

## **Communication under Rule 9(2) of the Rules of the Committee of Ministers in the case *P. and S. v. Poland* (App. No. 57375/08)**

**22 February 2019**

### **1. 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 the 2013 judgment of the European Court of Human Rights in the case of *P. and S. v. Poland* (App. No. 57375/08).

Some of the information provided in this submission is also relevant to the Committee of Ministers' assessment of Poland's implementation of the related cases *Tysic v. Poland* (App. No. 5410/03) and *R.R. v. Poland* (Appl. No. 37617/04).

The three judgments against Poland - *P. and S. v. Poland* (2013), *R.R. v. Poland* (2011) and *Tysic v. Poland* (2007) - each address distinct but overlapping issues regarding the ongoing and serious failures of the Polish authorities to ensure access to legal abortion in Poland. 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 and targeted implementation measures. The *P. and S.* case concerned an adolescent girl whose legal

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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.

entitlement to an abortion in Poland after she was sexually assaulted was established by a prosecutor, who issued a certificate to that effect. As such, contrary to the *Tysiyc* and *R.R.* cases, the *P. and S.* case did not center on decision making by medical professionals as to a woman's legal eligibility for abortion or prenatal testing on medical grounds.<sup>3</sup> Instead in *P. and S.* the first applicant's legal entitlement to access abortion was, and could only be, established by prosecutorial authorities. As a result, the Court's judgment in *P. and S.* grappled with the repeated arbitrary and harmful behavior by medical professionals and other state authorities which severely hampered the first applicant's access to the abortion care to which she was legally entitled. Indeed, as the Court recognized, in *P. and S.* medical staff simply, "did not consider themselves obliged to carry out" the care sought by the applicant, "on the strength of the certificate issued by the prosecutor."<sup>4</sup>

As such, implementation of the Court's judgment in *P. and S.* does not turn primarily on the establishment of an effective complaint procedure by which women in Poland can challenge medical professional's decisions as to their eligibility for legal abortion, but instead requires the State to establish effective enforcement policies and procedures by which Polish authorities vigorously hold health facilities and providers accountable for any failures to comply with legal obligations to provide legal abortion care.

In 2016, 2017 and 2018 we previously submitted information to the Committee of Ministers in relation to Poland's implementation of the *P. and S.* and *R.R.* cases and much of the information included in those submissions remains relevant at this time.<sup>5</sup> Indeed we remain seriously concerned that more than six years since the Court's judgement in *P. and S.*, Poland has taken no effective measures to implement the judgment. Our concerns regarding Poland's ongoing failure to comply with the judgment mirror those of the Committee of Ministers as issued in its

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<sup>3</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 100. In *Tysiyc v. Poland*, medical providers refused to issue a certificate authorizing a legal abortion despite finding that delivery would severely worsen the applicant's deteriorating vision and jeopardize her health, a legal ground for abortion under Polish law. The issue was the lack of a timely review and appeals procedure of medical professionals' decisions in cases where they determine conditions for abortion have not been met. *Tysiyc v. Poland*, App. No. 5410/03 para. 121-22. In *R.R. v. Poland*, medical providers' repeated refusal to provide diagnostic screening to determine fetal malformation prevented the applicant from being able to legally obtain an abortion based on severe fetal impairment, which is also a legal ground for abortion in Poland. The Court found that the State must provide a legal framework that allows real possibilities for abortion where it is legal under the law. The State must provide an adequate legal and procedural framework to guarantee that women obtain timely information to allow them to make informed decisions about their health and whether to end a pregnancy. *R.R. v. Poland*, App. No. 37617/04, para. 200.

<sup>4</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 108.

<sup>5</sup> 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>.

September 2018 conclusions. The Committee of Ministers expressed serious concern about Poland's continuing failure to adopt effective procedures for access to lawful abortion more than five years after the Court's judgment and called on the authorities to without further delay adopt and effectively implement a "viable system" for effective access to legal abortion and related information.<sup>6</sup>

Yet in its responses submitted in January 2019, Poland has not provided information on any concrete and effective measures it plans to adopt to establish a "viable system" through which to ensure that women and girls have effective access to legal abortion care and thereby to comply with the Court's judgment and the Committee of Ministers' recent decision.<sup>7</sup>

Our concerns regarding the Polish authorities' ongoing failure to effectively implement the *P. and S.* judgment are borne out by the official statistics on legal abortions sought by women and girls in Poland who have become pregnant as a result of sexual assault.<sup>8</sup> Indeed, each year, since 2008, the number of legal abortions reportedly performed in Poland on grounds of a pregnancy resulting from sexual assault has remained almost unchanged, ranging from 0 to 3 legal abortions per year.<sup>9</sup> These statistics demonstrate that women and adolescent girls who become pregnant following sexual assault and wish to end the pregnancy are effectively unable to do so legally in Poland.<sup>10</sup>

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<sup>6</sup> The Committee of Ministers requested from the State concrete information, including examples of cases and statistical data, on the following items: 1) Access to lawful abortion in Poland, in particular a) when a doctor invokes the conscience clause and b) when medical service providers fail to comply with their contracts with the National Health Fund; 2) Why existing protection mechanisms for patient data were not effective in relation to *P. and S.* and measures taken to ensure non-repetition; 3) Measures envisaged to ensure respectful treatment of minors seeking abortion care; 4) Measures taken to ensure that women seeking lawful abortion care receive appropriate consideration and adequate information on how to exercise their right to lawful abortion.

<sup>7</sup> Communication from the authorities (02/01/2019) in the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2019)16. DD(2019)28 - Communication from the Polish authorities in reply to submission from the Commissioner for Human Rights (Ombudsman) (DD(2018)802) - 02.01.2019; DD(2019)27 - Communication from the Polish authorities in reply to an NGO submission (Naczelna Rada Adwokacka - Polish Bar Council) (DD(2018)925) - 02.01.2019; DD(2019)26 - Communication from the Polish authorities in reply to an NGO submission (Center for Reproductive Rights) (DD(2018)814) - 02.01.2019

<sup>8</sup> In its 2 January 2019 communication, Poland points to official statistics on abortion and notes that the number of lawful abortions has doubled between 2008 and 2017. However, it is critically important to underline that this increase does not pertain to the circumstances in the *P. and S.* case where the first applicant was pregnant following sexual assault and sought a lawful abortion on those grounds. There has been no increase in the numbers of legal abortions provided on grounds of pregnancy resulting from sexual assault, and the increase in the number of legal abortions noted by the State in fact relates to one of the other grounds for legal abortion in Poland (where a severe fetal impairment is diagnosed).

<sup>9</sup> Report of the Council of Ministers on the implementation and the effects of application in 2016 of the Act of January 7, 1993 on family planning, protection of the human fetus and conditions of termination of pregnancy - adopted by the Council of Ministers in circulation on January 15, 2018, passed to the Sejm January 2018, available at <https://bit.ly/2obwTfY>.

<sup>10</sup> These low numbers can not be attributed to a correspondingly low instance of sexual assault in Poland. It is noteworthy that in Poland in 2017 there were 5,270 criminal investigations into alleged cases of sexual assault: <https://bit.ly/2IaAkQs>. Moreover, this number of criminal investigations does not correlate to the rates of sexual

The following sections provide information on:

- i) the way in which conscience-based refusals of legal abortion care continue to hamper access;
- ii) the continuing absence of any effective mechanisms by which women and adolescent girls can enforce their rights to legal abortion care;
- iii) the Polish authorities' failure to enforce health care facilities' contracts with the National Health Fund;
- iv) the ongoing lack of effective measures to guarantee medical confidentiality;
- v) the lack of effective measures to ensure the respectful treatment of adolescents seeking legal abortion care;
- vi) the failure to establish procedures to ensure that women and adolescent girls receive appropriate consideration and adequate information on how to exercise their right to legal abortion.

## **2. CONSCIENCE-BASED REFUSALS OF CARE CONTINUE TO UNDERMINE ACCESS TO LEGAL ABORTION CARE**

Many of the barriers that the first applicant faced in access to legal abortion care in the *P. and S.* case resulted from medical professionals' failures to comply with existing domestic regulations and duties when refusing to provide legal abortion care on grounds of conscience and religion. However, since the Court's judgment in *P. and S.*, Polish authorities have failed to adopt any effective measures to enforce existing regulations or sanction abusive refusals of legal reproductive health services, which remain widespread and continue to hamper women's timely access to abortion care across Poland.<sup>11</sup> On the contrary, since the Court's judgement in *P. and S.* legal safeguards protecting women's access to abortion care have been retrogressively removed from Polish regulations regarding medical professionals' conscience-based refusals of care.

In *P. and S.*, the Court held that “[s]tates are obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to

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assault in Poland, as under reporting of sexual assault remains a significant concern in Poland, as in other European countries, see <https://bit.ly/2S3lhIa>.

<sup>11</sup> As outlined in our previous submissions, the independence and impartiality of relevant disciplinary procedures are in doubt. Under Polish law, the National Board of Doctors is entrusted with addressing disciplinary cases against doctors who fail to comply with procedural requirements when refusing health care on grounds of conscience. Yet, the National Board of Doctors filed the Constitutional Tribunal case described above in which it challenged the constitutionality of procedural requirements placed on medical professionals who refuse care on grounds of conscience or religion, and compliance with which it is assigned to oversee. 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>.

services to which they are entitled under the applicable legislation.”<sup>12</sup> The Court noted that a critical facet of Polish law in this regard was the legal requirement, “making it mandatory for such refusals to be made in writing and included in the patient’s medical record *and, above all, by imposing on the doctor an obligation to refer the patient to another physician competent to carry out the same service.*”<sup>13</sup> The Court found that those minimum legal requirements, which at the time of its judgment were enshrined in Article 39 of the Medical Profession Act, were not complied with in practice in the case of *P. and S.*<sup>14</sup>

However, since the Court’s judgment, and in direct contradiction of the Court’s pronouncement on its importance, the referral obligation previously imposed on doctors was invalidated by Poland’s Constitutional Tribunal in 2015.<sup>15</sup> As a result, now when doctors refuse to provide legal abortion care to women on grounds of conscience or religion they have no duty to refer their patient to another competent provider or even to inform her of where or from whom she can obtain legal abortion care. The absence of this critical referral obligation on doctors contradicts international human rights standards and exposes women and adolescent girls to significant hardship and harm. Its invalidation has severe implications for all women and adolescent girls in Poland who are seeking timely access to legal abortion services and has particular grave implications for those who seek access to abortion care following sexual assault, for whom abortion is only legal in the first 12 weeks of pregnancy.

Not only has this retrogressive step undermined compliance with the Court’s judgement in *P. and S.*, it has also failed to adhere to the reasoning of other international human rights mechanisms which have repeatedly outlined that such referral obligations, alongside other regulatory measures to safeguard women’s timely access to legal abortion care, are vital when states choose to permit doctors to refuse to provide legal reproductive health care on grounds of conscience or religion.<sup>16</sup>

Poland must take effective measures to address the grave impact of the Constitutional Tribunal’s judgment and fulfill its international obligation to ensure that women’s access to legal abortion care is not undermined or hindered by medical professionals’ refusals of care on grounds of conscience or religion. However, to date Poland has taken no measures to address the serious

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<sup>12</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 106.

<sup>13</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 107.

<sup>14</sup> *P. and S. v. Poland*, App. No. 57375/08, paras. 107-108.

<sup>15</sup> The Polish Constitutional Tribunal, case no 12/14. See <https://bit.ly/2BcIKDt>. On 7 October 2015, the Polish Constitutional Tribunal ruled that Article 30 and 39 of the Medical Profession Act are partially unconstitutional, holding that the referral obligation imposed on doctors who refuse to provide abortion services on grounds of conscience was unconstitutional. As a result, in such situations doctors are no longer obliged to refer women to another doctor or medical facility where they can obtain a legal abortion.

<sup>16</sup> For an overview, see Center for Reproductive Rights, *Addressing Medical Professionals’ Refusals to Provide Abortion Care on Grounds of Conscience or Religion: European Human Rights Jurisprudence on State Obligations to Guarantee Women’s Access to Legal Reproductive Health Care*.

protection gap that now exists following the 2015 judgment and ensure that women and adolescent girls can and do obtain timely information and care.

In its January 2019 communications, Poland seems to argue that health care facilities should provide information to women and adolescent girls, who have been refused legal abortion care on grounds of conscience or religion, about where they can obtain the care. However, health care facilities are not providing this information to women and girls and it does not appear that they currently have a legal duty to do so.

Additionally, in its January 2019 communications, Poland appears to suggest that conscience-based refusals of legal abortion care are not a widespread practice in Poland and to support this assertion it refers to a 2014 study by the Ministry of Health which found that only three hospitals reported that a doctor had refused to provide legal abortion care on grounds of conscience or religion. However the general absence of these reports is no indication of the numbers of refusing providers in Poland and any assertion that such refusals of care are rare in Poland is untrue and has no statistical basis as Poland does not systematically monitor the number of available willing providers or the number of providers who refuse to provide legal abortion care on grounds of conscience or religion. Research conducted by the Federation for Women and Family Planning in 2015-2016 found that such refusals of care remain a widespread practice in Poland.<sup>17</sup> The research also identified four hospitals that institutionally refuse to provide abortion care on grounds of conscience. This practice directly contravenes Polish law as only individual doctors are permitted to refuse care on grounds of conscience and Polish law does not permit institutional refusals. Yet, Poland has taken no measures to sanction these breaches and ensure that health care facilities and doctors comply with their legal obligations. These enforcement failures are addressed in more detail in Section 3 and 4 below.

### **Recommendations**

To give effect to the Court's judgment in *P. and S.*, Poland must without delay:

- Adopt effective legally binding measures to ensure that women and adolescent girls who are refused legal abortion services on grounds of conscience or religion are referred in a timely manner to an alternative health care professional willing and able to perform the abortion.
- Enact legal provisions to require health care providers who refuse care on grounds of conscience to provide their patients with unbiased information on their legal entitlements to undergo abortion in certain circumstances, and on where services are available.

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<sup>17</sup> See <https://bit.ly/2EboykX>.

- Once these laws are adopted, issue clear directives to health care institutions and providers regarding their obligations thereunder, clarifying that Polish law does not allow institutional refusals of care and clearly outlining what sanctions will apply in case regulations and policies on refusals of care are breached.
- Actively enforce these laws and policies, including by ensuring breaches by health care institutions and medical providers are appropriately sanctioned and disciplinary action pursued.
- Monitor and publish data concerning the number and distribution of doctors providing legal abortion care and those that refuse to provide such care on grounds of conscience or religion.
- On foot of data from regular monitoring, take effective measures to guarantee the distribution of an adequate number of doctors willing and able to perform legal abortions throughout Poland so as to guarantee the accessibility of timely abortion care across the country.

### **3. ABSENCE OF EFFECTIVE ENFORCEMENT PROCEDURES OR COMPLAINTS MECHANISMS**

In its January 2019 communications, Poland suggests that the current complaints procedure under the Patient Rights Act serves as an adequate procedural mechanism which women and girls in Poland can use to enforce their entitlements to legal abortion care. Specifically, it appears to suggest that this existing complaints procedure suffices for implementation of the Courts' judgement in *P. and S.* and that it can be used in situations where doctors refuse to provide abortion care on grounds of conscience or religion.

However, as we have emphasized repeatedly in our previous submissions, the complaints procedure established by the Patient Rights Act does not provide an adequate or effective mechanism by which women can enforce their legal entitlements to abortion care.<sup>18</sup> Moreover, as outlined in the introduction, it is particularly misleading to suggest that the complaints procedure provides an effective and timely process that is of relevance to the specific circumstances of *P. and S.*

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<sup>18</sup> 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>.

There are a number of reasons for this:

- **First**, the existing complaints procedure is wholly inapplicable to situations similar to those experienced by the first applicant in *P. and S.* As it operates currently, the complaints procedure would apply only to issues regarding doctors' medical opinions as to whether women or adolescent girls are legally entitled to an abortion in situations of risk to health or life or a diagnosis of a severe fetal impairment. However, the situation of the applicant in *P. and S.*, did not involve a medical opinion regarding the applicant's eligibility for legal abortion. As a victim of sexual assault, her qualification for legal abortion services had been previously established by a prosecutor. As such, her legal entitlement to abortion care was not in question. Instead willful obstruction and procrastination by health care providers and abuse of the 'conscience clause' undermined her access to an abortion.
- **Second**, the existing complaints procedure is similarly wholly inapplicable to situations in which women are refused legal abortion care on grounds of conscience or religion,<sup>19</sup> and Poland's claim that the complaints procedure can currently be used to challenge refusals of care on grounds of conscience or religion 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 an abortion when doctors invoke the conscience clause. Similarly, as refusing providers are now no longer obliged to refer patients to other medical professionals willing to provide care, a failure to do so could not form part of a complaint under the current procedure.
- **Third**, the complaints procedure applies to all patients and all medical procedures and is not tailored to the specific needs of women seeking legal abortion services. Its general nature fails to meet the particular needs of pregnant women seeking to enforce or establish their legal entitlement to abortion care.
- **Fourth**, the complaints procedure currently provides the Medical Board with 30 days to issue a decision on complaints. This lengthy timeline is wholly inappropriate in situations where women are seeking access to legal abortion services – a situation in which, as the Court has underscored, the timely nature of any relevant process is imperative. Indeed, for women seeking legal abortion care following sexual assault Polish law prescribes that abortion is only legal in the first 12 weeks of pregnancy. The lengthy timeline clearly does not comply with the Court's specification that an effective urgent procedure be established. By way of comparison, Slovakia and the Czech Republic have imposed time limits of two to four days for appeal decisions on medical findings concerning abortion, thereby guaranteeing that decisions are taken as soon as possible and within a very short

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<sup>19</sup> 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>.



time-frame. This can be considered good comparative practice for complaints procedures concerning pregnant women's access to legal abortion care.

- **Fifth**, no procedures for ensuring execution and enforcement of the Medical Board's decisions have been put in place. As a result, women and adolescent girls who have obtained a decision recognizing their entitlement to legal abortion services have no way of enforcing the decision. Since the complaints procedure does not result in a legally enforceable order to a health facility or professional mandating them to provide the requested legal abortion care it does not offer an effective mechanism by which women and adolescent girls can enforce their entitlement to legal abortion care in a timely manner. The complaints procedure can only be considered effective if it results in an enforceable order to a health institution or professional to provide the care.
- **Sixth**, the Patient Rights Act excludes the possibility of judicial review of the Medical Board's decisions.<sup>20</sup> This means that the Medical Board's decisions are final and may not be challenged before a court. This wholly undermines basic rule of law requirements and contradicts standard practice in other jurisdictions.
- **Seventh**, Polish law places no obligation on medical professionals to inform women in writing of (i) their refusal of care on grounds of conscience or religion, (ii) their medical opinion that the patient does not qualify for legal abortion services, or (iii) of their right to complain. However, such requirements are critical components of any effective procedure, not only to ensure that women are properly informed of their right to challenge a doctor's opinion, but also so that they have a verifiable basis on which to do so.
- **Eighth**, a range of 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 review process.

For women and girls, like the first applicant in this case, who hold a prosecutor's certificate, the complaints procedure could only serve to confirm their already established legal entitlement to abortion care under Polish law. Since the procedure does not result in a legal enforceable order designating a specific doctor or health facility that will be mandated to provide the legal abortion care sought it does not and cannot serve to enforce a woman's or adolescent girl's legal entitlement to care.

We recall that at the heart of the *P. and S.* case was arbitrary behavior by health professionals who felt under no legal obligation to provide the applicant with legal abortion care although her entitlement to the care had been duly established by a prosecutor's certificate. In light of Poland's official statistics on legal abortion such arbitrary behavior can be assumed to be commonplace. Moreover, research into the conduct of Polish health care facilities regarding the provision of legal abortion services has found that many facilities impose a range of arbitrary

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<sup>20</sup> Patient's Rights Act, article 31(7).

requirements on women seeking legal abortion care that have no basis in law similar to those that the applicant in *P. and S.* encountered.<sup>21</sup>

### **Recommendations**

To give effect to the Court’s judgment in *P. and S.*, Poland must without delay:

- Establish an effective urgent procedural mechanism by which women and adolescent girls can enforce their legal entitlements to abortion care. This mechanism must ensure: a decision within no more than 3 days; the right of judicial appeal; where a woman is legally entitled to abortion care, the issuance of an enforceable order mandating a particular health care facility or medical provider to provide the care.
- Once the mechanism is established, publish and widely disseminate information to inform women and adolescent girls of the mechanism’s existence and how they can use it.
- Issue clear directives to health care institutions and providers regarding their obligations in respect of the new mechanism, including by specifying what sanctions will apply in case of breach.
- Actively enforce regulations concerning the new mechanism including by ensuring appropriate sanctions and disciplinary actions are pursued when health care institutions and medical providers breach relevant obligations.

#### **4. FAILURE TO ENFORCE CONTRACTS WITH THE NATIONAL HEALTH FUND**

In its January 2019 submissions, Poland again notes that all health facilities with National Health Fund contracts are required to provide legal abortions and that failure by any such facilities to provide this service will constitute a breach of contract and may lead to the initiation of what it terms “clarification proceedings.” It further states that where an individual doctor working for a health care facility refuses to provide abortion care on grounds of conscience or religion and the relevant health facility subsequently fails to provide patients with information about alternative providers from whom they can obtain legal abortion care, this will amount to a “faulty realisation of the contract” with the National Health Fund and will also constitute the basis for initiation of “clarification proceedings”.

Poland appears to indicate in its submissions that these “clarification proceedings” provide a remedy that enables women and adolescent girls to enforce their rights to legal abortion care. It

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<sup>21</sup> *P. and S. v. Poland*, App. No. 57375/08, paras. 102-104.

notes that when doctors refuse to provide abortion care, the health care facility has a duty to provide patients with information about how to enforce a contract with the National Health Fund.

Yet, placing the onus on individual patients, who are not party to the contract, to seek to enforce National Health Fund contracts between the Fund and the relevant health facility is entirely inappropriate. State authorities should establish effective monitoring mechanisms for ensuring compliance with these contracts and where shortcomings in compliance and implementation are identified they must take effective measures to hold those responsible accountable.

The proposition that women seeking urgent access to legal abortion care could viably seek to enforce such contracts as a mechanism to enforce their legal entitlements to abortion care under Polish law is wholly without basis and is entirely misleading.

- First, the only step that individual patients who believe they have been negatively impacted by such a breach of contract can take is to file an individual complaint with the National Health Fund. The Fund may decide thereafter to investigate a health care facility and its provision of health care services. However, the opening of any such “clarification procedures” is discretionary: the National Health Fund may refuse to investigate an individual complaint and instead require evidence of systematic failures before it opens an investigation. Even if the Fund does initiate an investigation, it is not required to conclude the investigation within any set timeframe and the process for finalizing the investigation report, which involves consultation with the health facility, is lengthy.<sup>22</sup>
- Second, the possible sanctions for breach of contract following such “clarification proceedings” are an order to return unduly collected funds to the Health Fund or an obligation to pay a contractual penalty to the Fund. There is no issuance of an order by the Fund to the relevant health care facility to provide the relevant care sought by a patient.

As a result, the possibility to make a complaint to the Fund seeking the institution of “clarification proceedings” does not in any way constitute an effective remedy for women or adolescent girls seeking to enforce their legal right to abortion care. Instead, the possibility of filing a complaint for failure to fulfil such contracts represents an entirely ineffective procedure by which women and adolescent girls would be expected to seek to enforce their rights. 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

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<sup>22</sup> For example, following the investigation a post-control assessment with recommendations for action will be issued and the health care facility may, within 7 days, raise objections to the assessment and any such reservations shall be considered within 14 days. The health care facility is then obliged, within 14 days from the date of the post-control statement, to inform the National Health Fund of how it is going to implement the recommendations and about the actions taken or the reasons for inaction.

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>23</sup>

### **Recommendations**

To give effect to the Court's judgment in *P. and S.*, Poland must without delay:

- Ensure State authorities are charged with effective monitoring of compliance by all health care facilities with their contractual obligations to the National Health Fund to provide legal abortion care to women and adolescent girls.
- Issue clear directives to health care institutions and facilities regarding their obligations to comply with National Health Fund contracts, and clearly outlining what sanctions will apply in case regulations and policies are breached.
- Ensure that State authorities pursue action to actively enforce these contracts, including by ensuring breaches by health care institutions and medical providers are sanctioned.

## **5. GUARANTEEING THE CONFIDENTIALITY OF PATIENTS' MEDICAL INFORMATION**

In *P. and S.*, the Court ruled that the hospital's public disclosure of the first applicant's wish to obtain an abortion "cannot be regarded as compatible either with the Convention standards as to the State's obligation to secure respect for one's private or family life, or with the obligations of the medical staff to respect patients' rights laid down by Polish law."<sup>24</sup>

In its January 2019 communications, Poland once again details the pre-existing legal framework regarding medical confidentiality that was already in place at the time of the Court's judgment in *P. and S.* and notes the recent entry into force of the EU General Data Protection Regulation, which protects confidentiality in the processing of personal data. The communication also provides information on the number of complaints regarding breaches of medical confidentiality examined by the district medical boards between 2008 and 2016. However, it is not evident whether or not any of these complaints relate to women who have sought legal abortion care.

Poland contends that the breaches of the first applicant's right to confidentiality was "incidental" and due to a "human factor". However, it fails to address the reasons behind medical professionals' lack of respect for those legal provisions and to ensure accountability for those breaches of confidentiality. Poland has taken no effective measures to redress the serious oversight and enforcement failures that led to the breaches of medical confidentiality in this case.

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<sup>23</sup> *Tysic v Poland*, para. 118.

<sup>24</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 133.

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 those responsible for the breach.<sup>25</sup> As a result no disciplinary measures have been pursued against those responsible for the breaches of the first applicant's confidentiality and no training programs or other preventative measures have been put in place. It is critical that the State ensures accountability for the breaches of medical confidentiality in this case and sends a clear message that such violations will be sanctioned.

## **Recommendations**

To give effect to the Court's judgment in *P. and S.*, Poland must without delay:

- Take meaningful demonstrable action to enforce relevant patient rights regulations vigorously and hold accountable those who breach medical confidentiality, including by issuing clear written directives to health care institutions and providers regarding their obligations in respect of patient confidentiality in reproductive health care matters, including by specifying what sanctions will apply in case of breach.
- Actively enforce regulations by ensuring appropriate sanctions and disciplinary actions are pursued when health care institutions and medical providers breach relevant obligations.
- Require all medical professionals to regularly undertake training modules regarding their duty to respect and safeguard confidential patient data.

## **6. ENSURING THAT ADOLESCENTS ARE TREATED IN A RESPECTFUL MANNER WHEN SEEKING REPRODUCTIVE HEALTH SERVICES**

In its 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>26</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>27</sup>

In its January 2019 communications, Poland has not outlined any measures envisaged to ensure the respectful treatment of minors seeking legal abortion care. Instead of adopting proactive measures necessary to ensure that adolescents seeking legal abortion care are treated respectfully,

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<sup>25</sup> DD(2014)258 - Communication from the Polish authorities - Action report - 29.11.2013, p. 3.

<sup>26</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 166.

<sup>27</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 168.

such as putting in place youth-friendly services, Poland provides information about remedies that may be available to those who have experienced violations of their rights. To this end, Poland continues to argue that the main measure of legal protection for women and adolescent girls who have been treated in a disrespectful manner when seeking legal abortion care is the complaints procedure under the Patient Rights Act.

However, as outlined in detail in Section 3 and in our previous submissions, the complaints procedure is not appropriate or effective to address the circumstances of *P. and S.* and the disrespectful treatment of the applicant by health care professionals.

## **Recommendations**

To give effect to the Court's judgment in *P. and S.*, Poland must without delay:

- Introduce youth-friendly reproductive health services throughout the country that comply with WHO guidelines and human rights standards and are provided in a confidential and non-judgmental manner, including through the adoption and widespread dissemination of policy guidelines for medical professionals on how to treat adolescent patients who seek sexual and reproductive health care, including legal abortion care.<sup>28</sup>
- Require all medical professionals providing reproductive health care to regularly undertake training modules regarding the appropriate and non-judgmental provision of youth-friendly reproductive health care, as well as on relevant international human rights standards, including as elaborated by the U.N. Committee on the Rights of the Child.<sup>29</sup>
- Publish and widely disseminate evidence-based non-biased information to adolescents about their entitlement to access reproductive health care that it is designed to empower minors to make independent and informed reproductive decisions.
- Reform its laws to ensure that adolescent girls can seek and obtain reproductive health services without requiring parental consent in accordance with their evolving capacities.<sup>30</sup>

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<sup>28</sup> WORLD HEALTH ORGANIZATION, MAKING HEALTH SERVICES ADOLESCENT FRIENDLY: DEVELOPING NATIONAL QUALITY STANDARDS FOR ADOLESCENT-FRIENDLY HEALTH SERVICES 7-8 (2012).

<sup>29</sup> Committee on the Rights of the Child, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24); General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence.

<sup>30</sup> Committee on the Rights of the Child, General Comment No. 20 on the implementation of the rights of the child during adolescence, para. 39; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, Dainius Puras, para. 60, U.N. Doc. A/HRC/32/32 (2016).

## **7. ENSURING THAT WOMEN AND GIRLS SEEKING LEGAL ABORTION CARE RECEIVE APPROPRIATE CONSIDERATION AND ADEQUATE INFORMATION ON HOW TO EXERCISE THEIR RIGHT TO THIS CARE**

In *P. and S.* the Court held that “effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, is directly relevant for the exercise of personal autonomy.”<sup>31</sup> The Court found that the applicants “did not receive appropriate and objective medical counselling which would have due regard to their own views and wishes.”<sup>32</sup> Instead, it held that the applicants had received misleading and contradictory information about any requirements they had to comply with after obtaining the prosecutor’s certificate attesting to the adolescent applicant’s qualification for a legal abortion.

In its January 2019 communications, Poland summarizes existing legal provisions regulating the medical profession and provision of information to patients in general, including by doctors and health care institutions. However, it has provided no information on measures taken or envisaged to ensure that women and adolescent girls seeking lawful abortion care, in particular following sexual assault, receive appropriate and adequate evidence-based information on how to exercise their right to lawful abortion.

Women and adolescent girls seeking lawful abortion care in Poland, not least following sexual assault, continue to encounter a series of serious barriers in access to accurate non-judgmental information and care.

As recognized by the Court, provision of accurate and accessible information about abortion care to women and adolescent girls who are pregnant following sexual assault and decide to end the pregnancy is particularly critical to their ability to exercise their legal entitlement to care. The ongoing shortcoming in the provision of such information may result in some women and adolescent girls seeking clandestine and potentially unsafe abortion care or being compelled to carry the pregnancy to term.

Despite the serious implications of these shortcomings the State has taken no effective measures to improve access to accurate non-judgmental information by women and adolescent girls seeking legal abortion care following sexual assault.

### **Recommendations**

To give effect to the Court’s judgment in *P. and S.*, Poland must without delay:

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<sup>31</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 111.

<sup>32</sup> *P. and S. v. Poland*, App. No. 57375/08, para. 108.

- Adopt guidelines for doctors and health care facilities on the provision of information about legal abortion care and its availability to women and adolescent girls, in particular those who are victims of sexual assault.
- Ensure that all health care providers are trained on their duty to provide information to women and adolescent girls on when abortion is legal, how to exercise their legal entitlements and where they can receive legal abortion care.
- Publish public information in accessible formats on women’s legal entitlements to abortion care as well as information about abortion and where legal abortion services are available.

## 8. CONCLUSION

Since the September 2018 decision of the Committee of Ministers, no measures have been taken toward the implementation of *P. and S. v. Poland* - or the other two cases - *Tysic v. Poland* and *R.R. v. Poland*. After more than ten years from the first of these judgments, *Tysic v. Poland* issued in 2007, Poland has still not fully implemented any of the judgments.<sup>33</sup>

The Committee of Ministers has acknowledged that the *P. and S.* case involves “structural and/or complex issues” and the implementation of the judgment is therefore subject to enhanced supervision.<sup>34</sup> Both of the two other cases involve many of the same structural problems that have undermined women’s access to legal abortion and exercise of their rights for more than a decade.

In fact, for more than two decades, numerous other international and regional human rights bodies have repeatedly affirmed that Poland’s abortion law and practice fail to respect women’s human rights and have called on Poland to reform the law.<sup>35</sup>

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<sup>33</sup> The Committee of Ministers of the Council of Europe continues to monitor implementation of the three ECtHR judgments, *see Tysic v. Poland*, Status of Execution, *available at* <https://bit.ly/2Nbqf7t>; *R.R. v. Poland*, Status of Execution, *available at* <https://bit.ly/2PIlikb>; and *P. and S. v. Poland*, Status of Execution, *available at* <https://bit.ly/2wJtDfs>.

<sup>34</sup> 8th Annual Report of the Committee of Ministers (2014), Appendix 2, p. 59, *available at* <https://bit.ly/2nED5wz>.

<sup>35</sup> Human Rights Committee, *Concluding Observations: Poland*, para. 8, U.N. Doc. CCPR/CO/82/POL2, (2004); ESCR Committee, *Concluding Observations: Poland*, para. 28, U.N. Doc. E/C.12/POL/CO/5 (2009); CRC, *Concluding Observations: Poland*, paras. 38-39, U.N. Doc. CRC/C/POL/CO/3-4 (2015); CAT Committee, *Concluding Observations: Poland*, para. 23, CAT/C/POL/CO/5-6 (2013); ESCR Committee, *Concluding Observations: Poland*, para. 29, E/C.12/1/Add.82 (2002); CEDAW Committee, *Concluding Observations: Poland*, paras. 25, U.N. Doc. CEDAW/C/POL/CO/6 (2007); *Concluding Observations: Poland*, para. 37(a), U.N. Doc. CEDAW/C/POL/CO/7-8 (2014). Report by Nils Muiznieks Commissioner for Human Rights of the Council of Europe Following His Visit to Poland From 9 to 12 February 2016, para. 188, CommDH(2016)23; *Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Anand Grover: Mission to Poland (May 2009).



Poland has ignored and disregarded these repeated judgments, findings and recommendations and has failed to take any meaningful action to comply with its obligations under international human rights law. It has not adopted any effective measures to guarantee that women have timely and unhindered access to abortion services in a manner that respects their dignity and fundamental human rights.

In light of Poland's serious and continuing failure to any take effective measures to implement the three judgments, we respectfully repeat our request that the Committee of Ministers continue its enhanced scrutiny of the *P. and S.* judgment and that it also include the implementation of the *Tysic v. Poland* and *R.R. v. Poland* under the enhanced scrutiny procedure until effective access to lawful abortion is guaranteed in practice for women and adolescent girls in Poland.