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THE POCSO ACT & ADOLESCENTS' ACCESS TO ABORTION IN INDIA:

Heightened Vulnerabilities, Health Risks, and Impact on their Rights



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ACCESS TO SAFE ABORTIONS UNDER INDIAN LAW



Prior to the enactment of the Medical Termination of Pregnancy Act, 1971 (MTP Act), the Indian Penal Code, 1860 (IPC) criminalized abortion, barring instances where it was performed to save the life of the pregnant woman. The MTP Act was introduced as an exception to the IPC provisions and allowed abortions to be performed under certain conditions based on gestational period or specific circumstances of the pregnant woman. The MTP Act has undergone amendments (most recently in 2021) to expand the conditions and gestational period within which abortions can be performed. However, abortions that are outside the scope of the limited circumstances under the MTP Act continue to be criminalized.

This factsheet explains the legal framework currently governing abortion services and adolescent sexuality in India, and then demonstrates the chilling effect of this legal framework on adolescents' access to safe and legal abortion services.

The opinion of how many medical practitioners is required for termination of pregnancy?

The number of medical practitioners that need to provide their opinion on whether the reason for abortion meets the requirements of the MTP Act **depends solely on the gestational period.**

0-20 Weeks

1 Registered Medical Practitioner

20-24 Weeks

2 Registered Medical Practitioners

Beyond 24 Weeks

Medical Board will decide

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT (POCSO ACT) AND ADOLESCENTS' ACCESS TO SAFE ABORTIONS

The POCSO Act was enacted in 2012 to “protect children from offences of sexual assault, sexual harassment and pornography” and lays down offences of a sexual nature involving a “child” under 18 years of age. Sex with a person below the age of 18 years is statutory rape under the POCSO Act.

Section 19 of the POCSO Act mandates that any person who “has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed” shall report to the special juvenile police unit or the local police. Although intended to ensure effective reporting of child sexual abuse, this mandatory reporting provision, when read conjointly with the MTP Act, creates significant barriers for access to safe and legal abortions by adolescents.

The key barriers are highlighted below:

1. CONFIDENTIALITY OF PREGNANT PERSONS

In 2017, a nine-judge Constitution Bench of the Supreme Court in Justice K.S. Puttaswamy v. Union of India recognised that the constitutionally guaranteed right to privacy encompasses the right to reproductive autonomy, including the statutory right to terminate a pregnancy. Since matters pertaining to family, marriage, procreation, etc. are integral to the dignity of an individual, the right of privacy therefore protects the right to decisional autonomy over such matters.⁽ⁱⁱⁱ⁾

Section 5A of the MTP Act protects the confidentiality of a pregnant woman by prohibiting medical practitioners from revealing their name or particulars “except to a person authorised by any law for the time being in force.”^(iv) However, Section 19 of the POCSO Act requires abortion service providers to mandatorily report to legal authorities, thereby



revealing the identity of the adolescent seeking an abortion. This mandatory reporting requirement must be viewed in light of the stigma surrounding abortions, and sexual and reproductive health issues in general.

Notably, adolescents from marginalized groups face additional barriers to accessing sexual and reproductive healthcare services (including safe and legal abortions) owing to intersecting caste, class, religion and gender identities and oppressions. Accordingly, revealing the identity of a person who has sought an abortion is likely to disproportionately impact pregnant adolescents from marginalized groups.

The Supreme Court of India on September 29, 2022 took note of these barriers in the case of *X v. The Principal Secretary, Health & Family Welfare Department, Govt. of NCT of Delhi*. The Court held that this requirement of mandatory reporting

under Section 19 of the Act was likely to leave minors with the options of either approaching a RMP and facing the possibility of criminal proceedings under the POCSO ACT, or seeking clandestine abortion services from an unqualified doctor. In view of the same, the Supreme Court has clarified that RMPs are not required to disclose the identity and personal details of a minor in the information provided under Section 19(1) of the POCSO Act or during any criminal proceedings that follow therefrom.

It is pertinent to note here that the Court has made these observations and directions with respect to cases involving the MTP Act alone and the mandatory reporting provisions of the POCSO Act still remain applicable in all other cases of adolescent sexual activity.

To ensure that the benefit of Rule 3B(b) is extended to all women under 18 years of age who engage in consensual sexual activity, it is necessary to harmoniously read both the POCSO Act and the MTP Act. For the limited purposes of providing medical termination of pregnancy in terms of the MTP Act, we clarify that the RMP, only on request of the minor and the guardian of the minor, need not disclose the identity and other personal details of the minor in the information provided under Section 19(1) of the POCSO Act. The RMP who has provided information under Section 19(1) of the POCSO Act (in reference to a minor seeking medical termination of a pregnancy under the MTP Act) is also exempt from disclosing the minor's identity in any criminal proceedings which may follow from the RMP's report under Section 19(1) of the POCSO Act. Such an interpretation would prevent any conflict between the statutory obligation of the RMP to mandatorily report the offence under the POCSO Act and the rights of privacy and reproductive autonomy of the minor under Article 21 of the Constitution. It could not possibly be the legislature's intent to deprive minors of safe abortions.

- X v. The Principal Secretary, Health & Family Welfare Department, Govt. of NCT of Delhi

2. CRIMINALIZATION OF CONSENSUAL SEXUAL RELATIONSHIPS BETWEEN ADOLESCENTS

The reporting mandate under Section 19 of the POCSO Act combined with the legal age of consent effectively criminalizes consensual sexual relationships between adolescents.

According to the National Family Health Survey-5 (2019–21), 10% and 39% of women (aged 25-49 years) first had sex before the ages of 15 and 18 respectively.^(vi) A 2016 representative study of adolescent behaviour in Bihar found that 14.1% boys and 12.1% girls (including married and unmarried girls) (aged 15-19 years) had premarital sex^(vi) with similar findings in a study in Uttar Pradesh.^(vii)

As per the POCSO Act and IPC, any sexual activity involving a person below 18 years of age constitutes statutory rape. This is complicated by the mandatory reporting requirement under the POCSO Act since abortion service providers are required to report sexual activity involving an adolescent who approaches them to seek an abortion. Failure to report may result in six months of imprisonment and/or imposition of a fine.

A clear conflict thus emerges between the POCSO Act and the MTP Act, as any sexual activity involving a person under 18 years of age, irrespective of consent, constitutes an offence under the POCSO Act, and must therefore, be reported. Pursuant to the decision in *Independent Thought vs. Union of India*,^(viii) the law does not make an exception for sex within marriage with girls under 18 years of age, irrespective of consent, thus rendering consenting married adolescents vulnerable to barriers to accessing safe and legal abortion services.

In *X v. The Principal Secretary, Health & Family Welfare Department, Govt. of NCT of Delhi*, the Supreme Court also noted how the POCSO Act, fails to recognize factual consent in a relationship involving minors.

3. FEAR OF PROSECUTION

The mandatory reporting requirement instils a fear of criminal action among abortion service providers, adolescents seeking services as well as adolescents' partners who face the threat of criminalization. The chilling effect heightens the vulnerability and risk of criminal prosecution that adolescents in consensual relationships already face because of the operation of statutory rape law.

Adolescent girls wanting to seek abortions, especially in cases of consensual relationships, risk their partners being prosecuted and punished because of which:

- Adolescents are likely to be denied, or face difficulty in seeking safe and legal abortions;
- Abortion service providers are forced to choose between fulfilling their legal obligation under the POCSO Act and fulfilling their ethical duty of confidentiality as healthcare providers. To avoid prosecution, they often refrain from providing abortion services.^(ix)

According to guidelines issued by the Ministry of Health & Family Welfare (the Ministry) in 2014, medical practitioners must ensure immediate access to abortions and emergency contraceptives to survivors of sexual violence, and their primary responsibilities are provision of treatment and medical investigations. Such investigations do not have to be preceded by police complaints or evidence collection.^(x)

This is further clarified in second edition of the Comprehensive Abortion Care Training & Service Delivery Guidelines issued by the Ministry in 2018 where medical practitioners have no obligation to file complaints or investigate, but only to inform authorities when providing abortion services to minors. Such provision of services should not be affected by any legal proceedings.^(xi) However, the chilling effect of the mandatory reporting requirement also acts as a deterrent to complete and effective implementation of these guidelines.



JUDICIAL RECOGNITION OF EVOLVING CAPACITIES OF MINORS

At the time of drafting the POCSO Act, the National Commission for the Protection of Child Rights^(xii) proposed that consensual penetrative sexual acts involving persons above 14 years of age and a person of the same age or within 3 years of their age should not be criminalised. This proposal sought to grant due recognition to the evolving capacities of minors to consent to sexual acts.

The evolving capacities of minors have also been taken note of by courts when dealing with cases of consensual sexual relationships involving persons below the age of 18 years. For instance, in April 2019, the Madras High Court in *Sabari v. Inspector of Police*^(xiii) stated that even if a girl is below 18 years and capable of giving consent in a relationship due to mental maturity, the

POCSO Act provisions would automatically apply if the relationship “transcends beyond platonic limits”. Further, the Madras High Court in *Vijayalakshmi & Anr. V. State*^(xiv) noted that the POCSO Act does not intend to regulate cases involving adolescents in consensual romantic relationships nor punish adolescent boys for entering such relationships.

Despite these orders, there continues to be jurisprudential inconsistency and a consequent failure to protect adolescents in consensual relationships from the adverse impact of the POCSO Act. This can be illustrated by cases such as *Peer Mohammad Ghotu Mohd. Ismail v State of Maharashtra*^(xv) where the court refused to grant legal recognition to the consent of a minor.

CRIMINALIZATION OF ADOLESCENT SEXUALITY CREATING BARRIERS TO ACCESS TO SRH SERVICES VIOLATES INDIA'S INTERNATIONAL COMMITMENTS

Over the years, treaty bodies such as the Committee on Rights of Children (CRC Committee) and the Committee on Elimination of Discrimination against Women have clarified that adolescents should have non-discriminatory access to the full range of sexual and reproductive healthcare services and information.^(xvi) The CRC Committee has specifically urged states to decriminalize abortion to uphold access to safe abortion and post-abortion services^(xvii) and called for confidential medical counselling and advice without the mandatory consent of a parent or guardian.^(xviii) Further, the Human Rights Council has called upon states to respect, protect and fulfil women and adolescent girls' human rights to have control over their sexual and reproductive health by implementing laws that respect their bodily autonomy and agency.^(xix) The World Health Organisation's 2022 Abortion Care Guideline recommends (i) the full decriminalization of

abortion, and (ii) removal of third-party authorisation requirements, and notes the need to bypass parental authorization requirements in case of adolescents “...to avoid anticipated violence, reproductive coercion, and family disharmony.”^(xx)

There is, thus, an inherent tension between mandatory reporting procedures under the POCSO Act that are rooted within the criminal law framework and internationally recognised human rights standards of ensuring “child friendly reporting mechanisms” that account for adolescents' evolving capacities and non-discriminatory access to sexual and reproductive healthcare services, including safe and legal abortions.

⁽ⁱ⁾We have referred to pregnant persons as pregnant women (and where relevant, girls). We recognize that abortion restrictions can have profoundly devastating impacts, not only on the lives of women, but also on those of transgender men, and nonbinary individuals who have the capacity to become pregnant. We will use gender-neutral language to describe groups who may require abortion services during their lifetimes. At the same time, we acknowledge that globally, abortion restrictions historically and at present are rooted in discriminatory stereotypes and control of cisgender women and girls, targeting the intersection of their biological ability to bear children and their gender identities as women and girls who are predestined to fulfill a role as mothers. Further, in referring to the legal provisions under the MTP Act and especially operation of the criminal law, we have used pregnant ‘women’ seeking abortion to reflect the current legal position.

⁽ⁱⁱ⁾Section 3(2) of the MTP Act.

⁽ⁱⁱⁱ⁾Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1. For instance, paras 72, 141.

^(iv)Section 5A of the MTP Act, through the MTP (Amendment) Act, 2021.

^(v)Indian Institute of Population Studies, National Family Health Survey (NFHS- 5), 2019-21: India Report, p. 210, http://rchiips.org/nfhs/NFHS-5Reports/NFHS-5_INDIA_REPORT.pdf

^(vi)https://www.popcouncil.org/uploads/pdfs/2017PGY_UDAYA-BiharFactsheet.pdf

^(vii)17 percent of older boys and six percent of unmarried older girls reported a sexual experience, and 10 percent of married older girls reported a sexual experience before marriage. https://www.popcouncil.org/uploads/pdfs/2017PGY_UDAYA-ExecSummUP.pdf

^(viii)Independent Thought vs. Union of India (2017) 10 SCC 800

^(ix)UNFPA, Laws and Policies Impacting Young People’s Sexual and Reproductive Health and Rights in the Asia-Pacific Region: 2020 Update, https://asiapacific.unfpa.org/sites/default/files/pubpdf/case_studies_laws_and_policies_impacting_young_peoples_sexual_and_reproductive_health_and_rights_in_the_asia-pacific_region_2020_update.pdf.

^(x)Ministry of Health & Family Welfare’s Guidelines & Protocols: Medico-legal Care for Survivors/Victims of Sexual Violence (<https://main.mohfw.gov.in/sites/default/files/953522324.pdf>)

^(xi)<https://www.guttmacher.org/report/adding-it-up-investing-in-sexual-reproductive-health-adolescents-india>

^(xii)Ministry of Health & family Welfare’s Comprehensive Abortion Care Training & Service Delivery Guidelines(https://nhm.gov.in/New_Updates_2018/NHM_Components/RMNCHA/MH/Guidelines/CAC_Training_and_Service_Delivery_Guideline.pdf)

^(xiii)An Analysis of Mandatory Reporting under the POCSO Act and its Implications of the Rights of Children (2018), Centre for Child and the Law, National Law School of India University, Bangalore < <https://feministlawarchives.pldindia.org/wp-content/uploads/Mandatory-Reporting-Paper-CCL-NLSIU.pdf>>

^(xiv)Sabari v. Inspector of Police, 2019 (3) MLJ Cr1 110

^(xv)Vijayalakshmi & Anr. V. State & Anr. Carl. M.P. No. 109 of 2021

^(xvi)Peer Mohammad Ghotu Mohd. Ismail v. State of Maharashtra & Anr., High Court of Bombay (Nagpur Bench), Criminal Appeal No. 491 OF 2021 (dated 31st January 2022).

^(xvii)Committee on the Rights of the Child, General Comment No. 20 on the implementation of the rights of the child during adolescence, paras. 59-60, U.N. Doc. CRC/C/GC/20 (Dec.2016) [hereinafter CRC Committee, General Comment No. 20]; and Committee on the Elimination of Discrimination Against Women, General Recommendation No. 24 on the Right to Health, para 18 (twentieth session, 1999), as cited in Center for Reproductive Rights, Briefing Paper, https://reproductiverights.org/wp-content/uploads/2021/05/CRR_Improving-international-human-rights-standards-on-adolescents-sexual-and-reproductive-health-and-rights_05132021.pdf.

^(xviii)CRC Committee, General Comment No. 20, para 60.

^(xix)Id., at para 39.

^(xx)United Nations Human Rights Council Resolution on Child , early and forced marriages in the time of crisis, including the COVID_19 pandemic, adopted on October 7th 2021 (<https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/274/59/PDF/G2127459.pdf?OpenElement>)

^(xxi)Center for Reproductive Rights, WHO’s New Abortion Guideline: Highlights of Its Law and Policy Recommendations, 2022, <https://reproductiverights.org/factsheet-who-abortion-guideline/>.

