

ACCESS TO SAFE & LEGAL ABORTION

A HANDBOOK ON ABORTION
LAWS FOR HEALTHCARE
SERVICE PROVIDERS IN INDIA



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CENTRE FOR JUSTICE, LAW & SOCIETY

The Centre for Justice, Law, and Society (CJLS) is a multidisciplinary research centre at Jindal Global Law School that critically engages with contemporary issues at the intersection of law, justice, society and marginalization in South Asia.

CJLS is a collaborative endeavour of a group of scholars, activists and students who are engaged in high quality empirical and theoretical research. CJLS foregrounds the question of justice, especially intersectional justice, in law and society studies, to respond to the changing relationship between law and society in South Asia. CJLS inaugurates a distinct terrain of research that is not mimetic of Western mainstream paradigms of law and society studies or those studies that do not focus on justice as a central theme.

At CJLS, we see ourselves facilitating conversations and legal and policy interventions as well as collaborating with social movements. We do not claim to speak for any movements and over the years we have continued to reflect on and learn from our activist and scholar friends on the various projects we have worked on.



IPAS DEVELOPMENT FOUNDATION, NEW DELHI

Ipas Development Foundation (IDF) is an Indian NGO that works to eliminate barriers to sexual and reproductive health and rights (SRHR) in India through enhanced access to, safe abortion and contraception.

IDF takes a comprehensive and rights-based approach to address all the factors impacting a person's ability to access sexual and reproductive health services, including abortion—from improving individual knowledge and agency to make reproductive health decisions, to challenging harmful social and community norms that are barriers to safe care, to expanding the trained health workforce that can provide safe care, to advocating for government ownership and supportive laws. Each year, IDF's interventions improve the lives of 500,000 women and girls.



ACKNOWLEDGEMENTS

CJLS would like to recognise the contribution of many people, without whom this handbook would not have been possible.

CJLS would like to recognise the contribution of all the individuals without whose efforts this project would not have been possible. This handbook has been conceptualised by Professor Dipika Jain, Director CJLS. In addition to Professor Jain, this handbook has been developed by Disha Chaudhari, Siddharth Saxena and Kavya Kartik. We would like to acknowledge Rhea Malik, Meemansa Singh, and Priyanka Biswas for their research assistance. We are grateful to all the student researchers for their commitment and tireless research assistance including Ana Khan, Manasa R., Kanak Mishra, and Srimanti Das. We would also like to thank our colleagues at CJLS, Natasha Aggarwal, Kanmani R., Anmol Diwan, and Ramani Mohanakrishnan. This project would not have been possible without their dedicated efforts and commitment. We would also like to thank Abhaya Tataavarti for her editorial assistance with the final draft of the handbook.

We are especially grateful to Ipas Development Foundation for their support. We would like to acknowledge Dr. Manisha Malhotra, Anubha Rastogi, Dr. Alka Barua and Swagata Raha for their invaluable time and efforts in reviewing the work of this handbook.

We have learnt a lot from activists in the past few years on the importance of cross-movement solidarity, intersectionality in our activism, and how to selectively advocate for those who are most marginalised. Our interactions with people's movements, collectives, advocates, healthcare professionals and service providers, and activists working on the ground to ensure access to safe abortion services have been immensely beneficial and have opened us up to new and nuanced perspectives.

We are also grateful to the design team at JGLS including Mr. Sanjay Pahwa, Anushka and Mr. Manoj for their invaluable inputs and assistance in bringing this project to fruition.

Finally, we thank the Vice Chancellor, O.P Jindal Global University, Prof. Dr. C. Raj Kumar, for his constant support, encouragement, and guidance.

INTRODUCTION

INTRODUCTION

Reproductive rights are fundamental rights of all persons under the Constitution of India and have also been recognised as statutory rights under the Medical Termination of Pregnancy Act, 1971. However, pregnant persons* continue to be denied their reproductive rights—particularly to terminate their pregnancy—due to misunderstandings and apprehensions amongst abortion seekers and providers about the law governing abortions. Therefore, the reproductive rights of pregnant persons cannot be realised without providing medical service providers access to information about their rights and obligations with respect to the medical termination of pregnancies.



A well-informed service provider will be able to support and facilitate the reproductive rights of pregnant persons, especially the right to access safe and effective abortion services.

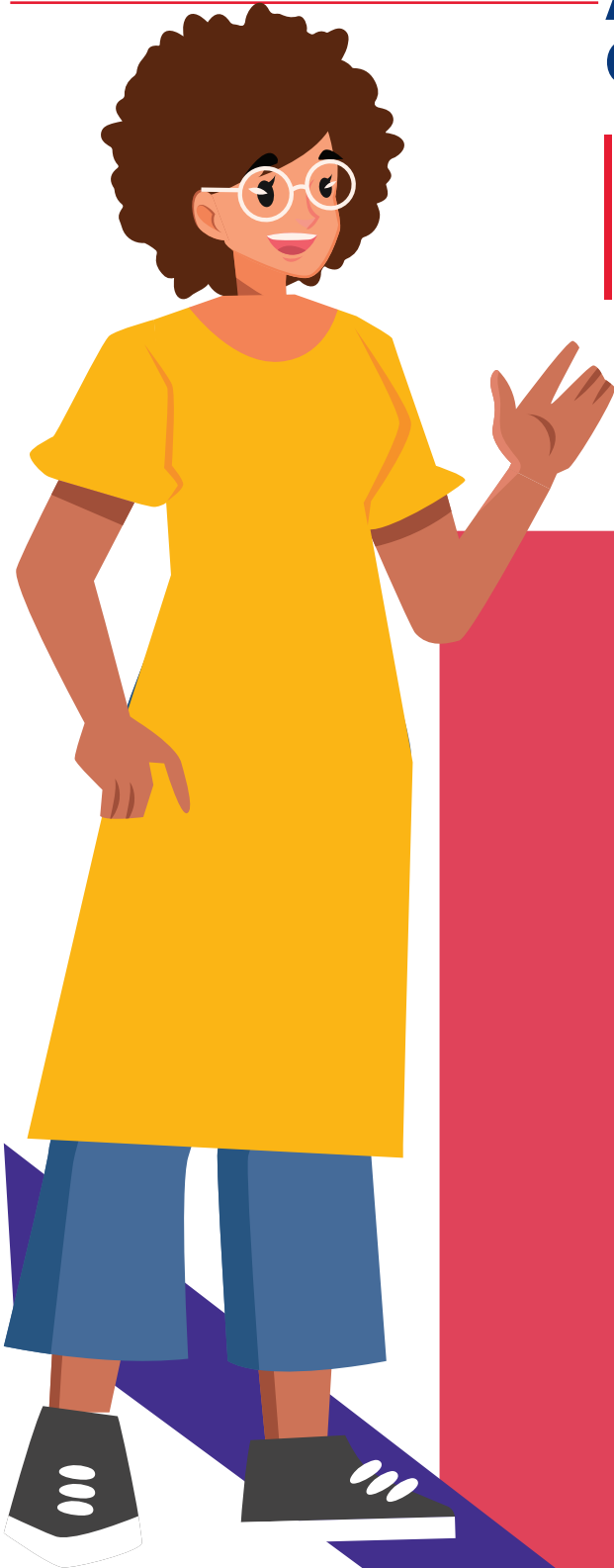
Accordingly, this handbook seeks to clarify the legal position with respect to abortion and make abortion service providers aware of their rights and obligations under the Medical Termination of Pregnancy Act 1971, as well as clarify the law on the rights of pregnant persons. In India, the law allows all pregnant persons to have an abortion upon satisfying certain specified conditions under the Medical Termination of Pregnancy Act. This handbook will chart out the circumstances under which pregnant persons are allowed to undergo abortions and the corresponding responsibility of service providers to facilitate such access.

Additionally, since pregnancies are also governed by the Indian Penal Code 1860, the Protection of Children from Sexual Offences Act 2012, and the Pre-Conception and Pre-Natal Diagnostic Techniques Act 1994, abortion service providers are dissuaded from performing abortions due to a fear of criminal prosecution. This handbook clarifies that abortions performed in line with the Medical Termination of Pregnancy Act are legal, and the service provider will not face any criminal consequences for terminating such a pregnancy. In fact, contrary to popular opinion, the law protects abortion service providers that act in good faith to facilitate the reproductive rights of pregnant persons.

We hope that the information available in this handbook will empower healthcare service providers to extend unconditional care and support to those seeking an abortion.

*The Medical Termination of Pregnancy Act 2021, uses the word “women” throughout. However access to abortion services is critical not only for cis-gender women, but also for transgender intersex and gender-variant persons. This handbook uses the phrase pregnant persons to ensure that the law is taking note of all individuals in need of access to safe abortions.

Abortion Is A Statutory And Constitutional Right In India



Abortion is a qualified right in India, which means that pregnant persons can access abortion upon meeting the conditions under the Medical Termination of Pregnancy Act 1971 (MTP Act).

- The MTP Act was passed with the stated aim of **enabling access to safe abortions**. It allows access to abortion services for women up to a certain gestational age and as per certain conditions.

Additionally, in two landmark decisions, the Supreme Court of India has held that reproductive rights fall under the fundamental right to life (Article 21), and equality and non-discrimination (Articles 14 and 15).

- In 2017, a nine-judge bench considered whether privacy was a fundamental right, in *Justice K.S. Puttaswamy v. Union of India*. While answering this question in the affirmative, the Court noted that reproductive rights were part of the fundamental right to life under Article 21, and the right to make reproductive decisions was a facet of the pregnant woman's decisional autonomy.
- In *Suchitra Srivastava v. Chandigarh Administration*, the Supreme Court held that the right to make reproductive decisions, which is a facet of personal liberty under Article 21, includes the right to procreate as well as the right to abstain from procreating.

Structure And Format Of the MTP Act, 1971 (Relevant Provisions)

Section 1

Short title, extent of application and date of commencement

Section 2

Definitions

Clause (a) : Guardian

Clause (aa): Medical Board

Clause (b) : Mentally ill person

Clause (c) : Minor

Clause (d) : Registered medical practitioner

Clause (e) : Termination of pregnancy

Section 3

Sub-section (1): Not an offence to terminate pregnancy as per MTP Act

Sub-section (2): Conditions required to be satisfied for terminating pregnancy

Sub-section (3): Additional criteria for determining if pregnancy poses risk to health of woman

Sub-section (4): Requirement of woman's consent, or guardian's consent in case of a minor

Section 4

Place where pregnancy may be terminated

Section 5

Sub-section (1): Easing of requirements for pregnancy terminated in good faith to save the life of the woman

Sub-section (2): Penalty for termination of pregnancy by a person who is not a registered medical practitioner

Sub-section (3) and (4): Penalty for termination of pregnancy in a non-authorized place

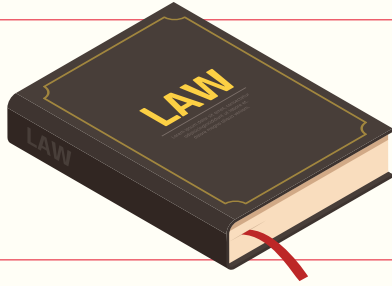
Section 5A

Penalty for violating privacy of the woman

Section 8

Protection from any legal proceedings for actions taken in good faith

Who Can Provide Abortion Services?



“Notwithstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of the MTP Act.”

– (Section 3(1), MTP Act)



Only registered medical practitioners can perform abortions under the MTP Act. If they do so in accordance with the conditions laid out under the MTP Act, they **cannot be held guilty of an offence** under any law.

As per Section 2(d) of the MTP Act, a “registered medical practitioner” means a medical practitioner who possesses any recognised medical qualification as defined in Clause (h) of Section 2 of the Indian Medical Council Act 1956:

- Whose name has been entered in a State Medical Register.
- Who has experience or training in gynaecology and obstetrics.

The Medical Termination of Pregnancy (Amendment) Rules 2021 (MTP Rules), under Rule 4 require that a registered medical practitioner should have at least one of the following experiences in gynaecology and obstetrics:

- Post-graduate degree or diploma in obstetrics and gynaecology
- Completed six months as house surgeon in obstetrics and gynaecology
- At least one year experience in the practice of obstetrics and gynaecology at any hospital that has all facilities
- Assisted a registered medical practitioner in 25 cases of medical termination of pregnancy of which at least five have been performed independently. However, in such cases the medical practitioner may only terminate a pregnancy within the first trimester, i.e. up to 12 weeks of gestation period;

- Experience at any hospital for a period of not less than three months in the practice of obstetrics and gynaecology; after which the practitioner can provide abortion services by medical methods ONLY up to nine weeks of the gestational period.
- Has independently performed ten cases of pregnancy termination by medical methods of abortion under the supervision of a Registered Medical Practitioner in a hospital established or maintained, or a training institute approved for this purpose, by the Government after which the practitioner can provide abortion services by medical methods ONLY up to nine weeks of the gestational period.

Auxiliary nurse midwives, trained nurses, traditional birth attendants, AYUSH practitioners, or any other person who is not a registered medical practitioner are not allowed to perform abortions under the Act

Under Section 5, a person who is not a registered medical practitioner shall be penalised with imprisonment between two and seven years, under the Indian Penal Code (IPC), for performing an abortion.



Where Can Abortion Services Be Provided?

“No termination of pregnancy shall be made in accordance with this Act at any place other than:

- a) a hospital established or maintained by Government, or
- b) a place for the time being approved for the purpose of this Act by the Government or a District Level Committee constituted by that Government.

– Section 4, MTP Act

A registered medical practitioner can only perform an abortion at:

- a) A Government hospital. including primary, secondary and tertiary levels of public healthcare sites.
- b) A place that has been approved under the Medical Termination of Pregnancy Act by the Government.
- c) Outpatient facilities or clinics that are not approved as a MTP certified site but have an established referral linkage to a MTP certified site provided they can display a certificate to this effect.

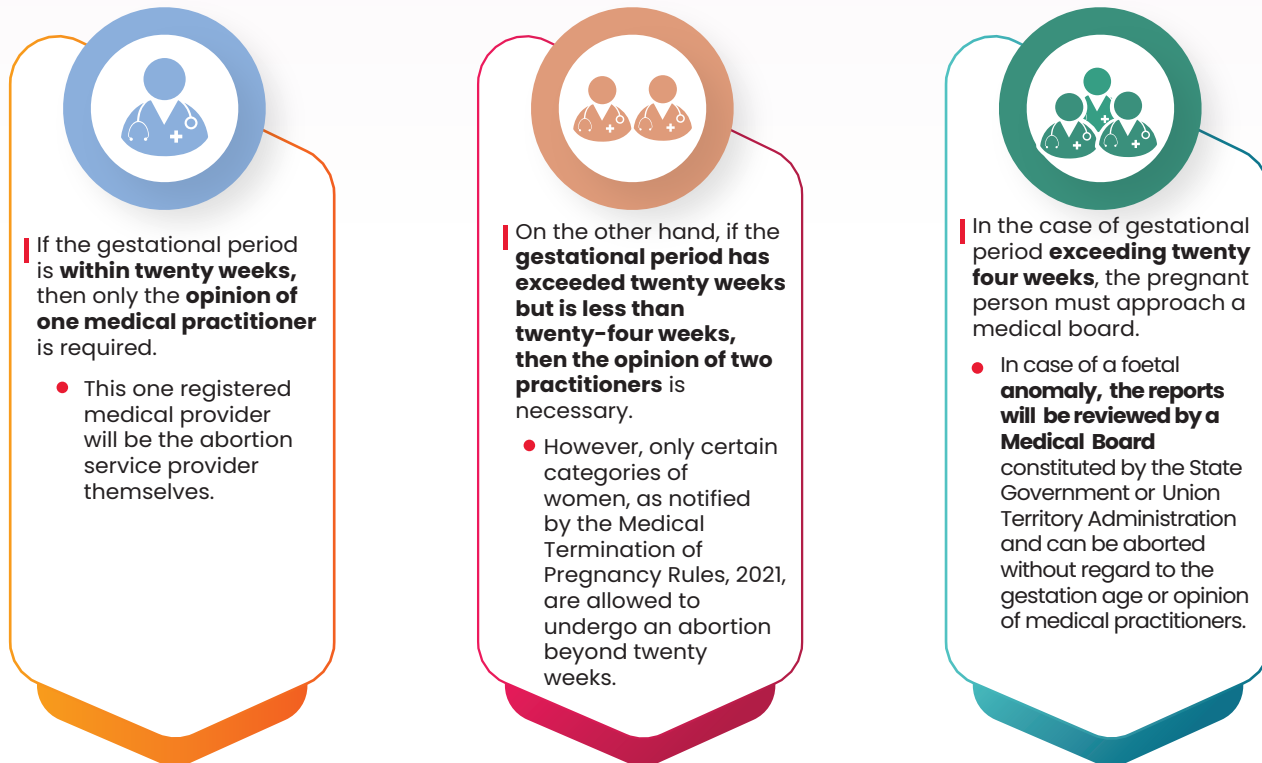
The Opinion of how many medical practitioners is required for termination of pregnancy?

Gestational Period



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.**

- It is **not dependent upon the reason given** for the termination of pregnancy.

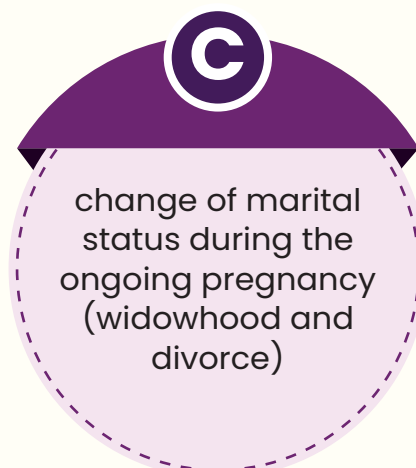
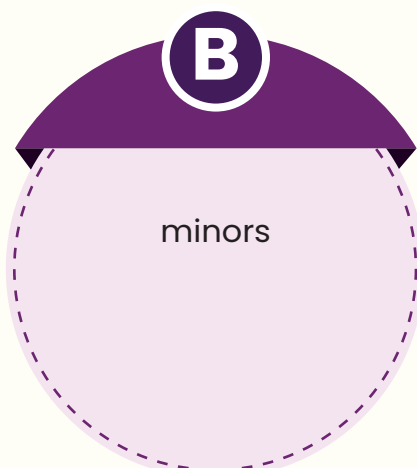


“The provisions of sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.”

– Section 3(2B), MTP Act

Categories Of Women Eligible For Termination Up To 24 Weeks

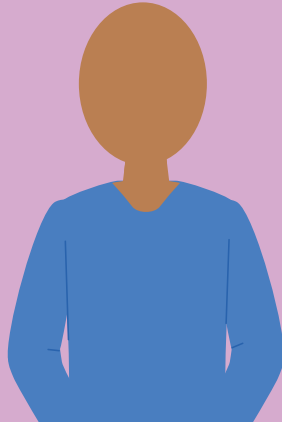
The category of women eligible for the termination of pregnancy up to twenty-four weeks prescribed under Section 3 (2) (b) of MTP Act are:



-Rule 3B of the MTP (Amendment Rules), 2021.

*Only certain categories of persons can terminate pregnancy beyond 20 weeks (Explained in Chapter V)

MEDICAL BOARDS



COMMUNITY MEMBER



SONOLOGIST/RADIOLOGIST



GYNAECOLOGIST



PEDIATRICIAN

Under Section 3(2D), the Medical Board shall consist of a Gynaecologist, a Paediatrician, a Radiologist or Sonologist; and such other number of members as may be notified in the Official Gazette by the State Government or Union territory, as the case may be.

In the case of pregnancies beyond 24 weeks, the person must approach the medical board for the termination of pregnancy and:

The Medical Board has the **power** to

- (i) **allow or deny termination of pregnancy** under sub-section 2B of Section 3 of MTP Act, **only after due consideration** and
 - ensuring that the procedure would be safe for the woman at that gestation age and
 - ensuring whether the foetal malformation has substantial risk of it being incompatible with life ;
 - deliberating if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped;
- (ii) **co-opt other specialists in the Board and ask for any additional investigations** if required, for deciding on the termination of pregnancy.

-Rule 3A Clause (a) of the MTP Rule

The functions of the medical board are;

In the case of pregnancies exceeding the gestational period of 24 weeks, the functions of the Medical Board Include:

- to examine the woman and her reports;
- provide the opinion of the Medical Board with regard to the termination of pregnancy or rejection of the request for termination within 3 days of receiving the request
- to ensure that the termination procedure is carried out with all safety measures along with appropriate counseling being provided within 5 days of the receipt of request for termination where granted

-Rule 3A Clause (b) of the MTP Rule

How To Interpret “Grave Injury To Physical Or Mental Health”?

Explanation 1

For the purposes of clause (a), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

– Section 3(2), MTP Act

Explanation 2

For the purposes of clauses (a) and (b), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

– Section 3(2), MTP Act

The explanations to Section 3 provide **two specific circumstances** that may be read as causing grave injury to the mental health of the woman.

Explanation 1

Lays out the list of such situations, wherein, the pregnancy is a result of the failure of any method or device sought to be used as a contraceptive measure to prevent impregnation.

- This includes all methods of contraception such as condoms, diaphragms, intrauterine devices (IUDs), birth control pills, emergency contraceptive pills, and voluntary sterilisation.

Explanation 2

States that any pregnancy that is the result of an alleged rape will also constitute a grave injury to the mental health of the woman.

- The completion of a criminal trial or production of a First Information Report (FIR) is not a prerequisite. The medical practitioner is bound to provide the requested services to the woman.
- The service provider must complete their requisite medico-legal responsibilities such as reporting the offence to the police after the provision of abortion services, especially in cases where the pregnant woman requires emergency medical care. The providers’ first priority must be the well-being of the pregnant woman, and any medico-legal procedure can be completed thereafter.

- The Ministry of Health & Family Welfare has also issued certain guidelines and protocols to enable access to reproductive healthcare on a priority basis without any procedural or other barriers, especially in cases of sexual assault and violence.



- 1 If a person has come directly to the hospital without the police requisition, the **hospital is bound to provide treatment and conduct a medical examination with consent of the survivor /parent /guardian (depending on age). A police requisition is not required for this.**
- 2 If a person has come on his/her own without FIR, s/he may or may not want to lodge a complaint but requires a medical examination and treatment. Even in such cases the **doctor is bound to inform the police as per law.** However, **neither court nor police can force the survivor to undergo medical examination.** It has to be with the informed consent of the survivor/ parent/ guardian (depending on the age). **In case the survivor does not want to pursue a police case, a medico-legal case must be made and she must be informed that she has the right to refuse to file FIR. An informed refusal must be documented in such cases.**
- 3 If the person has come with a police requisition or wishes to lodge a complaint later, the information about Medico-legal Case No. and police station should be recorded.
- 4 **Doctors are legally bound to examine and provide treatment to survivors of sexual violence.** The timely reporting, documentation and collection of forensic evidence may assist the investigation of this crime. **Police personnel should not be present during any part of the examination."**

Hello Advocate Hamza, my name is X and I would like to terminate my pregnancy as it was the result of rape. Can a healthcare service provider perform the abortion if the pregnancy is within 20 weeks?



Hello X! Yes, the healthcare service provider can assist you with terminating the pregnancy as rape is explicitly covered under the circumstances in which a pregnancy may be terminated as per the provisions of the MTP Act, 1971.

The healthcare service provider must act on your request and must not insist on seeking an FIR or other medico-legal documentation before termination. They only have an obligation towards assisting with the timely collection of information for the police.



Thank you for clarifying the legal position, Advocate Hamza. I will accordingly assist X in the termination of their pregnancy.

Doctor, my name is X and I have approached a registered medical practitioner to terminate my pregnancy as it is the result of rape. The RMP has refused to perform the abortion asking me to first register a complaint with the police before the pregnancy can be terminated. Can the medical practitioner refuse to provide abortion services to me given that my pregnancy is the result of an offence of rape?



Hi X! No, the healthcare service provider cannot refuse to provide abortion services to you. As per the provisions of the MTP Act, 1971, if the pregnancy is the result of an offence of rape, in such cases there is a grave injury to the mental health of the pregnant person who must be given urgent medical care. The medical practitioner cannot insist on the completion of formalities like the filing of a FIR before providing abortion services to the pregnant person. These obligations can be met after providing the necessary care to the pregnant person in question.



Hello Advocate Neha, my name is Y and my partner X and I have been married for 7 years. We have been using contraception as a family planning measure. However, I am now 16 weeks pregnant and want to terminate the pregnancy. Can the healthcare service provider assist me with the termination under the provisions of the MTP Act, 1971?



Hello Y! Yes, the service provider must assist you with the termination of the pregnancy. Explanation 2 to Section 3 of the MTP Act specifically allows pregnancies that are the result of failure of contraception to be terminated with the consent of the pregnant person. Furthermore, the consent of the pregnant person, which is you in this case, alone is required to terminate a pregnancy. Spousal consent or authorisation from a court is not required.

Can the healthcare service provider terminate the aforementioned pregnancy if X and I were not married?



Yes, they can. The MTP (Amendment) Act 2021, explicitly, recognises the right of any pregnant person, regardless of their partnership status, to seek an abortion. Therefore, a pregnant person can seek termination if they are in a marital relationship, non-marital relationship, or even if they are single.

“In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.”

– Section 3(3), MTP Act

Section 3(3) provides guidance to service providers on whether a situation is likely to risk of injury to a woman, and so is fit for termination of pregnancy.

- As per this Section, “in determining whether the continuance of pregnancy would involve such risk of injury to the health (...) **account may be taken of the pregnant woman's actual or reasonably foreseeable environment.**”
- Having to carry a pregnancy to term, wherein, the person is financially or emotionally incapable, unwilling to raise a child, unmarried and faces stigma for having pre-marital sex, has lost their partner or a family member, or faces a hostile familial or work environment are all circumstances that could warrant termination of pregnancy.

Hello Advocate Jenny. My partner X and I decided to have a child and I became pregnant. However, after twenty three weeks of the pregnancy, my partner X met with a fatal car accident and died. I have decided to terminate the pregnancy due to no longer feeling emotionally capable of raising a child soon after the sudden demise of my partner. Can the healthcare service provider terminate my pregnancy?



I am very sorry to hear of your loss, Y. To answer your question though, yes, the pregnancy can be terminated as even though at the time of conception, this was a wanted pregnancy by you and your partner, there has been a change in your actual and foreseeable environment. So, you no longer wish to continue the pregnancy and the change in your emotional circumstances can be considered a relevant ground under Section 3(3).



Hello doctors! My name is X and I am twenty-one years old and in a live-in relationship with Z who is twenty-two years old. Z and I reside in a conflict zone and I am now twenty-three weeks pregnant and seek to terminate my pregnancy. How many medical practitioners need to provide their opinion before the pregnancy can be terminated?



Hello X! Abortions between twenty and twenty-four weeks of gestation age are only available to the categories of pregnant women noted under Rule 3B of the MTP Rules and require the opinion of two practitioners. In this case, the circumstances of you and Z who are residing in a conflict zone would fall within the **categories of women specified under Rule 3(B) of the MTP Rules, 2021** and may terminate the pregnancy on the opinion of **two medical practitioners**.

Hello! My name is X and I am 26 weeks pregnant. During a recent prenatal screening test the doctor informed me that the foetus has been diagnosed with congenital heart defects. In the intervening period, I have suffered grave financial hardship and filed for a divorce from my partner and I now wish to terminate my pregnancy. What is the procedure to do so?



Hello X! You would need to seek the opinion of two registered medical practitioners to terminate the pregnancy exceeding 24 weeks. There is no upper gestational limit on when a pregnancy can be terminated in cases where the foetus has been diagnosed with congenital heart defects. However, you will need to seek the opinion of a medical board prior to terminating the pregnancy.

Hello! My name is X and I reside in Y village in Chhattisgarh. I am married with 2 children. I wish to terminate my pregnancy at 15 weeks as I do not want any more children. How many registered medical practitioners need to be consulted for termination of my pregnancy? What will be the cost of this procedure?



Hi X! The opinion of only one medical practitioner is required to terminate a pregnancy that is at a gestation age of less than twenty weeks, regardless of the reason for which it is sought to be terminated. So, the healthcare service provider does not need to seek the corroboratory opinion of any other practitioner, and their sole opinion on the matter will be satisfactory. You can have the procedure done at a nominal, subsidised cost in a public hospital.



EMERGENCY

What About Emergency Situations?

“The provisions of Section 4, and so much of the provisions of sub-section (2) of Section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.”

– Section 5(1), MTP Act

If the service provider, in **good faith**, is of the opinion that there exists an **immediate threat to the life of the pregnant person**, they may **terminate the pregnancy without the opinion of any medical practitioners and irrespective of the gestational age**.

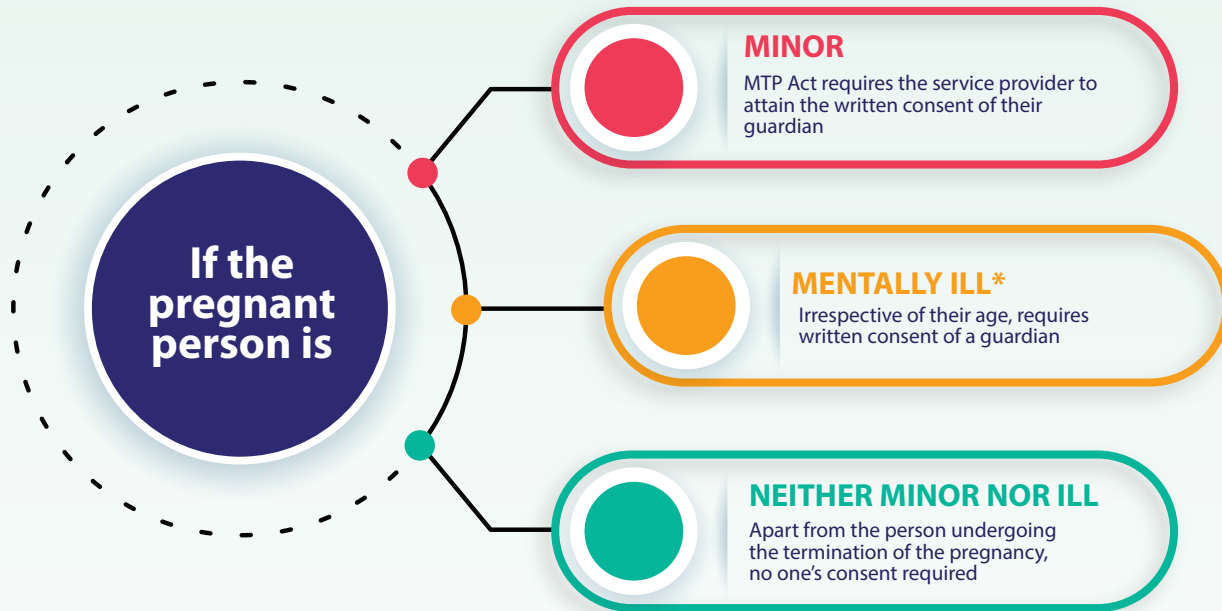
- As per Section 52 of the IPC, an act is done in good faith if it was performed with **due care and attention**. Therefore, an abortion performed in good faith is legal where the pregnancy has been terminated in accordance with the provisions of the MTP Act.

My partner X has suffered a fatal accident and requires the service provider to immediately terminate their pregnancy in order to save X's life. The gestational period elapsed is twenty-five weeks, there are no other medical practitioners available to provide an opinion, and the pregnancy is otherwise wanted. Doctor, can you terminate my partner's pregnancy?

Hello! Yes, the pregnant person's life is in immediate danger due to the fatal accident and as per Section 5(1) of the MTP Act, I would be acting in good faith, and do not require the opinion of any other medical practitioner or is not constrained by the gestation age of the pregnancy.



WHOSE CONSENT IS REQUIRED TO TERMINATE A PREGNANCY?



"Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman."

– Section 3(4)(b), MTP Act



Apart from situations involving a minor or mentally ill person, the **only person whose consent is required for termination is the pregnant person** themselves. Therefore, once the service provider has received the consent of the pregnant person, they may proceed with the termination of pregnancy.

"If the wife has consented to matrimonial sex and created sexual relations with her own husband, it does not mean that she has consented to conceive a child. It is the free will of the wife to give birth to a child or not. The husband cannot compel her to conceive and give birth to his child. Mere consent to conjugal rights does not mean consent to give birth to a child for her husband. (...) [N]o express or implied consent of the husband is required for getting the pregnancy terminated under the Act."

– *Dr. Mangla Dogra v. Anil Kumar Malhotra*, 2011 SCC OnLine P&H 16218



The **consent of any other third-party such as the partner, spouse, parent, alleged accused, or any other person is not legally required.**

In fact, Section 5A of the MTP Act makes it a **punishable offence for a service provider to reveal the name and particulars of the woman who has undergone abortion.** Any disclosure to a person than one who is authorised by the law shall be punishable with up to one year imprisonment and/or a fine.

"No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian."

– Section 3(4)(a), MTP Act

*in *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court drew a distinction between persons that are "mentally ill" and those that are "mentally retarded." The **consent of the person living with disability, and not the guardian, is still required in cases where the person is living with mild disability. Only in cases of severe disability that is, where the person is placed in an institutionalised environment, can the consent of the guardian substitute that of the pregnant person.**



Where the pregnant person is a **minor**, Section 4 (a) of the MTP Act requires the service provider to also attain the **written consent of their guardian**. A person who has already attained **eighteen years of age** will be considered a major and does not require the consent of a guardian for termination of pregnancy.

- A guardian “means a person having the care of the person of a minor or a mentally ill person.” This is a very broad definition and would include a de facto guardian—**any adult that accompanies the minor or mentally ill person to the clinic** can consent on their behalf.



A person who is **mentally ill**, irrespective of their age, requires the **written consent of a guardian** to undergo an abortion, as well.

- However, in *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court drew a distinction between persons that are “mentally ill” and those that are “mentally retarded.”
- The **consent of the person living with disability, and not the guardian, is still required in cases where the person is living with mild disability. Only in cases of severe disability that is, where the person is placed in an institutionalised environment, can the consent of the guardian substitute that of the pregnant person.**

Hello Doctor, my partner X and I are married, and I would like to terminate my pregnancy as I do not want to have a child at the current stage of my professional life. However, my partner X does not want the pregnancy to be terminated and is unaware of the fact that I have approached a medical practitioner to seek an abortion. Can the service provider mandate that my partner X should consent to the termination?



Hello Y. Apart from being barred from requiring any other person, including the spouse’s consent, as a prerequisite for the termination, the service provider cannot even request the consent of any such third-party. If the provider seeks the consent of a third-party, they would also be violating Section 5A, which requires them to maintain the confidentiality of the pregnant person. Therefore, your spouse’s consent is not required for terminating the pregnancy.

Hello, my name is X and I am a journalist working with one of the most prominent newspapers in the country. I also suffer from certain mental illness for which I have been seeking psychiatric treatment for the last 3 years. I became pregnant and would like to terminate my pregnancy. Can the medical practitioner provide me abortion services on the sole basis of my consent?

Hi X! Yes, you are living with only a mild mental disability. So, the abortion service provider must facilitate the request without appealing to any third person, because doing so would also violate the requirement of confidentiality under Section 5A.



Is it necessary for pregnant persons to get a court order for an abortion?



NO

Pregnant persons DO NOT need court order or third-party consent for an abortion



“In all cases, where a victim girl suffers an unwanted pregnancy and where the length of pregnancy does not exceed 20 weeks, the victim girl need not be referred to the Medical Board and the termination of pregnancy can be done as per the provisions of Section 3 of the Medical Termination of Pregnancy Act 1971. The victim girl should not be unnecessarily made to knock the doors of this Court.”

– **X v. State, Criminal Original Petition No. 14506 of 2019 (Madras High Court)**

No judicial or third-party authorisation is required for the termination of a pregnancy

| No provision under the statute requires such permission from the courts. This will only cause unnecessary and harmful delays that can make the abortion more complicated for the pregnant person.

| The only circumstance under which third-party authorisation is required is with respect to the Medical Board. In cases where the gestation age exceeds twenty-four weeks, the pregnant person can still undergo an abortion if their foetus has been diagnosed with a substantial “foetal abnormality” by a Medical Board.



Access To Abortion For Marginalised Persons

Pregnant persons including transgender persons, non-binary persons, gender non-conforming and gender variant persons, Dalit persons, Adivasi persons, persons living in poverty, persons living in rural areas and sexual minorities already face significant barriers in accessing abortion services.

Healthcare service providers must work to facilitate the access to abortion for everyone without discrimination, so as to support them in affirming their fundamental right to make reproductive choices.

- **Section 3 of the Transgender Persons (Protection of Rights Act) 2019** makes it a criminal offence for any person to discriminate against a transgender person, including through denying them or providing unfair treatment with respect to healthcare.
- **Section 3 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989** makes it a criminal offence for any person to deny a person belonging to a Scheduled Caste or Scheduled Tribe entry to a hospital.
- Incarcerated persons have the same right to abortion services as other pregnant persons.

“If a pregnant prisoner wants to terminate her pregnancy, then provision of section 3(2)(b)(i) or (ii) are applicable. She being a prisoner should not be treated differently than any other pregnant women. We, with all responsibility state that Section 3 of Medical Termination of Pregnancy Act bestows a very precious right to a pregnant woman to say no to motherhood. It is the right of a woman to be a mother so also it is the right of a woman not to be a mother and her wish has to be respected. This right emerges from her human right to live with dignity as a human being in the society and protected as a fundamental right under Article 21 of the Constitution of India with reasonable restrictions as contemplated under the Act.”

– ***Suo Moto PIL High Court on its own motion v. State of Maharashtra, (2016) SCC Online Bom 8426***



Is Medical Abortion Legal?

Medical abortion refers to the termination of pregnancy using medication, without the requirement of surgery or anesthesia.

Medical abortions by taking pills are considered to be safe and effective, with the recommended regime of mifepristone and misoprostol in combination working even in the early stages of pregnancies.

Medical abortions were approved by Drug Controller General of India in 2002.

The Central Drugs Standard Control Organisation (Directorate of Health) approved combination-pack of 200 mg mifepristone and 800 mcg misoprostol in 2008.

Pregnant persons can undergo a medical abortion till up to nine weeks of gestation.

“In the case of termination of early pregnancy up to 9 weeks using RU-486 with Misoprostol, the same may be prescribed by a Registered Medical Practitioner, as defined under clause (d) of section 2 of the Act and Section 4 of MTP Rules, at his clinic, provided such a Registered Medical Practitioner has access to a place approved under Section 4 of the MTP Act 1971 read with MTP Amendment Act 2002 and Rule 5 of the MTP Rules.”

– Explanation to Rule 5 of the MTP Rules, 2003

The prescription of medical abortion pills to terminate a pregnancy is also, explicitly recognised as a method of abortion under the MTP Rules 2021.

- Pregnant persons, however, require a registered medical practitioner’s prescription to be able to buy medical abortion pills, which are not available over the counter.



Is Abortion A Criminal Offence?

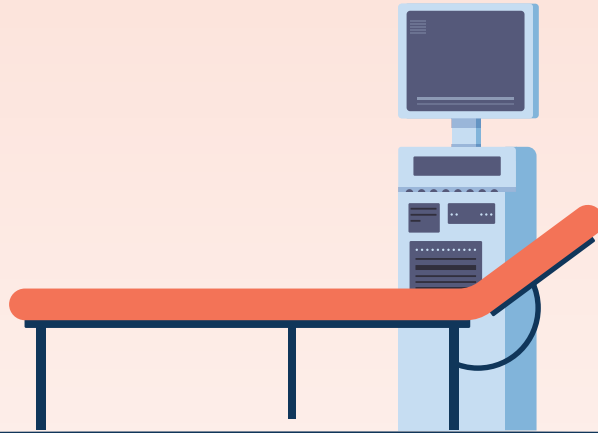
NO, neither undergoing an abortion nor providing one is a criminal offence, as long as the abortion service provider ensures that the requirements under the MTP Act are satisfied.

“No suit or other legal proceeding shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.”

–Section 8, MTP Act

Section 8 of the MTP Act, specifically, provides legal protection to service providers that have already acted or intend to act in good faith, irrespective of the harm that has been caused or may be caused by their actions.

- The IPC creates a similar exception for actions done in good faith to save the life of the woman under Sections 312 and 315.



Does The Pre-conception And Pre-natal Diagnostic Techniques Act 1994 (PCPNDT Act) Criminalise Abortion?

“An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide.”

– Statement of Objects and Reasons, PCPNDT Act

The text and objective of the PCPNDT Act are not related to abortions in any manner. The legislative intent behind the PCPNDT Act is strictly related to diagnostics and does not in any way deal directly with abortions.

Therefore, the PCDPNDT Act only regulates the framework for the use of pre-conception and pre-natal diagnostic techniques, it does not regulate abortion. In fact, the term “medical termination of pregnancy” is not used a single time in the entire statute. The term “abortion” is used only once to indicate that pre-natal diagnostic techniques are permitted in the instance that a pregnant woman has undergone two or more spontaneous abortions.

The aim of the PCPNDT is to prohibit any pre-natal gender determination.

There is no conflict between the MTP Act and the PCPNDT Act, because sex selection is an issue of sex determination and not abortion.

Healthcare service providers will not face any consequences under the PCPNDT Act for terminating a pregnancy in consonance with the MTP Act. However, it should be noted that gender determination is not a criterion for legal termination of pregnancy.

X and Y are a married couple, and have approached me to terminate X's pregnancy. Will I be held liable for a criminal act under the PCPNDT Act if I terminate a 20 weeks long pregnancy?



The purpose of the PCPNDT Act is to prohibit any pre-natal gender determination. It does not, in any way, prohibit a medical practitioner from performing the abortion requested by X and Y as this case meets the conditions under the MTP Act 1971. Therefore, you will not be held liable for criminal act under PCPNDT Act.



I am a pregnant person who has approached a medical practitioner seeking a termination of a twenty-three weeks pregnancy owing to a global health crisis that has resulted in the imposition of a nation-wide lockdown. The medical practitioner fears that performing an abortion for me would result in a criminal conviction because of the provisions of the PCPNDT Act. Does the PCPNDT Act prohibit the medical practitioner from performing the abortion for me?



No, the PCPNDT Act does not have any provision that prohibits the medical practitioner from providing you the services to terminate your pregnancy. You have met the conditions under the MTP Act. The MTP Act is the law that regulates the conditions for providing abortion services and the PCPNDT Act has no application in this case.



The medical practitioner is acting in accordance with the law in terminating the pregnancy in your case. Further, your case is covered under Rule 3B which lists the categories of pregnant persons who may terminate a pregnancy, and your situation is covered in this category under humanitarian crisis.



Abortion Access For Minors & Adolescents

As per the World Health Organisation (WHO), adolescents are defined as persons between the ages of 10–19 years of age, with early adolescents being the group of persons that fall within the age group of 10–14 years. For the purpose of the MTP Act, as well as the Indian Penal Code, all pregnant persons below the age of 18 are considered minors, the age of consent being 18 years in India.

“No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.”

– Section 3(4)(a), MTP Act

The MTP Act expressly recognises the provision of abortion services to minors with the consent of their guardian. A guardian “means a person having the care of the person of a minor or a mentally ill person.” This is a very broad definition and would include a de facto guardian—any adult that accompanies the minor to the clinic and can consent on their behalf.

Minors are also recognised as a vulnerable group under the special categories of women who may seek termination of pregnancies under Rule 3B of the MTP (Amendment) Rules, 2021 as noted in Chapter V above – on Page 11.

“No registered medical practitioner shall reveal the name and other particulars of a woman whose pregnancy has been terminated under this Act except to a person authorised by any law for the time being in force.”

– **Section 5A, MTP Act**

Section 5A of the MTP Act bars any medical practitioner from revealing “the name and other particulars of a woman whose pregnancy has been terminated (...) except to a person authorised by any law for the time being in force.”

However, the Protection of Children from Sexual Offences Act 2012 (POCSO Act) deems all underage sexual intercourse to be an offence which must be reported to the police or Special Juvenile Police Unit.

“Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,-
(a) the Special Juvenile Police Unit; or
(b) the local police.”

– Section 19(1), POCSO Act

So, under Section 19(1) of the POCSO Act, the abortion service provider is legally bound to report the pregnancy to the appropriate authorities i.e., the police or the Special Juvenile Police Unit after performing the abortion. This exception is created by the law to the limited extent of information to the police or the SJPU and the service provider may not reveal the particulars of the abortion to a third party.

“The provisions of Section 19(1), reproduced above, put a legal obligation on a person to inform the relevant authorities, inter alia, when he/she has knowledge that an offence under the Act had been committed. The expression used is “knowledge” which means that some information received by such a person gives him/her knowledge about the commission of the crime. There is no obligation on this person to investigate and gather knowledge.”

– Dr Sr. Tessa Jones & Ors. v. State of Kerala (2019) 3 SCC (Cri) 164

The requirement of mandatory reporting under POCSO Act should not act as a deterrent or be the cause of denial of access to abortion services in the case of adolescents and minors.

My name is X and I am sixteen years old. I have approached the healthcare service provider along with my adult guardian. I am seeking to terminate the eighteen week pregnancy, and the guardian has consented to the same. What should the healthcare service provider do in this situation?

Hello X! First and foremost, the healthcare service provider must facilitate the termination of the pregnancy, because their immediate duty is to the pregnant person. The guardian has provided their consent, so the healthcare service provider does not need to request the consent of any third person, including a legal authority such as the police. The provider must not also request any additional legal documentation, such as an FIR, as noted under Rule 6(3) of the POCSO Rules.





Abortion Under International Law



Multiple international treaties to which India is a signatory stress the importance of removing barriers to making reproductive choices.

- So, registered medical practitioners are also protected under international law for providing abortions to pregnant persons.



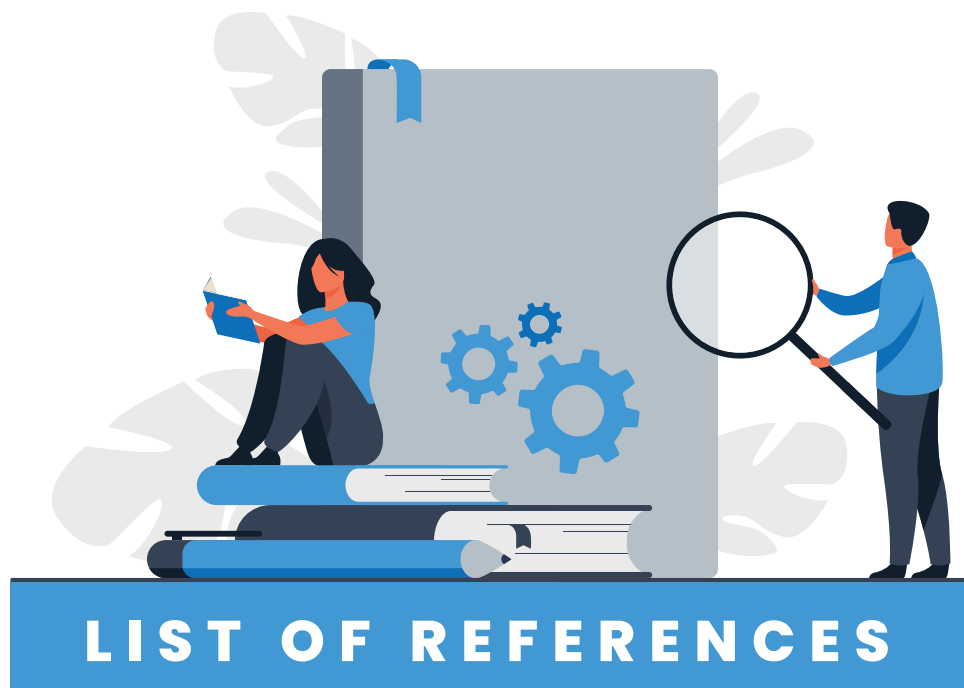
The foundational right to reproductive autonomy can be located in the right to health under Article 12 of the International Covenant on Social, Economic, and Cultural Rights (ICESCR).

- General Comment 22 to the ICESCR notes that sexual and reproductive health is an “integral part” of the right to health.
- This is echoed by the UN Working Group on Discrimination against Women and Girls in Law and in Practice. The latter states that, “[t]he right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, concerning intimate matters of physical and psychological integrity.”



Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) obligates States to eliminate discrimination between men and women in accessing healthcare.

- General Comment 33 to CEDAW clarifies that provisions criminalising medical services only required by women and girls, such as abortion, are discriminatory and violate their right to equality.
- General Recommendation 24 to CEDAW, similarly, emphasises decriminalising abortion and removing barriers to abortion, such as third-party authorisation from parents, spouses and courts.



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