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Ms Silvia Pimentel  
Chairperson  
UN Committee on the Elimination of  
Discrimination against Women  
Office of the United Nations  
High Commissioner for Human Rights  
UNOG-OHCHR  
1211 Geneva 10  
Switzerland

30 January 2013

Dear Ms Pimentel,

I am writing with regard to the proposed General Recommendation on access to justice, which will be considered during a half-day of general discussion on 18 February 2013. I would be grateful if you would distribute this letter to the other members of the Committee on the Elimination of Discrimination against Women (the Committee) and make it available on the Committee's webpage.

Amnesty International welcomes the concept note of the Committee on access to justice in light of obligations arising from the United Nations (UN) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in preparation of a potential General Recommendation on this topic. All the issues covered in the concept note are essential to a proper understanding of gendered discrimination in access to justice, and Amnesty International strongly supports their full examination in the forthcoming General Recommendation. The organization also looks forward to contributing to the debate on these issues going forward. This short submission will focus on one particular issue which, in our experience, is often not sufficiently explored in treaty body jurisprudence and guidance: the impact on women's access to justice discriminatory stereotyping, whether this stereotyping is perpetuated in law or in practice.

### **Link Between Discriminatory Norms and Vulnerability**

It is essential that the Committee explore the lack of access to justice arising from laws and policies that are themselves not compliant with CEDAW obligations, and the specific barriers to access to justice faced by women subject to these laws.

Discriminatory laws and policies have the direct result – in many cases the purpose – of enforcing the stereotypes on which they are built, subjecting women to discrimination and abuse both at the hands of the state and non-state actors using the law as a shield to justify rights-violating practices. This creates a vicious cycle of inequality and impunity that is at the very heart of women's unequal access to justice.

It is worth emphasising that laws based on discriminatory stereotyping are in themselves in violation of CEDAW provisions. International human rights law establishes a State obligation to take all necessary steps to give effect to the rights enshrined in the treaties, including the rights to equality and non-discrimination.<sup>1</sup> In addition, CEDAW sets out an obligation to "eliminate[e] prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles

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<sup>1</sup> See, for example, International Covenant on Civil and Political Rights, arts. 2(2), 26; International Covenant on Economic, Social and Cultural Rights, art. 2(1); Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW), art. 2; International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(1); Convention on the Rights of the Child, arts. 2 and 4.

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for men and women.”<sup>2</sup> Read in conjunction with the general obligation to take all necessary steps to eliminate discrimination, and to give effect to human rights, States Parties to CEDAW have a specific obligation to eliminate laws and practices based on discriminatory forms of gender stereotypes, including where these stereotypes apply to subgroups of women, such as, for example, lesbian women, female sex workers, single unmarried women, or any other subgroup.

In its concept note, the Committee lays out some of the concerns regarding fair trial guarantees that are linked to discriminatory stereotyping. This is crucial, and should include a consideration of the additional barriers to fair trial for women who are stigmatized by the perceived lack of conformity with prevalent gender norms.

In many countries in the world, there are entrenched expectations that all women should be married and be the core anchor for the family. This expectation is so strong that even when women are single as a result of being widowed or for other reasons, they are subjected to harmful, even deadly practices. The assumption that the essential role for all women is at the centre of the family means that women who are single, for any reason, are often subjected to discrimination, both *de facto* and *de jure*. This assumption also creates a climate in which women's personal lives and choices are interrogated if they do not appear to conform to this stereotyping of what a woman's essential role is. As a result, women who fail to conform find that assumptions and judgments are made about their intimate lives and many face social exclusion, discrimination, persecution and violence.

It will also be important to explore the impact of discriminatory laws and policies on women who are alleged perpetrators of conduct that has been criminalised as a direct result of discriminatory stereotyping.

This dynamic is particularly prominent where women and girl's sexual autonomy is involved, as discriminatory stereotyping is rife in the area of sexuality and reproduction. Laws and policies that punish sex work, same-sex sexual conduct, abortion, pregnancy and pregnant women, HIV exposure and transmission, consensual adult sexual conduct outside of marriage, adolescent sexuality, and provision of sexual and reproductive health services and information, are examples of state regulation that specifically targets and disproportionately affects women, girls and gender non-conforming individuals, denying them equal access to justice.

In this connection, Amnesty International highlights that the right to non-discrimination is enshrined in all international and regional human rights treaties,<sup>3</sup> and it is by now a well-established notion in international human rights law that the general prohibition of discrimination includes a prohibition of discrimination on the grounds of sexual orientation (as well as gender identity).<sup>4</sup> For this reason, courts and other adjudicating

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<sup>2</sup> CEDAW, art. 5(a).

<sup>3</sup> See, for example, International Covenant on Civil and Political Rights, art. 2(1); International Covenant on Economic Social and Cultural Rights, art. 2(2); Convention on the Rights of the Child, art. 2; African Charter on Human and Peoples' Rights; art. 2; American Convention on Human Rights, art. 1; European Convention on Human Rights, art. 14.

<sup>4</sup> See, for example, Human Rights Committee, *Toonen v. Australia*, Views, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994) ¶ 8.7; Human Rights Committee, *Young v. Australia*, Views, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/2000 (2003) ¶10.4; Human Rights Committee, 105th sess., *Concluding Observations: Armenia*, U.N. Doc. CCPR/C/ARM/CO/2 (advance version) (2012) ¶ 10; Human Rights Committee, 105th sess., *Concluding Observations: Kenya*, U.N. Doc. CCPR/C/KEN/CO/3 (advance version) (2012) ¶¶ 8-9; Human Rights Committee, 105th sess., *Concluding Observations: Lithuania*, U.N. Doc. CCPR/C/LTU/CO/3 (advance version) (2012) ¶ 8; Human Rights Committee, 105th sess., *Concluding Observations: Maldives*, U.N. Doc. CCPR/C/MDV/CO/1 (advance version) (2012) ¶ 8; Human Rights Committee, 103d sess., *Concluding Observations: Jamaica*, U.N. Doc. CCPR/C/JAM/CO/3 (2011) ¶¶ 8-9; Human Rights Committee, 103d sess., *Concluding Observations: Malawi*, U.N. Doc. CCPR/C/MWI/CO/1 (2011) ¶ 7; Human Rights Committee, 100th sess., *Concluding Observations: Poland*, U.N. Doc. CCPR/C/POL/CO/6 (2010) ¶¶ 5, 8; Human Rights Committee, 83d sess., *Concluding Observations: Kenya*, U.N. Doc. CCPR/CO/83/KEN (2005) ¶ 27; Human Rights Committee, 83d sess., *Concluding Observations: Greece*, U.N. Doc. CCPR/CO/83/GRC (2005), paras. 5, 19; Human Rights Committee, 82d sess., *Concluding Observations: Poland*, U.N. Doc. CCPR/CO/82/POL (2004) ¶¶ 5, 18; Human Rights Committee, 81st sess., *Concluding Observations: Namibia*, U.N. Doc. CCPR/CO/81/NAM (2004) ¶ 22; Human Rights Committee, 79th sess., *Concluding Observations: Philippines*, U.N. Doc. CCPR/CO/79/PHL (2003) ¶ 18; Human Rights Committee, 78th sess., *Concluding Observations: El Salvador*, U.N. Doc. CCPR/CO/78/SLV (2003) ¶ 16; Committee on Economic, Social and Cultural Rights, 34th sess., *Concluding Observations: China*, U.N. Doc. E/C.12/1/Add.107 (2005) ¶¶ 73,

bodies have been particularly careful in examining the motives for distinctions based on sexual orientation or expression. The Human Rights Committee has been adamant that distinctions made between those in different-sex and those in same-sex couples must be “reasonable and objective.”<sup>5</sup> The European Court of Human Rights has applied a similar logic, requiring particularly “convincing and weighty” reasons to justify distinctions in treatment resulting from an individual’s sexual orientation.<sup>6</sup>

Besides being based on discriminatory stereotypes, most laws and policies aimed at policing or restricting sexual or reproductive conduct are also vague and over-reaching, contrary to human rights principles of fairness and procedural guarantees of legal certainty. Further, they have not been proven to advance the purported public health or so-called ‘morality’ goals claimed. Rather, the potential punishment of sexuality and reproduction creates and perpetuates discrimination against persons engaging in, or perceived to be engaging in, the criminalised conduct. This discrimination, in turn, impairs access to justice and the enjoyment of other fundamental human rights.

### **Punitive Laws in the Area of Sexual and Reproductive Conduct**

Over the years, states have increasingly used punitive laws and policies to regulate the bodily autonomy of certain individuals and specific manifestations of sexuality, gender, and reproduction. Those who transgress accepted notions of sexuality and gender norms are seen as particularly threatening to social order, which often is, at least partially, built on a gendered vision of appropriate and inappropriate behaviour and roles.<sup>7</sup> The punitive laws and policies put in place by governments to control these individuals have a detrimental effect on everyone, in particular women.<sup>8</sup> For example, laws that punish women for consensual sex outside marriage place constraints on all women, including monogamous heterosexual married women, because these laws derive from, and perpetuate, a notion of women as dependent on men, and marriage as the main source of life satisfaction for women.

Several UN human rights bodies<sup>9</sup> and experts have expressed their specific concern regarding states’ use of criminal or punitive measures in the areas of sexuality and reproduction. Notably, the UN Special Rapporteur

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78(a) (Hong Kong Special Administrative Region); Committee on Economic, Social and Cultural Rights, 28th sess., *Concluding Observations: Trinidad and Tobago*, U.N. Doc. E/C.12/1/Add.80 (2002) ¶ 14; Committee on Economic, Social and Cultural Rights, 27th sess., *Concluding Observations: Sweden*, U.N. Doc. E/C.12/1/Add.70 (2001) ¶ 8; Committee against Torture, 33d sess., *Concluding Observations: Argentina*, U.N. Doc. CAT/C/CR/33/1 (2004) ¶ 6(g); Committee against Torture, 29th sess., *Concluding Observations: Egypt*, U.N. Doc. CAT/C/CR/29/4 (2002) ¶¶ 5(e), 6(k); Committee against Torture, 29th sess., *Concluding Observations: Venezuela*, U.N. Doc. CAT/C/CR/29/2 (2002) ¶ 10(d); Committee on the Rights of the Child, 49th sess., *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CRC/C/GBR/CO/4 (2008) ¶¶ 24, 25(b).

<sup>5</sup> See, for example, *Toonen v. Australia* ¶¶ 8.5-8.6.

<sup>6</sup> *Case of Lustig-Prean and Beckett v. United Kingdom*, Judgement, App. Nos. 31417/96, 32377/96 (Eur. Ct. H.R. 3d section 27 September 1999) ¶ 103. See also *id.* ¶ 82 (“when the relevant restrictions concern ‘a most intimate part of an individual’s private life,’ there must exist ‘particularly serious reasons’ before such interferences can satisfy the requirements of Article 8 § 2 of the Convention”); *Case of Smith and Grady v. United Kingdom*, Judgement, App. Nos. 33985/96, 33986/96 (Eur. Ct. H.R. 3d section 27 September 1999) ¶¶ 89, 110 (same); *Case of Perkins and R. v. United Kingdom*, Judgement, App. Nos. 43208/98, 44875/98 (Eur. Ct. H.R. 4th section 22 October 2002) ¶ 38 (investigation of servicemembers’ sexual orientation and their dismissal constituted direct interference in their private lives and could not be justified as “necessary in a democratic society”); *Case of Beck, Copp and Bazeley v. United Kingdom*, Judgement, App. Nos. 48535/99, 48536/99, 48537/99 (Eur. Ct. H.R. 4th section 22 October 2002) ¶ 51 (same).

<sup>7</sup> See Clare Sears, *Introduction: Sexuality, Criminalisation, and Social Control* (editorial), in *Social Justice* (22 March 2010).

<sup>8</sup> “Penalization mechanisms are embedded in a range of legal and administrative policy measures which are both explicitly targeted and more indirect.” Emma Blower, Kate Donald and Smriti Upadhyay, *The Human Rights Implications of Contemporary Patterns of Social Control*, 4 *Journal of Human Rights Practice* 2, 208 (2012). See also Lynn M. Paltrow and Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States 1973-2005: Implications for Women’s Legal Status and Public Health*, *Journal of Health Politics, Policy and Law*, Vol. 38, No. 2, April 2013.

<sup>9</sup> Substantial analysis and work has also been completed by regional human rights bodies such as the Organization of American States and inter-governmental organizations such as the Council of Europe, among others.

on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Special Rapporteur on health) has observed that criminalization of sexual and reproductive conduct is discriminatory, impedes the public health goals that ostensibly justify the intervention, impairs human dignity, interferes with autonomous decision-making and creates and perpetuates stigma. In two separate reports, one to the Human Rights Council in 2010 and the other to the General Assembly in 2011, the Special Rapporteur has analyzed the negative impact of punitive approaches to many of the above-referenced sexual and reproductive health and rights issues on the realization of the right to health, using data and examples from across the world, and applying an international human rights law lens.<sup>10</sup> These reports conclude that the criminalization of sex work, drug use, abortion, same-sex sexual conduct, and access to contraception, is seriously detrimental to the ability to enjoy human rights for everyone, in particular women and girls.

For example, while sex workers do indeed face increased health risks, these risks are less related to the act of sex work itself, and more to the policies, practices, and cultural biases that limit the health decisions and choices for those engaging in sex work. In other words, while sex work inherently carries certain risk factors, these are exacerbated manifold by the threat of criminal sanctions and stigma attached to sex work in many jurisdictions. The criminalization of sex work adds to rather than subtracts from the risk of police abuse and extortion. Additionally, the use of condoms as evidence in criminal cases against sex workers has shown to detract from a sex worker's ability to protect themselves against HIV and other sexually transmitted infections.

Further, in October 2012, the UN Working Group on the issue of discrimination against women in law and in practice issued a statement condemning the criminalization of adultery, noting that laws that assign criminal sanctions to adultery are inherently inconsistent with human rights norms and in practice have a more detrimental effect on women than on men.<sup>11</sup>

Where a legislature acts to criminalize a particular conduct such as adult consensual sexual relations, it is reasonable to infer that it does so intentionally<sup>12</sup> and in knowledge of the consequences that criminalization will have on those the law targets. As a general proposition, the legislature is presumed to intend the consequences that can reasonably be assumed to follow the laws it adopts.<sup>13</sup> Governments must therefore be held accountability both for their failure to reform discriminatory but also for passing new laws based on discriminatory stereotyping, such as for example laws that criminalize sexual and reproductive conduct.<sup>14</sup>

#### **Access to Justice for Disadvantaged Groups**

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<sup>10</sup> See Report of the Special Rapporteur on the right to the highest attainable standard of health, UN General Assembly, 66<sup>th</sup> Sess., 3 August 2011, UN Doc. A/66/254; and Report of the Special Rapporteur on the right to the highest attainable standard of health, Human Rights Council, 14<sup>th</sup> Sess., 27 April 2010, UN Doc. A/HRC/14/20.

<sup>11</sup> "Joint Statement by the UN Working Group on discrimination against women in law and in practice", 18 October 2012. At: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12673&LangID=E>

<sup>12</sup> The Committee against Torture explained that "elements of intent and purpose in article 1 [of the UN Convention against Torture] do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances." (UN Committee against Torture, General Comment No. 2, Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, 24 January 2008, paragraph 9.)

<sup>13</sup> See, for example, Peter de Cruz, "A Comparative Study of Statutory Interpretation," in *Comparative Law in a Changing World*, 2d ed., 1999, pp. 265-92. See also Claire M. Germain, "Approaches to Statutory Interpretation and Legislative History in France," *Duke Journal of Comparative and International Law*, vol. 13 (2003), pp. 195-206.

<sup>14</sup> See: UN Committee against Torture, Concluding Observations on Nicaragua, UN Doc. CAT/C/NIC/CO/1, 10 June 2009. Amnesty International, Nicaragua: The Impact of the Complete Ban of Abortion in Nicaragua: Briefing to the United Nations Committee against Torture, AI Index AMR 43/005/2009, 29 April 2009. At: <http://www.amnesty.org/en/library/info/AMR43/005/2009/en>

In 2007, the Rapporteurship on the Rights of the Women of the Inter-American Commission on Human Rights published her first report on access to justice for women victims of violence.<sup>15</sup> The report was followed by more specialized reports focusing on access to justice for women victims of sexual violence or victims of violence against women and girls in sub-regions of the continent.<sup>16</sup> These reports make clear that discriminatory stereotyping impedes access to justice for victims of violence generally, and in particular for those women who experience intersectional discrimination.

In this connection, the Rapporteurship notes that some women are more vulnerable than others to human rights violations, specifically fair trial guarantees, “because little or no importance is attached to their rights” and that in many cases “racism figures prominently as one of the underlying causes of the contempt for [specific women’s] rights.”<sup>17</sup> The Rapporteurship further comments on the problems that impair access to justice and effective punishment for abuse in the Americas:

“Outdated laws remain in force, as do discriminatory provisions based on stereotypes of the role of women in society and values such as the victim’s honor, decency and chastity. ... On the whole, even today the law focuses basically on domestic and intra-family violence, to the exclusion of other forms of violence perpetrated against women and the contexts in which such events occur outside of and apart from home and family.”<sup>18</sup>

The lessons from these reports are relevant to access of justice in the context of CEDAW obligations. In Amnesty International’s experience and research, some women have particular difficulties in accessing justice, because they are seen as less important than others: rural women, women from ethnic minorities, Roma women, women in conflict with the law, women engaging in commercial sex work, women in same-sex relationships, single women, and other women who are not seen as worthy.

### **Stigma, discrimination and lack of access to justice**

The notion of a system that attaches “little or no importance” to the rights of a specific subgroup of people was also explored in depth in the 2012 report on the impact of stigma by the UN Special Rapporteur on the human right to safe drinking water and sanitation.<sup>19</sup> In this report, the Special Rapporteur defines stigma as “a process of dehumanizing, degrading, discrediting and devaluing people in certain population groups, often based on a feeling of disgust.”<sup>20</sup> The report also identifies stigma as “closely linked to the body as a site of the ‘normal’ and the ‘different’ and as a vehicle of contagion, especially in terms of sexuality. ...Further, stigma is frequently attached to activities that are considered ‘immoral’, ‘detrimental to society’ or ‘dirty’, affecting, for instance, sex workers...”<sup>21</sup>

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<sup>15</sup> Rapporteurship on the Rights of Women, “Access to Justice for Women Victims of Violence in the Americas,” 20 January 2007, OEA/Ser.L/V/III. Doc 68.

<sup>16</sup> Rapporteurship on the Rights of Women, “Access to Justice for Women Victims of Sexual Violence in Mesoamerica,” 9 December 2011, OEA/Ser.L/V/II. Doc. 63; and Rapporteurship on Rights of Women, “Access to Justice for Women Victims of Sexual Violence: Education and Health,” 28 December 2011, OEA/Ser.L/V/II. Doc. 65.

<sup>17</sup> Rapporteurship on the Rights of Women, “Access to Justice for Women Victims of Violence in the Americas,” 20 January 2007, OEA/Ser.L/V/III. Doc 68, para. 14.

<sup>18</sup> *Ibid.*, para. 15.

<sup>19</sup> Special Rapporteur on the human right to safe drinking water and sanitation, “Stigma and the realization of the human rights to water and sanitation,” 2 July 2012, UN Doc A/HRC/21/42.

<sup>20</sup> *Ibid.*, para. 12.

<sup>21</sup> *Ibid.*, para. 13.

The conclusions of the report on stigma, discrimination and denial of access to water and sanitation are directly applicable to the issue of women's access to justice. Gender stereotypical attitudes and practices fuel the stigmatization of women and girls for a range of transgressive conduct, including "abnormal" sexuality—such as being lesbian or transgender—or "immoral" activities—such as engaging in commercial sex work or otherwise having sex outside marriage. Women stigmatized for this conduct face tremendous obstacles to their enjoyment of equal protection under the law and their rights in general.

In some countries, the criminalization of rape explicitly excludes sex workers, in others police, prosecutors, and judges apply prevailing stereotypes to conclude that a sex worker (or an unmarried woman) could not possibly have been raped. In many countries, women and girls reporting rape are themselves prosecuted for criminal activity such as adultery or sex outside marriage. Trans women are routinely arrested for merely appearing in public, on suspicion of sex work or for loitering or on other unrelated charges. Women who are suspected of adultery or of wanting to marry someone not chosen by their families may be subject to severe punishment or are placed in administrative detention "for their protection." State parties whose justice system distrusts, arrests and convicts women because of who they are, what they look like or because they attempt to assert their sexual autonomy, are not dispensing equal justice for all and are, therefore, failing to meet their international legal obligations under CEDAW.

### **Discrimination in Access to Justice, Link to Other Rights Violations**

Inequality in access to justice is also directly linked to obstacles in access to other rights. For example, women who are either convicted of a crime or suspected of being criminals may have severely limited access to fair trial guarantees, housing, education, legal documentation, and health, legal, or other services. Such discrimination is always of concern, but it is even more worrying where the criminalisation is the result of discriminatory stereotyping that assigns punitive sanctions for conduct that should never have been criminalised in the first place, such as for instance adult consensual sex outside marriage. Women and girls affected by this situation include sex workers, transgender women, women who have sex with women, or women who are seen to have transgressed gender norms (such as not being "good" mothers or otherwise failing as "women").<sup>22</sup>

### **Conclusion**

Amnesty International considers that the General Recommendation on access to justice provides a unique opportunity to explore the convergence of key CEDAW concepts, such as discriminatory gender stereotyping, equal access to justice, and sexual autonomy, and derived state obligations. Specifically, we urge the Committee to highlight the negative effect of criminal laws in the area of sexual and reproductive conduct on women's ability to exercise their human rights to equality under the law and access to justice.

The General Recommendation must explore barriers to justice both in cases where women or girls are victims of crimes, and where they are alleged perpetrators. It should also highlight barriers to justice linked to women and girls who are seen to transgress gender norms, whether these norms are upheld under threat of criminal sanctions or not.

Finally, the General Recommendation must acknowledge, throughout, that women and girls are vulnerable to abuse in the justice system, or are disadvantaged when it comes to access to justice, as a direct result of discrimination. Women and girls are not inherently "vulnerable" beings, and would not be disadvantaged if their rights were fully respected.

Please do not hesitate to be in contact should have you any questions about the contents of this letter.

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<sup>22</sup> Lynn M. Paltrow and Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States 1973-2005: Implications for Women's Legal Status and Public Health*, *Journal of Health Politics, Policy and Law*, Vol. 38, No. 2, April 2013.

Yours sincerely,

A handwritten signature in black ink that reads "Tania Baldwin-Pask". The signature is written in a cursive, slightly slanted style.

Tania Baldwin-Pask

International Advocacy Programme