



## **Expert Opinion by the Center for Reproductive Rights to the Parliament of the Federal Republic of Germany on the Draft Law of the Federal Government on Improving Information on Abortion (Print No. 19/7693)**

15 February 2019

The Center for Reproductive Rights respectfully submits this expert opinion to the Parliament of the Federal Republic of Germany for its consideration in the context of its review of the Draft Law of the Federal Government on Improving Information on Abortion (Entwurf eines Gesetzes zur Verbesserung der Information über einen Schwangerschaftsabbruch, Drucksache 19/7693, 12.02.2019).

This expert opinion is intended to provide the Parliament of the Federal Republic of Germany with an overview of international human rights standards and comparative European law on the regulation of information provision on abortion care, as is of relevance to its consideration of the Draft Law of the Federal Government on Improving Information on Abortion. As the opinion will outline, almost all European countries allow the public dissemination of medically accurate information on safe and legal abortion by medical providers. This standard European practice is in line with international human rights law and international public health and clinical guidelines, which provide that states should decriminalize the provision of information related to legal abortion and ensure that women can access medically accurate information on safe, legal abortion care including from their doctors.

The opinion is divided into three sections. Section 1 describes standard European practice on the regulation of information about abortion. Section 2 synthesizes Germany's obligations under international human rights law and standards to ensure women's access to safe and legal abortion care including to medically accurate information about abortion. Section 3 provides an overview of international public health and clinical guidelines on regulating access to information on legal abortion care.

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The Center for Reproductive Rights is one of the world's leading legal human rights organizations in the field of women's reproductive rights. For over 25 years the Center has worked to advance laws and policies that ensure the respect, protection and fulfillment of women's human rights in the field of reproductive health. The Center is a recognized expert on comparative law and international human rights law on reproductive rights issues, including on the regulation of abortion, and is regularly requested to provide law and policy makers in a wide range of national contexts with information and expertise in the context of legislative or policy reform processes. For example, in 2017 the Center was requested to provide expert evidence on comparative European law on abortion to the Joint Parliamentary Committee of the Irish Parliament (Joint Oireachtas Committee on the Eight Amendment) which was tasked with recommending to Government and Parliament the form that legislative and constitutional reform of Ireland's abortion law should take. Similarly, the Center's expertise is regularly sought by international and regional policy makers including in United Nations, Council of Europe and European Union fora. For example, recently the Center collaborated with the Council of Europe Commissioner for Human Rights to produce the Council of Europe Issue Paper on Women's Sexual and Reproductive Health and Rights in Europe.<sup>1</sup> The Center also has significant litigation experience and regularly files third party interventions with Courts and quasi-judicial bodies and represents women whose reproductive rights have been violated in complaints procedures.

## **I. Standard European legislative practice is to allow the provision and dissemination of medically accurate information on safe and legal abortion by medical providers**

The standard legislative practice across Europe is to allow medical providers to provide and disseminate medically accurate information on safe and legal abortion.<sup>2</sup> This means that the vast majority of European countries do not prohibit medical providers' provision or dissemination of medically accurate information on legal abortion in the public domain.

Germany appears to be one of only a small group of European Union member states and Council of Europe member states that prohibit advertising or the public dissemination of some or all forms of medically accurate information on legal abortion. Available information indicates that in

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<sup>1</sup> COMMISSIONER FOR HUMAN RIGHTS OF THE COUNCIL OF EUROPE, *Women's Sexual and Reproductive Health and Rights in Europe* (2017), available at <https://rm.coe.int/women-s-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dead>.

<sup>2</sup> This summary is primarily based on a review of the laws on abortion and the criminal and penal codes in place in the 28 EU member states and 47 Council of Europe member states.

addition to Germany only Albania,<sup>3</sup> Greece,<sup>4</sup> Hungary,<sup>5</sup> Liechtenstein,<sup>6</sup> and Russia<sup>7</sup> appear to retain different forms of legal provisions, in criminal codes or other laws, explicitly prohibiting some or all forms of advertising or public dissemination of medically accurate information regarding legal abortion. However, the wording of these provisions does not make it clear whether they also apply to medical providers' public provision of medically accurate information on legal abortion.<sup>8</sup>

The trend across Europe is to reform laws that restrict women's access to safe abortion care and that circumscribe the provision of medically accurate information on abortion by medical

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<sup>3</sup> LIGJI Nr.8045, dt 7.12.1995 "PËR NDËRPRERJEN E SHTATËZANISË" (Law number 8045 dated December 7, 1995, On the Interruption of Pregnancy), Chapter III article 15 (Alb.), <https://abortion-policies.srhr.org/documents/countries/01-Albania-Law-on-Interruption-of-Pregnancy-1995.pdf#page=8>. Article 15 states: "Every kind of propaganda and advertising, direct or indirect, in words or pictures, of institutions, methods, medications and products that cause abortions are prohibited, except in scientific publications destined for doctors and pharmacists" (unofficial translation).

<sup>4</sup> POINIKOS KODIKAS [P.K.] [CRIMINAL CODE] 305 (Greece), <https://abortion-policies.srhr.org/documents/countries/01-Greece-Penal-Code-1951.pdf#page=109>. Article 305 states: "(1) A person who publicly or by circulating printed texts or graphic or pictorial representations advertises or promotes, even indirectly, medicaments or any other articles or methods as enabling a voluntary termination of pregnancy to be performed or, likewise, offers his own services or those of another to perform, or participate in, a voluntary termination of pregnancy shall be liable to a period of imprisonment not exceeding two years. (2) The provision of information or explanations of a medical nature on voluntary termination of pregnancy in family planning centres or in the course of training physicians or persons lawfully empowered to employ methods for the voluntary termination of pregnancy, and the publication of articles and the like in specialized medical and pharmaceutical journals, shall not constitute an offence" (official translation).

<sup>5</sup> 2008. évi XLVIII. Törvény a gazdasági reklámtevékenység alapvető feltételeiről és egyes korlátairól (Act XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities) 17 (Hung.), <https://abortion-policies.srhr.org/documents/countries/07-HUNGARY-COMMERCIAL-ADVERTISING-ACT-2008.pdf#page=7>. Section 17 states: "No advertisement may be disseminated relating to abortions, institutions carrying out abortions, nor to means and procedures for carrying out abortions" (translation from World Health Organization's Global Abortion Policies Database). *See also* 1992. évi LXXIX. törvény a magzati élet védelméről (Act LXXIX of 1992 Law for the Protection of Fetal Life) 15 (Hung.), <https://abortion-policies.srhr.org/documents/countries/01-Hungary-Protection-of-Human-Life-Act-1992.pdf#page=3>. Section 15 states: "It is prohibited to encourage or promote any abortion with any device" (unofficial translation).

<sup>6</sup> STRAFGESETZBUCH [STGB] [Criminal Code], Oct. 22, 1988, § 98a (Liech.), <https://abortion-policies.srhr.org/documents/countries/01-Liechtenstein-Penal-Code-1987.pdf#page=65>. § 98a states: "Wer öffentlich in der Absicht, den Abbruch von Schwangerschaften zu fördern, seine eigenen oder fremde Dienste anbietet oder Mittel, Gegenstände oder Verfahrensweisen ankündigt, anpreist, ausstellt oder sonst zugänglich macht, ist mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bis zu 360 Tagessätzen zu bestrafen." [Unofficial English translation: "Offering One's Services for Abortion or Announcing Means to Obtain an Abortion: Whoever publicly, with the intention to promote abortion, offers his own or someone else's services or announces, recommends or exhibits means, devices, or procedures or otherwise makes them accessible will be sentenced to a prison term of up to one year or a fine of up to 360 days."].

<sup>7</sup> Федеральный закон «О рекламе» от 13.03.2006 N 38-FZ [Federal Law FZ-38 "On Advertising"] art. 7(9) (Russ.), <http://docs.cntd.ru/document/901971356>. Article 7(9) states: "Advertising is not allowed for...9) medical services for induced abortion" (unofficial translation).

<sup>8</sup> See for more information on these laws: *Stellungnahme des Deutschen Juristinnenbunds e.V. (djb) für eine öffentliche Anhörung des Ausschusses für Recht und Verbraucherschutz des Deutschen Bundestages am 27. Juni 2018 zu den Gesetzentwürfen zur Änderung des Strafgesetzbuches – Einschränkung bzw. Aufhebung von § 219a StGB – BT-Drucksache 19/820 (Gesetzentwurf der Fraktion der FDP), BT-Drucksache 19/93 (Gesetzentwurf der Fraktion Die Linke) und BT-Drucksache 19/630 (Gesetzentwurf der Fraktion Bündnis90/Die Grünen)*, 26.06.2018, [https://www.bundestag.de/blob/561796/424295eac3f0e125e1aeda4dcaf99e6c/lembke\\_djb-data.pdf](https://www.bundestag.de/blob/561796/424295eac3f0e125e1aeda4dcaf99e6c/lembke_djb-data.pdf).

providers. Recently, in 2018, Ireland legalized the provision of safe abortion care and repealed legislation prohibiting information provision on abortion. Similarly, in 2018, Belgium repealed criminal prohibitions on the public distribution of information on abortion.<sup>9</sup> There is also a trend towards protecting women's access to legal abortion care and to medically accurate information on abortion by prohibiting the dissemination of false information that is intended to dissuade women from obtaining abortions. For example, in 2017, France adopted provisions to prohibit the public dissemination of false and medically inaccurate information about abortion.<sup>10</sup>

## **II. International human rights law requires states to refrain from criminalizing the provision of medically accurate information on safe and legal abortion care.**

International human rights law and standards guarantee the right to highest attainable standard of physical and mental health,<sup>11</sup> which encompasses the right to sexual and reproductive health.<sup>12</sup> This includes the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding sexual and reproductive health, and the entitlement to unhindered access to a whole range of health facilities, goods, services and information.<sup>13</sup>

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<sup>9</sup> Loi relative à l'interruption volontaire de grossesse, abrogeant les articles 350 et 351 du Code pénal et modifiant les articles 352 et 383 du même code et modifiant diverses dispositions législatives, 15 Octobre 2018, [Law on termination of pregnancy, abrogating articles 350 and 351 of the Criminal Code and modifying articles 352 and 383 of the same Code and modifying various legislative provisions], art. 3 (Belg.), [http://www.ejustice.just.fgov.be/cgi\\_loi/loi\\_a1.pl?language=fr&caller=list&cn=1867060801&la=f&fromtab=loi&sq#Art.350](http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&caller=list&cn=1867060801&la=f&fromtab=loi&sq#Art.350).

<sup>10</sup> Loi No. 2017-347 du 20 Mars 2017 relative à l'extension du délit d'entrave à l'interruption volontaire de grossesse [Law 2017-347 of March 20, 2017 on the extension of offense of obstructing voluntary termination of pregnancy], Art. L 2223-2 (Fr.), <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006072665&idArticle=LEGIARTI000034243401&dateTexte=&categorieLien=id>. Article L2223-2 states: "A penalty of 2 years imprisonment and of a 30 000 euros fine is imposed on the act of preventing or attempting to prevent access to abortion or to information about abortion or to the prior acts outlined in articles L2213 to 2212-8 by any means, including electronically or online, notably by the dissemination or transmission of claims or indications to intentionally mislead someone, for the purpose of dissuasion, about the characteristics or medical consequences of an abortion: 1° by disturbing access to establishments mentioned in article L2212-2, the free circulation of persons within these establishments, or the working conditions of medical or non-medical personnel; 2° by exercising moral and psychological pressure, threats, or any act of intimidation against persons seeking information on abortion, against medical personnel working in the establishments mentioned in article L. 2212-2, or against women who have come to seek an abortion or the persons accompanying them" (unofficial translation).

<sup>11</sup> See International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, art. 12, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (*entered into force* Jan. 3, 1976); Convention on the Elimination of All Forms of Discrimination against Women, *adopted* Dec. 18, 1979, art. 12, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1980), U.N.T.S. 13 (*entered into force* Sept. 3, 1981).

<sup>12</sup> Committee on Economic, Social and Cultural Rights (ESCR Committee), *General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, para. 1, U.N. Doc. E/C.12/GC/22 (2016) [hereinafter ESCR Committee, *Gen. Comment No. 22*].

<sup>13</sup> ESCR Committee, *Gen. Comment No. 22*, *supra* note 12, para. 5. See also Programme of Action of the International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, paras. 7.2, 7.3, U.N. Doc.

States' obligations to guarantee women's right to sexual and reproductive health require them to ensure that women can access available, acceptable, and good-quality reproductive health services and information, including information regarding safe and legal abortion.<sup>14</sup> This means, among other things, that states are required to refrain from censoring, withholding, misrepresenting or criminalizing the provision of information on sexual and reproductive health care, including abortion care.<sup>15</sup> Instead, states should "repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine access by individuals or a particular group to sexual and reproductive health facilities, services, goods and information."<sup>16</sup> Overall, states must ensure that women can easily access evidence-based and medically accurate information on sexual and reproductive health, including on safe abortion care.<sup>17</sup>

International human rights mechanisms have underlined that medically unnecessary legal restrictions on the availability of evidence-based information on sexual and reproductive health, including safe and legal abortion, contradict states' obligations to respect, protect, and fulfil women's right to the highest attainable standard of health. As the Committee on Economic, Social and Cultural Rights has made clear, "[s]uch restrictions impede access to information and services, and can fuel stigma and discrimination."<sup>18</sup> The Special Rapporteur on the right to health has explicitly held that "criminal or other laws to restrict access to sexual and reproductive health information actively reduce access to information and therefore do not meet their obligations to respect the right to health."<sup>19</sup> He has called upon states to "[d]ecriminalize the provision of information relating to sexual and reproductive health" and to "[e]nsure that accurate, evidence-based information concerning abortion and its legal availability is publicly available."<sup>20</sup>

Similarly, the Special Rapporteur on the right to health has outlined that criminal laws and other legal restrictions on sexual and reproductive health care services and information can have numerous harmful consequences. In addition to generating and exacerbating stigma, such laws, for instance, restrict women's ability to access sexual and reproductive health care services and information, including safe and legal abortion care, and they can also discriminate against women by restricting their access to health services and information that they need.<sup>21</sup> He has also found

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A/CONF.171/13/Rev.1 (1995); Beijing Declaration and Platform for Action, The Fourth World Conference on Women, Beijing (4 - 15 September 1995), chapter IV part C (Women and health); World Health Organization (WHO), Constitution of the World Health Organization, *adopted* by the International Health Conference (New York, 19 June - 22 July 1946), *signed on* 22 July 1946 (Off. Rec. Wld Hlth Org., 2, 100), *entered into force on* 7 April 1948; WHO, REPRODUCTIVE HEALTH, [http://www.who.int/topics/reproductive\\_health/en/](http://www.who.int/topics/reproductive_health/en/).

<sup>14</sup> ESCR Committee, *Gen. Comment No. 22*, *supra* note 12, paras. 11-21; ESCR Committee, *General Comment No. 14: The right to the highest attainable standard of health (Article 12)*, para. 12, U.N. Doc. E/C.12/2000/4 (2000).

<sup>15</sup> ESCR Committee, *Gen. Comment No. 22*, *supra* note 12, para. 41.

<sup>16</sup> *Id.* at para. 49(a).

<sup>17</sup> *Id.* at para. 18, 21.

<sup>18</sup> *Id.* at para. 41.

<sup>19</sup> Anand Grover, Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Interim Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health*, para. 64, U.N. Doc. A/66/254 (Aug. 3, 2011) [hereinafter 2011 Special Rapporteur on Health Report].

<sup>20</sup> 2011 Special Rapporteur on Health Report, *supra* note 19, para. 65(e), 65(l).

<sup>21</sup> *Id.* at para. 17.

that the chilling effect created by the stigma associated with criminalization “may prevent health-care workers from seeking training and information on abortion.”<sup>22</sup>

Accordingly, laws that criminalize the public provision of medically accurate information on legal abortion care, including by medical providers, have no justification in international human rights law. No international human rights mechanism has called on a state party to restrict access to such information or to restrict its provision by medical providers. On the contrary, they have repeatedly expressed concerns regarding criminalization of the provision of information regarding sexual and reproductive health and have called on states to remove such prohibitions and instead guarantee women’s access to evidence-based information on safe and legal abortion care, including from their doctors.

Notably, the European Court of Human Rights has held that “[o]nce the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it”<sup>23</sup> and has underscored that European states have “a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion.”<sup>24</sup> The Court has recognized the important role of women’s timely access to relevant and reliable information in guaranteeing their ability to exercise personal autonomy and obtain lawful abortion services. It has condemned the intentional denial and manipulation of abortion-related information.<sup>25</sup>

### **III. International Public Health and Clinical Guidelines recommend the dissemination of medically accurate information on safe and legal abortion care and the decriminalization of information dissemination by medical providers**

International public health and clinical guidelines from the World Health Organization (WHO) and International Federation of Gynecology and Obstetrics (FIGO) underline the need for women to be able to access safe abortion care and accessible and evidence-based information on legal abortion, including from medical providers. Their evidence-based public health and clinical standards recommend that states ensure women can access publicly available medically accurate information on safe and legal abortion care, including from medical providers, and including on where they can obtain such care, in order to reduce negative physical and mental health outcomes for women and to promote and protect women’s health.

The WHO has outlined that “[a]bortion services should be integrated into the health system [...] to acknowledge their status as legitimate health services and to protect against stigmatization and discrimination of women and health-care providers,” and that safe abortion should be “delivered

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<sup>22</sup> *Id.* at para. 32.

<sup>23</sup> *Tysi c v. Poland*, No. 5410/03 Eur. Ct. H.R., para. 116 (2007).

<sup>24</sup> *R.R. v. Poland*, No. 27617/04 Eur. Ct. H.R., para. 200 (2011).

<sup>25</sup> *R.R. v. Poland*, No. 27617/04 Eur. Ct. H.R., paras. 197, 199 (2011); *P. and S. v. Poland*, No. 57375/08 Eur. Ct. H.R., paras. 102, 108, 111 (2012).

in a way that respects a woman's dignity, guarantees her right to privacy and is sensitive to her needs and perspectives."<sup>26</sup> FIGO has reached similar conclusions.<sup>27</sup>

The WHO has clearly underlined that public health evidence demonstrates that restricting legal access to abortion does not decrease the number of abortions or result in significant increases in birth rates.<sup>28</sup> WHO guidelines specify that: "[r]estricting legal access to abortion does not decrease the need for abortion, but it is likely to increase the number of women seeking illegal and unsafe abortions,"<sup>29</sup> or to increase the number of women traveling to obtain safe abortion in neighboring countries, which "creates social inequities."<sup>30</sup> Similarly WHO data demonstrates that, "laws and policies that facilitate access to safe abortion do not increase the rate or number of abortions."<sup>31</sup>

Against this backdrop WHO guidelines stress that "[l]aws and policies on abortion should protect women's health and their human rights,"<sup>32</sup> and that states should adopt comprehensive regulations and policies to ensure women can access safe abortion care.<sup>33</sup> To this end, the WHO has emphasized that "[a]ccess to information is a key determinant of safe abortion" and that "[t]he provision of information about safe, legal abortion is crucial to protect women's health and their human rights."<sup>34</sup> It has specified that "[c]riminal laws, including on the provision of abortion-related information [...] deter many women from requesting information from their regular health-care providers about legal services."<sup>35</sup>

The WHO has therefore recommended that "[s]tates should decriminalize the provision of information related to legal abortion and should provide clear guidance on how legal grounds for abortion are to be interpreted and applied, as well as information on how and where to access lawful services."<sup>36</sup>

The WHO has further affirmed that "[w]omen have a right to be fully informed of their options for health care by properly trained personnel, including information about the likely benefits and potential adverse effects of proposed procedures and available alternatives," and that "[c]ensoring, withholding or intentionally misrepresenting information about abortion services can result in a lack of access to services or delays, which increases health risks for women."<sup>37</sup>

The WHO has also made it clear that restrictions on access to abortion information and services "can deter women from care seeking and create a "chilling effect" (suppression of actions because

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<sup>26</sup> World Health Organization, *SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS* 64 (2d ed. 2012) [hereinafter WHO, 2012 SAFE ABORTION GUIDANCE].

<sup>27</sup> FIGO COMMITTEE FOR THE STUDY OF ETHICAL ASPECTS OF HUMAN REPRODUCTION AND WOMEN'S HEALTH, *ETHICAL ISSUES IN OBSTETRICS AND GYNECOLOGY* 154-55 (2015).

<sup>28</sup> WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 26, at 90.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 9.

<sup>33</sup> *Id.* at 98.

<sup>34</sup> *Id.* at 95.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 97.

of fear of reprisals or penalties) for the provision of safe, legal services.”<sup>38</sup> It has outlined that barriers such as prohibiting access to information on legal abortion care contribute to unsafe abortion because they “deter women from seeking care [...]; cause delay in access to services, which may result in denial of services due to gestational limits on the legal grounds; [and] create complex and burdensome administrative procedures.”<sup>39</sup> As such, the WHO has recommended that “[r]egulatory, policy and programmatic barriers that hinder access to and timely provision of safe abortion care should be removed.”<sup>40</sup>

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<sup>38</sup> *Id.* at 94.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 9.