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Date: 15/09/2017

**DH-DD(2017)991-rev**

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Meeting: 1294<sup>th</sup> meeting (September 2017) (DH)

Communication from a NGO (Helsinki Foundation for Human Rights) (04/09/2017) in the cases of R.R., P. and S. and TYSIAC v. Poland (Applications No. 27617/04, 57375/08, 5410/03) and reply from the authorities (15/09/2017)

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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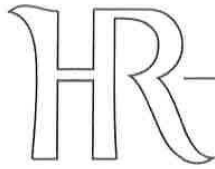
Réunion : 1294<sup>e</sup> réunion (septembre 2017) (DH)

Communication d'une ONG (Helsinki Foundation for Human Rights) (04/09/2017) dans les affaires R.R., P. et S. et TYSIAC c. Pologne (Requêtes n° 27617/04, 57375/08, 5410/03) et réponse des autorités (15/09/2017) **[anglais uniquement]**

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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DH-DD(2017)991-rev : Rules 9.2 & 9.6 NGO & reply from Poland in R.R., P. & S. and Tysiac.  
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1846/2017/ART.32/JJ



Warsaw, 1<sup>st</sup> September 2017

**TO:**

**The Secretary of the Committee of Ministers  
Council of Europe  
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F-67075 Strasbourg Cedex**

**COMMUNICATION FROM THE HELSINKI FOUNDATION FOR HUMAN RIGHTS**

**CONCERNING**

**EXECUTION OF ECtHR JUDGMENT IN CASES:**

***P. AND S. AGAINST POLAND (APPLICATION NO. 57375/08),***

***R. R. AGAINST POLAND (APPLICATION NO. 2761/04,***

***TYSIĄC AGAINST POLAND (APPLICATION NO. 5410/03).***

## **EXECUTIVE SUMMARY**

- **So far, the Polish authorities have not introduced an effective and fast procedure which would guarantee that women can exercise their right to terminate pregnancy in cases when abortion is allowed by national law.**
- **Polish authorities should guarantee that women receive reliable and objective information on the conditions for abortion and on the health of the foetus before termination of pregnancy becomes impossible due to exceeding the deadlines within which abortion is allowed.**
- **Mechanisms should be introduced which would prevent obliteration of the right to terminate pregnancy due to the doctors' invocation of the "conscience" clause.**
- **The general measures taken by the Polish authorities are not sufficient to limit possible future violations of the Convention similar to those recognised in the *P. and S. against Poland* judgment.**
- **We recommend that the Committee continue to supervise the execution of the *P. and S. against Poland* judgement.**

## 1. Introduction

The Helsinki Foundation for Human Rights with its seat in Warsaw (hereinafter “HFHR”) would like to respectfully present to the Committee of Ministers of the Council of Europe its communication, under 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, regarding the execution by the Polish authorities of the European Court of Human Rights (“ECtHR”) judgment in case *P. and S. against Poland* (application no. 57375/08).

The HFHR is a Polish non-governmental organisation established in 1989 with a principal aim to promote human rights, the rule of law and the development of open society in Poland and other countries. The HFHR actively disseminates the standards of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: “Convention”) and is dedicated to contributing to the proper execution of ECtHR judgments.

The HFHR presented an amicus curiae opinion to ECtHR in the *P. and S. against Poland* case. In its brief, the HFHR referred, among others, to a number of international standards related to the accessibility of legal abortion procedures. Additionally, the HFHR pointed out the difficulties present in the Polish practice in respecting women’s right to terminate pregnancy in circumstances allowed by law.

The HFHR undertakes legal actions in the public interest, including the representation of parties and preparation of legal submissions to national and international courts and tribunals, as well as interventions regarding the implementation of human rights standards. The Legal Department of the HFHR consists of, *inter alia*, the Anti-discrimination Programme “Article 32” and Strategic Litigation Programme. The Strategic Litigation Programme and the Anti-discrimination Programme “Article 32” provide leadership and support in constant advance of the human rights protection standards in Poland through the method of strategic litigation and participation in landmark cases.

In its activity, the HFHR pays particular attention to the execution of ECtHR judgements and monitors the implementation of ECtHR case-law standards by national authorities. For example, in 2017 the HFHR published a report on the implementation of judgements in Polish cases.<sup>1</sup> Moreover, in its opinions on draft legislation, the HFHR also emphasises the need to take into account the implications of ECtHR jurisprudence. This was the case in the HFHR’s opinion concerning the draft law which would introduce a complete ban on abortion.<sup>2</sup>

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<sup>1</sup> The report is available at: [www.hfhr.pl/wp-content/uploads/2017/03/Raport-implementacja-ETPC-10-03-2017.pdf](http://www.hfhr.pl/wp-content/uploads/2017/03/Raport-implementacja-ETPC-10-03-2017.pdf)

<sup>2</sup> The opinion in Polish is available at: [www.hfhr.pl/wp-content/uploads/2016/07/HFPC-opinia-ustawa-antaborcyjna.pdf](http://www.hfhr.pl/wp-content/uploads/2016/07/HFPC-opinia-ustawa-antaborcyjna.pdf)

In its communication, the HFHR will focus in particular on the practical aspects related to the accessibility of legal abortion procedures. At the same time, the circumstances in which abortion is legal are left outside the scope of the current communication, since they were not the issue of concern in the *P. and S. against Poland* case.

## **2. Standards established in the case *P. and S. against Poland***

The *P. and S. against Poland* case concerned a 14 years old girl (the first applicant) who was denied access to an abortion, allowed under Polish law in the circumstances, by consecutive doctors. In accordance with Article 4a (1)(3) of the Act on family planning, protection of the human foetus and conditions which permit termination of pregnancy,<sup>3</sup> the prosecutor issued a confirmation to the applicant that the pregnancy had been a result of a prohibited act. According to the above-mentioned law, in such circumstances the applicant had the right to legally terminate the pregnancy. Despite that fact, medical doctors in three hospitals provided the applicant and her mother (the second applicant) with incorrect information about the conditions for terminating the pregnancy and, as a consequence, refused to carry out the procedure. While refusing to perform an abortion, the doctors invoked the “conscience” clause, but without indicating an alternative way to receive the treatment from a different doctor or medical facility. An obligation to refer the patient to a facility where she would be able to undergo the procedure stemmed from Article 39 of the Act on the professions of a doctor and dentist.<sup>4</sup>

In the judgement *P. and S. against Poland*, ECtHR found violations of Articles 3, 5 and 8 of the Convention. When commenting on the access to a legal abortion, ECtHR emphasised:

“States 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 services to which they are entitled under the applicable legislation.”<sup>5</sup>

Additionally, according to the ECtHR:

“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. It reiterates that the notion of private life within the meaning of Article 8 applies both to decisions to become and not to become a parent (...). The nature of the issues involved in a woman’s decision to terminate a pregnancy or not is such that

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<sup>3</sup> Act of 7 January 1993 on family planning, protection of the human foetus and conditions which permit termination of pregnancy, Journal of Laws no. 17, position 78 with subsequent changes.

<sup>4</sup> Act of 5 December 1996 on the professions of a doctor and dentist, Journal of Laws of 2017, position 125 with subsequent changes (unified text).

<sup>5</sup> Judgement of the ECtHR of 30 October 2012 in the case of *P. And S. Against Poland*, § 106.

the time factor is of critical importance. The procedures in place should therefore ensure that such decisions are taken in good time.”<sup>6</sup>

### **3. Actions taken**

In its Action report, the government indicated steps and measures taken to implement the ECtHR *P. and S. against Poland* judgement. In the context of ensuring effective access to lawful abortion, the government noted that introduction of a possibility for making an objection to a doctor’s opinion or certificate constituted a general measure fulfilling the judgement’s standards. The government stated:

“When the Act on Patient Rights and the Ombudsman for Patient Rights of 6 November, 2008, came into effect patients were given the right to object to a doctor’s opinion or certificate. This right is now enjoyed by patients and, on their behalf, by their statutory representatives. Any woman who was refused an abortion can benefit from this right. In line with the above mentioned law, an objection to an opinion or certificate issued by a doctor or a dentist may be lodged with a Medical Commission with the Ombudsman for Patient Rights, if an opinion or a certificate impacts the rights or obligations of a patient under the law. The deadline for lodging the objection is 30 days from the date of issue of the opinion or a certificate by the attending doctor about the patient’s health condition. An objection has to have grounds, including a reference to the provision of law that lists the rights or obligations affected by the challenged medical opinion or certificate. The Medical Commission, based on medical documentation and, depending on the need, after examining the patient, issues a certificate promptly, but not later than within 30 days from the date of lodging the objection.”<sup>7</sup>

The HFHR appreciates the actions taken by the government to execute the ECtHR judgement in the *P. and S. against Poland* case, for example distributing the judgement’s translation. However, in our assessment they have not been sufficient for a full implementation of standards stemming from this judgement. In this context, it is particularly important to note that as a result of a judgement delivered by the Constitutional Tribunal in 2015, while invoking the “conscience” clause and refusing to carry out a medical service, a doctor does not have to refer the patient to another facility where they would actually be able to receive such a service.

### **4. Ineffective procedure for objecting to a doctor’s opinion or certificate**

In the government’s opinion, the procedure for objecting to a doctor’s opinion or certificate, which was introduced by the Act on patient’s rights and the Ombudsman for Patients’ Rights, constitutes an adequate procedural guarantee for women to use in situations when doctors refuse to perform a lawful abortion (even though the procedure

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<sup>6</sup> Judgment of the EctHR of 30 October 2012 in the case of P. And S. Against Poland, § 111.

<sup>7</sup> Action report - Communication from Poland concerning the case of P. and S. against Poland, [http://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:\[%22DH-DD\(2014\)258E%22\]}](http://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2014)258E%22]})

itself has a universal character and its application is not necessarily limited to the area of reproductive rights). In HFHR's assessment, it is not possible to agree with such a stance. It is important to note that the objection procedure was introduced to the Polish legal system before the judgement in the *P. and S. against Poland* case was issued, but after the events which constituted the factual basis for an application took place.

The objection procedure is excessively formalised. In particular, in rationales to their objection, patients are required to indicate particular legal provisions which set forth the patient's rights and duties affected by a given doctor's opinion or certificate. A copy of the opinion or certificate should be attached to the objection. At the same time, the procedure does not foresee the participation of a legal representative, in particular a professional counsel. A review of statistics concerning objections raised by patients shows that only a small part meet the formal requirements and are considered by the Medical Board by the Ombudsman for Patient's Rights. In 2016, the Ombudsman received 24 objections, of which only one fulfilled the formal criteria.<sup>8</sup> Similarly in 2015, only one objection was considered as to the substance.<sup>9</sup> In 2014, five out of 34 submitted objections were considered on the merits, while in 2013 only two out of 28 submitted objections met the formal requirements.<sup>10</sup>

What is more, the current legal framework concerning the objection procedure does not specify whether it is possible to raise an objection when a doctor refuses to issue an opinion or a certificate, or does it only orally. A possibility of raising an objection in such circumstances may have a particular importance in the context of applying for a lawful abortion. In such situations, doctors can refuse to issue a negative decision in writing or may delay issuance of such a decision, which can effectively undermine a woman's right to terminate pregnancy within a legally specified period. What is more, it is established that there is no right to raise an objection against a refusal to refer a person for medical diagnostics, which in the context of abortion has particular significance for prenatal testing. Results of such testing can play a crucial role in making an assessment as to whether the state of the foetus justifies termination of pregnancy and, as a consequence, can be indispensable for a woman to make a decision on continuing her pregnancy (compare with case *R.R. against Poland*).<sup>11</sup>

At the same time, it should be emphasized that there exist certain doubts as to the legal character of the decision issued by the Medical Board following submission of an

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<sup>8</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2016 and 31 December 2016, p. 46, available at: [www.bpp.gov.pl/gfx/bpp/userfiles/\\_public/bip/sprawozdania\\_roczne/sprawozdanie\\_za\\_2016\\_r\\_-\\_wersja\\_przyjeta\\_przez\\_rade\\_ministrow.pdf](http://www.bpp.gov.pl/gfx/bpp/userfiles/_public/bip/sprawozdania_roczne/sprawozdanie_za_2016_r_-_wersja_przyjeta_przez_rade_ministrow.pdf)

<sup>9</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2015 and 31 December 2015, p. 43, available at: [www.bpp.gov.pl/gfx/bpp/userfiles/\\_public/bip/sprawozdania\\_roczne/sprawozdanie\\_rpp\\_2015.pdf](http://www.bpp.gov.pl/gfx/bpp/userfiles/_public/bip/sprawozdania_roczne/sprawozdanie_rpp_2015.pdf)

<sup>10</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2014 and 31 December 2014, p. 38, [www.bpp.gov.pl/gfx/bpp/userfiles/\\_public/bip/sprawozdania\\_roczne/sprawozdanie\\_2014\\_r..pdf](http://www.bpp.gov.pl/gfx/bpp/userfiles/_public/bip/sprawozdania_roczne/sprawozdanie_2014_r..pdf)

<sup>11</sup> Judgement of ECtHR of 26 May 2011, application no. 2761/04.

objection. It is not clear whether the issued decision directly replaces the opinion or certificate which provoked the objection.

In its judgments the ECtHR emphasized that, in cases concerning abortion, time plays a crucial role. For this reason, one should negatively assess the 30-day deadline set up in law for consideration of an objection by the Medical Board. There is no regulation which would guarantee that the Medical Board will issue a decision before the end of the period when it is possible to obtain a lawful abortion.

The objection procedure in its current shape does not guarantee that the woman will receive reliable, full and objective information as to whether she has the right to obtain a lawful abortion. The objection procedure cannot address a situation when doctors deliberately hide certain facts or present incomplete and misleading information to a woman as to a potential abortion in order to thus make termination of pregnancy impossible. It should be stressed that provision of reliable and complete information on the existing procedures can have particular importance for women who are victims of crime and whose pregnancy is the result of said crime.

It is worth noting that certain works were carried out in the Ministry of Health aiming at the simplification of the procedure for lodging an objection against a doctor's opinion or certificate. The need for changes in the procedure was expressed by the Ombudsman for Patient's Rights.<sup>12</sup> However, as the government's response to the communication from the Polish Bar Council on the execution of judgements in cases *Tysiac against Poland* and *R.R. against Poland*<sup>13</sup> suggests, the works on these changes were to be moved to the Council of Ministers in 2016. However, until today no amendments have been adopted and introduced in the Act on patient's rights and the Ombudsman for Patient's Rights which would significantly alter the objection procedure, transforming it into an effective mechanism for protecting rights. The changes that have been introduced concerned only the formal aspects of adding oneself to the list of doctors who can be members of the Medical Board.

For these reasons, in HFHR's assessment the procedure of objecting against a doctor's certificate or opinion does not fulfil the requirements of an effective remedy as prescribed by Article 13 of the Convention and does not meet the standards established by ECtHR in *P. and S. against Poland* judgement (and also in cases *Tysiac against Poland* and *R.R. against Poland*). The procedure is ineffective and does not secure the respect for the right to a legal termination of pregnancy.

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<sup>12</sup> Information published on the official website of the Ombudsman for Patients' Rights, available at: <http://www.bpp.gov.pl/prawo-do-zgloszenia-sprzeciwu>

<sup>13</sup> Communication from the authorities (13/05/2016) in reply to the communication of an association (DH-DD(2016)549) concerning the cases of Tysiac and R.R. against Poland, available at: [http://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2016\)628E%22%7D%7D](http://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2016)628E%22%7D%7D)



## 5. Application of the “conscience” clause

As noted by ECtHR in the *P. and S. against Poland* case, it is the role of the state to organise the healthcare system in such a way so as, on the one hand, not to force doctors to perform services that conflict with their conscience, but on the other so as to ensure respect for patients’ right to receive services which they are legally entitled to receive. In particular, the ECtHR noted:

„Polish law has acknowledged the need to ensure that doctors are not obliged to carry out services to which they object, and put in place a mechanism by which such a refusal can be expressed. This mechanism also includes elements allowing the right to conscientious objection to be reconciled with the patient’s interests, by 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>14</sup>

At this point, it should be noted that the Constitutional Tribunal in its judgement of 7 October 2015<sup>15</sup> pronounced the Act on the professions of a doctor and dentist (Article 39 of the Act) to be in violation of the Polish Constitution<sup>16</sup> insofar as it obliged a physician refraining from performing a healthcare service contradicting his conscience to indicate an alternative way of obtaining such a service from another doctor or a different medical facility. The Constitutional Tribunal ruled that imposing such an obligation on a doctor disproportionately interferes with their freedom of conscience protected under Article 53 (1) of the Constitution. Additionally, the Tribunal ruled that the provisions of the Act on the professions of a doctor and dentist (Article 39 in conjunction with Article 30) were in violation of the Constitution, since despite the doctor’ invoking the “conscience” clause, it obliged the physician to perform a medical procedure contradicting their conscience “in other cases of immediate urgency.” The Constitutional Tribunal decided that the term was imprecise and did not allow for a unambiguous determination as to when the doctor cannot invoke the “conscience” clause and simply has to perform a medical procedure.

The judgement means that, at the moment, in Poland there is no legal provision which would oblige a physician or another member of the medical personnel in a given facility to present the patient with an effective way of obtaining a healthcare service in a different facility in case of a refusal to perform said service on account of the “conscience” clause. The HFHR does not have any information on legal works which would aim at imposing an obligation to refer the patient to a different physician or facility that would offer a real possibility of obtaining a denied healthcare service. In the HFHR’s assessment, such a situation endangers the exercise of patients’ right to receive

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<sup>14</sup> Judgment of the ECtHR of 30 October 2012 in the case of *P. and S. against Poland*, § 107.

<sup>15</sup> Case no. K 12/14.

<sup>16</sup> The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws no. 78, position 483 with subsequent changes.

healthcare services to which they are legally entitled. Such a situation can particularly endanger women who are refused access to a lawful abortion for ideological reasons. In such a case, their right to obtain this service can have a purely illusory character. This situation can force women to search for illegal methods of terminating pregnancy which could endanger their health or, even, life.

In the government's opinion, the issue is addressed by the regulation of the Healthcare Institutions Law of 15 April 2011<sup>17</sup>:

"Under Article 14 of the Law, any entity engaging in medical treatment activities shall make information concerning the scope and types of medical services publicly available. Furthermore, any entity engaging in medical treatment activities shall, at the patient's request, issue detailed information concerning the medical services provided, especially information concerning the diagnostic and/or therapeutic methods applied, including information on the quality and safety of said methods. Consequently, changes arising from the enactment of the aforementioned Constitutional Court judgment have caused no legal loophole in the form of an absence of authorities obliged to provide information concerning the location where specific medical services are provided; any statement to the effect of such loophole existing should be recognised as false."<sup>18</sup>

In the HFHR's assessment, this law cannot be considered an effective solution. Firstly, according to this provision, it is the patient who is responsible for finding a facility where he or she will be able to obtain a given medical service. Secondly, the law does not provide a deadline upon which the medical facility will have to provide detailed information to the patient, following the patient's request. For this reason, it cannot be stated that this regulation guarantees that a woman will receive reliable and timely information about the conditions for terminating pregnancy and about the facility where she will be able to undergo this procedure. It is worth noting that in P. and S. against Poland case, the applicants were forced to search for a facility where abortion would be performed due to the lack of reliable information from the medical personnel.

The legal *status quo*, which was established after the provisions questioned by the Constitutional Tribunal expired, creates a significant imbalance between the protection of doctors' freedom of conscience and the rights of patients to receive healthcare services. The role of the state should focus on introducing solutions which will guarantee that patients have an opportunity to receive healthcare services to which they are legally entitled.

That such actions are necessary can be evidenced by the fact that, according to media reports, in one of the provinces (*województwo*) in Poland all doctors signed the so-called general "conscience" clause. In the view of the Ombudsman for Patient's Rights, such a

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<sup>17</sup> Journal of Laws of 2016, item 1638, as amended.

<sup>18</sup> Communication from the authorities (14/06/2017) concerning the case of P. and S. v. Poland, available at: [http://hudoc.exec.coe.int/eng#%22EXECIdentifier%22:%22DH-DD\(2017\)751E%22](http://hudoc.exec.coe.int/eng#%22EXECIdentifier%22:%22DH-DD(2017)751E%22)).

situation can be considered as limiting access to legal termination of pregnancy, since in the territory of the whole province there is no entity which could carry out such a procedure. For this reason, the Ombudsman for Patient's Rights contacted the National Health Fund.<sup>19</sup> The Commissioner for Human Rights has also repeated times signalled difficulties faced by women in accessing legal abortion procedures.<sup>20</sup> Multiple irregularities in the implementation of provisions concerning abortion were also indicated in the report from monitoring of hospitals conducted by the Federation for Women and Family Planning.<sup>21</sup>

On the margin, it should be noted that the Committee against Torture in Concluding observations on the combined fifth and sixth periodic reports of Poland (2013)<sup>22</sup> and Human Rights Committee in Concluding observations on the seventh periodic report of Poland (2016)<sup>23</sup> underlined the necessity of introducing in Polish law an effective mechanism ensuring access to safe and legal abortion, especially in cases of conscientious objection. It is worth emphasising that before publishing its observations, the Human Rights Committee received numerous statements from non-governmental organisations<sup>24</sup> and the Commissioner for Human Rights.<sup>25</sup> In these documents, the authors pointed, among others, to the lack of effective execution and respect for the standards stemming from ECtHR jurisprudence in cases concerning access to legal abortion.

## 6. Plans of restricting the abortion law

In our view, it may be useful to present a wider context of the public debate on restricting the conditions for a legal abortion, although we would like to emphasise that in our communication we refer mainly to matter which have a procedural nature. The current model for legal abortion set forth in the Act on family planning, protection of the human foetus and conditions which permit termination of pregnancy has purposefully been left outside the scope of this submission.

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<sup>19</sup> The document is available at: [www.rpo.gov.pl/sites/default/files/RPP%20w%20sprawie%20legalnych%20aborcji%20na%20Podkarpaciu%2C%207.02.2017.pdf](http://www.rpo.gov.pl/sites/default/files/RPP%20w%20sprawie%20legalnych%20aborcji%20na%20Podkarpaciu%2C%207.02.2017.pdf)

<sup>20</sup> The letter of the Commissioner for Human Rights to the Speaker of the Sejm is available at: [www.rpo.gov.pl/sites/default/files/Uwagi%20RPO.pdf](http://www.rpo.gov.pl/sites/default/files/Uwagi%20RPO.pdf)

<sup>21</sup> Report „Dzień dobry, chcę przerwać ciążę – o procedurach dostępu do legalnej aborcji w polskich szpitalach” is available at: <http://federa.org.pl/wp-content/uploads/2017/06/RAPORT-SZPITALA-FEDERACJA.pdf>.

<sup>22</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fCO%2fPOL%2fCO%2f5-6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fCO%2fPOL%2fCO%2f5-6&Lang=en)

<sup>23</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fCO%2fPOL%2f7&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fCO%2fPOL%2f7&Lang=en)

<sup>24</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fSS%2fPOL%2f25283&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fSS%2fPOL%2f25283&Lang=en)

<sup>25</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fNHS%2fPOL%2f25456&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fNHS%2fPOL%2f25456&Lang=en)

On 19 August 2016, a civic draft law was submitted to the Sejm which was to introduce a complete ban on abortion. The draft was prepared by the "Stop abortion" Committee.<sup>26</sup> The law would fully prohibit termination of pregnancy, thus eliminating the so-called abortion compromise which allows for termination of pregnancy in three cases (when there is a danger to the mother's life or health; when the results of examinations show a high probability of an impairment of the foetus or an incurable disease endangering life; when there is a justified suspicion that the pregnancy was a result of a crime). The draft also foresaw that causing death to an unborn child would be punishable by imprisonment ranging from three month to 5 years. If the perpetrator did not act purposefully, they would face up to 3 years of imprisonment.

This draft law completely banning abortion caused a large wave of protests and criticism in the society (the protests were called "the Black Protest"). Eventually, in the course of the second reading in the Sejm on 6 October 2016, the proposed changes were rejected. Importantly, a civic draft law liberalising the abortion law was rejected by the Sejm already during the first reading.<sup>27</sup> As the media reports, further attempts to prepare another civic draft law aiming at a full prohibition of abortion in Poland have been undertaken. A relevant draft was yet again prepared by the "Stop abortion" Committee.

The above-presented information shows that the Committee of Ministers' decision to close the execution of the *P. and S. against Poland* judgement will have great importance for the ongoing debate and its limits.

## 7. Conclusions and recommendations

Having regard to the above-mentioned argumentation, the HFHR requests that the Committee of Ministers continues its supervision of the execution of *P. and S. against Poland* judgement. In our opinion, the general measures taken by the Polish authorities are not sufficient to limit further violations of the Convention similar to those found in the *P. and S. against Poland* judgement.

At the same time, we would like to note that the current observations can accordingly refer to the execution of judgements in cases *Tysiac against Poland* and *R.R. against Poland* due to the similar subject matter of these cases.

In the HFHR's view, in order to fully implement the judgement in the case *P. and S. against Poland*, the Polish authorities should:

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<sup>26</sup> Civic draft law on the amendment of the Act of 7 January 1993 on family planning, protection of the foetus and conditions for legal termination of pregnancy and Act of 6 June 1997 – Criminal code. Information concerning the draft and the course of the legislative procedure is available at: [www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=6EDFF98AE25263E5C125801400298427](http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=6EDFF98AE25263E5C125801400298427)

<sup>27</sup> Civic draft law on the rights of women and conscious parenting. Information on the draft and the course of the legislative procedure is available at: [www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=224D8461340B0FFDC125802D0032F6D3](http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=224D8461340B0FFDC125802D0032F6D3)

Documents distributed at the request of a Representative shall be under the sole responsibility of the said Representative, without prejudice to the legal or political position of the Committee of Ministers. / Les documents distribués à la demande d'un/e Représentant/e le sont sous la seule responsabilité dudit/de ladite Représentant/e, sans préjuger de la position juridique ou politique du Comité des Ministres.

- Introduce an effective and speedy procedure which would ensure that women can exercise the right to abortion when the latter is allowed under national law;
- Introduce mechanisms which would ensure that a woman receives reliable and objective information on the conditions for legal termination of pregnancy and the state of the foetus within the period when abortion is still possible;
- Introduce mechanism which will prevent obliteration of the right to abortion due to the doctors' invocation of the "conscience" clause.

We believe that this written communication will prove to be useful for the Committee of Ministers in performing the task defined in Article 46(2) of the Convention.

*The communication was prepared by Jarosław Jagura, lawyer of the Anti-discrimination Programme "Article 32" of the Helsinki Foundation for Human Rights with the support of Katarzyna Wiśniewska, the coordinator of the Strategic Litigation Programme.*

On behalf of the Helsinki Foundation for Human Rights,



A handwritten signature in black ink, appearing to read "Przywara", is written over a horizontal line.

Danuta Przywara

President of the Board



Republic of Poland  
Ministry  
of Foreign Affairs

Plenipotentiary of the Minister  
of Foreign Affairs for cases and procedures  
before the European Court of Human Rights  
Agent for the Polish Government

Warsaw, September 14<sup>th</sup> 2017

DGI

15 SEP. 2017

SERVICE DE L'EXECUTION  
DES ARRETS DE LA CEDH

**Ms. Geneviève Mayer**  
**Head of the Department**  
**for the Execution of Judgments**  
**of the European Court of Human Rights**  
**Council of Europe**  
**Strasbourg**

Dear Madam,

With reference to the communication submitted to the Committee of Ministers of the Council of Europe on 1<sup>st</sup> September 2017 by the Helsinki Foundation For Human Rights (hereinafter HFHR) concerning execution of the European Court of Human Rights' (hereinafter the Court) judgments in the cases of *P. and S. v. Poland* (application no. 57375/08), *R.R. v. Poland* (application no. 27617/04), *Tysiac v. Poland* (application no. 5410/03) I would like to submit the following comments prepared upon information submitted by the Ministry of Health.

**In the opinion of HFHR the general measures taken by the Polish authorities are not sufficient for full implementation of standards resulting from the *P. and S. against Poland* judgment.**

Detailed description of measures taken in the purpose of implementation of the abovementioned judgment and characteristics of current law framework had been presented in the Government's communication of 14<sup>th</sup> June 2017.

**According to HFHR, the procedure for objection to a physician's opinion or certificate should be considered ineffective in respect of its excessive formalism (according to the opinion of HFHR only small part of objections met the formal criteria - for instance, 24 objections were raised by patients to the Ombudsman for Patient's Rights in 2016 and only one fulfilled the formal criteria).**

According to information provided by the Ombudsman for Patient's Rights, in 2016 no objection to a physician's opinion or certificate concerning termination of pregnancy was submitted to his office.

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However it should be noted that provisions of the *Patient Rights and Patient Rights Ombudsman Law* of 6 November 2008 (Journal of Laws of 2016, item 186, as amended), not only introduced the patient's right to object to a physician's opinion or certificate, but also appointed - essential in a terms of protecting the all patients' rights, including pregnant women facing difficulties in the access to termination of pregnancy - central government administration body in the form of the Ombudsman for Patient's Rights, whose activities are not restricted to the institution of objection.

The scope of the Ombudsman's activities includes but is not limited to:

- 1) Conducting procedures concerning practices that violate collective patient rights,
- 2) Conducting procedures under Articles 50-53 of the Law (the provisions of which govern the Ombudsman's ability to launch clarification procedures, should he/she receive prima facie information of a probable patient rights violation);
- 3) In civil cases – performing tasks stipulated under Article 55 of the Law;
- 4) Co-operating with public authorities – with the respective minister for health-related issues – for the purpose of ensuring patient rights;
- 5) Submitting opinions and motions intended to provide effective protection of patient rights to relevant public authorities, organisations, institutions, and medical profession governing bodies;
- 6) Co-operating with non-governmental, social, and professional organisations with patient rights protection included in their statutory objectives;
- 7) Analysing patient complaints for the purpose of identifying threats and health protection areas that must be addressed.

Furthermore, in response to written motions and e-mailed reports, and in relation to personal patient visits to the Patient Rights Ombudsman's Office, the Ombudsman provides information concerning the broadly understood issue of pregnant women. In light of the above it ought to be emphasised that a pregnant woman who has been refused access to the medical service requested has the option of applying to the Patient Rights Ombudsman as well, upon which the Ombudsman may initiate clarification proceedings. Thus, a patient who has been refused pregnancy termination procedure may also – in addition to raising her objection to a physician's opinion or ruling – exercise her rights with the use of the aforementioned remedy.

In 2016 the Patient Rights Ombudsman conducted 6 clarification procedures concerning pregnant women relating to the *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination Law* of 7 January 1993. At this point, it should be noted that the Patient Rights Ombudsman undertakes activities to raise legal awareness among patients and support them in the execution of patient's rights, including *inter alia* execution of the right to objection. It should be noted that in the Patient Rights Ombudsman's Office functions a nationwide free hotline (0 800 190 590), through which the patient can be provided with all necessary information that may contribute to the effective use of abovementioned institution. Moreover, information are available in the Patient Rights Ombudsman's website ([www.bpp.gov.pl](http://www.bpp.gov.pl)).

Therefore it should be emphasized that from the previous experience of the Patient Rights Ombudsman's Office it is evident that patients definitely prefer exercise their right to legal termination of pregnancy in an informal way. Hence women more frequently report a problem through a nationwide free hotline of the Ombudsman or through the visit to the Patient Rights Ombudsman's Office than by submitting an objection.

**According to HFHR the current legal framework concerning the objection procedure does not specify whether it is possible to raise an objection when a physician refuses to issue an opinion or certificate, or does it only orally. Moreover, there exist certain doubts as to the legal character of the decision issued by the Medical Board following submission objection.**

Pursuant to article 41 paragraph 2 of the *Physician and Dental Surgeon Professions Law* of 5 December 1996 (Journal of Laws of 2017 item 125, with subs. changes) the physician is obliged to keep individual medical records of patient. The way of keeping and providing information by the physician are determined by provision of the *Patient Rights and Patient Rights Ombudsman Law* of 6 November 2008. According to Article 25 paragraph 2, the medical record shall include information about issuing an opinion or certificate to which it is possible to submit an objection (referred to Article 31 paragraph 1). As a result of this requirement an opinion has a written form.

Referring to the character of the Medical Board decision it should be noted that Article 31 paragraph 5 of the *Patient Rights and Patient Rights Ombudsman Law* of 6 November 2008 gives the Medical Board right to issue a medical decision. Therefore, the Medical Board has a right to uphold the previously given medical decision or medical opinion or to find it's groundlessness. If the medical decision or opinion is found groundless the Medical Board's decision, in fact, becomes a new decision or opinion which has an impact of the patient's right and obligations. On a basis of such decision the patient can exercise his/her rights, for example, the right of termination of pregnancy under the law of the *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination Law* of 7 January 1993.

**HFHR points out that until now no amendments to the *Patient Rights and Patient Rights Ombudsman Law* of 6 November 2008, which would modify the objection procedure, have been adopted.**

On 16<sup>th</sup> November 2016 the Permanent Committee of the Council of Ministers decided not to include the provisions governing the patient's right for objection to a physician's opinion or certificate in the projected amendments to the *Patient Rights and Patient Rights Ombudsman Law* of 6 November 2008.

Nevertheless, it ought to be emphasized that mechanism of objection in the current form functions without prejudice to the specificity and timing of the cases relating to termination of pregnancy. The Patient Rights Ombudsman's Office makes every effort to ensure that the objection procedure is not excessively long and complicated. Moreover, as mentioned



before, the objection procedure is not the only one procedure that woman can exercise when she was refused pregnancy termination.

**According to HFHR the objection procedure does not guarantee the rights to obtain a lawful abortion.**

An objection to a physician's opinion or ruling remains an efficient legal remedy, *inter alia* for women who were refused pregnancy termination (under any circumstance stipulated by the *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination Law* of 7 January 1993) or prenatal examination referral, and/or in the event a prenatal examination is not performed despite a proper referral having been issued.

The patient's right to object to a physician's opinion or certificate was introduced into the Polish legal system under provisions of the *Patient Rights and Patient Rights Ombudsman Law* of 6 November 2008 (Journal of Laws of 2016, item 186, as amended), primarily for the purpose of implementing the judgment of the European Court of Human Rights in the case of *Tysiac vs. Poland*. However, the law is general in nature, i.e. it has not been narrowed down to the case of pregnancy termination refusal under the circumstances stipulated under the *Family Planning, Human Foetus Protection, and Acceptable Conditions of Pregnancy Termination Law* of 7 January 1993. Making the aforementioned norm general in nature was a purposeful action with the intention of protecting the rights of all patients whose rights or obligations as stipulated by the law are affected by a physician's opinion or certificate (and under circumstances where no other legal remedies are provided for). A physician's refusal to terminate a pregnancy – regardless of the premise conditioning the performance of the procedure in a given case, and of the reason for refusal – affects the patient's rights. It should furthermore be pointed out that apart from introducing the right to objection, the *Patient Rights and Patient Rights Ombudsman Law* of 6 November 2008 appointed a central governmental authority – the Patient Rights Ombudsman – that is crucial to the protection of the rights of all patients, including pregnant women experiencing difficulties with access to pregnancy termination.

**HFHR refers in its communication to the Constitutional Court judgment of 7 October 2015, concerning compliance with the Constitution an Article 39 of the *Physician and Dental Surgeon Professions Law* of 5 December 1996, pointing out that currently in Poland exist no regulations which would obliged the physician to provide a patient with information about the place where certain medical services are provided and which would not be conducted by a physician due to conscience clause. Moreover HFHR emphasizes that the current legal framework do not maintain balance between protection of freedom of conscience of the physicians and the rights of patients to receive healthcare services.**

In reference to the issue at hand, above all the current legal regulations should be referred to. Under Article 39 of the *Physician and Dental Surgeon Professions Law* of 5 December 1996 (Journal of Laws of 2017, item 125, as amended), a physician has the right to refer to the principle of conscientious objection when refraining from performing specific medical services, subject to the provisions of Article 30 of said Law (within the scope in which it provides for a physician's obligation to provide medical assistance whenever a delay in

providing the same may result in danger to life or a risk of serious bodily injury or a grievous health disorder). In such cases, the physician is obliged to justify and record such decision in the relevant medical documentation. Furthermore, a physician performing his/her professional duties as an employee or as part of uniformed service shall also duly notify his/her superior in writing prior to exercising the conscience clause.

In connection with the Constitutional Court judgment of 7 October 2015, Ref. No. K 12/14, published on 16 October 2015 under item 1633 in the Journal of Laws of the Republic of Poland, the following regulations have expired:

- 1) Article 39, sentence one in connection with Article 30 of the *Physician and Dental Surgeon Professions Law* of 5 December 1996 (Journal of Laws of 2015, item 464) within the scope in which it imposed on a physician the obligation to provide a medical service against his/her conscience "in other urgent cases";
- 2) Article 39, sentence one of the *Physician and Dental Surgeon Professions Law* of 5 December 1996 within the scope in which it imposed on a physician referring to the principle of conscientious objection when refraining from providing a specific medical service the obligation to notify the patient of realistic options to receive such medical service from another physician or another medical facility.

In light of the above, relevant regulations in their amended versions referenced in the Constitutional Court judgment were duly analysed to find whether they ensure the physician's right to refrain from providing a medical service on the one hand, and the patient's right to obtain the medical service he/she is entitled to on the other (and, in such case, whether they ensure the patient's rights to information).

In this regard, the provisions of the *Healthcare Institutions Law* of 15 April 2011 (Journal of Laws of 2016, item 1638, as amended) should be referenced. Under Article 14 of the Law, any entity engaging in medical treatment activities shall make information concerning the scope and types of medical services publicly available. Furthermore, any entity engaging in medical treatment activities shall, at the patient's request, issue detailed information concerning the medical services provided, especially information concerning the diagnostic and/or therapeutic methods applied, including information on the quality and safety of said methods. Consequently, changes arising from the enactment of the aforementioned Constitutional Court judgment have caused no legal loophole in the form of an absence of authorities obliged to provide information concerning the location where specific medical services are provided; any statement to the effect of such loophole existing should be recognised as false.

Furthermore, it should be emphasized that the previous solution, questioned by the Constitutional Court, which involved obliging physician to notify patients of realistic options for receiving a medical service from another physician or another medical facility, was ineffective in practice. The aspect of such solution's irregularity in the context of the constitutional rule of freedom of conscience and religion notwithstanding, a physician had no knowledge of other physicians who do not apply the conscience clause for the purposes of the specific medical service.

It goes without saying that it should be emphasized that similar to any other freedoms listed in the Constitution of the Republic of Poland, freedom of conscience and religion is not absolute in nature; its limitations may be determined in conformity to the rule of proportionality specified under Article 31(3) of the Constitution of the Republic of Poland. The provisions of Article 39 of the *Physician and Dental Surgeon Professions Law* of 5 December 1996 provide that a physician has the right to refer to the principle of conscientious objection when refraining from performing specific medical services, subject to the provisions of Article 30 of said Law. This means that the physician cannot refer to the principle of conscientious objection and is obliged to provide medical assistance whenever a delay in providing the same may result in danger to life or a risk of serious bodily injury or a grievous health disorder. In its judgment of 7 October 2015, Ref. No. K12/15, the Constitutional Court ruled that the object of the motion in the case being considered is a marginal element of the professional activities of physicians, including activities classified as healthcare services under separate provisions, which, however, do not fall under a physician's primary obligation to provide patients with medical assistance, as described under Article 30 of the *Physician and Dental Surgeon Professions Law* of 5 December 1996.

In light of the above, as a result of the Constitutional Court judgment, a physician shall have no right, as has been the case hitherto, to refer to the principle of conscientious objection in refraining from providing specific medical services whenever a delay in providing the same could result in danger to the patient's life or a risk of serious bodily injury or a grievous health disorder. In this respect, the situation has not changed. Nonetheless, in other cases – recognized as urgent for a variety of reasons – a physician shall have the right to refer to the principle of conscientious objection in refraining from providing specific medical services (not involving medical assistance).

Furthermore, it is important that under the legal provisions currently in force, including, above all, under the regulation of the Minister of Health of 8 September 2015 *concerning the general conditions of healthcare service provision contracts* (Journal of Laws of 2016, item 1146), all medical facilities (hospitals) entering into a contract with the National Health Fund shall be obliged to provide all services specified thereunder – within their full scope and in conformity to the letter of law. By entering into a healthcare service provision contract, the service provider undertakes to provide all services guaranteed under implementing regulations relevant to the act, within the scope and inclusive of all service types specified by the contract. Notably, the regulation of the Minister of Health of 22 November 2013 *guaranteed services under hospital treatment* (Journal of Laws of 2016, item 694, as amended) provides for pregnancy termination procedures.

The inability to provide specific services constitutes a case of undue performance of the contract, as a result of which a potential contractual penalty may be imposed on the service provider. Therefore, in principle, all medical facilities (hospitals) that have entered into a contract with the National Health Fund shall be obliged to provide all services specified thereunder – within their full scope and in conformity to the letter of law. The rule of conscientious objection should not violate the aforementioned obligation. Issues of ensuring due and proper service provision and exercising the patient's rights to information are thus

duly regulated under the Polish legal system. Liability in this regard lies with the service provider – the medical entity.

**HFHR points out that in order to fully implement the judgement in the case P. and S. against Poland, the Polish authorities should: introduce an effective and speedy procedure which would ensure that women can exercise their right to abortion when abortion is allowed under national law; introduce mechanisms which would ensure that a woman receives reliable and objective information on the conditions for legal termination of pregnancy and the state of the foetus within the period when abortion is still possible; introduce mechanisms which will prevent obliteration of the right to abortion due to physician invocation of the conscience clause.**

The procedure which allows women to make abortion lawfully is determined by the *Family Planning, Protection of the Human Foetus and Conditions Permitting Pregnancy Termination Law* of 7 January 1993. Provision of abovementioned Law determine conditions on which termination of pregnancy is possible and conditions of a conduction of abortion itself.

According to Article 4a paragraph 1: an abortion can be carried out only by a physician where:

- 1) pregnancy endangers the mother's life or health;
- 2) prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease;
- 3) there are strong grounds for believing that the pregnancy is a result of a criminal act.

Circumstances in which abortion is permitted under paragraph 1, sub-paragraphs 1) and 2) above shall be certified by a physician, unless the pregnancy entails a direct threat to the woman's life, the circumstances mentioned in paragraph 3 shall be stated by the state prosecutor.

To perform a pregnancy termination procedure the woman's written consent shall be required. Written consent of the statutory representative shall be required in the case of a minor or legally incapacitated woman. In the case of a minor over 13 years of age, her written consent shall be required as well. In the case of a minor under 13 years of age, the consent of the guardianship court shall be required, with the minor entitled to express her own opinion. In the case of a fully legally incapacitated woman, her written consent shall be required as well, unless her mental condition does not allow for the expression of such consent. Should the statutory representative refuse to consent to the termination of pregnancy, the consent of the guardianship court shall be required.

When prenatal tests or other medical conditions indicate high risk of fact that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease termination of pregnancy is possible until the moment the fetus attains the ability to live independently outside the body of a pregnant woman. In case of reasonable suspicion that the pregnancy is a result of a criminal act the termination of pregnancy is possible if it has not been more than 12 weeks since the beginning of pregnancy.

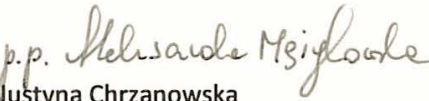
The *Family Planning, Protection of the Human Foetus and Conditions Permitting Pregnancy Termination Law* of 7 January 1993 specifies in Article 4b: "persons covered by social security and persons entitled under separate regulations for free medical treatment shall be entitled to a free termination of pregnancy in medical entities". List of guaranteed services related to termination of pregnancy is specified in annex number 1 to the regulation of the Minister of Health of 22 November 2013 *guaranteed services under hospital treatment* (Journal of Laws of 2016, item 694, as amended)

The regulation of the Minister of Health and Social Care of 22 January 1997 *on qualifications of physicians authorized to perform abortions* specifies the requisite qualifications of physicians who can perform legal abortions. Additionally the regulation reads that the circumstances indicating that pregnancy constitutes a threat to the woman's life or health shall be attested by a consultant specializing in the field of medicine relevant to the woman's condition.

With reference to mechanisms which would ensure that a woman receives reliable and objective information on the conditions for legal termination of pregnancy and the state of the foetus within the period when abortion is still possible, it shall be recalled provisions of the *Physician and Dental Surgeon Professions Law* of 5 December 1996 and the *Patient Rights and Patient Rights Ombudsman Law* of 6 November 2008 which constitute physician's obligations and the patient's right to the information about his/her health status. Accordingly the physician shall provide patient or his/her statutory representative with understandable information about his/her state of health, diagnosis, proposed and possible diagnostic methods, therapeutic, foreseeable consequences of their application or omission, the results of treatment and prognosis. These are general provisions, and they are applicable to all medical services including termination of pregnancy.

Detailed information concerning mechanisms which will prevent obliteration of the right to abortion due to physician invocation of the conscience clause has been presented above.

Yours sincerely,

  
Justyna Chrzanowska  
Government Agent