UN Working Group on the issue of discrimination against women in law and in practice (“UN Working Group”)

Office of the High Commissioners for Human Rights

Geneva, Switzerland

RE: Inputs for the UN Working Group thematic report on women deprived of liberty

Dear Working Group Members:

This submission is intended to support the UN Working Group as it examines discrimination against women in law and practice, with a focus on women deprived of liberty. This submission will share our main findings on women and adolescents in situations of vulnerability resulting from the criminalization of abortion in Latin America.

We provide information concerning the main challenges Latin American States have establishing judicial guarantees in countries with restrictive abortion laws. Our information and analysis are based on increasing rates of breaches of confidentiality and violations to privacy when women and adolescent girls seek abortion care in public health facilities, as described below, regarding questions 1 and 3 of the questionnaire.

**I. Justice system**

**1. What are the main causes for women coming into conflict with the law and facing the associated deprivation of liberty, including pre-trial detention? Which are the groups of women who are most vulnerable and why? Please list the types of offenses for which women, or any particular group of women, are typically charged with, including administrative offenses.**

Studies on the magnitude of abortion show that abortion is a common reproductive experience in women's lives. However, women and adolescent girls’ access to safe abortion care depending on the legal status of abortion. Women living in restrictive legal settings have less access to safe abortion and suffer an increased risk of dying or injuries due to unsafe procedures conducted in an illegal setting. Unsafe abortions are almost exclusively concentrated (97%) in developing countries.[[1]](#footnote-1)

Some of the world’s most restrictive abortion laws are in Latin America. Legal prohibition of abortion does not prevent abortion, but rather it forces women to seek unsafe procedures, which increase risks to their health and life. Restrictions on abortion disproportionately affect marginalized women living in poor urban or rural areas in developing countries. These women and girls have limited access to education, information, contraception, and are at increased risk of being in abusive relationships or victims of sexual violence.

To understand the impact of restrictive regulatory frameworks, Ipas and partners carried out a legal investigation of the factors leading to the investigation, illegal detention and imprisonment of women and adolescents[[2]](#footnote-2). Where abortion is restricted, women in Latin America are criminalized when they seek public health services for treatment from abortion complications. It is generally their health providers who report them to the police.

The health system is the main entry point to the criminal justice system. Women are often prosecuted based on the evidence that is collected in violation of medical secrecy, confidentiality and women’s right to privacy in health care. Law enforcement personnel, prosecutors, and judges punish women who decide to not continue with their pregnancies based on stereotypes and moral values about role of women in the family and motherhood. Judicial and health systems are the main apparatus where states enforce criminal laws to control women and adolescents’ sexuality and moral capacity to make decisions about their lives.

**Provider’s breach of confidentiality is a regional trend violating women’s right to privacy, to health and judicial guarantees during abortion care**

The longstanding provider-patient confidentiality ethical standard is quietly eroding as an alarming number of medical staff across Latin America are reporting women and girls to the police for having abortions when they come in for emergency obstetric care.

Health-care providers are often in the difficult position of choosing between the obligation to protect a patient’s confi­dentiality, and the obligation to obey government guidelines, regulations, and social norms that require them to report patients suspected of having abortions. It should be noted that providers may report a woman to the police even when the law does not require this.

Ipas found that health-care providers in some Latin American countries, including Brazil, El Salvador, Bolivia, Mexico, and Argentina have become the entry point for women into the criminal justice system. As a result, fear of being reported prevents women and girls from seeking the medical attention they need for life-threatening abortion complications. This leads to high rates of maternal mortality and morbidity.

**3. What are the main challenges for women’s access to justice, including, for example, the availability and quality of legal representation, the ability to pay for bail, and the existence of gender stereotyping and bias in judicial proceedings?**

Several countries have public policies and laws that criminalize behaviors in the field of sexuality and reproduction. This disproportionately affects the most marginalized groups by violating their fundamental human rights. The use of criminal law to address public health issues has a devastating impact on women’s health, rights, and wellbeing. The criminalization of sexual autonomy and reproductive decision-making discriminates against women, adolescent girls, and sexual minorities.[[3]](#footnote-3)

In 2011, the Special Rapporteur on the right of every person to the enjoyment of the highest possible level of health physically and mentally stated that criminalization is not just a breach of the duty of the State to prevent discrimination, but it also creates an atmosphere where affected individuals are significantly "disempowered" and cannot attain the full realization of their human rights. According to the Rapporteur, this includes laws that criminalize the transmission of HIV, homosexuality, sex work, and abortion.

Health providers often assume a woman’s guilt. Ipas has documented cases of health professionals testifying against women, girls, and adolescents in courts. In some Mexican states, law enforcement, prosecutors, and judges have applied aggravated penalties against women who induce abortion. They were charged and investigated for homicide aggravated by kinship, clearly demonstrating human rights violations to due process.

In Brazil there is an increase of health professionals reporting cases of abortion in the public health services, and subsequent flagrant arrests of women. In some cases, women were handcuffed to hospital beds shortly after surgical procedures. There are also cases where police investigations used private medical records as evidence against the women served[[4]](#footnote-4). This trend was confirmed in a legal investigation carried out in 2010 in the state of Rio de Janeiro.[[5]](#footnote-5) The study showed the selective and discriminatory impact of the application of criminal law by State agents toward the most marginalized women. The legal analysis of the data revealed asymmetries of class, color, schooling and age group of the women charged, and concluded that the highest incidence of judicial cases enters by military police, were based on complaints made by professionals in health services (Oliveira, 2012; Ipas,2012). It was also verified that, while no woman or adolescents were sentenced to prison, there were several cases of detention in flagrant and preventive prison in public health facilities and police stations.

For example, in one case in Mexico, the prosecutor who carried out the investigation for the crime of rape and sexual abuse was the one who initiated ex officio the judicial proceeding for an illegal abortion against that same girl. There are also cases of women reported for abortion in states in Mexico where abortion is legal. This means that even if abortion is legal, it is often unavailable because of the government’s neglect in providing good quality and information on legal abortion services (CLACAI, 2018).

**Human rights violations to judicial guarantees and due process of law**

Women and adolescent girls are frequently imprisoned without knowledge of their rights, including the right to obtain legal representation or other elements of a fair trial. This unjustly deprives them of their freedom and other fundamental rights, including their access to medical care.

Research shows that during the course of judicial proceedings the treatment given by the criminal justice system is biased, with moral judgments and abuse of women and adolescents who have abortions. In the case of adolescents, complaints are levied by people in their inner circle social or family. In one case, a teenager was reported by a professional of the Council of Children and Adolescent’s Rights, a body that in theory, should ensure the protection of the rights of children and adolescents[[6]](#footnote-6).

Children and adolescents are considered human beings under development and are thereby subject to special protection of the State, family and society, as established in the law. The self-incrimination through "confession" is characterized as a situation of coercion during health care, which does not respect the right of defense and the principle of the presumption of innocence and violates the right to due process of law. The women and adolescents accused have legal right to be heard, to be informed, to keep silence about the facts, and not to produce evidence against themselves. The delay of judicial processes helps to create a scenario of intersectional and multiple forms of discrimination, institutional violence, torture, mistreatment and treatment cruel during abortion care.

For example, in Mexico, abortion is considered a crime in all entities, with certain exceptions. The only cause under which abortion is legal throughout the country is when the pregnancy is the product of a sexual violation, and in Mexico City is allowed abortion by the will of the woman until week 12 of gestation. According to GIRE’s report: “Most of the entities impose prison sentences for women who seek an abortion, as well as economic fines. Some establish alternative sanction measures, such as the application of treatments to "help women overcome effects and consequences caused by induced abortion "or reaffirm" human values for motherhood "or working in favor of the community.” [[7]](#footnote-7)

In El Salvador, many of the women and adolescents who have suffered obstetric emergencies or extra-hospital deliveries, spontaneous abortions report that when they arrive at the health center with heavy hemorrhages or in a state of shock they are violated, stigmatized and re-victimized by medical personnel precisely because of the type of complication they have had during pregnancy. In addition, the majority of women, and adolescents who have been prosecuted for the crime of abortion and for aggravated homicide related to abortion, obstetric complications or extra-hospital births, they have been humiliated, coerced, cheated and mistreated by the medical staff that attends them, by the police, and agents of the Public Ministry, and even, in many cases, they have been deceived to confess the crime they have allegedly committed. In turn, there have been cases in which the authorities do not inform the families of the defendants that they have the right to refrain from reporting and declaring against their daughters, sisters or granddaughters, and then use that statement as evidence in the trial of background. Women, girls and adolescents are often questioned by the health professionals themselves who then testify against them in the judicial process (CLACAI, 2018).

In countries like Brazil, providers can be required to share con­fidential information about suspected illegal abortions during criminal investigations or legal proceedings. For example, the police may obtain a court order from a judge mandating the release of an individual’s medical records. Or a judge may sub­poena a doctor to testify in a hearing about a patient.

The culture of suspicion cre­ated by laws or practices that disclosure confidential patient information puts women and girls seek­ing medical care at risk of investigation, prosecution, and illegal detention, even if they have not had an illegal abortion. Woman or girls who display any post abortion-related symptom are very often assumed to have induced an abortion. This creates serious legal and health concerns for women who have spontaneous miscarriages, which often have very similar symptoms to post abortion symptoms.

The lack of respect for the judicial guarantees of women and adolescents has increasingly become the general rule for complaint and judicial investigation for crimes related to abortion in those countries where abortion is criminalized like El Salvador and even in those in which access to safe and legal abortion is allowed under certain circumstances, like Mexican states, Argentina and Brazil.

**Criminalization of abortion causes women to undergo forced pregnancy and coerced motherhood**

When it comes to criminalizing abortion, the State intends to pursue two main objectives that, according to the evidence, are not met even though this criminalization takes effect. On the one hand, with criminalization, the State aims to dissuade women, girls and adolescents from abandoning the intention to terminate and, on the other hand, through punishment, aims to convince or coerce women, girls and adolescents to assume their reproductive and maternal role in society.

The profile of women and adolescent girls criminalized also indicates discrimination in the application of the law in practice. The criminalization of abortion limits access to health services and has a disproportionate impact on women, girls, and adolescents in vulnerable situations.[[8]](#footnote-8)

The fear of being reported, criminalized, and incarcerated can harm mental health and is equivalent to torture, inhumane, and degrading treatment to these women and adolescents. The cruel, inhumane or degrading treatment is not restricted to acts that cause physical pain, but also includes mental suffering[[9]](#footnote-9), especially when a woman is forced to carry her pregnancy to term if it has been the product of a rape or sexual violence.

Harmful consequences that can particularly affect the mental health of women, girls and adolescents include anxiety, anguish, severe depression and / or post-traumatic stress when forced to continue an unwanted pregnancy. More recent data on women’s experiences after receiving or being denied access to abortion has shown that:"Obtaining a desired abortion was not associated with mental health damage. Compared to obtaining an abortion, having denied a desired abortion was associated with the presence of more symptoms of anxiety and low self-esteem a week after the denial of service.”[[10]](#footnote-10)

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**The Committee on the Rights of the Child General comment No. 20 (2016) on the implementation of the rights of the child during adolescence** - CRC/C/GC/20 has established that:

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60. There should be no barriers to commodities, information and counselling on sexual and reproductive health and rights, such as requirements for third-party consent or authorization. In addition, particular efforts need to be made to overcome barriers of stigma and fear experienced by, for example, adolescent girls, girls with disabilities and lesbian, gay, bisexual, transgender and intersex adolescents, in gaining access to such services. The Committee urges States to decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services, review legislation with a view to guaranteeing the best interests of pregnant adolescents and ensure that their views are always heard and respected in abortion-related decisions.

**The Committee on Economic Social and Cultural Rights General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights**) established that:

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1. States parties are under immediate obligation to eliminate discrimination against individuals and groups and to guarantee their equal right to sexual and reproductive health. This requires States to repeal or reform laws and policies that nullify or impair certain individual’s and group’s ability to realize their right to sexual and reproductive health. A wide range of laws, policies and practices undermine the autonomy and right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health, for example criminalization of abortion or restrictive abortion laws. States parties should also ensure that all individuals and groups have equal access to the full range of sexual and reproductive health information, goods and services, including by removing all barriers that particular groups may face.
2. Examples of violations of the obligation to respect include establishment of legal barriers impeding individuals’ access to sexual and reproductive health services, such as the criminalization of women undergoing abortions and the criminalization of consensual sexual activity between adults. Banning or denying access in practice to sexual and reproductive health services and medicines, such as emergency contraception, also violates the obligation to respect. Laws and policies which prescribe involuntary, coercive or forced medical interventions, including forced sterilization; mandatory HIV/AIDS, virginity or pregnancy testing, also violate the obligation to respect.

**Criminalization of self-induced abortion with pills in countries with restrictive abortion laws**

The fear of being persecuted, prosecuted, and imprisoned limits the ability of women, girls and adolescents to seek the medical attention they need after attempting to terminate a pregnancy or even after a miscarriage. This fear makes it more difficult to exchange accurate and reliable information about the safest methods of induced abortion, including medications such as mifepristone and misoprostol. Thus, criminalization makes it more complicated for women, girls and adolescents to obtain safe methods and forces them to resort to obtaining the necessary drugs through less reliable sources, such as clandestine sales or the Internet.[[11]](#footnote-11)

Brazil is a case example of women incarcerated for trying to buy abortion pills in the internet. Several studies confirmed that (i) abortion induced with misoprostol is safer than when induced by other means, and (ii) a reduction in the complications of unsafe abortion is observed over time, in parallel with an increase in the sales of misoprostol. Misoprostol, which was originally developed to treat certain gastric ulcers, effectively treats incomplete abortion or miscarriage, as well as other complications of pregnancy, including postpartum hemorrhage. It is also used by itself or with another medicine, mifepristone, for inducing abortion. The drug is especially useful in developing countries where maternal mortality due to postpartum hemorrhage, incomplete abortion and miscarriage is high. It’s inexpensive, doesn’t require refrigeration and offers an alternative to treatment by manual aspiration. The World Health Organization published its second edition of *Safe abortion: Technical and policy guidance* *for health systems* in June 2012, including many important new guidelines for medical abortion provision. Significantly, the guidance stresses that women should have the choice to access abortion methods.

Due to restrictive law on abortion in Brazil, and due to National Regulatory Agency - Anvisa

restrictive regulations concerning the prohibition of information share and misoprostol sales in

pharmacies, both young and adult women who use misoprostol for abortion, have irregular access, often buying it from the parallel market (hence subject to using fake drugs), and have no official

information on how to use the drug, facing risks to their reproductive health and lives.

Women’s profile and how the justice system deals with these cases were revealed in a research carried out by Anis Institute and the University of Brasilia[[12]](#footnote-12). They often decide with their partners and get inaccurate information on drug dosage from the drug seller. When they seek care in public health facilities some of them are reported to the police.

The research analyzed 10 judicial cases and police investigations against women and misoprostol

sellers and have found that 70% of women prosecuted were born in North and Northern region and

have stable relationships, their literacy rate is low and the majority is of domestic workers and

traders. The main outcomes were: 1. Young women in steady relationships use misoprostol at

home or with the assistance of drug vendors. Of the seven women indicted, three were reported

upon arrival at the public hospital to finalize abortion; 2. The drug vendors work at the community

drugstore and are local agents for the sale of misoprostol. They instruct women on how to use the

drug and how to prevent infections but refuse to provide them with care in case of emergency.

Traffickers operate via the internet and have a larger inventory of drugs; 3. There were two cases

of maternal mortality due to the combination of high risk methods, such as a vaginal probe and

misoprostol. The main causes for maternal mortality are the delay in seeking medical care, as

women fear criminal prosecution and the combined use of misoprostol with high risk methods

**Conclusion: Abortion law with detention punishment perpetuates stigma, discrimination, and violence against women and adolescent girls**

The imbalanced gender and powered relations between women and providers is also a contributing factor to discrimination and institutional obstetric violence against women and adolescents in health care when providers report women to police. Laws that oblige providers to report women for abortion must be eliminated because they are discriminatory and are fueled by stigma and values around women’s main role as mothers and procreation in societies – forced pregnancy is already recognized a form of gender-based violence in countries where abortion is criminalized, according to CEDAW General Recommendation 35:

**General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, July 14 2017:**

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“18. Violations of women’s sexual and reproductive health and rights, such as forced sterilizations, forced abortion, forced pregnancy, criminalization of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.”

The criminalization of abortion produces and reinforces stigma against women. Understanding how this occurs is important in understanding how law and culture meet and especially how the law can replicate oppressive cultural patterns to social groups. Also, criminalization of abortion reflects the use of criminal law to perpetuate gender inequality and discriminate against women. Penal Code provisions criminalizing abortion are a legal representation of gender-based violence institutionalized by the punitive power of the state.

We recommend to the UN Working group to develop clear global human rights standards on the right to privacy and confidentiality in abortion care to avoid detention in flagrant, arrest in hospitals and incarceration when providers found evidence of abortion in women and adolescents’ bodies or extracted confessions in breach of confidentiality and medical secrecy. Police investigation or criminal proceedings should not be initiated based on confidentiality breaches that can lead to illegal arrests in flagrant or prosecutions. Providers’ main role is to provide emergency obstetric care, respect patient’s human rights and to avoid more physical or psychological harm to women or adolescents seeking health care.

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2. O’Neill Institute for National and Global Health Law & Ipas. Betraying Women: Provider duty to report: Legal and human rights implications for reproductive health care in Latin America. Chapel Hill, NC: Ipas; 2016. Available at <http://www.ipas.org/en/Resources/Ipas%20Publications/Betraying-women-Provider-duty-to-report.aspx>. [↑](#footnote-ref-2)
3. Diya Uberoi, Maria de Bruyn & Beatriz Galli (2012): Using human rights to address consequences of criminal laws on sexuality and reproductive autonomy, The International Journal of Human Rights, DOI:10.1080/13642987.2011.652366 [↑](#footnote-ref-3)
4. Galli, B. (2011), “Negative Impacts of Abortion Criminalization in Brazil: Systematic Denial of Women’s Reproductive Autonomy and Human Rights”, *University* *of Miami* *Law* *Review*, 65: 969. [↑](#footnote-ref-4)
5. Ricardo, J., R. Noronha y C. Alves Vestena (2012), “Trayectorias de mujeres incriminadas por aborto en el Tribunal de Justicia del Estado de Río de Janeiro: un análisis de los actores y de los discursos del sistema de Justicia Criminal” (Trajectories of women criminalized for abortion in the Tribunal of Justice of Rio de Janeiro State, an analysis of actors and discourses in the Criminal Justice System) , en F. L. de Oliveira (org.), *Justiça* *em foco: estudos empíricos*, Río de Janeiro, FGV. Accessible in: [www.bibliotecadigital.fgv.br](http://www.bibliotecadigital.fgv.br) [↑](#footnote-ref-5)
6. Oliveira, F. L. de (org.) (2012), *Justiça* *em foco: estudos empíricos* (Justice in Focus: empirical studies*)*, Río de Janeiro, FGV, Accessible in: [www.bibliotecadigital.fgv.br](http://www.bibliotecadigital.fgv.br)

   Ipas (2012), “Mulheres incriminadas por aborto no Rio de Janeiro: diagnostico a partir dos atores do sistema de justiça” (Women incriminated for Abortion in Rio de Janeiro: analysis from Justice System actors), Grupo de Pesquisa Direitos Humanos – Poder Judiciário e Sociedade - UERJ, Río de Janeiro. [↑](#footnote-ref-6)
7. GIRE, Maternidad o Castigo, Criminalización del Aborto en Mexico (Criminalization of Abortion in Mexico.), 2018. Acessible in: <http://criminalizacionporaborto.gire.org.mx/assets/pdf/Maternidad_o_castigo.pdf> [↑](#footnote-ref-7)
8. Galli, Beatriz and Viana, Ana Paula, O Caso Elineide: Reflexões Sobre as Barreiras Existentes Ao Acesso a Interrupção Legal Da Gravidez Por Risco a Saúde Da Mulher (The Case Elineide: (Reflections on Existing Barriers to Women's Access to Legal Pregnancy Termination Due to Health Risk) (October 1, 2013). Available at SSRN: <https://ssrn.com/abstract=2484238> or [http://dx.doi.org/10.2139/ssrn.2484238](https://dx.doi.org/10.2139/ssrn.2484238)  [↑](#footnote-ref-8)
9. Human Rights Council, I Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57.January 5 2016. Accesible at: <http://undocs.org/en/A/HRC/31/57> [↑](#footnote-ref-9)
10. Woodruff K [Gould H](https://www.ansirh.org/staff-members/heather-gould) [Biggs MA](https://www.ansirh.org/staff-members/m-antonia-biggs) [Foster DG](https://www.ansirh.org/staff-members/diana-greene-foster) [Attitudes Toward Abortion After Receiving vs. Being Denied an Abortion in the USA](https://link.springer.com/article/10.1007%2Fs13178-018-0325-1). March 2018. Journal of Sexuality Research and Social Policy; <https://doi.org/10.1007/s13178-018-0325-1>. Because of the ideological controversies over abortion, and the difficulties of study design, before the Turnaway Study, there was little quality research on the physical and social consequences of unintended pregnancy for women. Most of the research that did exist focused on whether abortion causes mental health problems such as depression and post-traumatic stress disorder, or alcohol and drug use.That body of work often used inappropriate comparisons groups—comparing, for example, women who obtain abortions with those who continue their pregnancies to term by choice—and used retrospective designs that depended on women’s reporting of unintended pregnancies and abortions in hindsight. Such comparisons are inherently biased and paint a distorted picture of life following an elective abortion or pregnancy continuation. <https://www.ansirh.org/research/turnaway-study> [↑](#footnote-ref-10)
11. APRIL L. CHERRY, Shifting Our Focus from Retribution to Social Justice: An Alternative Vision for the Treatment of Pregnant Women Who Harm Their Fetuses, 28 J.L. & HEALTH 6, 24 (2015) [↑](#footnote-ref-11)
12. DINIZ, Debora e MADEIRO, Alberto. Cytotec and abortion: the police, the vendors and women. *Ciênc. saúde coletiva* [online].

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    81232012000700018&lng=pt&nrm=iso&tlng=en [↑](#footnote-ref-12)