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Submitted by the Polish Coalition against Commercial Sexual Exploitation of Children

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The Polish Coalition against Commercial Sexual Exploitation of Children, is an affiliated group of ECPAT International in Poland, composed of 10 NGOs working throughout Poland for the benefit of children rights, with a particular attention to the fight against commercial sexual exploitation of children and child trafficking. The group is coordinated by Fundacja Dzieci Niczyje (Nobody's Children Foundation), Warsaw and the members are:

- Komitet Ochrony Praw Dziecka (The Committee of Children's Rights Defence), Warsaw
- Stowarzyszenie na Rzecz Dzieci i Młodzieży Program STACJA (Children and Youth rights Association, Programme - STATION), Warsaw
- Stowarzyszenie dla Dzieci i Młodzieży SZANSA („CHANCE” Association for Children and Youth), Głogów
- Terenowy Komitet Ochrony Praw Dziecka (The Committee of Children's Rights Defence), Poznań
- Stowarzyszenie Po Moc (Association “Help”), Katowice
- Centrum Edukacji i Profilaktyki Społecznej PARASOL („Umbrella” - Education and Social Prevention Center), Cracow
- Fundacja Przeciwno Handlowi Ludźmi i Niewolnictwu La Strada (La Strada Foundation), Warsaw
- Stowarzyszenie „Misja Dworcowa” im. Ks. Jana Schneidera („Train Station Mission” reverend Jan Schneider’s Association), Wrocław
- Stowarzyszenie Czyste Dźwięki (“Clear sounds” Association), Sopot

The objectives of the document are to present the views of non-governmental organisations about the main problem areas with regard to commercial sexual exploitation of children and child trafficking in Poland, to provide recommendations how to efficiently address these issues and support the efforts of the Government, local authorities, civil society organisations and all relevant stakeholders in protecting children from commercial sexual exploitation and child trafficking.

Executive summary

The following report focuses both on the issues of ratifying adequate international legal standards and on amending the law in accordance with those standards. Poland's process of harmonizing domestic law with international legal standards shows tendency to ratify international law and amend state law accordingly, however those actions lack coherence and comprehensiveness. Three years after signing the Lanzarote Convention, this major legal standard still has not been ratified by the government. In addition, the Optional Protocol on the sale of children, child prostitution and child pornography and the Council of Europe Convention on Action against Trafficking in Human Beings have not been fully implemented. Main concerns of reporting organizations are the lack of full, clear and coherent protection of all children against exploitation in prostitution and pornography. Also, through the implementation process of the Council of Europe Convention on Action against Trafficking in Human Beings, it appeared that Polish law still contains loopholes which affect the protection of children against sale and trafficking in human beings.

1. Matters regarding child prostitution and child pornography

Poland signed the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the "Lanzarote Convention") in 2007. However, it still has not been ratified.

In 2008 and 2010 amendments to Polish penal code were introduced in accordance with the Convention. They were i.a. provisions concerning grooming, simulated pornographic images of children, and aggravating circumstance of a child's age in crime of statutory rape. In 2008 also the Act on the responsibility of collective entities for penalized offenses (DzU. 2002.197.1661) was amended to comply with newly introduced provisions of the penal code.

Even though reforms tend to express a tendency to adapt Polish law to international standards, it must be highlighted that they somewhat lack clarity and coherence. Polish law still fails to comply not only with requirements of Lanzarote Convention, still not ratified, but also those of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC) ratified by Poland in 2004.

One of the concerns expressed in the Concluding Observations of the Committee on the Rights of the Child on the initial report submitted by Poland under Article 12, paragraph 1 of the Optional Protocol on the sale of children, child prostitution and child pornography (October 2009)¹, is the lack of definition of child prostitution (which is also required by the Lanzarote Convention, article 19.2). Polish penal law uses either the term "prostitution" (not defined in any way within Polish law) or refers to giving or promising material or personal gains in exchange for sexual services. Along with lack of definition of prostitution Polish law lacks effective protection of children between the ages of 15 and 18 against being exploited in prostitution whenever they offer sexual services but are not convinced or brought to involve in sexual activities by the perpetrator. This legal loophole has been highlighted by the Committee on the Right of the Child in its Concluding Observations on the initial report submitted by Poland under Article 12, paragraph 1 of the Optional Protocol on the sale of children, child prostitution and child pornography (October 2009)² Altogether the protection of children against exploitation in prostitution is inconsistent and unclear as to what kind of relations are penalized especially those involving children between 15 and 18 years of age.

Polish law also still does not include a definition of child pornography. Art. 202 of the penal code, which constitutes offences connected to child pornography, is moreover incoherent as a whole. It contains especially alarming provision of §4b which narrows the range of materials considered as illegal in comparison to definitions of pornography set by the art. 2(c) of the OPSC or art. 20 of the Lanzarote Convention. It does not criminalize

¹ CRC/C/OPSC/POL/CO/1

² CRC/C/OPSC/POL/CO/1

material depicting child's sexual organs for primarily sexual purposes and does not clarify whether material depicting children engaged in simulated sexual activity would be considered as illegal. Provisions of art. 202 do not include erotic materials involving children, not engaged in sexual activities, which might indicate or imply that depicted children are available for sexual purposes. Furthermore, the penal code does not protect from prosecution children, who have reached the age of consent and possess pornographic images of themselves, created with their consent and intended for their personal use only. Another issue regarding the provisions of art. 202 of Polish penal code is the inconsistency of the protection of children between 15 and 18 years of age against different forms of exploitation in pornography. Producing, distributing, fixation, bringing, storing, keeping or possessing pornographic materials featuring children between 15 and 18 years of age is only punishable when it has a purpose of disseminating the materials. The construction of provisions concerning child pornography created a paradox where pornography involving a created image of a child until the age of 18 is fully punishable by art. 202 § 4b, while penalization of acts connected to pornography involving an actual child – victim is narrowed whenever the pornographic materials are not intended to be disseminated or are not proven to be.

Our concern regarding all aforementioned offences is also the matter of determining the victim's age and the perpetrator's knowledge of the victim's age. Both international acts under consideration require that uncertainty about the age of the victim – e.g. of the person presented in pornographic materials – does not prevent initiation of investigation (art. 34.2 of the Lanzarote Convention, art. 8.2 of the OPSC). There are not any provisions in this matter in Polish law. However it is advisable to consider including them, as current policy does to comport with good practice standards as investigations are not pursued based on non-professional assessments that the child looks older than the definition of a child contained in criminal provisions. It is also necessary to clearly authorize only the court supported by experts to decide on the punishability of the crime whenever the age of the victim is uncertain, or the perpetrator's knowledge of the victim's age is in question.

Given aforementioned examples of lack of coherence of Polish law in the matter of child prostitution and pornography, the tendency of legislator to further amend applicable provisions is welcome. It must however be noted that the amendments already implemented in Polish law as well as those proposed, are at the same time belated and imperfect. More energy and particular precision ought to be applied in future works in this matter. Also the process of social consultations of legislation is currently very unclear. The process of passing an act depends on at least four different regulations, which are not coherent, and lack clear instructions on participation of society in the process. As a result, participation of non – governmental organizations is often ineffective as proposed changes in legislation are neglected or simply lost in the process. This results in introducing deficient legislation which needs to be amended soon after passing, as it does not take into account practices and expertise of specialist non-governmental organizations.

Recommendation:

The government of Poland should urgently ratify the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

Domestic penal law should be harmonised with the standards set forth in the Council of Europe Convention once it is ratified.

It is recommended that Polish legislator creates a consistent plan including detailed schedule of amendments to penal law implementing the provisions of the Lanzarote Convention (still not ratified) and the OPSC. It is essential to apply special precision formulating particular provisions to assure its compliance with aforementioned international acts and the best possible protection of the victims. The

major focus should be on providing comprehensive provisions in reasonable time. To reach appropriate level of compliance it is also necessary to hold consultations with expert organizations. Efficiency of the consultations can be assured through clear and consistent procedure for giving opinions on legislative projects.

2. Matters regarding trade in human beings and sale of children

On April 25, 2008 Poland ratified the Council of Europe Convention on Action against Trafficking in Human Beings which was recommended by the CRC in 2009 Consideration of Reports submitted by state parties to the OPSC³. Following this ratification particular amendments were made to the penal code, introducing the definition of trafficking in human beings in art. 115 §22 of the penal code⁴, separating the crime of trafficking in human beings and illegal adoption (art. 211a of the penal code).

As aforementioned amendments were welcome in Polish penal law it must be brought to attention that the process of implementing them was conducted somewhat incompletely, thus causing particular gaps in legal system.

For over a year (from September 8, 2010 until November 14, 2011) the Act on the responsibility of collective entities for penalized offenses (DzU. 2002.197.1661) was not compatible with amended provisions of the penal code. This act provided for liability of legal persons for crimes concerning trafficking in human beings constituted previously by art. 253, of the penal code. The legislator failed to introduce changes in this act, which should have followed removal of art. 253 of the penal code and introduction of art. 189a in its place. Although appropriate amendment came into force on November 14th, 2011, it must be highlighted that legal persons cannot be held liable for trafficking in human beings committed to their profit after September 8, 2010 and before November 14th, 2011.

Also Polish penal procedure was not amended to comply with new system of protection against trafficking in human beings and requirements of art. 8.1a) of the OPSC and articles 28.3 and 30 of the Convention. They require special protection of a child acting as a victim or witness. Polish law provides such special treatment – single hearing, outside courtroom proceedings, with participation of a psychologist – for victims and witnesses of offences enlisted in articles 185a and 185b of the penal proceedings code, who are younger than 15 years of age at the time of hearing. The range of crimes covered by art. 185a and 185b does not include trafficking in human beings itself, therefore there is no obligation to apply aforementioned special means. The construction of special protection of minor victims and witnesses during hearings, in opinion of involved organizations, should be revised to provide full protection for all children (until 18 years of age). Present provisions do not protect children over 15 years of age. They are also very general i.e. there is no particular obligation to hold such hearings in child-friendly facility. Providing the possibility of repeating the hearing on demand of the defendant not represented during the first hearing, is also cause for often unjustified decisions to hold the hearing again. This particular provision should be reconsidered to balance the defendant's right to a fair trial and the protection of a traumatized child. E.g. appointing a public attorney for otherwise not represented defendant to participate in the child's hearing could serve both purposes.

Another important gap emerges due to confusion between trafficking in human beings, subject of the Council of Europe Convention, and sale of children, subject of the OPSC⁵. Through aforementioned amendments the crimes of trafficking in human beings and illegal adoption were strictly specified. Trafficking in human beings has been defined by a set of actions, means and purposes. The specific wording of art 211a of the penal code according to Polish doctrine specifically penalizes organized business of arranging adoptions with

³ Concerns of CRC/C/OPSC/POL/CO/1

⁴ CEDAW/C/POL/CO/6, A/HRC/WG.6/1/POL/2

⁵ CRC/C/OPSC/POL/CO/1

defiance of the law – the perpetrator is the person organizing illegal adoption and not the persons selling or buying the child. As opposed to previous, less specific, provision of art. 253 this situation leaves out certain forms of sale of children. Lacking clear and specific penalization of sale of children a situation falling under this term might not be qualified as a crime according to Polish penal law whenever either none of the purposes enlisted in art 115 §22 can be proven or the perpetrator does not take up arranging illegal adoption as systematic business.

Recommendation:

Polish legislator should review and amend the penal law, and the penal procedure to bring them into compliance with ratified international documents: OPSC and Council of Europe Convention on Action Against Trafficking in Human Beings, and to provide required protection of child – victims within the courtroom proceedings. It is crucial to assure that Polish law recognizes the separate nature of trafficking in human beings and sale of children, and provides an explicit definition and penalization of any participation in sale of children in the Penal code. The Penal procedure code should acknowledge fragile nature of involvement of the child – victim of trafficking in human beings and sale of children, by setting an obligation of holding the victim's or witness' hearing in special conditions provided in art. 185a or art. 185b of the penal proceedings code.