

The Obligation to Report Cases of Child Sexual Abuse – Comparison of Legal Regulations in Poland, Austria, and the Federal Republic of Germany

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Abstract: The subject matter of this work constitutes the comparison of the legal regulations governing the obligation to report cases of child sexual abuse in Poland, Austria, and the Federal Republic of Germany. The authors have focused on the analysis of the method of reporting the crime of paedophilia, the legal and social consequences of the failure to notify of that kind of offence, and the differences in the legislative, administrative, social, and educational measures taken to protect a child's welfare.

1. Introduction

Sexual abuse of children has occurred and will continue to occur in different times and cultures. Child sexual abuse is one of the most serious crimes committed against the welfare of a child. Victims of sexual abuse can be found in all age groups, starting from infancy. In order to prevent child sexual abuse, protective measures are taken, including legislative, administrative as well as social initiatives by creating social programs aimed at children and their guardians, the requirement for any information on cases of mistreatment of children, and effective prosecution of paedophilia perpetrators. The aim

of this paper is to analyse and compare the legal regulations governing the obligation to report cases of child sexual abuse in Poland, Austria, and the Federal Republic of Germany in terms of the nature of the obligation to report, the categories of persons obligated to report the relevant information to law enforcement authorities, the time frame within which the report must be made, the social and legal consequences of failing to report, and the required form of reporting.

2. The Extent of the Obligation to Report Paedophilia Offences in Poland

The obligation to report cases of child sexual abuse has been set forth in Article 240¹ § 1 of the Polish Criminal Code, which stipulates that anyone who has reliable information concerning the commission of a prohibited act specified in Article 200² of the Polish Criminal Code, that is a paedophilia offence, but does not promptly inform an authority responsible for

¹ The Act of June 6, 1997 – Criminal Code, consolidated text: Journal of Laws of 2022, item 1138, as amended. Art. 240 of the Criminal Code reads as follows: “§ 1. Anyone who has reliable information concerning a punishable preparation or attempt, or the commission of a prohibited act specified in Articles 118, 118a, 120–124, 127, 128, 130, 134, 140, 148, 156, 163, 166, 189, 197 § 3 or 4, 198, 200, 252 or a terrorist offense, but does not promptly inform an agency responsible for prosecuting such offences is liable to imprisonment for up to three years. § 2. Anyone who has sufficient knowledge to assume that an agency competent to prosecute, knew of the prohibited act specified in § 1 being planned, attempted or committed but fails to report it, has not committed the offence specified in § 1; anyone who prevents a prepared or attempted prohibited act from being carried out has also not committed the offence specified in § 1. § 3. Anyone who failed to report it out of fear of a criminal liability threatening him or herself or a next of kin will also not be liable to a penalty.”

² Art. 200 of the Criminal Code reads as follows: “§ 1. Anyone who has sexual intercourse with a minor under the age of 15, or commits any other sexual act, or leads him or her to undergo such an act or to execute such an act, is liable to imprisonment from two to 12 years. § 2. (repealed). § 3. Anyone who presents pornographic material to a minor under the age of 15, or makes available items of this nature to him or her, or distributes pornographic material in the way allowing him or her to become familiar with such material is liable to a fine, the restriction of liberty or imprisonment for up to three years. § 4. Anyone who, for their own sexual satisfaction or that of another person, presents a minor under the age of 15 with the performance of a sexual act shall be subject to the penalty specified in § 3. § 5. Anyone who advertises or promotes activities involving the distribution of pornographic material in the way allowing a minor under the age of 15 to become familiar with it shall be subject to the penalty specified in § 3.”

prosecuting such offences is liable to imprisonment for up to three years. This universal and legal duty of denunciation serves the purpose of exposing an attack on the interests protected by Article 200 of the Criminal Code and apprehending its perpetrator, or, if that is not possible, preventing the offences specified therein. According to the doctrine and case law, it is accepted that the interest protected by Article 200 of the Polish Criminal Code is the proper physical and mental development of a minor up to the age of 15, which may be violated by too early sexual initiation and may lead to his or her demoralisation. It is recognised that due to their immaturity, children at this age are not able to properly assess the danger and make a binding decision regarding their sexual life. Therefore, the provision comes forward with an absolute prohibition on any sexual acts with a child under the age of 15.³

The obligation to report to law enforcement authorities rests on every person who has reliable information concerning a punishable preparation or attempt, or the commission of a prohibited act defined in Article 200⁴ of the Criminal Code, provided that this concerns persons who have in no way participated in the commission of this prohibited act. The criminal liability under Article 240 of the Criminal Code cannot apply to the perpetrator of the primary offence or to perpetrators who have informed law enforcement authorities of the committed offence, and their acts remain closely related to the primary offence.⁵

According to the content of the provision of § 2a, a victim of the crime of paedophilia who refrains from reporting the offence is not subject to punishment. It should not be a matter of doubt that this regulation aims to protect the victim from negative consequences of the offence and is also justified by the need to avoid double victimisation of the victim.⁶ Article 240 of the Polish Criminal Code does not aim at penalising the victim

³ See Sławomir Hypś, „Komentarz do art. 200 k.k.,” in *Kodeks karny. Komentarz*, 7th ed., eds. Alicja Grześkowiak and Krzysztof Wiak (Warsaw: C.H. Beck 2021), 1196–1197.

⁴ See: Krzysztof Wiak, „Komentarz do art. 240 k.k.,” in *Kodeks karny. Komentarz*, 7th ed., eds. Alicja Grześkowiak and Krzysztof Wiak (Warsaw: C.H. Beck, 2021), 1373.

⁵ Appellate Court in Lublin, Judgement of 5 February 2009, Ref. No. II AKa 3/09, KZS 2009, No. 5, item 59. Cf. S. Cora, “Notification of a Crime as an Obligation and Right,” *Państwo i Prawo* 2011, No. 6 (2011): 79–80.

⁶ Cf. Wiak, “Komentarz do art. 240 k.k.,” 1374.

but other persons who have learned about the commission of the offence specified in Article 200 of the Criminal Code, that is, witnesses of the act.⁷

The doctrine lacks a clear position on the implementation of Article 240 of the Criminal Code, namely the obligation of reporting by individuals who, due to their profession, should keep confidential the circumstances they have learned about while performing their professional activities. In the substantive discussion, priority is given to the so called absolute professional secrecy over the duty of denunciation under Article 240 § 1 of the Criminal Code, and it is emphasised that exclusions in this regard should be clear and unambiguous.⁸ It should be highlighted that the current normative framework is incorrect and leads to a collision of those important legal goods.

In the related literature, it is emphasised that pursuant to Article 178 of the Polish Code of Criminal Procedure,⁹ defence attorneys, lawyers or legal advisers acting under Article 245 § 1 of the Polish Code of Criminal Procedure cannot be interviewed as witnesses regarding the facts they have learned while providing legal advice or handling a case. It does not matter where the information falling within the scope of defensive or non-defensive attorney-client privilege has been obtained.¹⁰ Prohibition under Article 178 the Polish Code of Criminal Procedure is addressed to the judicial bodies, as it expressly prohibits interrogating the advocate-defender on the circumstance indicated therein. This means that it is inadmissible to

⁷ Cf. Katarzyna Dudka, „Prawny obowiązek zawiadomienia o przestępstwie a odpowiedzialność pokrzywdzonego z art. 240 k.k.,” *Czasopismo Prawa Karnego i Nauk Penalnych*, no. 1 (2005): 110. In the doctrine, one can come across the position that anyone except for perpetrators of crimes listed in this provision can commit the offence under Art. 240 § 1 of the Criminal Code, including the victim. However, it should be emphasised that from an axiological perspective, this view is often difficult to accept. See: Tomasz Razowski, „Komentarz do art. 240 k.k.,” in *Kodeks karny. Część szczególna. Komentarz*, ed. Jacek Giezek, LEX/el. 2023, thesis 4. Compare also Justyna Żulińska, „Prawny obowiązek zawiadomienia o niektórych przestępstwach (art. 240 k.k.),” *Prokuratura i Prawo*, no. 10 (2015): 51.

⁸ See: Michał Królikowski, „Problemy z nowym zakresem obowiązku powiadomienia o przestępstwie,” *Forum Prawnicze*, no. 4 (2021): 10.

⁹ Act of 6 June 1997 – Code of Criminal Procedure, consolidated text: Journal of Laws 2022, item 1375, as amended [hereinafter: the Code of Criminal Procedure].

¹⁰ See: Michał Kurowski, „Komentarz do art. 178 k.p.k.,” in *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, ed. Dariusz Świecki, LEX/el. 2023, thesis 2.

summon them and question them as a witness. Therefore, such a lawyer or legal adviser is not even required to appear when summoned, if the summons itself states that they will be questioned about those matters.¹¹ The absolute inadmissibility in evidence also applies to clergy members of religions that are legally recognised and that provide for individual confession, which is confidential. Clergy members who are no longer performing their priestly service¹² are also bound by the seal of confession. Those individuals, who share an absolute duty of confidentiality, are exempt from the obligation specified in Article 240 § 1 of the Criminal Code.¹³ On the other hand, it is emphasised that in cases where there is suspicion of the commission of a crime against a minor, the hierarchy of values adopted by the legislature is of significant importance. The legislature places a higher value on protecting the victim's interests, when it is a child, over the right to privacy and requires individuals who obtain reliable information concerning the commission of a crime within the scope of their professional secrecy, but associated with less significant legal interests,¹⁴ to report such information. Therefore, the professional secrecy of doctors and journalists does not free them from the obligation specified in Article 240 of the Polish Criminal Code.¹⁵

It should be emphasised that medical confidentiality is not absolute and there are special circumstances in which disclosure of confidential information is possible. The act on the profession of doctor and dentist proves that the obligation to maintain professional secrecy does not apply if maintaining confidentiality may pose a danger to the life or health of

¹¹ See: Jacek Izydorczyk, „Tajemnica obrończa a tajemnica adwokacka,” in *Etyka adwokacka a kontradyktoryjny proces karny*, eds. Jacek Giezek and Piotr Kardas (Warsaw: Wolters Kluwer 2015), 300; see also: Jarosław Zagrodnik, *Obrońca i pełnomocnik w procesie karnym i karnym skarbowym* (Warsaw: Wolters Kluwer, 2020), 77.

¹² See: Michał Błoński, „Zakazy dowodowe,” in *Meritum. Postępowanie karne*, ed. Dariusz Świecki (Warsaw: Wolters Kluwer, 2019), 509.

¹³ See: Maria Szewczyk, Adam Wojtaszczyk, and Witold Zontek, „Komentarz do art. 240 k.k.,” in *Kodeks karny. Część szczególna. Tom II. Część II. Komentarz do art. 212–277d*, eds. Włodzimierz Wróbel and Andrzej Zoll, LEX/el. 2023, thesis 16.

¹⁴ See: Królikowski, „Problemy z nowym zakresem obowiązku powiadomienia o przestępstwie,” 10.

¹⁵ See: Szewczyk, Wojtaszczyk, and Zontek, „Komentarz do art. 240 k.k.,” thesis 16; Razowski, „Komentarz do art. 240 k.k.,” thesis 8.

the patient or other individuals.¹⁶ There is no doubt that the crime of child's sexual abuse threatens his or her health and life, so if the information held by a doctor gives grounds for such a belief (certainty of the commission of the offence does not have to be 100% but its occurrence must be significant), invoking the danger to the child's health to waive medical confidentiality is justified. According to Article 240 § 1 of the Polish Criminal Code, a doctor who has the relevant knowledge of the symptoms of sexual abuse of a child has a legal obligation to report the offence to law enforcement authorities under Article 200 of the Polish Criminal Code because of the literal wording of Article 40 § 2 item 1 of the act on the profession of doctor and dentist.¹⁷

In the case of journalists, the grounds for exemption from the obligation to maintain professional secrecy under Article 240 of the Polish Criminal Code are provided for in Article 16 item 1 of the Act of 26 January 1984 – Press Law, clearly indicating that a journalist is exempt from the obligation to maintain professional secrecy when the information, press material, letter to the editorial office, or other content of this nature concerns the offence specified in Article 240 § 1 of the Criminal Code or the author or person providing such content exclusively to the journalist agrees to disclose his or her name or the content itself.¹⁸ In addition, when there is a suspicion of violence against a child or child abuse, the “Blue Cards” procedure also applies, according to which a medical professional, including a doctor, nurse, midwife and paramedic, is obliged to provide the child with information about the possibilities of obtaining assistance and support, and about the right to obtain a free medical certificate on determining the causes and types of bodily injuries related to the use of domestic violence.¹⁹

¹⁶ Art. 40 sec. 2 point 3 of the Act of December 5, 1996 on the profession of doctor and dentist, consolidated text: Journal of Laws of 2022, item 1731, as amended [hereinafter: The Act on the Profession of Doctor and Dentist].

¹⁷ See: Piotr Bogacki, „Problematyka wykorzystania seksualnego dziecka w kontekście odpowiedzialności karnej lekarza za niezawiadomienie o przestępstwie,” *Wojskowy Przegląd Prawniczy*, no. 2 (2021): 133.

¹⁸ Consolidated text: Journal of Laws of 2018, item 1914, as amended.

¹⁹ § 14 sec. 1–3 of the Ordinance of the Council of Ministers of September 13, 2011 on the “Blue Cards” procedure and templates of the “Blue Card” forms, Journal of Laws 2011 No. 209, item 1245.

Actions involving a child who is suspected of being affected by domestic violence should, if possible, be conducted in the presence of a psychologist.²⁰

In the related literature, it is emphasised that the offence under Article 240 of the Polish Criminal Code is a common but also individualised offence,²¹ which means that the obligation to make a report arises only when the information about the offence obtained by a person is reliable.²² The message must be reliable objectively and subjectively as well as impartially. The potential informant's own belief that the finding deserves recognition and is convincing is not sufficient. It is necessary to relate the finding to objective factual circumstances. The subjective condition is closely related to the denouncer and is based on the internal conviction that an offence has been committed, which is based on existing evidence.²³ After obtaining reliable information about the prohibited act, the obligation under Article 240 § 1 of the Criminal Code should be fulfilled immediately. The term "immediately" should be understood as "without undue delay" and the determination of the specific temporal scope of this obligation will depend on the situation in which the perpetrator is found.²⁴

It should be noted that the obligation to immediately report the commission of a paedophilia offence under Article 200 of the Polish Criminal Code, which applies to any person who has information concerning a punishable preparation or attempt or the commission of a prohibited act, was established upon the entry into force of the Act of 23 March 2017 amending the Criminal Code, i.e. the Act on Juvenile Delinquency Proceedings and the Code of Criminal Procedure.²⁵ However, the legislator did not include any special intertemporal provision in the amended Article 240 of the Criminal Code, which would allow to directly determine that the amended provision applies to persons who receive such information after the entry into force of this provision.

²⁰ § 5 sec. 3 of the Ordinance of the Council of Ministers of September 13, 2011.

²¹ See: Razowski, „Komentarz do art. 240 k.k.,” thesis 3 and 4.

²² See: Marek Mozgawa, „Komentarz do art. 240 k.k.,” in *Kodeks karny komentarz aktualizowany*, ed. Marek Mozgawa, LEX/el. 2023, thesis 5.

²³ See: Królikowski, „Problemy z nowym zakresem obowiązku powiadomienia o przestępstwie,” 17–18.

²⁴ See: Wiak, „Komentarz do art. 240 k.k.,” 1373–1374.

²⁵ Journal of Laws 2017, item 773.

In practice, this has led to many interpretative difficulties, especially on the part of those appointed to deal with cases of paedophilia offences. This could be exemplified by the actions taken by the State Committee for the investigation of cases of acts against sexual freedom and morality committed against persons under the age of fifteen,²⁶ following the receipt of a report regarding commission of the offences by two bishops, governed under Article 240 § 1 of the Criminal Code (the clergy's failure to report offences under Article 200 of the Criminal Code), that the State Committee on Paedophilia then forwarded to the competent district prosecutor's office. However, the prosecutor refused to institute an investigation due to the lack of elements of a prohibited act, taking the position expressed in the statement of reasons, that the obligation to make an immediate report must always be related to the moment of obtaining reliable information about a prohibited act. The State Committee on Paedophilia expressed a different view, arguing that the term "immediately" should be related not to the day of obtaining information about the prohibited act but to the day of imposing criminal liability for the failure to report such an act. Due to the emergence of divergent views on the interpretation of the amended provision of Article 240 § 1 of the Criminal Code, the State Committee on Paedophilia submitted requests to the courts examining the case to consider the need to refer to the Supreme Court in order to resolve a legal issue requiring a fundamental interpretation of the act.²⁷

Considering the above issue, the Supreme Court stated that:

The phrase "having reliable information" used in Article 240 § 1 of the Criminal Code should be understood as the state of knowledge of the entity at the time of committing the act; the term "immediately" refers not to the time of obtaining information about the prohibited act added to the catalog of offenses listed in Article 240 § 1 of the Criminal Code by the Act of March 23, 2017 amending the Criminal Code, the Act on Juvenile Delinquency Proceedings

²⁶ The State Committee on Paedophilia operates on the basis of the Act of 30 August 2019 on the State Committee for the Prevention of Sexual Abuse of Minors under 15 years of age, consolidated text: Journal of Laws 2020, item 2219, as amended [hereinafter: the Act on the State Committee on Paedophilia].

²⁷ The second report of the State Committee for Clarifying Cases of Actions Against the Sexual Freedom and Morality of Minors under 15 years of age, 26–29, accessed March 10, 2023, <https://pkdp.gov.pl/wp-content/uploads/2022/12/raport-drugi-www-1.pdf>.

and the Code of Criminal Procedure (Journal of Laws of 2017, item 773), but to the moment when the obligation to denounce was updated, which occurred on July 13, 2017; the only causative act of the act prohibited under Article 240 § 1 of the Criminal Code defines the verb “not reporting”.²⁸

In the cited resolution, the Supreme Court expressed the view that individuals who had reliable information about the sexual abuse of a child and did not report it to law enforcement authorities were also subject to punishment if they had obtained the information before July 13, 2017 (the entry into force of the amendment to Article 240 of the Criminal Code), thus resolving the intertemporal issue and precisely defining when the obligation to denounce arises, which is significant from the point of view of actions taken by the individuals appointed to deal with cases of paedophilia. The interpretation of the definition of the offence under Article 240 § 1 of the Criminal Code adopted by the Supreme Court means that the application of this provision to persons who obtained reliable information about the offence under Article 200 of the Polish Criminal Code before July 13, 2017 does not violate the *lex retro non agit* principle because the obligation to report is not imposed earlier than the date on which the amendment entered into force. Michał Królikowski, in the context of the amendment to Article 240 of the Polish Criminal Code, has pointed out one important issue, namely that having detailed knowledge on the subject matter at issue, which may require to be precisely recollected and the very fact of possessing such knowledge may even require to be recollected, is the precondition for holding a person accountable who has reliable information about a crime committed before the amended version of Article 240 of the Criminal Code came into force.²⁹ However, the Supreme Court emphasised in the substantiation of the resolution that such a position was groundless, especially in the situations where the information about the prohibited act under Article 200 of the Polish Criminal Code had reached the person

²⁸ Polish Supreme Court, Judgement of July 1, 2022, Ref. No. I KZP 5/22, OSNK 2022/9/32, LEX No. 3361947.

²⁹ Królikowski, „Problemy z nowym zakresem obowiązku powiadomienia o przestępstwie,” 19–20.

responsible for the offence under Article 240 § 1 of the Polish Criminal Code shortly before July 13, 2017.³⁰

The notification of an offence under Article 200 of the Polish Criminal Code can be submitted to any law enforcement authority (police, prosecutor's office, Internal Security Agency, Customs Service, Central Anti-Corruption Bureau, Military Gendarmerie, and other authorities provided for in specific provisions referred to in Article 312 of the Polish Code of Criminal Procedure). The notification does not require any specific form (it can be verbal, written, submitted over the telephone, via electronic mail or even in the form of a message). It is not necessary for the notification to be addressed to the exact authority that is objectively competent to run the case, either (the perpetrator may therefore, for example, notify the police instead of the Military Gendarmerie).³¹ As of 26 September 2019³² suspicion of an offence under Article 200 of the Polish Criminal Code can also be reported to the State Committee on Paedophilia, that is obliged to refer the case to the prosecutor's office.³³ Information can be submitted in writing or in person during the so-called "hearing" at the Commission's headquarters. Reporting to the State Committee on Paedophilia is equivalent to informing law enforcement authorities.³⁴

In addition to the injunction specified in Article 240 of the Polish Criminal Code, there is also a social obligation to report a crime, as governed by Article 304 §1 of the Code of Criminal Procedure, that states: "Anyone who learns of a crime prosecuted ex officio has a social obligation to report it to the prosecutor or the police. The provisions of Article 148a and Article 156a shall apply accordingly."³⁵ This is a classic *lex imperfecta*, as its implementation is not guaranteed by any criminal sanction but is subject

³⁰ Cf. Anna Wilk, „Skutki nowelizacji art. 240 k.k. dla odpowiedzialności karnej za niezawiadomienie o przestępstwach seksualnych. Glosa do uchwały Sądu Najwyższego – Izba Karna z dnia 1 lipca 2022 r., I KZP 5/22,” *Orzecznictwo Sądów Polskich*, no. 1 (2023): 52–54.

³¹ See: Mozgawa, „Komentarz do art. 240 k.k.,” thesis 7.

³² From the date of entry into force of the Act on the State Committee on Paedophilia.

³³ Art. 3 section 2 item 1 of the Act on the State Committee on Paedophilia.

³⁴ Tasks of the State Commission against the sexual exploitation of minors under the age of 15, accessed March 10, 2023, <https://pkdp.gov.pl/o-komisji/zadania/>.

³⁵ Consolidated text: Journal of Laws 2022, item 1375, as amended.

only to the judgement in terms of the moral and ethical aspect.³⁶ The failure to fulfil the above obligation may result in social responsibility associated with stigmatisation of behavior, which may be particularly important in the era of mass media influence and in the reality of the uncensored Internet.³⁷ However, Article 304 § 2 of the Code of Criminal Procedure contains a legal obligation to report a crime, limited in relation to the social obligation by indicating the categories of bodies on which it rests. The legislator has assumed that the reporting obligation rests on the State and local government institutions. Additionally, information about the commission of an offence prosecuted *ex officio* must be obtained in connection with their activity. The obligation that accompanies the reporting imperative is the obligation to take (necessary) measures aimed at preventing the erasure of traces and evidence of the crime, which must be ensured until the arrival of the authority appointed to prosecute crimes or until the authorised person issues an appropriate decision. The obligation to report a crime rests on the persons authorised to represent the State and local government institutions, e.g. this obligation does not rest on a school guidance counsellor but on the school principal. The failure to fulfil the institutional obligation to report a crime is penalised by law under Article 231 of the Criminal Code.³⁸

3. The Extent of the Obligation to Report Cases of Child Sexual Abuse in Austria

The obligation to report cases of child sexual abuse in Austria has been governed by the provisions of the Code of Criminal Procedure and the Child and Youth Protection Act.³⁹ This obligation applies to certain professional groups and institutions working with children and young people. The obligation is stipulated by § 78 section 1 of the Austrian Code of Criminal Procedure, and the report is submitted to law enforcement authorities:

³⁶ See: Wiak, „Komentarz do art. 240 k.k.,” 1372.

³⁷ See: Kurowski, „Komentarz do art. 178 k.p.k.,” thesis 2.

³⁸ Cf. Alfred Staszak, „Komentarz do art. 304 k.p.k.,” in *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, ed. Dobrosława Szumiło-Kulczycka. LEX/el. 2022, thesis 8.

³⁹ Mitteilungspflicht an die Kinder- und Jugendhilfe, accessed March 3, 2023, <https://www.gewaltinfo.at/recht/mitteilungspflicht/>.

the police or the prosecutor's office.⁴⁰ The obligation to submit this report is imposed on: courts, authorities, other public supervisory bodies (such as family and juvenile courts, school authorities, federal police) as well as child and youth care or educational institutions (such as kindergartens, nurseries, schools, day-care centres, after-school care facilities), individuals who care for and educate children and young people on a freelance basis, e.g. babysitters, psychosocial counselling facilities such as an ombudsman for children and the youth, family, women's or parenting counselling facilities, child protection and violence facilities, shelters for women, and private child and youth care facilities, freelancers hired to care for children and young people. The obligation to report is also imposed on the individuals who deal with children in their workplace: hospitals and health resorts, home care facilities, members of legally regulated medical professions (such as doctors, dentists, clinical psychologists, health psychologists, psychotherapists, midwives, occupational therapists, speech therapists, qualified nurses, massage therapists, and music therapists).⁴¹ They are all set forth in the provisions of the Code of Criminal Procedure, not the Criminal Code. Therefore, the failure to submit the report must be treated as the violation of a legal obligation, that is not subject to criminal sanctions, rather than a criminal offence.

According to the provisions of the Austrian Child and Youth Protection Act,⁴² the report must include the name or other personal data of the abused person, a description of the case along with the substantiation why the informant considers the particular case to be a case of sexual abuse.⁴³

⁴⁰ § 78 section 1 of the Austrian Code of Criminal Procedure *Strafprozeßordnung* 1975 (StPO): „Wird einer Behörde oder öffentlichen Dienststelle der Verdacht einer Straftat bekannt, die ihren gesetzmäßigen Wirkungsbereich betrifft, so ist sie zur Anzeige an Kriminalpolizei oder Staatsanwaltschaft verpflichtet“.

⁴¹ § 37 section 1, 1–6 of *Bundesgesetz über die Grundsätze für Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche* (Bundes-Kinder- und Jugendhilfegesetz 2013 – B-KJHG 2013), accessed November 29, 2022, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008375>.

⁴² *Bundesgesetz über die Grundsätze für Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche* (Bundes-Kinder- und Jugendhilfegesetz 2013 – B-KJHG 2013), <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008375>.

⁴³ § 34 section 4 of *Bundesgesetz über die Grundsätze für Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche* (Bundes-Kinder- und Jugendhilfegesetz

The report must also specify the data of the potential perpetrator.⁴⁴ Furthermore, the Child and Youth Protection Act contains the provision that the obligation to submit the report waives the obligation of confidentiality contained in other specific regulations.⁴⁵ An identical provision is also provided for in § 79 sentence 2 of the Austrian Code of Criminal Procedure.⁴⁶

The obligation to report the suspicion or the fact of committing an act of sexual abuse is always imposed on institutions, as long as the persons accountable for such reporting do not perform their activities independently. Which specific person is to submit the report should be assessed in accordance with the organisation's internal bylaws and communication principles. Therefore, it is not an individual obligation that is imposed on a natural person but an obligation of the organisational unit. In the event of disagreement within the organisation as to the existence of a suspected threat, the right to inform the Office for Children and Youth remains. Natural persons are not obliged to submit the report. However, if a natural person reports the offence of child sexual abuse, there is no possibility for such a report to be ignored by law enforcement authorities – they must take action to clarify the circumstances of the case.⁴⁷

The obligation to report arises if there is reasonable suspicion that a child is or has been sexually abused, neglected, or otherwise seriously endangered, and such a danger has been observed in the course of professional

2013 – B-KJHG 2013), <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008375>, accessed November 29, 2022.

⁴⁴ § 34 section 4 of Bundesgesetz über die Grundsätze für Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche (Bundes-Kinder- und Jugendhilfegesetz 2013 – B-KJHG 2013), <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008375>.

⁴⁵ § 34 § 5 of Bundesgesetz über die Grundsätze für Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche (Bundes-Kinder- und Jugendhilfegesetz 2013 – B-KJHG 2013) „Berufsrechtliche Vorschriften zur Verschwiegenheit stehen der Erfüllung der Mitteilungspflicht gemäß Abs. 1 und Abs. 3 nicht entgegen.“

⁴⁶ The Austrian Code of Criminal Procedure Strafprozeßordnung 1975 (StPO) StF: BGBl. Nr. 631/1975 (WV) „Eine Berufung auf bestehende gesetzliche Verschwiegenheitspflichten ist insoweit unzulässig“.

⁴⁷ Gewalt an Kindern und Jugendlichen, Information – Hilfsangebote – Prävention. Kinder- und Jugendanwaltschaft Tirol, 2019, p. 39.

activity.⁴⁸ The territorial jurisdiction depends on the child's place of residence, not on the registered seat or principal office of the facility. The offence of child sexual abuse must be reported immediately after assessing the existence of a specific suspicion and the report must be submitted in a written form.

The report must include the following information: personal observations, the victim's history, professional conclusions as the reasons and grounds for the suspicion of the child's exposure to danger, names and personal identity particulars of the child and parents as well as contact details of those obligated to report – any anonymous reporting is not possible.

4. The Lack of the Obligation to Report Child Sexual Abuse in the Legislation of the Federal Republic of Germany

The German legislator has not resolved to govern the failure to report the sexual abuse of children and adolescents in the criminal law. However, there are specifically other provisions governing – in a number of ways – the obligation to report such cases. Pursuant to § 294a of the Fifth Book of the German Social Code (SGB V),⁴⁹ doctors are obliged to provide health insurance companies with the necessary data, including information on the causes and possible perpetrators, if there are signs of health hazards caused by third parties. This also includes the obligation to report acts and perpetrators of child abuse or sexual abuse. It is recognised that the doctor is obliged to report such cases, as otherwise the doctor may be held criminally liable for bodily injury caused by omission – this is § 323c of the German Criminal Code (the failure to provide assistance in the event of danger).⁵⁰

⁴⁸ § 79 section 2 of the Austrian Code of Criminal Procedure Strafprozeßordnung 1975 (StPO).

⁴⁹ Sozialgesetzbuch (SGB) Fünftes Buch (V) - Gesetzliche Krankenversicherung - (Artikel 1 des Gesetzes v. 20. Dezember 1988, BGBl. I S. 2477.

⁵⁰ Prof. Dr. jur. Julia Zinsmeister, *Rechtliche Handlungsmöglichkeiten und -pflichten der Einrichtungsleitungen bei Verdacht auf sexualisierte Gewalt in Institutionen*, zKK-Nachrichten 1/2007: Sexualisierte Gewalt durch Professionelle in Institutionen, pp. 17–20.

5. The Obligation to Report the Crime of Child Sexual Abuse and Canon Law

It should be emphasised that the obligation to report such crimes was set forth in canon law by Pope Francis. Additionally, the tort of “concealment” was also implemented therein. The Pope demanded specific measures from bishops: “The crimes of sexual abuse offend Our Lord; cause physical, mental and spiritual damage to the victims; and harm the community of the faithful.”⁵¹ In a few words, Pope Francis indicated how terrible sexual abuse by clergy was for those affected by it. In this way, he put forward new standards for the internal church procedure. This applies primarily to the practice of reporting in dioceses all around the world: since 2019 priests and monks have been required to fully and immediately report suspected cases to the competent church authorities. Each diocese was obliged to establish one or more “easily accessible” reporting points within a year, where the suspicion of child sexual abuse could be reported.

6. Conclusions

It should be emphasised that neither in Austria nor in Germany has a criminal sanction been set forth for the failure to report child sexual abuse crimes. This is different in the Polish law in which the Criminal Code explicitly provides for such a sanction. The Polish legislator, by stipulating the criminal liability for the failure to report the commission of a paedophilia crime, has assumed that the primary task of criminal law is to protect the child’s welfare. The welfare of the child is one of the most important constitutional principles of the Republic of Poland, directly resulting from the principle of the common good and the principle of human dignity. By sanctioning the failure to report the commission of a paedophilia crime to law enforcement authorities, the legislator has secured the welfare of the child by countering sexual abuse of minors. Moreover, guided by the need to avoid double victimisation of the victim, it has also excluded the criminal liability for the failure to report the crime by its victim, which is governed by Article 240 § 1 of the Criminal Code.

⁵¹ Überfällig, aber nicht genug, accessed March 3, 2023, <https://www.dw.com/de/kommentar-kirchliche-meldepflicht-bei-missbrauch-%C3%BCberf%C3%A4llig-aber-nicht-genug/a-48676708>.

In Austrian and German law, it is possible to be prosecuted for sexual abuse of children under the provisions governing the failure to provide assistance, although the Austrian legislation provides for the obligation to report such crimes, which stems from the Austrian Code of Criminal Procedure and the Child and Youth Protection Act. In contrast, the German legislator has set forth those provisions in the Fifth Book of the German Social Code, while also specifying the limited extent of that obligation. The moment at which the obligation to report the crime of paedophilia arises is also different – in Poland it comes about whenever the information is obtained and should be fulfilled immediately, while in Austrian law it arises from obtaining the information about such a crime in connection with professional duties, and in the German legal system, there is no such a obligation.

The Austrian and German legislators are cautiously restrained, arguing that the obligation to report such crimes may lead to lower detection rates or even the concealment of the victimised child by those close to them, resulting in even greater harm caused to the child. The legislator aims to take into account the concern, expressed by doctors and psychotherapists who work with children and adolescents, that reporting a crime and taking legal measures could create conflicts or have other consequences that could jeopardise the success of the child's treatment. It should also be emphasised that in both countries, important roles in preventing this type of crime are played by training educators, parents, and children (teaching children assertive behavior and to say “no”) raising awareness among children about how to recognise dangers online and how to deal with them.

In the analysed legal systems, the required form of reporting also varies. In the Polish legal system, it is completely optional – such a report can be submitted even by means of a text message sent by phone (text message), while in the Austrian legal system, it is a formalised and elaborate form – specific suspicion must be indicated, at least a brief description of why such suspicion has arisen, and the person to whom the matter relates must be identified.

To sum up, it should be noted that the Polish, Austrian, and German legislators have aimed to fully implement the provision of Article 19

of the Convention on the Rights of the Child,⁵² according to which the State authorities shall take all appropriate legislative, administrative, social, and educational steps to protect the child against any forms of physical or mental violence, including sexual abuse. In the Polish legal system, fulfilling the convention requirement involves securing the child's welfare by sanctioning the failure to report by anyone with reliable information about the commission of a paedophilia crime to law enforcement authorities. However, in Austria and the Federal Republic of Germany, the emphasis is primarily on implementing various preventive measures that include victim prevention, which involves early detection of children affected by sexual violence, preventing further sexual assaults, and providing supportive therapies as well as precluding perpetrators from relapsing into crime, which involves providing them with psychological or criminological therapy.

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⁵² Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989, Journal of Laws 1991, No. 120, item 526.

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