

**Communication under Rule 9(2) of the Rules of the Committee of Ministers in the cases *Tysic v. Poland* (App. No. 5410/03), *R.R. v. Poland* (Appl. No. 37617/04) and *P. and S. v. Poland* (App. No. 57375/08)**

**22 January 2020**

**Introduction**

Pursuant to Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, the Center for Reproductive Rights<sup>1</sup> and the Federation for Women and Family Planning<sup>2</sup> hereby submit updated information to the Committee of Ministers regarding Poland's implementation of three judgments of the European Court of Human Rights regarding access to legal abortion and associated reproductive health care and information, *Tysic v. Poland* (App. No. 5410/03) and *R.R. v. Poland* (Appl. No. 37617/04), and *P. and S. v. Poland* (App. No. 57375/08).

The three judgments became final in 2007, 2011, and 2013 respectively, and more than 12 years have now passed since the first of these landmark judgments. Yet effective measures to give effect to these judgments have still not been adopted by the Polish authorities.

The three judgments each address distinct but overlapping issues regarding the ongoing and serious failures of the Polish authorities to ensure that access to legal abortion in Poland becomes a practical reality for women and adolescent girls and is not merely a theoretical entitlement. Although each of these three judgements mandate some of the same implementation measures, they also each involve distinct and separate issues which can only be addressed by specific implementation measures.

- *Tysic v. Poland* concerned a woman whose continued pregnancy posed a serious risk to her eyesight and her health but who was denied a medical certificate attesting to her entitlement

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<sup>1</sup> The Center for Reproductive Rights is an international non-governmental legal advocacy organization based in New York dedicated to the advancement of reproductive freedom as a fundamental human right that all governments are legally obliged to protect, respect, and fulfill.

<sup>2</sup> The Federation for Women and Family Planning is a non-governmental organization based in Poland that works locally, regionally and internationally on advancement of women's reproductive rights through monitoring, advocacy and educational activities as well as strategic litigation before domestic and international courts.

to a legal abortion. The Court's judgment centered on the absence of an effective procedure by which women can challenge and resolve disagreements with and between doctors concerning their right under domestic law to an abortion on medical grounds.

- ***R.R. v. Poland*** concerned medical providers' repeated failures to guarantee the applicant's entitlement under domestic law to prenatal diagnostic tests, which prevented her from being able to legally obtain an abortion on indication of risk of severe fetal impairment. The Court held that Poland must put in place an effective legal and procedural framework that guarantees that relevant, full and reliable information is available to women enabling them to take informed decisions about their pregnancy. The Court emphasized that Poland must take steps to address what it termed a "striking discordance" between the theoretical legal right to abortion services and women's inability to access abortion services in practice. The Court also held that Poland must ensure that women's access to legal reproductive health services is not jeopardized by conscience-based refusals of care by medical professionals.
- ***P. and S. v. Poland*** concerned an adolescent girl whose legal entitlement to an abortion after she was sexually assaulted was established by a prosecutor as required by Polish law. However, she faced repeated arbitrary and harmful behavior by medical professionals and other state authorities which severely hampered her access to legal abortion care and resulted in disclosure of her confidential medical information. The Court recognized that medical professionals "did not consider themselves obliged" to provide legal abortion care based on the prosecutor's certificate and held that the adolescent girl was treated by the authorities in a deplorable manner.<sup>3</sup> The judgment requires Poland to take measures to guarantee effective access to reliable information on the conditions for and effective procedures enabling access to legal abortion care. It also necessitates strengthening enforcement policies and procedures for holding health facilities and professionals accountable for failures to comply with legal obligations to provide legal abortion care.

As such, and as repeatedly outlined in our previous submissions,<sup>4</sup> and as underscored by the decisions of the Committee of Ministers,<sup>5</sup> the three judgments require the adoption of the following measures:

- An effective and timely procedure for women to challenge and resolve disagreements with and between doctors regarding their entitlement to legal abortion care and to exercise their rights in this regard;

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<sup>3</sup> P. and S. v. Poland, App. No. 57375/08, para. 108.

<sup>4</sup> Rule 9.2 Communication from two NGOs (Center for Reproductive Rights and Federation for Women and Family Planning) (22/02/2019) in the case of P. and S. v. Poland (Application No. 57375/08), DH-DD(2019)235; Communication from Center for Reproductive Rights and Federation for Women and Family Planning in the cases of P. and S., R.R. v. Poland, (24/08/2018) available at <https://rm.coe.int/native/09000016808d297d>; Communication from Center for Reproductive Rights in the case of P. and S. v. Poland, (13/09/2017) available at <https://rm.coe.int/native/0900001680751a47>; Communication from Center for Reproductive Rights in the case of P. and S. v. Poland, (28/09/2017) available at <https://rm.coe.int/native/0900001680751a47>; Communication from Center for Reproductive Rights in the case of R.R. v. Poland, (02/09/2016) available at <https://rm.coe.int/16806a950f>; Communication from Center for Reproductive and Federation for Women and Family Planning in the case of P. and S. v. Poland, (06/10/2014) available at <https://rm.coe.int/native/09000016804a96bf>.

<sup>5</sup> See CM/Del/Dec(2019), 1340/H46-13, 1340/H46-31; CM/Del/Dec(2018), 1324/H46-15; CM/Del/Dec(2017), 1294/H46-19.

- Effective measures to guarantee women access to reliable information on the conditions and effective procedures for their access to legal abortion care;
- An effective legal and procedural framework that guarantees that full and reliable information is provided to women and adolescent girls enabling them to take informed decisions about their pregnancy;
- Effective measures to ensure that conscience-based refusals by medical professionals do not undermine or delay women's access to legal abortion services or prenatal testing;
- Strengthened enforcement procedures and measures to hold health facilities and professionals accountable for any failures to comply with legal obligations to provide legal reproductive health services and information;
- Effective measures to enhance protection of patient data confidentiality;
- Targeted measures to ensure that the needs of adolescents who are seeking legal abortion services are met and that they are treated with respect and due consideration for their vulnerability.

Only once all of these measures have been adopted by the Polish authorities can these three judgments be considered implemented.

In its recent submissions and action reports, the Polish authorities have once again outlined information previously provided to the Committee of Ministers on the existing legal framework in Poland regarding access to legal abortion, to prenatal genetic testing, conscience-based refusals by health professionals, the complaint procedure under the Patient's Rights Act and the mandate of the Ombudsperson for Patients' Rights, the enforcement of contracts with the National Health Fund, and the protection of patient confidentiality.<sup>6</sup> None of these submissions contain new information about any effective measures that have been adopted since the Committee of Ministers' last examination of implementation of the judgments in March 2019 and that would give effect to the Court's three judgments or to the decisions of the Committee of Ministers.

The State continues to take the view that the existing legal frameworks are adequate for discharging its obligation to implement these judgments. However, this view disregards the fact that common to the three cases were shortcomings in existing legal frameworks and mechanisms as well as arbitrary behavior by health care professionals who failed to apply existing legal provisions entitling women to abortion services or prenatal genetic testing in good faith, disregarded clear legal obligations or provided the applicants with misleading and inaccurate information about how to obtain legal reproductive health services. As such, the violations at the heart of these cases were largely the result of inadequate legal protections, rule of law deficits, and entrenched enforcement failures and require reforms of existing legal frameworks and procedures, as outlined above. In the following sub-sections we respond to claims made by the State in its recent submissions that its existing legal framework is adequate for implementing the three judgments.

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<sup>6</sup>Updated action report (20/12/2019) - Communication from Poland concerning the case of *Tysi c v. Poland* (Application No. 5410/03), DH-DD(2020)4; Updated action report (20/12/2019) - Communication from Poland concerning the case of *R.R. v. Poland* (Application No. 27617/04), DH-DD(2020)3; Communication from the authorities (20/12/2019) in the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2020)5; Reply from the authorities (09/12/2019) to a communication from a NGO (Center for Reproductive Rights and the Federation for Women and Family Planning) in the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2019)1492; 1369th meeting (March 2020) (DH) - Rule 9.6 - Reply from the authorities (09/12/2019) to a communication from a NIHR (Office of the Commissioner for Human Rights of the Republic of Poland) in the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2019)1493.

More than 12 years after the first of these three judgments, none of the measures outlined above have been enacted which would enable women and adolescent girls to obtain timely access to legal abortion care and associated reproductive health services and information and put in place effective mechanisms and procedures for women and adolescent girls to exercise their rights under Polish law to these health services. Instead during this period regressive measures have been adopted or are again under consideration.<sup>7</sup>

In light of the absence of any meaningful action on the part of State authorities to implement the Court's judgments and give effect to the decisions of the Committee of Ministers we respectfully urge the Committee of Ministers to maintain its enhanced scrutiny of all three cases and urge the State authorities to adopt the measures required by the judgments to address prevailing legal shortcomings and enforcement deficits and enable women and adolescent girls to exercise their rights under Polish law to obtain reproductive health services.

### **1. Official data on legal abortions is not evidence of effective implementation of the law**

In its recent submissions, the State authorities argue that the official data on legal abortions “confirms that these guaranteed health services are indeed performed.”<sup>8</sup> It refers to the number of legal abortions in the years when the events in the cases took place: 138 abortions in 2000, 159 abortions in 2002, and 499 abortions in 2015, in comparison to the number of legal abortions in 2018 (1076) and notes that the numbers have increased significantly over the years.

However, the official data on legal abortions is by no means evidence that the law is being fully and effectively implemented and that women who meet the legal requirements for access to abortion services obtain the care they are legally entitled to in practice. While the overall number of abortions may have increased, for women in seeking legal abortion care following sexual assault or because of a risk to their health or life the situation has deteriorated since the events in these cases as the numbers of legal abortions have significantly decreased or remained close to zero over the past decade.

For women whose health is at risk, as was the case in *Tysiąc*, the number of legal abortions on grounds of risk to health or life has dropped from around 80 in 2000 to around 25 abortions annually in recent years. This number is particularly low when compared to the rates in other countries. For example, in Germany 2 abortions per 10,000 women of reproductive age were performed on medical indications in 2018, whereas in Poland 0.02 abortions on this indication were performed per 10,000 women of reproductive age.<sup>9</sup>

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<sup>7</sup> As further detailed below a draft bill entitled “Stop pedophilia” is currently pending before the Sejm and would threaten all persons – doctors, educators, teachers, health professionals - who are engaged in providing any form of sexuality education or information on sexual and reproductive health care to adolescents with a 3-year prison sentence.

<sup>8</sup> Communication from the authorities (20/12/2019) in the case of P. and S. v. Poland (Application No. 57375/08), DH-DD(2020)5, p. 5; Updated action report (20/12/2019) - Communication from Poland concerning the case of *Tysiąc v. Poland* (Application No. 5410/03), DH-DD(2020)4, p. 10; Updated action report (20/12/2019) - Communication from Poland concerning the case of *R.R. v. Poland* (Application No. 27617/04), DH-DD(2020)3, p. 12.

<sup>9</sup> *Abortions by reason of termination, duration of terminated pregnancy and number of previous live births*, STATISTISCHES BUNDESAMT (Feb. 27, 2019), <https://bit.ly/2rzTurO>.

Furthermore, it should be noted that there are important regional disparities in Poland in women's access to legal abortion care on indication of risk to health or life. In 2017 there were six voivodships in Poland where no abortions were performed because of risk to the health or life of the woman. A total of 2.5 million women of reproductive age live in these regions, and given the population size it is likely that some women living in these regions whose health is at risk during pregnancy were unable to access legal abortion services in practice.

For survivors of sexual assault, like the applicant in *P. and S.*, legal abortion care remains inaccessible in practice as demonstrated by official statistics. Since 2008, between 0 and 3 legal abortions on indication of sexual assault were performed each year in Poland. In 2010, 2011, and 2017, no legal abortions were performed in Poland for women who were pregnant as a result of sexual assault.

Survivors of sexual assault who wish to end a resulting pregnancy and who are denied this right in Poland will find other ways to do so. According to information obtained from Women on Web, a non-profit, online telemedicine service, 2% of women who obtained medical abortion pills through telemedicine in 2019 explained that their pregnancy resulted from rape.<sup>10</sup> In 2018, more than 2,100 women in Poland obtained medical abortion pills from Women on Web, and the number of women seeking assistance through telemedicine has increased in recent years.<sup>11</sup> This data would suggest that more than 40 women in Poland who were pregnant following sexual assault last year, did not obtain legal abortion care in Poland despite the fact that they would have been legally entitled to this care. The majority of the women (79.6%) who contacted Women on Web explained they did so as a result of the highly restrictive legal framework on abortion in Poland.<sup>12</sup>

The authorities have argued that the number of legal abortions for women who are pregnant following sexual assault does not reflect the number of pregnancies resulting from sexual assault.<sup>13</sup> Indeed, there is no official data on the number of sexual assaults resulting in pregnancy. Furthermore, there is severe under-reporting of sexual assault in Poland. Research conducted in 2015 by the Foundation for Equality and Emancipation STER found that out of 451 women interviewed, 91.8% of the women who stated they had been raped had never reported the crime to the police. There are also no official police statistics in Poland on the number of reported cases of rape as only reported cases that lead to opening of a criminal case are recorded by the police. According to official statistics, in 2017 the police initiated 2,486 cases because of allegations of rape. Given the very low rate of reporting rape to the police this data can only provide a very low estimate of the number of sexual assaults in Poland and there is no data on how many of the survivors had become pregnant. Nevertheless, the data from Women on Web indicates that dozens of women in Poland who have become pregnant following sexual assault wish to end the pregnancy and are resorting to self-managing medical abortion because of barriers in access to care.

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<sup>10</sup> Letter from Women on Web International Foundation on file with the Center for Reproductive Rights. This mirrors data from Ireland and Northern Ireland where 2% of 5,650 women who accessed early medication abortion through Women on Web between 2010 and 2015 reported requesting early medication abortion due to rape, *see* Abigail R.A. Aiken, *Opening Statement to the Joint Oireachtas Committee on the Eighth Amendment to the Constitution*, (2017), p. 3, available at <https://bit.ly/2shK1Fk>.

<sup>11</sup> Letter from Women on Web International Foundation on file with the Center for Reproductive Rights.

<sup>12</sup> *Id.*

<sup>13</sup> Reply from the authorities (09/12/2019) to a communication from a NGO (Center for Reproductive Rights and the Federation for Women and Family Planning) in the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2019)1492, p. 1.

Most legal abortions in Poland are performed on indication of risk of a severe or fatal fetal impairment and has totaled around 1,000 abortions in recent years. However, this number can be considered low when compared to the rate in other countries. For example the number of legal abortions on this ground in Poland corresponds to 1 abortion per 10,000 women of reproductive age, while in Norway in 2018, 2,7 abortions per 10,000 women of reproductive age were performed on indication of risk of a severe or fatal fetal impairment, almost three times as many as in Poland.<sup>14</sup> Furthermore, women in Poland continue to face many obstacles in access to information including prenatal testing and women in rural areas often face particular difficulties accessing these tests. For example, in three voivodships - Kujawsko-Pomorskie, Lubelskie and Podkarpackie – these barriers seem particularly prevalent as comparatively small numbers of women access prenatal testing.<sup>15</sup> As a result, they may be unable to exercise their right to make an informed decision about whether to continue a pregnancy.

## **2. Complaint procedure is not effective mechanism for women and adolescent girls to enforce right to legal abortion care and prenatal testing**

In its recent submissions, Poland asserts that the complaint procedure established in 2008 under the Patients' Rights Act corresponds to the requirements arising from the *Tysic* and *R.R.* judgments and is a sufficient and effective mechanism through which women can exercise their rights to legal abortion care and prenatal genetic testing.<sup>16</sup>

However, as we have outlined in our previous submissions,<sup>17</sup> and based on the Committee of Ministers' previous assessment of the complaint procedure,<sup>18</sup> it clearly falls short of what is required to implement the Court's judgments in these two cases.

As we have highlighted repeatedly in previous submissions the complaint procedure suffers from a series of shortcomings, namely:

- It is not tailored to the specific needs of women seeking legal abortion services or prenatal genetic testing and its general nature fails to meet the particular needs of pregnant women seeking to establish or enforce their legal entitlements to abortion care and prenatal genetic testing.
- The time frame of up to 30 days to issue a decision on complaints fails to ensure that women receive a timely decision through an effective urgent procedure.

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<sup>14</sup> Mette Løkeland ET AL., RAPPOR OM SVANGERSKAPSAVBROT FOR 2018, FOLKEHELSEINSTITUTTET (2019), available at <https://bit.ly/2EeUOTp>.

<sup>15</sup> See Annex 2.

<sup>16</sup> Updated action report (20/12/2019) - Communication from Poland concerning the case of *Tysic v. Poland* (Application No. 5410/03), DH-DD(2020)4, p. 4; Updated action report (20/12/2019) - Communication from Poland concerning the case of *R.R. v. Poland* (Application No. 27617/04), DH-DD(2020)3, p. 5

<sup>17</sup> Rule 9.2 Communication from two NGOs (Center for Reproductive Rights and Federation for Women and Family Planning) (22/02/2019) in the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2019)235; Communication from Center for Reproductive Rights and Federation for Women and Family Planning in the cases of *P. and S., R.R. v. Poland*, (24/08/2018) available at <https://rm.coe.int/native/09000016808d297d>; Communication from Center for Reproductive Rights in the case of *P. and S. v. Poland*, (13/09/2017) available at <https://rm.coe.int/native/0900001680751a47>; Communication from Center for Reproductive Rights in the case of *P. and S. v. Poland*, (28/09/2017) available at <https://rm.coe.int/native/0900001680751a47>; See Communication from Center for Reproductive Rights in the case of *R.R. v. Poland*, (02/09/2016) available at <https://rm.coe.int/16806a950f>.

<sup>18</sup> See CM/Del/Dec(2019), 1340/H46-31.

- It is overly cumbersome and formalistic as it requires patients to refer to the legal provisions that have been breached. As a result, the vast majority of complaints filed have been declared inadmissible on procedural grounds.
- The Medical Board's decisions are final and not subject to judicial review. This wholly undermines basic rule of law requirements and contradicts standard practice in other jurisdictions.
- Additional procedural and rule of law deficits also undermine the effectiveness of the relevant procedure. These include the lack of entitlement for women to be heard during the process.

The ineffective nature of this procedure is clearly demonstrated by the very small number of complaints filed since 2013 regarding access to legal abortion and the fact that none of these have been upheld.<sup>19</sup> The Ombudsperson for Patients' Rights has confirmed that between 2013 and 2018 only three complaints were filed concerning access to legal abortion services, none of which were considered admissible.<sup>20</sup>

Recent cases also illustrate the complaint procedures' shortcomings and ineffectiveness as a mechanism to ensure women have timely access to abortion care. In 2019 the Federation for Women and Family Planning provided legal support in the case of Mrs. *I. P.*<sup>21</sup> who filed a complaint challenging the arbitrary denial of legal abortion care in a hospital in Rybnik (a town in southern Poland). However, the complaint was only examined by the Medical Board after the deadline for a legal abortion had passed.

As the Committee of Ministers has previously concluded, the current complaint procedure is inadequate in discharging the State's obligation to establish an effective and timely mechanism for women to enforce their legal rights to reproductive health care. Until the mechanism is reformed Poland will not have implemented these judgments and provided an effective procedure for women to establish and exercise their right to legal abortion care.

### 3. Role of the Commissioner for Patients' Rights

In its recent submissions Poland also refers repeatedly to the role that the Commissioner for Patients' Rights can play in initiating clarification proceedings when women are refused access to abortion services or prenatal testing to which they are legally entitled.<sup>22</sup>

While the Commissioner for Patients' Rights through its good offices may intervene with health care facilities on behalf of women who are facing obstacles in access to legal abortion care or prenatal

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<sup>19</sup> Reply from the authorities (09/12/2019) to a communication from a NGO (Center for Reproductive Rights and the Federation for Women and Family Planning) in the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2019)1492, p. 8.

<sup>20</sup> Reply from the Ombudsperson for Patients' Rights to the Federation for Women and Family Planning, 23 December 2019, RzPP-DPR-WPL.0133.42.2019.KBI.

<sup>21</sup> Personal data on file with the Federation for Women and Family Planning.

<sup>22</sup> Updated action report (20/12/2019) - Communication from Poland concerning the case of *Tysi c v. Poland* (Application No. 5410/03), DH-DD(2020)4, p. 6-7; Updated action report (20/12/2019) - Communication from Poland concerning the case of *R.R. v. Poland* (Application No. 27617/04), DH-DD(2020)3, p. 7-8; Communication from the authorities (20/12/2019) in the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2020)5, p. 8.

testing this possibility in no way provides an effective mechanism through which women and adolescent girls can enforce their right to legal abortion care or prenatal testing.

The possibility for women who are denied legal reproductive health services to seek assistance through the Office of the Commissioner for Human Rights does not fulfil any of the measures outlined above which are required to implement these judgments.

#### **4. Conscience-based refusals and enforcement failures continue to impede access to legal abortion care**

As we have repeatedly outlined in our previous submissions,<sup>23</sup> the practice of conscience-based refusals by health professionals continue to undermine women's access to legal abortion care in Poland in contravention of the Court's judgments requiring the State to ensure that such refusals do not prevent women from obtaining the reproductive health care to which they are legally entitled.

The invalidation in 2015 by the Constitutional Tribunal's judgment of the referral obligation on health professionals who invoke the conscience clause significantly undermined Poland's compliance with the Court's judgments. However, a series of other shortcomings in the regulation and enforcement of conscience-based refusals also continue to impede compliance with the Court's judgment and the Committee of Ministers' decisions.

In March 2019 the Committee of Ministers called on the Polish authorities to establish in secondary legislation a duty on health facilities to refer a woman who has been refused abortion care on grounds of conscience to another facility which will provide the service. However, no measures have been taken to date by the State to establish this duty in law.

In its recent submissions, Poland states that where a health care service cannot be provided in a health facility the facility has an obligation to refer the patient to an alternative facility which will provide the service.<sup>24</sup> The State has asserted that amendments to the Law on Physicians and Dentists, which would include a new provision specifying this referral obligation on health facilities, is under discussion. However, no information has been provided to date on when this provision may be adopted.

Furthermore, even if such a provision was adopted, it remains uncertain that it would in practice be effective in ensuring that women are referred to an alternative health care facility or provider. Evidence to date demonstrates entrenched disregard by health professionals and institutions for legal obligations and failures to apply the law pertaining to women's entitlement to legal abortion services and the regulations regarding conscience-based refusals.

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<sup>23</sup> Rule 9.2 Communication from two NGOs (Center for Reproductive Rights and Federation for Women and Family Planning) (22/02/2019) in the case of P. and S. v. Poland (Application No. 57375/08), DH-DD(2019)235; Rule 9.2 Communication from a NGO (Federation for Women and Family Planning, The Center for Reproductive Rights) (24/08/2018) in the cases of P. and S., R.R. and Tysiac v. Poland (Applications No. 57375/08, 27617/04, 5410/03), DH-DD(2018)814; Communication from Center for Reproductive Rights in the case of R.R. v. Poland, (02/09/2016) available at <https://rm.coe.int/16806a950f>.

<sup>24</sup> Reply from the authorities (09/12/2019) to a communication from a NGO (Center for Reproductive Rights and the Federation for Women and Family Planning) in the case of P. and S. v. Poland (Application No. 57375/08), DH-DD(2019)1492, p. 2.



In particular, we recall that a number of hospitals continue to institutionally refuse to provide abortion care on grounds of conscience in contravention of Polish law. State authorities have taken no measures to sanction these breaches and hold health facilities accountable. Furthermore, there continue to be entire regions of Poland where legal abortion care is inaccessible as no health facilities or professionals are providing the care. For example, in 2018 no abortions were performed in Podkarpackie voivodship, a region with a population of women of reproductive age of more than 500,000. In this region more than 3,000 doctors signed the conscience clause declaration attesting to their unwillingness to perform legal abortions.<sup>25</sup> Recent research found that only one hospital in Rzeszów, the capital city of that region, declared that in principle it does offer abortion services while four other hospitals declared they do not provide legal abortion services.<sup>26</sup>

Moreover, since health facilities already appear to have a duty under Polish law to refer women to alternative providers when legal reproductive health services are refused on grounds of conscience it is unclear how a new legal provision to the same effect will have any significant impact in the absence of a series of other measures to ensure that women do not face obstacles and delays in access to legal reproductive health services.

The State has also argued that health facilities should organize the provision of services in a manner that allows conscience-based refusals while ensuring that patients obtain the medical services they are legally entitled to.<sup>27</sup> However, the State is failing to monitor that health facilities are in fact organizing the provision of services accordingly. Polish authorities are not currently monitoring the practice of conscience-based refusals by health professionals which would enable it to organize its health system in a manner that would ensure that women are not prevented from obtaining reproductive health services to which they are legally entitled, as required by the Court's judgments.

Finally, the Polish authorities in recent submissions again assert that the above-mentioned complaint procedure is also applicable to situations where health professionals refuse legal reproductive health care on grounds of conscience.<sup>28</sup> However, as we have emphasized in previous submissions the complaints procedure is similarly wholly inapplicable to situations in which women are refused legal abortion care on grounds of conscience or religion,<sup>29</sup> and Poland's claim that the complaint procedure can currently be used to challenge refusals of care on grounds of conscience is misleading. Since doctors have an entitlement under Polish law to refuse care on grounds of conscience or religion it is unclear on what basis a complaint could be made by women seeking to enforce their right to legal reproductive health care when doctors invoke the conscience clause.

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<sup>25</sup> Madeline Roache, *Poland Is Trying to Make Abortion Dangerous, Illegal, and Impossible*, FOREIGN POLICY (Jan. 8, 2019), available at <https://bit.ly/2rzWvZa>.

<sup>26</sup> See the results of monitoring conducted by the Federation for Women and Family Planning, available at <https://federa.org.pl/dostepnosc-aborcji-rzeszow/>.

<sup>27</sup> Reply from the authorities (09/12/2019) to a communication from a NGO (Center for Reproductive Rights and the Federation for Women and Family Planning) in the case of P. and S. v. Poland (Application No. 57375/08), DH-DD(2019)1492, p. 2.

<sup>28</sup> Reply from the authorities (09/12/2019) to a communication from a NIHR (Office of the Commissioner for Human Rights of the Republic of Poland) in the case of P. and S. v. Poland (Application No. 57375/08), DH-DD(2019)1493, p. 3.

<sup>29</sup> See Communication from Center for Reproductive Rights and Federation for Women and Family Planning in the case of R.R. v. Poland, (02/09/2016) available at <https://rm.coe.int/16806a950f>.

## **5. Inadequate information on how women and adolescent girls can exercise their right to legal abortion services**

The applicants in all three cases faced obstacles in access to legal reproductive health services as a result of contradictory or even misleading information about the requirements they had to fulfil and the procedures they had to follow.

In its recent submissions, Poland argues that transparent and effective procedures are in place to provide women with reliable information on the steps they should take to obtain legal reproductive health services.<sup>30</sup> In this regard it refers to existing legal frameworks regarding provision of information to patients.

However, the State has again provided no information on measures taken or envisaged to ensure that women and adolescent girls seeking lawful abortion care receive appropriate and adequate information on how to exercise their right to lawful abortion.

There are currently no guidelines in place for health facilities and professionals on the provision of information about legal abortion care, the requirements and steps that patients must follow, and where legal abortion services can be obtained throughout Poland. The absence of such guidelines has resulted in some health facilities imposing additional requirements on women seeking legal abortion care without any basis in law. In 2019 the Federation for Women and Family Planning undertook an update of its 2016 assessment of access to legal abortion in hospitals in Poland's largest cities.<sup>31</sup> Information received from hospitals indicated that they impose many barriers and requirements that have no basis in law.<sup>32</sup> Such requirements include mandatory psychological consultation in the perinatal hospice, additional medical tests and repetitive medical examinations, provision of certificates and approvals that are difficult to obtain such as a certificate from the National Consultant for Gynecology and Obstetrics or the approval of the Bioethical Commission, and convening medical consultations within health facilities to ascertain the woman's eligibility for legal abortion care.

Recent research by civil society confirms that women continue to encounter many barriers in access to necessary and essential information about how to access legal abortion care. For example, the Medical Center Ujastek LLC in the capital of Małopolskie (Kraków), which has a contract with the National Health Fund to provide gynecological services, refused to disclose information on the procedure it has in place for women seeking legal abortion services. The hospital considered that this was not public information.<sup>33</sup>

Furthermore, in 2019 alone the Federation for Women and Family Planning intervened in almost 100 cases concerning arbitrary denial of legal abortion services or the imposition of additional unlawful barriers in access to legal abortion. Some women who qualified for legal abortion services in Poland

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<sup>30</sup> Updated action report (20/12/2019) - Communication from Poland concerning the case of *Tysiąc v. Poland* (Application No. 5410/03), DH-DD(2020)4, p. 4; Updated action report (20/12/2019) - Communication from Poland concerning the case of *R.R. v. Poland* (Application No. 27617/04), DH-DD(2020)3, p. 6.

<sup>31</sup> Federation for Women and Family Planning, *Dzień dobry, chcę przerwać ciążę – o procedurach dostępu do legalnej aborcji w polskich szpitalach*, available at <https://federa.org.pl/raport-dzien-dobry-chce-przerwac-ciaze-o-procedurach-dostepu-do-legalnej-aborcji-w-polskich-szpitalach/>.

<sup>32</sup> Federation for Women and Family Planning, available at <https://federa.org.pl/dostepnosc-aborcji-warszawa/>; <https://federa.org.pl/dostepnosc-terminacji-ciazy-olsztyn/>; <https://federa.org.pl/dostepnosc-aborcji-rzeszow/>.

<sup>33</sup> Voivodeship Administrative Court in Cracow, judgement of 14 November 2019, case number II SAB/Kr 358/19.

nevertheless decided to travel to another jurisdiction to access safe and legal care and avoid humiliation, delays and risk of denial of care in Polish hospitals.

The absence of guidelines for health professionals and professionals, public information campaigns, leaflets for women seeking legal abortion care or any other measures that would provide women with accessible information on how they can exercise their right to legal abortion care and where this care is available means that Poland has not implemented a key requirement arising from the Court's judgments and the Committee of Ministers' decisions.

## **6. Failures to enforce National Health Fund contracts**

In its recent submissions, Poland again outlines how health facilities have obligations under contracts with the National Health Fund to provide legal abortion services and that failures to do so may result in initiation of clarification procedures.<sup>34</sup> The authorities also note that in 2018 no information regarding failures by health facilities to comply with contractual obligations related to legal abortion care was received by the National health Fund or the regional health funds.

However, research conducted by civil society indicates that a significant number of health facilities are not providing legal abortion services and would therefore in principle be in breach of their contractual obligations to the National Health Fund. For example, in 2017, legal abortions were provided by only 45 health facilities in Poland, representing just 9% of the 478 health facilities contracted by the National Health Fund to provide legal abortion services.<sup>35</sup> However, no effective measures have been taken by the State to establish monitoring mechanisms for ensuring compliance with these contracts and that shortcomings in compliance are addressed to hold those responsible accountable.

Furthermore, the National Health Fund has demonstrated limited interest in investigating reports of violations of contractual obligations. In 2019 the Federation for Women and Family Planning sent a letter to the National Health Fund outlining information obtained directly from hospitals regarding the additional barriers and requirements that many hospitals impose on women seeking legal abortion care without any basis in the law. The National health Fund replied that it only investigates complaints from individual patients.<sup>36</sup> In 2019 the Federation for Women and Family Planning did file an individual complaint to the National Health Fund on behalf of a woman who was denied legal abortion care with reference to the conscience clause and who was not referred to an alternative provider or facility. The National Health Fund replied then that it does not address cases regarding the conscience clause.

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<sup>34</sup> Updated action report (20/12/2019) - Communication from Poland concerning the case of *Tysic v. Poland* (Application No. 5410/03), DH-DD(2020)4, p. 5; Updated action report (20/12/2019) - Communication from Poland concerning the case of *R.R. v. Poland* (Application No. 27617/04), DH-DD(2020)3, p. 6; Communication from the authorities (20/12/2019) in the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2020)5, p. 2;

<sup>35</sup> Federation of Women and Family Planning, *The Institutionalized Violence. On Violations of Reproductive Rights*, December 2019, available at <https://federa.org.pl/przemoc-instytucjonalna/>.

<sup>36</sup> Replies addressed to the Federation for Women and Family Planning from the National Health Fund, DK-WŚ.401.1.2020, DK-WŚ.401.2.2020, DK-WŚ.401.3.2020, DK-WŚ.401.4.2020.

As we have previously emphasized in our submissions,<sup>37</sup> it is entirely inappropriate and misleading to suggest that women seeking urgent access to legal abortion care could viably seek to complain about contractual breaches as a mechanism to enforce their legal entitlements to abortion care. The possibility to make a complaint to the National Health Fund seeking the institution of “clarification proceedings” does not in any way constitute an effective remedy for women seeking to enforce their legal right to abortion care. Not only does the decision to issue clarification proceedings rest entirely at the discretion of the Fund, but the process may be lengthy and will only take place *post facto* and cannot result in the timely issuance of an order to provide legal abortion care to a woman or adolescent girl. As such, it is by its very nature wholly ineffective as a mechanism by which women and adolescent girls can enforce entitlements to legal abortion services in a timely and preventative manner.<sup>38</sup>

## 7. Ensuring respect for patient data confidentiality

In its recent submissions, Poland refers to the existing legal frameworks regarding protection of patient data confidentiality and the accreditation process in place to ensure that health professionals and facilities operate in accordance with established standards.<sup>39</sup> It also outlines the training programs in place for health professionals regarding patients’ rights, including for those specializing in obstetrics and gynecology.<sup>40</sup> The State again argues that the violations of patient data confidentiality in the *P. and S.* case were incidental and caused by a human factor.<sup>41</sup>

However, Poland’s submission again fails to address the root causes behind medical professionals’ lack of respect for legal provisions on confidentiality in the *P. and S.* case, and the State has taken no measures to ensure accountability for those breaches of confidentiality or to redress the serious oversight and enforcement failures that led to the breaches of medical confidentiality in this case. Despite the gravity of the breaches of patient confidentiality in the case, no measures have been taken to hold accountable those responsible or to prevent similar breaches in the future. In fact the investigation into the breach of medical confidentiality was discontinued due to the authorities’ inability to establish the circumstances surrounding it and identify those responsible for the breach.<sup>42</sup> Furthermore no targeted training programs or other preventative measures have been put in place to prevent similar violations in the future.

In its recent decision the Committee of Ministers called on the Polish authorities to adopt measures to enhance the effective implementation of existing mechanisms for protection of patient data confidentiality. However, the Polish authorities have adopted no such measures to date.

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<sup>37</sup> Rule 9.2 Communication from two NGOs (Center for Reproductive Rights and Federation for Women and Family Planning) (22/02/2019) in the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2019)235.

<sup>38</sup> *Tysic v Poland*, para. 118.

<sup>39</sup> Updated action report (20/12/2019) - Communication from Poland concerning the case of *Tysic v. Poland* (Application No. 5410/03), DH-DD(2020)4, p. 7-8; Updated action report (20/12/2019) - Communication from Poland concerning the case of *R.R. v. Poland* (Application No. 27617/04), DH-DD(2020)3, p. 8-9; Communication from the authorities (20/12/2019) in the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2020)5, p. 5-7.

<sup>40</sup> Communication from the authorities (20/12/2019) in the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2020)5, p. 7.

<sup>41</sup> Reply from the authorities (09/12/2019) to a communication from a NGO (Center for Reproductive Rights and the Federation for Women and Family Planning) in the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2019)1492, p. 7.

<sup>42</sup> DD(2014)258 - Communication from the Polish authorities - Action report - 29.11.2013, p. 3.

## 8. Ensuring adolescents seeking legal abortion services are treated in a respectful manner

In the *P. and S.* judgment the Court held that “no proper regard was had to the first applicant’s vulnerability and young age and her own views and feelings”<sup>43</sup> and that “the first applicant was treated by the authorities in a deplorable manner and that her suffering reached the minimum threshold of severity under Article 3 of the Convention.”<sup>44</sup>

In its recent submissions, Poland has again outlined existing legal provisions regarding access to legal reproductive health services and information for adolescents as well as the existing professional duties on health providers to treat their patients respectfully. It also provides information on consultations regarding obstetrics and gynecology provided to patients under the age of 18.<sup>45</sup>

However, it has provided no information on measures adopted or envisaged to specifically address the situation and needs of adolescents seeking legal abortion care who are particularly vulnerable. This requires the adoption of targeted and specific measures including guidelines and training programs for health professionals.

Furthermore, it should be noted that instead of adopting positive measures to address the particular situation and needs of adolescents, Polish authorities are currently considering regressive measures that would jeopardize access to reproductive health information and education for adolescents. A draft bill entitled “Stop Pedophilia” is currently pending before the Polish Sejm (parliament).<sup>46</sup> The draft bill is the result of a civic initiative led by “Pro-Right to Life” and proposes to amend Art. 200b of the Penal Code.<sup>47</sup> The bills seeks to ban “demoralization and sexualization of children.”<sup>48</sup> The proposed amendment would threaten all persons – doctors, educators, teachers, health professionals - who are engaged in providing any form of sexuality education, information or sexual and reproductive health care to adolescents with a 3-year prison sentence. If endorsed, this draft amendment would deprive adolescents of access to information and education about their sexuality and could further undermine their access to sexual and reproductive health information and services.

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<sup>43</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 166.

<sup>44</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 168.

<sup>45</sup> Reply from the authorities (09/12/2019) to a communication from a NGO (Center for Reproductive Rights and the Federation for Women and Family Planning) in the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2019)1492, p. 9.

<sup>46</sup> On 15 October 2019 the first reading of the draft bill entitled Citizens’ Draft Bill On Amendments to 6 June 1997 Penal Code was held in the Sejm and it has been sent for further deliberation in the Parliamentary Commission on Changes in Legislation. On 22 November 2019 the draft bill was sent to the first reading, which should be held within six months.

<sup>47</sup> Art. 200b §1. Whoever publicly promotes or approves of the pedophile behavior is subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years. §2. The same punishment shall be imposed on anyone who publicly propagates or approves of the minors' sexual intercourse. §3. If the perpetrator commits the act specified in §2 by means of mass communication, he/she shall be subject to the penalty of deprivation of liberty for up to 3 years. §4. The proposed amendment reads: “Whoever promotes or approves of a minor undertaking sexual intercourse or other sexual activity, acting in connection with his occupation or professional activities related to upbringing, education, treatment or care of minors or acting on the premises of a school or other establishment or educational institution, is subject to the penalty of deprivation of liberty for up to 3 years.” See <https://bit.ly/2JkH10L>.

<sup>48</sup> See the substantiation for the “Stop Pedophilia” draft bill (p. 3, 5, 7, 8), available at <http://orka.sejm.gov.pl/Druki9ka.nsf/0/B43A98E392CAAB89C12584BA004470EB/%24File/39.pdf>; the analysis by the Legal Culture Institute “Ordo Iuris”: <https://ordoiuris.pl/rodzina-i-malzenstwo/analiza-projektu-zlozonego-przez-komitety-inicjatywy-ustawodawczej-stop>.



Annex 1

**Official statistics on legal abortions in 1993 – 2018 by indications for abortion<sup>49</sup>**

Year	Total number	Reasons for legal abortion			
		Social reasons	Risk to a woman's life or health	Serious fetal impairment	Pregnancy resulting from unlawful act
1993	685	–			
1994	782	–	689	74	19
1995	559	–	519	33	7
1996	505	–	457	40	8
1997	3,047	2,524 <sup>50</sup>	409	107	7
1998	310	–	211	46	53
1999	151*	–	94	50	1
2000	138	–	81	55	2
2001	124	–	63	56	5
2002	159	–	71	82	6
2003	174	–	59	112	3
2004	193	–	62	128	3
2005	225	–	54	168	3
2006	340	–	82	246	12
2007	322	–	37	282	3
2008	499	–	32	467	0
2009	538	–	27	510	1
2010	641	–	27	614	0
2011	669	–	49	620	0
2012	752	–	50	701	1
2013	744	–	23	718	3
2014	971	–	48	921	2
2015	1,040	–	43	996	1
2016	1,098	–	55	1,042	1
2017	1,057	–	22	1,035	0
2018	1,076	–	25	1,050	1

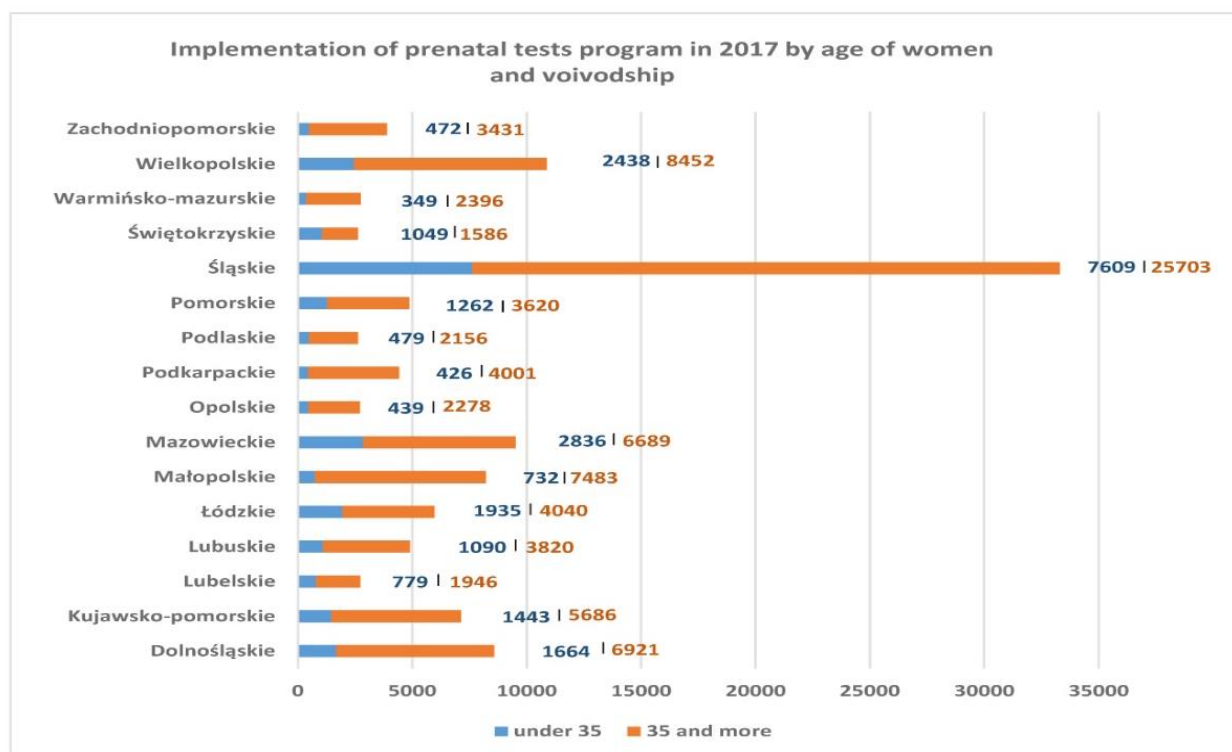
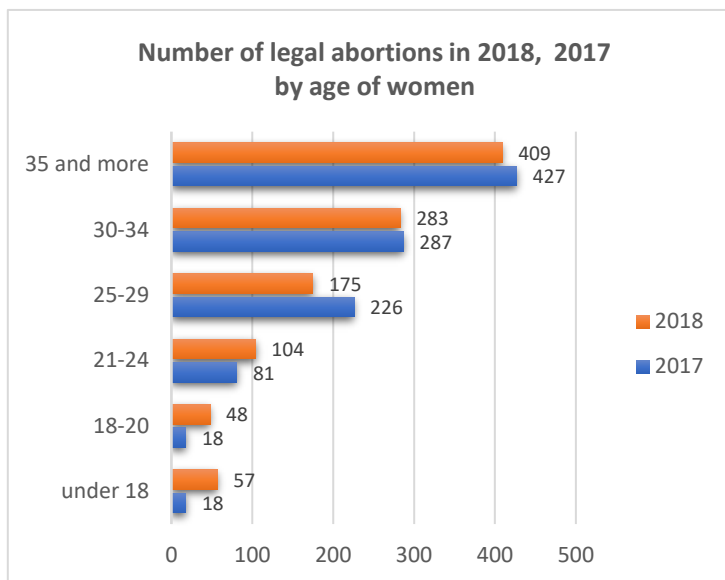
\* Although the Government's report indicates the total number of abortions for 1999 as 151, the number of abortions listed under each ground only totals 145.

Annex 2

<sup>49</sup> Annual reports of the Council of Ministers on the implementation and the effects of application in the years 1994-2017 of the Act of 1993. Center of Healthcare Information Systems (data of 2018).

<sup>50</sup> In 1997, amendments to the 1993 Act that permitted abortion on social grounds were briefly in force, from 4 January 1997 until they were invalidated by the Constitutional Tribunal in May 1997.

## Legal abortions by age of women (2018, 2017) and prenatal tests by age of women and voivodship (2017)<sup>51</sup>



<sup>51</sup> Sources: Center of Healthcare Information Systems (2018). Report of Council of Ministers on the implementation and effects in 2017 of the Act of 1993.