

**Third party intervention
by the Council of Europe Commissioner for Human Rights**

under Article 36, paragraph 3, of the European Convention on Human Rights

**K.B. v. Poland and 3 other applications (applications nos. 1819/21, 3682/21, 4957/21, 6217/21),
K.C. v. Poland and 3 other applications (applications nos. 3639/21, 4188/21, 5876/21, 6030/21),
and A.L. - B. v. Poland and 3 other applications (applications nos. 3801/21, 4218/21, 5114/21,
5390/21)**

Introduction

1. On 23 September 2021, the Council of Europe Commissioner for Human Rights (hereinafter: ‘the Commissioner’) informed the European Court of Human Rights (hereinafter: ‘the Court’) of her decision to intervene as a third party in the Court’s proceedings, in accordance with Article 36, paragraph 3, of the European Convention on Human Rights (hereinafter: ‘the Convention’), and to submit written observations concerning the cases of *K.B. v. Poland and 3 other applications* (nos. 1819/21, 3682/21, 4957/21, 6217/21), *K.C. v. Poland and 3 other applications* (nos. 3639/21, 4188/21, 5876/21, 6030/21), and *A.L. - B. v. Poland and 3 other applications* (nos. 3801/21, 4218/21, 5114/21, 5390/21). These cases concern abortion rights in Poland.
2. According to her [mandate](#), the Commissioner promotes the effective observance of human rights; assists member states in the implementation of Council of Europe human rights instruments, particularly the Convention; identifies possible shortcomings in laws and practices concerning human rights; and provides advice and information regarding the protection of human rights across the region.¹
3. The protection of women’s human rights is a priority issue for the Commissioner and has been addressed extensively in both her country visits and her thematic work. Advancing and protecting women’s sexual and reproductive health and rights is an essential component of member states’ obligations to respect and protect women’s human rights and to advance gender equality. The present intervention aims to draw attention to two aspects: the worsening situation with regard to women’s access to safe and legal abortion care and their enjoyment of sexual and reproductive health and rights in Poland; and more generally, the significant harmful impact of restrictive legal and policy frameworks regarding access to abortion on women’s human rights. It is based on the Commissioner’s work on Poland² and her continuous monitoring of the human rights situation in the country. It also draws on the country and thematic work carried out by the Commissioner’s Office over the years, in particular the 2017 [Issue Paper](#) on women’s sexual and reproductive health and rights in Europe (hereinafter: ‘the 2017 Issue Paper on SRHR’) containing recommendations by the Commissioner including on ensuring all women’s access to safe and legal abortion care.
4. Section I contains the Commissioner’s observations on the legal framework and the practical situation for access to abortion in Poland. Section II provides a comparative overview of the situation regarding access to safe and legal abortion across the Council of Europe region and notes the existence of a firmly established European consensus on access to safe and legal abortion care on women’s request or on broad grounds. In Section III, the Commissioner gives her analysis of the harmful impact of the existing situation on women’s rights in Poland, along with a review of the applicable international human rights standards and her own recommendations. The three sections are followed by the Commissioner’s conclusions.

I. The legal framework and the practical situation as regards access to abortion in Poland

- a. *The increasingly restrictive legal framework governing access to abortion*
5. Until January 2021, Poland’s legislation on abortion was already one of the most restrictive in Europe, limiting its legality to three narrowly defined circumstances only: when there is a risk to the woman’s health or life; when there is a high probability of severe and irreversible damage to the foetus or an incurable life-threatening disease; or when the pregnancy is the result of sexual assault. Outside these situations, abortion is criminalised and doctors or anyone else who performs an abortion is liable to a three-year prison sentence.
6. Poland’s legislation on abortion became even more restrictive following the adoption, on 22 October 2020, of a ruling by Poland’s Constitutional Tribunal which struck down the legal ground for abortion based on high probability of severe and irreversible damage to the foetus or an incurable life-threatening disease. The ruling was promulgated and entered into force on 27 January 2021. It has been reported that immediately after the ruling and even prior to its entry into force, certain hospitals began to refuse to perform abortions in cases of foetal impairment. Since the entry into force of the ruling, hospitals and clinics in Poland have been routinely refusing to carry out abortions on this ground. Moreover, some medical professionals have reportedly become reluctant to perform abortions on the ground of the risk to the woman’s life or health, even though the Constitutional

¹ [Resolution \(99\)50](#) on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999.

² See: 2019 country visit [report](#); ‘Rule 9’ [submission](#), made on 27 January 2020; several [statements](#) made by the Commissioner on women’s sexual and reproductive health and rights in Poland. See also the previous Commissioner 2016 [country report](#) on Poland.

Tribunal's ruling does not apply to situations of that kind. It has further been reported that, after the ruling, there had been a noticeable decrease in pre-natal testing performed in Poland.³

7. The above-mentioned ruling sparked demonstrations by hundreds of thousands of protesters across the country. Despite the restrictions on public gatherings in force at the time on the grounds of the Covid-19 pandemic, large-scale protests continued for several days. The Commissioner [reacted](#) to the ruling, concluding that it effectively resulted in a near-total ban on pregnancy terminations in Poland. Warning that the ruling would lead to more clandestine abortions or abortions carried out abroad for those women who could afford it, and an even greater ordeal for all those who did not, she called the day on which the ruling was adopted a "sad day" for women's human rights.
8. In October 2020, the President of the Republic submitted to parliament's lower house a [bill](#) proposing to amend Poland's legislation to again allow pregnancies to be terminated but only in cases of fatal impairment of the foetus. On 3 October 2020 the bill was referred to the parliamentary commission for health and justice and human rights. It does not appear that there has been any meaningful progress in the work on the bill since then.
9. In addition, over the past few years there have been several unsuccessful attempts to further restrict the existing legislation on abortion. The most widely publicised one, in 2016, involved a bill tabled in Poland's parliament as a citizens' initiative which proposed a total ban on abortions except in cases of danger to the woman's life. It resulted in mass demonstrations by hundreds of thousands of protesters across Poland and abroad. Though ultimately unsuccessful, in 2017 it was followed by [another bill](#) labelled "Stop Abortion", which sought to remove the possibility of terminating the pregnancy when there was a severe foetal impairment, including in cases where such impairment was fatal. This last bill remains pending in the lower house of the parliament. In September 2021, yet another citizens' bill labelled "Stop Abortion 2021" was tabled in parliament. It aims to introduce a definition of the term "unborn child" into the Polish Criminal Code and to repeal criminal law provisions sanctioning illegal abortion, which in the opinion of the bills' authors should instead be treated on par with the crime of homicide, and carry the same penalty.

b. Limited prevalence of legal abortions in Poland and the related medical care

10. The number of legal abortions carried out in Poland has remained more or less steady at 1,000 per year for the past several years, with 1,040 terminations in 2015, 1,098 in 2016, 1,057 in 2017, 1,076 in 2018, and 1,110 in 2019. The overwhelming majority of all legal abortions carried out in Poland were based on the legal ground of foetal impairment or disease: almost 97% in 2019 (1,074 out of a total of 1,110) and almost 98% in 2020 (1,053 out of 1,076). As regards terminations of pregnancies resulting from sexual assault, only a single such termination took place in 2017 and three in 2019; none at all were carried out on this basis in 2018 and in 2020.
11. No up-to-date official data or estimates are available on the annual number of clandestine ("underground") abortions in Poland, or abortions performed by Polish women and girls abroad. The last available official figures for 2007 estimated the annual number of clandestine abortions at ca. 10,000 per year. According to estimates by Polish and international women's rights non-governmental organisations, anywhere between 80,000 and 180,000 abortions are carried out each year outside of Poland's public health system.
12. There are significant geographic discrepancies in the number of lawful abortions carried out each year in Poland, and vast areas exist in Poland where abortion care is either entirely unavailable or, at the very least, severely limited. While in 2020, most legal abortions were carried out in the Mazowieckie (239 abortions), Pomorskie (147), Śląskie (123), and Łódzkie (112) regions, only 12 abortions were carried out in the Lubelskie region and 19 each in the Świętokrzyskie and Warmińsko-Mazurskie regions. Only a single abortion was carried out in the southeastern region of Podkarpackie (bordering Slovakia), where no abortions at all had been carried out in the preceding years 2018 and 2019. These numbers confirm the information obtained by the Commissioner during her 2019 country visit from the then health minister, that in some of the 800 or so hospitals in Poland abortions and related care services could not be obtained. The limited availability of abortion services specifically in the Podkarpackie region was also noted. In its [interim resolution](#) adopted in March 2021, the Committee of Ministers of the Council of Europe noted with regret the lack of explanation by the Polish authorities about the reasons for persisting regional disparities and about hospitals not performing lawful abortions.

³ "Zakaz aborcji uderzył w medycynę płodu. Prof. Węgrzyn: Mniej kobiet na badaniach prenatalnych" ("The ban on abortion has affected prenatal healthcare. According to Prof. Węgrzyn, fewer women claim pre-natal testing"), OKO.press, [article](#), 21 October 2021.

13. Another often insurmountable obstacle to effective access to abortion in Poland is the growing incidence of refusals by healthcare professionals to perform legal terminations or to carry out prenatal testing on the grounds of conscience. Although since 2014 the Polish authorities have not collected any data on the number of such refusals, this practice has become increasingly common in Poland in recent years, with several thousand Polish medical practitioners signing up to a declaration through which they formally pledged to reject abortion, contraception, and in vitro fertilisation. Since a ruling rendered by Poland's Constitutional Tribunal in October 2015 Poland has had no reliable referral mechanism for women denied access to abortion by medical professionals invoking conscience. As a result, women entitled to legal abortion have often been unable to find a health care provider willing to perform a legal abortion. The means of recourse available to the patients are not effective and do not allow women to effectively challenge individual practitioners' decisions and access the requisite care in good time. In its above-mentioned [interim resolution](#), the Committee of Ministers strongly urged the Polish authorities to adopt clear and effective procedures on the steps women need to take to access lawful abortion, including in the event of a refusal of abortion on grounds of conscience.
 14. Since the adoption of the October 2020 ruling, tens of thousands of Polish women and girls have reportedly sought help from women's associations and informal help groups to access abortion, including abortion abroad, and it has been reported that the number of requests for such help has risen sharply in recent times.⁴
- c. Other problems related to respect for women's and girls' sexual and reproductive health and rights*
15. In the Commissioner's view, the near-total ban on abortions needs to be seen also in the wider context of the long-standing disregard for women's sexual and reproductive health and rights in general. As noted in the Commissioner's Rule 9 submission to the Committee of Ministers, made in January 2020, the situation in the area of sexual and reproductive health and rights in Poland has not only failed to improve, but has actually worsened in the past several years.
 16. For instance, access to contraception, including emergency contraception, remains a concern. As set out in the 2017 [Issue Paper](#) on SRHR, the protection of sexual and reproductive rights requires a holistic approach which includes guaranteeing the affordability, availability and accessibility of modern contraception. Contraception, including emergency contraception, is a key element of any human rights-based policy seeking to prevent unintended pregnancies. In this respect, the Commissioner's 2019 country visit report on Poland, like her predecessor's 2016 country visit report, described various hindrances in access to modern contraception in Poland, including doctors' and pharmacists' refusal to prescribe and deliver contraceptives on the grounds of conscience. Furthermore, in July 2017, Poland made access to the emergency contraceptive pill, whose over-the-counter sale had previously been declared safe and legal, available on prescription only. Hurdles that need to be overcome in order to obtain a prescription for emergency contraception include refusals or delay by doctors motivated by conscience; long waiting times; high cost of a medical appointment; for minors, the need for the legal guardian's authorisation to seek such an appointment; and the failure by some pharmacists to keep stocks. The Commissioner notes, however, that informal networks of volunteer physicians and activists have been created to help women and girls access emergency contraception in good time.
 17. Moreover, no comprehensive sexuality education is provided in Poland. The Commissioner notes that comprehensive sexuality education is an essential tool for raising awareness about the sexual and reproductive health and rights of women, including access to modern contraception and safe abortion.⁵ Mainstreaming mandatory, age-appropriate, standardised, evidence-based and scientifically accurate sexuality education is crucial for the prevention of unintended pregnancies. However, mandatory education on sexual and reproductive health was removed from Polish school curricula in 1999 and replaced in 2009 in secondary schools by optional classes on preparation for family life. Major hurdles to the provision of sexuality education in Poland include low attendance, exemptions by parents, and lack of knowledge and adequate training for teachers.⁶ In October 2019, a citizens' bill which may have a negative impact on the provision of sexuality education in Polish schools, was introduced and allowed to proceed. The Commissioner [urged](#) the Polish parliament to reject it but, the lower house voted to proceed with the examination of the [bill](#), which remains pending.

⁴ "Przez rok działaczki Aborcji Bez Granic pomogły 34 tys. osób w dostępie do aborcji" ("Over one year, activists of "Abortion without Borders" helped 34,000 people to access abortion"), OKO.press, [article](#), 21 October 2021.

⁵ Commissioner for Human Rights, [Human Rights Comment](#) "Comprehensive sexuality education protects children and helps build a safer, inclusive society", 21 July 2021.

⁶ [Submission](#) by the Commissioner for Human Rights under Rule 9.4 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, 27 January 2020, para. 20.

18. The Commissioner also notes that women and girls who seek an abortion in Poland continue to face intense societal pressure and stigma, which leads many of them to resort to clandestine and potentially unsafe or late abortions or abortions carried out abroad. In particular, the low official annual numbers of legal abortions, the extremely low occurrence or complete unavailability of abortions in some Polish regions, and close to zero incidence of requests for termination of pregnancy as a result of sexual assault, are warning signals that due to societal pressure and stigmatisation, such abortions may be carried out clandestinely or abroad in large numbers. The stigmatisation of abortion and the corresponding reluctance by some medical professionals to perform legal abortions is further compounded by the chilling effects of the antagonising advocacy of groups operating so-called “anti-abortion vans” and billboards, which carry graphic imagery or slanderous allegations directed at gynaecological clinics and are often seen in front of schools or hospitals.
19. Although Polish law does not penalise women for having unlawful abortions, assisting unlawful abortions is a criminal offence that carries penalties of up to several years’ imprisonment. In 2017, Poland’s State Prosecutor’s Office disseminated among all subordinate prosecutors a legal opinion urging more criminal prosecutions of persons helping pregnant women to carry out abortions outside of the Polish legal regime, e.g., by providing abortion medication; financing or facilitating travel to have an abortion abroad; assisting in contact with abortion clinics; or providing information in this regard. In 2019, civil society representatives informed the Commissioner that the circulation of the instruction was followed by an increase in the number of investigations opened.
20. The increasingly restrictive legal and policy framework in Poland concerning women’s access to abortion and other SRHR should also be seen in a wider context of attacks on the human rights of women and LGBTI people and an erosion of the rule of law in Poland. The Commissioner has drawn the Polish authorities’ attention to these trends notably regarding measures undermining the independence of the judiciary and in particular the Constitutional Tribunal⁷ but also the stigmatisation of LGBTI people who are often targeted by the same ultraconservative movements in Poland. For instance, in a Memorandum published on 3 December 2020, the Commissioner called for the rejection of several bills targeting LGBTI people which nevertheless remain pending in the Polish parliament.⁸ The Commissioner is also concerned at reports that, since the Constitutional Tribunal ruling, women human rights defenders have faced an increasingly hostile and dangerous environment.⁹
21. The Commissioner further notes that the 2020 Constitutional Tribunal ruling was delivered at the time of the COVID-19 pandemic and severe restrictions limiting freedom of movement and assembly. The pandemic, indeed, continues to compound the ruling’s negative effect on women’s rights. Abortion care is extremely time-sensitive, yet obtaining timely access to abortion has become more difficult with the pandemic. This is particularly true for women living in places like Poland where abortion is illegal or severely restricted and lockdowns and travel restrictions make it even more difficult to seek assistance and care elsewhere.¹⁰

d. Poland’s persistent failure to execute the Court judgments in respect of access to abortion

22. Within this context, the Commissioner underscores Poland’s continuing failure to execute European Court of Human Rights’ judgments in respect of access to abortion. In the three landmark judgments handed down in 2007, 2011 and 2012, concerning abortion rights in Poland, the Court found multiple violations of Articles 3 and 8 of the Convention due to the lack of an effective mechanism to enable women to effectively access lawful abortion in cases of refusal by medical professionals; the authorities’ failure to provide reliable information in that regard; and the way in which the authorities had treated some of the applicants who sought a legal abortion or prenatal testing.¹¹ [Interim resolution](#) CM/ResDH(2021)44 adopted by the Committee of Ministers in March 2021 confirms that, despite the passage of many years, none of the above-mentioned final judgments has been implemented. This was made even more apparent by Poland’s failure to amend its Medical Professions Act in July 2020 in a way that would explicitly oblige healthcare providers who refuse a

⁷ See in particular the Commissioner’s 2019 country visit report, para. 10.

⁸ Commissioner for Human Rights, [Memorandum](#) on the stigmatisation of LGBTI people in Poland, 3 December 2020, notably para. 42.

⁹ “Poland: A Year On, Abortion Ruling Harms Women”, [statement](#) by 14 human rights organisations, on 19 October 2021.

¹⁰ Commissioner for Human Rights, “COVID-19: Ensure women’s access to sexual and reproductive health and rights”, [statement](#) 7 May 2020.

¹¹ *Tysi c v. Poland*, Application no. 5410/03, *R. R. v. Poland*, Application no. 27617/04, and *P. and S. v. Poland*, Application no. 57375/08.

medical service on grounds of conscience to refer patients to an alternative and willing provider.¹² A provision to that effect, which had been put forward by the Polish government and received the support of the Senate, the Committee of Ministers and the Commissioner, was ultimately removed in parliament's lower house.

23. Against this backdrop, the constitutional Tribunal ruling, which essentially closed the door on all but a handful of lawful pregnancy terminations in Poland, should be seen as the latest step in an already overwhelmingly prohibitive legal and procedural framework governing access to safe and legal abortion care and sexual and reproductive health and rights in the country. The Commissioner, nonetheless, finds that this negative trend in law and practice is in stark contrast to the shift in public attitudes to abortion in Poland. As mentioned above, since 2016, there has been a strong increase in public engagement, including widespread street protests denouncing the erosion of women's sexual and reproductive health and rights. As noted in the Commissioner's 2019 Report on Poland, the change in public attitudes to abortion was clear from an opinion poll commissioned by the Federation for Women and Family Planning (a Polish NGO) in September 2018. According to results of the poll, 69% of respondents believed a woman should be able right to have an abortion up to 12 weeks into her pregnancy. A more recent poll put the level of support for abortion on request up to the 12th week of pregnancy at 66%. In a survey conducted by the same polling organisation in February 2019, the figure had been 53%.¹³

II. A comparative overview showing a firmly established European consensus in favour of access to safe and legal abortion care

24. The worsening situation in Poland stands in stark contrast to legislation in the vast majority of Council of Europe member states that legalises access to abortion care. The Commissioner notes that the vast majority of member states have adopted legislation in favour of access to abortion on women's request¹⁴ or on broad social grounds,¹⁵ at least in the first trimester of pregnancy, firmly establishing a consensus among Council of Europe member states in this regard. Specifically, out of the 47 Council of Europe member states, 41 states currently make abortion legal on broader grounds, and have further legalised abortion on request. Access later in pregnancy in certain specific circumstances, such as when the woman's health or life is at risk, is accepted in almost all member states.
25. Already in 2012, the Court, in its *P. and S. v. Poland* ruling, found that "there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion".¹⁶ Since that time, despite several attempts to undermine this progress addressed below, the European consensus in favour of allowing access to abortion has continued to grow. It is striking to note that since the publication of the Issue Paper on SRHR in 2017, the number of states that have legalised access to abortion has continued to rise. In this respect, for instance, the Commissioner recently welcomed the decriminalisation of abortion in [Northern Ireland](#) and the progressive legislation on abortion, passed by the [Irish Parliament](#).
26. Apart from Poland, the only other member states with restrictive legislation that do not permit abortion on request or on broad social grounds are Andorra, Liechtenstein, Malta, Monaco and San Marino. Importantly, in San Marino, further to a referendum that took place in September 2021, the authorities are duty-bound to amend legislation to remove the criminalisation of abortion and provide access to abortion care.
27. In recent years, a number of Council of Europe member states have enacted legislation that aims to remove procedural and regulatory obstacles faced by women when accessing abortion.¹⁷ Some have notably reformed their legislation to extend the time limits for accessing abortion, due to the harmful impact and complications that delay in accessing abortion may have on women's lives or health. For example, in 2019, [North Macedonia](#) expanded access to abortion on women's request up to 12 weeks of pregnancy and removed the need to obtain the hospital commission's approval for accessing abortion at up to 22 weeks. The same year, [Iceland](#) expanded access to abortion on

¹² "The Commissioner urges President of Poland to veto the amendments to the Medical Professions Act", [statement](#), 22 July 2020.

¹³ See [IPSOS Poll 2020](#).

¹⁴ Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Republic of Moldova, Montenegro, Netherlands, North Macedonia, Norway, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey and Ukraine.

¹⁵ United Kingdom and Finland.

¹⁶ *P. and S. v. Poland*, Application no. 57375/08, para.97.

¹⁷ See Center for Reproductive Rights, [Reproductive Rights Developments in Europe](#) (2019), [European Abortion Laws: A Comparative Overview](#) (2021).

request to 22 weeks of pregnancy, regardless of the circumstances; it also allowed minor girls to terminate pregnancy without the consent of a parent or guardian. In 2018, Belgium adopted a new law on abortion, removing abortion regulation from its criminal code and eliminating the requirement that obliged women seeking abortion services to declare they were in a state of distress. Also in 2018, in [Cyprus](#), a law was passed allowing abortion on request until the 12th week of pregnancy, until the 19th week in cases of sexual assault, and without any time limit where a woman's life or health is at risk. While many obstacles remain and still need to be removed, there is no question that the general trend in Europe is towards progressively removing barriers and restrictions.

28. Although the wider trend is one of progress towards a strengthening and expansion of women's access to abortion care, the Commissioner remains very worried about the backlash resulting from residual attempts by movements in some countries, including Poland, to undermine women's access to safe and legal abortion and, more generally, to roll back progress achieved in the area of women's sexual and reproductive health and rights. In some cases, such attempts are aimed at introducing new requirements for accessing abortion care, such as mandatory waiting periods or counselling. For example, in October 2021, the Commissioner [urged](#), for the third time in three years, Slovak parliamentarians to reject amendments that would restrict women's access to safe and legal abortion services, seriously jeopardising women's health and reproductive rights. Proposals for near-total bans on abortion have also been tabled in some countries, and courts have been confronted with legal challenges threatening women's sexual and reproductive health and rights.¹⁸ While these attempts have for the most part been unsuccessful, often as a result of public outcry and vigorous campaigning by human rights defenders, the Commissioner considers that they provide an important reminder of the need to remain vigilant in safeguarding women's rights in Europe.

III. The harmful impact of restrictive legal and policy frameworks regarding access to abortion on women's human rights

29. In her last country visit [report](#) on Poland, published in June 2019, the Commissioner considered that removing one of the three exceptions for accessing abortion care, namely when there is a high probability of severe and irreversible damage to the foetus or an incurable life-threatening disease, "would effectively amount to a near-total ban on abortions, putting Poland at variance with its obligations under international human rights law, in particular by endangering women's freedom from ill-treatment and violating the principle of non-retrogression, which prohibits measures that diminish existing rights in the field of health." The Commissioner called on the Polish parliament to "reject any initiatives that aim at eroding existing protections or seeks to roll back women's access to their sexual and reproductive rights".
30. Sexual and reproductive rights, including the right to sexual and reproductive health, derive from international human rights law and standards. Civil, political, economic, social and cultural rights enshrined in human rights instruments apply for the entire duration of human beings' sexual and reproductive lives. Although human rights mechanisms have repeatedly recognised that all human rights are relevant to women's sexual and reproductive health and rights, they have often identified certain human rights as having particular relevance in this context. This includes the right to health, the right to life, the right to be free from torture and ill-treatment, the right to private life, and the right to be free from discrimination.¹⁹
31. As stressed in the 2017 Issue Paper on SRHR, human rights mechanisms have consistently held that ensuring women's access to safe abortion care is a critical component of states' obligations to respect and guarantee women's human rights. They have stated that international human rights standards place requirements on states in relation to the provision of safe abortion care and specify a range of concrete measures. Thus, states are obliged to ensure that laws and policies on abortion do not prevent or obstruct women's access to quality abortion care. Laws that severely restrict access to abortion services contravene myriad international human rights standards, and a number of human rights mechanisms have underlined that states' obligations to respect and ensure women's human rights require reforming restrictive abortion laws and removing associated criminal penalties. Human rights mechanisms have also pointed out that legalising the provision of safe abortion care will not be sufficient to ensure compliance with human rights obligations. States must also take concrete action to guarantee the quality of abortion care and ensure that it is available and accessible in practice. In particular, international human rights standards oblige states to take effective

¹⁸ See for more information the Commissioner's 2017 Issue Paper on SRHR, pp. 22-23.

¹⁹ *Ibid.* pp. 47-56.

measures to ensure that medical professionals' refusals of care on grounds of conscience or religion do not jeopardise women's access to sexual and reproductive health care, including abortion care.

32. The Commissioner stresses that the human rights mechanisms' reading of state obligations has evolved over the years and will continue to change as human rights treaties are living instruments the interpretation of which develops with the advancement of public health research and evidence concerning women's sexual and reproductive health as well as social progress related to women's roles in society, their sexuality and their reproductive lives.
33. The Commissioner would like to address two rights in particular in respect of access to safe and legal abortion care which are particularly relevant in the context concerning Poland mentioned above: the prohibition of torture and ill-treatment under Article 3 and the right to private and family life under Article 8 of the Convention.

a. *Prohibition of torture and inhuman or degrading treatment under Article 3*

34. As stated in the 2017 Issue Paper on SRHR, freedom from torture or inhuman or degrading treatment or punishment, enshrined in Article 3 of the Convention, imposes rigorous and absolute obligations on Council of Europe member states for the entire duration of women's sexual and reproductive lives. It not only requires states to refrain from such treatment, but also to eliminate laws, policies and practices related to sexual and reproductive health that may expose women to intense physical or mental suffering, anguish, or feelings of humiliation or debasement. Further, it demands that states be proactive, including through the adoption of laws, policies, and programmes to prevent torture and ill-treatment.
35. According to the Court's case-law on Article 3, acts or omissions of the authorities in the field of health care policy, such as denying health care or medical treatment, may give rise to suffering of a degree of severity that would fall under the scope of Article 3.²⁰ In particular, in a series of landmark judgments mentioned above, the Court ruled that Poland's failures to ensure women's access in practice to abortion services, as well as to prenatal testing services, violated the prohibition of ill-treatment under the Convention.
36. UN human rights mechanisms have repeatedly found highly restrictive abortion laws to engage the prohibition on ill-treatment, concluding that women's freedom from ill-treatment requires states to legalise abortion to protect women's lives or health, as well as in other situations in which carrying a pregnancy to term would cause women substantial physical or mental pain or suffering. The UN Human Rights Committee, in its two landmark decisions in *Mellet v. Ireland* (2016) and *Whelan v. Ireland* (2017), found that denial of abortion, whether de jure or de facto, may result in pain and suffering sufficient to reach the minimum threshold required by the prohibition on cruel, inhuman or degrading treatment under Article 7 of the International Covenant on Civil and Political Rights (ICCPR).²¹ The Committee specified that in each case, the suffering could have been avoided if the women had not been prohibited from terminating her pregnancy in the familiar environment of their own country and under the care of health professionals whom they knew and trusted.²² It concluded that laws compelling women to choose between continuing a non-viable pregnancy or travelling to another country at personal expense and separated from the support of family forced them to bear significant financial, psychological and physical burdens that intensified their suffering. It also found that "the shame and stigma associated with the criminalization of abortion" exacerbated the women's suffering.²³
37. These standards have also been reaffirmed by the Committee on the Elimination of Discrimination Against Women (the "CEDAW Committee") which, in a report issued in 2018, found a highly restrictive legal framework denying access to abortion to involve "mental or physical suffering constituting violence against women and potentially amounting to torture or cruel, inhuman and degrading treatment."²⁴ It examined the situation of women being forced to carry to term a non-viable

²⁰ See, for example, *Powell v. the United Kingdom* (2000) ECHR 703; *P. and S. v. Poland* (2012) ECHR 1853, para. 160; *R.R. v. Poland* (2011) 53 EHRR 31, para. 151; *V.C. v. Slovakia* (2011) ECHR 1888, paras.106-120.

²¹ Human Rights Committee Decisions *Mellet v. Ireland*, Communication No. 2324/2013 (2016) and *Whelan v. Ireland* Communication No. 2425/2014 (2017).

²² *Mellet v. Ireland*, para 7.4; *Whelan v. Ireland*, para. 7.5.

²³ *Ibid.* Also, the Human Rights Committee, in its General Comment No. 36 issued in 2018, found that "restrictions on the ability of women or girls to seek abortion must not [...] subject them to physical or mental pain or suffering which violates article 7", and that states must guarantee "safe, legal and effective access to abortion where [...] carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable."

²⁴ CEDAW Committee, Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (2018) U.N. Doc. CEDAW/C/OP.8/GBR/1, para. 65.

foetus (in cases of fatal foetal impairment) or where the pregnancy results from rape or incest, finding the State party to be in grave and systematic violation of the Convention on the Elimination of All Forms of Discrimination against Women for its “deliberate maintenance of criminal laws disproportionately affecting women and girls, subjecting them to severe physical and mental anguish that may amount to cruel, inhuman and degrading treatment.”²⁵ In its General Recommendation No. 35, the CEDAW Committee reiterated that “criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, forced continuation of pregnancy, [...] are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.”²⁶

38. In a joint statement, the CEDAW Committee and the Committee on the Rights of Persons with Disabilities (CRPD) considered that “access to safe and legal abortion, as well as related services and information are essential aspects of women’s reproductive health and a prerequisite for safeguarding their human rights to life, health, equality before the law and equal protection of the law, non-discrimination, information, privacy, bodily integrity and freedom from torture and ill treatment.”, and called on states to “decriminalize abortion in all circumstances and legalize it in a manner that fully respects the autonomy of women, [...] to take a human rights based approach that safeguards the reproductive choice and autonomy of all women”.²⁷
39. The United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has stressed that the denial of abortion care, whether it stems from a legal prohibition or from state conduct, can result in severe suffering and anguish. In particular, the Special Rapporteur found that forms of ill-treatment included “denial of legally available health services such as abortion and post-abortion care”²⁸ and that “highly restrictive abortion laws that prohibit abortions even in cases of incest, rape or fetal impairment or to safeguard the life or health of the woman violate women’s right to be free from torture and ill-treatment.”²⁹
40. As mentioned in the 2017 Issue Paper on SRHR, the international prohibition on torture and ill-treatment is an absolute proscription – no justification or extenuating circumstances of any kind may ever be invoked to excuse violations of women’s rights to freedom from torture and ill-treatment. No religious, moral or social considerations, political, economic or public health concerns, or interests in protecting the rights of others may be legitimately invoked to mitigate state responsibility. Women’s rights to freedom from torture and ill-treatment must always be given precedence, and there can never be attempts to “balance” those rights with other rights or state interests.
41. In light of the foregoing, the Commissioner concludes that women confronted with a denial of abortion care in their country of residence due to restrictive laws or the conduct of state authorities and health care professionals are likely to find themselves in situations of great vulnerability that may cause them severe anguish, pain and mental and physical suffering. Such suffering can reach a level of severity that engages the absolute prohibition on torture or inhuman or degrading treatment under Article 3 of the Convention.

b. Right to respect for private and family life under Article 8

42. Different constraints on women’s sexual and reproductive health and autonomy, including a legal or actual denial of access to abortion care, can also violate women’s right to private and family life under Article 8 of the Convention. As indicated in the 2017 Issue Paper on SRHR, the right to respect for private and family life encompasses broad elements that take on critical importance in relation to women’s sexual and reproductive health and lives. In particular, in its case-law, the Court has found that the “decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy [and] legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing fetus.”³⁰ The UN Human Rights Committee, *in Mellet v. Ireland* (2016) and *Whelan v. Ireland* (2017), stipulated that the denial of access to abortion care resulting from rules prohibiting abortion violated women’s right to privacy enshrined in Article 17 ICCPR,³¹ clarifying that “preventing the [woman] from terminating her pregnancy in Ireland [...] constituted an

²⁵ *Ibid.*, para. 72.

²⁶ CEDAW Committee, [General Recommendation No. 35](#) on gender-based violence against women, updating General Recommendation No. 19, (2018) U.N. Doc. CEDAW/C/GC/35, para. 18.

²⁷ Joint statement by CEDAW and CRPD, [Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities](#), 2018.

²⁸ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, (2013) U.N. Doc. A/HRC/22/53, para. 46.

²⁹ *Ibid.* U.N.Doc. A/HRC/31/57, (2016), para. 43.

³⁰ *R.R. v. Poland* (2011) 53 EHRR 31, paras 180-181.

³¹ *Mellet v. Ireland* (2016) paras 7.7-7.8; *Whelan v. Ireland* (2017) paras 7.8-7.9.

intrusive interference in her decision as to how best to cope with her pregnancy, notwithstanding the non-viability of the foetus.”³²

43. States’ obligations to respect and ensure women’s right to private life require them to refrain from arbitrary or disproportionate restrictions on, or intrusions into, women’s personal and bodily integrity or their freedom to make decisions about their sexual and reproductive health and lives. Unlike the prohibition on torture and ill-treatment, the nature of the protection afforded to the right to private life under international human rights law and standards is not absolute; at times, states may be permitted to restrict women’s right to private life. However, human rights standards require that any such measures limiting women’s sexual and reproductive rights must meet a number of strict and cumulative criteria: states must demonstrate that limitations are lawful, pursue a legitimate aim, and are necessary and proportionate. Human rights mechanisms have frequently found that states’ restrictions on women’s sexual and reproductive rights have failed to strike the right balance and meet these benchmarks, and thus violated their right to private life. Furthermore, in the Commissioner’s view, the existence of a firmly established European consensus in favour of ensuring access to safe and legal abortion on women’s request or broad social grounds and related progress in facilitating access to abortion impose on states a very narrow margin of appreciation in discharging their obligations under Article 8 of the Convention. This is in line with the Court’s long-standing principle that the Convention is a “living instrument” which must be “interpreted in the light of present-day conditions”.
44. The Commissioner remains very vigilant about attempts to instrumentalise and co-opt the rights of others, such as the rights of children, the right to freedom of religion or belief and the rights of people with disabilities in order to try and justify restrictions on access to abortion. For instance, as noted in the 2017 [Issue Paper](#) on SRHR, some restrictions on access to abortion are taken on the basis of a purported “prenatal” or “unborn” right to life. However, the Commissioner underscores that, in line with how the right to life is interpreted within core treaties, this right does not apply prior to birth and international human rights mechanisms do not recognise a prenatal right to life.
45. The Commissioner notes that disability rights language, especially leveraging legitimate concerns related to the history of eugenics, has also been co-opted by movements opposing women’s rights to access safe and legal abortion. The Commissioner takes note of the concerns expressed by disability rights organisations that such campaigns perpetuate not only harmful stereotypes about persons with disabilities but also reinforce the stigma surrounding abortion. In the Commissioner’s view, an intersectional human rights-based approach is necessary to address such arguments. This includes removing legal restrictions on women’s reproductive autonomy and providing accessible information and any necessary support to facilitate their decision-making in the area of sexual and reproductive health. It requires states to combat the root causes of abortion-related and disability-related stigma and to ensure women’s voluntary access to unbiased, evidence-based information and non-directive information by trained providers to guarantee that women are able to make free and informed decisions.³³ The Commissioner also considers that states should adopt comprehensive measures to address inequalities, in particular the structural and social barriers that prevent persons with disabilities from fully exercising their rights and to ensure the availability of appropriate services and financial support for persons with disabilities, and in particular children with disabilities and their families, which may influence such decisions. Furthermore, the Commissioner notes that the UN Committee on the Rights of Persons with Disabilities (CRPD), in its concluding observations concerning Poland recommended that the authorities “take the measures necessary to ensure that the autonomy and decisions of women with disabilities are respected, that women’s rights in relation to reproductive health are secured, (and) that access to safe abortion is provided”.³⁴
46. Moreover, states have positive obligations to adopt measures to guarantee women’s enjoyment of the right to private life, including by taking effective action to prevent its infringement by private actors. The Court has thus ruled that failure to enable women’s practical access to legal abortion services can give rise to a violation of the right to private life, and reiterated that states have “a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion.”³⁵ The Commissioner recalls that international human rights standards oblige states to take effective measures to ensure that medical professionals’ refusals of care on grounds of conscience or religion do not jeopardise women’s access to sexual and reproductive health care. Notably, human rights mechanisms have emphasised that the right to freedom of religion

³² *Whelan v. Ireland* (2017) para. 7.9.

³³ Women Enabled International, [Abortion and Disability: Towards an Intersectional Human Rights-Based Approach](#), 2020, p.24.

³⁴ CRPD, [Concluding observations](#) on the initial report on Poland (2018), para. 44(e).

³⁵ See *Tysi c v. Poland*, Application No. 5410/03 (2007), *R. R. v. Poland*, Application No. 27617/04, (2011) and *P. and S. v. Poland*, Application No. 57375/0 (2012); Human Rights Committee: *K. L. v. Peru*, Communication No. 1153/2003 (2005) and *L. M. R. v. Argentina*, Communication No. 1608/2007 (2011).

or belief does not entail an absolute right to manifest one's religion or belief, and they have refused to recognise any entitlement for medical professionals to refuse sexual and reproductive health care under international human rights law.³⁶

47. In light of the above, the Commissioner considers that the near-total ban on abortions in Poland combined with the existing practical barriers described in Part I have a direct negative impact, including a chilling effect, on the exercise of the right to private life of every woman of reproductive age, including those who simply consider becoming pregnant, as well as those who do not intend to ever become pregnant. This situation obliges them to adapt their conduct in order to prevent potential pregnancy – just as the options to do so have been, as was shown in Part I, made extremely limited and fraught with peril.

c. *The principle of non-retrogression under international human rights law*

48. Lastly, attempts to weaken safeguards for women's sexual and reproductive health and rights violates the principle of non-retrogression under international human rights law as applicable in particular to the right to health. As expressed in the Commissioner's 2017 Issue Paper on SRHR, the principle of non-retrogression prohibits steps that undermine, restrict or remove existing rights or entitlements. As a result, member states' introduction of retrogressive measures – deliberately backward steps in law or policy that directly or indirectly impede or restrict enjoyment of a right or entitlement – will almost never be permitted under international human rights law. In the Commissioner's view, member states' adoption of measures that roll back protections for women's sexual and reproductive health and rights, introduce new barriers, or remove or scale back women's entitlements to sexual and reproductive health care will almost always be at variance with international human rights standards. This is particularly the case when a measure with the effect of creating a virtual total ban on abortion, such as the ruling of the Constitutional Tribunal, is introduced.

Conclusion

49. In conclusion, the Commissioner considers that:

- Ensuring women's effective access to safe and legal abortion care is a critical component of states' obligations to respect and guarantee women's human rights, and in particular the right to be free from torture and inhuman or degrading treatment under Article 3 and the right to private and family life under Article 8 of the Convention;
- In particular, states' obligations to respect and ensure women's human rights require reforming restrictive abortion laws and removing associated criminal penalties;
- Legalising the provision of safe abortion care is not sufficient to ensure compliance with human rights obligations. States must also take concrete action to guarantee the quality of abortion care and ensure that it is available and accessible in practice;
- The October 2020 ruling of the Polish Constitutional Tribunal resulting in a near-total ban on abortions has created a situation removing Poland even further from its obligations under international human rights law, particularly those stemming from Articles 3 and 8 of the Convention. This situation also runs counter to the principle of non-retrogression under international human rights law;
- The increasingly restrictive legal and policy framework in Poland stands in stark contrast with the firmly established European consensus in favour of access to safe and legal abortion and the general trend towards further removing remaining barriers in law and practice in this field;
- In order to ensure the effective protection of women's human rights, Poland should urgently guarantee to all women and girls full and adequate access to safe and legal abortion care by bringing its law and practice into line with international human rights standards, including the Convention, and regional best practices.

³⁶ See *R. R. v. Poland*, Application No. 27617/04 (2011), *P. and S. v. Poland*, Application no. 57375/0 (2013), and *Pichon and Sajous v. France*, Application. no. 49853/99 (2001); European Committee of Social Rights, *FAFCE v. Sweden*, Application no. 99/2013 (2015).