IN THE CONSTITUTIONAL COURT OF THE REPUBLIC OF MACEDONIA

Initiative on assessing the constitutionality of the Law on Termination of Pregnancy
[U. br. 137/2013, filed on September 27, 2013]

WRITTEN COMMENTS

BY

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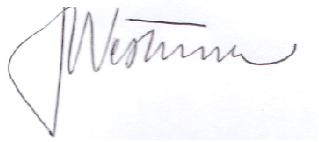

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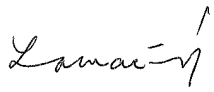

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1. Introduction

1. These written comments are submitted by the international human rights organization Center for Reproductive Rights in support of the Initiative on assessing the constitutionality of the Law on Termination of Pregnancy (as published in the Official Gazette of the Republic of Macedonia, no. 87/2013) [U. br. 137/2013, filed on September 27, 2013].

2. These comments focus on standards developed by international and regional human rights bodies as well as by the World Health Organization (WHO) addressing mandatory biased pre-abortion counselling and mandatory waiting period requirements prior to abortion. It is respectfully submitted that these standards should inform the interpretation of the relevant provisions of the Law on Termination of Pregnancy (as published in the Official Gazette of the Republic of Macedonia, no. 87/2013) by the Constitutional Court of the Republic of Macedonia.

2. Interest of the Center for Reproductive Rights

3. The Center for Reproductive Rights (CRR), founded in 1992, is one of the world's leading legal human rights organizations in the field of women's reproductive rights. CRR's mission is to strive for the respect, protection and fulfillment of women's human rights in relation to their reproductive health and reproductive autonomy worldwide. Consisting primarily of human rights lawyers, CRR advocates for rights-promoting reproductive health laws and policies globally, and engages in strategic litigation to advance women's human rights. In this capacity, the organization has brought forth and won several high-profile cases on behalf of women whose reproductive rights have been violated, such as the European Court of Human Rights cases *R.R. v. Poland* (2011) and *P. and S. v. Poland* (2012) and the CEDAW Committee cases *Alyne da Silva Pimentel v. Brazil* (2011) and *L.C. v Peru* (2011). The CRR's expertise is also frequently called upon by U.N. human rights bodies such as the U.N. human rights Treaty Monitoring Bodies, the Office of the High Commissioner of Human Rights, and the Human Rights Council. The CRR has also submitted third-party interventions in national level cases including in a case on the constitutionality of abortion on request permitted under the Slovak law, which was decided by the Constitutional Court of the Slovak Republic in 2007.

3. International human rights and WHO standards addressing mandatory biased counselling and mandatory waiting period prior to abortion

4. United Nations Treaty Monitoring Bodies (UNTMBs) have repeatedly called for *increased* access to safe, legal abortion services, and urged state parties to eliminate barriers that prevent women from accessing these services.[1] The Committee on Economic, Social and Cultural Rights (ESCR Committee), in charge of monitoring the implementation of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and providing guidance for its interpretation, has specifically noted that "[t]he realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information,

[1] *See, e.g.*, Committee on Economic, Social and Cultural Rights (ESCR Committee), *Concluding Observations: Argentina*, para. 22, U.N. Doc. E/C.12/ARG/CO/3 (2011); Committee on the Elimination of Discrimination against Women (CEDAW Committee), *Concluding Observations: India*, para. 41, U.N. Doc. CEDAW/C/IND/CO/3 (2007); *Hungary*, paras. 30-31, U.N. Doc. CEDAW/C/HUN/CO/7-8 (2013); ESCR Committee, *Concluding Observations: Poland*, para. 28, U.N. Doc. E/C.12/POL/CO/5 (2009); CEDAW Committee, *Concluding Observations: Poland*, para. 25, U.N. Doc. CEDAW/C/POL/CO/6 (2007).

including in the area of sexual and reproductive health."[2] The Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights (ICCPR), has further noted that "in cases where abortion procedures may lawfully be performed, all obstacles to obtaining them should be removed."[3] And the Committee on the Elimination of Discrimination against Women (CEDAW Committee), monitoring implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), has advised state parties to address obstacles women face in accessing reproductive health services.[4] In addition, recognizing harmful effects of procedural barriers such as biased mandatory counselling and mandatory waiting periods on women's access to safe abortion, **the CEDAW Committee has specifically urged a state party to "[e]nsure access to safe abortion without subjecting women to mandatory counselling and a medically unnecessary waiting period …"**[5]

5. The European regional bodies also support access to safe and legal abortion services. The Parliamentary Assembly of the Council of Europe (PACE) has expressed concern about the conditions the Council of Europe member states have imposed that "restrict the effective access to safe, affordable, acceptable and appropriate abortion services," noting that waiting periods and requirements for repeated medical consultations have the potential to hinder or prevent access to safe abortion services.[6] As a result, **PACE has called on member states to "guarantee women's effective exercise of their right of access to a safe and legal abortion" and "lift restrictions which hinder, *de jure* or de facto, access to safe abortion."**[7]

3.1. Mandatory and biased pre-abortion counselling requirement

6. Informed consent in the medical sphere is a process of communication between a health care provider and patient and is a critical element of all medical procedures. It requires the patient's consent to be given freely and voluntarily, without threats or improper inducements, after the patient has been counseled on associated risks, potential side effects, benefits and alternatives to a medical procedure, in a manner that is understandable to her or him.[8] In the reproductive health field, this process is central to ensuring a woman's right to be involved in medical decision-

[2] ESCR Committee, *General Comment No. 14: The right to the highest attainable standard of health (Art. 12)*, (22nd Sess., 2000), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 78, para. 21, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008).
[3] Human Rights Committee, *Concluding Observations: Argentina*, para. 14, U.N. Doc. CCPR/CO/70/ARG (2000).
[4] CEDAW Committee, *General Recommendation No. 24: Article 12 of the Convention (women and health)*, (20th Sess., 1999), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, para. 21, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008) [hereinafter CEDAW Committee, *Gen. Recommendation No. 24*].
[5] CEDAW Committee, *Concluding Observations: Hungary*, para. 31(c), U.N. Doc. CEDAW/C/HUN/CO/7-8 (2013).
[6] PACE Resolution 1607, paras. 2 & 3, Access to safe and legal abortion in Europe (2008).
[7] *Id*. paras. 7.2 & 7.4.
[8] FIGO, *Ethical issues in Obstetrics and Gynecology* (Oct. 2012), at 13-15, *available at* http://www.figo.org/files/figo-corp/English%20Ethical%20Issues%20in%20Obstetrics%20and%20Gynecology.pdf; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (64th Sess.), transmitted by Note of the Secretary-General*, para. 15, U.N. Doc A/64/272 (2009) (by Anand Grover) [hereinafter SRRH (2009)].

making that concerns her health.[9] The WHO has indicated that in connection with the right to informed consent, patients also have a "right not to be informed," should they wish to abstain from receiving medical information.[10]

7. The provisions of the Macedonian Law on Termination of Pregnancy (no. 87/2013) regulating mandatory counseling are not designed to ensure that women have access to full, proper and appropriate information surrounding abortion. Instead, as further outlined below, these provisions are designed to deter women from exercising their reproductive autonomy by questioning their decision-making capacity about the fate of their pregnancies.

8. **The WHO standards do not support mandatory and biased counselling on abortion.** The WHO has made clear that "[m]any women have made a decision to have an abortion before seeking care, and this decision should be respected without subjecting a woman to mandatory counseling."[11] It has also advised that counseling should be "voluntary, confidential, non-directive and [provided] by a trained person."[12] It has stressed that women making decisions about pregnancy need to be treated with respect and understanding and be provided with information in an understandable manner, so that they can make such decisions without inducement, coercion or discrimination.[13]

9. As such, the WHO has noted that counseling about abortion should be non-directive,[14] and "healthcare providers should be trained to support women's informed and voluntary decision-making."[15] The WHO has made clear that "censoring, withholding or intentionally misrepresenting information about abortion services can result in a lack of access to services or delays, which increase health risks for women"[16] and "States should refrain from… intentionally misrepresenting health-related information."[17] Further, "information must be complete, accurate and easy to understand, and be given in a way that facilitates a woman being able to freely give her fully informed consent [and] respects her dignity."[18]

10. **A law that imposes mandatory and biased counselling on women directly discriminates on the ground of sex.** The CEDAW Committee has defined direct sex discrimination as "different treatment explicitly based on grounds of sex and gender differences."[19] In General Comment No. 20, the ESCR Committee pointed out that unfavorable treatment on the basis of prohibited grounds can constitute direct discrimination even when there is no comparable similar

[9] *See* SRRH (2009), *supra* note 8, paras. 54-60.
[10] World Health Organization (WHO), European Consultation on the Rights of Patients, Declaration on the Promotion of Patients' Rights in Europe, para. 2.5, ICP/HLE 121 (June 28, 1994).
[11] WHO, SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 36 (2nd ed. 2012) [hereinafter WHO, SAFE ABORTION (2012)].
[12] *Id*.
[13] *Id*. at 68.
[14] *Id*. at 36.
[15] *Id*. at 68.
[16] *Id*. at 97.
[17] *Id*.
[18] *Id*.
[19] CEDAW Committee, *General Recommendation No. 28: The Core Obligations of States Parties under (Art. 2)*, (47th Sess., 2010), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, para. 16, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008).

situation, such as in cases involving pregnancy.[20] Furthermore, the CEDAW Committee has made clear that "[i]t is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women."[21] As abortion is a health service that solely women need, legal provisions that subject women to mandatory counselling and are designed to provide biased information on pregnancy and abortion in order to prevent or deter women from accessing abortion services constitute discrimination against women. The CEDAW Committee has recognized the discriminatory impact of mandatory counselling on women seeking abortion by urging Hungary to "[e]nsure access to safe abortion without subjecting women to mandatory counselling …"[22]

11. **Mandatory counselling on abortion constitutes gender discrimination also because it perpetuates negative stereotypes about women's abilities to make rational and competent decisions on their pregnancy. In addition, the mandatory counselling, as regulated in the Macedonian Law on Termination of Pregnancy (no. 87/2013), is intended to persuade women not to terminate their pregnancies, which in fact perpetuates the stereotype of women as mothers and caretakers.** In its recent concluding observations to Macedonia, the CEDAW Committee expressed concern "about the persistence of stereotypes concerning the roles and responsibilities of women and men in the family and society, which overemphasize the traditional role of women as mothers and wives, thus undermining women's social status and their educational and professional careers."[23] As a result, the Committee urged the state "to put in place a comprehensive policy with proactive and sustained measures, targeted at women, men, girls and boys, to overcome stereotypical attitudes about the roles and responsibilities of women and men in the family and in society."[24] The provisions on mandatory and biased counseling in the 2013 Macedonian Law on Termination of Pregnancy stand in direct conflict with this recommendation.

3.2. Mandatory waiting period requirement prior to abortion

12. Studies on mandatory waiting periods prior to abortion have found that they inhibit women's access to abortion services, causing women to have abortions later in pregnancy and increasing the number of second-trimester abortions.[25] While abortion generally is an extremely safe medical procedure, risks of complications associated with the procedure increase as the pregnancy progresses.[26] As such, the imposition of barriers that delay women's access to abortion services, such as mandatory waiting periods, poses a risk to women's health. Mandatory

[20] ESCR Committee, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, para 10(a), U.N. Doc. E/C.12/GC/20 (2009).
[21] CEDAW, *Gen. Recommendation No. 24*, *supra* note 4, para. 11.
[22] CEDAW Committee, *Concluding Observations: Hungary*, para. 31(c), U.N. Doc. CEDAW/C/HUN/CO/7-8 (2013).
[23] CEDAW Committee, *Concluding Observations: the former Yugoslav Republic of Macedonia*, para. 20, U.N. Doc. CEDAW/C/MKD/CO/4-5 (2013).
[24] *Id.* para. 21(a).
[25] *See* WHO, SAFE ABORTION (2012), *supra* note 11, at 96-97; Guttmacher Institute, *The Impact of State Mandatory Counseling and Waiting Period Laws on Abortion: A Literature Review*, 15 (2009), *available at* http://www.guttmacher.org/pubs/MandatoryCounseling.pdf.
[26] WHO, SAFE ABORTION (2012), *supra* note 11, at 32.

waiting periods also increase the cost associated with accessing abortion services, as women generally have to make at least two trips to the health facility.[27] The added financial burden of repeated visits to the health center has a disproportionate impact on marginalized women, as explained below, which leads to increased health inequities and social injustice.

13. **The impact of the mandatory waiting period requirement is twofold: (i) the waiting period itself delays the performance of the procedure, and (ii) the resulting requirement that women make two trips to the facility where the abortion will be performed unduly hinders abortion access for women who find each trip to the facility particularly burdensome.** This may include, *inter alia*, women who have to travel long distances to reach the health facility, women who lack access to reliable transportation, and women who have difficulty making time to go to the facility due to, for example, their work or familial obligations. As such, **mandatory waiting periods have a disparate impact on vulnerable and marginalized groups.** The considerable increase in financial expenditures that women must make to attend the health facility twice is particularly burdensome for women living in rural areas and poor women because rural women may need to travel farther distances for each visit to the facility, incurring significant transportation and other relevant costs such as those related to childcare and/or work, while poor or low-income women may be particularly burdened by these extra costs.

14. **The WHO has explained that "mandatory waiting periods can have the effect of delaying care, which can jeopardize women's ability to access safe, legal abortion services."[28] It has also made clear that "once the decision [to have an abortion] is made by the woman, abortion should be provided as soon as is possible"[29] and without delay.[30] Anand Grover, the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, has reinforced that mandatory counseling and waiting periods can make abortion inaccessible,[31] thereby violating international human rights norms.**

15. The imposition of a mandatory waiting period on women seeking abortion services clearly calls into question women's decision-making capacity about their reproductive lives, insinuating that without a mandated time to ponder their decision, women would fail to give proper thought to the impact of their actions. The exclusion of both minors and women with disabilities from the mandatory waiting period requirement in the Macedonian Law on Termination of Pregnancy (no. 87/2013) elucidates this point. For both minors and women with disabilities – who under the law must always seek permission from a third-party (either a parent or guardian) in order to access abortion services – the decision to terminate a pregnancy does not lie solely in their hands. As such, the lawmaker is indicating that because another party either weighed into or made the decision about termination for these women, there is no need to further question the decision.

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[27] Frances A. Althaus, Stanley K. Henshaw, *The Effects of Mandatory Delay Laws on Abortion Patients and Providers*, 26 FAMILY PLANNING PERSPECTIVES 228, 233 (1994).
[28] WHO, SAFE ABORTION (2012), *supra* note 11, at 96.
[29] *Id.* at 36.
[30] *Id.* at 64.
[31] Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard oh physical and mental health, *Interim rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard oh physical and mental health, transmitted by note of the Secretary-General*, para. 24, U.N. Doc. A/66/254 (Aug. 3, 2011) (by Anand Grover).

The WHO has noted that mandatory waiting periods "demean[] women as competent decision-makers,"[32] urging states to "ensure that abortion care is delivered in a manner that respects women as decision-makers" including by eliminating waiting periods.[33]

16. **Mandatory waiting periods prior to abortion constitute discrimination against women because they question women's reproductive decision-making capacity and because they perpetuate negative gender stereotypes.** Subjecting women to mandatory delay of their reproductive choices reinforces discriminatory stereotypes about women's abilities to make rational and competent decisions about their pregnancies. The discriminatory implications of mandatory waiting periods on women's access to abortion was recognized by the CEDAW Committee when it urged Hungary to "[e]nsure access to safe abortion without subjecting women to … a medically unnecessary waiting period as recommended by the World Health Organization."[34]

17. Additionally, the state's differential treatment of abortion services reinforces the stigma that women face for accessing sexual and reproductive health services and for exercising their sexual and reproductive rights. The procedural barriers attached to abortion services instill a sense of disapproval of women who follow through with the decision to terminate a pregnancy. As such, this creates the sense that women who terminate a pregnancy are doing something wrong – either by finding themselves facing an unwanted pregnancy or by making the decision that they do not want to carry the pregnancy to term. The stigma attached to accessing reproductive health services perpetuates discrimination surrounding women's sexuality and deters women from accessing reproductive health services.[35]

4. Conclusion

18. While the Macedonian Law on Termination of Pregnancy (no. 87/2013) states that "[t]he right to terminate pregnancy can only be limited for the purpose of protecting the health and life of the pregnant woman,"[36] the measures contained therein have the opposite effect, seriously jeopardizing women's lives and health. Procedural barriers such as mandatory waiting period and biased counseling seriously hinder women's access to safe abortion services and inhibit them from fully exercising their fundamental rights by perpetuating discrimination against women, infringing upon women's autonomy, and exacerbating the stigma attached to abortion.

[32] WHO, SAFE ABORTION (2012), *supra* note 11, at 96.
[33] *Id.* at 96-97.
[34] CEDAW Committee, *Concluding Observations: Hungary*, para. 31(c), U.N. Doc. CEDAW/C/HUN/CO/7-8 (2013).
[35] *See* Anuradha Kumar et al., *Conceptualizing Abortion Stigma*, 11(6) CULTURE, HEALTH & SEXUALITY 625 (2009); *see also* Alison Norris et al., *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21-3S WOMEN'S HEALTH ISSUES S49 (2011).
[36] Law on Termination of Pregnancy (no. 87/2013), Article 2 (2013) (Maced.).