

September 27, 2010

Ms. Liliane Maury Pasquier, President
Social, Health and Family Affairs Committee
Parliamentary Assembly of the Council of Europe
Avenue de l'Europe
67075 Strasbourg Cedex
FRANCE
Via electronic delivery

Re.: Proposed Resolution (Document 12347)
Women's Access to Lawful Medical Care: the Problem of Unregulated Use of
Conscientious Objection

**ALLIANCE OF ROMANIA'S FAMILIES: A LEGAL AND POLICY COMMENTARY ON
THE PROPOSED PACE DRAFT RESOLUTION "WOMEN'S ACCESS TO LAWFUL
MEDICAL CARE: THE PROBLEM OF UNREGULATED USE OF CONSCIENTIOUS
OBJECTION" (Document 12347)**

Dear Ms. Maury-Pasquier:

Greetings from the Alliance of Romania's Families! The Alliance of Romania's Families ("ARF") has taken notice that on July 20, 2010 a Report has been issued by the Social, Health and Family Committee of the Council of Europe, titled "Women's Access to Lawful Medical Care: The Problem of Unregulated Use of Conscientious Objection." The Report is authored by Ms. Christine McCafferty, Rapporteur, and is subject to a motion to be adopted as an official resolution of the Council of Europe. We are grateful for the opportunity to submit this Commentary on the proposed Resolution and respectfully request that it be disseminated to all PACE delegates well in advance of the upcoming vote scheduled for the week of October 4, 2010.

ARF submits this Commentary to express and explain its opposition to the Report and to urge all delegates in the PACE to vote against it. We find the Report factually and conceptually unpersuasive, methodologically flawed, and containing significant legal and conceptual inaccuracies.

ARF is a civic, nongovernmental, pro-life organization which promotes family values in Romania, the European Union, and in the Council of Europe. Our constituency consists of hundreds of thousands of Romania's families. The concepts and proposals promoted in the McCafferty Report are incongruent with and injurious to the interests and values which we promote and to the values and interests of our constituency. Therefore, we object to the Report and respectfully request that it be rejected.

RADICAL PROPOSALS FOR AN INADEQUATELY EXPLAINED PROBLEM

Our **first major concern** with the McCafferty Report is that it proposes solutions to a problem alleged to exist but which is not explained cogently or demonstrated to actually exist. What precisely is the Report attempting to address? More to the point, what is the problem at hand, if indeed one exists, that needs to be rectified?

We start by taking issue with the predicates of the Report which pretend to sound the alarm on a supposedly major problem, one which the detached reader is unable to comprehend. Paragraph 2 states that "The Assembly is deeply concerned about the increase and largely unregulated

occurrence of conscientious objection, especially in the field of reproductive health care, which poses an obstacle to women's access to lawful medical care in many Council of Europe member states." We respectfully request, where is the evidence to substantiate this allegation? Not in the Report. At least we do not find it there.

1. Methodology

The Report recites, generally, that it is based on the opinions of experts. The experts identified in the Report are not neutral, as reflected in their stated affiliations. This, in turn, is a major flaw which taints the whole Report with a biased flavor. The Report identifies four (4) experts only, all of them interviewed in Paris and coming from institutions which are known to promote abortion worldwide. While this may suffice to present the pro-abortion side of the matter, it is wholly insufficient to render the entire Report unbiased and present the full dimensions of the subject of the Report. For the Report is not based on the expert input of any individuals or institutions which promote freedom of conscience, namely religious thinkers, theologians, ethicists, moralists, or similar perspectives. Or even the opinion of medical personnel. This strident failure of the Report seems to be deliberate, as, we observe, is the case with most reports compiled in the Council of Europe. They seemed to be designed to present only one point of view. In this vein, PACE votes focus on only one perspective of what otherwise are much broader issues.

We further note that the honorable rapporteur limited the inquiry and collection of data to only institutions based in the Western countries of the Council of Europe. We believe it would have been more proper and useful to seek much broader input from a diverse geographical spectrum of the Council of Europe. The input from Czernowitz, Ukraine, for instance, would have been as valuable to the Report as the one from New York.

Furthermore, the credentials or expertise of the experts are not disclosed and no probative evidence is given to support the conclusions of the Report.

2. What Is the Problem?

A cursory review of the Report reflects a specific concern with women's access to medical care, which in itself is indeed a legitimate concern which should be a foremost objective of all Council of Europe Member States. Reasonable minds would agree that there is, or should be, compatibility between the fundamental freedom of the individual to conscientious objection and the access of women to health care. The dangers begin to loom, however, once the Report diverts into nebulous notions of **sexual and reproductive health rights** which cause alarm. For these alleged "rights" concern one medical procedure alone – abortion. And with respect to abortion reasonable minds necessarily differ that there should be compatibility between the fundamental liberty of the individual to conscientious objection and a request to abort the unborn child.

We, therefore, take issue with the ambiguity which pervades the Report, seeking to facilitate an unacceptable end, namely abortion, through the otherwise legitimate objective of access to lawful medical care.

We also take issue with the fact that the Report launches a broad attack against the individual's freedom of conscience by seeking to displace it when confronted with "the right of **each** patient to access lawful medical care in a timely manner." This broad enunciation of the issue does not do justice to the Report's targeted audience, considering that the Report's ultimate and exclusive objective eventually is stated as being abortion. The "right of **each patient** to access lawful medical care in a timely manner" is being used in the Report as a subterfuge to promote abortion, a highly

questionable practice which does not necessarily transform every pregnancy into a patient needing medical attention. Thus, the situation where an abortion is requested must be distinguished from the vast majority of situations where patients in genuine need of medical care actually need medical attention and access to healthcare.

And in this respect, too, the Report is poorly argued, if at all. Statistical evidence of pregnancies, and in particular of lack of access or availability of medical care to pregnant women in the Council of Europe, is nonexistent. The Report fails to disclose the dimensions of the problem it addresses. We are asked to take the Report's dicta and conclusions at their face value. Essential data is missing and compelling evidence is nowhere to be found. The reader is simply asked to presume or agree with the Report's premise that there is a health crisis specifically facing pregnant women, that this crisis is generated exclusively by medical personnel who refuse to render abortion services based on conscientious objection, and that this crisis can only be mended by wholly displacing or significantly undermining the freedom of conscience of medical personnel. The Report needlessly vilifies the medical personnel and institutions which refuse to provide abortion services, and, therefore, is divisive.

3. Statistical Evidence: There Is no Problem

On the other hand, data provided by internationally renowned institutions reflect that conscientious objection is not a major, or even the slightest cause, for maternal mortality during child birth. At least not in the Council of Europe. On April 12, 2010 the prestigious British medical publication The Lancet published a major report on maternal mortality in 181 countries. ("Maternal Mortality for 181 Countries, 1980-2008: A Systematic Analysis of Progress Toward Millennium Development Goal 5" The Lancet, Volume 375, Issue 9726, Pages 1609-1623) According to this report, in 2008 an estimated 342,900 women died while giving birth, down from 526,300 in 1980. However, of the 342,900 maternal deaths recorded in 2008, 61,400 were primarily caused by HIV infections and complications, and the remaining 281,500 by pregnancy complications. More than 50% of all maternal deaths in 2008 occurred in six (6) countries, namely India, Nigeria, Pakistan, Afghanistan, Ethiopia, and the Democratic Republic of Congo. Notably, these six countries are among the poorest and most populous countries in the world. The maternal deaths in these countries can hardly be attributed to the refusal of medical personnel to perform abortions. Instead, the causes more readily appear to be linked to underdevelopment.

Data issued recently by the World Health Organization point to the same conclusion. According to a 2010 WHO Report, compiled based on data provided by the WHO, UNICEF, UNFPA, and The World Bank, the number of maternal deaths in Asia has dropped from 315,000 in 1990 to 139,000 in 2008, a decrease of 52%. Also, 99% of all maternal deaths recorded in 2008 occurred in the world's developing regions, sub-Saharan Africa and South Asia accounting for 57% and 30% of all deaths respectively. However, even in sub-Saharan Africa maternal deaths decreased by 26%. See, World Health Organization: Trends in Maternal Mortality: 1990 to 2008 (2010) http://whqlibdoc.who.int/publications/2010/9789241500265_eng.pdf

This data compels the conclusion that maternal deaths in the 47 Member States of the Council of Europe, however heartbreaking and unfortunate they are, do not support the implied conclusion of the McCafferty Report that maternal deaths in the Council of Europe are primarily, or even indirectly, caused by conscientiously objecting medical personnel refusing to perform abortion services. If 99% of all maternal deaths occur in developing countries, and 87% of them in Sub-Saharan Africa and South Asia, it follows that the number of maternal deaths in the Council of Europe must be very low, and that it is not caused by lack of access to abortion services.

That maternal deaths cannot be attributed to the exercise by medical personnel of their freedom of conscience to reject abortion services, is further shown by the fact that some of the countries which only allow abortions in exceptional circumstances, such as Ireland and Chile, have some of the lowest maternal mortality rates in the world.

THE FUNDAMENTAL FREEDOM OF CONSCIENCE

Our **second major concern** focuses on the Report's request that Member States regulate a fundamental liberty. Freedom of conscience is fundamental, and, in contrast, the European Court of Human Rights has failed, or even abstained, from recognizing a right to abortion. We are, therefore, confronted with a rather pretentious claim that a fundamental freedom be displaced, undermined, or modified to accommodate abortion, a practice which has yet to gain any status under international law. It is well known that the Universal Declaration of Human Rights articulates the freedom of conscience, along with freedom of religion, in Article 18. In contrast, there is no international legal instrument proclaiming a right to abortion. Moreover, freedom of conscience is a historic freedom, rooted in the collective conscience of humanity, unlike abortion, a practice which, while historic, has not gained the acceptance of humanity even as a right, let alone as a fundamental liberty or freedom. To the contrary, for most of history abortion was regarded as a moral wrong, as it also is today by a significant number of the citizens of the Council of Europe.

We additionally state the obvious - freedom of conscience is fundamental to democracy and freedom itself. Democracy cannot exist without individuals being allowed to exercise their freedom of conscience. Freedom of conscience is the beginning of freedom itself. It stands at the top of the hierarchy of rights. Chief Justice Dickson of the Canadian Supreme Court put it well in R. v. Big M Drug Mart Ltd. (1985) when stating: "It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisites for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the **centrality** of the rights associated with freedom of **individual conscience** both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy of "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental." They are *sine qua non* of the political tradition underlying the Charter."

Precisely because of the "centrality" and importance of freedom of conscience for all of us, the recipes proposed in the McCafferty Report are unacceptable. We address them now one by one.

1. Institutionalized Negation of Freedom of Conscience

In **Paragraph 4.1** the McCafferty Report suggests freedom of conscience be only extended to medical personnel directly involved in abortions but not to public hospitals. This is both incomprehensible and unacceptable for several reasons.

First, it is incomprehensible because hospitals as institutions cannot be separated from their medical personnel. It is the medical personnel, the human beings, which make up the institutions, in this case the hospitals, and not the other way around. So long as the individuals possess freedom of conscience, this freedom is portable and it is carried by each person at all times and in all places. It may not be left at the gate of the state hospital or only be exercised sporadically or only in certain areas.

Second, in addition to doctors, there are other individuals who indirectly participate in the abortion process and who nevertheless object or may want to object to being involved in the process. For instance, nurses, laboratory technicians, or even custodial workers might object to participating in it. The nurse may object because her indirect participation assists the doctor, who directly performs the abortion, in the commission of an act, against another human being, which the nurse views as deeply offensive to her conscience and which she resents. A laboratory technician may also be constrained, against her conscience, to participate indirectly in the performance of the abortion, knowing that the tissue or cultures she examines will eventually be used to abort human life. The custodial worker may likewise find it offensive, also based on conscience, to dispose of the aborted human fetus, for instance by incineration, knowing full well that the fetus had been aborted. The same may be said about the pharmacist who refuses to sell abortifacients.

Third, wholly depriving state or public hospitals of the ability to grant exemptions to doctors who refuse to abort, based on their conscience, is equally unacceptable. This would effect discrimination by a public entity against the individual and would amount to state-sponsored violations of the medical personnel's constitutionally granted freedom of conscience. States and state actors, including state and public hospitals, should protect, not undermine or displace, their employees' freedom of conscience. If taken to its logical conclusion, the Report's suggestion would result in doctors and medical personnel having to choose between their conscience and their livelihood, such that conscientiously objecting medical personnel would be denied employment at public hospitals. This suggestion is particularly troublesome because in many Council of Europe Member States there are very few private hospitals and nonconforming medical personnel would thus be excluded from employment in public hospitals.

2. Duty to Treat or, Alternatively, to Refer

Equally unacceptable is the recommendation that conscientiously objecting medical personnel be compelled to abort in emergency situations (such as danger to the patient's health and life), or where referral to another medical provider is not feasible. (Paragraph #36) Medical personnel object to providing abortion services because, based on their religious, moral, or ethical convictions, they regard the unborn fetus as a human being fully endowed with moral and legal rights, and its aborting as murder. It would thus be a prima facie violation of the freedom of conscience to compel a medical provider to kill one human being to save another. Moreover, in reality, such situations would be extremely rare, especially in the Council of Europe. Another consequence of this proposal, if implemented legislatively, would force doctors to render abortion services even though they are professionally unqualified to do so, or, alternatively, to specialize in abortion services.

Similar arguments militate against the Report's **duty to refer** proposition. (Paragraphs 32-35) Under this proposal medical personnel who refuse abortion services would be compelled to refer patients to medical personnel who provide them. This, too, would amount to an unscrupulous violation of freedom of conscience. As stated already, for those who refuse to abort, abortion is murder, the killing of an innocent human being, of an unborn child. Under this view, the Report's proposal would compel medical personnel to refer a patient to medical personnel who "kill unborn human beings." In this fashion the conscientious objector is compelled to become an accomplice, an auxiliary to what she perceives to be a crime. In circumstances other than abortion, such acquiescence would result in severe criminal penalties. Conscience, religious, and ethical tenets forbid this. One is not allowed to commit murder directly or indirectly. The moral equivalent of this situation would be for a soldier who refuses to kill innocent civilians in times of war to be requested to disclose the identity of another soldier who is willing to kill the very people he refused to kill.

Moreover, freedom of conscience is a continuum. It is embedded in the very personality of the individual from where it cannot be dislodged. It cleaves to one's persona. It does not stop, it cannot

be suspended, and it is nonnegotiable - in all places, in all settings, and in all circumstances. In this respect, one reading the Report is worried that if the freedom of conscience is displaced with respect to abortion, in the near future it will be displaced in other equally controversial situations which also implicate religious, moral, philosophical and ethical considerations: euthanasia and assisted suicide. Suppose that in the near future the European Court of Human Rights proclaims the existence, under the European Convention of Human Rights, of a right to **euthanasia and assisted suicide**. Will then the PACE commission similar reports for the purpose of depriving medical personnel of the right to conscientious objection and compel them to euthanize or take the life of other human beings? Are we to discern on the horizon a Europe morphing into an Island of Dr. Moreau through resolutions of the Council of Europe? That would be unthinkable. For the conscientious objector all life is precious and deserving of full dignity, born or unborn, small or big, healthy or unhealthy, rich or poor, manifestly influential or manifestly humble. For the conscientious objector the right to life, enshrined in Article 2 of the European Convention of Human Rights, is supreme, it being the foundation of society and must, at all costs, be preserved, not destroyed.

Furthermore, freedom of conscience should not be compelled to bend before the frivolous. The reasons for seeking an abortion are many. In many cases abortions are sought for reasons which the conscientious objector deems truly frivolous when contrasted to the value of life itself. The conscientious objector is hard pressed to understand why she should act contrary to her deeply held convictions and abort an unborn child simply because the mother does not want the child; or because she does not like the sex of the child; or because the family already has too many children; or because the adolescent made an error of judgment with respect to her lifestyle which resulted in an unwanted pregnancy; or because the unborn child is female; or belongs to a certain ethnic or racial background; or because the coming into the world of an additional human being will impose economic costs on the parents; or because, as we hear increasingly frequently, there are enough human beings in the world already and they destroy the environment. In a sense, the grounds for abortion which a conscientious objector would find frivolous are many, and the overwhelming majority of them do not even justify a good faith dialogue on the conflict between conscience and abortion.

Connected with the duty to refer, one points out that the Report omitted a viable alternative to this duty, namely the medical provider referring the patient to counseling on the negative impact of abortion on women's health, a well known fact.

3. Complaint Mechanism

We further object to the establishment of a complaint mechanism with appeal rights for patients who are refused abortions or are not given referrals to willing medical personnel. (Paragraph 41) We believe this suggestion is unwise. The medical profession is highly regulated already. It does not need another layer of regulation simply to deal with those extremely rare circumstances where an abortion seeking person is unable to secure an abortion within the time frame allowed by the law. In those extremely rare situations the patient had actually not been harmed. The law generally does not provide a remedy in situations where failure to act does not result in injury, following the well established dictum "no harm, no remedy." Also, the circumstances implied in the Report as warranting the lodging of a complaint are ambiguous, thus encouraging the filing of frivolous complaints, for instance where a doctor refuses to do an abortion and the patient cannot find a willing doctor "within a reasonable distance," presumably from the place of residence of the patient. (See Paragraph 4.1.3) What constitutes a "reasonable distance" implicates a highly subjective assessment and may even be carried to the illogical extreme of demanding abortion services at home.

A further negative implication of a complaint mechanism would be the unnecessary tarnishing of the professional reputation of otherwise respectable medical professionals, for the sole reason that they choose to remain faithful to their conscience. The public is to trust the medical profession. Allowing the filing of frivolous complaints against doctors refusing to perform abortions would thus undermine the reputation of medical personnel and the confidence of the public in the medical profession. And, should the ECHR eventually recognize a right to euthanasia and assisted suicide, would a similar complaint mechanism be set in place against doctors who refuse to euthanize human beings?

CONCLUSION

We conclude by once again urging all PACE delegates to vote down the motion for a resolution on the McCafferty Report. The Report is a political document, an expression of the population control ideology which pervades the thinking of the world's elites at the beginning of the New Millennium. It is not compatible with the thinking, concerns, and values of the overwhelming majority of the citizens of the Council of Europe.

Respectfully submitted,

ALLIANCE OF ROMANIA'S FAMILIES