Ministry
of Foreign Affairs
Republic of Poland
Undersecretary of State
Piotr Wawrzyk

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Mr. Nils Muižnieks
Commissioner for Human Rights
of the Council of Europe

Dear Mr. Commissioner,

With regard to your letter of 19 January 2018 addressed to the Polish Prime Minister and in addition to the response already given to your correspondence I would like to take the opportunity to refer more specifically to some of the issues you raised in your letter.

In respect of your remarks on judiciary reform in Poland, let me point out that detailed explanations of the grounds for amending the Act on the Supreme Court and the Act on the National Council for the Judiciary have been provided by the Polish Government on many occasions. The last meeting during which these issues were discussed took place in December 2017. During your visit to Warsaw you met with representatives of the Ministry of Justice who exhaustively answered your questions regarding this issue.

Nevertheless, I would like to refer to arguments raised in the letter. The Government is of the opinion that in the Act on the National Council of the Judiciary adopted on 8 December 2017, Poland implemented the ODHIR recommendations by:

- resignation from distinguishing two chambers within the Council;

- providing the possibility of proposing candidates for members of the National Council for the Judiciary for a group of at least 2,000 nationals of the Republic of Poland or a group of 25 judges; this way the Council is going to be composed of 25 members (15 judges, 4 deputies – elected by the SEJM, 2 senators – elected by the Senate, 1 representative of the President and ex officio – the First President of the Supreme Court, the President of the Supreme Administrative Court and the Minister of Justice;

- limitation that a deputies' club can propose no more than 9 candidates for the Council members from amongst judges whose candidatures have been submitted;

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- introducing a principle that Council members are to be elected by the majority of 3/5 votes with at least half of the statutory number of deputies present.

Moreover, it can also be stated that, according to the opinion of the Venice Commission, an independent council of the judiciary does not imply judges' self-governing and the administration of judiciary should not necessarily be wholly managed by judges. The Venice Commission Recommendations say that councils of the judiciary should include in their compositions more non-judicial members in order to avoid the risk of corporatism and to provide a factor of external and more neutral supervision.

It should also be indicated that the model of electing the council members, as adopted in the Act of 8 December 2017 on the National Council of the Judiciary resembles the model existing in the Spanish system. Spanish judges can stand as candidates when supported by 25 judges or a judicial association, and the members of the General Council of the Judiciary are elected by the Parliament only from the list proposed to them by the Council (Articles 572–578 of the Spanish organic act no 6/1985 on the judiciary of 1 July 1985).

Moreover, the Spanish General Council of the Judiciary is composed of the Chairperson, that is the President of the Supreme Court, and 20 members (12 judges elected by both chambers of the Parliament (6 judges each) from amongst 36 candidates proposed by judicial associations or non-attached judges in the amount of 2% of judges in active service and 8 from amongst other legal professions, each chamber of parliament electing 4).

The allegations referring to electing candidates only from amongst those proposed by judges (like in Poland) as well as the allegation addressing the NCJ, regarding the composition of the Council including candidates proposed by the Parliament are hard to understand, since such allegations are not put forward with regard to states like Spain, having a judicial council with much more advanced competences, e.g. to adjudicate disciplinary measures against judges, including their removal from the office.

Next, let me address the issues that you raised in your letter which concern access to contraception and access to legal and safe abortion.

The Ministry of Health adopted measures to regulate more precisely access to medical products from the ATC G03A group – hormonal contraceptives for internal use. These measures were taken in order to increase the safety of patients and to provide them with medical care tailored to their individual needs. The patient should first see a doctor who specializes in gynaecology before she takes this kind of medical product. A visit to a gynaecologist involves a physical examination. A physician who keeps his or her patient's medical records knows how often these medical products have been prescribed and is aware of the possible unwanted effects that can appear and of possible interactions of this medical product with other drugs. Thanks to the passed legislation, a physician will be in a position to assess whether and how the administration of this drug will affect the health condition of his or her patient.

Referring to your remarks about access to legal and safe abortion, I would like to explain that pursuant to Art. 4a (1) of the Act of 7 January 1993 on Family Planning, Protection of Human Foetus and Conditions under which Pregnancy May be Terminated, the termination of pregnancy may be performed solely by a physician, when:

1) the pregnancy endangers the life or health of the pregnant woman;

2) prenatal tests or other medical findings indicate that there is a high probability of a severe and irreversible foetal defect or incurable illness that endangers the foetus's life;

3) there are strong reasons to suspect that the pregnancy is the result of an unlawful act.

In the event that a prenatal test or other medical findings indicate that there is a high probability of severe and irreversible foetal defect or incurable illness that imperils the foetus's life, the pregnancy may be terminated before the foetus is capable of living independently outside the pregnant woman's body. In the event there is warranted suspicion that the pregnancy resulted from an unlawful act, the pregnancy may be terminated if not more than 12 weeks have elapsed since the beginning of the pregnancy.

Pursuant to the said Act "Persons who are covered by social insurance and persons entitled to free health care under other legislative provisions have the right to free-of-charge termination of pregnancy in medical establishments." The list of guaranteed services connected with termination of pregnancy is included in attachment 1 to Ordinance of the Minister of Health on Guaranteed In-Patient Treatment Services of 22 November 2013. The Ordinance of the Minister of Health and Social Protection of 22 January 1997 on Professional Qualifications of Physicians Giving Them the Right to Terminate Pregnancies and the Right to State that the Pregnancy Endangers the Life or Health of a Woman or That There is High Probability of Severe and Irreversible Foetal Defect or Incurable Illness that Endangers the Foetus's Life (Dz. U. item 49) stipulates who can determine the existence of circumstances that indicate a high probability of severe and irreversible impairment of the foetus or incurable illness that endangers the foetus's life. These circumstances are determined by a physician who holds the title of a specialist and finds that there is a genetic defect of the foetus on the basis of genetic tests, or a physician who holds the title of a specialist in obstetrics and gynaecology who finds that there is a birth defect of the foetus on the basis of ultrasound tests taken by the pregnant woman. Only a physician can determine the extent of the foetal defect and the probability of slow foetal growth since the extent of foetal defect can vary in the same diseases, especially complex ones.

A physician who holds the title of a specialist in the branch of medicine relevant to the type of disease that the pregnant woman suffers is competent to state that there exist circumstances indicating that the pregnancy endangers the life or health of a pregnant woman. The decision on whether circumstances referred to in the aforementioned Art. 4a (1) (1) or Art. 4a(1)(2) of the Act occurred is taken by a physician with respect to a concrete patient, based on current medical knowledge, accessible methods and means of preventing, diagnosing and treating diseases, professional ethics and due diligence.

These circumstances, the cause of the pregnancy risk endangering the life or health of a pregnant woman, the results of the prenatal test or the medical findings which indicate that there is a high probability of severe and irreversible foetal defect or an incurable illness that endangers the foetus's life are all recorded in medical documentation.

Currently, the Government is not drafting an amendment to the Act on Family Planning, Protection of Human Foetus and Conditions under which Pregnancy May be Terminated of 7 January 1993. Both of the draft laws mentioned in the letter of the Commissioner for Human Rights of the Council of Europe are citizens' bills. Pursuant to the Constitution of the Republic of Poland, groups of at least

100,000 citizens who have the right to elect members of the Sejm have legislative initiative (i.e. the right to submit a bill to the Sejm).

I would like to refer to the issue of difficult access to abortion in circumstances permitted by law due to the fact that physicians invoke the so-called conscience clause. It needs to be pointed out that pursuant to Art. 39 of the Act on the Profession of Physician and Dentist of 5 December 1996 (Dz. U. of 2017 item 125 as amended), a physician may refrain from performing medical services that go against his or her conscience, subject to Art. 30 (to the extent that it obligates a physician to provide medical assistance in every case when a delay in providing such assistance could result in a risk of loss of life, severe impairment of the body or severe health disorder). A physician is under an obligation to justify this fact and to record it in medical documentation. A physician who performs his or her profession under an employment contract or as a service is also obligated to notify his or her superior of this fact in advance.

It is important to note that the conscience clause can only be invoked by individual doctors, not medical establishments. The right to freely define one's personal world view (i.e. free from any kind of pressure) is the point here and this condition is not met if the refusal is expressed by a collective.

A health care provider undertakes to offer all the guaranteed services whose scope and type were stipulated in the contract for providing health care services. If the health care provider is unable to provide such services and was not able to foresee this in advance, it is obliged to undertake prompt actions to maintain continuity of providing such services (by referring the patient to another health care provider that offers the service in question) and to inform the relevant provincial branch of the National Health Fund about this fact and the actions taken. It should also be pointed out that a health care provider in a hospital secures the provision of services comprehensively, also by performing the necessary tests such as laboratory tests and ultrasound diagnosis and by putting in place medical procedures that entail the provision of such services. Therefore, in the event that a physician who performs his or her profession under an employment contract or as part of a service informs a health care provider that he or she might refuse to perform a service in the situation referred to in the commented regulation i.e. by invoking the conscience clause, the health care provider is obligated to secure the performance of this service in another manner. The provision of medical services in a medical establishment should be organised in a way that secures – on the one hand – conditions for physicians to perform their profession in agreement with their conscience, and – on the other – undisrupted access to medical services which female patients are entitled to receive. As a rule then, all medical establishments (hospitals) that signed contracts with the National Health Fund are obligated to offer services provided for in such contracts to the full extent and pursuant to the applicable law. Invocation of the conscience clause should not violate this obligation.

Chapter 8 of the Act on the Rights of Patients and the Commissioner for Patients' Rights of 6 November 2008 gave patients the right to submit objections to an opinion or a decision issued by a physician. This right is enjoyed by patients and their statutory representatives. An objection may be lodged with the Medical Commission operating in the Office of the Ombudsman for Patients' Rights, if an opinion or a decision affects patients' rights or obligations resulting from legislative provisions.

The right to submit objections to an opinion or decision issued by a physician was introduced to the Polish legal system in order to execute the European Court of Human Right's judgment in the case of Tysiąc v. Poland and also to implement the judgment in the case of R.R. v. Poland. This is a general right and as such was not narrowed down solely to cases of refusals to perform abortion under

circumstances provided for in the Act on Family Planning, Protection of Human Foetus and Conditions under which Pregnancy May be Terminated of 7 January 1993. The reason for the general nature of the norm was to secure the protection of all patients whose rights or obligations resulting from legislative provisions are affected by a physician's opinion or decision and when they cannot assert their rights using other routes of appeal. The right to submit an objection to a physician's opinion or decision is an effective legal remedy also for women who were refused an abortion (under the circumstances provided for in the 1993 Act), a doctor's referral for prenatal tests, and in the event that despite a doctor's referral, such prenatal tests were not done.

Next, I wish to address another issue that you raised, namely the searches carried out by the Polish police in the premises of several NGOs assisting women at the beginning of October 2017 after the so-called Black Protest.

I would like to inform you that the Regional Prosecutor's Office in Poznan oversees an investigation (file no. RP I Ds 3.2017) against public officials employed by the Ministry of Justice in Warsaw for allegedly exceeding their authority or not performing their duties from 2012 to 2015 in connection with awarding, inspecting the spending and settlement of funds from the Victim Assistance Fund administered by the Ministry of Justice's Department of International Cooperation and Human Rights and by so doing acting to the detriment of public interest, which is an offence under Art 231 § 1 of the Criminal Code.

The decision issued by the Prosecutor's Office on 24 July 2017 following a request by the Voivodeship Police Command ordered the handover of items that could be used as evidence in the said investigation and if such request was refused to conduct a search of the premises of six organisations that were authorised to use funds from the Victim Assistance Fund. This investigation is not conducted by the Ministry of Justice.

All secured evidence was handed over voluntarily. Organisations to which this decision applied did not submit any reservations to the seizure report. After copying, electronic data carriers are being successively returned to the organisations from which they were seized so as not to paralyze the work of these institutions.

I would also like to point out that the Regional Prosecutor's Office in Poznan secured documents in the Ministry of Justice at an earlier time.

According to information provided by the National Prosecutor's Office, procedural steps were carried out in the premises of the following organisations: Śląska Fundacja Błękitny Krzyż, Stowarzyszenie Przeworsk – Powiat Bezpieczny, Lubuskie Stowarzyszenie na Rzecz Kobiet „BABA", Stowarzyszenie Pomocy Bliźniemu im. Brata Krystyna, Katolickie Stowarzyszenie Potrzebującym „AGAPE", Fundacja Centrum Praw Kobiet. These organisations have different profiles of operation.

These steps were taken because it was necessary to confront evidence secured in the Ministry of Justice with documents in the possession of organisations that realised tasks financed out of the Victim and Post-Penitentiary Assistance Fund.

Considering the above circumstances, specifically the subject matter being investigated that is exceeding authority or not performing their duties from 2012 to 2015 in Warsaw by pubic officials employed in the Ministry of Justice in connection with awarding, inspecting the spending and settlement of funds from the Victim Assistance Fund and the way in which these steps were

conducted, the assumption that these steps were taken because they were intended to affect the operation of women's organisations is groundless.

Responding to your concerns about the problems experienced by women's rights NGOs and NGOs providing assistance to victims of domestic violence, I would like to present the following explanations.

The Victim and Post-Penitentiary Assistance Fund, also known as the Justice Fund, operates pursuant to Art. 43 of the Code of Execution of Criminal Sentences. The possible catalogue of measures undertaken on the basis of amassed funds was extended by amendments introduced by the Act of 12 July 2017 (Dz. U. of 2017 item 1452), which entered into force on 12 August 2017, amending the Code of Execution of Criminal Sentences and Ordinance of the Minister of Justice on the Victim and Post-Penitentiary Assistance Fund – Justice Fund of 13 September 2017 (Dz.U. of 2017 item 1760).

On 29 September 2017 the Minister of Justice, acting pursuant to Art. 2 (1) and Art. 2 (2) of the Ordinance of the Minister of Justice of 13 September 2017 on the Victim and Post-Penitentiary Assistance Fund – Justice Fund, announced Programme I in the following priority areas:

I. Providing assistance to victims of offences and their closest relatives,

II. Providing assistance to witnesses and their closest relatives,

III. Supporting and developing an institutional system of assistance to victims of offences and witnesses, and implementation by public sector organisations of statutory tasks connected with protecting the interests of victims of offences and witnesses, and eliminating the effects of injury by offence.

Subsidies from the Victim and Post-Penitentiary Assistance Fund to provide assistance to victims of offences and their closest relatives and to provide post-penitentiary assistance were granted:

- in 2012, to 31 organisations with the aim of providing assistance to victims,

- in 2013, to 34 organisations with the aim of providing assistance to victims,

- in 2014, to 31 organisations with the aim of providing assistance to victims,

- in 2015, to 26 organisations with the aim of providing assistance to victims,

- in 2016, to 26 organisations with the aim of providing assistance to victims,

- in 2017, to 31 organisations with the aim of providing assistance to victims.

The years 2015-2016 saw an increase in the number of NGOs that received subsidies for their programmes. Several organisations that received co-financing in 2017 to implement their tasks also received co-financing in previous years. Thus, there are no grounds to conclude that there is a risk that the standard of the assistance provided would deteriorate because organisations with relevant and extensive experience resigned from taking part in tenders.

Subsidies from the Victim and Post-Penitentiary Assistance Fund were granted:

- in 2015, to 26 organisations with the aim of providing assistance to victims,

- in 2016, to 26 organisations with the aim of providing assistance to victims,

- in 2017, to 31 organisations with the aim of providing assistance to victims.

On 4 December 2017, the Minister of Justice announced the first open call for proposals to commission the implementation of tasks to be financed by the Justice Fund, with the aim of providing assistance to victims of offences and their closest relatives, and of providing assistance to witnesses and their closest relatives. The call's timeframe is 2018, and it is addressed to non-profit organisations that are not part of the public sector, including associations, foundations, organisations and institutions. It forms part of Programme I Priority I: "Providing Assistance to Victims of Offences and their Closest Relatives", and Priority II: "Providing Assistance to Witnesses and their Closest Relatives", which was announced on 29 September 2017. The maximum amount of funds that can be provided in the form of subsidies amounts to PLN 35 million.

Reports by the organisations that performed the commissioned tasks and implemented the proposals they submitted show that a substantial part of the assistance provided to victims by these institutions is directed to victims of violence, specifically to women. This means that individuals that fell victim to offences have been secured access to professional assistance. The aim of this programme is to support victims as early as possible after an offence was committed, irrespective of whether the offence was reported or not. The assistance provided to a victim could bear in a significant way on his or her decision to report the offence.

Considering the projected increase in funding allocated to assist victims, it is safe to conclude that the implementation of the programmes will result in actual support being provided to victims of domestic violence.

Please accept the assurances of my highest consideration.

Yours sincerely,