines.

The Commissioner noticed a gap in the regulations on the duties of Border Guard officers concerning the receipt from foreigners of statements of intent to apply for international protection. No existing regulation specifies how Border Guard officers should document border checks, including cases when during a border check a foreigner expresses intent to seek protection in Poland. In the Commissioner's assessment, the procedure followed by officers must be regulated in order to render substance to the right of foreigners to file for international protection. First and foremost, interviews with foreigners during border checks should, as a rule, be documented using uniform interview forms that include, as an obligatory item, the question whether the foreigner intends to seek international protection in Poland. Neither the Commander in Chief of the Border Guard nor the Minister of Internal Affairs and Administration, to whom the Commissioner appealed, agreed with the Commissioner's standpoint.

A new chapter of the crisis on Poland's eastern border began when the Commissioner started receiving reports of cases of decisions refusing entry into Poland to foreigners with regard to whom the European Court for Human Rights or the UN Human Rights Committee had made recommendations, preceded by the foreigners' complaints, to implement interim measures consisting in temporary postponement of deportation from Poland. In the reported cases, foreigners with regard to whom interim measures had been recommended, turned up for border control and the Border Guard denied them entry into Poland despite being aware of the nature of the recommended interim measures. In the Commissioner's opinion, the fact that interim measures have been recommended with regard to a foreigner is enough to grant him/her entry into Poland, even if he/she does not meet any other conditions for entering and staying in Poland.

The Commissioner joined the proceedings before the Voivodeship Administrative Court in a case involving a complaint against the decision of the Council for Refugees which upheld the decision of the Head of the Office for Foreigners to deny a foreigner refugee status and to deny him/her supplementary protection. The reason for the Commissioner's intervention was that the representative of the foreigner in the administrative proceeding had no access to confidential information that had been gathered in the case and that provided

the grounds for the decisions that were unfavourable for the foreigner. Both the Head of the Office for Foreigners and the Council for Refugees refused to provide factual justification of their decisions. The Commissioner acknowledged that national legislation, including the Administrative Proceedings Code and the Act on Protection of Foreigners on the Territory of the Republic of Poland, applicable in this case, do provide for refusal of access to confidential case files and for refusal to provide factual justification of an administrative decision insofar as it concerns confidential information. However, in the Commissioner's opinion, national legislation is at odds with the provisions of Directive 2013/32, according to which access of a foreigner's representative to the case files may be limited only if the given Member State has implemented procedural guarantees that alleviate the consequences of such limitation, and according to which a Member State which has rejected an application is obliged to provide factual and legal justification of the rejection. The fact that the authorities in the cited case have applied national legislation despite its inconsistency with EU law has resulted in violation of article 47 of the Charter of Fundamental Rights of the European Union which guarantees the right to an effective appeal. Since the Voivodeship Administrative Court dismissed the complaint, the Commissioner filed an appeal to the Supreme Administrative Court.

# Political rights and freedoms

## A. Freedom of assembly

What raises significant concerns is the legislator's priority treatment of regular assemblies, which ultimately led to the ban on the organization of other assemblies at the same time and place. Such a ban results in granting absolute protection to regular assembly participants and simultaneous violation of the freedom of assembly of all other individuals. In this case, namely, what is taken into consideration is the fact that a regular assembly is held at exactly the same time and venue as the prohibited assembly. Yet, the body issuing the ban fails to evaluate the issue of security. According to the Commissioner, the law in such a shape is in breach of the constitutional freedom of assembly (even though a different opinion in that regard was expressed by the Constitutional Tribunal in the judgement of 16 March 2017) and additionally, it constitutes a constant source of social protests.

In 2017 the Commissioner made a number of interventions in cases concerning specific assemblies. The interventions in question were addressed both to competent police commanders as well as the Commander-in-Chief. The Commissioner drew attention to the actions of the Police taken against peaceful manifestation participants across the whole country and indicated problems associated with the interpretation by the Police of the provisions concerning public assemblies. The Police use measures targeted at assembly participants which are not always justified (handcuffs, removing individuals from assemblies, excessive checking of ID documents). Moreover, access to particular parts of cities is limited. This situation, in the view of the Commissioner, leads to the so called "chilling effect" and makes citizens wary about using their freedom of assembly. Therefore, the Commissioner reminds competent bodies about the basic obligations of public authorities related to the need to secure a peaceful course of gatherings and take actions only if a significant risk of compromising security and public order occurs. According to the Commissioner, the rights of individuals participating in such assemblies or in the so called "counter-demonstrations" are often violated and legal provisions concerning assemblies are applied in defiance of European standards. In response, the Commander-in-Chief of the Police explained that the role of the Police was limited in discussed cases to the performance of tasks specified in the act on the Police and provision of support to other entities that, pursuant to other legal regulations, could request such assistance from the Police.

## B. Right to equal access to public service

In a number of acts, the legislator questioned the constitutional, substantive right of citizens to the access to public service on equal terms. The legislator decided to terminate employment relationships with persons on higher positions in civil service. The decisions about termination were made at the sole discretion of the heads of particular offices. Similar solutions were adopted in relation to the employees of the Office of the Constitutional Tribunal,



Customs officers and employees of the Agricultural Property Agency and Agricultural Market Agency. In all those cases the legislator abandoned the constitutional duty to establish the guarantee for the protection of an employee. The employer, not limited by any merit-related criteria, can freely determine the fate of employees. Individual acts do not comprise objective criteria for the selection of persons for further performance of public service. They also fail to secure equal opportunities and the possibility to avoid discrimination.

### **C. Right to access public information**

The tendency to groundlessly restrict citizens' access to public information still prevails. Therefore, the Commissioner declares his participation in judicial and administrative proceedings concerning the refusal to make such information available. Furthermore, the Commissioner presented remarks to the draft act on the transparency of public life in which he observed that some foreseen solutions may restrict the access to public information and may constitute a step back from the existing legal order. Commissioner's concerns related, among other things, to fees for making public information available or the possibility to refuse access to public information due to persistent submission of requests. Those remarks were considered in the course of work on the draft act conducted so far.

### **D. Voting rights**

In 2017 the Commissioner continued his work on guaranteeing voting rights. Having considered concerns of citizens, opinions expressed at conferences and seminars as well as own analyses, the Commissioner prepared a number of interventions concerning the protection of voting rights. In his intervention to the President of the State Electoral Commission the Commissioner highlighted the problem of the need to ensure the secrecy of voting in the polling station as well as the issue of disposing of the ballot paper by the voter. The President of the State Electoral Commission shared the view of the Commissioner that it is essential to effectively inform voters about the possibility of casting ballot papers in envelopes. This possibility may gain in even more importance now, as in local elections in 2018 transparent ballot boxes will be used for the first time all across Poland.

In his interventions to the Minister of the Interior and Administration the Commissioner signalled the need to introduce changes to provisions regulating the participation in elections of voters without a residence address. The Minister of the Interior and Administration informed that details of the amendment are currently being worked on. The legislative process leading to implementing changes will be initiated as soon as that work is concluded.

The Commissioner also declared his participation in the proceedings before the Constitutional Tribunal in the case concerning the need to reject political party's financial statement by the State Electoral Commission when funds are accumulated or expenses made for electoral campaigns with the omission of the Election Fund, irrespective of the circumstances, causes and the severity of the breach of provisions concerning the financing of electoral campaigns and the value of resources gathered or spent in violation of those provisions. The State Electoral Commission is obliged to accept or reject the statement without assessing the

nature and scale of violations. It should only confirm the occurrence of circumstances leading to the acceptance or rejection of the statement. In case of establishing the occurrence of premises leading to the rejection of the statement, the consequences of such a rejection shall be the same, irrespective of the scale of breach or the intentional or unintentional nature of actions of the person who committed the breach. According to the Commissioner, this “automatic” nature of financial statements’ rejection raises justified concerns. The case is awaiting examination before the Tribunal.

Actions were also taken to regulate the phenomenon of the so called “pre-election campaign”. The Commissioner put a spotlight on the lack of an effective regulation concerning campaigning activities conducted by various entities prior to the commencement of an election campaign and going beyond such a campaign. As a result, the Commissioner requested the President of the Human Rights, Rule of Law and Petitions Committee at the Sejm of the Republic of Poland to make relevant changes in the electoral law. Unfortunately, there has been no response to that intervention yet.

The Commissioner also continued his involvement in the case of the so called “national election observers”. In an intervention to the President of the Legislation Committee at the Senate of the Republic of Poland he outlined the problem of the lack of relevant regulations in that regard in the Polish electoral law. The institution of the national election observers has been included in the draft on amending certain acts in order to increase the participation of citizens in the process of selection as well as the operation and control of some public bodies. The Commissioner presented his remarks and suggested improvements in the opinion on the draft that was presented to the Speaker of the Sejm of the Republic of Poland. He emphasized, inter alia, that pursuant to the draft, only associations have been authorized to propose candidates for the role of such observers. It seemed necessary, therefore, to consider expanding the group of authorized entities. Commissioner’s remarks were taken into account in the course of legislative work and the group of organizations entitled to propose social observers was enlarged.

Very serious changes to the electoral law were provided for in the draft on amending some acts for the purpose of increasing the participation of citizens in the process of selection as well as operation and control of certain public bodies (parliamentary paper No. 2001). The Commissioner prepared his opinion in the course of legislative work, in which he considered proposed amendments unjustified. Moreover, in his view, they posed a threat to the proper execution of electoral rights by citizens. What was evaluated particularly negatively were proposed changes to the structure of electoral bodies and administration. The Commissioner also pointed out negative aspects of changes concerning, inter alia, indicating voter’s preferences as well as the financing of election campaigns. Moreover, he indicated the need to consider threats associated with broadcasting from polling stations, so that the new solution is not in breach of the principle of voting secrecy, protection of privacy or image. The Commissioner consistently argued for retaining the procedure of voting by correspondence. Numerous suggestions presented by the Commissioner were taken into account. Unfortunately, major remarks concerning, among other things, the structure of electoral bodies, indicating preferences, the principles of financing election campaigns failed to win significant support.

# Economic, social and cultural rights and freedoms

## A. Right to property

In 2017 the Commissioner still needed to intervene with regard to provisions that in various ways restrict, due to public interest, the rights of owners to use their property as well as with regard to the scope of compensation granted for that reason and the way such compensation is pursued. The Commissioner appealed to the Constitutional Tribunal against the provision which provides real estate owners with a short period of only 2 years to present claims related to the limitation of property rights due to environmental protection requirements. He voiced concerns with regard to very short periods within which the owner of a property could pursue claims for compensation resulting from work conducted on the premises aimed at determining whether a given plot is suitable for nuclear plant construction. The motion of the Commissioner was acknowledged by the Constitutional Tribunal in 2018.

In an intervention addressed to the Minister of Culture and National Heritage, the Commissioner once again brought up the problem of limitations imposed on property rights, stemming from the entry of a given property to the municipal register of monuments. In response to that intervention, the Minister informed that he appointed a team responsible for developing a bill to regulate the issue of monument protection. The task of the team was, among other things, to review and evaluate the provisions of the existing act on the protection and conservation of monuments and prepare a new one in that regard.

The Commissioner also continued his activities aimed at strengthening the protection of rights of real estate owners that were limited due to prescription by an industrial company, the so called utility easement. The Commissioner declared his participation in proceedings before the Constitutional Tribunal aimed at resolving the legal question posed by the District Court in Poznań concerning the acquisition, by prescription, of land easement, that is an equivalent of utility easement, by the State Treasury or an industrial entrepreneur if no administrative decision was passed to restrict the right of the owner to a given land. The case is now pending consideration by the Constitutional Tribunal.

In an intervention addressed to the Minister of the Environment the Commissioner highlighted the problems of owners of land classified as forest plots. The property law is in this case significantly compromised due to the obligation to conduct proper forestry management, comply with the environment protection requirements and observe the development ban. Yet, because of complicated historical and legal circumstances that group of owners cannot make any claims (compensation for limitations imposed on their property in public interest). Unfortunately, the Minister failed to take a stance on legislative actions proposed in that regard by the Commissioner.

With respect to expropriation for public purposes as well as returning of real estate which proved useless for those purposes, what seems noteworthy is the decision of the Constitu-

tional Tribunal which, in line with the stance of the Commissioner, determined the unconstitutionality of the provisions of the act on real estate management. The solutions applied until that point made it impossible for the previous owner or his legal successors to have the property returned if it was acquired for public purposes pursuant to a civil-law agreement concluded in the course of pre-expropriation negotiations and that property proved to be useless for the public purpose for which it was acquired. The protection of the expropriated was, therefore, ultimately strengthened.

What required Commissioner's involvement was the problem of reprivatization, which still remains unsolved by the legislator. The Commissioner continued the correspondence with the Council of Ministers, which began already in previous years and concerned the need to ultimately resolve emerging problems by means of an act. In response to Commissioner's appeal, the Chairman of the Permanent Committee of the Council of Ministers explained that creating one act for solving the problems stemming from normative acts serving various purposes and subject to execution by various bodies and according to various procedures is a complicated task requiring consideration of numerous values protected by law. He also indicated that the Sejm passed an act on special principles for removing legal consequences of property restitution decisions affecting Warsaw real estate which were taken in breach of legal provisions. That act, among other things, created a special committee vested with the task of evaluating reprivatization decisions and removing their legal consequences.

The Commissioner also intervened in the case of the so called Verification Commission on Warsaw land nationalization pursuant to the so called Bierut Decree. At the stage of legislative work he indicated his reservations concerning particular solutions applied in the draft act and after its adoption he requested the President of the Commission to explain the practice of applying a number of general or unclear provisions of that act by that body. The Commissioner believes that in the current shape such provisions entail a risk of authorities taking arbitrary decisions. The Commissioner also pointed out that the Commission needs to observe standards concerning hearing of persons summoned by bodies of this type that have been established in constitutional case-law. In response, the Minister of Justice stated that so far no complaints and motions have been submitted by the participants of proceedings to the President of the Commission (or possibly to the Minister of Justice) that would pertain directly to the way the Commission operates.

Once again the Commissioner took actions in relation to the non-performed judgement of the Constitutional Tribunal which determined the unconstitutionality of the provision of the Code of Administrative Procedure (Article 156 (2)) in the scope in which it allows for the determination of invalidity of the decision passed in clear breach of legal regulations when significant period of time has passed since the issuance of the decision and the decision constituted basis for the acquisition of a right or expectancy right. Despite numerous announcement of the Ministry of the Interior and Administration concerning plans to develop a concept for changing the Code of Administrative Procedure, the problem remains unsolved. This leads to uncertainty among transaction participants who do not know whether in a given case it is admissible to determine the invalidity of a particular decision, e.g. if it was passed a dozen or so years ago. Such a situation results in compromised legal safety of persons who

have already established their material and personal relationships based on administrative decisions from many years back - even if they were defective. Those circumstances - the security of transactions and the protection of citizens' trust towards the state and the law it lays down - made the Tribunal indicate that the challenged provision may infringe on citizens' rights who may not be certain whether a given state of affairs that was shaped by past decisions is definitive and final or whether it may still be questioned.

After numerous years of efforts taken by the Commissioner in contacts with the Constitutional Tribunal, the Supreme Administrative Court as well as consecutive Ministers of the Interior and Administration, the judicial control of rulings passed by church regulatory (reprivatisation) commissions was permitted. Even though the Supreme Administrative Court, due to formal reasons, failed to adopt a resolution to clarify such a significant legal issue, in an individual case in which the Commissioner was involved, the Court acknowledged his pro-constitutional argumentation and in an unprecedented judgement deviated from the body of rulings passed by administrative courts so far. Despite the fact that since the provisions allowing for the so called church reprivatisation came into force, courts have consistently refused the victims to appeal against similar decisions, in that case the court ultimately determined the invalidity of the regulatory ruling which violated the rights of the residents of the reprivatized tenement house.

## **B. Freedom of choice and exercise of a profession**

The Commissioner addressed the Minister of Health with regard to the lack of a system of erasing the penalty of deprivation of the right to exercise profession by a doctor or a dentist. He emphasized that in case of other medical professions the legislator provided for the possibility of reinstating individuals to work after a certain period. He also indicated constitutional doubts pertaining to the impossibility of reapplying for the right to perform the profession of a doctor by a person deprived of this right pursuant to a decision of a disciplinary court. The Minister did not share the view presented by the Commissioner, stating that introduced limitations serve the purpose of protecting the life and health of citizens.

The Commissioner presented his concerns to the Minister of Development and Finance with regard to initiated conceptual work on the provisions obliging tax advisors, legal counsels and attorneys to notify tax authorities of suspicious optimization patterns of their clients. According to the Commissioner, the new legislation may lead to the risk of violating trade secrets of persons performing public trust professions. In response, the Minister observed that the proposed solution, consisting in reporting tax schemes, will result in the acquisition of knowledge by the Ministry before the taxpayer takes any actions. It will also significantly facilitate the process of automatic risk analysis concerning tax evasion. What is considered with respect to public trust professions for which the law provides for the protection of trade secrecy is the introduction of an obligation to report information about tax schemes with the inclusion or exclusion of identification data of entities that participate or are supposed to participate in such a scheme. The relevant information is expected to be provided by an entity performing a public trust profession. The case in question remains on the Commissioner's agenda.

## C. Employee rights

What requires particular attention is the problem of excessive use of work relationship termination in case of organizational transformations in the public sector. The notion of work relationship termination in that case constitutes a deviation from the generally applicable regulation pertaining to the transfer of the employment establishment or its part. Even though the scope of modifications is diversified, it is based on a specific solution consisting in indicating the body that is taking over and making a reservation that work relationships with employees to whom the new employer fails to propose new wage and working conditions shall expire. Against this background, one may have significant concerns about the discretionary nature of employer's decision on whether to propose new wage and working conditions. The basic reason for those concerns is the laconic nature of provisions governing the situation of employees in acquired companies who have not been offered new working and wage conditions. The mechanism of work relationship termination applied in those cases fails to provide due protection to employees on many levels. General protection is compromised as there is no need to present the justification for terminating the employment contract that was concluded for an unspecified period or to consult the intention to terminate such a contract with a trade union organization. Employee protection is also affected on a more specific level when there is a ban in place on making a declaration of intent to terminate employment or when employment relationship is terminated in particular periods (parental leave, pre-pensioner age, justified absence from work). For the reasons stated above, the institution of work relationship termination provided for in statutory regulations pertaining to organizational transformations in public sector should be used only in exceptional situations. According to the Minister of Agriculture and Rural Development, whom the Commissioner approached with respect to that case, challenged provisions do not infringe on the constitutional rights of citizens, including the constitutional standard stating that work is under the protection of the Republic of Poland and the state supervises the conditions for work performance as well as the standard ensuring that Polish citizens enjoying full citizens' rights can access public service on equal terms.

The Commissioner also submitted an intervention to the Minister of National Education concerning the education reform and the related transformation of educational facilities. In complaints addressed to the Commissioner teaching professionals expressed concerns about the possibility of losing their jobs due to keeping six-year-olds in kindergartens and liquidating middle schools (gymnasiums). The issue of ensuring employment for teachers, after the changes take effect, was not omitted by the legislator. Yet, what really matters for the protection of employee rights is the assessment, made on the basis of signals and information shared by local self-governments, schools and interested groups, of the adequacy of adopted legal solutions to the actual situation, resulting from introduced changes. In the opinion of the Minister, changes occurring in relation to the implementation of the education reform will contribute to the increased number of jobs for teachers. The total number of pupils will not change, neither will the period of receiving education. The number of grades VII and VIII will be higher than grades I and II of middle school (gymnasium), since classes in pri-

mary schools are less numerous than in gymnasium. That, in turn, means that the demand for teachers will be growing every year.

The trade organization ‘Polish Association of Footballers’ presented to the Commissioner the problems associated with the principles of employing professional football players and offering them a proper retirement pension scheme. What constitutes the most significant problem according to the Association is the lack of implementation of the “Minimum requirements for standard football contracts”, derived from an autonomous agreement concluded under the patronage of the European Commission. In light of that document, a football contract concluded by a professional player with a football club should, in particular, be subject to labour law, which, as the Polish Association of Footballers believes, would guarantee a better level of protection to footballers than the one offered by the solutions applicable in Poland at the moment. Another problem that was presented concerns retirement pension provision to professional athletes. Income generated during one’s sporting career does not create sufficient grounds for retirement pension provision and employment after the conclusion of one’s career usually fails to secure a decent standard of living later in life. The Minister of Sport and Tourism shared the opinion of the Commissioner concerning the need to initiate work on developing a concept for employing and providing retirement pension schemes for professional athletes in cooperation with experts and representatives of stakeholders. The Minister announced taking concrete actions in that regard.

After the examination of a legal question and related proceedings that were also joined by the Commissioner, the Constitutional Tribunal declared that the provision of the act on employing temporary employees in the scope in which it makes it impossible to bring a legal action before a court in whose area work is, was or was supposed to be performed, is inconsistent with the constitutional principle of equality before the law in connection with the constitutional right to a fair and public hearing within a reasonable time by a competent, independent and impartial tribunal previously established by law. Thus, the Tribunal shared the stance presented by the Commissioner. The Tribunal failed to find any rationale behind restricting the territorial jurisdiction for examining claims made by a temporary employee to courts competent for the seat of the temporary work agency that employed the claimant. The Tribunal observed that alternating territorial jurisdiction in cases concerning labour law satisfies a major demand for the protection of an employee, resulting from the need to level his/her chances in relation to an economically stronger employer. Furthermore, the possibility to examine a case concerning claims of a temporary employee by a court having territorial jurisdiction over the place where work is, was or was supposed to be performed, may have a positive impact on the economics of trials. The contested provision was repealed as of 1 June 2017.

The Commissioner contacted the Minister of Family, Labour and Social Policy with regard to the impossibility of satisfying claims of citizens who were judicially granted compensatory benefits due to the bankruptcy of obliged entities and lack of assets on their part or their legal successors obliged to pay those benefits. The Commissioner believes that the situation of persons deprived of the payment of their compensatory benefits, granted for the loss of health resulting from performed work, should be at the top of public authorities’

agenda. What is required are systemic regulations securing the payment of compensatory benefits in every case, in the amount adjudicated or agreed upon between the parties, irrespective of external circumstances. The Commissioner believes that the act on the protection of employee claims should be expanded to include compensatory benefits in case of employer's insolvency and extended periods of guaranteed payment. In reply, the Minister of Family, Labour and Social Policy stated that compensatory benefits are granted and paid on principles provided for in the provisions of the civil law. The obligation to pay compensatory benefit rests solely on the employer who has been obliged to do so pursuant to a settlement or court ruling. The Ministry sees no grounds for indicating another entity that could be held responsible for those liabilities. Likewise, there is no legal basis for the Ministry to create statutory solutions in that scope.

Cases analyzed by the Commissioner revealed that there is a lack of legal regulations governing mutual settlements between an entrepreneur and a contractor if it is assumed that work was performed in circumstances indicative of an employment relationship. No provision of the systemic act constitutes grounds for the contributions' payer to demand the payment by the insured of that part of contributions that should be financed by them. The Commissioner believes that it is essential to introduce regulations in the systemic act, specifying the principles for taking responsibility for outstanding contributions, resulting from the determination of a past employment relationship. Basing those principles on the provisions on unjust enrichment, due to related financial consequences, may block actions leading to the enforcement of creating employment-based jobs. In response to the intervention of the Commissioner in that case, the Minister of Family, Labour and Social Policy stated that one of the fundamental principles of contract law is the freedom of contract expressed in the Civil Code, in accordance with which, the parties to an agreement may freely determine their legal relationship as long as its content or purpose is compliant with the nature of the relationship, the act as well as the principles of social coexistence. Both parties making a declaration of intent leading to the conclusion of a contract for a specific task should be aware of the consequences of such a declaration. If one of the parties comes to the conclusion later that the contract violated his/her interest, he/she may pursue his/her rights before the court. Yet, he/she should not feel exempt from the need to settle his/her obligations, resulting from the claims of the other party, pursuant to the provisions of the civil law. Transferring responsibility to one party only does not seem accurate, according to the Ministry.

## **D. Right to social security**

As of 1 March 2017 the amount of the lowest old-age pension as well as pension for incapacity to perform work and survivor's pension was increased from 882.56 PLN to 1000 PLN and the pension for partial incapacity to perform work from 676.75 to 750 PLN. Yet, complaints received by the Commissioner showed that pensions granted ex officio to the discussed group of beneficiaries who failed to have a required seniority remained at the level increased by the adjustment indicator only (100.44%) or by 10 PLN in comparison with the amounts they were entitled to on 28 February 2017. The Commissioner believes that the



increase of the lowest pension benefits should occur as part of systemic legal solutions separate from adjustment. Yet, percentage rate-based adjustment that guarantees that all benefits at least retain their real value should still apply. The increase of the lowest pension benefits from 1 March 2017 meets those requirements. However, in the view of the Commissioner it should also cover ex-officio pensions. Moreover, increasing the ex-officio pensions should occur by virtue of an act with compensation from 1 March 2017. In response to the intervention of the Commissioner, the Minister of Family, Labour and Social Policy informed that as a result of remarks presented by other ministries as well as opinions of social partners and agreements made with the Social Security Institution the ministry agreed to make relevant provisions more precise. As announced, the Ministry will remove all interpretation doubts concerning the need to meet statutory work seniority requirement by pensioners receiving benefits ex officio and not benefits granted due to the incapacity to work. Such unclear provisions appeared in the draft bill on amending the act on pensions from the Social Security Fund as well as the act on social insurance related to accidents at work and occupational diseases.

The Commissioner received complaints from caretakers of persons with disabilities who were applying for pension benefits due to incapacity to work after the care period was completed. The Commissioner believes that the legislator needs to intervene in order to introduce changes to the conditions for acquiring the right to pension benefit due to incapacity to work of caretakers of persons with disabilities after the end of care provision. The general condition for granting the right to such a benefit is a contribution and non-contribution period of 5 years within the last 10 years before submitting the application for the pension benefit or prior to the day of occurrence of incapacity to work. Yet, in line with applicable regulations, welfare institution is not obliged to pay pension contributions for persons with sufficient insurance periods. As a result, there are numerous caretakers without the required 5-year contribution and non-contribution period falling over the last 10 years before the submission of application for the pension benefit or prior to the day of the occurrence of incapacity to work. As a consequence, a person with a determined incapacity for employment who has a generally required insurance period will not acquire the right to a pension benefit due to incapacity to work. Therefore, in case of persons who gave up employment in order to personally and directly care for a family member and have an insurance period exceeding 25 contribution and non-contribution years the only requirement for acquiring the right to a pension benefit should be the certificate of total or partial incapacity for work. In response to Commissioner's intervention, the Minister of Family, Labour and Social Policy informed that an inter-ministerial Team for Developing Solutions aimed at Improving the Situation of Persons with Disabilities and their Families was established, following an instruction of the Head of the Council of Ministers. The team is supposed to present proposals of legislative and systemic solutions that would improve the situation of persons with disabilities and members of their families.

In an intervention to the Minister of Family, Labour and Social Policy, the Commissioner highlighted existing variation in principles on which the amount of the pension benefit is established, depending on the month when the application was submitted. In accordance

with the pension authority practice, in case of establishing the amount of the pension benefit in the period from January to May and from July to December of a given year, contributions ascribed to the account of the insured after 31 January of the year in relation to which the last annual adjustment was conducted, as well as initial capital and contributions recorded for a previous period that were subject to the last annual adjustment, are also subject to quarterly adjustments. Yet, when the pension amount is determined in June of a given year, the amount of contributions that was subject to the last annual adjustment is not subject to additional, quarterly adjustment, since it has already been adjusted for the last year starting from 1 June of the year in which pension application was submitted. The difference in the amount of the pension benefit, depending on whether the pension benefit application was filed in June or the remaining eleven months, may range from around 50 to even 300 PLN. The Commissioner believes that applying the said method in relation to pension applications submitted in June may lead to unacceptable variation in the principles of calculating the amounts of pension benefits. It constitutes a legal trap as the month of filing the application within the same quarter may make the beneficiary suffer from negative consequences as a result of paying further contributions and receiving a lower benefit. Yet, eliminating the differences between June and remaining months should not result in the deterioration of the situation of persons retiring in the remaining 11 months of the year. In response, the Minister informed the Commissioner that the Ministry is familiar with the problem he brought to his attention. The Ministry is willing to take actions leading to the amendment of the currently applicable regulations.

The analysis of cases submitted to the Commissioner revealed a problem with determining the income of nursing home residents who, due to old age, were granted an honorary benefit. When such an individual turns 100 years old and apart from a pension benefit obtains the right to an honorary benefit, the fee for staying in the nursing home goes up, since the honorary benefit is considered a part of the senior's income. In the opinion of the Commissioner, the fact of obtaining this benefit should not be treated on a par with all other sources of income. In particular, income increased in this way should not lead to charging higher amounts for the stay in the nursing home. Including the honorary benefit in the income determined for the purposes of the act on welfare raises a justified feeling of injustice and that benefit loses its unique nature as ultimately, the elderly person receives lower financial support since higher amount is charged for his/her stay in the nursing home. The Commissioner requested the Minister of Family, Labour and Social Policy to consider taking a relevant legislative initiative that would modify the principles for establishing income for persons receiving honorary benefits. In response, the Minister indicated that financial resources obtained from fees charged to nursing home residents are spent on the operation of that facility. An increased fee for staying in the nursing home, resulting from additional income received by its resident, often makes it possible to cover the full cost without the need to rely on support from the family (spouse, descendants and later ascendants) and municipality.

5 September 2016 marked the day of entry into force of changes to the act on social welfare that were supposed, *inter alia*, to extend the scope and regulate the types of support provided to the homeless. Those changes included a principle stating that facilities for the

homeless, e.g. warming-up rooms, night shelters and day shelters may only house persons who are able to perform self-care activities and persons whose health status poses no risk to the life and health of other residents. In an intervention to the Minister of Family, Labour and Social Policy, the Commissioner pointed out that the fact that the legislator failed to define the concept of a “person able to perform self-care activities” and strict enforcement of the related rule may hinder the provision of assistance to the homeless, especially since that group also includes persons with disabilities, persons chronically ill or individuals who suffer from partial or transitional inability to perform self-care activities. Furthermore, entities running facilities for the homeless, without proper support from healthcare institutions, are virtually unable to accurately assess the health status of homeless individuals in terms of their ability to perform activities of daily living and threats they pose to the life and health of other residents. In response, the Minister stated that the legislator failed to provide the definition of a “person unable to perform self-care activities” since the situation of every homeless person sent to the facility is examined individually. It should be emphasized however, that no homeless person in need of assistance and support should be denied help in light of applicable legal provisions. Neither age nor disability should be the reason for refusing admission to a shelter to any person in need of help.

## **E. Right to healthcare**

The Commissioner intervened before the Minister of Health with regard to the most serious, unsolved problems concerning healthcare, such as the availability and quality of provided services, discrimination of some patient groups and shortages of medical staff (doctors of certain specializations and nurses) and their working conditions. The Commissioner believes that it is essential to put an end to the practice of restricting access to services financed from public resources based on internal regulations of the National Health Fund. Provisions concerning the possibility of using cross-border healthcare services should become more patient-friendly. One should also introduce regulations with regard to the standard of hospital alimentation. The Commissioner also pointed out the need to bring healthcare provided to specially protected groups of patients to a constitutional standard. What still persists are problems associated with the lack of guarantee for the continuity of medical care for a newborn once he/she leaves medical facility, the principles of access to gynaecological and urological care to minors aged 15 and above as well as standards for perinatal care or care provided to seniors. Undoubtedly, more attention from public authorities should also be devoted to mental health. It is particularly alarming that the National Mental Health Protection Programme for years 2016-2020 entered into force with almost a 9-month delay and the protection of mental health in Poland is notoriously underfunded. The Commissioner is awaiting a response from the Minister.

The Commissioner also made an intervention to the Minister of Health with regard to wage and working conditions of nurses and midwives, the need to increase their number, reform the education system, reduce their workload by appointing medical assistants and nursing assistants and the need to consider convalescence leaves in order to reduce the risk

of burnout. In response, the Minister of Health informed about the actions of his ministry aimed at improving the current situation. The case in question remains on the Commissioner's agenda.

In light of media reports about instances of doctors' deaths in their workplace, the Commissioner addressed an intervention to the Minister of Health in which he indicated the lack of legal mechanisms for regulating maximum working time of medical staff and related threats for both, patients and doctors as such. What Commissioner also highlighted is the excessive use of the so called 'opt-out' clause whose inclusion in a contract allows one to perform work for more than 48 hours a week in a given settlement period. In response, the Minister of Health informed about the reasons for this phenomenon as well as taken measures and plans for the future. The issue has not been fully resolved yet.

In an intervention to the Minister of Health, the Commissioner expressed his concerns with respect to citizens' access to health services financed from public resources in the context of nationwide protests of doctors (residents) and massive revocations of the so called "opt-out" clauses. According to the Commissioner, expected drastic shortage of physicians related to the protest movement requires not only further monitoring but also concrete actions that would ensure the continuity of provided medical services and the operation of service providers (outpatient clinics, laboratories, hospital wards). Health security of citizens as well as improved accessibility and quality of healthcare in Poland should lie at the heart of those actions. The Commissioner is awaiting the position of the Minister of Health in that matter.

The introduction of the basic system for hospital healthcare provision (the so called 'network of hospitals') on 1 October 2017 resulted in further restriction of access to medical services attributed to the reorganization of health facilities as well as changed place of providing healthcare services at night and during public holidays and inclusion of service providers to the network of hospitals. The Commissioner shared his concerns with the Minister with regard to implemented reform. What disturbed the Commissioner are, among other things, practical problems of patients awaiting healthcare services as well as omission of geriatric wards in new regulations. The Commissioner is awaiting a response from the Minister.

In an intervention addressed to the Minister of Health, the Commissioner indicated a number of problems with exercising parents' (guardians') right to accompany their children during their stay in hospital. He also reminded that children have the constitutional right to special healthcare. Moreover, the requirements of modern medicine and modern care standards also suggest the need to ensure parental care to children staying in hospitals. Parent's presence close to a sick child is of particular importance in case of hospitalizations of the smallest children as well as those suffering from chronic or terminal illnesses. The Commissioner also took up the issue of hospital's failure to implement perinatal care standards that are specified in the regulation of the Minister of Health with regard to medical procedures provided to women in the course of physiological pregnancy, delivery, puerperium and newborn care. The Minister informed about undertaken measures aimed at improving the situation as well as the commencement of work on the determination of new organizational standards in perinatal care.

The Commissioner contacted the President of the Supreme Medical Council with a request to take a stance on the health safety of persons exposed to the risk of contracting HIV. Applicable provisions do not, namely, regulate the method how a doctor should inform persons at a direct risk of contracting the virus from its carrier about the threat. The act on the prevention and combating infections and infectious diseases does not provide for any legal consequences for the sick person who fails to fulfil the obligation of informing his/her family and relatives about the risk of infection. The President of the Supreme Medical Council has not responded to Commissioner's intervention.

The Commissioner also took actions regarding the access to medical services related to infertility treatment. The Commissioner requested the Minister of Health to provide explanations in relation to information about work on legal changes that would allow the Minister of Health to discontinue health programs operated by local governments. In response, the Minister informed that he had never intended to interfere with local procreation programs. Yet, due to the fact that some provisions in drafted regulations raised such controversies, the Minister decided to modify them.

The Commissioner received information about the ineffectiveness of the Program for Comprehensive Protection of Reproductive Health in Poland in years 2016-2020. What raises particular concerns with relation to that program is the fact that it only includes diagnostic and preventive actions and it does not provide contractors with adequate funding allowing them to commence the performance of medical services. In response to the intervention in that regard, the Minister informed that work on the program is performed according to schedule and the evaluation of program's effectiveness at such an early stage is not possible.

The Commissioner also presented his stance to the Minister of Health with respect to restricted access to ellaOne which became a prescription medication. Without negating the legal grounds for the introduction of such a change, the Commissioner pointed out to the need to perceive that issue in a broader perspective that pays heed to the quality of sexual education or availability of gynaecologists in Poland. In response, the Minister stated that restricted accessibility to that medication is supposed to increase patients' safety.

In interventions addressed to, among others, the Head of the Council of Ministers and the Minister of Health the Commissioner highlighted the need to initiate legislative work aimed at regulating the problem of genetic tests, including genetic counselling. Prior to test performance, a given patient should be informed about the nature and purpose of the test so that he/she can give his/her conscious consent. Furthermore, it should be borne in mind that test results may constitute a significant mental burden so patients should be provided with a psychological consultation. The Minister of Health shared the position of the Commissioner and ensured that presented remarks will be taken into account in the course of preparing the act on genetic tests.

## F. Assistance provided to persons with disabilities

The system of support offered to persons with disabilities, their families and caretakers requires fundamental change. What is necessary, among other things, is the elimination of disproportions in benefits provided to caretakers of adults with disabilities and caretakers of persons who have been disabled since their childhood. Three years have passed in October 2017 since the entry into force of the judgement of the Constitutional Tribunal in which it stated that differentiating the right to care benefit for persons taking care of an individual with disability depending on the moment when that disability occurred is inconsistent with the Constitution. Despite the fact that, as the Tribunal stated, the execution of the judgement requires immediate legislative actions, legislative work has not been finalized yet. For this reason, the Commissioner addressed an intervention to the Head of the Council of Ministers with a request for the PM to oversee legislative work on the restoration of equal treatment of caretakers of persons with disabilities. The Commissioner also requested information on the direction and time of the conclusion of analytic work concerning the changed shape of the support system offered to persons with disabilities and their families. In reply, the Minister of Family, Labour and Social Policy informed that the ministry is conducting analyses of possible changes to the system of support available to persons with disabilities, their families and caretakers of individuals with disabilities. The Minister also indicated that what constitutes a substantial measure increasing material support provided to persons with disabilities and their families is a significant increase of offered benefits: care allowance, minimum pension and social assistance pension. Support for families that include persons with disabilities is also provided through the “Family 500 Plus” program. The judgement of the Constitutional Tribunal is still awaiting execution. Therefore, the Commissioner is trying to protect the rights of entitled individuals by participating in court and administrative proceedings concerning benefits for caretakers of persons with disabilities.

In 2017, the Commissioner continued to emphasize the need to adjust obsolete provisions to contemporary international standards concerning the protection of rights of persons with disabilities, in particular to the Convention that Poland ratified. What is essential is an amendment of the Civil Code provisions and the change of the concept that has been functioning for years of the full and partial incapacitation. What also needs to be resolved is the problem of representing the rights of such persons in legal transactions (including, proceedings before state authorities), which plays a key role in their functioning in social life. The Commissioner is monitoring the legislative work in that area. Unfortunately, he has not seen much progress yet.

The governmental draft amendment to the act on the protection of tenants took account of the Commissioner’s demand to introduce a new norm that would oblige municipalities to consider applicant’s disability when determining the principles for renting apartments from the housing stock. The draft requires municipalities to outline conditions that an apartment designated for persons with disabilities has to meet, with consideration given to actual needs resulting from a particular type of disability. All that information should be contained in resolutions that implement the principles for renting apartments from the municipal housing stock.

## G. Right to education

In 2017, the Commissioner monitored the developments associated with the organization and functioning of schools after the education reform came into force. It can be concluded from media reports as well as numerous complaints sent to the Office of the Commissioner for Human Rights that one of the fundamental effects of introduced changes is an increased number of children in primary schools, which leads to overcrowding in buildings and deterioration of teaching conditions. What may pose a problem is enrolment in secondary schools in school year 2019/2020 when graduates from pre and post-reform period cumulate. Parents also pointed out to maladjusted school curricula (especially in grade VII). Problems are also experienced by gymnasium pupils who failed to be promoted to second grade in the school year 2016/17 and who, consequently, became pupils of the seventh grade of primary school (that they have already completed). Those and other problems have not met with a proper response from the Ministry of National Education that believes that the reform was conducted in an appropriate manner. Complaints coming to the Office of the Commissioner, however, seem to contradict that. Therefore, the situation affecting pupils and their right to education will remain on the Commissioner's agenda.

The Commissioner is also monitoring the problem of acknowledging the results of the so called old-type secondary school leaving examination (matriculation examination) during recruitment to medical and dental university courses. In an intervention to the Minister of Health, the Commissioner observed that such a situation raises serious doubts from the point of view of compliance with the principle of equality and right to education which are enshrined in the Constitution. The right to education is not only an inherent subjective right but it also constitutes an essential premise for proper realization of many other rights and freedoms of individuals and citizens. Central administration bodies as well as state schools of higher education should ensure, therefore, that the recruitment and teaching process allows everyone to exercise their right to education. The Minister of Health did not agree with the position of the Commissioner, stating that demands of secondary school graduates with the so called "old" matriculation examination results could not be acknowledged without violating the constitutional principle of equal access to education.

What constituted the subject of the Commissioner's intervention to the Minister of Science and Higher Education were problems of secondary school graduates with timely submission of their matriculation certificate for recruitment purposes to universities when their matriculation examination had been incorrectly evaluated by the examination board, and after an appeal it turned out that the required threshold of 30% was exceeded and the matriculation certificate was issued. What was also brought up in that intervention were problems of graduates whose current matriculation certificate was cancelled since the total number of points had changed. In response, the Minister ensured that the Commissioner's reservations would be taken into account in the course of legislative work aimed at drafting a new Act on Higher Education and Science.

## H. Protection of the family

The Commissioner intervened before the Minister of Family, Labour and Social Policy with respect to the interpretation of the provision outlining the rules for determining family members when examining the right to a child benefit. The Commissioner asked the Minister to present a stance in that regard and comment on the possibilities for the resolution of problems by means of a relevant legislative initiative. In light of the act on the state support for children upbringing, a family unit comprises children who live together with spouses, parents and actual guardians. The possibility to indicate a child as a family member by both, the mother and the father applying for the child benefit has been reserved by the legislator exclusively for parents who, by court order, exercise alternating care over their child. The Commissioner believes that problems with determining the right to a child benefit are caused by the notion of ‘alternating care’ that the legislator used in the act without defining it. That notion also failed to be defined directly in the Family and Guardianship Code or in the Code of Administrative Procedure. Consequently, the practice of administrative bodies as well as judgements of administrative courts are not consistent with respect to the application of the provisions of the above-mentioned act. The Minister explained that in compliance with the provisions of the act on the state support for children upbringing, the minister competent for family has to present to the Council of Ministers an evaluation of the benefit system together with conclusions concerning introduced changes and prepare a review of family benefit system within maximum 12 months from the entry into force of the said act. Only then can one expect the ultimate shape of the act’s provisions.

What requires consideration is awarding the right to an extra childcare allowance to persons running their own business activity during parental leave. That allowance is paid to a mother or father, or an actual or legal guardian of the child, if the child remains under the actual custody of that person who is entitled to parental leave. It is paid for no longer than: 24 calendar months, 36 calendar months if one takes care of multiplets, 72 months if he/she takes care of a child with a certificate of disability or certificate of significant disability. The main purpose of parental leave is to exempt an employee from the obligation to perform work and personally care for a small child. Meanwhile, parents who suspended their business activity in order to take care of their child stumble upon problems to obtain that childcare allowance to family benefit. According to the Commissioner, it is necessary to clarify the provisions on family benefits by stating directly that childcare allowance in the period of parental leave should also be paid to persons who suspended their business activity in order to care for their child. In response, the Minister stated that parental leave is a right regulated by the Labour Code and is granted to persons employed on the basis of an employment relationship. A natural person conducting business activity or suspending it pursuant to the provisions of the act on freedom of business activity is not an employee employed on the basis of employment relationship and is not entitled to parental leave pursuant to the Labour Code, hence she/he is also not entitled to the said allowance.

In 2017 the Commissioner continued activities related to the enjoyment of the right of access that was adjudicated by court. In the opinion of the Commissioner, provisions that



have been in force for several years that provide for the imposition of a fine, in a two-stage proceedings initiated at a request, on the person hindering or preventing contact with a child require an in-depth analysis since complaints sent to the Commissioner suggest that they are not effective. Unfortunately, the Minister of Justice failed to agree with the critical assessment of those regulations and does not plan any changes in that regard.

Equally ineffective were actions taken in cooperation with the Children's Ombudsman aimed at introducing changes to procedural provisions concerning foreign adoptions. The analysis of regulations governing that procedure revealed that there is an urgent need to amend some provisions in order to guarantee full protection of children's rights, resulting from both, the Constitution as well as other legal acts, including the Convention on the Protection of Children and Cooperation in Respect of Inter-Country Adoption (the Hague Convention). In light of currently applicable legal regulations, foreign adoption should always be treated as *ultima ratio*, which stems directly from the Convention on the Rights of the Child. That document allows an adoption that involves moving abroad only as a supplementary childcare measure if a given child cannot be placed in a foster or adoption family or if it is by no means possible to ensure appropriate care in the country of origin.

The Commissioner continued to take a number of measures to improve the effectiveness of execution of court orders concerning child support, among other things, he requested the Ministry of Justice to consider the use by courts of the so-called alimony tables that would facilitate the determination of a relevant child maintenance amount. In response to Commissioner's intervention, the Minister of Justice informed about work initiated in the ministry and aimed at developing alimony tables. Yet, since such tables constitute a novelty in the Polish legal system and there is a need to adjust existing procedural rules to the newly proposed solution, outcomes will be presented for consultation after the work is concluded.

Furthermore, the Commissioner for Human Rights together with the Children's Ombudsman proposed the establishment of a central register of notorious alimony non-payers, which would improve the effectiveness of the enforcement procedure. In response, the Minister of Justice informed that in light of the growing problem of non-payment of alimony, initiatives aimed at increasing the effectiveness of maintenance claim recovery are welcome. However, due to the general nature of proposed solutions it is not possible to clearly evaluate their plausibility and taking legislative actions to implement them would be premature at this point.

The Ombudsman and the Commissioner also made a plea to the President of the Council of Ministers to conduct a nationwide social campaign concerning the problem of alimony non-payment. According to them, putting more spotlight on the problem will help to achieve a higher level of alimony payment and will reduce social tolerance for alimony non-payment. In response, the Minister of Family, Labour and Social Policy informed that the decision on the rationale for the social campaign dedicated to alimony non-payment will be taken after the conclusion of current work on legislative solutions concerning the improvement of the situation of persons entitled to alimony who do not receive it due to ineffective enforcement (the so called alimony package).

The Commissioner submitted a motion to the Supreme Court with a request to comment on the issue of evading the alimony obligation. In the body of rulings of the Supreme Court

and courts of law one can notice two contradictory positions: according to one, irrespective of the number of breaks in the non-payment of alimony and their length we deal with one unlawful act. According to the second, a break in non-payment of alimony implies the occurrence of two or more offenses. The Commissioner believes that a break in alimony non-payment should make one assume that we deal with two separate acts, thus a new offense, unless the perpetrator's conduct consisting in paying for the maintenance or objective inability to fulfil that obligation are of short-lived nature. The Supreme Court refused to present an interpretation in that regard. According to the Court the Commissioner did not demonstrate the existence of divergent interpretations in judicial decisions.

## **I. Children's rights**

As a result of visits to institutions for juveniles, representatives of the National Mechanism for the Prevention of Torture diagnosed a number of systemic problems relevant to the protection of children's rights. In numerous interventions addressed to the Minister of Justice, the Commissioner pointed out to the need to regulate, by way of a parliamentary act, the use of video surveillance systems in juvenile institutions. In the Commissioner's opinion, despite the awareness that the surveillance of detention centres contributes to more efficient supervision of persons deprived of liberty, thereby increasing the level of security at the facility, it should not be used without a legal regulation consistent with the Constitution. In addition, there is a need to regulate the procedures of body search of children in shelters for minors and in correctional facilities. Including such procedures in an act of the Parliament would guarantee that such a search is made respecting the right to intimacy and privacy. Also, issues such as the stay of underage mothers in rehabilitation centres, or testing the children in shelters and correctional institutions for the presence of alcohol, narcotics and psychoactive substances require legislative action. It also seems reasonable to harmonize the practices of supervision over children's correspondence, used by the staff of facilities for minors. In some centres the child's incoming correspondence is opened by the supervisor in the child's presence in order to check the contents while in other facilities the check is performed in the absence of the juvenile. Due to their age and development stage, children are particularly vulnerable and exposed to inappropriate treatment. In the Commissioner's opinion, supplementing the Act on Juvenile Delinquency Proceedings with the suggested regulations will significantly contribute to strengthening the system of protection of their rights. The Minister informed that a Team was appointed on the order of the Minister of Justice to analyse the existing legal regulations concerning proceedings in juvenile cases, adapt these regulations to the existing standards and develop new legal solutions.

## **J. Freedom of artistic expression and freedom of scientific research**

The issue of protection of these freedoms emerged against the background of the famous case regarding the merger of the *Museum of the Second World War* and the *Museum of*

*Westerplatte and the War of 1939.* The complaint against the merger of these cultural institutions, brought by the Commissioner, was rejected by the administrative court. During the proceedings the Commissioner pointed out, however, that accepting the merger of the museums as an internal management procedure (therefore not subject to judicial review) entails far-reaching consequences. This is so because public authorities, guided by the tastes and views of the people who represent them may, in an unlimited manner, interfere with the freedom of artistic expression, freedom of speech or freedom of scientific research, transforming or closing down cultural institutions that do not meet their expectations. The Commissioner maintains the view that the act of transforming a cultural institution is not an act resulting from management powers and organizational relationships between public administration bodies. Theatres or museums are, as a rule, organizations which represent freedom of speech, freedom of artistic expression and freedom of scientific research, and not just exercise public administration functions within their internal structure.

## **K. Ecological security and environmental protection**

The Act amending the Nature Conservation Act and the Forest Act abolished the obligation to obtain a permit to remove trees or shrubs growing on properties owned by natural persons, which are being removed for purposes not related to running a business. The practice of applying the amended law has shown, however, that the solution, which came into force at the beginning of 2017, does not guarantee a balance between the two values protected by the Constitution: environmental protection and property law. In connection with the parliamentary work on the amendment of the Nature Conservation Act, due to excessive liberalization of the rules for removal of trees and shrubs, which resulted in their uncontrolled removal, the Commissioner's position on possible legal solutions was presented to the Chairman of the Committee on Environmental Protection, Natural Resources and Forestry of the Sejm. In the Commissioner's opinion, it seems advisable to introduce an obligation to report the removal of a tree or shrub, and to grant the environmental protection authorities the right to submit objection within a specified, reasonable time, in the cases provided for by law. The case is pending.

In his intervention letter to the Minister of Infrastructure and Construction, the Commissioner indicated problems related to the development of car-sharing services (city car rental systems) in Poland, and emphasized the need to amend the Road Traffic Law. The development of the services can help reduce traffic and environmental pollution. Car-sharing services often offer electric vehicles that do not emit pollutants. Using this form of transport can therefore improve air quality, in particular in the centres of large cities, and may also be a tool to fight smog. In response, the Minister admitted that simpler solutions should be sought to facilitate business activity, especially as regards emerging new technologies and those conducive to pro-environmental investments.

## L. Housing policy and protection of tenants' rights

In the area of housing law, the Commissioner's activities are, as a rule, focused on the issues of eviction from housing and protection against homelessness. Of great significance has been the fact that the Constitutional Tribunal considered the Commissioner's application and agreed that omitting, in the Act on Enforcement Proceedings in Public Administration Bodies, of provisions that would establish similar standards of protection against sidewalk eviction as those existing in the civil procedure, is inconsistent with the Constitution. It is particularly important that the Constitutional Tribunal emphasized the connection between human dignity and the prohibition to remove anyone from the flat without providing them with another shelter. The judgment imposes on the legislator the obligation to supplement the Act on Enforcement Proceedings in Public Administration Bodies with appropriate regulations.

In his intervention letter to the President of the Republic of Poland, the Commissioner presented critical comments regarding the so-called institutional lease introduced into legal transactions by the Act on Publicly Owned Housing Resources. The Commissioner objected to the possibility of evicting people only on the basis of a notary deed provided with a warrant of execution, thus omitting a judicial examination of the eviction validity, in particular the court's ruling on entitlement to social housing.

The Commissioner pointed to the lack of protection against homelessness for persons who lost their ownership of a flat as a result of auction and especially after they stopped making mortgage payments. Also in this group of citizens there are dramatic situations which justify the state's support in getting a shelter after losing the title to home. The Polish President did not respond to the above intervention. The act was signed and entered into force on 11 September 2017. In the opinion of the Ministry of Infrastructure and Construction, in a situation where the Constitution does not explicitly specify criteria for preventing homelessness or the relevant legal remedies, providing the possibility of using shelters, night shelters or other social rooms for the homeless by public authorities means fulfilling the basic interests of citizens.

The Commissioner addressed the Minister of Infrastructure and Construction about the lack of a statutory definition of "income", the amount of which justifies the granting of housing assistance by the municipality. As a result, some municipalities set the amount of income at such a low level that even people living at the minimum subsistence level can not apply for a council flat. The lack of this definition also causes uneven practice regarding the inclusion or non-inclusion of the 500+ benefit into the income. Unfortunately, the Ministry of Infrastructure did not share the Commissioner's position regarding the need to define the term "income" in the Act on the Protection of Tenants' Rights.

In his activities in 2017, the Commissioner again raised the problem of membership of the apartment saving scheme that existed under the former political system, which problem has been unresolved for decades. Currently, over one million people are still members of the apartment saving scheme that was launched before 1990. As a result of the political transformation of the state, the deposits accumulated by the scheme members lost their real

value. For years, the state had been declaring it would solve the problem by paying out the so-called guaranteed compensation. However, one is entitled to the compensation only after achieving one of the housing scheme's objectives defined by law. The amount of the compensation has been gradually decreasing over several years. The offer is not attractive for the scheme members, as evidenced by the decreasing number of members willing to receive the payments under the scheme in recent years. Citizens expect a more effective solution of their problem, for example, allowing them to use the guaranteed compensation to raise their housing standard or replace the worn out technical infrastructure, or being offered funds in an amount that would actually help them buy or rent an apartment. In response to the Commissioner's intervention letter, the Minister of Infrastructure and Construction informed that the Ministry saw the problem of the annually decreasing number of members collecting their savings under the scheme, and of the very large number of persons who are still members of the scheme despite the programme for payments made to such persons from the state budget over many years. The National Housing Programme adopted in September 2016 by the Council of Ministers envisages taking action in the coming years to change the situation.

The Commissioner presented his critical comments on the adopted amendment to the Act on Housing Co-operatives. The amendment has only partially removed the existing legal shortcomings while, due to numerous vague regulations, it is going to cause further practical problems. Some quite radical changes have been made, e.g. regarding membership in a housing co-operative, the manner and scope of management of real estates by a cooperative, or establishing a claim to re-establish the right to premises after repayment of debt by a former member. The new regulations raise doubts of a constitutional nature and will certainly bring a lot of work to common courts which will have to make a difficult interpretation of the incomplete and unclear regulations.

The Commissioner also appealed for changes to the regulations governing the functioning of general meetings in a housing cooperative. He drew attention to the fact that despite the obligation, in force for more than 10 years, to replace representatives' meetings in housing co-operatives with general assemblies, representatives' meetings still function in many co-operatives because it is not possible to "force" the co-operative members to change the statute. On the other hand, the Civil Procedure Code introduced a provision protecting the co-operative members from transferring the burden of responsibility for the co-operative's obligations to them such as, inter alia collecting the co-operative's debts from monthly fees paid by its members to cover the costs of maintaining and operating their apartments, which the Commissioner pointed to previously.

## **M. Protection of consumer rights**

The Commissioner joined the proceedings before the Supreme Court concerning the legal issue in which a banking transaction carried out by an unauthorized entity should be considered null and void. The Commissioner presented a position according to which banking transactions referred to in the Banking Law, made by an unauthorized entity, are valid and the only sanction resulting from the Banking Law is the obligation to repay the collected

interest, fees, commissions or other remuneration. The Supreme Court adopted a resolution in which it approved the Commissioner's position.

In his intervention letter to the Minister of Justice, the Commissioner pointed to the lack of provisions regarding the pre-consent for separation of residential premises without encumbrances in case of bank's bankruptcy, which - similarly to the rules applied in the event of a developer's bankruptcy - would protect purchasers of residential premises. Such pre-consents were issued by the Co-operative Bank of Crafts and Agriculture (hereinafter: "SK Bank") having a mortgage on a property on which development projects were being implemented. The announcement of bankruptcy of SK Bank resulted in doubts whether it was possible for the SK Bank's administrative receiver to implement the pre-consents for separation of premises without encumbrances, previously issued by SK Bank. In the petitioners' opinion, it is the administrative receiver that is obliged to give a consent for the separation of the premises without encumbrances. The citizens were concerned that the receiver would refuse to comply with the pre-consents, which would result in violation of constitutional standards for the protection of property rights as they had performed the contract and paid the full price for the apartments. Since the Minister did not respond to the intervention, the Commissioner again requested for the relevant legislative action.

In connection with numerous complaints from citizens, the Commissioner submitted a letter of intervention to the Minister of Justice, requesting him to repeal the Civil Code provision under which the court may issue a payment order when the bank is asserting claims based on an excerpt from bank accounts, signed by persons authorized to submit declarations relevant to the bank's property rights and obligations, stamped by the bank, as well as the proof of servicing the debtor with a default notice. This provision causes excessive privileges of banks in pursuing claims from customers in the writ of payment proceedings, which undoubtedly leads to the imbalance of the process to the disadvantage of the weaker party, i.e. the defendant consumer. The Minister shared the position of the Commissioner and took legislative action to eliminate the challenged provision from the legal order. The Commissioner awaits the completion of the legislative work.

The Commissioner drew attention of the Minister of Justice to creditors' practices consisting in applying for the issuance of a payment order in the electronic writ-of-payment proceedings, without the intention of further litigation if the defendant files an objection to the order. In such a situation, there is no substantive dispute while the debt (often doubtful or overdue) may be claimed by another entity in the next proceeding after it is bought. The Minister partially shared the Commissioner's position and informed about the commenced legislative actions under which the regime of limitation of entrepreneurs' claims towards consumers would be tightened by introducing the impossibility of effective enforcement of the claim by virtue of law after expiration of the limitation period.

In his intervention letter to the Minister of Digitization, the Commissioner brought up the subject of the storage of recordings of telephone conversations during which a contract with consumer was concluded. In the Commissioner's opinion, the legislator's failure to regulate the storage of recordings of conversations with consumers at every stage of contract conclusion, as well as their availability, entails negative effects for consumers. The Minister

informed about the relevant analysis made among others with the Minister of Justice and the President of the Office of Competition and Consumer Protection. The Commissioner continues to be interested in the case.

As a result of regional meetings with citizens, the Commissioner has been informed about unfair market practices of entrepreneurs towards older people consisting in the use of unclear and illegible contract forms. In the Commissioner's opinion, the use of unclear and illegible contract forms by companies means that the contractual balance of the parties is non-existent and the consumers can not be sure of their rights and obligations under the contract concluded. The Commissioner requested the President of the Office of Competition and Consumer Protection to take a position on the case and provide information on the actions taken.

# Measures to protect freedoms and rights

## A. Tort liability of public authority

In his intervention with the Minister of Justice, the Commissioner pointed to the problem concerning the domicile premise specified in the Act on the voiding of verdicts given against persons repressed for activities aimed at the sovereign existence of the Polish State. In the Commissioner's opinion, it seems unreasonable to exclude repressed persons who died as a result of repressions by Soviet state authorities in areas lost by Poland after 1946 from among the repressed persons eligible for compensation. To apply this premise to Polish citizens fighting for the country's independence who continued this activity and died outside of Poland because the borders were shifted, means failure to meet the constitutional standards derived primarily from the principle of equality before the law. The adopted solution means that their next of kin may not claim damages. The Minister announced that the change in the subject scope of the February Act, proposed by the Commissioner, seems fully justified. At the same time, he pointed out that the Sejm is considering the Senate bill on the amendment of the Act on the voiding of verdicts given against persons repressed for activities for the sovereign existence of the Polish State. On this occasion, at the Commissioner's request, consideration could also be given to the domicile premise as one of the conditions for obtaining the right to compensation and redress. In view of the above, the Commissioner asked the Chairman of the Justice and Human Rights Committee of the Polish Sejm to consider introducing appropriate changes.

## B. Right to court

As part of his activities, the Commissioner also pointed to situations involving deprivation or limitation of recourse to law. This kind of problem occurred, among others, during interpretation of the provision of art. 1046 of the Code of Civil Procedure regarding the demand to vacate temporary premises (some courts were rejecting lawsuits in such cases). Significant objections regarding the right to court were aroused by the lack of statutory premises for refusal to issue a copy of a notary deed to a third party. It prevents participants in the proceedings from developing proper argumentation and makes the court's decision arbitrary.

The year 2017 saw regulation of the issue regarding the admissibility of instituting proceedings de novo on the basis of the Constitutional Tribunal's verdict after five years from the verdict validation. The provisions of the civil procedure were amended by extending the deadline for resuming the proceedings from five to ten years from the date on which the verdict became final. As a consequence, the Commissioner withdrew his intervention with the Constitutional Tribunal brought in this case.



## **C. Right to two-instance court**

The Commissioner joined the proceedings before the Constitutional Tribunal regarding a constitutional complaint in which the constitutionality of the Act on the Principles of Development Policy was challenged in the part where in the case of exhaustion of allocation, available under an operational program, for implementing an action or priority, the Act requires the relevant institution to leave a protest (and a complaint to the administrative court respectively) without consideration. In the Commissioner's opinion, such a regulation is a restriction of the right to two-instance proceedings, referred to in the Constitution, without rational justification. The beneficiaries are deprived of the right to an effective remedy. In the Commissioner's opinion, the lack of unambiguous criteria for determining the exhaustion of the allocation creates the possibility of arbitrary decision-making by the managing authorities, which is contrary to the principle of a democratic state of law. The case is awaiting examination by the Constitutional Tribunal.

# Other normative standards

## A. Principle of the rule of law

In 2017, the Commissioner dealt with amendments to the laws regulating the functioning of the Constitutional Tribunal. He filed an application with the Constitutional Tribunal to examine the compliance with the Constitution of three acts adopted in December 2016: the Act on the Status of Judges of the Constitutional Tribunal, the Act on Organization and Procedure before the Constitutional Tribunal and the Regulations introducing the Act on Organization and Procedure before the Constitutional Tribunal. The Commissioner questioned, *inter alia*, the regulations for termination of employment relations with the Tribunal Office employees, the entitlement of the Constitutional Tribunal President to select CT verdicts to be published in Journal of Laws, initiating disciplinary proceedings against Constitutional Tribunal judges and assigning cases to three persons who took an oath with the President but whose legality of appointment to the position of judge raises important constitutional doubts. The Constitutional Tribunal, in its verdict of 24 October 2017, recognized the challenged provisions as compliant with the Constitution.

Moreover, the Commissioner joined the proceedings before the Constitutional Tribunal aimed at the settlement of a competence dispute between the President of the Republic of Poland and the Supreme Court regarding the application of the law of grace towards persons convicted by an invalid court verdict. The Commissioner took the view that in this case the conditions for issuing a verdict that would settle the competence dispute between central constitutional organs of the state were not met, therefore proceedings before the Tribunal should be discontinued. The case is awaiting the Tribunal's hearing.

The Constitutional Tribunal examined the Commissioner's application regarding the fee for a new driving license issued in place of the license which requires change of particulars and the vehicle registration fee imposed in a situation where the change of particulars was caused by the acts of public authorities. The Court granted the Commissioner's application and acknowledged that collecting fees for a new driving license with current particulars does not raise any constitutional doubts if the change is a consequence of the citizen's actions. However, if the change of the particulars is a consequence of the acts of local authorities, not initiated by the citizen, charging them with the costs is not constitutional.

## B. Rules for imposing taxes and other public levies

The Commissioner presented to the Minister of Development and Finance his concerns caused by the implementation, starting from 15 July 2016, of a clause against tax evasion in order to combat tax fraud, regarding the use of an ambiguous wording and its applicability in practice not only to entrepreneurs most often connected with foreign entities but also to ordinary taxpayers. In the Commissioner's opinion, it is necessary to provide taxpayers with

guarantees that the clause will be applied with the highest possible predictability of decisions, and that the meaning of the ambiguous terms will not be determined by the bodies applying these provisions. In response, the Minister informed that the purpose of introducing the said legal regulations in the Polish tax law was to counteract tax evasion through aggressive tax optimization. The Commissioner will monitor the activities of tax authorities and judicial-administrative decisions in this regard.

The Commissioner approached the Minister of Development and Finance regarding the manner of conducting enforcement proceedings concerning public administration entities, relating to customs duties incurred prior to Poland's accession to the European Union. The Commissioner pointed out that in practice there are situations in which, although it is impossible to conduct effective enforcement proceedings concerning public administration entities, the authorities repeatedly initiate executions to prevent limitation in time. Such an option is excluded for customs duties incurred after Poland's accession to the European Union. In the Commissioner's opinion, it is extremely important that the institution of limitation should be realistic. Limitation should be seen as an instrument of legal certainty. The institution of limitation is aimed at sorting out relations between the customs duty creditor and the customs duty debtor by introducing stability and clarity as to the parties' obligations in this legal relationship. In response, the Minister promised to reply after analysing all the pending proceedings.

In connection with citizens' complaints, the Commissioner drew the attention of the Minister of Development and Finance to the lack of appropriate legal regulations that would let citizens restructure their debt (mortgage) with the bank without negative consequences of having to pay personal income tax. In the Commissioner's opinion, the status in which the legislator imposes on citizens public burdens which in fact exceed their capabilities, is unacceptable. The Minister shared the Commissioner's position and issued a notice ordering to abandon collection of the tax.

In his intervention letter to the Minister of Development and Finance, the Commissioner pointed to the problems associated with filing a joint income tax return with the child before the final divorce / marital separation decree is issued. The court proceedings, such as divorce or separation, are often prolonged, which prevents a person who actually raises a child / children single-handedly from using this tax facility. In the Commissioner's opinion, the legislator should strive to strengthen the tax situation of people who carry the burden of raising a child single-handedly, in particular during the course of the court divorce or separation proceedings. The Minister did not share the Commissioner's position in this regard.

In his intervention letter submitted to the Minister of Development and Finance, the Commissioner drew attention to the situation of the so-called victims of the tax break associated with a 12-month period of registered residence. He pointed out that taxpayers should not bear the negative consequences of frequently changed and imprecise tax regulations. Significant doubts arose regarding the situation in which, for purely formal reasons (no declaration submitted of having been registered in the premises for a period of at least 12 months), citizens lose their right to the tax break despite the fact that they were actually registered in the premises for a period required by the law. The mere fact of having been registered

in a given building or flat for permanent residence is a circumstance that can be verified at any time, based on an official document issued by the municipal authority. In addition, the tax authority may collect data from the social security (PESEL) register on its own. In the Commissioner's opinion, tax breaks should not become a kind of trap for the citizen and the system of reliefs should support citizens in satisfying their housing needs. The Commissioner requested the Minister to consider verification of the very restrictive position of the authorities on filing a statement confirming registration in the premises and take other actions to strengthen the situation of this group of victimized taxpayers. The Minister did not share the Commissioner's position.

In 2017, the Commissioner again approached the Minister of Development and Finance about the need to amend the Inheritance and Donation Tax Act as regards the taxation of donations to foster children by their foster parents and equate the fiscal situation of foster families with natural families. The changes to the Act, proposed by the Commissioner, consisting in granting foster families the same rights as those enjoyed by parents and their natural children, would help the state's efforts to provide foster children with adequate support when they are reaching adulthood. The principle of taxation justice also favours this solution. In response, the Minister announced that the option of extending the existing housing reliefs to cover the purchase of the "first flat" would be analysed.

The Commissioner continued procedural actions to the benefit of the entrepreneurs for whom the tax authorities questioned the possibility of applying a 0% VAT rate to marine environment protection services. While examining the Commissioner's and a taxpayer's cassation complaints, the Supreme Administrative Court decided to submit the legal issue raised in this case to a composition of seven judges. In a resolution adopted by the seven judges, the Supreme Administrative Court shared the Commissioner's view and stated that according to the legal status in force in 2011 and 2012, services consisting in the reconstruction and development of the Baltic Sea shore reinforcements, intended to preserve undamaged the existing sea shores and protect them against further damage were services of protection of the marine environment. Thus, a 0% VAT rate was applicable to them.

The Commissioner joined the Supreme Court proceedings aimed at resolving a legal issue concerning VAT being added to the enforcement fee determined by a court bailiff. In the Commissioner's opinion, VAT should not be added to the enforcement fee set by the court bailiff because it already includes VAT. The Supreme Court shared the Commissioner's view and opined that the constitutional principle adopted in Polish law, which requires a statutory basis for the public charges and benefits obligation, in conjunction with the rule that VAT is already included in the receivables for the goods or services, makes the addition of VAT to the enforcement fee unacceptable without an express authorization in a statutory regulation.

The Supreme Administrative Court, composed of seven judges, adopted a resolution consistent with the Commissioner's position, in which it stated that for the purposes of personal income tax on the sale of real estates and property rights inherited by a spouse, the date of their acquisition or construction is the date of acquisition (construction) of those real estates and property rights as the joint property of the spouses. Thus, it was decided that the beginning of the 5-year period on which the taxation depends is the moment of purchase of the real

estate by the spouses as the joint property. Importantly, the Supreme Administrative Court found it advisable to apply the *in dubio pro tributario* principle in face of the significant doubts regarding the concept of “acquisition” under the Act on Personal Income Tax.

# Protection of the rights of soldiers and public officials

The Commissioner addressed the Minister of Internal Affairs and Administration with regard to the issue of dismissal, from executive positions in the Police formations, of persons employed in the past by the Citizens' Militia, and inquired how the planned dismissal would be implemented. In the Commissioner's opinion, the analysis of the regulations pointed to by the representatives of the Police Independent Self-governing Trade Union leads to the conclusion that dismissal from a position, on the sole grounds of the date on which the employment relationship was established, may constitute discrimination on the grounds of age. In the Commissioner's opinion, issues related to appointment and dismissal from those positions need to be explained. The legislator clearly distinguished between the acts of nomination and dismissal of an officer (as acts applicable only to the listed positions having the status of government administration authority) on the one hand, and the acts of appointment, transfer and dismissal of officers (as acts applicable to other positions in the Police structure) on the other hand. The Commissioner emphasized that the acts of appointment and dismissal have all the features of an administrative decision but they are not decisions but specific acts of government administration nominating or recalling a police officer to strictly defined positions. The analysis of the Act's provisions leads to the conclusion that they refer to specific positions of Police Chiefs at various levels of the hierarchy. Nomination and dismissal from these positions is something other than appointing and dismissing a policeman from a specific position in the Police structures (except the Police Chief) as stipulated by the provisions of the Act. In reply, the Minister explained that the appointment referred to in the article of the Police Act and nominating an officer for an official position constitute separate and mutually exclusive forms of establishing a legal relationship, which in both cases has a different character. The Minister also noted that in the case of service positions obtained through nomination, a policeman's transfer to a lower position is possible only if the conditions laid down in the Act are met while the relevant decision, being an administrative one, is subject to the rigors of the administrative procedure and judicial review. None of the conditions set out in the regulation refer to the date of commencement of service. Such a circumstance may not, therefore, constitute an unconditioned reason for transferring a nominated officer to a lower post.

Some policemen who were obliged to use up their unpaid leave during the first quarter of the year turned to the Commissioner for assistance. Most of them were officers whose holiday leaves were postponed in 2016 due to the organization of the NATO summit and World Youth Days. The police officers pointed out that the regulations applicable to civilian employees were more favourable. They enabled an employee to take an overdue holiday in the summer time (by 30 September of the next calendar year at the latest). In response to the Commissioner's intervention, the Minister of Interior and Administration replied that the provisions of the Labour Code, including the provisions regarding the acquisition and grant-

ing of holidays, did not apply to Police officers or the officers of other uniformed services. The service means not only privileges, but also duties and, above all, dedication. For this reason, the police officers do not always have the option of using service-related benefits at a convenient time.

On 1 March 2017, the Act on National Fiscal Administration and the Regulations introducing the Act on National Fiscal Administration entered into force. In connection with the above, the Commissioner was addressed by customs officers who were concerned about the process of transforming their officer's uniformed service employment relationships into ordinary employment relationships. In their opinion, a better solution would be to make those relationships gradually more civil by replacing, with civilian employees, those officers who serve in positions not directly related to the statutory tasks of the service. The Minister of Development and Finance, whom the Commissioner addressed in this matter, explained that as a result of consolidation of the Customs Service, tax administration and tax control offices, the employees and officers will be transferred to one organization, the National Fiscal Administration (KAS).

Therefore, it is unjustified to diversify their employee status in a situation where they are going to fulfil equivalent or similar tasks. Where the status is being changed from officer to employee, it is assumed that the remuneration will be maintained at the current level including the current emoluments and rank allowance. However, in a letter addressed to the Head of the National Fiscal Administration, the Commissioner brought up the issue of the customs officers who were proposed new employment conditions as civilian employees at the National Fiscal Administration subdivisions. The applicants argued that the remuneration they were offered was significantly lower than the allowances they had previously received as customs officers. In response, the Commissioner was informed that the remuneration in the offer specifying new employment conditions for persons whose service relationship was transformed into a labour relationship was determined under the principle of equal treatment. If in some cases the current salary of an officer differs from the previous one it is because their official position / function has been changed.

The Commissioner joined a number of court and administrative proceedings initiated by the Customs and Tax officers who were not offered new conditions of employment or service with the National Fiscal Administration relating to the inaction of the Directors of Tax Administration Chambers (DIAS) in deciding about the applicants' service relationship. In the Commissioner's opinion, the lack of a written offer in a situation where the authority interferes with the officers' material and legal position requires an administrative decision. Therefore, also in the absence of action, the authority should issue an act constituting a unilateral resolution of the public administration body with binding consequences of the applicable norm of administrative law for an identified individual and a specific administrative-legal relationship. The Voivodeship Administrative Court settled two of the cases in which the Commissioner participated and concluded the authority had been inactive. It also obliged the Tax Administration Director to issue a decision regarding the applicants' employment relationship.

The Commissioner was approached by retired officers of the state protection services, whose pension benefits were to be reduced. The applicants' doubts concerned a regulation of the Pension Act, from which it appears that the Minister of Interior and Administration can retain retirement pension in its previous amount if the following conditions are met: short-term service before July 31, 1990 and reliable performance of tasks and duties after September 12, 1989. Doubts were raised in particular by the second condition because access to information allowing reliable verification may be difficult for two reasons. Firstly, political considerations - understood as the situation of the individual uniformed services within the government administration structure - indicate diverse subordination of the services to the ministers managing individual departments of government administration while the Pension Act does not specify the rules and mode of cooperation between the Minister of Internal Affairs and Administration and other ministers or government administration bodies within the scope indicated. Secondly, the assessment of the reliable performance of tasks and responsibilities by officers performing operational and reconnaissance activities will be made, *inter alia*, by reference to the provisions of the Classified Information Protection Act, which provides that personal files in the cases mentioned in the Act are protected regardless of the passage of time. A large part of some officers' files may therefore not be available. Moreover, the officers themselves, performing operational and reconnaissance activities, will not be able to reliably enforce their rights due to potential criminal liability for the disclosure of classified information. The Minister of the Interior and Administration, whom the Commissioner addressed in the above-mentioned case, did not share the doubts raised in the Commissioner's intervention. At the same time, he pointed out that the regulation under scrutiny was not about determination of the pension right but the possibility of applying specific solutions relevant to the rules determining the amount of pension benefits for certain persons, by issuing an arbitrary decision by way of exception.

In connection with the adopted Act establishing the Internal Audit Office, the Commissioner pointed to the European standards of civilian supervision over uniformed services. In the Commissioner's opinion, the adopted model of civilian supervision over uniformed services does not meet the basic criterion of independence, both in the institutional, hierarchical and practical aspects. The tasks of the Minister of Internal Affairs and Administration laid down by the Act, the Office organization and mode of operation, in particular the rules for delegating active officers from the services subordinate to the Minister to the Office, as well as omitting other uniformed services (including special services) encourage the conclusion that the rights and freedoms of citizens harmed by improper conduct of uniformed services officers will not be properly protected. The Commissioner requested the President of the Republic of Poland to exercise his right of veto against this law and to initiate work to set up an independent body investigating complaints about improper conduct of uniformed services officers.

An officer from the Foreign Intelligence Agency requested the Commissioner to file a cassation complaint against the verdict of the Voivodeship Administrative Court concerning a security clearance withdrawal. An analysis of the court-administrative proceedings file revealed the problem of the lack of access by the Commissioner to the classified content of



the decision justification and the officer's vetting records. The lack of access to information about the facts which caused the security clearance withdrawal makes it impossible to form an effective remedy thus depriving officers and soldiers of their right to appeal to the Commissioner for assistance in protecting their freedoms or rights.

In response, the Commissioner was informed that the rules of the classified information protection system, which safeguard its effective protection, do not imply that the Commissioner should acquire controlling authority powers with regard to completed vetting procedures. This solution is the result of the legislator's effort to provide the shortest possible list of entities having access to sensitive data contained in the vetting procedure files or verification procedure files and the extension of this list has no legal or factual justification.

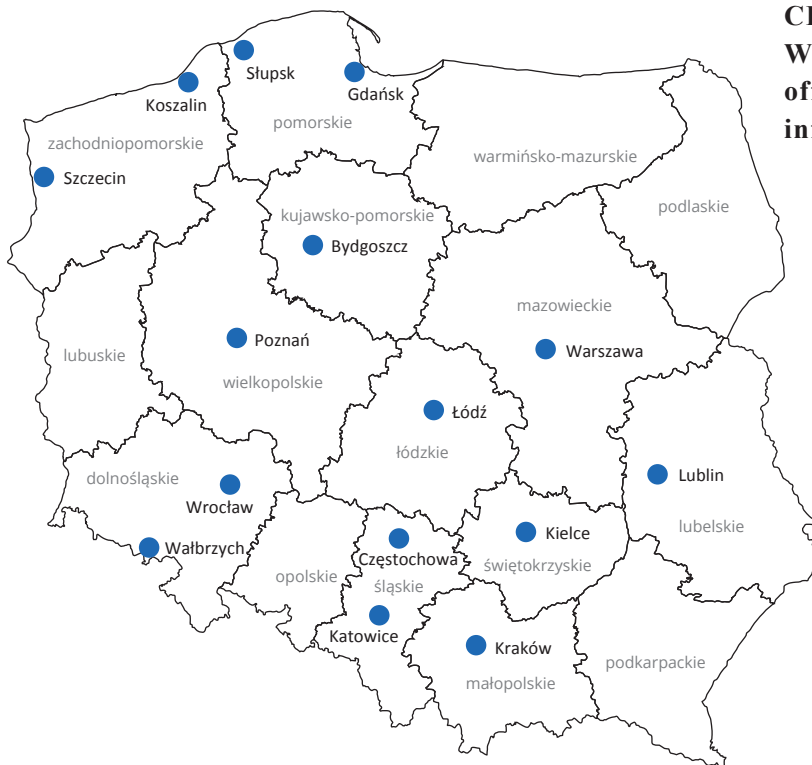
# Mechanisms and methods of work of the Commissioner for Human Rights

## Close to people

The main form of work of the CHR is to be in contact with citizens and to receive complaints and applications from them. It is mainly in direct contact with persons who have experienced some type of disadvantageous treatment that the Commissioner and the CHR Office employees find out about different cases in which human and civil rights are violated.

Citizens may report such cases:

- to the CHR Regional Offices in Wrocław, Gdańsk and Katowice (opening days: Monday to Friday),
- to the citizen information points which, in 2017, were open on specific days of the month in: Bydgoszcz, Częstochowa, Kielce, Kraków, Lublin, Łódź, Słupsk and Szczecin. In 2017, new citizen information points were also prepared to be opened in Poznań, Wałbrzych and Koszalin; they have been working since 2018),
- during the regional meetings, to a lawyer from the Applications Preliminary Assessment Team of the CHR Office (who always accompanies the Commissioner).



**CHR office in  
Warsaw, regional  
offices and citizen  
information points**

The largest number of cases is reported to the Office of the Commissioner for Human Rights, based in Warsaw. Applications can be submitted while speaking directly to an employee of the Office, or can be sent by traditional mail, e-mail or electronic contact form.

In Warsaw, lawyers also provide information via a free-of-cost helpline available at 800 676 676. The callers can get information on whether their case comes within the CHR's scope of competence, ask where to seek help, or submit a complaint. It is also possible to record a video message in the sign language and send it to the CHR Office.

## **Regional consultations of the CHR**

Even the ongoing development of the network of the citizen advice points cannot ensure the possibility of direct contact and conversation with the Commissioner for Human Rights. That is why since taking up his office Adam Bodnar has been meeting with citizens at many different locations. Every month, he holds regional consultations which last a few days. He speaks to citizens, meets with representatives of social organizations and institutions working in the field of human rights, and visits schools and universities.

In 2017, the Commissioner visited 58 towns in 9 voivodeships. In 35 of those towns, he met with local residents and representatives of social organizations. The Commissioner also learned about the activities of 25 social organizations that provided assistance to persons at risk of social and occupational exclusion, among others in Bydgoszcz, Częstochowa, Gryfino, Kalisz, Krotoszyn, Nowy Czarnów, Nowy Klincz, Ptaszki, Tczew and Zduny.

## **Issues reported to the Commissioner during the consultation meetings**

The range of issues raised during the consultation meetings was very wide. Certain subjects were mentioned in almost each of the regions. They included: problems of persons with disabilities and of their carers, lack of support for adults with disabilities who have completed their education but are unable to live independently, and the rights of older people.

The issue of domestic violence, in particular concerning older persons with disabilities, was also raised frequently. The Commissioner's attention was drawn to the fact that measures taken by the police, courts as well as social welfare services are not effective.

Other frequently mentioned issues included construction projects that were onerous for local residents, the absence of a parliamentary act on odour pollution, and threats to the environment (in the following voivodeships: Łódzkie, Mazowieckie, Opolskie, Wielkopolskie and Zachodniopomorskie), as well as the need to increase road safety. In Brzeg, the issue of a hazardous waste landfill that posed a risk to local residents was mentioned. In Nysa, there were complaints concerning changes to the local zoning plan, introduced without consulting the residents.

In many places across the country, the wide-ranging problem of transport exclusion was mentioned. It consists in the restriction of the right to use the full scope of public services due to the impossibility to get to schools, hospitals, cultural centres or cemeteries by public transport.

There were also complaints concerning difficulties in contacts with public authorities or institutions, as well as violation of consumer rights.

Problems relating to courts and e-courts were reported in Łódzkie, Mazowieckie and Opolskie voivodeships. In particular, attention was drawn to cases of abusing the rights of older and lonely persons who are not taken care of by others. Other issues included existing connections between local judges, police officers, public notaries and bailiffs, which, according to the participants of the meetings, resulted in taking decisions and issuing judgments that were to the detriment of various persons.

Problems in the field of assistance provision to senior persons, persons with disabilities or persons with addictions also caused concern. In Siedlce, a serious problem was mentioned concerning the impossibility for deaf persons to use anti-addiction therapy because of the lack of Polish sign language interpreters, as well as the lack of psychologists and therapists qualified to work with deaf people. Cases of exclusion of deaf persons were recorded across Poland, according to the reports of the Expert Committee on Deaf People.

Among the problems raised in the Opolskie and Zachodniopomorskie voivodeships was the parliamentary act that reduced old-age pensions of members of former state security services and caused their feeling of injustice and harm.

In the Dolnośląskie, Mazowieckie and Zachodniopomorskie voivodeships, problems with access to public information were reported. Difficulties in the cooperation between NGOs and local authorities were raised in the Łódzkie, Opolskie and Wielkopolskie voivodeships.

The Commissioner was also informed of bailiffs' practice of seizing social assistance pension which is not subject to the same protection as salary or retirement pension. Another problem was the fact of parental debts inherited by children raised in orphanages.

There were objections as to the lack of possibility to appeal against a decision of a competent educational authority to the Ministry of Education in the event of a dispute between a school and relevant educational administration. In Malbork, there was a mention of discrimination of children of religion other than that of the majority (their religion lessons were held between other lessons that were mandatory). The issue of planning contacts with children after divorce and of difficulties in maintaining such contacts in practice was also raised.

In the Śląskie voivodeship, there was a problem with websites accessibility for blind persons, which makes it difficult for them, for example, to complete grant applications forms in the electronic version and translates into their limited business activation and involvement in community life. Citizens were also concerned with the changes in the health care system, including the closure of certain wards in hospitals and, in particular, limited access to geriatric care after the entry into force of the parliamentary act on the so-called network of hospitals.

Participants of the meetings also complained about negative consequences of taking part in public demonstrations, and negatively assessed the measures taken by police officers. In this context, debates were held on the continuity of the state, of constitutional values and on the protection of human and civil rights.

## Effects of the regional meetings

The Commissioner for Human Rights submitted numerous general interventions to the representatives of different authorities and institutions, requesting them to provide explanations or to take specific steps to solve problems reported by citizens and non-governmental organizations during the consultation meetings. He also intervened in individual cases concerning, inter alia, an illegal hazardous waste landfill, or negative impact on the locality of a large-scale animal breeding farm. He also joined a number of court proceedings.

Often, having returned to Warsaw, the CHR continues his interventions through his regional representatives. Sometimes this requires acting as facilitator / mediator between citizens and local governments in order to solve problems of significance for local communities (e.g. insufficient number of community flats in Poznań and the related consequences suffered by tenants who cannot afford flat rental at commercial prices).

In such cases, the CHR initiates and supports cooperation between all those who can contribute to solving the problem, in order to encourage all stakeholders (local authorities and institutions, social organizations, church representatives, potential beneficiaries and those who implement good practices in other towns) to jointly find the best solution.

The aim of such activities is to overcome obstacles and achieve social change. Thanks to such action, initiated by the CHR after receiving information from a participant of a regional meeting, a day-care centre named *Club 25+* for adults with disabilities, in need of significant degree of support, was established in the town of Chełm. The efforts towards making the club a reality lasted a year and a half but ended successfully. Thanks to the cooperation among numerous partners, persons in need of significant support have a centre where they can stay for 4 hours a day, which gives their carers time for work, other activities or just a respite.

The Commissioner also reacts to certain needs identified during the regional meetings, e.g. the need to hold workshops for communities that are particularly active in the field of human rights protection, or that are particularly vulnerable and may be strengthened by the CHR's support.

The regional meetings also serve the purpose of promoting good practices and solutions that contribute to the possibility of exercising people's human and civil rights in their local communities.

In eight of the meetings (in Prudnik, Krapkowice, Leszno, Stargard, Gryfice, Sosnowiec, Bielsko-Biała and Jaworzno) the participants wondered what could be done locally to ensure to older persons the possibility to live independently at home for as long as possible. With this goal in mind, the Expert Committee developed a model of community support provision to older persons, and disseminated it e.g. during the regional meetings. Other solutions in this area included the drawing up of publications such as the *Golden book of good practices aimed at social inclusion of older persons*, or *Senior-friendly public space*.

In 2017, the transcripts of eight debates concerning the Constitution, held during the regional meetings of 2016, were published. Each debate was devoted to one selected article of the Constitution. The publication contains transcripts of the debates on: the limits of freedom

of artistic expression, the freedom of conscience and religion, the rights of national and ethnic minorities, the communities of neighbours who are of different religions and cultures, as well as the rights to work, to health protection and to personal freedom.

## Strategic litigation

**The possibility for the Commissioner to join court proceedings is one of the CHR's main tools to prevent violation of civil rights and freedoms.**

Of strategic importance are individual cases conducted by lawyers from the CHR Office, in which judgments are significant not only for the parties to the given proceeding but also for other citizens who are in similar situations. Most frequently, judgments issued in such cases influence judgments in other similar cases, as they relate to subjects important for the whole society, and bring about changes in the law.

The CHR's strategic litigation programme makes it possible to achieve three objectives:

- to assist a specific person, and if his/her case is won, to support the arguments of other persons fighting for their rights in similar situations;
- to present, to the court, argumentation that is related to human rights and is based also on the jurisprudence of the European Court of Human Rights, to which the court should refer in its judgment;
- to introduce to the public debate subjects related to the protection of the rights of individuals.

The Commissioner finds out about pending court proceedings from various sources: from citizens, their proxies, the CHR's regional meetings, non-governmental organizations with which he cooperates, and the media. Legal arguments presented in strategic litigation cases are posted on the CHR website.

In 2017, strategic litigation conducted by the CHR Office related, among others, to the following issues:

- the level of reimbursement to parents of the costs of transport of their children with disabilities to school (the CHR joined the proceedings in 2017),
- whether a mother may breastfeed her baby in all public places, and in what circumstances (the CHR joined the proceedings in 2017),
- the date of expiry of the Insurance Guarantee Fund's obligations towards a person whose health has been damaged as a result of a road traffic accident (the Supreme Court's judgment was issued in 2017),
- whether a tenant who has been harassed in order to make her agree to eviction is entitled to any compensation, and in what amount (the judgment became final in 2017),
- the limits of expressing criticism of public figures (the judgment became final in 2017).

## Cooperation with social partners

**In order to increase the effectiveness of his activities, the Commissioner builds extensive cooperation networks that include numerous institutions and organizations. He**

**perceives citizens and their organizations as important partners of the CHR Office in its measures taken with the aim to protect human and civil rights. Such cooperation is conducted in various forms.**

### **Debates, conferences and seminars examples**

For the Commissioner, conferences provide opportunities for promoting issues that are of social significance, for developing social standards, seeking new solutions and comparing positions of different groups representing the society. Conclusions reached in the debates frequently provide the basis for the CHR's interventions before the government and the parliament.

#### *a) The 1<sup>st</sup> Congress on Civil Rights*

In 2017, the most noteworthy event was the First Congress on Civil Rights, held on 8 and 9 December on the occasion of the 30<sup>th</sup> anniversary of the establishment of the CHR Office and organized in cooperation with numerous non-governmental organizations.

The Congress was attended by 1500 citizens. During the event's 36 panels, the floor was taken by 160 experts, community activists and representatives of the media who developed recommendations indicating the main challenges in the field of human rights in Poland.

The Congress attempted to answer the question of *what are the key problems concerning human rights observance in Poland*, according to the participants. The event was broadcast on the internet. Summaries of the individual panels, drawn up on current basis, as well as publications, documents and movies from the debates were posted on a dedicated page on the CHR website. By placing links to the page, the participants could share the opinions and comments of the Congress on social media.

#### *b) Regional debates of the National Mechanism for the Prevention of Torture*

The success of the programme of regional consultations encouraged the CHR to initiate a series of regional debates of the National Mechanism for the Prevention of Torture. In 2017, eight debates were held in capital cities of various voivodeships. The meetings provided opportunities for experience sharing between representatives of authorities that manage detention facilities of all types, and of prosecutors' offices, judicial authorities, voivodeship governments and universities.

#### *c) A series of debates on bioethical issues*

The goal was to support cooperation among bioethics professionals in the drafting of regulations ensuring better protection of human rights in the light of new possibilities offered by biology and genetics (the issues included regulations on genetic testing and or patient's informed consent to undergo a medical procedure).

#### *d) Support in the area of mental health*

On 8 May 2017, the First Congress on Mental Health was held. Its slogan was *Polish psychiatry under change*. The event was organized jointly by physicians, persons who suffer of mental illness and their families. The goal of the Congress was to highlight the need to provide modern support to persons with mental problems and to counteract their stigmatization. The Commissioner for Human Rights took active part in the Congress and presented the CHR Office's ongoing and planned activities aimed at protecting the rights of persons with mental illness. The next conference, held on 14 March 2017 and organized jointly with the Association of Polish Counties, presented examples of good practices in supporting mentally ill persons, followed by the counties of Oleśnica, Gniezno, Wadowice, Wąbrzeź and Wieliczka. During the 1<sup>st</sup> Congress on Civil Rights, social partners organized a panel devoted to the self-help movement of persons suffering of mental illness.

#### *e) Action "For our old age and yours! Let's talk about the Convention on the rights of older persons"*

Since April 2016, the Commissioner has been engaging social partners in the debate on the drafting and adoption of the Convention on the Rights of Older Persons. The debate is held in the UN structures, within the framework of the Open-ended Working Group on Aging (OEWGA) established in 2010. Participants of the action *For our old age and yours!*, including individuals, non-governmental organizations and public institutions are informed by e-mail about the upcoming stages of the debate and encouraged to take part in the discussion.

#### *f) Appeal to the Prime Minister to deinstitutionalize support provision to persons with disabilities and older persons*

In the case of issues of special significance for the society, the Commissioner addresses the government and the parliament by submitting appeals jointly with social organizations. An example can be the appeal to the Prime Minister, submitted by the Commissioner jointly with 54 social organizations, relating to deinstitutionalization of the support system for persons with disabilities and older persons. Deinstitutionalization is a process of transition from institutional care to support at the community level, with due respect for the subjectivity and inherent dignity of all people, including their right to live independently.

### **The Social Council supporting the Commissioner for Human Rights. Social support for the CHR's regional representatives. Expert Committees operating at the CHR Office**

In implementing his mission and statutory tasks, the Commissioner for Human Rights is supported by the Social Council which is a consultative and advisory body.

The Commissioner's regional representatives in Gdańsk, Katowice and Wrocław also cooperate with non-governmental organizations, local governments, universities, so-called third age universities, representatives of the judiciary and local media. The cooperation with



local media and civil organizations contributes to the dissemination of knowledge about civil rights and methods of their protection. An example can be the action entitled *Law at school*, organized by the Regional Association of Legal Counsels in Wrocław.

In 2017, the Regional Representatives of the CHR in Gdańsk and Wrocław were supported in their work by the social councils whose members used their professional experience and outstanding knowledge to support the representatives in their work.

In his activities, the Commissioner for Human Rights is supported by experts from the standing committees which adopt positions on issues important for the society.

**Expert Committee on Homelessness Prevention** – in 2017, its activities focused on good practices in the field of non-institutional support for persons in the crisis of homelessness.

**Expert Committee on the National Preventive Mechanism** – assisted the CHR in the formulation of his position statements; the experts also took part in the regional debates of the NMPT and supported the building of the attitude of non-acceptance of torture and inhuman treatment or other forms of violence against detained persons.

**Expert Committee on Senior Persons** – developed expert opinions on the state's policies concerning senior persons, proposed changes in relevant systems, indicated issues of importance for the elderly and instances of human rights violation requiring the Commissioner to adopt a firm position.

**Expert Committee on Health** – worked, among others, on problems such as working time of physicians, rights of pregnant women and women in labour, access to physiotherapy and health resort treatment, rare diseases and access to ophthalmologist care.

**Committee on Deaf Persons** – gathered information on the specific problems and needs of deaf persons, and indicated areas in which human rights of this group were violated.

**Expert Committee on Migrants** – supported the Commissioner in the formulation of comments on the bill on granting protection to foreigners on the territory of the Republic of Poland. Some of those comments were taken into account by the Ministry of the Interior and Administration.

**Expert Committee on Persons with Disabilities** – focused in particular on: education of children with disabilities, independent living and inclusion in the local community, deinstitutionalization of support, personal assistance services and universal design.

**Expert Committee on Mental Health Protection** – a new Committee which, in 2017, determined the directions of the CHR's activities in the field of mental health protection.

The CHR and the Ombudsman for Children's **joint team on child maintenance** – seeks to identify system-related reasons for which a very large number of children receives no economic support from their parents.

## Helplines' Coalition

In 2017, the Helplines' Coalition programme was continued with the main aim of improving the quality of work of the consultants (through training and exchange of experience). The Coalition groups over 30 entities: the CHR, the Ombudsman for Children, the Patients' Om-

budsman, the Financial Ombudsman, the Office of Competition and Consumer Protection, as well as non-governmental organizations including, for example, the Empowering Children foundation, the Center for Women's Rights and the Itaka Foundation. Commissioner Adam Bodnar also invited associations and foundations that help addicts and their families, such as the Alcoholics Anonymous foundation of Poland, to cooperate with the coalition.

## Educational activity of the CHR

The Commissioner's educational project seeks to disseminate knowledge about human rights and tools for their protection, including knowledge concerning the Commissioner's role, competences and actions for the observance and protection of human and civil rights in line with the provisions of the Constitution.

An important element is to disseminate knowledge on equal treatment, anti-discrimination and protection of the rights of persons who at risk of discrimination: seniors, persons with disabilities, mentally ill persons, foreigners, representatives of national, ethnic and religious minorities, as well as other social groups.

The Commissioner's educational activities in the area of human rights are carried out, among others, in the form of:

- meetings with young people (only within the CHR's regional meetings the Commissioner held 19 meetings with pupils and students);
- workshops (e.g. on exercising the right to public information and the right to file a petition; on practical aspects of the principle of equal treatment; on what discrimination really is, how to report it, and what related rights are provided for under the Constitution);
- publications and studies that facilitate inclusion in and impact on the process of developing public policies at the local and central levels (*Senior-friendly public space* and *Model of community support provision to senior persons*);
- good practice collections (e.g. *Golden book of good practices aimed at social inclusion of older persons* and *Housing programmes for counteracting homelessness*);
- student internships, including summer apprenticeship programmes for law students.

In 2017, 14 workshops were held, both at the CHR Office and at schools. They were attended by lower-level secondary school students, upper-level secondary school students and children from the last grades of primary schools. We also organized a five-day workshop for lower-level secondary school students - winners of the Social Science Competition for lower-level secondary schools. As part of the continued project entitled "The Constitution Week", carried out in cooperation with the Professor Zbigniew Hołda Association, the Commissioner prepared a series of lessons for lower-level and upper-level secondary schools, during which students solved practical examples relating to human and civil rights protection under the Constitution.

The Commissioner also carried out educational activities during the CHR regional visits.

In 2017, the project consisting in the organization of workshops for participants of the *Mentor* programme at the Nicholas Copernicus University in Toruń was continued. The topics focused on the protection of the rights of foreigners - students taking part in the Erasmus

programme, and took into account the current legal regulations as well as the problem of existing prejudices and stereotypes.

At the Youth Correctional Center in Czuchów-Pieńki, a representative of the CHR Office conducted a workshop on discrimination on the grounds of gender. She spoke about the symptoms of unequal treatment of girls and women in the area of education, about various forms of sexual harassment, and about girls' lack of access to certain vocational and technical schools. The workshop was held in consultation with the head of the Centre, at the request of its female residents.

#### *a) Przystanek Woodstock music festival*

Since 2009, the Commissioner for Human Rights has attended the *Przystanek Woodstock* music festival. In the Civil Rights Tent, those taking part in the festival may find out about human and civil rights as well as seek legal advice. Apart from employees of the CHR Office, the tent's staff included representatives of the Warsaw Bar Association, *Zwolnieni z teorii* social projects platform, *Court Watch* foundation, the Helsinki Foundation for Human Rights, *ClientEarth* (Lawyers for the Earth) foundation, Citizens Network Watchdog Poland, *Fado* social cooperative, Judge Jarosław Gwizdak, attorney Bogumił Zygmunt, youtuber Karol Paciorek and the CHR's Ambassador for Human Rights Kacper Gwardecki.

As part of the festival's *Academy of Truly Fine Arts*, a discussion on the role of law in everyday life was conducted with the participation of Adam Bodnar, PhD, and judge Jarosław Gwizdak. The discussion was moderated by Piotr Kraśko.

#### *b) „The CHR Ambassadors” project*

The CHR ambassadors in 2017 were law students who had completed apprenticeship in the CHR Office and developed an annual programme of cooperation with the Office. In 2017, they conducted workshops, conferences and debates across Poland. In Kraków, they organized a workshop entitled *I, human: my rights in practice* for upper secondary school students. In Gdańsk, the CHR Ambassadors co-organized the National Conference on Humanitarian Law (the panel on human rights). In three schools in Garwolin they conducted workshops on human rights. In Toruń, they conducted a two-day workshop on human rights and the European Court of Human Rights, addressed to the participants of the European Youth Parliament (within the game *Guess the judgment*). In Bielsko-Biała, they organized a workshop on discrimination.

## **Cooperation with other ombudsman bodies**

Cooperation with other ombudsman bodies in the country is a regular element of work of the Commissioner for Human Rights.

Thanks to such cooperation, it was possible to work out solutions to the problem of alimony non-payment (the CHR and the Ombudsman for Children's joint team on child maintenance).

It was also possible to conduct an information campaign for borrowers, concerning bank loans denominated in Swiss francs (jointly with the Financial Ombudsman, and in cooperation with the Office of Competition and Consumer Protection and the consumer ombudsmen).

Cooperation with the Patients Ombudsman made it possible to examine the issue of long-term stays in psychiatric institutions of persons who have committed an offence and pursuant to a court order have been placed in a psychiatric hospital (under a so-called precautionary measure) because of their intellectual disability or mental illness resulting in their classification by the court as having no mental capacity at the time of committing the offence. The CHR discovered that in few cases, persons guilty of relatively minor offences were placed in closed psychiatric hospitals even for over ten years (i.e. a period longer than the maximum penalty for the offence). Within his cooperation with the Patients Ombudsman, the CHR is verifying how many persons may still be in such a situation.

## **International-level activities of the CHR**

The Office of the Commissioner for Human Rights cooperates primarily with counterpart institutions for the protection of human and civil rights in Europe. The Commissioner also maintains regular contacts with institutions for the protection of human and civil rights from the Central and Eastern Europe. Since 2003, regular meetings of the Ombudsmen from the Visegrad Group countries (V4) have been held. For the last several years, to a large extent thanks to the support of the European Commission, it has been possible to extend the Visegrad Group's cooperation to the countries of the Western Balkans.

An important element of the Commissioner's cooperation at the international level is his engagement in the works of the International Ombudsman Institute (IOI).

Among the Commissioner's activities on the international arena there is also cooperation with the agencies operating within the United Nations international human rights system.

An important partner of the Commissioner in his international activities is the European Network of National Human Rights Institutions (ENNHRI) based in Brussels.

The role of the Commissioner for Human Rights in Poland, in the context of the profound changes that took place in 2017 with regard to the work of the Constitutional Tribunal and the system of justice, in particular the judiciary, attracted the interest of representatives of the diplomatic corps accredited in Poland.

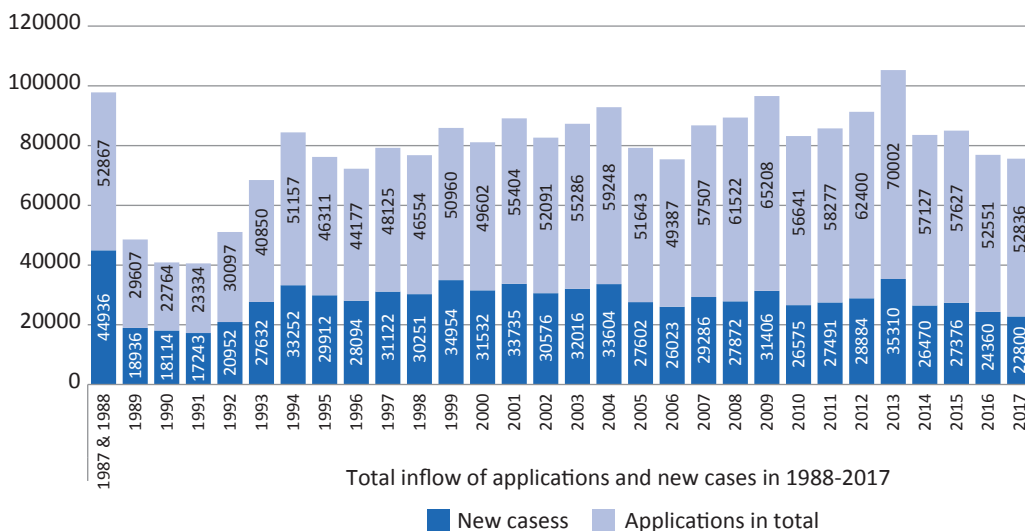
# Statistical information and data

## Applications received by the Commissioner for Human Rights

	2017 1.01 – 31.12.
Applications in total	52 836
New cases	22 800
Replies in cases in which the CHR intervened	13 278

In 2017, employees of the Office of the Commissioner for Human Rights met with 4713 applicants and answered 34212 telephone calls, providing relevant explanations and advice.

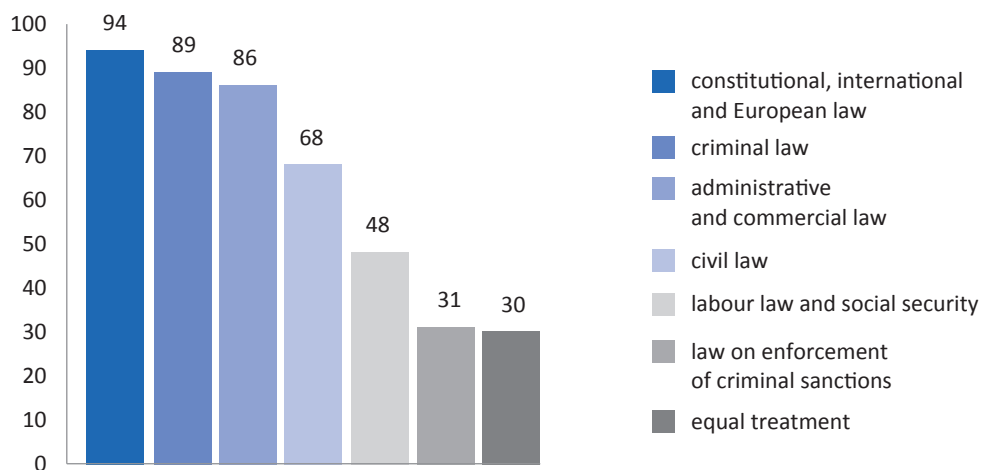
### Total inflow of new cases in 1988-2017



The Commissioner for Human Rights		2017
1)	submitted problem-related interventions, – including motions to take legislative action	273 115
2)	submitted applications to the Constitutional Tribunal for adjudicating laws and regulations' inconsistency with higher-level legislation	6
3)	notified the Constitutional Tribunal of his joining the proceedings initiated by constitutional appeals	10

<b>The Commissioner for Human Rights</b>		<b>2017</b>
4)	notified the Constitutional Tribunal of his joining the proceedings initiated by questions of law	4
5)	notified the Constitutional Tribunal of his joining the proceedings initiated by motions	6
6)	addressed questions of law to the Supreme Court	3
7)	notified the Supreme Court of his joining the proceedings initiated by questions of law	14
8)	filed cassation complaints	55
9)	filed cassation appeals to the Supreme Court in civil cases	5
10)	filed cassation appeals to the Supreme Court in labour law cases	1
11)	filed motions to consider courts' final judgments non-consistent with the law (the civil law)	1
12)	filed cassation appeals to the Supreme Administrative Court	10
13)	filed applications to the Supreme Administrative Court for interpretation of laws and regulations	1
14)	notified the Supreme Administrative Court of his joining the proceedings initiated by questions of law	3
15)	filed complaints to Voivodeship Administrative Courts	24
16)	joined court proceedings	45
17)	requested initiation of civil proceedings	5

### General interventions by problem area

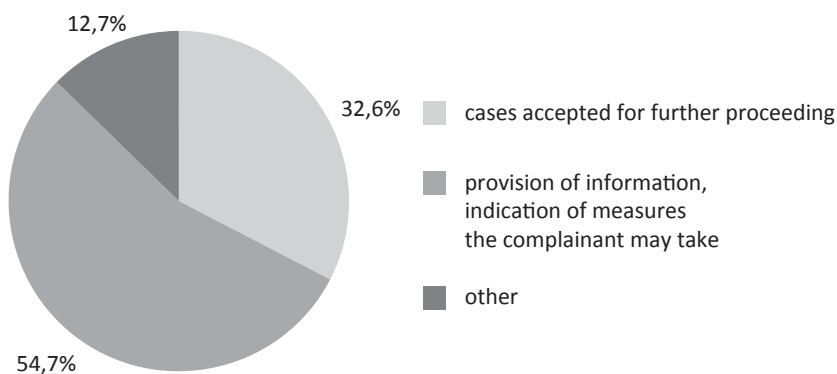


## Cases examined in 2017

*In the period covered by this Report, 25711 cases were examined, of which:*

	Method of examination		Number of cases	% share
1	2		3	4
Cases accepted for further proceeding	1	<b>Total</b>	<b>8 385</b>	<b>32.6</b>
	2	cases accepted for further proceeding, including on the CHR's initiative	7 199	28.0
	3	in the form of general intervention	1 186	4.6
Provision of information, indication of measures the complainant may take	4	<b>Total</b>	<b>14 070</b>	<b>54.7</b>
	5	Provision of information, indication of measures the complainant may take	14 070	54.7
Other	6	<b>Total</b>	<b>3 256</b>	<b>12.7</b>
	7	complaint referred to a competent authority	803	3.1
	8	complaint returned to the complainant for adding necessary information	1 073	4.2
	9	not accepted for further proceeding <sup>1</sup>	1 380	5.4
<b>Total</b>			<b>25 711</b>	<b>100.0</b>

### Method of examination of cases in 2017

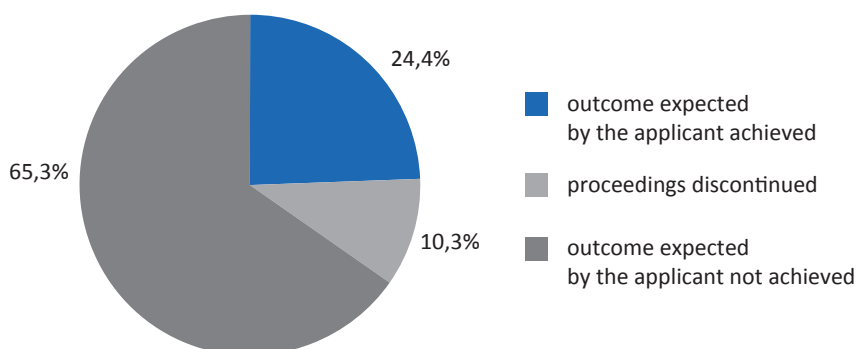


<sup>1</sup> Complaints forwarded to the Commissioner as c/o; and complaints with unintelligible content

## Proceedings were completed in 7310 cases initiated in 2017 and in previous years.

Result	Reason for completion		Number of cases	% share
1	2		3	4
Outcome expected by the applicant and the CHR achieved	1	<b>Total (2+3)</b>	<b>1 783</b>	<b>24,4</b>
	2	Applicant's claim confirmed	878	12,1
	3	CHR's general intervention successful	905	12,3
Proceedings discontinued	4	<b>Total (5+6)</b>	<b>752</b>	<b>10,3</b>
	5	Proceedings pending (on-going procedure)	465	6,5
	6	CHR's discontinuation of proceedings (due to objective reasons)	287	3,8
Outcome expected by the applicant not achieved	7	<b>Total (8+9+10)</b>	<b>4 775</b>	<b>65,3</b>
	8	Applicant's claim not confirmed	4 130	56,5
	9	CHR's general intervention not successful	606	8,3
	10	Measures available to the CHR exhausted	39	0,5
<b>Total</b>			<b>7 310</b>	<b>100,0</b>

### Completion of cases

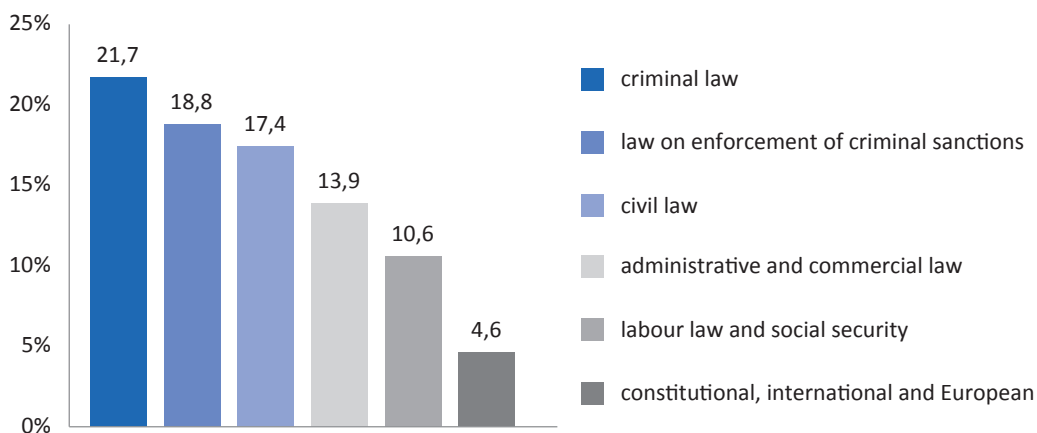




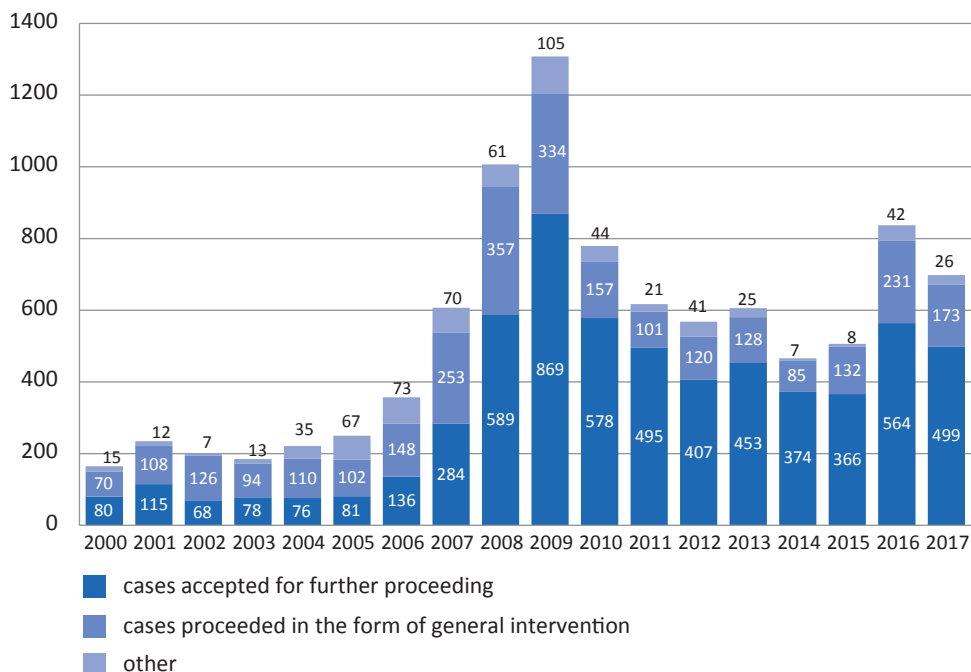
## New cases (applications) in 2017 by problem area

	Problem area	Number of cases	% share
1	constitutional, international and European law	1 044	4.6
2	criminal law	4 941	21.7
3	law on enforcement of criminal sanctions	4 275	18.8
4	labour law and social security	2 410	10.6
5	civil law	3 959	17.4
6	administrative and commercial law	3 168	13.9
7	equal treatment	669	2.9
8	National Preventive Mechanism	95	0.4
9	protection of the rights of soldiers and officers	2 049	8.9
10	other	190	0.8
<b>Total</b>		<b>22 800</b>	<b>100.0</b>

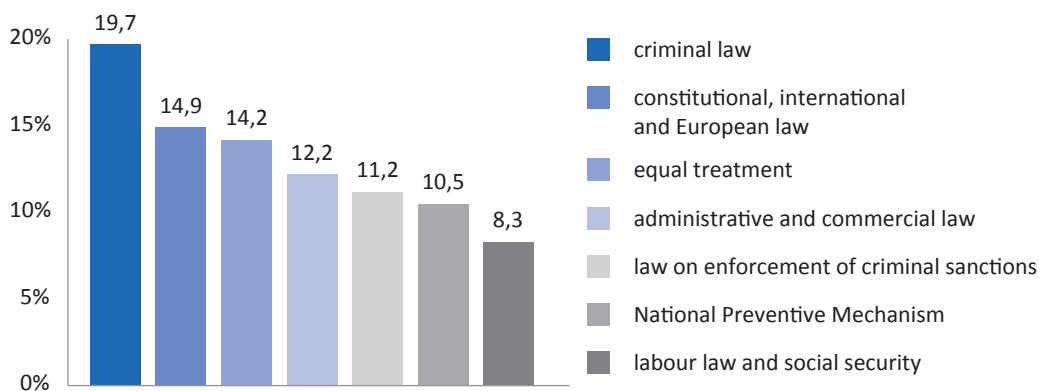
### Main problem areas of new cases in 2017



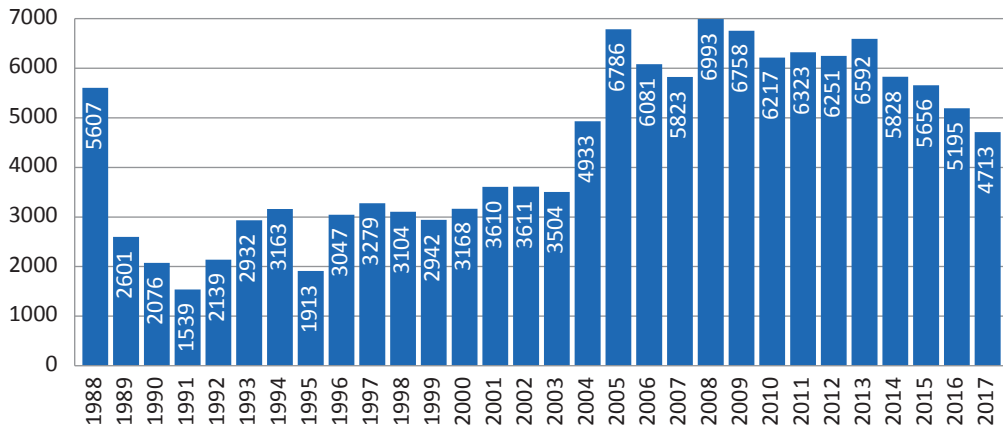
## Cases examined on the initiative of the Commissioner for Human Rights



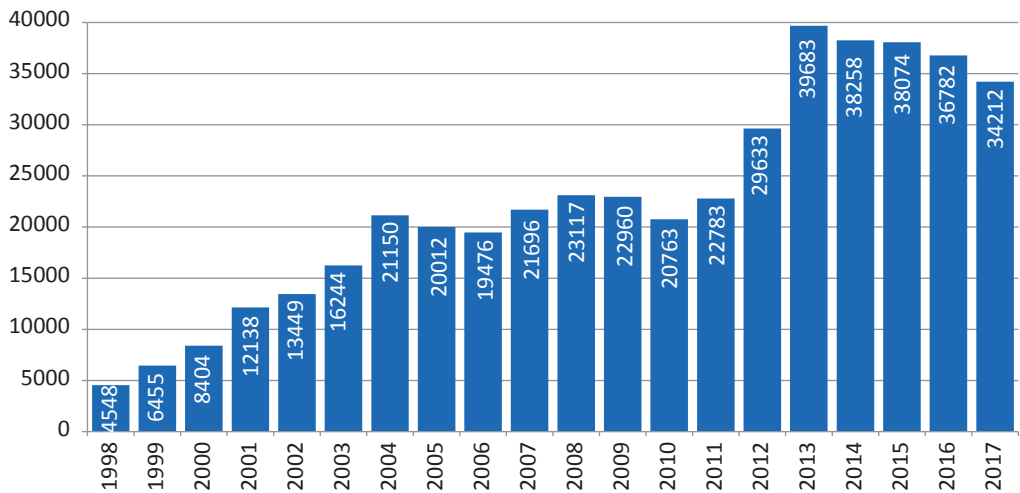
## Cases examined on the initiative of the Commissioner for Human Rights by problem areas



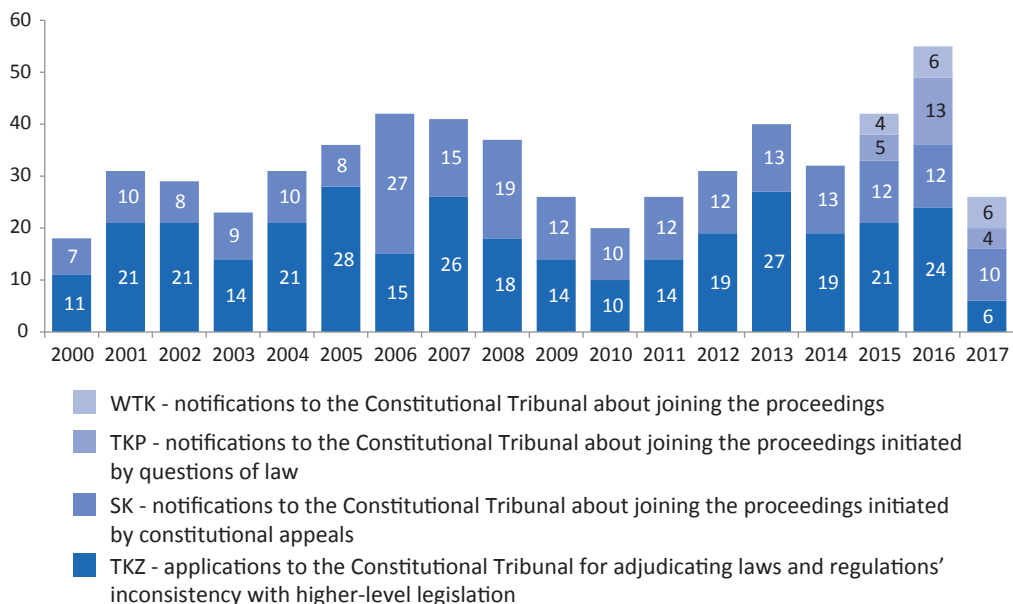
### Applicant visits in 1988 - 2017



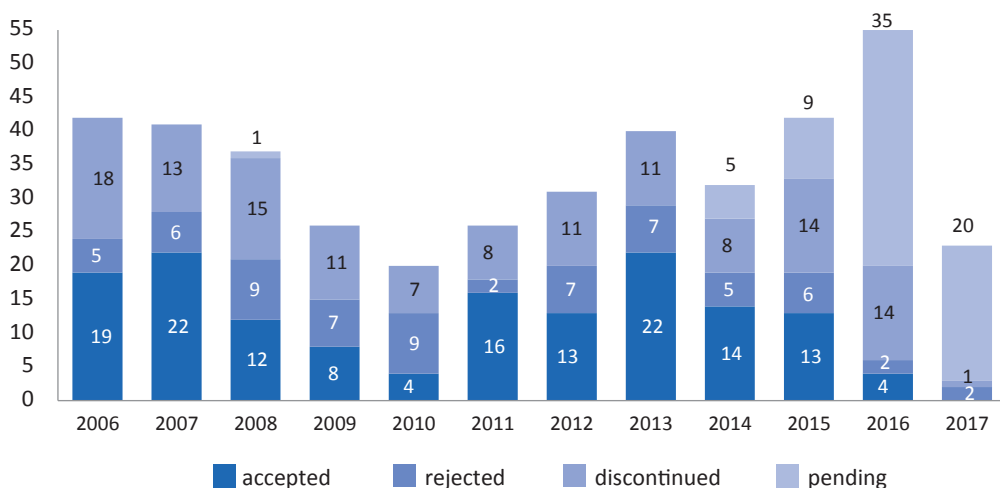
### Advice provided by telephone in 1998 - 2017



## Applications to the Constitutional Tribunal, constitutional appeals, inquiries and question of law joined by the CHR



## Method of considering: applications to the Constitutional Tribunal for adjudicating laws and regulations' inconsistency with the Constitution; constitutional appeals; motions and questions of law cases joined by the CHR<sup>2</sup>



<sup>2</sup> As of 31 December 2017. Data are presented by years when the applications to the Constitutional Tribunal were submitted by the Commissioner for Human Rights. In 2017, in three cases the Commissioner was not allowed to join the proceedings.