

## **The role of research services and sharing their work with the public**

### **Introduction**

The presentation is devoted to certain important issues, relating to parliamentary research services sharing the results of their work with the public.

However, before presenting these issues, by way of introduction, I would like to say a few words about the institution that I represent. I speak here as a representative of the Sejm Bureau of Research – an expert unit operating within the Chancellery of the Sejm, providing scientific advice for the lower chamber of our parliament.

The Sejm Bureau of Research is one of the organisational units of the office providing services to the Sejm and reporting to the Head of the Chancellery of the Sejm. The Bureau currently employs around 80 persons, a vast majority of whom perform expert tasks. A large part of employees of the bureau are lawyers, currently working in three departments<sup>1</sup>. Their responsibilities include preparing legislative opinions on bills submitted to the Sejm, evaluating the compliance of bills with European Union law and preparing expert reports on the application of parliamentary law, in particular of the Standing Orders of the Sejm. Apart from lawyers, the Bureau employs specialists in other areas: economy, public finance, environmental protection, agriculture and social issues. They are divided into two departments<sup>2</sup>.

The task of the experts specialising in specific fields of knowledge is to enable authorised entities to use expert reports and studies concerning issues related to legislative work as well as to carry out wider study works covering issues that are of interest to the Sejm. Moreover, these experts prepare comparative studies concerning legal regulations in force abroad. It is worth noting here that experts who prepared an opinion may be invited to the sitting of a Sejm Committee in order to present their view on the matter more extensively or to answer further questions.

The Bureau prepares a major part of commissioned opinions by its own means (experts employed in the Bureau are authors of these opinions), yet sometimes it is necessary to use the services of external experts (due to a particularly complicated nature of the issue concerned or for organisational reasons). In such cases, the Bureau – guided by its own knowledge of a given field – is responsible for choosing the expert and commissions him/her to prepare the opinion. Another task of the Bureau is financing opinions commissioned by specific authorised entities directly to external experts indicated by the latter. In such cases, the Bureau has no influence on the choice of expert and carries out only organisational tasks<sup>3</sup>.

Against this informational background I would like to present two issues which show the nature of the very delicate and complex relationship between expert services

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<sup>2</sup> Department of Social and Economic Research and Department of Political Research.

<sup>3</sup> § 4(2) and (3) in relation with § 5(2a) of Resolution no 28 of the Presidium of the Sejm of 19 April 1995 on the principles of organisation of scientific advice to the Sejm and its bodies, appointing advisers to the Sejm and using expert reports and opinions, the unified text includes recent amendments introduced by Resolution no 13 of 30 March 2016 (hereinafter: Resolution no 28).

working for the political decision-maker and the society (general public) subject to the power of this decision-maker.

Firstly, it is necessary to consider in this context the issue of the contemporary significance of expert activities in the exercise of power, i.e., in fact, the issue of the expert's status in the legislative process, in its current shape and conditions.

Secondly, it should be noted that there is a tension – within the contemporary decision-making process – between transparency and confidentiality, between the interests of the political decision-maker who focuses on achieving a set goal and the interests of society, which, as a rule, strives to obtain the broadest possible access to all information.

I intend to present both these issues in the most general manner possible, trying to outline regularities present in many contemporary political systems, noticed by representatives of the doctrine in many contemporary states. Next, I will compare these general findings with institutional practice concerning sharing the work of parliamentary research services in Poland – using the experience of the Sejm Bureau of Research as a reference point.

### **A) The position of parliamentary research services in the legislative process**

Referring to the issues of concern one has, above all, to note the large and ever growing influence of experts on the course of the law-making process and on the content of adopted laws. In general – according to numerous attentive observers of the modern world – the involvement of experts in decision-making processes and the scale of such involvement – almost a domination of experts in social life – are currently very typical or even generalised phenomena. They are considered a sign of the times. Obviously, this general pattern also applies to parliamentary research services, which consist of experts and advise the decision-maker in the course of legislative work.

What is the cause of this state of affairs?

The involvement of experts in the legislative procedure directly reflects the scale of the challenge which contemporary political decision-makers, including legislators, have to face. The increasing role of experts is seen as a clear sign of the growing ignorance of decision-makers (legislators), which – importantly – is not their fault. The reason for the ignorance of the decision-maker (legislator) is objective and lies in the complexity of social relations in all dimensions of life: administrative, social, commercial and private, caused for instance by technological progress. These social relations, that are constantly becoming more and more complicated, are the subject of law-making activities and contribute to the continuously growing scope of regulations created. General knowledge and discernment based on common sense in a given field plus experience gained at work – i.e. the traditional attributes of the political decision-maker (legislator) – are no longer enough to make decisions. Qualified highly specialist knowledge is often required. Therefore, the involvement of experts in the decision-making process (law-making process) is a response to the deficiencies of the legislator that are natural in this case, and is essential in the context of the assumptions that I have just presented. Consequently, the decision-maker has to trust the expert because he has to rely on him and depends on him in many aspects.

The assumptions pointed out determine the position of the expert in the decision-making process – they establish the (decision-making?) role played by the expert in

the law-making procedure. Therefore, they directly translate into the status of the expert.

Literature distinguishes: a) basic – constitutive – elements of the function exercised by the expert (i.e. the necessary elements of the notion of “expert”), and b) various methods of assigning the status of expert to a given person.

Let me begin by discussing the two basic elements which make up the status of expert.

Firstly, it is acknowledged that an expert is someone with relevant knowledge in a given field and who, due to this knowledge, has been assigned a specific task – to express an objective view on a given state of affairs. Therefore, an expert must, above all, act like as a researcher. His/her role is neutral – he/she does not represent any interests. Ultimately, the authority of the expert’s utterance derives from the authority of science. The expert is to provide the decision-maker (legislator) with certain (reliable) and complete knowledge – within the scope of modern science. After all, knowledge provided by the expert is to fill the decision maker’s information gaps (which are natural in current circumstances). In principle, this is to enable the decision-maker to make a reliable decision – in order to make “good” law.

Secondly, the role of an expert goes beyond the role of researcher. An expert is not limited to describing a given field in a scientific manner. His task also consists in presenting an opinion on the future consequences of projected solutions, based on a scientific description of a given field. However, clear-cut solutions on such topics – and these are generally what the decision-maker expects from the expert – are usually disputable from a scientific point of view. By suggesting the most appropriate solution, the expert makes certain assessments. Literature suggests that in such a case the expert gives an answer “according to his/her knowledge and on his/her own behalf rather than in the name of science”<sup>4</sup>. Therefore, the expert occupies a particular place in the law-making process – between science and political decision. This is a place which (another quote) “can neither be safe nor unambiguous”<sup>5</sup>.

Both functions of the expert – the role of “scientist” and that of “adviser to the decision-maker” – determine the basic dual nature of expert activities and describe the most important elements of his/her role in the law-making process. The distinction of these elements is also important because it clearly shows the expert’s scope of responsibility. The expert prepares an opinion which may be used by the decision-maker and serve as the basis for a political decision and impact the shape of the law adopted. However, it is not the expert who makes the decision – and the decision-maker is never (should never be) able to transfer the responsibility for its own political decision onto the expert. Therefore, the expert is responsible for the quality of the opinion presented, assessed according to scientific criteria. He/she is however by no means liable for the political resolution based on his/her opinion.

The aforementioned roles of expert (“researcher” and “adviser to the decision-maker”) correspond to a certain extent to the models of assigning the status of expert to a certain person (entity), presented in legal literature<sup>6</sup>. There are two models:

Firstly, an expert is a person whose exceptional competencies are recognised by his/her own professional (usually scientific) environment that is completely independent from the decision-maker. It is assumed that such an expert has particular personal traits which make him/her suitable for exercising this function. The

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<sup>4</sup> S. Wronkowska, *Ekspert a proces tworzenia prawa*, PiP 2000, No 9, p. 4.

<sup>5</sup> H. G. Gadamer, *Granice eksperta* (in:) *Dziedzictwo Europy*, Warsaw 1992, p. 86.

<sup>6</sup> S. Wronkowska, *op. cit.* p. 3.

decision-maker can only appoint rather than create such an expert (i.e. order his/her opinion). Under this model, the competence of a given person to issue expert opinions is a primary element with regard to the act of his/her official appointment as an expert in a given case. The basic – and ultimate – guarantee of the expert's integrity are his/her personal and professional (scientific) competencies (“personal authority” model).

Secondly, being deemed an expert may depend on the given person (entity) being appointed by the decision-maker to exercise such a role. In this model, the assessment of the expert's actual competencies by his/her own professional (scientific) environment is secondary with regard to the official act, i.e the order to issue an opinion on a given topic. In this case, the basic guarantees ensuring the expert's integrity are institutional guarantees that set out the rules of formulating expert opinions. Usually, such guarantees are related to the expert's employment in a certain expert institution (“institutional authority” model).

It is worth pointing out that whereas the first model (“personal authority”) is certainly the ideal model, the second one (“institutional authority”) is generally closer to modern parliamentary and, in broad terms, political practices.

What is important, from the point of view of discussions on the role of experts (and parliamentary legal services) and of making their work available to the public, the aforementioned dual nature of expert (“researcher” and “adviser to the decision-maker”) translates directly into dilemmas related to the scope in which the results of their work should be made available.

On one hand, scientific activity is based on the assumption of full transparency – submitting a view (thesis) to public criticism is practically a guarantee of its scientific character.

On the other hand, the decision-maker sometimes needs to exercise restraint with regard to sharing information – in some cases the transparency of actions may even pose a threat to certain protected values.

The rules – and the practice – of sharing the results of experts' work (including the results of work of parliamentary research services) must therefore reflect the tension that exists between the transparency and confidentiality of decision-making processes.

## **B. General principles of sharing results of work by parliamentary research services**

There is no doubt that in the modern world the tendency towards ever broader disclosure of information on the course of decision-making processes, which affect society, is becoming increasingly marked.

This tendency is reflected in regulations setting out the guarantees of law-making process transparency and in the institutions of the right of access to public information. Typically, transparency constitutes the principle, whereas its limitations – an exception from the rule, which is interpreted restrictively and described in exhaustive lists of exemptions.

This regulation is followed by the activity of the law-maker and supporting experts (including the parliamentary research services) in practice. The solutions adopted in various political systems are based on a certain interpretation of the ratio between the transparency and confidentiality of the law-making process. This ratio serves as a (constructional) assumption of the solutions adopted.

The grounds for the transparency of law-making procedures are commonly known and refer to the essence of democratic governance. Its obviousness is particularly clear when delivering a speech on a forum such as this one, addressing you, librarians, whose basic functions include making knowledge (about the activity of parliament) available. In the democratic system, the public debate legitimises decisions taken – just like openness to criticism allows to justify scientific theses.

When juxtaposing the transparency of the law-making process with expert activities – which provide support to this process – it should be assumed that expert activities should also be subject to guarantees of transparency. The assumption is that the more an expert serves as “an adviser to the decision-maker”, the more restrictive the requirements related to the transparency of his/her work and impact on the law-making process should be. In principle, these guarantees should – to an appropriate extent – apply to all expert activities.

Nevertheless, from the point of view of the discussion about parliamentary research services sharing the results of their work with the public, it is important to justify the confidentiality of certain actions that they take.

Interesting remarks related to this topic may be found in a paper prepared by IFLA and the Inter-Parliamentary Union (IPU) – Guidelines for parliamentary research services<sup>7</sup>.

When discussing the issue of the balance between transparency and confidentiality in the functioning of the parliamentary research services, the document mentions, inter alia, protection of parliamentarians’ autonomy in making political decisions related to the shape of legislative resolutions. Along with knowledge about the decision-making process becoming more widespread, the (external) pressure on its course and the need to protect the decision-maker against this pressure are obviously growing.

Furthermore, the guidelines also raise the issue of the need to provide parliamentarians with comfort in cases when they address questions to research services and are concerned that their ignorance will be revealed to third parties, in particular to political opponents. In such a case, the role of research services is to provide a parliamentarian with knowledge, which he/she may freely and effectively use during a parliamentary debate.

Generally, in accordance with the guidelines, parliamentarians highly value the confidentiality of contacts with the parliamentary research services. They find it important that the following are not disclosed to other parliamentarians or third parties (outside the parliamentary research services):

- identity of the person who commissions the research services to prepare an opinion,
- information covered by the order,
- form in which the commissioned opinion is presented,
- purpose of its preparation.

The parliamentarians’ expectations set out in the aforementioned document may be taken into account only to a certain extent – depending on the regulatory assumption regarding balance between transparency and confidentiality of the law-making process adopted in a given legal system.

Abstractly, we can distinguish two models of such regulations:

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<sup>7</sup> Guidelines for parliamentary research services, IPU & IFLA 2015.

1. In numerous legal systems, the activity of the parliamentary research services is subject to the full right of access to public information (e.g. to acts on freedom of information). It is assumed that since the actions of such services are public, the access to the results of their actions should be generally open – to other parliamentarians and even all stakeholders.
2. In other legal systems, opinions prepared by the legal research parliamentary services may be disclosed to third parties upon the consent of the ordering party – i.e. the parliamentarian who requested the preparation of these opinions.

The remarks on the general assumptions concerning the sharing of results of work carried out by the parliamentary research services – and model solutions in that respect – serve as the background for presenting the Polish example – basic legal solutions and practices regarding sharing the results of the work of the Sejm Bureau of Research. This is the third – and final – part of my presentation.

### **C. Making opinions and other studies available to the public by the Sejm Bureau of Research**

In order to present the experience of the Sejm Bureau of Research in sharing opinions and other studies, one must, at least briefly, outline the legal basis of its activity. It is important to mention: **a)** the regulation on expert activities in the Sejm and **b)** the regulation on the requirements related to the transparency of these activities.

#### **1. Legal basis for the activities of the Sejm Bureau of Research**

Firstly, the expert activities of the Sejm Bureau of Research are governed by the general rules of organisation of scientific advice for the Sejm.

Pursuant to the Polish Act on the exercise of the mandate of a deputy or senator, the Chancellery of the Sejm and the Chancellery of the Senate, (...) ensure and organise assistance for deputies and senators that is required for the fulfilment of their obligations, including technical assistance, especially regarding access to specialised publications, literature and expert reports<sup>8</sup>. The Standing Orders of the Sejm of the Republic of Poland refer to the competence of the Presidium of the Sejm to determine the rules of organising scientific advice, appointing Sejm advisers and using opinions and expert reports<sup>9</sup>.

In April 1995, the Presidium of the Sejm exercised this competence to issue a resolution on the principles of organisation of scientific advice to the Sejm and its bodies<sup>10</sup>, which has already been amended several times. This resolution provides that scientific advice to the Sejm, its bodies and deputies consists in recruiting experts and providing expert reports, opinions and consultations<sup>11</sup>. It does not specify restrictions by object regarding scientific advice. Given the assumption that the advice is related to work resulting from the function of the Sejm, it covers all fields of

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<sup>8</sup> Article 46 (2) of the Act of 9 May 1996 on the exercise of the mandate of a deputy or senator (reference of the Polish Journal of Laws: Dz. U. z 2016 r., poz. 1510).

<sup>9</sup> Article 12 (6) of the Standing Orders of the Sejm of the Republic of Poland.

<sup>10</sup> Resolution no 28

<sup>11</sup> Resolution no 28 § 1(1).

knowledge and specialisation<sup>12</sup>. The Sejm Bureau of Research creates an institutionalised form for providing such advice – which is formally one of many forms available to the Sejm pursuant to the current regulation<sup>13</sup>.

Secondly, the resolution of the Presidium of the Sejm referred to also sets out transparency guarantees concerning the results of the work of the Sejm Bureau of Research.

First of all this resolution imposes upon the Sejm Bureau of Research the obligation to keep a register of expert reports and opinions. Such a register is kept in the form of the internal REX database. This database was set up in 1995 but contains documents drafted in the Bureau since the end of 1990, i.e. since its inception. It now includes approximately 75 thousand documents, which means that 2800 documents, on average, are input to the REX database every year.

Moreover, the resolution sets out the principles of sharing expert reports and opinions. In principle, the act allows sharing them. This right is however restricted. In compliance with the resolution, expert reports and opinions of the Sejm Bureau of Research may be shared only with specific entities – the same ones that have the right to order an opinion (these include, putting it simply, Sejm bodies and deputies as well as parliamentary clubs and deputies' groups). Additionally, expert reports and opinions concerning bills may be shared only after the party that ordered them has become acquainted with them<sup>14</sup>.

Therefore, in principle, the collection of expert reports and opinions of the Bureau is not publicly available. The database also does not contain information on the experts themselves in a formally distinct form. The consent of the order giver is not required in order to share a study prepared for him.

Notwithstanding the rules set out in the resolution of the Presidium of the Sejm, sharing the studies prepared in the Sejm Bureau of Research is subject to the general standard concerning making public information available. This standard is set out in the Public Information Access Act, i.e. in an act of general law applicable to all entities performing public tasks<sup>15</sup>. This act implements the right to public information<sup>16</sup> that has its foundations and is very broadly set out in the Constitution of the Republic of Poland<sup>17</sup>. In compliance with the Act any person, irrespective of citizenship, is authorised to access such information. The Act provides for various modes of making information available. Information may be made available by an obliged entity ex officio or upon request.

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<sup>12</sup> Resolution no 28 §3 (1). Expert reports, opinions and consulting services may concern on-going or scheduled work related to the legislative and scrutiny functions of the Sejm and its bodies, as well as research work (research projects, long-term reports).

<sup>13</sup> Resolution no 28 § 4.

<sup>14</sup> Resolution no 28 § 8. Clause 1 of this provision states that the Sejm Bureau of Research shall keep a register of expert reports and opinions and store their texts, excluding expert reports and opinions ordered by authorised parties directly from the experts. According to clause 2, expert reports and opinions may be shared only with authorised parties, referred to in § 3 clause 2, however, expert reports and opinions on bills may only be shared after the party that ordered them has become acquainted with them.

<sup>15</sup> The Public Information Access Act of 6 September 2001 (references of the Polish Journal of Laws: Dz.U. z 2016 r. poz. 1764, hereinafter referred to as the PIAA).

<sup>16</sup> Article 2 of the PIAA. Clause 1 Each person is entitled, subject to Article 5, to the right of access to public information, hereinafter referred to as "the right to public information". Clause 2 The person exercising the right to public information cannot be demanded to demonstrate the legal or factual purpose.

<sup>17</sup> Article 61 of the Constitution of the Republic of Poland.

## 2. Sharing the results of the work of the Sejm Bureau of Research – practicalities

The regulations discussed form the basis for making the work of the Sejm Bureau of Research available. In connection with these regulations, in practice, the vast majority of expert studies prepared by the Bureau is published on the publicly available Sejm websites. The remaining studies are shared at the request of the interested entities – according to the general principles of the Public Information Access Act. This state of affairs is connected with the fact that the results of the work of the Bureau have been qualified as public information, subject to be shared.

On the basis of the presented assumptions, it is possible to categorise Sejm Bureau of Research studies according to their mode of publication.

Firstly, numerous expert reports and opinions are published in periodicals issued by the Bureau. These periodicals include BAS Law Review, BAS Studies as well as BAS Analyses and INFOS – Socio-Economic Issues (the last two are published only in electronic version)<sup>18</sup>. The authors of articles to these periodicals include experts from the Sejm Bureau of Research as well as external authors invited to publish by the Bureau.

An important feature is that, apart from typical problem-focused articles, these periodicals also publish materials prepared by Sejm Bureau of Research experts at the order of deputies and Sejm bodies. Such materials are presented in a dedicated section of the periodical and accompanied by a comment indicating when and at whose order they were originally elaborated. The editorial teams of the periodicals select the expert reports and opinions of the Bureau for publication, guided primarily by the significance of the topics addressed from the point of view of the parliamentary debate. Publication of expert reports and opinions in these periodicals generally takes place many months after they have been prepared and transmitted to the ordering parties.

Secondly, some expert reports and opinions of the Sejm Bureau of Research are published on the Sejm website. This happens in various cases and for various reasons. Certain opinions of the Sejm Bureau of Research are appended on a standard basis to Sejm papers containing bills and published together with the latter. This concerns opinions of the Sejm Bureau of Research on the compliance of bills with European Union law, which, in accordance with the Standing Orders of the Sejm, are prepared with regard to all deputies' bills. Another example of opinions published on the Sejm website are opinions of the Bureau regarding drafts of European Union legal acts. Such opinions are prepared at the order of the Sejm European Union Affairs Committee and then published on the website of the Sejm's European Information and Documentation Centre. Finally, numerous expert reports and opinions of the Sejm Bureau of Research are published on the Sejm websites dedicated to individual bills and the course of their legislative process. The decision to publish opinions on such a site is made by the management of the Sejm Bureau of Research, again, considering their significance for the parliamentary debate.

Thirdly and lastly, one must distinguish the expert reports and opinions of the Sejm Bureau of Research that have not been published in any of the above mentioned modes. Such opinions are made available to interested parties upon request –

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<sup>18</sup> BAS Law Review is a quarterly published since 2004, dedicated, as indicated by the title, to legal affairs. BAS Studies is a quarterly where expert publications presenting important current social and economic affairs of the country, significant from the point of view of the Sejm's legislative process, are published. BAS Analyses is a periodical dedicated to social and economic topics. INFOS – Socio-Economic Issues is a short analytic and informative newsletter on issues of high importance for Poland and its society.



submitted in the mode set out in the Presidium of the Sejm resolution (in the case of requests made by Sejm bodies or Deputies) or in the mode of access to public information (in the case of all other entities).

## **Conclusions**

There are many indications that the complex, dual position of the expert in the contemporary decision-making (law-making) process translates directly into the problems connected with defining the appropriate form for making his work available to the public. The position of expert assumes the necessity of combining two different roles: “researcher” and “decision-maker’s advisor”. These roles impose different requirements, proper for each of them, upon the expert. This is the reason why tension between transparency and confidentiality of the actions of parliamentary research services is a permanent and characteristic feature. The example of Poland, both in terms of regulations and practice of the Sejm Bureau of Research, fully confirms this rule.