

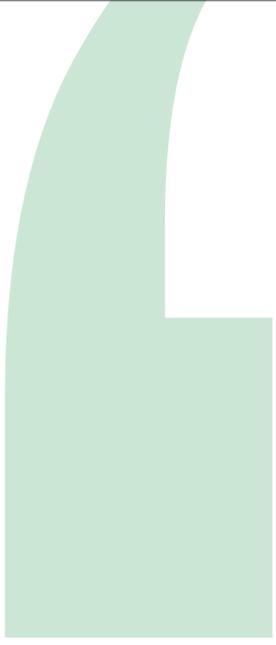


UNABHÄNGIGE KOMMISSION
ZUR AUFARBEITUNG
SEXUELLEN KINDESMISSBRAUCHS

**Recommendations to Improve
the Situation of Victims and Survivors
of Sexual Violence in Childhood
and Adolescence in German Investigations
and Criminal Proceedings**



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“Victims and survivors must find conditions in court that will give them justice.”

A victim and survivor



I. PREFACE

According to police criminal statistics, 11,500 cases of child sexual abuse (Sections 176, 176a, 176b German Criminal Code [StGB]) were reported in 2017. In addition, there were approximately 1,400 reported cases of sexual abuse on adolescents or wards (Sections 174, 182 German Criminal Code).¹ However, it is regularly estimated that around 80%² of cases concerning sexual abuse to the detriment of children and adolescents go unreported, meaning to a large extent that victims and survivors do not report the crimes committed against them.

Victims and survivors have stated various reasons to the Independent Commission for Child Sexual Abuse Issues in Germany (hereinafter referred to as “the Commission”) for not reporting child abuse in adulthood. These include, in particular, the limitation period in proceedings, the fear of jeopardising social and family relationships, and the lack of strength to deal intensively with the crimes.³ Remarkable was that many victims and survivors assumed that they would encounter insensitiveness during the investigations and criminal proceedings and that they would not be believed. They often stated that they had the impression the court proceedings against the perpetrators were highly likely to be dismissed, or that the perpetrators would be given a mild sentence or could even hope for an acquittal. During the investigations and criminal proceedings, on the other hand, they are attributed a role that is associated with high psychological strain. This is also the reason why experts, for example at specialist counselling centres, often recommend not reporting the crimes.

“The counselling centre and the youth welfare office both advised me and my mother not to report the cases. In terms of what it would mean for the victim and survivor, they said that it wasn’t worth bringing it all to court.”

A victim and survivor

1 PKS Bundeskriminalamt 2017, Standard Übersicht Falltabelle, Polizeiliche Kriminalstatistik, Grundtabelle V1.0 (Excel), created 23 January 2018. In addition, there are reported offences recorded as elements of other crimes, such as sexual assault or rape.
 2 See also Stadler et al. (2012), pp. 47-48.
 3 Other important factors are the lack of need for punishment, fear of the perpetrator, a vow to maintain secrecy, respect for the perpetrator or relatives, fear of stigmatisation and shame.

This reveals a loss of confidence in the police and judiciary, even though the law is supposed to contribute to “restoring injured dignity”⁴. The state determining that injustice has occurred means a lot for many victims and survivors and can help them to come to terms with what happened to them.

“For me, it was totally important to kind of give it back and say officially: the guilt – here, this is yours, that’s where it belongs.”

A victim and survivor

In addition to other punitive purposes, perpetrators should be deterred from committing further offences. Criminal charges are, however, worth much more than only leading to the perpetrator’s conviction: they break the silence. Moreover, the charges are entered into criminal statistics, which, according to the details of the charge, can help to raise public awareness of the actual number of abusive crimes. Documenting statements in investigation files can also facilitate prosecution in other cases. After all, it is well-known that a high risk of detection has a major effect on prevention.

“You report it and nothing happens because it’s statute-barred. When I reported it, I kept asking myself the question: why did you bother? In the meantime, I have learnt that information like this is really important. By reporting the incident, the perpetrator could be identified. This helps when further offences in the area of sexual abuse are reported. That’s when I thought: you actually did something right.”

Dorina Kolbe,
Member of the Council of Victims
and Survivors at the Independent Commissioner
for Child Sexual Abuse Issues

Concerning sexual violence, the Commission considers law enforcement to be important. Based on the reports made by victims and survivors, it raises questions on which improvements are necessary and feasible to even facilitate or assist victims and survivors in accessing and participating in criminal proceedings.



4 Augstein, in: Fastie (2017), p. 12.

II. PRESENTATION OF THE SOURCES OF INFORMATION



The Commission's recommendations are based, on the one hand, on the statements of victims and survivors as well as of contemporary witnesses in confidential hearings at the Commission and, on the other hand, on their written reports submitted to the Commission⁵. Thus, 152 victims and survivors or contemporary witnesses, respectively, stated that either they themselves or third parties (such as parents, siblings, youth welfare offices) had reported the incident and that investigations or criminal proceedings, respectively, had subsequently been initiated. In 661 cases, and thus around 81% of the evaluated confidential hearings and written reports, there was no mention of having reported the incident. The data related to all reporting periods (from 1945 on); however, several accounts also dealt with more recent criminal proceedings. Many negative, but also some positive experiences with the police and judiciary were reported. However, victims and survivors described their status as (victim and survivor) witnesses in investigations and criminal proceedings as well as their personal contact with the police and judiciary as problematic. Reliability testing, the length of the proceedings and the lack of knowledge amongst decision-makers in the judiciary, particularly regarding post-traumatic stress disorders, were also criticised. Regardless of whether they reported the case or not, the majority of persons who offered information demand higher penalties and the abolition of limitation periods for proceedings on child sexual abuse. They also call for improved education and training for members of the police and judiciary as well as better cooperation between the authorities so that victims and survivors do not have to keep repeating their accounts.

Two group discussions with the Commission's Hearing Officers have enabled the Commission to gain further insights. These have served as an exchange on the current problems that persons as victims and survivors in their childhood and adolescence encounter during investigations and criminal proceedings. The Hearing Officers are predominantly highly experienced lawyers who, as joint plaintiffs, experience reality in German courtrooms on a daily basis. The Commission's deliberations are also based on informal discussions with employees at specialist counselling centres as well as with judges, public prosecutors and members of the Council of Victims and Survivors of the Independent Commissioner for Child Sexual Abuse Issues. Furthermore, the expertise of Brigitte Tilmann, member of the Commission and former judge, as well as the legal advisers of the Commission's office – a public prosecutor seconded from the judiciary in Bremen and a judge seconded from the Bavarian judiciary – have been incorporated into the assessment and drafting of these recommendations.

III. PROBLEM AREAS IDENTIFIED BY VICTIMS AND SURVIVORS

1. Designing Proceedings Sensitive for Victims and Survivors

The German legislator has attempted to reinforce the rights of victims and survivors in proceedings, thus making investigations and criminal proceedings more sensitive for both child and adult witnesses who experienced sexual violence as children or juveniles. For example, by introducing judicial audio-visual recorded witness examinations some time ago and recently psychosocial assistance in court proceedings. In theory at least, Germany has thus achieved high standards protecting victims in criminal proceedings.

It is also evident, however, that the existing possibilities for designing proceedings in a way to make them sensitive to the victims and survivors are implemented very differently according to court district. In Munich, for example, the investigating judges who specialise in proceedings focussing on the protection of children and adolescents conduct well over 100, in some cases even significantly over 200 video hearings every year, which are also regularly used here to replace having to summon witnesses to give evidence in the main trial. At many other courts, however, there are no audio-visual recorded witness examinations at all or they do not replace hearing witnesses at the main trial. As a result, witnesses are sometimes questioned more frequently, instead of less frequently, and proceedings are delayed. For other reasons, witnesses often face multiple hearings, which lead to particular strains on victims and survivors.

“The argument that audio-visual recorded witness examinations cannot be carried out in smaller court districts, because the technical possibilities do not exist there, is repeated again and again. This is not sufficient for the legal situation. It cannot be the case that the money is not made available for this.”

Doris Kahle,
Hearing Officer in Hanover

“Audio-visual recorded witness examinations are rare here. If I apply for one, it means that the examination won’t be possible for another six months. My application would just delay the procedure. And if an audio-visual recorded witness examination

6 Judicial audio-visual recorded witness examinations have also been carried out for many years in the catchment area of other public prosecutor’s offices and courts, for example in Braunschweig, cf. Ministry of Justice of Lower Saxony 2017, pp. 14–16.

7 See also Weisser Ring Stiftung (2017) pp. 165–166.

is carried out anyway, the child is interviewed again to verify the statement and during the main trial.”

**Theda Giencke,
Hearing Officer in Berlin**

“I virtually had to appear four times before the trial started. Why isn’t it possible to introduce a little shortcut?”

A victim and survivor

Legal regulations provide many opportunities for injured parties to exercise their rights in investigations and criminal proceedings, as well as to be advised and represented in these proceedings. However, opportunities for participation do not exist throughout all of the proceedings. For example, in the case of certain proceedings that are terminated, e.g. due to minor fault, joint plaintiffs have neither a say in the matter nor the right to complain. Furthermore, they are not formally involved in procedural agreements and may not contest the judgement with the objective of another legal consequence being imposed for the offence.

“It was completely incomprehensible to me why they asked the perpetrator and not me whether I agreed with the proceedings being terminated with a fine. I was presented with a fait accompli. According to the public prosecutor, it was done to protect me. They just bypassed me again. I didn’t report it to protect myself, but to make something happen that would also protect others.”

A victim and survivor

Active participation in proceedings is sometimes even prevented where the fundamental right to participate actually exists. For example, using the argument that it could endanger the purpose of the investigation, individual public prosecutors and courts in word-against-word constellations deny joint plaintiffs general access to the files. The infringed party’s statutory right to information is not sufficiently taken into account.⁸

“As a joint plaintiff, I’ve seen that the public prosecutor didn’t even want me to get a copy of the charge. I have also been partially denied access to the file throughout the first instance, arguing that I could influence the witness and that this could affect the second instance. Then the infringed parties are the only ones who know nothing, who are only ‘evidence’. You have a lawyer, but she can’t

do anything. I remember a proceeding in which a false accusation made by the defence lawyer was only noticed while interrogating another witness. I didn't have a chance to uncover it myself because I didn't have any knowledge on the file. When we ask to access a file, we're generally treated with suspicion."

Barbara Petersen,
Hearing Officer in Berlin

As joint plaintiffs are not necessary parties in the proceedings in the criminal procedure code, judges often do not take hindrances on the part of the joint plaintiffs into account when scheduling main trials. As a consequence, parts of the main trials are regularly conducted in their absence. This shows that the role of infringed parties in criminal proceedings does not appear to have fundamentally changed and that there are still reservations about their full participation in the proceedings.

In addition, some victims and survivors often consider the personal contact with them to be insensitive. Some emphasise that a more appropriate personal contact would have helped or has helped them to process the proceedings positively, regardless of the outcome.

"In my case, it was statute-barred. But the judge was very understanding and gave me a few sentences on the way which I can hold on to today when I'm feeling low. Those were things that often helped me a lot when I had fallen into an abyss. It gave me back a piece of my credibility."

A victim and survivor

"When I'm asked if I would advise someone else to file a report, from my perspective I would definitely say no. Only the last judge treated me humanely, took off his robe, came down from the judge's bench, sat next to me and talked to me quite normally. He listened to me. It was a weight from my shoulders. If the persons had been human like that before, the whole thing would have turned out for me very differently. As it was, it was a horror story!"

A victim and survivor

When those involved in the proceedings are insensitive or uninformed, this leads to extremely negative feelings or even retraumatisation for the victims and survivors. Certain

reproaches and questions can give the impression of a shift of guilt from the perpetrator to the victim. For example, it still occurs that when the victims and survivors serve as witnesses, they are reproached or, in cases where they have had a “relationship” with the abusing perpetrator this is taken into consideration to mitigate punishment. Such and similar statements are perceived by victims and survivors as belittling or blame.



“My story is also about the trial, how I was treated, that the judge said that there had been a relationship between the perpetrator and myself for years and that’s why, among other things, he had been given a milder sentence. It wasn’t a relationship! It was abuse! I didn’t do it willingly. The judge’s claim still really hurts me. As if my childhood, my youth hadn’t been bad enough.”

A victim and survivor

“When I reported it, I spoke to a policewoman who said: ‘Yes, unfortunately that happens very often, especially to weak women.’”

A victim and survivor

For children and adolescents and their access to justice, it is crucial that court proceedings are child-friendly. As yet, this has only been the case to a limited extent in Germany.⁹ Many children and adolescents feel insufficiently involved, treated unkindly, questioned in a language that they do not understand, or even discriminated against because of their age or other characteristics.¹⁰ Additionally, their hearings do not always take place in a protected environment that is child-appropriate. This makes it more difficult for children and adolescents to make a comprehensive statement and to process the proceedings positively.

“The investigating judge greeted me with the words: ‘I’ll recognise it immediately if you lie to me.’ Then, the hearing was like an inquisition. I felt like a criminal. The judge kept repeating: ‘That doesn’t sound conclusive, can you describe it in more detail?’ I was 14 years old at the time and had difficulties sorting it out myself. I couldn’t find the words for many things.”

A victim and survivor

⁹ Graf-van Kesteren (2015), p. 3.

¹⁰ Graf-van Kesteren (2015), pp. 14–18.

2. Verifying the Statements of Victims and Survivors / Psychological Statement Validity Assessments

Sexual violence against children and adolescents usually takes place secretly and often over a long period of time. Only rarely are crimes immediately reported after being committed.¹¹ In many proceedings, therefore, there is no evidence other than the victims' and survivors' statements. In such word-against-word situations, the courts are obliged to examine the victims' and survivors' statements with particular care. According to the jurisprudence of Germany's supreme courts¹², an examination must be carried out on the basis of the so-called "null hypothesis" theory: The court must assume that the statement is untrue until this assumption is no longer compatible with the collected facts. In particular, the hypotheses must be examined that the statement may be based on a lie, an error or a suggestion.

In the current judicial practice, the Commission sees several problems: due to this type of examination, victims and survivors feel under suspicion from the outset of not telling the truth. If, while verifying a statement, the conclusion is made that the statement is not necessarily based on a real experience, they understand this as the statement being assessed as not reliable, and often also that they themselves are not credible.

“That was really harsh. Because the court-appointed assessor began with having hypotheses all assuming that I’m not telling the truth, either because I want to harm the perpetrator, consciously tell lies or because the therapy I’d had might have subsequently ‘created’ my statement. I think it’s tough that expert opinions are made like this and that I’m so explicitly told that, to prove it, I have to convince this court-appointed assessor of the opposite. How am I supposed to do that? I understand the approach in itself, but I would expect that the court-appointed assessor would be neutral, that she would not give me the feeling that she is principally on the perpetrator’s side from the beginning.”

A victim and survivor

Scientists criticise the use of the term “null hypothesis” as stemming from the field of statistics and giving the impression of precision. With the help of the methods from psychological statement validity assessments, however, it has only been possible to derive some helpful indicators, which must be weighted and interpreted with regard to the peculiarities and characteristics of each respective individual case. Statistically

11 Stadler et al. (2012), p. 52.

12 BGH, NJW 1999, pp. 2746 et seq.

safeguarded assessment strategies are currently not available here.¹³ Amongst laypersons, but also amongst experts, therefore, the use of this term has caused more uncertainty than quality assurance.¹⁴



“Over the last 15 years, it has been observed that the subjectivity embedded in the method of psychological statement validity assessments is increasingly being forgotten. It requires courage to point out its boundaries.”

Petra Ladenburger,
Hearing Officer in Cologne

It should be noted that judges and public prosecutors often do not trust themselves to carry out the required assessment and therefore call in court-appointed assessors to conduct them. In particular, if judges and public prosecutors only rarely decide on complex word-against-word situations, they sometimes lack the necessary knowledge to professionally conduct their own verification of the statements of victims and survivors in such cases. It also sometimes seems that the court-appointed assessor’s result is adopted almost without any examination of their own. As a result, although, even in difficult evidence situations such as word-against-word cases, the reliability assessment of witness statements is actually the very task of the court, the responsibility to make decisions is shifted to the court-appointed assessors. A court only needs to consult psychological or psychiatric experts if the facts of the case are so specific that doubts may arise as to whether the court’s competence is sufficient to assess the statement’s validity in the particular circumstances.¹⁵ The decision – even after obtaining the opinion of a court-appointed assessor – must always be made by the court according to an overall assessment of all circumstances.

“More emphasis must be placed on the competences of the judiciary, in particular by training those who have to make the decision. The court-appointed assessors may not be the ‘secret judges’.”

Claudia Willger,
Hearing Officer in Saarbrücken and Stuttgart

Particularly in cases where the expert assessment concludes that suggestive influences on the witness cannot be excluded, the courts sometimes do not seem to make the necessary overall assessments. The extent of the potential suggestion is not assessed, nor whether it actually had any effect on the statement. This contributes to proceedings

¹³ König et al., in Fegert, König, Greuel (2009), p. 17.

¹⁴ Greuel, in Fegert, König, Greuel (2009), p. 82.

¹⁵ Established jurisprudence; BGH NSTZ 1982, p. 42; BGHR StPO Section 244 Paragraph 4 Sentence 1 Glaubwürdigkeitsgutachten 2 and Sachkunde 6; BGH StV 1999, pp. 471, 472.

involving witnesses who are particularly worthy of protection, such as pre-school children, being relatively frequently terminated or ending with an acquittal, as, in these cases, the assessment of the victims' and survivors' statements often leads to the conclusion that they could also be explained by suggestion, meaning that the contents of the statements therefore cannot be assessed. Accordingly, if the victims and survivors do not report the crimes until long after their occurrence, the proceedings are often terminated without any further investigation.

Criticism of the psychological statement validity assessments, which has been expressed in particular by victims and survivors as well as trauma researchers, the limits of this method and the question as to whether the latest development of scientific knowledge would offer further opportunities of gaining knowledge, are rarely addressed by members of the judiciary.

“It goes without saying that judges will have to be required to deal with state-of-the-art research on both psychological statement validity assessment as well as the criticism of it. If one takes the criticism of the limitations of the method of psychological statement validity assessments seriously, the way must also be paved for the court to include further findings – such as those of child and youth psychiatrists, psycho-traumatologists, etc.”

Claudia Burgsmüller,
Hearing Officer in Wiesbaden¹⁶

In order to avoid the suspicion of suggestive influences, investigating authorities advise the parents of child victims and survivors, amongst other things, not to engage in any conversations on what happened. Although an exclusively stabilising treatment, provided it is carried out professionally, is not supposed to have any effect on the statement, trauma therapy or sometimes even any kind of therapy is often discouraged¹⁷ – thus denying children the necessary help and support.

3. Lack of Knowledge among Decision-Makers in the Judiciary

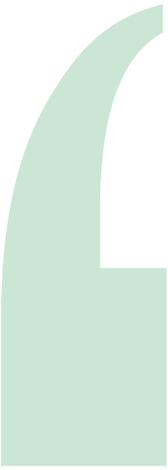
There are many well-informed, empathic and committed people working as public prosecutors and judges in Germany. As a rule, the required qualification for working in the judiciary is proof of above-average legal knowledge in an (honours level) examination.

¹⁶ Burgsmüller in: Fegert, Hoffmann, König, Niehues, Liebhardt (2014), p. 200

¹⁷ See in detail The Advisory Board of the Independent Commissioner for Child Sexual Abuse Issues (2016), p. 2; correspondingly: Stang, Sachsse (2014), p. 210.

Additionally, interdisciplinary knowledge is required for (fair) decisions in proceedings focussing on the protection of children and adolescents and to deal appropriately with victims and survivors; this cannot be acquired either within the framework of legal training or by analysing other proceedings. It is particularly worth mentioning knowledge of perpetrator strategies, crime-specific dynamics, developmental psychology, typical consequences of sexual violence against children and adolescents, traumatology and the assessment of dangerous situations for children and adolescents. The requirements for interviewing minors, especially children, in criminal proceedings differ considerably from those of adult witnesses. However, due to the abundance of other topics, the general work overload in the judiciary¹⁸ and the lack of an obligation to receive further training, internal judicial training on these topics is not sufficiently offered or taken advantage of. Members of the judiciary rarely take part in external specialist conferences, partly because they are generally not reimbursed for their costs. As a result, hardly any interdisciplinary exchange occurs. There is also a lack of case-specific knowledge because, when suspicion of sexual abuse becomes known, hardly any networks are established which include actors responsible for the protection of children and young people, such as police, youth welfare office, family court, doctors and criminal justice.

A lack of knowledge and inadequate networking mean, inter alia, that aspects on child protection are not sufficiently taken into account in decisions, regulations to protect victims during the proceedings are not consistently applied and proceedings are not coordinated with one another. It may also occur that police and judicial personnel cannot imagine certain criminal constellations, such as an abusive mother, and therefore do not think along these lines. Misconceptions, for example of expected “typical” victim behaviour or the belief that such offences take place almost exclusively in a socially precarious environment, can lead to victims and survivors not being believed.



“The parents’ social status, the outer appearance, must not be taken as a yardstick for criminal acts. If only out of the perpetrator’s fears, abusive families usually have a perfect appearance, much more perfect than ‘healthy’ families. My family is a prime example, even the judiciary believes appearances more than my memories.”

A victim and survivor

¹⁸ In the German coalition agreement between CDU, CSU and SPD 2018, p. 123: 2,000 new positions for judges as well as for additional personnel were announced for the courts of the federal states and the federal government.

4. Length of Proceedings

“If the defendant is not in remand detention, you can expect one to two years of proceedings in cases of sexual abuse.”

Birgitt Lüeße,
Hearing Officer in Kiel

By ratifying the Lanzarote Convention on 18 November 2015, the Federal Republic of Germany committed itself to ensuring that investigations and criminal proceedings in cases of sexual abuse and the sexual exploitation of children are given priority and carried out without any unjustified delay (Article 30(3) of the Convention). However, the principle of expedited proceedings is not new to either legislators or politicians. As early as 1998, the “Bundeseinheitliche Handreichung zum Schutz kindlicher (Opfer-) Zeugen im Strafverfahren” (Federal Uniform Guidelines for the Protection of Child (Victim and Survivor) Witnesses in Criminal Proceedings) referred to No. 221 of the “Richtlinien für das Strafverfahren und Bußgeldverfahren (RiStBV)” (Guidelines for Criminal Proceedings and Fine Proceedings) as a reference to the obligation to expedite processing.¹⁹

Despite this commitment, it can be stated that proceedings focussing on the protection of children and adolescents can last very long, often even several years. In most public prosecutor’s offices and courts, expedition only takes place if the defendant is in remand detention while awaiting trial.²⁰ On the one hand, this is a result of the complexity of the sometimes very extensive investigations and, on the other hand, of the limited resources of the police²¹ and judiciary²².

“It feels as if the state has simply abandoned its claim to protect children because of staff shortages. I think that’s terrible.”

Claudia Willger, Hearing Officer
in Saarbrücken and Stuttgart

On the other hand, a violation of the principle to expedite proceedings in which the defendants are not in remand detention has no consequences whatsoever on the proceedings.²³ Children’s vulnerability alone does not seem to play a decisive role in how cases are handled. The huge strain placed on girls and boys, but also on adult victims and survivors, is not taken into account when proceedings go on for a long time.

¹⁹ Federal Ministry of Justice (1998), pp. 9 et seq.

²⁰ If the defendants are in remand detention, the court trial must generally begin within six months, Section 121 Paragraph 1 of the Code of Criminal Procedure (StPO).

²¹ It can take several years (2–3 years), for example, just to evaluate data carriers; this is becoming increasingly important when it comes to allegations of child sexual abuse, see for example: Schleswig-Holstein Parliament (2017).

²² Clarifying the strain on the judiciary: BVerfG (2005): “[...] the permanent work overload of the Grand Criminal Chambers of the Aachen Regional Court [...], known to the Federal Constitutional Court also from other proceedings [...]”; Karlsruhe Higher Regional Court, 2016: “The state of affairs known to the Senate from, inter alia – but not limited to – the economic criminal chambers, as a result of which non-detention cases must wait for several years before they can be heard due to a lack of personnel, whereby in some cases, allegations of criminal offences become statute-barred, is evidently contrary to the rule of law.”

²³ With the exception of claims for damages due to excessive length of proceedings pursuant to Sections 198 et seq. of the Court Constitution Act (GVG).

Legislators and judicial administrations have so far failed to safeguard that proceedings focussing on the protection of children and adolescents are dealt with as a matter of priority and without delay.

“Many in court don’t even think about what that means for victims and survivors when proceedings take so long.”

Claudia Willger, Hearing Officer
in Saarbrücken and Stuttgart

“I reported it in 2010, the final acquittal verdict came in 2016. You’re always looking in the mailbox because you roughly know that something’s coming, and there’s never anything in it. You don’t hear anything from the court, you don’t hear anything from the police, you have to wait, wait, wait - terrible! You’ve taken this step and you’re left hanging.”

A victim and survivor

“I carried it around with me for a year, always thinking about it. That was cruel! All the time, you think that a letter from the court will come tomorrow, and you have to go there and tell the story again. You can’t relax.”

A victim and survivor

5. Level of Penalties

Victims and survivors who have been heard by the Commission or presented written reports notably often demand harsher punishments for the perpetrators, criticising that sentences are all too often suspended on probation in cases of child sexual abuse.²⁴ Courts do not take the often lifelong consequences for victims and survivors of sexual violence enough into account.

“I would like to see judgements – in the few cases where there are any – take up the upper end of the penalty limits provided by law. That brave judges already pass first-instance judgements with considerable prison sentences even on first-time perpetrators

²⁴ See also Nagel, Kavemann (2017); Nagel, Kavemann, Klarmann, Doll (2017). In the study carried out by the FrauenForschungsInstitut in Freiburg on the expectations of victims and survivors with regard to reconditioning and the Independent Commission, it was asked how they view the Commission as having achieved its goals: 72.8% (N = 316) of victims and survivors stated that this would be the case, among other things, if perpetrators were punished more consistently; 46.8% said that it was part of a good reconditioning of coming to terms with the situation of holding the perpetrators accountable. For several, recognition goes hand in hand with the “just”, “adequate”, “really high”, “hard”, “appropriate”, “more consistent, sustainable” punishment of perpetrators.

and that appeal courts uphold these judgements. For many years, even sometimes decades, victims and survivors live with one single night in which boundaries were not respected. This circumstance must be taken into account in the sentencing.”

A victim and survivor

Following the nationwide press coverage, one (not only victims and survivors) can get the impression that child sexual abuse is assessed very differently by different public prosecutors and courts.²⁵ In each individual case, it must always be borne in mind that a multitude of individual circumstances must be included in the sentencing and, therefore, no comparative assessment can be made externally without any detailed knowledge of the specific circumstances. At the same time, reporting often proves to be shaped by the reporting medium’s subjective opinion: especially with regard to the topic of “child sexual abuse”, there is often no willingness to present various accounts. But, also the mere feeling of a roughly different or too mild application of the law can damage confidence in the justice system. The notion that criminal proceedings will not in any way meet their expectations of punishment may discourage victims and survivors from reporting the crimes to the police. Sentences, following any convictions, perceived by victims and survivors as unreasonably low has a clear impact on their long-term satisfaction with the judicial process.²⁶



25 The Criminal Law Department of the Deutscher Juristentag will also be dealing with the topic “Sentencing guidelines vs. the free assessment of evidence of the court – do we need a new sentencing law?”, with reference to varying regional penalty levels for similar criminal offences, 26 to 28 September 2018.

26 So does Volbert, in: Fastie (2017), pp. 246 et seq., which states that a very high number of confrontational court hearings, ongoing proceedings and the lack of social support are accompanied by pronounced strain during the proceedings, a judgement assessed as too mild, the termination of proceedings or an acquittal lead to a more negative assessment in the long term.

IV. CONCLUSIONS AND RECOMMENDATIONS²⁷

As described above, proceedings involving child witnesses or witnesses who were adults at the time of the proceedings and who had been victims of criminal offences in their childhood or adolescence (proceedings focussing on the protection of children and adolescents) differ considerably from other investigations and criminal proceedings. The judicial administrations and the law simultaneously see judges and public prosecutors as generalists who can and must become active in a wide variety of legal fields within a short period of time. At smaller courts, they have to work on several specialised fields, sometimes even simultaneously. However, complex specialised knowledge is not only required in proceedings focussing on the protection of children and adolescents, but also in many other areas of law. While members of the legal profession often specialise in a certain field, for example by taking specialist courses for lawyers, decision-makers in the judiciary often lack in-depth training in specialised subjects. They often only have to work on a small number of these cases, amongst many other tasks, or, because of the short time they spend on the individual departments, they cannot acquire the necessary knowledge. In addition, the judiciary is generally underfunded and understaffed.

Due to these structures, the competence with which proceedings focussing on the protection of children and adolescents are conducted at certain courts/authorities depends very much on the commitment and interest of individual judges and public prosecutors. For victims and survivors, it is left only to a matter of luck if their cases are dealt with by a public prosecutor's office or a court with well thought-out concepts for dealing with cases focussing on the protection of children and adolescents and by decision-makers with in-depth knowledge and experience in dealing with these proceedings. This is unreasonable for victims and survivors of sexual violence in childhood and adolescence, especially for children.

1. Establishment of Competence Centres

The Commission therefore recommends that, through structural changes in the judiciary, locally and objectively concentrated competence centres are established in proceedings focussing on the protection of children and adolescents. This can be achieved by first creating specialist prosecutors' offices and specialist courts for cases focussing on the protection of children and adolescents.²⁸ Such a local concentration of proceedings is already common in other specialist areas, such as commercial criminal matters. The consequence would be that neither every one of the more than 600 local courts nor

²⁷ The Commission's recommendations primarily address criminal justice. In particular, however, those on establishing competence centres, further training, quality assurance and networking also apply to the police.

²⁸ Specialised public prosecutor's offices can be established via Section 143 (4) GVG; local courts as specialised courts via Section 58 (1) GVG in conjunction with state ordinances on jurisdiction; regional courts as specialised courts via Section 13a GVG in conjunction with federal state laws. By supplementing Section 74b GVG in accordance with Section 74c Paragraph 3 GVG, the federal legislator is recommended by statutory order of the federal state governments to create an authorisation rule for simply allocating matters focussing on the protection of children and adolescents to a regional court for the districts of several regional courts.

every one of the more than 100 district courts in Germany would be involved in proceedings focussing on the protection of children and adolescents, but only a few of them which have a larger regional catchment area and a correspondingly higher number of cases.

As a further step, offices predominantly competent in proceedings focussing on the protection of children and adolescents should then also be created in the specialised courts thus established.²⁹ Particularly because of the lower number of cases needing to be dealt with, judges who preside over these proceedings only in addition to cases focussing on the protection of children and adolescents or general criminal cases are rarely able to acquire the necessary experience, knowledge and skills in the field focussing on the protection of children and adolescents. If having to deal with a larger number of cases focussing on the protection of children and adolescents due to a local³⁰ and technical – i.e., double – concentration, investigating judges at the local courts³¹ could also better fulfil their significant role in the proceedings focussing on the protection of children and adolescents. If they are only rarely involved in the questioning of a child victim and survivor (or of an adult who experienced sexual violence as a child or adolescent, cf. Section 58a of the Code of Criminal Procedure (StPO)) at smaller local courts or at larger local courts with many investigating magistrates, it is difficult for them to carry out a technically and legally sound audio-visual recorded witness examination. This instrument is too unusual and error-prone in practice. However, investigating magistrates can only manage this important, sometimes decisive evidence for the later criminal proceedings (Section 255a Paragraph 2 StPO) with error-free audio-visual recorded witness examinations. Their questioning will determine whether the child or adult witness needs to be heard again in the main trial.

Finally, economic aspects also speak in favour of specialisation. The technical equipment required for the recording and playback of audio-visual recorded witness examinations could thus be procured centrally and better utilised through a higher number of proceedings.

2. Professionalisation through Education and Training

There is no way towards a systematic professionalisation of the judiciary without education and training.³² When specialising, an in-depth knowledge transfer could be useful where this knowledge is specifically needed and applied in a larger number of cases. It can also be assumed that specialist judges and public prosecutors will develop a greater

29 Public prosecutor's offices already frequently have special departments or departments focussing on the protection of children and adolescents.

30 The public prosecutor's office can already bring about a certain local concentration here via Section 162 Paragraph 1 Sentence 1 StPO.

31 This shall apply *mutatis mutandis* to youth judges if they perform investigative duties in proceedings focussing on the protection of children and adolescents.

32 Haller (2011), pp. 970, 973. The state's obligation to ensure specialisation is also found in Articles 5(1), 34(1) and 36(1) of the Lanzarote Convention and Article 15 of the Istanbul Convention, see also Clause 119 of the Explanatory Notes to Article 18.

interest in area-relevant services, such as quality management (for example, through trial monitoring or a quality analysis of conducted audio-visual recorded witness examinations) and support services, such as supervision.

3. Standardised Networking

Policy-makers and judicial authorities must ensure standardised cooperation between and a cross-unit networking of actors responsible for the protection of children and adolescents (see Article 10(1) of the Lanzarote Convention; Article 18(2) of the Istanbul Convention). So far, however, official and judicial proceedings as well as medical and psychological assistance in the field of the protection of children and adolescents have not been systematically linked in Germany. In the US “Children’s Advocacy Centers” or in the Scandinavian “Barnahus”, cooperation developed from a child’s perspective has been taking place for years, helping to reduce the strain on children. As part of a pilot project, the “Childhood Haus”, which is to be opened in Leipzig on 27 September 2018, an attempt is being made to transfer the basic ideas of the “Barnahus” to German conditions.³³ In the Commission’s view, this concept could be a suitable model for institutionalised networking and exchange, and could be well combined with the idea of competence centres within the judiciary presented here.

4. Interdisciplinary Discourse on Credibility Testing

The Commission also recommends an open, multidisciplinary discourse on the verification method of the statements of victims and survivors in word-against-word situations and in psychological statement validity assessments by courts. Research in traumatology, developmental psychology, child and adolescent psychiatry as well as international approaches should be taken into account. In accordance with the minimum requirements for expert opinions on culpability and prognosis³⁴ developed in interdisciplinary working groups and published in specialist journals, guidelines could be developed which clarify the function of psychological statement validity assessments in the system of judicial assessment of evidence and point out the methods and limits of psychological statement validity assessments. The possibilities of drawing on further scientific knowledge should also be addressed. The term “null hypothesis” should be reconsidered or, at least, made easier to understand. The guidelines would need to be regularly reviewed and adapted in accordance with the latest scientific findings.

³³ For more information on the “Childhood Haus”, see: <http://www.childhood-de.org/project/childhood-haus-leipzig/> (retrieved 1 August 2018).

³⁴ Boetticher et al. (2005), pp. 57 et seq.; Boetticher et al. (2006), pp. 537 et seq.

5. Evaluation of Legal Practice

Furthermore, the Commission recommends conducting scientific studies on the systematic evaluation of legal practice³⁵, in particular on the application of existing standards for the protection of victims and survivors in investigations and criminal proceedings as well as their impact on victims and survivors, and on the practice of the courts concerning convictions in cases focussing on the protection of children and adolescents. The impression described above – that sexual abuse of children and adolescents is assessed very differently by different public prosecutors and courts – cannot currently be verified as to its truthfulness. In this respect, an evaluation could either correct a false impression or contribute to a discourse within the judiciary on the adequacy of penalties imposed and to a general discourse on the adequacy of existing criminal frameworks³⁶. This also applies to the question of whether further reforms are necessary to protect (victim) witnesses in criminal proceedings.

6. Expediting Proceedings Focussing on the Protection of Children and Adolescents

Finally, legislators and public administrators are called upon to ensure that proceedings focussing on the protection of children and adolescents are dealt with as a matter of priority and without delay.³⁷ In proceedings, it must be examined whether the requirement to expedite proceedings, due to its significance for the protection of children and adolescents, is to be expressly included in the Code of Criminal Procedure or the Judicial Systems Act.³⁸ In addition, the question of a remedy against unjustified delays in proceedings should be discussed with the aim of directly enforcing the principle of expediting proceedings, for example by filing a complaint for expedition as provided for in Section 155 b of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG)³⁹.

35 Additionally: Council of Victims and Survivors of the Independent Commissioner for Child Sexual Abuse Issues 2016, p. 1.

36 Pursuant to Article 27(1) of the Lanzarote Convention, the Federal Republic of Germany has undertaken to threaten sexual offences against children and adolescents with effective, proportionate and dissuasive sanctions which take account of the seriousness of the offence.

37 See also Article 49 (1) of the Istanbul Convention.

38 According to estimates by more than 80% of the respondents, the legal inclusion of a priority and expedition requirement in the FamFG has led to an expedition of proceedings, see Ekart, Heiderhoff, Federal Ministry of Justice and Consumer Protection (2018), pp. 259–260.

39 Section 155 b FamFG: “(1) A party involved in parent and child matters as defined in Section 155(1) may assert that the previous duration of the proceedings does not correspond to the priority and expedition requirement under the aforementioned provision (complaint of expedition). In so doing, it shall state the circumstances from which it follows that the proceedings were not prioritised and expedited. (2) The court or tribunal shall decide on the complaint for expedition by order within one month of its receipt at the latest. If the court or tribunal considers the complaint for expedition to be well-founded, it shall immediately take appropriate measures to ensure that the proceeding is carried out as a matter of priority and expeditiously; in particular, it shall examine the possibility of issuing interim measures. (3) The complaint for expedition shall also be deemed to be a notice of delay within the meaning of Section 198 Para. 3 Sentence 1 GVG.

7. Equipping the Judiciary

The Commission also expressly emphasises that it is the state's responsibility to provide law enforcement authorities and courts with the necessary human and technical resources⁴⁰ and to prevent the judiciary from being overburdened.⁴¹ In proceedings focussing on the protection of children and adolescents, it must not be the case that delays in proceedings which are contrary to the rule of law are generally accepted as an apparently unavoidable fact.⁴²

Regarding crimes against children and adolescents, especially concerning violent and sexual offences, effectively networked and highly professional criminal prosecution authorities and courts are indispensable and must not depend on the victims' and survivors' places of residence or on the will and commitment of individual persons. They are rather the responsibility and obligation of the state⁴³ and must become standard.



40 See also Article 5(2) and Article 34(1) of the Lanzarote Convention.

41 Impressively BVerfG (2005), which speaks of the failure of the state because it does not provide the courts with the necessary resources.

42 OLG Karlsruhe (2016).

43 See the provisions of the UN Convention on the Rights of the Child, the Lanzarote Convention and the Istanbul Convention.

V. OUTLOOK

The Commission is convinced that the implementation of its recommendations will improve the quality of the proceedings focussing on the protection of children and adolescents in Germany. Nevertheless, the consideration of the victims' and survivors' needs in criminal proceedings finds its limits in the inviolable principles of the rule of law, for example in the presumption of innocence applicable to every defendant until his or her final conviction. The main objective of criminal proceedings is to determine the perpetrator's individual guilt.

However, justice and legal satisfaction require more than holding the perpetrators accountable. It must also be about the dignity and restoration of the victims' and survivors' physical and mental condition resulting from a crime and their reintegration into a normal life. This cannot and must not be a private matter for the individual victim or survivor, but a challenge from which the state and society may not remove itself. The victims' and survivors' recoveries and the regaining of control over their lives⁴⁴ are just as important for social coexistence as punishing and rehabilitating the perpetrators. Therefore, politics and society should develop ideas and concepts on how to meet the victims' and survivors' legitimate and necessary needs.

The concept of "parallel justice" could be one idea which would show victims and survivors respect and give them a sense of justice. The basic idea here is to determine in separate proceedings the injustice suffered and to grant tangible help to victims and survivors, irrespective of whether a perpetrator can be identified and/or convicted. It should be (further) discussed in politics and legal teachings whether and how such a procedure with its own procedural principles, like the principle "in case of doubt for the victim", can be implemented into our legal system.⁴⁵

"If the authorities officially recognise the suffering, instead of just demanding that the victims and survivors provide justification and constantly bear the burden of proof – this would change so much."

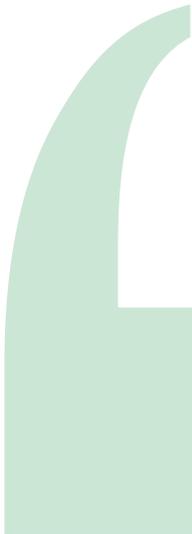
A victim and survivor

⁴⁴ See Burgsmüller, in Pollähne, Rode (2012), pp. 173–179 (175).

⁴⁵ See Herman (2010); Steffen, in: Marks, Steffen (2013), pp. 107–110; Pfeiffer, in Marks, Steffen (2013); Gräfin von Galen (2013), pp. 171–178; Kreuzer (2014), pp. 3–4; doubtful: Hörnle et al. (2014), pp. 49–54.

EXCURSUS: STATUTE OF LIMITATION

The abolition of statutes of limitation⁴⁶ for offences of sexual abuse of children and adolescents is a matter of great concern to a large number of victims and survivors who have contacted the Commission.⁴⁷ In the hearings and written reports, many victims and survivors have vividly reported that they did not have the words to express the sexual violence they had experienced in childhood; it usually took them many years to even realise what had happened to them. This applies all the more, but not exclusively, to sexual abuse in the family or in the close social environment. It takes time to overcome the shame and break the silence. In addition, perpetrators often force children and adolescents to maintain secrecy. To be able to speak about it at all, victims and survivors often first have to completely detach themselves from their family and/or social environment. Frequently, victims and survivors experience rejection or little support from their family and social environment as soon as they begin to open up. Furthermore, victims and survivors report that they are sometimes still confronted with the various physical and psychological consequences of sexual abuse many years after the crime, in some cases to this day.



“Being a victim of sexual assault, especially when it takes place in an atmosphere of fear and dependence, causes strong feelings of guilt and disorientation. Only today, even as a family father, materially and psychologically stable, am I in a position to classify and evaluate what happened”.

A victim and survivor

“The statute of limitations for sexual offences also needs to be reconsidered. Of course, it’s difficult to provide evidence after decades and some people may also balance ‘abuse with abuse’. For the victims of sexual offences, however, legal doors close at the moment the statute of limitation comes into force.”

A victim and survivor

In principle, it would be conceivable to abolish the limitation periods. Their existence is not any compelling consequence arising from the constitutional principle of the rule of law. The reasons for the need for limitation periods⁴⁸ are debatable.⁴⁹ At the same time, many of the victims’ and survivors’ accounts clearly show that they are not only interested in the one-sided desire for legal satisfaction, but that the sexual abuse of children and adolescents represents a very serious violation of rights which usually has

46 Victims and survivors are primarily concerned here with the so-called “limitation period in proceedings” (exclusion of the legal punishment for an offence after a certain period of time).

47 The “Sexueller Kindesmissbrauch in Abhängigkeits- und Machtverhältnissen im privaten und öffentlichen Einrichtungen und im familiären Bereich” Round Table, approved by the Federal Cabinet on 24 March 2010, considered the limitation periods to be sufficiently long and called for the start of the limitation period from the age of 21, cf. Final report of 30 November 2011, p. 30.

48 Keywords: legal certainty, impossibility of implementing punishment, relieving the judiciary, disciplining the prosecution authorities, difficulties concerning evidence, risking miscarriage of justice, see Hörnle et al. (2014), pp. 6-16.

49 Hörnle et al. (2014), pp. 16 et seq., 48-63.

considerable and long-term consequences and justifiably raises questions on their statute of limitations.

Nevertheless, without reconsidering the entire structure of the limitation periods in the Criminal Code, it will not be possible to hold a balanced debate on the abolition of limitation periods. For it is undeniable that the circumstances in the case of offences of sexual abuse of children and adolescents described by victims and survivors are not only similar⁵⁰, but also apply, for example, in individual cases to any physical or psychological violence against children and adolescents or their neglect in the family or in the home. It is neither productive nor appropriate to start discussing which suffering may be worse. If one bases the argumentation for abolishing the statute of limitation on almost lifelong suffering or the lack of possibility for prompt criminal charges, the abolition of limitation periods could be considered for some offences⁵¹, particularly those which occur to the detriment of children.

The Commission welcomes the fact that the legislator has now adopted a new approach to the situation of child victims and survivors of sexual abuse previously described within the framework of the 49th law amending the Criminal Code of 27 January 2015, taking into account that the statute of limitations now only begins after the victims and survivors reach the age of 30.⁵² Therefore, for example, the statute of limitations for accusations of serious sexual child abuse usually expires when the victims and survivors reach the age of 50.⁵³ It remains to be seen whether this regulation will prove its worth and do justice to the protection of the legally protected right to sexual self-determination; this should be researched and borne in mind by those responsible.⁵⁴ Despite the above-mentioned regulation, which has been in force since 27 January 2015, it is still worth starting debate in legal teachings and politics on the issue of the abolishing limitation periods⁵⁵ for serious, long-lasting infringements of legally protected rights.

50 One should also think of victims and survivors of human trafficking for the purpose of sexual exploitation.

51 Cf. the regulation in Switzerland, which according to Article 101 Sentence 1 StGB, there is no statute of limitation in cases of: genocide, crimes against humanity, war crimes, crimes which, as means of extortion or coercion, endangering or threatening to endanger the life and limb of many people, in particular through the use of weapons of mass destruction, the triggering of disasters or the taking of hostages, sexual acts involving children (Article 187 (1)), sexual coercion (Article 189), rape (Article 190), desecration (Article 191), sexual acts involving institutional care, prisoners, defendants (Article 192 (1)) and exploitation of an emergency (Article 193 (1)) when committed against children under the age of twelve.

52 It should be noted here that due to the constitutionally guaranteed prohibition on retroactivity, this provision only applies to victims and survivors for whom the criminal charges were not yet statute-barred when the act came into force on 27 January 2015.

53 Interruptions of the statute of limitations within the meaning of Section 78c StGB and thus “quasi-extensions” of the statute of limitations are usually caused by certain orders of the courts or investigating authorities, for example for searches, the interrogation of the defendants and the filing of charges. After such an interruption of the limitation period, the statute of limitations commences anew.

54 As the Stadler study et al, 2012, p. 50 has hinted, are younger victims and survivors really more willing to report crimes?

55 This will be yet a further aspect of the debate as witnesses, victims and survivors may have to be at the disposal of the judiciary for the rest of their lives, which is something not all victims and survivors want. Therefore, after the expiry of the current limitation period, the Council of Victims and Survivors demands that further criminal prosecution be made dependent on an application by the victims and survivors. The Council of Victims and Survivors of the Independent Commissioner for Child Sexual Abuse Issues (2016), No. 11.

OVERVIEW OF RECOMMENDATIONS

- 1. Local concentrations as well as technical specialisations should lead to the creation of competence centres throughout the country for proceedings focussing on the protection of children and adolescents.**
- 2. Public prosecutors and judges involved in proceedings focussing on the protection of children and adolescents should be better prepared for the special requirements of these proceedings by receiving intensive further training to accompany and support them in the performance of their duties.**
- 3. The standardised networking and exchange of information between all professional groups responsible for the protection of children and adolescents must be safeguarded.**
- 4. An interdisciplinary working group should formulate and regularly review standards for verifying the statements of victims and survivors by courts and experts in line with the current state of research.**
- 5. A systematic scientific evaluation of legal practice should be conducted, in particular regarding the application of existing standards for the protection of victims in investigations and criminal proceedings as well as the conviction practice of the courts in cases focussing on the protection of children and adolescents.**
- 6. Expedited processing of proceedings focussing on the protection of children and adolescents must be ensured.**
- 7. The judiciary must be equipped with the necessary human and material resources in a sustainable manner.**



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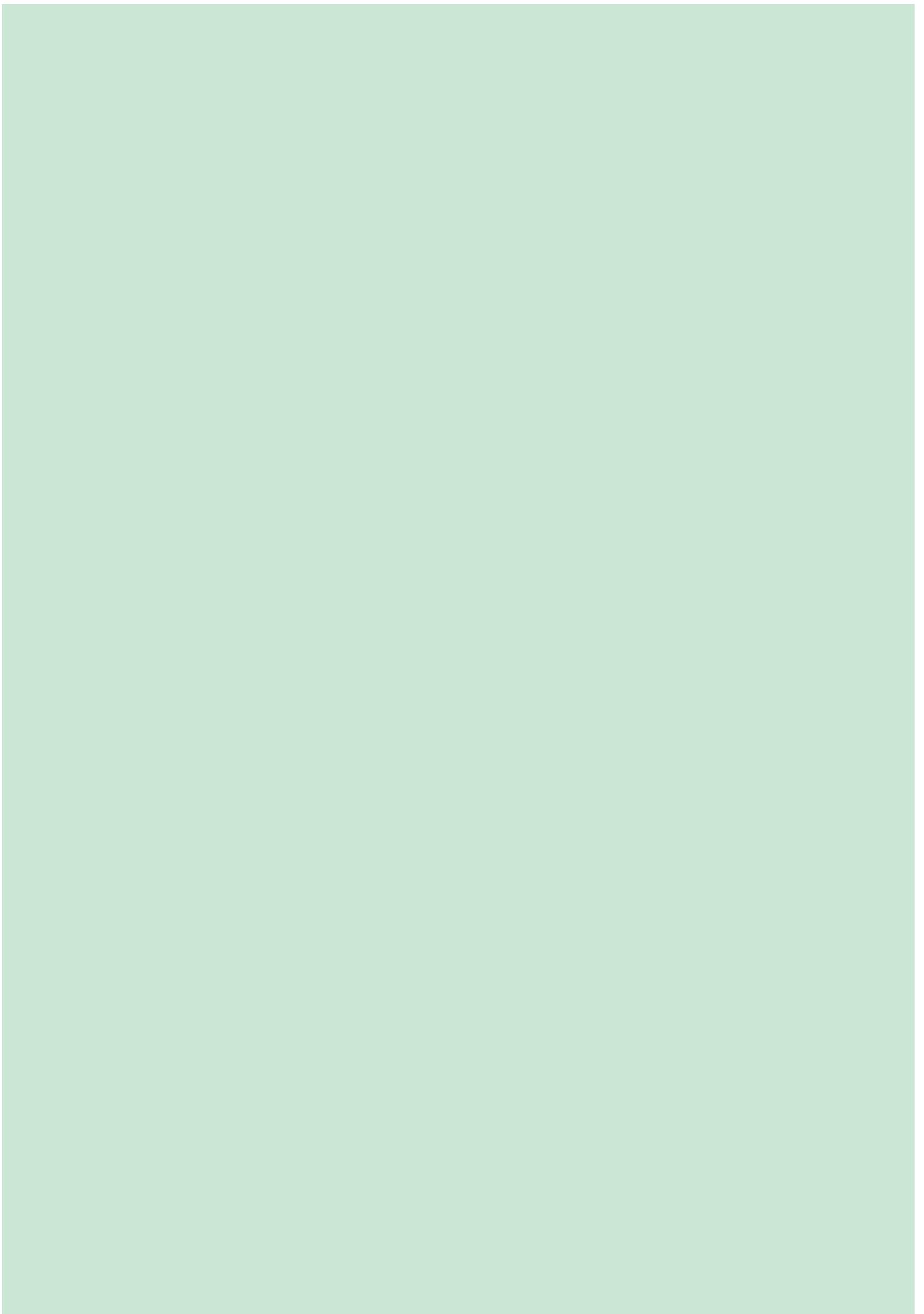
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